INTERNATIONAL EXTRADITION

United States Law and Practice

SIXTH EDITION

M. Cherif Bassiouni

OXFORD

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M. Cherif Bassiouni

List of Abbreviations

AAADC	American-Arab Anti-Discrimination Committee
AEDPA	Anti-Terrorism and Effective Death Penalty Act
ASEAN	Association of Southeast Asian Nations
ASPA	American Service Members' Protection Act
ATCA	Alien Tort Claims Act
AU	African Union
AUSA	Assistant U.S. Attorney
BIA	Board of Immigration Appeals
BTS	Directorate of Bureau of Border and Transportation Security
CAT	Convention against Torture and All Forms of Cruel, Inhuman, or Degrading Treatment or Punishment
CCE	Continuing Criminal Enterprise
CIA	Central Intelligence Agency
CIL	Customary International Law
C.F.R.	Code of Federal Regulations
COE	Council of Europe
CTR	Cash Transaction Requirement
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DJA	Declaratory Judgment Act
DOJ	Department of Justice
DRC	Democratic Republic of the Congo
EAC	East African Community
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ECOFIN	European Council of Economic and Finance Ministers

EOIR	Executive Office for Immigration Review
EU	European Union
FARR	Foreign Affairs Reform and Restructuring Act
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FLN	Algerian Liberation Movement
FSIA	Foreign Sovereign Immunities Act
G.A.	General Assembly of the United Nations
HSA	Homeland Security Act
IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICE	United States Immigration and Customs Enforcement
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IIRAIRA	Illegal Immigration Reform and Immigrant Responsibility Act
ILO	International Labour Organization
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service (defunct)
IRA	Irish Republican Army
I.R.S.	Internal Revenue Service
FISA	Foreign Intelligence Surveillance Act
MCC	New York Metropolitan Correctional Center
MLAT	Mutual Legal Assistance Treaty
MNF-I	Multinational Force-Iraq
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAS	Organization of African States
OAU	Organization of African Unity
OIA	Office for International Affairs
OSI	Office of Special Investigations
PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

PCIJ	Permanent Court of International Justice
PIRA	Provisional Irish Republican Army
PFLP	Popular Front for the Liberation of Palestine
PKK	Kurdistan Workers' Party
PLO	Palestine Liberation Organization
PRC	People's Republic of China
RICO	Racketeer Influenced and Corrupt Organizations Act
SAARC	South Asian Association for Regional Cooperation
SADC	South African Development Community
SC	Security Council
SCSL	Special Court for Sierra Leone
SEC	Securities and Exchange Commission
SOFA	Status of Force Agreement
STL	Special Tribunal for Lebanon
TVPA	Torture Victims Protection Act
U.C.M.J.	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
U.S.	United States of America
U.S.C.	United States Code
USCBP	United States Customs and Border Protection
USCIS	United States Citizenship and Immigration Services
USSR	Union of Soviet Socialist Republics

Introduction

The sixth edition of *International Extradition: United States Law and Practice* adds over 300 pages of new material to the fifth edition. The treaties, laws, and cases cited in the fifth edition have all been updated and new material has been added, including new comparative material dealing with the European Union and cases involving the United States decided by other countries, and reflected in major decisions of the high courts of the United Kingdom, Canada, France, South Africa, Australia, Israel, Italy, and Germany.

Despite several FOIA requests, this writer was unable to obtain information from the U.S. Department of State and Department of Justice regarding extradition requests and figures on the number of times the United States has been denied extradition requests or has denied the requests of other states. This lack of transparency on the number of requests made and received is, to say the least, strange. What bureaucratic reasons compelled these agencies to do so and why is purely speculative. Yet, such information would have been useful to those following the practice of extradition.

As with the prior editions, the sixth edition continues to expose certain questionable practices of the United States. Among these is the practice of ambiguous assurances given to foreign governments by the U.S. Department of State and Department of Justice and how those assurances are not always respected after a person's extradition to the United States is completed. It also includes the unlawful seizure of persons abroad, abuses of the immigration process in this country and in those requested states where the United States can exercise political influence over the executive branch of certain requested states, the violation of the principle of specialty in certain U.S. courts with support from the government, and certain practices of prosecutorial abuses in connection with variations of prosecutorial charges and the imposition of sentences. The purpose in all of that is not to embarrass the U.S. government, but to hopefully induce government officials to act in a manner that is more consistent with this country's adherence to the Rule of Law, which the United States rightly champions throughout the globe but sometimes fails to live up to at home. The knowledge of these practices is also useful to judges and practitioners in order to prevent their occurrence.

Earlier editions of *International Extradition: United States Law and Practice* have been cited both nationally and internationally. In total it has been cited four times by the U.S. Supreme Court, thirty times by U.S. Circuit Courts of Appeals, and forty-five times by U.S. Federal District Courts. Internationally, it has been cited once by the International Court of Justice, once by the High Court of Australia, once by the Supreme Court of Canada, five times by the Supreme Court of Israel, once by the New Zealand Court of Appeals, four times by the Constitutional Court of the Republic of South Africa, once by the House of Lords of the United Kingdom, and once by the High Court of England and Wales.

This edition remains, as its preceding ones, the most comprehensive text on the subject of international extradition, as practiced in and by the United States, and in general about the international practice of extradition.

M. Cherif Bassiouni
Chicago,
June 2013

Chapter I

The Legal Framework of Extradition in International Law and Practice

Contents

1. Introduction

Extradition is a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, or comity, or on the basis of national legislation.[1] Most states require a treaty, whether bilateral or multilateral, and enabling national legislation. The participants in the extradition process are, therefore, the requesting and requested states and the individual who is the subject of the proceedings. The process and its participants have not changed much throughout the course of history, but the legal bases for it and the applicable state practices have. Internationally and regionally states have protected human rights by giving legal rights to individuals, entitling them to certain legal rights and placing limitations on the powers of the respective states.

Extradition is the means by which states cooperate in the prevention, control, and suppression of domestic and international criminality. In the age of globalization, in which individuals cross territorial boundaries or conduct business in multiple states at unprecedented rates, the obligation to extradite or prosecute has gained greater importance and acceptance. Moreover, as states across the globe provide accused persons similar guarantees of fair and impartial trials with due process of law, there is less reason for requested states to be concerned when extraditing an individual. Thus, historic grounds for denial of extradition are eroding, as are procedural and formal requirements embodied in the process. Nevertheless, state processes remain lengthy and cumbersome without necessarily enhancing due process of law.

2. Historical Background

Throughout its history, extradition has been a process consisting of several stages involving the executive and judicial branches of the respective states whereby one state surrenders to another a person sought as an accused criminal or a fugitive offender.

2.1. Introduction

Extradition originated in early non-Western civilizations such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian.[2] In the early days of the practice, the delivery of a requested person to the requesting sovereign was undertaken in solemn formulas and was performed with pomp and circumstance. Delivery of individuals to a requesting sovereign was usually based on pacts or treaties, but it also occurred on the basis of reciprocity and comity (as a matter of courtesy and goodwill between sovereigns). The delivered person was usually a subject of the requesting sovereign or that of another sovereign, but seldom was the delivered person a subject of the requested sovereign. Undertakings involving the rendition of fugitives were deemed

1 This process is sometimes also referred to as "rendition." Rendition refers to the process of surrendering a person from one state to another or to an international tribunal, provided it is done in accordance with the legal and administrative requirements of the surrendering state. Rendition is therefore a synonym for extradition. If the rendition bypasses extradition or other legal processes, it is legally questionable although practiced by some states. This form of rendition is still subject to international and regional human rights law norms. "Extraordinary rendition" is a term used since 2001 to describe the kidnapping and transfer of individuals by the United States for purposes of interrogation and torture, which is illegal under both international and U.S. law. *See* M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (2010).

2 For different national perspectives, see inter alia Wolfgang Schomburg, Otto Lagodny & Thomas Hackner, Internationale Rechtshilfe in Strafsachen (5th ed. 2012); Gary Botting, Canadian Extradition Law (2005); Julian B. Knowles, Blackstone's Guide to the Extradition Act of 2003 (2005); Mario Pisani, Franco Mosconi & Daniela Vigoni, Codice Delle Convenzioni Di Estradizione E Di Assistenza Giudiziaria in Materia Penale (2004); Carlos Cezon Gonzalez

a feature of friendly relations between sovereigns, and sometimes such acts were performed spontaneously. Thus, rendition did not always derive from the process of extradition, but was more a gesture of friendship and cooperation between sovereigns. The individual in these early days of the practice was deemed an object and not a subject of the process. The power to deliver or not to deliver rested with the head of state or the legal authority representing the state as a whole, or their respective delegates.

Extradition and other forms of rendition have essentially been for the benefit of states, and individuals have no rights other than those provided by treaty, whether bilateral or multilateral. In time, the formal process of extradition became one of the modes of rendition of persons sought by friendly states and it gradually became a more formal legal process with some rights conferred upon the individual.[3] Since WWII, international and regional conventions on human rights have provided individuals with certain substantive and procedural rights.

& Juan Jose Lopez Ortega, Derecho Extradicional (2003); Karin Pale, Villkor For Utlamning (2003); Francesco Salerno, Diritti Dell'uomo, Estradizione Ed Espulsione: Atti Del Convegno Di Studio Organizzato Dall'Universita Di Ferrara per Salutare Giovanni Battaglini, 29–30 Ottobre 1999 (2003); Michael Abbell & Bruno A. Ristau, International Judicial Assistance (1990); Satya D. Bedi, Extradition in International Law and Practice (1968); André Billot, Traité De L'extradition (1874); Pedro Blandino, La Extradicion en America (1994); Sir Edward G. Clarke, A Treatise upon the Law of Extradition (London, Stevens and Haynes 1874) [hereinafter Clarke Treatise]; Cooperacion Interamericana en los Procedimientos Penales (Ludwik Kos-Rabzewicz-Zubkowski ed., 1983); La Coopération Pénale Internationale par voie d'Extradition au Maroc (1986); Henri Donnedieu de Vabres, Introduction a l'Étude du Droit Pénal International(1922); Albin Eser et al., Internationale Rechtshilfe in Strafsachen (1993); Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms (1998); V.E. Hartley-Booth, British Extradition Law and Procedure (1980); Alun Jones, Jones on Extradition (1995); Gerald V. LaForest, Extradition to and from Canada (2d ed. 1977); Otto Lagodny, Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland (1987); Robert Linke et al., Internationales Strafrech (1981); Claude Lombois, Le Droit Penal International 536–634 (2d. ed. 1979); Tiziana Travisson Lupacchini, L'Estradizione Dall'Ester per L'Italia (1989); Maria Riccarda Marchetti, La Convenzione Europea di Estradizione (1990); John Bassett Moore, A Treatise on Extradition and Interstate Rendition (Boston, Boston Book Co. 1891); Nicoletta a Parisi, Estradizione e Diritti Dell'uomo (1993); Blanca Pastor Borgoñon, Aspectos Procesales de la Extradition en Derecho Español (1984); Horacio Daniel Piombo, Tratado de la Extradicion: Internationacional e Interna (1998); Dominique Poncet & Philippe Neyroud, L'Extradition et L'Asile Politique en Suisse (1976); Wolfgang Schomburg & Otto Lagodny, Internationale Rechtshilfe in Strafsachen (1998); Hans Schultz, Das Schweizerische Auslieferungsrect (1953); Klaus Schwaighofer, Auslieferung und Internationales Strafrecht (1988); Eileen Servidio-Delabre, Le Rose de la Chambre D'Accusation et la Nature de son avis en Matiere D'Extradition Passive (1993); Ivan A. Shearer, Extradition in International Law (1971); Theo Vögler, Auslieferungsrecht und Grundgesetz (1969); Theo Vögler & Peter Wilkitzki, Gesetz Über die Internationale Rechtshilfe in Strafsache (1992); 6 Marjorie Whiteman, Digest of International Law (1968); Joâ Marcello de Araujo, *Extradicâo Alguns Aspectos Fundamentáis*,*in* 326 Revista Forense 61 (1993); Manuel Adolfo Vieira, *L'Evolution Récente de L'Extradition Dans Le Continent Américain*,*in* Recueil des Cours de L'Académie de Droit International 155, 155 (1979); Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. Int'l Comp. L. Rev. 39 (1981); *Symposium Issue,* 62 Rev. Int'le de Droit Pénal 1 (1991); *Symposium Issue*, 39 Rev. Int'le de Droit Pénal 3–4 (1968).

3 In contemporary practice, there is an increased resort to the surrender, delivery, or return of persons by one state to another in a variety of ways both legal (*see* Ch. II) and extralegal (*see* Ch. V).

The rendition of a person to a requesting state presupposes that the person in question is in the requested state, either because he/she seeks refuge there or because of other circumstances, thus giving the requested state personal jurisdiction over the person. The surrender of a person who has been granted the privilege of presence or refuge in the requested state was deemed an exceptional measure running against the traditions of asylum and hospitality of the requesting state. This gave rise to a speculation about the etymology of the term extradition (i.e., "extra-tradition"), which ultimately evolved into "extradition." A more commonly accepted explanation for the term "extradition" is the Latin *extradere*, which means forceful return of a person to his sovereign.[4]

Because extradition is between states, it is clear that there is a nexus between the interests of the respective states and the granting or denial of extradition. In fact, the whole history of extradition is a reflection of the political relations between the states requesting and granting extradition.[5] This explains why, whenever a state maintained a certain degree of formality in its relations with another state, extradition was bound in solemn formulas and treaties, but whenever relations between the interested states were politically close, other informal modes of rendition were used, manifesting friendly cooperation. This is also true of contemporary interstate relations as it was in the earliest recorded times, though there is a marked tendency to accept the notion of a commonly shared goal of combating criminality as an international duty, or *civitas maxima*.[6]

2.2. Historical Phases

The earliest recorded extradition case appears in what is commonly referred to as the Old Testament. It occurred in approximately 1350 BCE when one tribe refused to surrender a member accused of rape and manslaughter of a member of another tribe.[7]

The situation arose when a Levite and his concubine sojourned in the city of Gib'-e-ah, which was inhabited by the Benjamites. After the Levite found lodging, the owner of the house was approached by a group of men from the city, the sons of Be'-li-al, who sought to sodomize the Levite. The owner of the house protested against such wickedness, but the men would not be turned away. In an attempt to satiate their demands, the concubine was brought forth to the men. Throughout the night, the woman was repeatedly raped. In the morning, the concubine fell down at the threshold of the house and died. When the Levite found his concubine dead, he cut up her body into twelve pieces and sent them to the different tribes of Israel, asking them to consult together as to what should be done.

After a gathering of the assembly of Israel, men from the various tribes were sent throughout the tribe of Benjamin and declared, "Now therefore deliver us the men, the children of

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4 2 M. Faustin Helie, Traité de L'Instruction Criminelle, ch. V (n.d. circa 1850) (asserting that the term "extradition" was not known in France before the Decret-Loi of February 19, 1791, and that prior thereto the term used was *remittere*, meaning delivery or restitution, which differs from the Latin etymological origin of *tradere*, which is the basis for *extradere*). *See also* Billot, *supra* note 2, at 34; Blakesley, *supra* note 2, at 39–42.

5 Christine Van den Wijngaert, *The Political Offense Exception to Extradition: Defining the Issues and Searching for a Feasible Alternative*, Revue Belge de Droit Int'le 745–746 (1983) (referring to earlier treaties contemplating the surrender of political offenders and not common criminals, as in the Treaty of 1174 between Henry II, King of England, and William, King of Scotland, and the Treaty of Paris of 1303 between the English and French kings). This history is described in Paul O'Higgins, *The History of Extradition in British Practice 1174–1794*, 1964 Ind. Y.B. Int'l Aff. 80.

6 *See* M. Cherif Bassiouni & Edward Wise, *Aut Dedere Aut Judicare*: The Duty to Extradite or Prosecute in International Law (1995) [hereinafter Bassiouni & Wise, *Aut Dedere Aut Judicare*].

7 *Judges* 19–20.

Be'-li-al, which are in Gib'-e-ah, that we may put them to death, and put away evil from Israel." The Children of Benjamin, however, refused to turn over the perpetrators. As a result of this failure to extradite, Israel and Benjamin went to war. In the first two military encounters, Benjamin defeated Israel. In the third battle, however, Israel prepared an ambush and, after setting fire to the city of Gib'-e-ah, routed the Benjamites, resulting in the slaughter of 25,000 Benjamite soldiers.

The first recorded extradition treaty in the world was concluded in circa 1259 BCE. In one of the oldest documents in diplomatic history, Ramses II, Pharaoh of Egypt, signed a peace treaty with the Hittites after he defeated their attempted invasion of Egypt.[8] King Hattusili III signed it for the Hittites, and the document, written in hieroglyphics, is carved on the Temple of Ammon at Karnak and is also preserved on clay tablets in Akkodrain in the Hittite archives of Boghazkoi. The peace treaty expressly provided for the return of persons sought by each sovereign who had taken refuge on the other's territory. This ancient treaty is overlooked in classic European texts of international law, which only refer to the practices of ancient Greece and Rome.[9]

Surrendering persons sought by another state did not necessarily mean that the individual was a fugitive from justice charged with a common crime. In fact, from antiquity until the late eighteenth century, such persons were not sought for common crimes but rather for political reasons.[10] Sovereigns obliged one another by surrendering those persons who challenged them, offended them or simply displeased them. Thus, the stronger the relationship between the sovereigns, the greater their interest and concern for each other's welfare and the more intent they were on surrendering to one another those persons who had created the dangers or concerns to their respective welfares. Common criminals were the least sought-after species of offenders because their harmful conduct affected only commoners and not the sovereign or the public order.

The history of extradition can be divided into four periods: (1) ancient times to the seventeenth century CE—a period revealing an almost-exclusive concern for political and religious offenders;[11] (2) the eighteenth century until 1833—a period of treaty-making chiefly concerned with

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8 Elman Edel, Der Vertrag Zwischen Ramses II. Von Ägypten und Hattušili III. Von Hatti (1997); Blakesley, *supra* note 2; S. Langdon & Allen H. Gardiner, *The Treaty of Alliance between Hattusili, King of the Hittites, and the Pharaohs Ramses II of Egypt*, 1 J. Egyptian Archaeology 179 (1920). *See also* Friedrick Von Haltzendorf, Volkerrecht 169 (1885); Elman Edel, Der Vertrag Zwischen Ramses II. Von Ägytpen und Hattušili III. von Hatti (1997). It is interesting to note that Ramses II, who had the treaty with the Hittites engraved on the temple of Karnak in Luxor, Egypt, referred to Hattusili as "Prince" of the Hittites as a way of diminishing his rank, but the original papyrus that contained the treaty referred to Hattusili as "King." For the full text of the treaty, see 6 J. Egyptian Archaeology 181 *et seq.* (1920). *See also* James Pritchard, Ancient near Eastern Texts Relating to the Old Testament 199–203 (1992). The Constitutional Court of South Africa has discussed the history of extradition. *See President of the Republic of South Africa and Others v. Quagliani, and two similar cases*, 2009 (2) SA 466 (CC) (S. Afr.).

9 *See* Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome 358–374 (1911).

10 *See* Helie, *supra* note 4. *See also* Clarke Treatise, *supra* note 2, at 18–22; Arthur Nussbaum, A Concise History of the Law of Nations 214, 215 (1954); Charles de Visscher, Theory and Reality in Public International Law 243 (1957); Paul O'Higgins, *The History of Extradition and Rendition in the United Kingdom,in* 6 Brit. Dig. Int'l L. 444 (1965) (showing two main extraditable offenses, "treason" and "rebellion," as nonpolitical, even though they are both deemed examples of political offenses *par excellence*).

11 *See* Andre de Mello, Manual of the Law of Extradition and Fugitive Offenders Applicable to the Eastern Dependencies of the British Empire (2d. ed. 1933) (dividing extradition history into the three first periods identified herein).

military offenders characterizing the condition of Europe during that period;[12] (3) 1833 to 1948—a period of collective concern for suppressing common criminality; and (4) post-1948 developments, which ushered in a greater concern for protecting the human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations.

The historical development of the practice of extradition reveals that the surrender of fugitives, which originated with the need to preserve the internal order of the respective states, was not deemed to be a tool of international cooperation for the preservation of common societal interests. Hugo Grotius first articulated this latter concern in 1624 and it gained momentum between the seventeenth and eighteenth centuries as part of the efforts of the international community to combat piracy.[13] Thus extradition, which at one time had manifested itself as a practice designed to preserve the personal interests of monarchs and the political and religious interests of states, gradually shifted to serve xenophobic and militaristic tendencies, before it finally evolved into an international means of cooperation in the suppression of criminality. This was due in part to philosophers of the Age of Enlightenment, such as Voltaire, Samuel Puffendorf, Emerich de Vattel, and Jean-Jacques Rousseau. In the eighteenth century Cesare Beccaria built on these theories and argued for the extradition of common criminals.[14]

In Europe, the history of international extradition did not parallel the practice in the older civilizations of the southern and eastern Mediterranean basin. Until the eighteenth century, the relatively new and independent sovereign states of Europe found no need for cooperative undertakings, particularly in view of an almost-constant state of suspicion or war between them. Consequently, asylum was generally granted to fugitives from justice of other states, and a sovereign could enforce the return of fugitives only by force of arms. As the threat of war was always looming, it did not add much as a disincentive to granting asylum. Extradition as an inducement to peaceful relations and friendly cooperation between states emerged between 1700 and 1800 in Europe,[15] and has continued to increase, particularly in since the start of the twentieth century. For instance, the member states of the Council of Europe are linked

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12 *See* G.F. de Martens, Nouveau Recueil de Traités (Gottingue, Dieterich 1842). This observation is confirmed by an examination of eighteenth-century treaties between 1718 and 1830 compiled by de Martens, where, of the ninety-two treaties concluded during this period, twenty-eight deal exclusively with military deserters.

13 Hugo Grotius, de Jure Belli ac Pacis, ch. 21, § 5(1) (2d ed. Amsterdam 1631). This position was earlier taken by Jean Bodin. *See* 3 Jean Bodin, Les Six Livres de la République, ch. 6 (Paris 1577); Donnedieu de Vabres, *supra* note 2, at 230; 2 Emerich de Vattel, Le Droit des Gens, Ch. 6, § 76 (Londres 1758). Blakesley, although recognizing the existence of the practice from antiquity, challenges the assumption that it was part of a *civitas maxima* to combat common criminality, taking instead the position that it was more of an act of political accommodation between friendly sovereigns. Blakesley, *supra* note 2. This position was espoused by Billot when he was considering the practice essentially a "contract" between sovereigns. Billot, *supra* note 2, at 2. *See also* M. Cherif Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, *in* Aktuelle Problem das Internationalen Strafrechts 10 (D. Oehler & P.G. Potz eds., 1970); Edward M. Wise, *Some Problems of Extradition*, 39 Rev. Int'le de Droit Pénal 518 (1968), *reprinted in* 15 Wayne L. Rev. 709 (1969).

14 *See* James A. Farrer, Crimes and Punishments 193–194 (London, Chatto & Windus 1880) (discussing Beccaria); An Introduction to the Principles of Morals and Legislations (Harriman ed., 1948) (regarding Bentham). *See also* Coleman Phillipson, Three Criminal Reformers: Beccaria, Bentham and Romilly (1923). It must be noted that Beccaria and Bentham never advocated giving asylum to common criminals.

15 *See* De Martens, *supra* note 12 (listing ninety-two treaties between 1718 and 1830).

by a multilateral convention, and the member states of the European Union (EU) have developed accelerated and simplified procedures to cooperation in penal matters.[16] With respect to the United States, a common United States–European Union extradition regime came into force in February 2010.[17]

Globalization has brought about increased mobility for persons across national borders, greater opportunities for transnational crimes, and significantly more concern over international crimes. Thus, extradition has become more important, and state practices have tended to reduce the formalities in order to enhance the practice's effectiveness. In a sense, we are witnessing a slight reversion back to the late 1800s where the interests of the state outweigh those of individuals.[18]

3. The Duty to Extradite: *Aut Dedere Aut Judicare*

3.1. Introduction

The early classical commentators on international law recognized the importance of extradition as a means to lawfully achieve the rendition of fugitive offenders. However, differences existed among them with respect to the rationale and modalities, especially whether a legal duty or moral obligation existed that required the requested state to surrender persons accused of crimes to the requesting state.[19] Hugo Grotius, the Dutch jurist, asserted in 1624 that the state of refuge was obligated either to return the accused to the requesting state or punish the accused under its own laws. He expressed this view with the maxim *aut dedere aut punire*, which is more appropriately phrased as *aut dedere aut judicare* in contemporary practice.[20] Grotius thus espoused the view that a *civitas maxima* existed for extradition, which was further expounded upon by the Italian jurist Beccaria in the eighteenth century. Emerich de Vattel, the Belgian jurist, argued in 1758 that international law imposed a definite legal duty on the state to extradite persons accused of serious crimes.[21] In 1672, a contrasting view was put forward by Puffendorf, the German jurist, who, in reference to Grotius, argued that the duty to extradite was only an imperfect obligation that required an explicit agreement in order to become fully binding under international law and thus to secure the reciprocal rights and duties of the contracting states.[22] Similarly, the French jurist Billot took the position that there was no duty to extradite save by contract or agreement between states.[23] The contemporary practice of states reflects the latter point of view with respect to common crimes, but international law

16 2 M. Cherif Bassiouni, International Criminal Law 309, 317, 327, 325 (2d ed. 1999).

17 *See supra* Sec. 4.2.

18 Interestingly, with the increase in common and international criminality, contemporary conceptions of extradition and their policy implications are reverting from considerations bearing on the human rights of the individual to the interests of states, as expressed in the concept that the practice is essentially a "contract" between sovereigns for their benefit. *See* Billot, *supra* note 2; Moore, *supra* note 2.

19 Shearer, *supra* note 2, at 23.

20 Grotius, *supra* note 13, at ch. 21, §§ 3, 4. *See also* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6.

21 2 De Vattel, *supra* note 13, at ch. 6, §§ 76, 77. Grotius and de Vattel were supported by such diverse scholars as Heineccius, Burlamaqui, Rutherford, Schmelzing, and Kent. *See* Shearer, *supra* note 2, at 24; Henry Wheaton, Elements of International Law 188 (C. Phillipson ed., 5th ed. 1916).

22 2 Samuel S. Puffendorf, The Elements of Universal Jurisprudence, ch. 3, §§ 23, 24 (W. Oldfather trans., 1931) (1672). This view drew support from scholars such as Voet, de Martens, Kuber, Leyser, Kliut, Saalfeld, Schmaltz, Mittermaier, and Heffter. Shearer, *supra* note 2, at 24; Wheaton, *supra* note 21, at 188.

23 Billot, *supra* note 2, at 2–3. This did not mean, however, that a formal treaty was required, but rather an agreement between the interested states.

doctrine has long favored the position advocated by Beccaria, Grotius, and de Vattel with respect to what is now called jus cogens international crimes.[24]

The duty to extradite by virtue of a treaty, whether bilateral or multilateral, is the most common basis for the practice among states, though reciprocity, comity, and national legislation are also used as legal bases relied upon by a number of states. For example, the United States requires a treaty,[25] as does the United Kingdom[26] and most common law countries.[27] The practice in the civil law countries, by contrast, is not necessarily predicated on an extradition treaty. Instead, extradition may be granted on the basis of reciprocity or comity. For instance, in 1872, the French Minister of Justice issued a *circulaire*, which stated that reciprocity was a permissible basis for extradition absent a treaty, and that in such circumstances the practice was to be governed by the applicable rules of international law.[28] Thus, reciprocity made extradition a matter of discretion, and international law could fill the gap only if there existed no treaty or statute.[29]

Certain South American states occasionally recognize the legal duty to extradite in the absence of a treaty. For example, in 1953, the Supreme Court of Venezuela, relying upon the traditional approach of its courts, ordered the surrender of an American national to Panama even though no extradition treaty existed between these countries. The court expressly found that granting the request was "in conformity with the public law of nations [whereby] friendly states recognize a reciprocal obligation to surrender offenders who have taken refuge in their respective countries."[30]

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24 A jus cogens crime is a violation of a peremptory norm of international law, such as torture or genocide, from which no derogation is permitted.

25 *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Rauscher, 119 U.S. 407 (1886); Holmes v. Jennison, 39 U.S. 540 (1840); 4 Hackworth Digest 11; 6 Whiteman Digest 732. *See* Ch. II. *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

26 4 William Blackstone, Commentaries 66, 67; Clarke Treatise, *supra* note 2; Hartley-Booth, *supra* note 2; 2 Arnold D. McNair, International Law Opinions 43 (1956). The Law Offices announced the following opinion in 1842 concerning *The Creole*, a case in which slaves rose up against a vessel owned by the United States, killed the ship's master and a passenger, and sought refuge in the Bahamas:

> It is the practice of some States to deliver up persons charged with Crimes who have taken refuge, or been found within their Dominions, on Demand of the Government of which the alleged Criminals are Subjects, but such practice does not universally, or ever generally prevail, nor is there any rule of the Law of Nations rendering it imperative on an Independent State to give up persons residing or taking refuge within its territory. The mutual surrender of criminals is indeed sometimes stipulated for by Treaty, but as there is not at present any subsisting Treaty to that effect with the United States of America, we think that Her Majesty' Government is not bound on the demand of the Government of the United States to deliver up the persons in question, or any of them, to that Government to be tried in the United States.

The Creole, 6 Brit. Dig. Int'l L. 456 (1965). *See also* An Act for Amending the Law Relating to the Extradition of Criminals, 1870, 33 & 34 Vict. ch. 52.

27 See Hartley-Booth, *supra* note 2, regarding the position of the United Kingdom and Laforest, *supra* note 2 (concerning the position of Canada). Canada also permits extradition without the need for a formal treaty. 322 R.S.C. pt. 11 (1952) (Can.). Australia until 1974 required a treaty. *See* Brown v. Lizars, 2 Commonwealth. L. Rev. 837 (1905) (Austl). But with the "Extradition (Foreign States) Act" (1974), reciprocity can be relied upon. *See* Ivan A. Shearer, *Extradition without Treaty*, 49 Austl. L. J. 116 (1975). India requires a treaty. *See* Babu Ram Saksena v. The State, 1950 S.C.R. 573 (India).

28 Billot, *supra* note 2, at 422–423; *Circulaire* (July 30, 1872).

29 Shearer, *supra* note 2, at 26.

30 *Re Tribble*, 20 I.L.R. 366 (Fed. Ct. 1953) (Venez.).

In 1924, a Brazilian court surrendered a Brazilian national to Great Britain in the absence of a treaty, although Brazil does not ordinarily do so. The court recognized the assurance that reciprocity was permitted under British law. That assurance, however, proved to be false.[31] Similarly, the law of Argentina provides for extradition in the absence of a treaty. Under the Argentine Code of Criminal Procedure, extradition is proper based on "the principle of reciprocity or the uniform practice of States." Although this statement fails to clarify the meaning of "the uniform practice of States," it may be read as adopting in such circumstances the applicable rules of international law in a manner similar to the French practice previously mentioned.[32]

Taken together, it can be said that extradition is not regarded by most states as a binding obligation in the absence of a treaty.[33] However, there is a growing trend to recognize the duty to prosecute or extradite with respect to jus cogens crimes.[34]

A number of multilateral conventions on international crimes require states to prosecute or extradite, in keeping with the maxim *aut dedere aut judicare*.[35] Even though these treaties constitute a basis for the duty to prosecute or extradite, the practice of states has hardly proven to be consistent. Nevertheless, *opino juris* on the matter has been quite strong. Thus, the duty to prosecute or extradite for international crimes should be deemed part of customary international law.[36] To date, however, the duty to prosecute or extradite for jus cogens international crimes, without a treaty obligation to do so, is still debated although several rulings of the International Court of Justice (ICJ) concerning the prosecution of Hissène Habré has shed some light on the matter.[37]

Political and military interests still impede extradition, however, and realpolitik certainly plays a role in the practice of extradition. For instance, in 2010, the German Administrative Court of Cologne dismissed an action by which Khaled El-Masri, plaintiff, sought to compel the German government to seek the extradition of thirteen CIA agents from the United States for allegedly kidnapping and transporting him to Macedonia for torture and interrogation.[38] The Court held that the German government was not obliged to seek extradition for "extraordinary rendition."[39] As explained by Dr. Peter Wilkitziki, the Cologne Administrative Court:

> . . . held the plaintiff legitimate in bringing an action the basis of Germany's obligation under international law, namely the duty to protect her citizens against illegal acts abroad, (in particular those implying grave breaches of the victim's basic rights), referring also to the plaintiff's potential role as "private accessory prosecutor." In so far the Court followed the government's reasoning that no victim has a constitutional right for certain investigatory measures to be performed, but on the other hand the victim must not be treated as a "mere object" of law enforcement.

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31 *In re* Milton Gomes, 5 Ann. Dig. Pub. Int'l L. 280 (STF 1929) (Braz.).

32 Shearer, *supra* note 2, at 26.

33 *See Harvard Draft Convention on Extradition*, 29 Am. J. Int'l. L. 21, 30 (Supp. 1935).

34 *See* M. Cherif Bassiouni, *The Need for International Accountability*,*in* 3 International Criminal Law 3–30 (1999).

35 *See* Appendix I.

36 *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. (2001). The International Court of Justice weighed in on the matter in the situation of Hissène Habré, the former president of Chad who is currently in Senegal and the subject of an extradition request from Belgium. The ICJ ruled that Senegal was obligated to try Habré immediately or extradite him to Belgium to stand trial there. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J. ____ (July 20).

37 *See supra* Sec. 3.4.

38 Peter Wilkitziki, *German Government Not Obliged to Seek Extradition of CIA Agents for "Extraordinary Rendtion*, 9 J. Int'll Crim. Justice 1117–1127 (2011).

39 For a description of this practice, see Bassiouni, *supra* note 1, at 141.

> The action, however, came to be dismissed on the merits. The Court again referred to the argument that the governmental authorities exercise a broad margin of discretion when deciding on making requests or granting foreign requests for extradition and assistance in criminal matters. Such decisions will always have to take a number of factors into consideration such as the legitimate interest of the persons involved, fair trial guarantees and the state interest in foreign policy matters, including the interest in efficient reciprocal cooperation between law enforcement and intelligence agencies. When weighing up these interests the government enjoys ample but not unlimited space for opportunity and utility considerations. In the given case the Court, acknowledging the comprehensive decision-making process documented in the governmental files, held that the German authorities had not transgressed the limits of their margin of discretion. As the first sentence of Article 7, paragraph 1 of the US–German Extradition Treaty leaves it to the parties' discretion whether or not to grant extradition of own nationals (provided their law does not so preclude) the US authorities would have been free to refuse extradition, had the German government filed such a request. Moreover, as the US authorities had already declared that US security interests would not allow extradition of the suspects, a German request would (even though the US administration had meanwhile changed) not have had any chance of success and would have been of a merely symbolic character.[40]

Increasingly, international treaties and national laws require states to fulfill their obligations to extradite or prosecute for international crimes. This trend places an enhanced duty on states in their bilateral treaty obligations to exercise greater diligence in seeking to achieve extradition. Thus, perfunctory rejection of extradition without exercising due diligence or attempting to effectuate extradition is no longer acceptable in the contemporary context of interstate cooperation in penal matters. This is, however, what Germany did in the El-Masri case, evidencing the state-centric approach to extradition that weighs political considerations more heavily than human rights and accountability. Accordingly, states must seek better and more efficient ways to carry out, in good faith, their extradition obligations and to make better use of "assurances,"[41] if needed, to satisfy a requested state that needs to allay its concerns and thus help achieve extradition. The alternative is for the requested state to prosecute domestically, particularly when victims are likely to suffer injustice because impunity is the consequence of the failure to prosecute or extradite, but this supposes that the state has jurisdiction under domestic law and the ability to exercise it.[42]

3.2. The Emerging Rights of Victims

Concern for victims and their rights has increased at the international, regional, and national levels. Historically many national legal systems have provided victims with access to justice and even with participatory rights in criminal proceedings such as a *partie civile* in the French and Belgium codes of criminal procedure, or as a *parte civile* in the Italian code of criminal procedure.[43] In these and other European systems, a victim may be represented in criminal proceedings in order to ensure that all available evidence pertaining to the accused is presented in court, and as a way of ensuring the victims' right to compensation through civil damages arising out of a subsequent civil judgment.[44] The International Criminal Court (ICC) gives

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40 Wilkitziki, *supra* note 38, at 1123

41 *See* Ch. VII, Sec. 7.

42 *See* Ch. VI.

43 M. Cherif Bassiouni, *Victims Rights and Participation in ICC Proceedings and in Emerging Customary International Law*, UCLA Online Forum, www.uclalawforum.com/reparations#Bassiouni (last visited Sept. 26, 2012); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 Hum. Rts. L. Rev. 203 (2006).

44 Jonathan Doak, Victims' Rights: Human Rights and Criminal Justice: Reconceiving the Role of Third Parties (2008).

rights to victims to be represented in its proceedings, as do the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.[45] In 2005, the UN General Assembly Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* established the right of victims to access justice, but more important, the victims' right to hold the perpetrator of a crime accountable; these rights require the prosecution or extradition of alleged perpetrators.[46]

3.3. The Duty to Extradite for International Crimes under Conventional International Criminal Law

A number of conventions on international criminal law establish explicitly the duty to prosecute or extradite.[47] These multilateral conventions also establish that they can be relied upon by states that require a treaty for extradition, and they serve as a basis for states that do not require a treaty as a legal basis for extradition. Piracy is deemed the oldest international crime, and it is one upon which Grotius relied to establish his duty to extradite or punish, *aut dedere aut punire*.[48]

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45 Rome Statute of the International Criminal Court, art. 68(3), July 17, 1998, 2187 U.N.T.S. 90; International Criminal Court, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 85. *See also* T. Markus Funk, Victims' Rights and Advocacy at the International Criminal Court (2010); Bassiouni, *supra* note 43.

46 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Dec. 16, 2005, Article III, para. 4–5:

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.
>
> To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

47 At present there are 142 international criminal conventions containing extradition provisions. *See* Appendix I. *See also* M. Cherif Bassiouni, Introduction to International Criminal Law (2d ed., 2012). For a compilation of international criminal law conventions, *see* M. Cherif Bassiouni, Introduction to International Criminal Law: Second Revised Edition (2d ed., 2013). *See also* Bassiouni, International Criminal Law Conventions and Their Penal Provisions (1997) [hereinafter Bassiouni, ICL Conventions]; Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6; M.Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987) [hereinafter Bassiouni, Draft Code]. *See also* M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 Case W. Res. J. Int'l L. 27 (1983).

48 Grotius, *supra* note 13, at ch. 21, § 5(1). It should be noted that Grotius was retained by the Dutch West Indies Company to prepare what today would be called a "brief" to establish the right of freedom of navigation on the high seas as a basis for the Company to fight off pirates who attacked its merchant

The expression *aut dedere aut judicare* is the modern adaptation of Grotius's maxim *aut dedere aut punire*, which can be translated as "either extradite or punish." Grotius contended that a general obligation to extradite or punish exists with respect to all offenses by which another state is particularly injured. The injured state has a natural right to exact punishment, and the state in which the offender seeks refuge should not interfere with the exercise of this right. Therefore, the requested state ordinarily must deliver a guilty individual to the requesting state for punishment; it is not rigidly bound to do so, however. It has an alternative—to punish the offender itself. But it is bound to do one or the other: either extradite or punish. By contrast, the modern shorthand maxim, *aut dedere aut judicare*, which was first coined by this writer, is used to refer to a formula included in certain treaties concerning certain international crimes (see Appendix 1). The maxim's adoption in an increasing number of multilateral treaties has given rise to the question of whether the principle *aut dedere aut judicare* can now be said to represent an emerging rule of customary law, particularly with respect to certain international crimes.[49] The importance of the *aut dedere aut judicare* concept is that by imposing this strict obligation, impunity is reduced and deterrence is reinforced because offenders are prosecuted.[50]

Historically, the duty to prosecute or extradite, as it emerged and developed in the writings of scholars, was not limited to certain international crimes. Indeed, it was advocated as a *civitas maxima* with respect to all common crimes that states recognized in their respective legal systems, because that was a way of preserving world public order.[51]

The duty to prosecute or extradite,[52] even in the writings of scholars, is an imperfect obligation with respect to non-international crimes as domestic crimes require either the existence of extradition treaties, national legislation, or both.[53] In the course of the evolution of

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fleet. *See also* Declan Costello, *International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare*, 10 J. Int'l L. & Econ. 483 (1975).

49 Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6, at 1–23.

50 *See generally*, M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* Post-Conflict Justice (M. Cherif Bassiouni, ed. 2001). *See supra* notes 34 and 36. *See also* M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. Colo. L. Rev. 409.

51 *See* Grotius, *supra* note 13, § 4(1). For a philosophical view, *see* 2 De Vattel, *supra* note 13, at ch. 4, §§ 76, 77; Cornelius F. Murphy, *The Grotian Vision of World Order*, 76 Am. J. Int'l L. 477 (1982); Christian F. Von Wolff, *Jus Gentium Methodo Scientifica Per Tractatum, in* Classics of International Law § 152 (Joseph H. Drake trans., 1934) (1764). Puffendorf, who relied on the work of Grotius, was more of a positivist on this question. *See* Puffendorf, *supra* note 22, at ch. 3, §§ 23–24. *See generally*, Christine Van Den Wijngaert, The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order, 132–140 (1980); Daniel Derby, *Duties and Powers Respecting Foreign Crimes*, 30 Am. J. Comp. L., 523, 530 n.40 (Supp. 1982). For another perspective, see Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 Loy. L.A. Int'l & Comp. L. Rev. 369 (Summer 2003); Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6; Edward M. Wise, *Extradition: The Hypothesis of a* Civitas Maxima *and the Maxim Aut Dedere Aut Judicare*, 62 Rev. Int'le de Droit Pénal 109 (1991). *See also* M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality*, 15 Nova L. Rev. 353 (1991); M. Cherif Bassiouni, *Working Paper on International Norms and Standards in International Criminal Law*, presented to the Meeting of the United Nations Committee of Experts convening at the International Institute of Higher Studies in Criminal Sciences (Siracusa), Jan. 10–15, 1983, in connection with the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, on Crime Prevention and Criminal Justice in the Context of Development: Challenges for the Future (1982); Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, U.N. Doc. A/Conf./121/22/Rev. 1 (1986).

52 The duty is to prosecute or extradite is discussed in Sec. 3.

53 *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6, at 1–23.

international criminal law, the duty can also be construed as imperfect because it emerged on an ad hoc basis in international criminal law conventions; some conventions do not even explicitly state the duty. But after consistent reaffirmation of the duty to prosecute or extradite in conventional international criminal law, as discussed above, it can be argued that this principle constitutes an emerging customary duty. The duty itself has not been expressed with sufficient specificity to indicate whether it is an alternative or a coexistent duty. Whatever doctrine there is on the subject, it is unclear whether the duty to prosecute or extradite is disjunctive or coexistent. As stated by this writer:

> Doctrine is unclear as to the meaning of "alternative" or "disjunctive" and "coexistent" obligations to extradite. The following distinction is suggested. If the duty to extradite or prosecute is an alternative or disjunctive one, then there is a primary obligation to extradite if relevant conditions are satisfied, and a secondary obligation to prosecute under national laws if extradition cannot be granted. Thus, the duty to prosecute when it arises under national law leaves the requesting state with no alternative recourse.
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> If the duty to extradite or prosecute is coexistent rather than alternative or disjunctive, then the requested state can choose between extradition and prosecution at its discretion. As a result, the state may refuse to extradite the relator to one state, but later agree to extradite him or her to another state or to prosecute. In any event when a state elects to prosecute then discretion plays a broader role, and can be invoked without a breach of treaty or other international obligations.
>
> The doctrine usually expressed is that the international obligation to extradite or prosecute, if it exists, would be construed as a coexistent duty provided that national law permits it.
>
> There is a general doctrinal failure to consider states' international obligations deriving from treaties regarding international crimes, such as war crimes, slavery and slave-related practices, aircraft hijacking, and the kidnapping or taking as hostage of diplomats or civilians, etc. Almost all of the multilateral conventions regarding these international crimes specifically require signatory states to extradite or prosecute violators of the treaties' proscriptions: in other words, they place upon states the alternative duty *aut dedere aut judicare*. Thus, a signatory state to such conventions that refuses to extradite an alleged offender of one of these proscriptions, when the conventions constitute the legal basis for the extradition request, is under a positive duty to prosecute the individual. Failing this, the requested state is in violation of its obligations under the conventions.[54]
>
> The formula to prosecute or extradite is not usually well-developed in international criminal law conventions, as is evident from the textual language contained in Appendix 1. There are some occasional exceptions, but they confirm the rule. Furthermore, the formula fails to clarify whether prosecution comes first as a matter of right, or if that right is subject to certain unstated qualifications, just as extradition may also be subject to certain unstated qualifications. Is there an unarticulated premise that prosecution should be effective (*i.e.,* not a sham), in the state of custody or in the requesting state?[55] Are the respective rights of the custodial state and the requesting state dependent upon a ranking of jurisdictional theories?[56] Recent multilateral conventions have not addressed these issues as the diplomats who draft them continue to

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54 M. Cherif Bassiouni, *General Report on the Juridicial Status of the Requested State Denying Extradition, in* Proceedings of XIth International Congress of Comparative Law of 1982.

55 For a complete analysis, *see* Secs. 3.3 & 3.4 with regard to the duty to extradite for violations of conventions and jus cogens offenses. *See also* Christian Tomuschat, *The Lockerbie Case before the International Court of Justice*, 48 Int'l Comm'n Jurists Rev. 38 (1992). *See* European Convention on the Transfer of Criminal Proceedings, ETS no. 73 (1972); Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. 163 (2002). *See also* Julian Schutte, *Transfer of Criminal Proceedings*,*in* 2 International Criminal Law 643 (1999).

56 *See* Ch. VI.

follow earlier textual language because such precedents offer the best opportunities for political agreement.[57]

3.4. The Duty to Extradite for Jus Cogens Violations

It follows from what is stated above with respect to a victims'-oriented approach, and from other aspects of international law values and policies that states have at least an inchoate obligation to prosecute or extradite for all international crimes, and specifically for jus cogens crimes. This is reflected in the ICJ's 2012 ruling in the *Habré* case.[58] A state's failure to carry out the duty to extradite or prosecute arising out of jus cogens crimes could subject a state to international responsibility pursuant to the Responsibility of States for Internationally Wrongful Conduct as developed under customary international law.[59]

The very same concept of a duty to extradite or prosecute for jus cogens crimes applies also as a bar for a state to surrender a person to another state if such an individual risks being subjected to a jus cogens crime. This is clearly contained in Article III paragraph 1 of the Convention against Torture and All Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[60]

The relationship between jus cogens and foreign state immunity was ruled upon in the 2012 ICJ's case on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*.[61] In it the Court held:

> The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943–1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.
>
> This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943–1945 does not infringe the principle that law should not

57 For a critical approval of international criminal law treaties, see M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*,*in* I International Criminal Law 3 (1999).

58 *See infra* Sec. 3.4.

59 Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 (Jan. 28, 2008).

60 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. res. 39/46, U.N. Doc. A/39/51, Art. III para. 1.

61 Jurisdictonal Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. ____ (Feb. 3).

be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943–1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, I.C.J. Reports 2006*, p. 6, paras. 64 and 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, paras. 58 and 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (*case No. Up-13/99*, Constitutional Court of Slovenia), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *NZAR* p. 420; *ILR*, Vol. 141, p. 702), and Greece (*Margellos*, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* and *Kalogeropoulou and others* v. *Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne*

> v. *Libyan Arab Jamahiriya* (No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of *jus cogens* are alleged.[62]

It should be noted that in the *Italy v. Germany* case, the ICJ dealt with a procedural question, namely that of the applicability of foreign sovereign immunity under customary international law and not with the substantive issue of state obligations and state responsibility in connection with the duty to prosecute or extradite persons accused of committing jus cogens crimes. Had Italy proceeded against Germany before the ICJ instead of allowing a civil case to proceed before its domestic courts, the ICJ would have not been barred by the doctrine of foreign sovereign immunity as this doctrine is applicable to domestic legal proceedings and other proceedings involving an action by an individual against a state, save for some exceptions involving commercial litigation. Italy, however, argued that there should be two internationally recognized exceptions to the doctrine of foreign sovereign immunity: the first being with respect to jus cogens crimes and the second being when the national jurisdiction becomes the last resort available to a victim, particularly a victim of an international crime. The ICJ rejected both arguments.

The *aut dedere aut judicare* question was partially addressed by the ICJ in the *Lockerbie* and *Habré* cases. Although the *Habré* case affirmed the duty to prosecute, neither judgment satisfactorily resolved the question of jurisdictional priorities, which is clearly relevant to the duty to extradite or prosecute. The following analysis of the cases is taken from the second edition of *Introduction to International Criminal Law*.[63]

> In the *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) case (the *Habré* case),[64] the ICJ affirmed its earlier position in the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom and Libya v. United States of America) case (the *Lockerbie* case) regarding the duty of states when to extradite or prosecute.[65] The two cases resulted in similar holdings, in essence that the duty to prosecute "outweighs" the duty to extradite, even though both cases arose under different conventions, namely the 1971 Montreal Convention for the *Lockerbie* case,[66] and the 1984 CAT for the *Habré* case.[67] Neither case, however, addressed the implicit requirements of fairness and effectiveness discussed below.
>
> The *Lockerbie* and *Habré* cases turned on the interpretation of relevant provisions of the Montreal Convention and the CAT, respectively. Article 7 of the Montreal Convention declares that:
>
> > The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence

62 *Id.* at para. 92–96.

63 Bassiouni, Introduction to International Criminal Law, *supra* note 47.

64 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J. ____ (July 20).

65 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S. and U.K.), 1992 I.C.J. 3 (Apr. 14).

66 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177.

67 Convention against Torture, *supra* note 60.

> was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

Article 7(1) of the CAT provides that:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Both Conventions use substantially the same language with the same syntactical construction, namely: *if* the state in which the alleged perpetrator does not extradite, *then* it must prosecute him/her. Under Article 31 of the Vienna Convention on the Law of Treaties, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[68] The ICJ, in both the *Lockerbie* and *Habré* judgments, reasonably concluded on the basis of the "ordinary meaning" of Article 7 of the Montreal Convention and Article 7(1) of the CAT that the duty to prosecute precedes that of extradition.

The ICJ's two rulings have their logic, as the requested state is likely to be the one where the crime occurred, or the state of nationality of the alleged perpetrator (as in the *Lockerbie* case) or the state in which the alleged perpetrator has sought asylum (as in the *Habré* case). In the *Habré* case, Belgium, the requesting state, claimed universal jurisdiction over the crimes under the CAT, but was neither the state in which the crimes occurred nor the state of nationality of the alleged perpetrator. Senegal did not satisfy these jurisdictional assumptions either, but it was the fact that it was the state which gave *Habré* asylum after his escape from Chad that gave it priority over extradition in the eyes of the ICJ.

Under Article 7 of the CAT all state parties have an obligation to prosecute, and it was therefore logical and reasonable for the ICJ to conclude that Senegal, the state of custody, had the duty to prosecute Habré, and failing that, to extradite him to Belgium. The Court interpreted extradition as being optional under the CAT, which underscored its secondary status in relation to the obligation to prosecute. In summarizing the duty to prosecute or extradite, the Court stated that:

> . . . if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.[69]

Unfortunately, in stating categorically that prosecution invariably outweighs extradition, the Court failed to take into account any jurisdictional priorities or state interests that a requesting state may have over the custodial state. This is particularly so where the requesting state is the territory on which the crime was committed or the state whose nationals were the victims of the crime, while the custodial state may have only the physical presence of the alleged perpetrator as a jurisdictional nexus.[70]

While both the *Lockerbie* and *Habré* cases dealt with the issue of prosecution or extradition, otherwise reflected in the maxim *aut dedere aut judicare*, both judgments relied on the respective applicable treaties, namely, the Montreal Convention and the CAT. The Court did not rely on, or supplement, its understanding of the respective provisions with developments in customary

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68 Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 UNTS 331.

69 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. ____, ¶¶ 89–95 (July 20).

70 *See* Ch. VI.

international law. This omission is particularly significant since there have been developments in customary international law since the drafting of the 1971 Montreal Convention and the 1984 CAT which should have led the ICJ to an interpretation of the alternative duties to prosecute or extradite that includes the implicit requirements to provide an effective and fair trial. Satisfying these requirements is essential not only to achieving the object and purpose of the respective conventions to prevent and punish the underlying crimes, but also to respect the rights of the accused and the victims, a class that is increasingly recognized in international law.[71]

The right to a fair trial is well established in international human rights law. Fairness in judicial proceedings is required by Article 14(1) of the ICCPR,[72] as well as the ECHR and the ACHR. The courts established by the ECHR[73] and ACHR[74] have issued a number of decisions supporting the proposition that a person should not be extradited to a state where he/she is likely to be tortured or treated with discrimination, or where his/her fundamental procedural rights would be violated.

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71 The rights of victims are detailed in the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

Similarly, Article 68(3) of the Rome Statute provides that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Rome Statute of the International Criminal Court, *supra* note 45.

The Extraordinary Chambers in the Courts of Cambodia also provides for victim participation through "Civil Party" representation, with rights of audience and the power to question witnesses.

72 International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966). Article 14 of the ICCPR states:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Admittedly, no ICL convention containing a provision on the duty to prosecute or extradite specifically includes such implicit conditions requiring effectiveness of the prosecution and fairness of the prosecution by both the requested and requesting states. Nevertheless, the ICJ failed to provide any guidance on the question of such implicit conditions in the *Habré* case even though the existence of these conditions is inferred on the basis of logic and sound legal judgment.

Logic and sound legal judgment dictate that at the very least effectiveness precludes sham prosecutions and extradition to states which are likely to engage in such proceedings. The effectiveness requirement can, for instance, be read into the willingness provision of Article 17 of the ICC Statute, which states:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.
>
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.
>
> 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
>
> 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
>
> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

73 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 222.

74 American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[75]

At the heart of Article 17 is an analysis of whether the national courts of the state seeking to remove jurisdiction from the ICC are "unwilling or unable genuinely to carry out the investigation or prosecution." Such an analysis could be transposed onto extradition cases by requiring states to assess whether national courts in the requesting or requested state have the capacity, will and independence to effectively investigate and prosecute a particular case.

Surprisingly, the ICJ in the *Habré* case did not address the issue of effectiveness or fair trial, nor did it even refer to them, thus leaving open the question of when and how the duty to prosecute or extradite under either a treaty obligation—including under the Montreal Convention or the CAT—or under customary international law, is to be interpreted if the requesting or requested state is unable or unwilling to guarantee an effective or fair trial.

In the *Habré* case, the ICJ referred to Article 6 of the CAT,[76] which requires the investigation of torture allegations. The ICJ could have relied on this provision to consider investigation as a prelude to prosecution, and to consider that an effective and prompt investigation also extends to an effective and prompt prosecution. This was not the case, even though Senegal first indicted Habré in 2000. The ICJ could have reasonably considered that after 12 years, Senegal was not particularly diligent in the pursuit of investigation and prosecution of Habré, and that this would have a bearing on the future capacity to ensure an effective and fair prosecution. One must infer from the context of the case that the Court found it more practical for Senegal to pursue its prosecution, particularly since its government had indicated its willingness to do so than to order Habré's extradition to Belgium. Thus, Senegal's explanation for the delay in moving to the prosecutorial stage is the costly and complex nature of the case, but that this alone was not enough to justify removing the case to Belgium.

It should also be noted that the in the *Habré* case the Court concluded that "the prohibition of torture is part of customary international law and it has become a peremptory norm of international law (*jus cogens*)."[77] However, the Court went on to qualify this holding by stating that "the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned."[78] One would

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75 Rome Statute of the International Criminal Court, *supra* note 45, at art. 17.

76 Article 6 of the Convention against Torture provides, in pertinent part:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

Convention against Torture, *supra* note 60. *See also* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. ____¶¶ 78–88, 120 (July 20).

77 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. ____ ¶ 99 (July 20).

78 *Id*. at ¶ 100.

> have expected the Court to be more progressive on this question, especially in light of the *jus cogens* status of the crime of torture.[79]

It should be noted that the ICJ did not reach a decision on the merits because the Security Council intervened and preempted it with a resolution ordering Libya to extradite those accused of the explosion on board Pan Am 103 at the time it was flying over Lockerbie, Scotland.[80] The fact that the Security Council decided to order extradition pursuant to the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation[81] underscores the existence of an international obligation to prosecute or extradite, and one can assume from the Security Council resolution that its decision to order extradition as opposed to opting for Libya's intention to prosecute underscores the two unstated conditions in the obligation to extradite or prosecute, namely that the prosecution should be fair and effective, and if any of these conditions are unsatisfied then extradition is the option. Conversely, if the request for extradition is to a state that is not likely to provide for a fair and effective trial, then the option would be for domestic prosecution or for prosecution before an international tribunal or another national tribunal, which can exercise jurisdiction and carry out fair and effective proceedings.

The combined evolution of conventional and customary international law evidences the partial existence of the duty to prosecute or extradite. It is certainly an emerging customary international law norm with respect to jus cogens crimes. Although this is evidenced in the practice of international tribunals such as the ICC,[82] International Criminal Tribunal for Yugoslavia (ICTY),[83] International Criminal Tribunal for Rwanda (ICTR),[84] and the mixed model

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79 With respect to attacks on civilian aircrafts, more commonly known as falling within the meaning of "terrorism," these crimes have also since then risen close to their recognition as jus cogens international crimes. M. Cherif Bassiouni, *Extraterritorial Jurisdiction: Applications to "Terrorism," in* Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Mirjan Damaška 201 (Jon Jackson, Maximo Langer & Peter Tillers, eds. 2008); M. Cherif Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations, in* Values & Violence: Intangible Aspects of Terrorism 216 (Wayne McCormack ed., 2008); M. Cherif Bassiouni, *An Assessment of International Legal Modalities to Control International Terrorism*, 31 Arab J. Legal & Judicial Sciences 17 (2005); M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 Case W. Res. J. Int'l L. 299 (2004); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Perspective*, 43 Harv. Int'l L.J. 83 (2002); M. Cherif Bassiouni, *International Terrorism, in* 1 International Criminal Law 765 (M. Cherif Bassiouni, ed. 1999); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 Law & Contemp. Probs. 63 (1996).

80 S.C. Res. 883, ¶ 16, U.N. Doc. S/Res/883 (Nov. 11, 1993). *See also* S.C. Res. 731, U.N. Doc. S/Res/731 (Jan. 21, 1992); S.C. Res. 748, U.N. Doc. S/Res/748 (Mar. 31, 1992); S.C. Res. 1192, U.N. Doc. S/Res/1192 (Aug. 27, 1998).

81 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 974 U.N.T.S. 178.

82 *See* Rome Statute of International Criminal Court, *supra* note 45.

83 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory for the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). *See also* M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996); Virginia Morris & Michael P. Scharf, An insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (1995).

84 Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994). *See also* Virginia Morris & Michael P. Scharf, 1–2 The International Criminal Tribunal for Rwanda (Transnational 1998); The International Tribunal for Rwanda: Facts, Cases, Documents (C. Sheltema & W. Van der Wolf eds., Nijmegen 1999).

tribunals (Sierra Leone, Kosovo, Timor Leste, Cambodia, and Bosnia Herzegovina),[85] there is only limited application of that doctrine in state practice in domestic jurisdictions.[86] The practice of states, the writings of the most distinguished publicists, and the jurisprudence of international tribunals evidence a consistent reinforcement of the duty to prosecute or extradite for jus cogens crimes notwithstanding the procedural barrier of the foreign sovereign immunity doctrine when used in connection to domestic proceedings. However, it should be noted that this doctrine applies only to the immunity of states and that is usually in connection with damages and other civil proceedings. It does not apply to the responsibility of individuals acting for and on behalf of the state when they commit jus cogens crimes.

Heads of states and senior ministers are no longer immune from prosecution except during the period in which they are in office as established by the ICJ in the case of *Belgium v. Congo*.[87] Conversely the ICC statute, which now has 122 state parties, contains an unqualified removal of heads of state immunity in Article 27, which states,

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[88]

4. Extradition by Multilateral Regional Arrangements

There are a number of regional extradition arrangements that usually supplement the bilateral treaties of the parties thereto. But these multilateral treaties can be used as an independent basis for extradition. The state parties are usually part of a region in the geographic and political sense. A regional extradition arrangement can take the form of a convention that (1) replaces or supplements bilateral treaties, or (2) obligates the parties to enact national legislation in accordance with the provisions or requirements of the arrangement.

States enter into multilateral arrangements to secure the advantage of reducing or eliminating the divergent and uncertain characteristic of multiple bilateral treaties and diverse national legislation. Multilateral arrangements thus serve as a means to harmonize national systems. Regional arrangements contribute to the customary international law of extradition. The following is a brief description of the eight existing regional arrangements.[89]

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85 *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002) 2178 U.N.T.S. 138; United Nations Interim Administrative Mission in Kosovo, S.C. Res. 1244 para 5 (June 10 1999), 38 I.L.M. 1451 (1999); Group of Experts for Cambodia, GA Res 52/135 (1998–1999); UN Transitional Administration in East Timor, S.C Res 1272 (1999) 39 I.L.M. 240 (2000); Statute for the Special Tribunal for Lebanon (May 30, 2007) S.C. Res. 1757; Law on the Court of Bosnia Herzegovinia (Nov. 12, 2000). *See* Bassiouni, Introduction to International Criminal Law, *supra* note 47.

86 For national practice *see* M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application 649–742 (2011).

87 *Case Concerning the Arrest Warrant of April 11, 2000* (Congo v. Belg.), 2002 I.C.J. Rep. 3 (Feb. 14); J. Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 Leiden J. Int'l L. 253 (2003); S. Wirth, *Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium Case,"* 13 E.J.I.L. 877 (2002).

88 Rome Statute, *supra* note 45, at art. 27.

89 *See* Ivan A. Shearer, *The Current Framework of International Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties*, *in* 2 A Treatise on International Criminal Law 326 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

4.1. European Regimes

Europe has two legal regimes concerning extradition and other modalities of interstate cooperation in penal matters, those of the Council of Europe[90] and those of the European Union.[91]

The first regime of the Council of Europe is composed of a series of multilateral treaties, which began with the 1957 European Convention on Extradition[92] and its four additional protocols.[93] The first Additional Protocol deals with political offenses and more specifically, what is not to be considered part of the political offense exception.[94] The second Additional Protocol applies to fiscal matters, extends the applicability of the convention to "pecuniary sanctions," and includes as extraditable offenses violations of taxes, duties, and custom and exchange laws and regulations that contain criminal sanctions.[95] The third Additional Protocol develops simplified and accelerated extradition procedures subject to the consent of the person whose extradition is sought.[96] The fourth Additional Protocol addresses issues of lapse of time and proscription, the rule of specialty, re-extradition to third states, channels and means of communications between states, and interpretation of the European Convention and its Protocols in light of other international instruments, as well as declarations, reservations, and denunciations.[97]

The purpose of the European Extradition Convention is to foster uniformity among member states of the Council of Europe.[98] Following ratification by Norway, Sweden, and Turkey, the convention entered into force on April 18, 1960. By 2011, it had forty-seven European state parties and three non-European members.[99] It is noteworthy that nonmembers of the Council

90 Council of Europe, http://www.coe.int/ (last visited Sept. 25, 2012).

91 European Union, http://europa.eu/ (last visited Sept. 25, 2012). Member states include: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

92 European Convention on Extradition, Dec. 12, 1957, E.T.S. No.24.

93 First Additional Protocol, Oct. 15, 1975, C.E.T.S. No. 86 (thirty-nine states have ratified; one state has signed but not ratified); Second Additional Protocol, Mar. 17, 1978, C.E.T.S. No. 98 (forty-two states have ratified; one state has signed but not ratified); Third Additional Protocol, Oct. 11, 2010, Europe T.S. No. 209 (nineteen states have signed; four states have ratified); Fourth Additional Protocol, Sept. 20, 2012, C.E.T.S. No. 212 (twelve states have signed; no states have ratified). *See also* Council of Europe, European Convention on Extradition and Protocols to the Said Convention—Council of Europe Treaty Series No. 24, 86, 98, 209, 212 (2012). *See generally*, European Inter-State Co-operation in Criminal Matters, The Council or Europe's Legal Instruments (Eddkehart Müller-Rappard & M. Cherif Bassiouni eds., 1991). Third Additional Protocol, July 7, 2010, Europe T.S. No. 209 (four states have ratified; nineteen states have signed but not ratified). *See generally,* Michael Plachta, *Third Additional Protocol to the 1957 European Convention on Extradition*, 27 Int'l Enforcement L. Rep. 831–835 (Aug. 2011); Michael Plachta, *Simplified Extradition: A Proposal for the Third Additional Protocol to the 1957 Council of Europe Convention*, 26 Int'l Enforcement L. Rep. 272–275 (July 2010).

94 Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, C.E.T.S. 86.

95 Second Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, C.E.T.S. 98.

96 Third Additional Protocol to the European Convention on Extradition, Nov. 10, 2010, C.E.T.S. 209

97 Fourth Additional Protocol to the European Convention on Extradition, Sept. 20, 2012, C.E.T.S. 212.

98 All Council of Europe members are party to the convention.

99 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. Non-member state parties include Israel, Korea and South Africa.

of Europe may accede to the convention, contingent upon the unanimous consent of the ratifying states. Finally, reservations are permissible under the convention, and some have in fact been made, but on the whole uniformity has been achieved.[100] The convention has served as a model for bilateral treaties concluded between European and other countries.

The Council of Europe's extradition regime also includes the European Convention on the Suppression of Terrorism,[101] which is designed essentially to remove the "political offense exception" from application to certain international crimes (e.g., hijacking and taking of hostages). The convention is, however, subject to reservations, such as those of Italy, which is required to deny extradition under its constitution and Article 8 of the 1931 Criminal Code, in the case of an offender who is politically motivated, irrespective of the crime committed.

The European Convention on the Suppression of Terrorism entered into force on August 4, 1978, three months after the third member state had ratified it. It now has forty-six member states, with one additional state having signed but not ratified the convention.[102] The preamble of the convention notes "the growing concern caused by the increase of acts of terrorism" and states as its goal "to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment."[103] The convention relies on the principle of *aut dedere aut judicare* to achieve this objective. It lists offenses that have become the modus operandi of contemporary terrorists, such as air piracy, kidnapping, offenses using bombs or automatic firearms that endanger human life, and attacks on diplomatic personnel. It further stipulates that these acts may not be regarded as political offenses for the purpose of extradition.

The second of the legal regimes is that of the European Union, which as of 2013 has twenty-eight members. In contrast to multilateral treaties, the EU established what is tantamount to a supranational legal regime through the Commission's Framework Directives. On that basis, it established the European Arrest Warrant (EAW) through its Framework Decision on June 13, 2002.[104] This

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100 *See* Shearer, *supra* note 89, at 330–331, 333.

101 *Id.*

102 Forty-six member states have ratified the convention: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, F.Y.R. Macedonia, Turkey, Ukraine, and the United Kingdom. Andorra has signed but not ratified the convention.

103 *Id.*

104 Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, July 18, 2002, 2002/584/JHA, OJ L190/1. *See* Robin Lööf, *Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU*, 12 Eur. L.J. 421–430 (May 2006); Susie Alegre & Marisa Leaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant*, 10 Eur. L. J. 200–217 (Mar. 2004). *See generally*, Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 Eur. J. In'tl L. 989 (2004); Mar Jimeno-Bulnes, *After September 11th: The Fight against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples*, 10 Eur. L. J. 235–253 (2004); Elspeth Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice*, 10 Eur. L. J. 218–234 (Mar. 2004); Mar Jimeno-Bulnes, *European Judicial Cooperation in Criminal Matters*, 9 Eur. L. J. 614–630 (2003). Extradition has also occurred pursuant to the Schengen Agreement of 1985 between Switzerland and Germany for tax evasion. *See* Bruce Zagaris, *Swiss Highest Court Affirms Extradition to Germany for Tax Evasion*, 26 Int'l Enforcement L. Rep. 277–278 (2010); The Schengen acquis—Convention implementing the Schengen Agreement of June 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14, 1985 O.J. L 239. There were two other extradition agreements in 1995 and 1996 that built upon the 1957 European Extradition Convention, on simplified extradition procedures between member states (1995) and the

regime provides for a European judicial space and quasi-automatic recognition of arrest warrants signed by any of the member states, requiring all member states to give it effect.[105] A number of European countries have had to develop national implementing legislation to give effect to these directives. Others, such as France and Germany, have limited the applicability of the EAW through their judiciary. The Courts of Appeals in France in several cases have limited the automatic recognition of the EAW, which were affirmed by the Cour de Cassation.[106] Germany's Constitutional Court (*Bundesverfassungsgericht*) held in 2006 that the EAW violates Germany's federal constitution, partially with respect to the extradition of German nationals, which is prohibited under the country's constitution (*Grundgesetz*).[107]

The purpose of the EAW is to create a new system of surrender between EU judicial authorities and to replace the former bilateral and multilateral extradition scheme. The EAW system is based on the principle of mutual recognition as opposed to that of mutual cooperation, which is the basis of the Council of Europe's multilateral treaty regime.[108] In the EU's 2005 Framework Decision, the EAW is defined as "a judicial decision issued by a Member States with a view to arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."[109] The warrant can be issued for offenses that are punishable for a maximum of at least one year, or when a sentence has been passed or detention ordered for at least four months.[110]

Several major procedural changes between the EAW and the former extradition procedures were made in order to simplify and expedite the overall process. The procedures under an EAW

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other regarding extradition between European Union member states. Neither of these is yet in force. *See* Gjermund Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond*, 79 N.J.I.L. 1, 4–5 (2010).

105 This is similar to the Full Faith and Credit Clause of the U.S. Constitution, Article IV, Sec. 1. However, as applied, the Full Faith and Credit Clause required that one state obtain a judgment that recognized the judgment of the other state, whereas the EAW goes directly to the implementing judge in any EU country. For a discussion of proposals to improve mutual legal assistance in criminal matters from G8 countries, see generally, Michael Plachta, *Improving Mutual Legal Assistance in Criminal Matters: Contribution from G8 Countries*, 27 Int'l Enforcement L. Rep. 841–843 (2011).

106 *See* La Cour De Cassation, Chambre Criminelle [Cass. Crim.] [Supreme Court of Appeal] Paris, Mar. 15, 2005, Bull. Crim., No. 1688 M. Cotte (Fr.).La Cour De Cassation, Chambre Criminelle [Cass. Crim.] [Supreme Court of Appeal] Paris, Feb. 1, 2005, Bull. Crim., No. 742 M. Cotte (Fr.); La Cour De Cassation, Chambre Criminelle [Cass. Crim.] [Supreme Court of Appeal] Paris, Aug. 5, 2004, Bull. Crim., No. 4630 M. Pibouleau (Fr.) (EAW procedures are not laws within the meaning of the criminal code and apply to acts committed after Nov. 1, 1993); La Cour De Cassation, Chambre Criminelle [Cass. Crim.] [Supreme Court of Appeal] Paris, Aug. 5, 2004, Bull. Crim.,No. 4540 M. Piboluleau (Fr.) (court cannot validly order surrender of French national subject to EAW for acts that are not a violation of French law); La Cour De Cassation, Chambre Criminelle [Cass. Crim.] [Supreme Court of Appeal] Paris, July 8, 2004, Bull. Crim., No. 4351 M. Cotte (Fr.) (commission of part of the acts on French territory justified refusal to surrender); Cour d'Appel de Pau [Court of Appeals of Pau], Chambre l'Instruction, Arret No. 238/2003, May 16, 2003 (refusal of extradition to Spain because of suspicion of torture by Spanish police).

107 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2005, 2 BvR 2236/04, Absatz-Nr. (1–201) (F.R.G.), *available at* http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html; Schomburg, Lagodny, & Hackner, *supra* note 2.

108 For a detailed analysis of the different mutual trust among EU member states regarding the EAW and Nordic States regarding the Nordic Arrest warrant, and for a discussion of the Intra-Nordic Extradition system as a possible inspiration for the EAW, *see* Gjermund Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond*, 79 N.J.I.L. 1, 10–24 (2010).

109 Council Framework Decision on EAW, *supra* note 100, at art. 1(1).

110 *Id*. at art. 2(1).

are much faster, as the state in which an individual has been arrested has to return the individual to the issuing state within ninety days of the arrest. Additionally, the dual criminality rule was abolished for thirty-two of the most serious offenses, allowing a surrender pursuant to an EAW without verification of the double criminality of the act, if the offense is punishable by a sentence of at least three years.[111] For other criminal acts, the double criminality rule applies and the surrender pursuant to the arrest warrant can be subject to the condition that the act constitutes an offense under the law of the executing member state.[112] One of the most significant changes is the removal of the political offense exception that exists in extradition treaties and customary international law.[113] Government ministers in the respective EU states no longer have the final decision to extradite or not. The execution of EAWs is a formal judicial process, subject to ensuring respect for fundamental rights, in accordance with the provisions of the European Convention on Human Rights. Finally, countries can no longer refuse surrender of their own nationals without certain justifications; however, a country can request that a national serve his or her sentence in its territory. Grounds for refusal include *ne bis in idem*, if an offense is covered by an amnesty, if the prosecution of the offense is barred by prescription, or if the individual is a minor.[114]

The EAW replaces existing extradition treaties and agreements between EU states regarding extradition, including: the 1957 European Extradition Convention,[115] the 1978 European Convention on the Suppression of Terrorism,[116] the 1990 Convention Implementing the 1985 Schengen Agreement,[117] the 1995 Convention on Simplified Extradition Procedure between the Member States of the European Union, and the 1996 Convention relating to Extradition between Member States of the European Union. Although the EAW replaces the above treaties, EU member states still can use bilateral and multilateral agreements for extradition with non-EU states. Denmark, Finland, and Sweden have stated that they will continue to apply uniform legislation in force between themselves.[118]

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111 *Id.* at art. 2(2). The following offenses are included: participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions, and explosives; corruption; fraud; laundering proceeds of crime; counterfeiting currency; computer-related crime; environmental crime; facilitation of unauthorized entry and residence; murder; grievous bodily injury; illicit trade in human organs and tissue; kidnapping; illegal restraint and hostage-taking; racism and xenophobia; organized or armed robbery; illicit trafficking in cultural goods; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircrafts or ships; and sabotage.

112 Art. 2(4), Council Framework Decision on EAW, *supra* note 100.

113 *See* Ch. VIII, Sec. 2.1.

114 [European] Convention on Human Rights and Fundamental Freedoms, Nov. 5, 1950, E.T.S. 5, 213 U.N.T.S. 222, as amended by Protocols Nos 3, 5, and 8, which entered into force on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1, 1990 respectively, Arts. 3, 4.

115 European Convention on Extradition, *supra* note 92.

116 European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 090.

117 Schengen Agreement, *supra* note 100.

118 Statements provided for in Article 31(2) of Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 246 (Sept. 29, 2003); Nordic Extradition Act (Denmark Act No 207 of February 3, 1960); Nordic Extradition Act (Finland 270/1960); Act concerning extradition to Denmark, Finland, Iceland and Norway for Criminal Offenses (Sweden 1959:254). With respect to the application of the European Arrest Warrant in Italy, which is based on a law adopted by the Italian Parliament to give effect to the warrant, there have been a number of decisions by the courts of appeal and by the Cort de Cassazione, which are discussed in Rivista Italiana di diritto e Procedura penale, Fasc. 2- Aprile-Giugnio 2006 at 761–776.

The EAW was the result of extensive political discussion and debate among various European states regarding the implementation, in the European system of criminal law, of mutual recognition and implementation of judicial decisions and pretrial orders.[119] The desire for a simpler and faster means of cooperation among EU members regarding extradition, particularly extradition of fugitives who had already been finally sentenced, was an announced goal in the 1999 Tampere European Council meeting.[120] However, this push for a streamlined method of mutual recognition and implementation of judicial decisions among EU states in the context of extradition was not made a top priority until after the terrorist attacks in the United States of September 11, 2001.[121] These attacks resulted in the inclusion of various offenses for which there was no common European definition in the list of extraditable offenses, and for practical reasons removed the double criminality requirement for these offenses.[122] This emphasis on a simplified means of cooperation among EU states has faced a few hurdles toward its full application and efficacy among those states, namely the establishment of mutual trust among EU states, the interrelation of the concepts of mutual recognition and harmonization of the varying legal systems among EU states, and the concept of state sovereignty and constitutionality of the EAW with respect to each EU state party's constitution.[123]

There is, as of the time of this writing, no broad, uniform convergence among the various EU states regarding substantive and procedural criminal law systems. Although there are certainly some basic examples of agreement among EU states, this agreement does not extend beyond certain basic concepts. Absent such a broad-based consensus, it is more difficult for one EU state, when presented with a judgment from another EU state, to trust that the appropriate judicial authority of that EU state, regarding the substantive and procedural criminal rights of a given individual, has considered the relevant principles and procedures of the EU state that has been presented with that judgment and a request to cooperate with its enforcement. This concern relates to the fundamental concept that has come to be known as "mutual trust."[124] Without a baseline confidence in the fairness of a given judicial system regarding the rights of an accused individual, mutual recognition of a judgment as between two sovereign states is less likely to occur. This is particularly true given a state's interest in protecting the rights of its nationals, evidenced by various EU states continuing to consider double criminality even in instances where such consideration is optional under the European Arrest Warrant's

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119 Massimo Fichera, *The European Arrest Warrant and the Sovereign State:A Marriage of Convenience?*, 15 Eur. L. J. 70, 71 (2009) (hereinafter "Fichera EAW").

120 Tampere European Council, *Presidency Conclusions* (Oct. 15 and 16, 1999), conclusion 35, *available at* http://www.europarl.europa.eu/summits/tam_en.htm (last visited Sept. 8, 2011).

121 J. Wouters & F. Naerts, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An ppraisal of the EU's Main Criminal Law Measures against Terrorism after 11 September*, Common Market L. Rev. 909 (2004); M. Jimeno-Bulnes, *After September 11th: The Fight against Terrorism in National and European Law Substantive and Procedural Rules: Some Examples*, 10 Eur. L. J. 235 (2004). There were some discussions in the 2000 Programme on Mutual Recognition of adopting an arrest warrant. These discusisons included various modalities regarding the scope of the arrest warrants application; some delegations proposed that the arrest warrant apply to the most serious offenses listed in Article 29 of the Treaty of the European Union, others proposed absolute mutual recognition, and others an approximation modality based on a "minimum maximum" method. *See* Fichera EAW, *supra* note 119, at 72.

122 Fichera EAW, *supra* note 119, at 72.

123 For an early assessment of the implementation of the EAW, *see* Bruce Zagaris, *European Commission Issues Report on Success of European Arrest Warrant*, 25 Int'l Enforcement L. Rep. 420–422 (2007).

124 See in this regard the Preamble to the 1996 Convention relating to Extradition between the Member States of the EU, [1996] OJ C313/12: "The High Contracting Parties…EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial…."

Framework Decision.[125] One author has suggested that mutual trust may be fostered by reducing the number of crimes contained in Article 2(2) to those core crimes that EU member states would more easily find commonality among their various legal approaches to the definition of criminality.[126] Article 1(3) of the Framework Decision specifies that the fundamental rights in Article 6 of the Treaty of the European Union[127] will not be modified by the Framework Decision. The respect for human rights and state practice under the EAW will provide another source to test the mutual trust among EU states in the context of the surrender of nationals pursuant to an EAW. As mutual trust among EU states becomes more established, EU states will be more inclined to adopt mutual recognition of requests made pursuant to the EAW.

While the proper role of harmonization has been the subject of extensive debate, there is a synergistic relationship between harmonization and mutual recognition.[128] The potentially problematic nature of harmonization and mutual recognition is reduced if, as should be the case, these two concepts are analyzed as a matter of degree rather than as absolutes. That is to say, harmonization need not be equated to unification of various systematic approaches to a given issue, and mutual recognition need not be viewed as applying to each and every decision issued by a given governmental authority. Harmonization should be viewed, in the context of the EAW, as a means to provide approximation of rules on criminal matters to foster an environment of cooperation among EU states.[129] This approximation of rules should serve to ease concerns regarding the criminal processes of a given state and foster mutual trust among states, which would tend to promote mutual recognition of judgments among states. It remains to be seen whether this minimum level of harmonization will be sufficient to allow a functional

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125 Belgium, the Netherlands, Germany, Poland, and Ireland all continue to consider dual criminality in the context of the EAW. *See* Fichera, *supra* note 119, at 79–80. Article 2(2) of the European Arrest Warrant Framework Decision lists offenses that, if punishable in the issuing member state by a custodial sentence or detention of a maximum period of three years, need not be verified regarding double criminality. *See* Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, Art. 2(2), 2002 O.J. (L 190/1).

126 Fichera EAW, *supra* note 119, at 80.

127 Article 6 states in its entirety:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
>
> 3. The Union shall respect the national identities of its Member States.
>
> 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, C 321 E/1.

128 For the debate regarding harmonization, *see* T. Vander Beken, *Freedom, Security and Justice in the European Union. A Plea for Alternative Views on Harmonisation*, *in* Harmonisation and Harmonising Measures in Criminal Law 95 (A. Klip & H. van der Wilt eds., 2002). A. Klip, *European Integration and Harmonisation and Criminal Law*, *in* European Integration and Law (D. M. Curtin et al. eds., 2006), 134. *See contra* mutual recognition, B. Schünemann, *Alternative Project for a European Criminal Law and Procedure*, Crim. L. Forum 227 (2007).

129 For a detailed discussion of this from a European perspective, see Fichera EAW, *supra* note 119, at 73–77 (arguing that harmonization as approximation is supported by the text of the Treaty of the European Union as well and discussing the implications of the Lisbon Treaty in allowing the European Parliament and Council to establish rules defining criminal offenses and sanctions for serious cross-border crimes).

European Judicial System to develop, or whether disagreements among EU states will arise such that compromise between two competing systems cannot be reached and the efficient application of legal norms is hindered. It is possible, in such cases, for the affected state to rely on a "safeguard clause" to refer the situation to the European Council for a decision, during which time the procedure is suspended pending resolution by the European Council or other consensus is reached.[130] If consensus has not been reached, the mechanism of "enhanced cooperation" may apply to resolve the issue, but this mechanism requires at least nine countries to wish to adopt the directive notwithstanding opposition from one or more states.[131]

Although the EAW Framework Decision was unanimously approved by EU member states, certain issues concerning the constitutionality of national implementing legislation arose.[132] In Poland, Germany, and Cyprus, the court with authority to review the constitutionality of surrender of nationals pursuant to an EAW found that such surrender was prohibited.[133] These courts based their decisions on the tradition of prohibiting the surrender of nationals; each court also stressed its concerns regarding the lack of certainty of law in the application of the EAW in that particular circumstance. The Czech high court took a different approach to complaints based on similar concerns of non-surrender of nationals and uncertainty as to the law defining the offenses at issue by distinguishing between extradition and the EAW processes.[134] The Czech court noted that extradition was based on mutual distrust among states, whereas the EAW was based on mutual trust deriving from the high mobility of individuals among EU member states and interstate cooperation.[135] The European Court of Justice (ECJ) in *Advocaten voor de Wereld* was presented with a challenge to the preliminary ruling by the Belgian Constitutional Court.[136] The ECJ was called upon to resolve two issues: (1) whether the Framework Decision was an appropriate instrument or whether a Convention was required under the Treaty of the European Union; and (2) whether Article 2(2) of the Framework decision, removing the verification of double criminality, was compatible with the principles of legality and equality under the Treaty of the European Union. One set of policy concerns surrounding these issues was the fact that conventions had been traditionally used by states to foster cooperation and by virtue of involvement of national parliaments reflected a more democratic control of the issue of cooperation, and that Framework Decisions under one interpretation of the Treaty of the European Union could only be used to adopt minimum rules relating to the elements of crimes and penalties. The opposing policy concerns were the possibility that not all member states would ratify a convention on the EAW, rendering it ineffective, and the fact that the Framework Decision does not violate principles of legality as it merely provides a mechanism of assistance between member states and does not purport to grant the executing state the ability to review the merits of the case (meaning that the arrest and surrender procedure would not be punitive in nature).[137] With regard to the first issue, the Court found that the Council had discretion to choose between the Framework Decision and Convention in this case, and was not limited by the Treaty of the European Union in making this choice.[138] With regard to the second

130 *See* Fichera EAW, *supra* note 119, at 77.

131 *Id.* at 77.

132 *See generally*, Zsuzsanna Deen-Racsmany, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, 14 Eur. J. Crim. L. & Crim. Just. 271 (2006).

133 *See* Fichera EAW, *supra* note 119, at 82–83. For a detailed discussion of the Polish Parliament's constitutional amendment to accommodate the EAW, *see* Michael Plachta, *Polish Parliament Amends Constitution to Accommodate European Arrest Warrant*, 23 Int'l Enforcement L. Rep. 48–53 (2007).

134 *See* Fichera EAW, *supra* note 119, at 83–84.

135 *Id.*

136 *Advocaten voor de Wereld v Leden van de Ministerraad*, [2009] E.C.R. C-303/05; Michael Plachta, *European Court of Justice Rules on the European Arrest Warrant*, 25 Int'l Enforcement L. Rep. 487 (2009).

137 Fichera EAW, *supra* note 119, at 84–85.

138 *Id.* at 85.

issue, the Court found that the purpose of the Framework Decision was not to harmonize criminal offenses, but rather to remove the requirement of double criminality for those crimes serious enough to affect public order and safety.[139] However, this reasoning presumes the existence of mutual trust when in fact in a given case it is possible for the state executing the EAW to feel as though a foreign system is being imposed on it without regard to its substantive and procedural criminal provisions.[140]

Various European courts have considered the application of the EAW to their nationals. The United Kingdom has taken a formalistic approach to the EAW in determining what type of "conduct" was covered by the implementing act,[141] namely whether a separate certificate was required for the EAW to be valid,[142] and when *habeas corpus* is available to challenge an EAW.[143] The relationship between extradition and the EAW has also been considered by Spanish[144] and Belgian[145] courts. Italian courts have faced questions regarding the provision of additional grounds for refusal in the implementing statute.[146]

In a 2008 decision, the ECJ defined the terms "resident" and "staying" in regard to Article 4(6) of the EAW Framework Decision, which provides an optional ground for refusal to execute the EAW where the executing state, in accord with its domestic law, undertakes to execute the sentence or detention order issued by the requesting state.[147] The importance of residence for the purposes of Article 4(6)'s optional ground for refusal to execute an EAW regarding execution of a custodial sentence where the requested individual is staying in or a resident of the

139 *Id.* at 85.

140 *Id.* at 86.

141 *Office of the King's Prosecutor, Brussels v Cando Armas and Another* [2005] UKHL 67, [2006] AC 1. Mr Cando Armas, an Ecuadorian citizen, was sought by the Belgian authorities after conviction in absentia to five years' imprisonment for human trafficking, facilitation of unauthorized entry, and residence and forgery of administrative documents.

142 *Dabas v High Court of Justice, Madrid* [2007] UKHL 6, [2007] 2 AC 31.

143 *Re Hilali* [2007] EWHC 939 (Admin), [2007] 3 All ER 422.

144 *See* M. Jimeno-Bulnes, *The Enforcement of the European Arrest Warrant: A Comparison between Spain and the UK*, Eur. J. Crime, Crim. L. & Crim. Justice 263 (2007) (implementation in Spain); S.T.C., June 5, 2006, no. 177/2006 (Sala Segunda), Recurso de Amparo no 5933/2005.

145 On the case law in Belgium, see the *Cour de Cassation* website, *available at* http://www.cass.be. *Cour de Cassation*, Aug. 24, 2004, n. P.04.1211.N; *Cour de Cassation*, Dec. 8, 2004, n. P.04.1562.F; *Cour de Cassation*, Apr. 13, 2004, n. P.04.0513.N; *Cour de Cassation*, Feb. 1, 2006, n. P.06.0109.F; *Cour de Cassation*, June 8, 2004, n. P.04.0842.N; *Cour de Cassation*, Jan. 11, 2006, n. P.05.1544.F; *Cour de Cassation*, Oct. 18, 2006, n. P.06.1316.F; *Cour de Cassation*, Mar. 7, 2007, n. P.07.0259.F; *Cour de Cassation*, May 11, 2004, n. P.04.0660.N; *Cour de Cassation*, Sept. 21, 2005, n. P.05.1270.F; *Cour de Cassation*, Mar. 1, 2006, n. P.06.0280.F.

146 *Cass.*, sez. VI penale, May 8, 2006, n.16542, (Cusini) (Italian citizen charged with fraud in Belgium released for Belgium's failure to transmit the relevant national provisions to the extraditing judicial authority); *Cass.*, sez. un., Feb. 5, 2007, n.4614, (Ramoci) (length of pretrial detention); *Cass.*, sez. feriale penale, Sept. 13–14, 2005, n.33642, (Hussain). The defendant in Hussain argued, inter alia, that he was being persecuted on one of the grounds mentioned by recital 12 of the Framework Decision (reproduced as grounds for refusal by the Italian law). The court replied that a violation of the fundamental rights of a person must be deduced from objective circumstances and the tradition of the requesting state excludes the existence thereof. *See* Fichera EAW, *supra* note 119, at 95.

147 *Kozlowski* [2008] E.C.R. C-66/08, ECR I-6041. The ECJ stated a "resident" was an individual who had established his actual place of residence in a member state, and a person as "staying" in a member state when the individual had acquired connections with the state similar to those of residence following a stable period of presence in that state. These "connections" are determined with reference to objective factors including the length, nature, and conditions of his presence and the family and economic connections with the executing member state.

executing member states, and that state undertakes to execute the sentence or order in accord with its domestic law, is illustrated by the *Wolzenburg* case.[148] Wolzenburg had been issued suspended custodial sentences by two German courts for various offenses, which were converted into one suspended custodial sentence in 2003 for a term of one year and nine months.[149] Wolzenburg entered the Netherlands in 2005, and the German court issued an order revoking the suspension of conditional sentence a month later.[150] After the German judicial authority issued an EAW for Wolzenburg, he attempted to register in the Netherlands as a citizen of the European Union.[151] Wolzenburg also refused to consent to his surrender to Germany, and a Dutch court found that the facts were punishable under Netherlands law without Wolzenburg losing his residency status in the Netherlands; the Dutch court did, however, refer the case to the ECJ for a preliminary ruling. The ECJ noted that the requested individual must have been a lawful resident for at least five years in the Netherlands for Article 4(6) to be available in the case of a custodial sentence where the Netherlands was the executing state.[152] The ECJ also ruled that the Dutch legislation at issue—which provided that the Netherlands may refuse to surrender its nationals or non-nationals who have been residents in the Netherlands for a continuous period of five years and possess a residence permit of indefinite duration—was not contrary to the principle of non-discrimination based on nationality as both comparable and different situations will be treated in accord with objectively justifiable reasoning based on the situation presented.[153] This five-year residency requirement ensured that execution of an EAW is refused only for persons with genuine prospects of a future in the requested state. The ECJ also issued a ruling regarding the "Principle of Specialty" and stated that if a surrendered person faces an offense other than that for which he or she was surrendered, consent must be requested and obtained pursuant to Article 27(4) of the EAW Framework Decision before a provision affecting that person's liberty may be executed.[154] However, the person may be prosecuted for the other offense prior to consent being obtained as long as no restriction on the person's liberty is applied during prosecution or following judgment.

More concerning than the interpretation of the EAW is the way in which surrender pursuant to the EAW has occurred in violation of various procedurally suspect grounds. EAWs have been issued on the basis of flawed evidence obtained by the mistreatment of witnesses.[155] EAWs have been issued for minor offenses, such as the possession of 100 Euros in counterfeit currency.[156] The concept of mutual trust under which EAWs operate can present flaws, especially given that "previous attempts to legislate at the EU level to require all member states to raise defense rights to a basic minimum consistent with Article 6 of the European Convention on Human Rights have failed."[157] The issue of a fair trial has arisen in the context of an EAW issued fifteen years after a UK citizen was tried in absentia and convicted on drug charges in France.[158]

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148 *Wolzenburg*, [2009] E.C.R. C-123/08.

149 Michael Plachta, *European Court of Justice Rules on the European Arrest Warrant*, 25 Int'l Enforcement L. Rep. 489 (Dec. 2009).

150 *Id.*

151 *Id.*

152 *Id.* at 491.

153 *Id.* at 492.

154 *Leymann-Pustovarov*, [2009] ECR C-388/08 PPU, I-000.

155 Catherine Heard, *The New European Extradition System—A Critical Review*, 25 Int'l L. Enforcement Rep. 398, 399 (2009) (discussing the case of Andrew Symeou who was served in 2008 with an EAW regarding the death of another UK youth in Greece in 2007).

156 *Id*. at 400.

157 *Id*. at 401.

158 *Id*. at 402. (discussing the case of Deborah Dark). The United Kingdom initially detained Rafik Abdelmourme Khalifa under an EAW issued by a French court for allegations of embezzlement, and the United Kingdom in 2009 found Khalifa extraditable to Algeria where he was convicted in absentia on

The EAW was conceived of as a system to replace formal extradition among EU member states toward the end of speeding up the delivery of suspects and convicted offenders. The implementation of the EAW has been flawed as uniformity across all member states has had to be balanced with the recognition of the differences among the various national criminal systems in these states. Although it is important to allow states a margin of freedom and discretion in recognition of national sovereignty, the wider this margin becomes the less effective the EAW will be as a tool to facilitate international criminal justice.

4.2. The United States–European Union Extradition Agreement[159]

In response to the attacks of September 11, 2001, the European Union and the United States have undertaken to increase cooperation in penal matters through a new agreement on extradition and mutual legal assistance entered into in 2003.[160] This is a unique type of agreement because it purports to be a multilateral agreement whereas in reality it is a bilateral one. Its contracting parties are the European Union as an organization and the United States. But the European Union assumes the undertaking of having its member states conform their bilateral treaties with the United States to the contents of the EU treaty. Nevertheless, each member state has to negotiate a separate agreement with the United States, which operates as an amending protocol to the existing bilateral treaties the United States has with several EU states. Further adding to the unique if not sui generis nature of the agreement, it cannot be used as a basis for extradition by the United States to the European Union because the European Union is a legal entity that does not have sovereign territory as do its member states. Moreover, the agreement is not for the extradition of EU personnel from the various buildings occupied by the European Union in Brussels, or wherever it may have offices in the territory of the member states. The extradition agreement is more like a framework agreement intended by the United States to gain political leverage with EU member states to negotiate protocols amending existing bilateral extradition treaties. Although this approach may have a valid political purpose, it nonetheless appears to be quite different from any known form of multilateral agreement as understood within the meaning of the Vienna Convention on the Law of Treaties and customary international law. There is also nothing under the *Restatement (Third) of the Foreign Relations Law of the United States* that covers this type of agreement, which can best be described as a master-model agreement, whose only real purpose is to motivate the adoption of bilateral

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various charges and sentenced to life in prison in 2007. *See Court Backs Algerian Extradition*, BBC News, June 25, 2009, *available at* http://news.bbc.co.uk/2/hi/africa/8119610.stm, Kalifa's appeal is expected to involve the provisions of fair trial in the International Convention on Human Rights and trial in absentia. *See* Bruce Zagaris, *British Court Rules Algerian Business Mogul Khalifa Extraditable to Algeria*, 25 Int'l Enforcement L. Rep. 363–364 (2009).

159 *See also* Ch. II. *See also* Sean Murphy, 2 United States Practice in International Law: 2002–2004 (2006); Sean D. Murphy (ed.), *New U.S./EU and U.S./UK Extradition Treaties, in Contemporary Practice of the United States Relating to International Law*, 98 Am. J. Int'l L. 850 (2004); Kyle M. Medley, *The Widening of the Atlantic: Extradition Practices between the United States and Europe*, 68 Brook L. Rev. 1213 (2003); Catherine Heard, *Fair Trials International's Policy Paper: A Brief Review of U.S.–U.K. Extradition under the Extradition Act of 2003 from a Human Rights Perspective*, 25 Int'l Enforcement L. Rep. 2–7 (2009) (discussing disparity between U.S. and UK requests for extradition and human rights issues relating to the death penalty, dual criminality, abuse of process regarding plea bargains, and evidence obtained by torture as in the Abu Hamza case).

160 Agreements on Extradition and on Mutual Legal Assistance between the European Union and the United States of America, signed June 25, 2003, Council of Europe doc. 9153/03, CATS 28, USA 4. *See also* Council Decision of June 6, 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in Criminal Matters, 2003/516/EC, OJ L181 (July 19, 2003). *See generally*, Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 Eur. J. Int'l L. 989 (2004).

agreements that are in conformity with the EU agreement. What is perplexing is that with respect to the twenty-five bilateral treaties that the United States has negotiated with EU member states on the basis of the EU agreement, there are differences that reveal that EU member states did not consider themselves bound by each and every obligation contained in the United States–European Union agreement. In a most unusual practice, the George W. Bush administration classified the United States–European Union extradition treaty as "secret" when it sent it to the Senate Committee on Foreign Relations.[161] It is difficult to understand why the administration classified the treaty when a published version could be obtained from the EU website.[162] Currently, the full text is available on the Senate website.[163] This agreement entered into force on February 1, 2010, along with the individual bilateral agreements.[164]

The agreement removes the legislative and certification requirements and simplifies the documentation required in order to expedite the extradition process. By facilitating direct contact between the central authorities, it also improves the channels of transmission, especially for cases concerning provisional arrest. It further enlarges the number of extraditable offenses by allowing extradition for any offense that has a sentence of more than one year in prison, but excludes the death penalty. At the same time, EU member states still maintain their right to refuse extradition under the bilateral extradition treaty as the extradition agreement does not replace the bilateral treaties, but rather supplements them or only replaces some provisions. European Union member states can also stipulate that the death penalty will not be imposed in extradition cases, and require a fair trial by an impartial tribunal.

4.2.1. Implications of the European Arrest Warrant and the United States–European Union Extradition Agreement for Extraditions between the European Union and the United States

The push to streamline inter-European arrest and transfer of alleged criminals and the push to streamline extra-European extraditions, at least so far between the European Union and the United States, is indicative of an imminent transformation of the European system into a more federal system with laws regulated by a supranational legislative governing entity, although economic pressures since 2007 have placed great strain on the European Union. The EAW, as noted above, arose from a Council of Europe Framework Decision. The United States–European Union extradition agreement included a provision requiring the agreement to apply to existing and new EU member states, and that new EU member states modify any existing bilateral extradition treaty with the United States to bring it into compliance with the agreement.[165] The EAW directive, though controversial and the subject of debate regarding its conflict with national constitutions, was ultimately accepted by EU member states, some of which

161 On September 28, 2006, the treaty together with twenty-two supplemental bilateral treaties were received in the Senate, and sent to the Committee on Foreign Relations, and had their injunction of secrecy removed.

162 Website of the European Union Law, *available at* http://eur-lex.europa.eu/en/index.htm.

163 Thomas Website of Library of Congress, *available at* http://thomas.loc.gov/. There was an informative hearing on the EU–U.S. extradition treaty in 2008 that summarized the new features of the EU–U.S. extradition treaty. *See Extradition and Mutual Legal Assistance Agreements with the European Union Bilateral Instruments with European Union Member States, Including Extradition Treaties with Bulgaria, Estonia, Latvia, Malta, and Romania Mutual Legal Assistance Treaty with Malaysia Before the Sen. Comm. on Foreign Relations,* 110th Cong. 12 (2008) (testimony of Susan Biniaz, Deputy Legal Adviser, U.S. Department of State, attached to S. Exec. Doc. No. 110-12 (2008)).

164 *See* Department of State United States of America, Treaty Actions Feb. 2010 at 3, *available at:* http://www.state.gov/documents/organization/147342.pdf (last visited Sept. 25, 2012).

165 Agreement on Extradition between the European Union and the United States, Art. 3, July 19, 2003, S. Treaty Doc. 109-14.

modified their constitutions to accommodate the EAW directive. Thus, the proposition that an EU directive can supersede contradictory national laws appears settled, even though this principle is not yet explicit as countries that modified their constitutions did not explicitly recognize this binding nature of EU directives. The European Commission is like the locomotive pushing onward toward a Europe that is able to cooperate more efficiently in criminal matters. The price to be paid to ride this locomotive is the harmonization of member states' legal systems, inevitably leading to restructuring of the laws of criminal procedure to track a proposed standard legislation in the area of cooperation in criminal matters.

Perhaps the best indicator of this push to harmonization is the efficiency of the Nordic extradition system, including the Nordic Arrest Warrant, when compared to the Inter-European extradition system, including the EAW. Nordic legal systems are closely harmonized, so that principles such as double criminality would be less divisive or controversial than in the comparable European system.[166] A substantial objection to an extradition would be based on a state potentially acting contrary to its *ordre public* in certain circumstances were it to grant extradition, such as when the act was committed in the requested state and the act was not deemed a crime in the requested state.[167] Although an extradition system could provide for a territoriality ground for refusal of extradition (i.e., not requiring extradition for an act deemed not criminal by the requested state when it did not occur in the requesting state), it would be more desirable to achieve this through a positive as opposed to a negative means. That is to say, having both member states view the same conduct as either criminal or not would be a more desirable way to achieve cooperation in criminal matters than allowing the difference in opinion to remain and potentially create tension between the requesting and requested state. Similar arguments can be raised with regards to the need for proportionality in penalty thresholds or for provisions regarding extradition of accessories to crimes.[168] Fundamentally, the issues regarding mutual trust, double criminality, specialty (to a more limited extent),[169] and territoriality stem from differences in the legal systems of the requesting and requested states.

The function of the European Commission as a harmonizing entity should be distinguished from the harmonizing factor of the U.S. Supreme Court, although both have roles in a federal system. Although the Supreme Court may issue a decision telling a U.S. state that its law or ruling was incorrect, it does not purport to set forth a general standard for all states to follow. That is to say, the Supreme Court will not render an advisory opinion or an opinion on an abstract issue that may arise in the future. Rather, the Supreme Court will rule in a particular case involving a particular factual scenario. The European Commission, in contrast, drafts directives that specify the form a given EU member state's legislation or legal procedure must take with regard to the subject of the directive. Thus, the European Commission can engage in abstract review of a problem that has not arisen, and draft a directive to mitigate against the occurrence of that problem in the future. Further, the directive will operate as an amendment to existing contrary national laws of all member states.

The function of the European Commission as a harmonizing supranational legislature will be necessary to guard against abuses of the criminal process in the guise of efficient justice. For example, the ability of the United States to negotiate bilateral extradition agreements with individual EU member states, which differ from the United States–European Union extradition agreement, may have the practical effect of streamlining the extradition of relators from certain EU member states as compared to others. Further, the EAW has the practical effect

166 Gjermund Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond*, 79 N.J.I.L. 1, 24–27 (2010).

167 *Id.* at 25.

168 *Id.* at 27–29.

169 *Id.* at 29–32.

of expediting the transfer of relators between and among member states. This can have the unseemly result of the United States being aware of a wanted relator in EU member state A, but not pursuing extradition by that state and preferring to follow formal extradition proceedings with EU member state B with whom it has more favorable provisions in its bilateral extradition agreement, given the particular factual scenario under which the relator is sought. Before filing a formal extradition request with EU member state A, the United States could suggest that EU member state B submit a request for the relator from EU member state A pursuant to the EAW, presuming there would be a valid ground to make a request pursuant to the EAW. Within ninety days, the United States could submit a formal extradition request to EU member state B, using the time it knows it has pursuant to the EAW request to complete whatever extradition packet it would need to present. Thus, a relator sought by the United States could be deprived of certain additional protections or favorable terms contained in the EU member state A's bilateral agreement with the United States on no principled basis except convenience.

However, Article 3 of the United States–European Union extradition agreement specifies that Articles 4 (extraditable offenses) and 5 (transmission and authentication of evidence) will replace all existing bilateral extradition agreements with regard to their subjects; Articles 6 (transmission of requests for provisional arrest), 8 (supplemental information), 9 (temporary surrender), 11 (simplified extradition proceedings), 12 (transit), and 14 (sensitive information in a request) will be applied absent any other provisions in existing bilateral extradition agreements. As Articles 4 and 5 deal with the core issues of extradition (i.e. the acts and proof of the acts allegedly committed), it can provide some protection against extradition in violation of certain core substantive requirements. Another concern remains, however, in that the existence of separate agreements between the United States and the European Union, and between the United States and individual EU member states can allow for two bites at the apple. Thus, if the extradition fails under the United States–European Union agreement, the United States may try again under a separate bilateral agreement with a given EU member state. Further, under the principle of reciprocity, the same can be said of an EU member state requesting the extradition of a relator from the United States. This poses a problem for a relator, as facing detention under successive extradition requests, which could take months to resolve, may place undue stress on a relator to waive his or her rights to an extradition hearing in order to avoid the prospect of being imprisoned for an extended period of time awaiting transfer. Given the difficulty of challenging an extradition request, both financially and legally, this kind of pressure is not insignificant. However, there is little practice invoking the United States–European Union extradition agreement, and it remains to be seen whether the United States will continue to rely on bilateral agreements with individual EU member states as has been its traditional practice thus far.[170]

The concern among EU member states in developing systems of cooperation in criminal matters seems to involve a great concern that the criminally accused individual not escape justice. The Action Plan Implementing the Stockholm Programme summarizes this concern by stating as follows:

> Criminal law is a relatively novel area of EU action for which the Treaty of Lisbon sets a clear legal framework. A criminal justice strategy, fully respecting subsidiarity and coherence, should guide the EU's policy for the approximation of substantive and procedural criminal law. It should be pursued in close cooperation with European Parliament, national parliaments and the Council and acknowledge that focus will remain primarily on mutual recognition and the harmonisation of offences and sanctions will be pursued for selected cases.
>
> The administration of justice must not be impeded by unjustifiable differences between the Member States' judicial systems: criminals should not be able to avoid prosecution and prison

170 *See* Ch. II.

> by crossing borders and exploiting differences between national legal systems. A solid common European procedural base is needed. A new and comprehensive system for obtaining evidence in cross-border cases and better exchange of information between Member States' authorities on offences committed are essential tools to developing a functioning area of freedom, security and justice. The Commission will prepare the establishment of a European Public Prosecutor's Office from Eurojust, with the responsibility to investigate, prosecute and bring to judgement offences against the Union's financial interests. In doing so, the Commission will further reflect on the cooperation with all the actors involved, including the European Anti-Fraud Office (OLAF).
>
> …
>
> Essential to making real progress will be mutual trust. This requires the establishment of minimum standards (e.g. on procedural rights) as well as understanding of the different legal traditions and methods. A common European culture in this field, through training and Erasmus-style exchange programmes, as well as an European Law Institute, building upon existing structures and networks, can make a valuable contribution and will be actively encouraged.[171]

In a related context, the Institute for International Research on Criminal Policy (IRCP) at Ghent University has analyzed problems associated with the implementation of the 2008 EU Framework Decision regarding mutual recognition of judgments and transfer of prisoners.[172] This survey showed that between 20 percent and 25 percent of the respondents (judges, practitioners, advocates, and representatives from competent authorities designated to implement the Framework Decision) thought that important information, such as detention conditions in an executing state, was not relevant for the decision-making process under the Framework Decision.[173] Many of the recommendations made by this report involve centralization of information, standardization of minimum detention standards, and establishment of sentencing equivalency processes and standards.[174] These minimum standards designed to harmonize variances in practice among EU member states may be created in accord with Article 82 of the Treaty on the Functioning of the European Union, which provides as follows:

> 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
>
> (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
>
> (b) prevent and settle conflicts of jurisdiction between Member States;

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171 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Delivering an area of freedom, security and justice for Europe's citizens—Action Plan Implementing the Stockholm Programme, COM(2010) 171, Brussels 4/20/2010, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:en:HTML (last visited Sept. 25, 2012).

172 Council framework decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008 OJ L 327, p. 27.

173 Institute for International Research on Criminal Policy (IRCP), *Cross-Border Execution of Judgments Involving Deprivation of Liberty in the EU: Overcoming Legal and Practical Problems through Flanking Measures*, 40 IRCP Series 85 (2011).

174 *Id.* at 85–102.

> (c) support the training of the judiciary and judicial staff;
>
> (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
>
> 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
>
> They shall concern:
>
> (a) mutual admissibility of evidence between Member States;
>
> (b) the rights of individuals in criminal procedure;
>
> (c) the rights of victims of crime;
>
> (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.[175]

The usefulness of such directives in the context of mutual cooperation in criminal matters, with reference to the transfer of prisoners between and among EU member states, is underscored by the fact that almost half of respondents to the IRCP survey stated that they felt that variations in sentence execution modalities and early and conditional release programs would make people reluctant to use the 2008 Framework Decision.[176] Over half of the respondents agreed that the European Union should introduce binding measures to harmonize these sentencing execution and early and conditional release modalities.[177] Thus, the consensus appears to be growing among EU member states for a more uniform approach in matters of criminal justice, at least in regards to intra-EU cooperation in criminal matters.

4.3. Arab League Extradition Agreement[178]

The Arab League Extradition Agreement replaces, supplements, or complements existing bilateral treaties.[179] It was approved by the Council of the League of Arab States on September 14, 1952. Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, and Syria became signatories, but only Egypt, Jordan, and Saudi Arabia subsequently ratified it. The agreement has, therefore, been in effect only among those three states since August 28, 1954.[180]

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175 Consolidated Version of the Treaty on the Functioning of the European Union, Art. 82, 2010 OJ C 83/47.

176 Institute for International Research on Criminal Policy (IRCP), *Cross-border Execution of Judgments involving Deprivation of Liberty in the EU: Overcoming Legal and Practical Problems through Flanking Measures*, 40 IRCP Series 94 (2011).

177 *Id.* at 102.

178 Dated Sept. 14, 1952, 1952 B.F.S.P. 159 at 606, League of Arab States Treaty Series 27–32, *reprinted in* 8 Rev. Egyptienne de Droit Int'l 328–332 (1952). *See also* Said Hussein Youssef Khadr, Extradition Law and Practice in Egypt and Other Arab States (1977).

179 For extradition in the Middle East and North Africa, see generally, David P. Warner, *Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and Its Alternatives*, 50 Vill. L. Rev. 479 (2005).

180 *See* Shearer, *supra* note 89, at 327. A supplementary agreement was concluded in 1983; *see* Geoff Gilbert, Transnational Fugitive offenders in International Law 35 (1998).

The 1998 Arab Convention for the Suppression of Terrorism[181] and the Convention of the Organization of the Islamic Conference on Combating International Terrorism[182] also contain provisions on extradition with the elimination of the political offense exception.

4.4. The Benelux Extradition Convention[183]

The Convention on Extradition and Judicial Assistance in Penal Matters was signed by Belgium, Luxembourg, and the Netherlands on June 27, 1962. In contrast to other multilateral arrangements, this convention is in certain respects more permissive. This may be explained in part by the closer economic relationships among these states, which have been almost entirely subsumed within the larger European Union.[184] Although the substantive provisions of this convention reflect to a certain extent the closer ties of the parties, most provisions follow the European Convention on Extradition.[185]

4.5. The Commonwealth Extradition Scheme[186]

The foundational extradition document for the Commonwealth of Nations is the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, which was drafted at a meeting of Commonwealth Law Ministers in London in 1966, and was embodied in the Fugitive Offenders Act of 1967. The origin of Commonwealth cooperation, however, dates to 1843 when the Imperial Parliament enacted the first statute providing for the surrender of fugitives between British possessions.[187] In 1881, the Fugitive Offenders Act superseded this statute.[188] Many of the same features of the 1881 statute have been carried forward into the 1966 scheme despite the transformation of the British Empire into the Commonwealth of Nations.[189]

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181 Arab Convention for the Suppression of Terrorism, Apr. 22, 1998, *available at* http://www.unhcr.org/refworld/docid/3de5e4984.html (last visited Sept. 25, 2012).

182 Annex to Resolution no. 59/26-P, signed at Ouagadougou on Sept. 25, 1999, *available at* http://www.unhcr.org/refworld/docid/3de5e6646.html (last visited Sept. 25, 2012).

183 1962 Tractatenblad van het Koninkrijk der Nederlanden No. 97. *See also* Coen Mulder & Bert Swart, *Sub-Regional Arrangements: The Benelux and Nordic Countries, in*, 3 International Criminal Law 389, *supra* note 34. *See also* Bart de Schutter, *International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries*, 14 Neth. J. Int'l L. 382–410 (1967), *reprinted in* 2 A Treatise on International Criminal Law 249 (M. Cherif Bassiouni & Ved P. Nanda, eds., 2 vols. 1973).

184 *See* Shearer, *supra* note 89, at 328.

185 *See* European Convention on Extradition, *supra* note 92. *See generally*, European Committee on Crime Problems, *Legal Aspects of Extradition among European States* (Council of Europe, 1970); *Explanatory Report on the European Convention on Extradition* (Council of Europe, 1969).

186 Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth, 1966, Cmnd 3008 at 1. *See generally*, Avrinder Sambei & John R.W.D. Jones, Extradition Law Handbook (2005);The Law of Extradition and Mutual Legal Assistance (Clive Nicholls, Clare Montgomery & Julian Knowles eds., 2002); Satyadeva Bedi, Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders within and with the Commonwealth Countries (2002); Hartley-Booth, *supra* note 2; Jones on Extradition, *supra* note 2, at 1–1059. *See also* the Fugitive Offenders Act of 1967.

187 *See* An Act for the Better Apprehension of Certain Offenders, 1843, 6 & 7 Vict. ch. 34; Shearer, *supra* note 89, at 328.

188 *See* Fugitive Offenders Act, 1881, 44 & 45 Vict. ch. 69; Shearer, *supra* note 89, at 328.

189 Extradition (Commonwealth Countries) Act, 1966, Cmnd 75. *See also* Fugitive Offenders Act, 1967, Cmnd 68 (Great Britain); Commonwealth Fugitive Criminals Act, 1967, Cmnd 54 (Malaysia); Shearer, *supra* note 89, at 329–330. The Australian Extradition (Commonwealth Countries) Act, 1966, part III, applies among Australia, the British Solomon Islands Protectorate, Fiji, the Gilbert and

The scheme was deemed to be more acceptable than a multilateral treaty because it was based on the reciprocal legislation approach. The 1967 Fugitive Offenders Act does not preclude member states from entering into bilateral treaties containing additional or alternative provisions. As former colonies of the British Empire developed their legal systems and entered into new multilateral and bilateral agreements, they also saw the need to revisit the 1966 Commonwealth Extradition Scheme.[190] Over the course of forty years, it is also evident that this approach, as well as the Fugitive Offenders Act of 1967, needed to be amended to reflect the needs of the Commonwealth states. At present there are fifty-four Commonwealth members.[191]

The latest developments in the Commonwealth system are the Scheme Relating to Mutual Assistance in Criminal Matters [Harare Scheme];[192] the London Scheme for Extradition within the Commonwealth,[193] which has effectively replaced the 1966 scheme; the Commonwealth Scheme for Rendition of Fugitive Offenders;[194] the Scheme for Transfer of Convicted Offenders within the Commonwealth;[195] the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption;[196] and the 2003 UK Extradition Act.[197]

Ellice Islands Colony, and New Zealand. Shearer, *supra* note 89, at 330. For the European Convention on Extradition and other conventions on inter-state cooperation in penal matters to which the United Kingdom and other Commonwealth members may be a party thereto, see generally, European Inter-State Co-operation in Criminal Matters: The Council of Europe's Legal Instruments (Ekkehart Müeller-Rappard & M. Cherif Bassiouni eds., 2d. ed. 1993). *See also* Dominique Poncet & Paul Gully-Hart, *Extradition: The European Approach, in* 2 International Criminal Law 461 (2d. ed. 1999).

190 A complete listing of Commonwealth countries' agreements, orders, and acts relating to extradition and rendition of fugitive offenders can be found on the Commonwealth website, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{FB427D7C-77DE-4CB8-8CCA-A132562F3DE5}_EXTRADITION_pt1.pdf (last visited Sept. 25, 2012).

191 Antigua and Barbuda, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji Islands, the Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, and Zambia. Fiji is currently suspended from the Commonwealth due to the failure of the ruling military junta to hold elections.

192 Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, Amended in April 1990, November 2002, October 2005, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf (last visited Sept. 25, 2012).

193 London Scheme for Extradition within the Commonwealth Incorporating the Amendments Agreed at Kingston in November of 2002, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{56F55E5D-1882-4421-9CC1-71634DF17331}_London_Scheme.pdf (last visited Sept. 25, 2012).

194 Commonwealth Scheme for Rendition of Fugitive Offenders, Amended in 1990, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf (last visited Sept. 25, 2012).

195 Scheme for Transfer of Convicted Offenders within the Commonwealth, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{BF5E0493-DE14-43D6-A5E8-7641447B2CB1}_convicted_criminals.pdf (last visited Sept. 25, 2012).

196 Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{C628DA6C-4D83-4C5B-B6E8-FBA05F1188C6}_framework1.pdf (last visited Sept. 25, 2012).

197 2003 UK Extradition Act, *available at* http://www.opsi.gov.uk/acts/acts2003/20030041.htm.

4.6. The Inter-American Conventions

The Montevideo Convention of 1899, which was supported by five countries, was the first extradition arrangement among American states. It was followed by a convention signed by seventeen nations, including the original signatories to the 1899 Convention, in Mexico in 1902. In 1911, a conference in Bolivia received support from five states for a new convention. The Bustamante Code supplemented the preexisting Montevideo Convention, and was adopted in Havana in 1928 by the Sixth International Conference of American States. It was followed by the Second Montevideo Convention, concluded in 1933, which did not abrogate existing treaties in force between the parties, but was designed to enter into force immediately upon the lapse of prior treaties.

Further revisions were made in 1940 and 1957.[198] After a draft convention was proposed by the Organization of American States in 1973, the Inter-American Convention on Extradition was signed in 1981 and entered into force on March 3, 1982.[199] The Inter-American states also entered into the 2002 Convention Against Terrorism,[200] and the 196 Convention Against Corruption,[201] which both contain provisions on extradition.

4.7. The Nordic States System

The Nordic countries, consisting of Denmark, Finland, Iceland, Norway, and Sweden, began developing a subregional extradition system in 1962, which evolved as a result of the influence of the EAW.[202] The Nordic countries rely on a Nordic Arrest Warrant and on their respective national legislation for extradition.[203] In 2005, the Nordic countries concluded a multilateral convention creating a Nordic Arrest Warrant that functionally mirrored the EAW, but with differences making the Nordic Arrest Warrant arguably more efficient and effective than the EAW.[204] The foundation of the Nordic system rests on mutual trust in each other and the national legal systems of each state.[205] More important, the Nordic countries rely on the fairness of their legal processes and on the integrity of their judicial systems to calm fears about the miscarriage of justice. This high level of mutuality of trust has led to a subregional cooperation system, which is not based on treaty obligations.[206] Instead it is based on a flexible cooperative approach of relying on the issuance of arrest warrants or criminal judgments to which the countries give the equivalent of what the U.S. Constitution requires for judgments and legal acts of the different states of the Union, namely "full faith and credit."[207] As a result of the above many of the conditions that are normally required in extradition proceedings are no longer necessary. This includes, for example, the principle of double criminality.[208] The Nordic

198 Organization of American States T.S. No. 36.

199 Inter-American Convention on Extradition, Feb. 25, 1981, O.A.S. Doc. B-47. Six countries have ratified the convention: Antigua and Barbuda, Costa Rica, Ecuador, Panama, St. Lucia, and Venezuela. Ten countries have signed the convention: Argentina, Bolivia, Chile, Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, and Uruguay.

200 Inter-American Convention Against Terrorism, June 3, 2003, AG/Res. 1840 (XXXII-O/02), O.A.S. No. A-66.

201 Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S. Doc. B-58.

202 Gjermund Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Examination, the Nordic Arrest Warrant and Beyond*, 79 Nordic J. Int'l L. 1 (2010).

203 *Id.* at 17.

204 *Id.* at 16–24

205 *Id.* at 5–7.

206 *Id.* at 8.

207 U.S. Const. art. IV, §1

208 *See* Ch. VI, Sec. 2.

scheme allows for the extradition of each country's nationals to another Nordic state, and for all practical purposes eliminates such defenses as "the political offense exception."[209] Nevertheless, the defense of *ne bis in idem* still remains.[210]

The Nordic states that are part of this subregional system are also subject to the EAW.[211] Moreover these Nordic states are also members of the 1957 European Convention on Extradition, which with fifty state parties makes it the world's most widely ratified multilateral extradition treaty.[212] In addition, the Nordic states are parties to the 1995 European Union Convention on Simplified Extradition Procedure[213] and the 1996 European Union Convention on Extradition.[214]

4.8. African Union

No multilateral extradition treaty currently exists among the African states. In 1961, twelve of France's fourteen former Equatorial and West African colonies formed the Union Africaine et Malagache.[215] On September 12 of that year, these states signed a convention on judicial cooperation at Antananarivo. In 1963, the Organization of African States (OAS) was formed. In September 1999, the OAS issued the Sirte Declaration that established the African Union (AU), which is loosely modeled after the European Union.[216] Although there is no extradition treaty in the African system, the Organisation of African Unity Convention on the Prevention and Combating of Terrorism[217] and the AU Convention on Preventing and Combating Corruption[218] both contain provisions on extradition and are patterned after the corresponding UN conventions.

Within Africa there are two subregional agreements: the Economic Community of West African States (ECOWAS) Convention on Extradition of 1994 and the South African Development Community (SADC) Protocol on Extradition of 2002.[219]

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209 Mathisen, *supra* note 202, at 10. For a discussion on the "political offense exception" *see* Ch. VIII, Sec. 2.

210 *See* Ch. VIII, Sec. 4.3.

211 Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p.1. For further discussion on the European Arrest Warrant, see Ch. II, Sec. 4.1 on European Regimes.

212 European Convention on Extradition, *supra* note 92, at 4.

213 Council Act of March 10, 1995 drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, Mar. 30, 1995, OJ C 78.

214 Council Act of September 27, 1996 drawn up on basis of Article K.3 of the Treaty on European Union relating to extradition between the Member States of the European Union, June 23, 1996, OJ C 313.

215 The original parties were Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mauritania, Niger, Senegal, and Upper Volta. *See* Shearer, *supra* note 89, at 333. Concerning other treaties of these countries, see Daniel P. O'Connell, State Succession in Municipal Law and International Law 58–88 (1967).

216 Constitutive Act of the African Union, July 11, 2000, http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm (last visited Sept. 25, 2012).

217 OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, http://www.africa-union.org/root/au/Documents/Treaties/Text/Algiers_convention%20on%20Terrorism.pdf (last visited Sept. 25, 2012).

218 AU Convention on Preventing and Combating Corruption, July 11, 2003, http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited Sept. 25, 2012).

219 Economic Community of West African States (ECOWAS) Convention on Extradition, Aug. 6, 1994, http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf (last visited Sept.

4.9. Asia

Although there is no regional extradition treaty in Asia,[220] the South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism of 1987 contains provisions on prosecution or extradition.[221]

5. Bilateral Treaty Practice

Since the late 1800s the number of bilateral and multilateral extradition treaties has been increasing.[222] In the post–WW II period, the increase in bilateral treaty practice has been unparalleled in history. The United States alone has over 150 extradition treaties in force.[223] The common law–based systems have traditionally relied on bilateral treaty practice, supplemented by national legislation to regulate the procedure.[224] Civil law–based systems rely essentially on national legislation as well as treaties, reciprocity, and comity.[225]

As the number of independent states increased after WWII, particularly in Africa, the Middle East, and Asia, the number of participants to the practice of extradition grew in equal measure. Unlike developed countries, which have increased their inter-state cooperation in penal matters, developing countries preferred to enter into bilateral treaties in order to emphasize their sovereignty. Furthermore, such treaties were preferred because, under the doctrine of state succession, these newly independent states were still bound by the treaties entered into by their former colonial rulers.[226]

Bilateral treaty practice in extradition is the most cumbersome form that can be relied upon, due to the lack of uniformity among treaties and the greater flexibility in treaty provisions. The United Nations has 192 member states; thus, assuming that each state entered into a bilateral treaty with the other states, there would be more than 35,000 extradition treaties in force among these states. Furthermore, all states would be constantly engaging in diplomatic negotiations to amend these treaties as international and national exigencies required, and then their national legislative processes would be engaged in the signature and ratification processes and, whenever required, in the development of new national legislation. In addition, treaties are subject to a variety of peculiarities such as the effect of war and state succession, and the severance of diplomatic relations. All these factors make that approach unmanageable.[227] Of course, uniformity can be enhanced by the adoption of regional multilateral

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25, 2012); South African Development Community (SADC) Protocol on Extradition of 2002, Oct. 3, 2002, http://www.sadc.int/index/browse/page/148 (last visited Sept. 25, 2012).

220 For a review of China's extradition law of 2000, see generally, Hu Qian & Chen Qiang, *China's Extradition Law of 2000*, 2 Chinese J. Int'l L. 647 (2002).

221 South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism, Nov. 4, 1987, http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf (last visited Sept. 25, 2012), art. IV.

222 *See supra* Sec. 1.

223 *See* Ch. II.

224 *See supra* Sec. 2.

225 In 1996 the United Nations Crime and Justice Information Network conducted a survey of extant bilateral extradition treaties. This writer knows of no subsequent complete listing of bilateral extradition treaties; *available at* http://www.uncjin.org/Laws/extradit/extindx.htm (last visited September 18, 2012).

226 *See, e.g.*, O'Connell, *supra* note 215.

227 *See* Ch. II.

treaties, employing uniform or standard treaty provisions, and increasing the flexibility of such treaty provisions.[228]

A growing concern in bilateral treaty practice is the record of human rights abuses in a given country, which is illustrated by the difficulty facing the Chinese government's attempts to enter into extradition treaties with certain countries.[229]

6. Extradition without a Treaty

Extradition is regarded by states as a sovereign act. The view of most states is that the duty to extradite arises by virtue of a treaty or national legislation, or both. In the absence of an international duty, states can and do rely on reciprocity and comity, which are grounded in international principles of friendly cooperation among nations. Reciprocity could become binding under international law if it manifests the custom of a state as evidenced by its consistent practice. However, comity is not binding as it is an act of courtesy. A state's non-treaty may grant or request extradition on the basis of the national legislation that authorizes it[230] and provides the framework, substantive conditions, exceptions, and procedures inherent in it.[231] Thus, there are few general principles or rules that can be derived from practice based on reciprocity or comity, as that practice is subject to national legislation that varies from state to state. Ad hoc arrangements are occasionally entered into by states to suit their particular needs at certain times.[232]

Some states occasionally extradite upon a specific bilateral exchange of letters between their executive branches. Their modalities will depend on the constitutional and legislative requirements of the states in question. Other forms of rendition fall into the category of alternative forms of rendition as described in Chapters IV and V. Extradition to international criminal tribunals is also an increasing practice.[233]

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228 *See* United Nations General Assembly's Model Treaty on Extradition, *in* M. Cherif Bassiouni, The Protection of Human Rights in the Administration of Justice: A Compendium of United Nations Norms and Standards 459 (1994) [hereinafter Bassiouni Compendium].

229 *See generally,* Matthew Bloom, *Note: A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 Yale J. Int'l L. 177 (2008); Bruce Zagaris, *PRC Promotes Negotiation of Extradition Treaties*, 23 Int'l Enforcement L. Rep. 296–297 (2007). *See also* Chs. VII and VIII.

230 For example, the French practice started with the Decret-Loi of February 19, 1791, followed by the Ministry of Justice Circulaire of July 30, 1872, and the law of March 10, 1927. *See also* Billot, *supra* note 2; Pierre Bouzat & Jean Pinatel, Traité de Droit Pénal et de Criminologie (2d rev. ed. 1970); Henri Donnedieu de Vabres, Traité Elémentaire de Droit Criminal et de Législation Pénal Comparée (2d ed. 1943); Henri Donnedieu de Vabres, Les Principles Modernes de Droit Pénal International 249 (1928); Jean Claude Lombois, Droit Pénal International 539 (2d ed. 1979); Roger Merle & André Vitu, Traité de Droit Criminal (2d ed. 1973). For another, which permits reciprocity by a common-law based system, see the Australian "Extradition (Foreign States) Act" of 1974. *See* Shearer, *supra* note 27.

231 National legislation serves the same purpose for states that rely on treaties, but, as in the case of the United States, national legislation is subject to treaties. *See* Ch. II. For other conditions and procedures, *see also* Chs. VI, VII, VIII, and IX.

232 The case in point is the rendition of one Chaim Levy who was surrendered by Egypt to the United States pursuant to an ad hoc arrangement based on an exchange of letters between the two governments. United States v. Levy, 947 F.2d 1032 (2d Cir. 1991). *See generally*, Matthew Bloom, Note, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 Yale J. Int'l L. 177 (2008).

233 *See infra* Sec. 7.

7. Surrender to International Criminal Tribunals

7.1. ICTY and ICTR

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[234] and the International Criminal Tribunal for Rwanda (ICTR)[235] were both established by the Security Council pursuant to Chapter VII of the United Nations Charter.[236] As a member of the United Nations, the United States is bound by the organization's Charter.[237] These two tribunals are sub-organs of the Security Council, and therefore the United States is bound by the Statutes of the ICTY and ICTR. Article 32 of the Statute of the ICTY provides, in pertinent part, that: "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to…the surrender or the transfer of the accused to the International Tribunal."[238] Article 28 of the Statute of the ICTR mirrors the requirements set forth in Article 32 of the Statute of the ICTY.[239]

In order to implement the two international surrender agreements that the United States had signed with the Yugoslavia and Rwanda tribunals,[240] Congress passed and the president signed

234 The International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993), *annexed to* Report of the Secretary-General Pursuant to Paragraph 2 of the U.N. Security Council Resolution 808 (1993), U.N. Doc. S/2-5704 & Add. 1 (1993). *See also* Michael Bohlander, *Referring an Indictment from the ICTY and ICTR to Another Court—Rule 11BIS and the Consequences for the Law of Extradition*, 55 Int'l Comp. L. Q. 219 (2006); Geert-Jan Alexander Knoops, Surrender to International Criminal Courts: Contemporary Practice and Procedures (2002); Bassiouni & Manikas, *supra* note 83; M. Cherif Bassiouni, *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 Crim. L. Forum 279 (1994); M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 Fordham Int'l L. J. 1191 (1995).

235 The International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

236 Article 39 provides that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken…to maintain or restore international peace and security." "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." U.N. Charter art. 41.

237 The United States signed the United Nations Charter on June 26, 1945 and ratified it on August 8, 1945.

238 *See also* Louis Klarevas, *The Surrender of Alleged War Criminals to International Tribunals: Examining the Constitutionality of Extradition via Congressional–Executive Agreement*, 8 UCLA J. Int'l L. & Foreign Aff. 77 (Spring–Summer 2003).

239 Although surrender requests are made generally by the ICTY and ICTR and are de jure binding upon all countries, the practical effect is that of a request to an individual country. Therefore, for example, the ICTR made seventy-two surrender requests under its Article 28 powers, for individuals located in twenty-five individual countries, namely: Angola (one request), Benin (one request), Burkina Faso (one request), Cameroon (ten requests), Democratic Republic of the Congo (six requests), Denmark (one request), Germany (one request), Belgium (six requests), Gabon (one request), France (three requests), Ivory Coast (two requests), Kenya (fourteen requests), Mali (two requests), Namibia (one request), the Netherlands (two requests), Rwanda (one request), Senegal (one request), South Africa (one request), Switzerland (two requests), Tanzania (six requests), Togo (two requests), Uganda (two requests), United Kingdom (one request), United States (one request), and Zambia (three requests). *Available at* http://www.unictr.org/Cases/StatusofDetainees/tabid/202/Default.aspx (last viewed Sept. 18, 2012).

240 On October 5, 1994, the United States entered into with the Yugoslavia Tribunal an Agreement on Surrender of Persons. Similarly, on January 24, 1995, the United States entered into an agreement with the Rwandan Tribunal, named the Agreement on the Surrender of Persons Between the Government of the United States and the Tribunal (the "Surrender Agreement"). However, both agreements did not

the National Defense Authorization Act, which provides for the surrender of persons found in the United States who are sought by either tribunal for prosecution.[241]

The constitutionality of the National Defense Authorization Act was challenged in the case of *Ntakirutimana v. Reno*. In that case Ntakirutimana challenged his surrender to the ICTR to face genocide charges. The Southern District Court of Texas held the Act unconstitutional, reasoning that "Congress has no independent authority to regulate extradition and that a treaty of extradition is required before extradition can occur."[242] Interestingly, and in response to the second request for Ntakirutimana's extradition, the Southern District Court of Texas held that "it is within the power of the Executive and Congress to surrender fugitives . . . under an executive agreement with congressional assent via implementing legislation."[243] Upholding Ntakirutimana's surrender to the ICTR, the Fifth Circuit Court of Appeals stated that "it is not unconstitutional to surrender Ntakirutimana . . . pursuant to the Executive–Congressional Agreement."[244] Therefore, even though an Article II treaty has not been established authorizing the extradition of an individual, he/she may be surrendered to either tribunal pursuant to the National Defense Authorization Act.

7.2. ICC

The International Criminal Court (ICC) entered into effect as of July 1, 2002 after sixty states ratified it.[245] The ICC is an international legal institution established by treaty for the investigation and prosecution of individuals who commit the most serious crimes of an international nature.[246] The ICC's exercise of jurisdiction is based on national legal authority, but it can exercise jurisdiction even without a state's consent, after the state has ratified the treaty.[247] Because the ICC was established by treaty, jurisdiction does not extend to nonstate parties, with the exception of the Security Council referral,[248] voluntary nonstate party referral,[249] or when a citizen of a nonstate party commits a crime within the Court's jurisdiction, on the territory of a state party, or against a state party's nationals.[250]

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enter into force until February 14, 1996, at which time the United States adopted the National Defense Authorization Act. National Defense Authorization Act, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996).

241 National Defense Authorization Act, *supra* note 240. *See also* Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War Crimes Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 Crim. L. Forum 561 (1996).

242 *In re* the Surrender of Ntakirutimana, 988 F. Supp. 1038, 1041 (S.D. Tex. 1997).

243 *In re* the Surrender of Ntakirutimana, 1998 WL 655708, *9–10 (S.D. Tex. 1998). *See also* Panayiota Alexandropoulos, *Enforceability of Executive–Congressional Agreements in Lieu of an Article II Treaty for Purposes of Extradition:* Elizaphan Ntakirutimana v. Reno, 45 Vill. L. Rev. 107 (2000).

244 Ntakirutimana v. Reno, 184 F.3d 419, 427 (5th Cir. 1999).

245 *See* Rome Statute of the International Criminal Court, *supra* note 45. As of March 2012, 122 countries have ratified the Rome Statute. *See* http://www.icc-cpi.int/Menus/ASP/states+parties/. *See also* M.Cherif Bassiouni, 1 The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text 123 (2005) [hereinafter Bassiouni, Legislative History]; M. Cherif Bassiouni, *International Criminal Court Ratification and National Implementing Legislation*, 71 Rev. Int'l de Droit Pénal (2000); M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History (1998).

246 Examples include Genocide (Art.6), crimes against humanity (Art. 7), and war crimes (Art. 8). *See* Bassiouni, Legislative History *supra* note 245, at 123.

247 *Id.* at 124–125.

248 *Id.* at 124, art. 13(b).

249 *Id.* at art. 12(3).

250 *Id.*

To distinguish between inter-state procedures and those involving states and international criminal tribunals, the term "surrender" is used instead of "extradition."[251] The ICC is not a substitute for national criminal justice systems, but is "complementary" to them, exercising the equivalent of a transfer of criminal proceedings.[252] Article 1 of the Rome Statute of the ICC states: "[the Court] shall be complementary to national criminal jurisdictions." The request for surrender is contained in Article 89:

> 1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
>
> 2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in Article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.[253]

As the ICC is complementary to national criminal justice, the Statute contains another Article that deals with competing requests of other States. Article 90 states:

> 1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
>
> 2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
>
> > (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
> >
> > (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
>
> 3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
>
> 4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
>
> 5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
>
> 6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the

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251 Rome Statute of the International Criminal Court, *supra* note 45.

252 *Id.*, Articles 1, 17. *See* also Julian Schutte, *Transfer of Criminal Proceedings: The European System*, *in* 2 International Criminal Law 643 (M. Cherif Bassiouni ed., 2d ed. 1999).

253 *See* Rome Statue of the International Criminal Court, *supra* note 45, at art. 89.

requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.[254]

The ICC Statute contains a series of rules governing the cooperation between the state parties and the Court. The rules, which are contained in Part 9 of the Statute, relate to the surrender of persons to the court, as well as the overall cooperation regime that governs this part of the relationship between the Court and the state parties.[255]

All state parties to the ICC have a general obligation to cooperate with the Court.[256] In addition, state parties are also required to provide procedures under their national laws for all forms of cooperation that are specified in Part 9 of the Statute.[257] The Court is able to seek cooperation from both state parties[258] and nonstate parties in certain circumstances.[259] A failure to cooperate with the court may result in the court's referral of the case to the Assembly of State Parties and/or the UN Security Council.[260]

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254 *Id*. at art. 90.

255 *Id*. at art. 90 at Part 9.

256 *Id.* at art. 86. Article 86 of the Statute provides that: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

257 *Id.* at art. 88. *See also* Bassiouni, ICC Legislative History, *supra* note 245, at 179 (noting that Articles 86 and 88 could be interpreted as being open-ended obligations, leaving no opportunity for a state party to rely on a least-effort basis by complying with the letter of the specific provisions.)

258 Forms of cooperation that the court may seek from state-parties include: assistance in identifying and locating various items, taking testimony, producing reports, questioning persons under investigation, serving documents, examining sites, temporarily transferring persons, executing searches and seizures, protecting victims and witnesses, and freezing or seizing proceeds or other property and instrumentalities of crimes. *See* Rome Statute of the International Criminal Court, *supra* note 45, at art. 93(1).

259 The ICC may request cooperation from a non–state-party on an ad hoc basis. In such circumstances, the court enters into an agreement with the non–state-party, whereby the non–state-party undertakes rights and responsibilities stemming from the agreement. *See* Rome Statute of the International Criminal Court, *supra* note 45, at art. 87(5).

260 *Id.* at art. 87(7).

With respect to the issue of cooperation in matters of arrest and surrender, Article 89 of the Statute authorizes the court to request the arrest and surrender of an individual from any state on the territory of which such person may be found.[261] State parties are obligated to comply with the ICC's request for arrest and surrender.[262] The Statute contains only five exceptions to the state's obligation to cooperate.[263] These are cases where:

1. A state is currently investigating or prosecuting the case,[264] unless the court determines, on the Prosecutor's motion, that the state is unable or unwilling to genuinely carry out its obligations under the treaty;[265]

2. The person sought by the court is demonstrated to have been investigated, prosecuted, and acquitted (or convicted) for conduct encompassing the Court's request;[266]

3. The UN Security Council requests a deferral of investigation or prosecution pursuant to Article 16;[267] and

4. A state denies a request for judicial assistance with regard to the disclosure of documents that may compromise its "national security interest."[268]

The fifth exception is in Article 98 of the ICC Statute. Pursuant to Article 98, the Court is required to refrain from seeking the surrender of an individual in cases where the request for surrender would conflict with international obligations involving diplomatic immunity or the property of the third state, under paragraph (1).[269] Pursuant to paragraph (2) of Article 98, the Court must also refrain from seeking the surrender of an individual from a state in cases where that individual is "sent" in some official capacity from another state to the state from which the Court is contemplating the surrender. The legislative history of the ICC indicates that the individuals protected from surrender in circumstances described in Article 98(2) are limited to those "sent" pursuant to Status of Forces Agreements (SOFA).[270]

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261 *Id.* at art. 89(1).

262 *Id.* at art. 89(1).

263 Bassiouni, ICC Legislative History, *supra* note 245, at 182.

264 Rome Statute of the International Criminal Court, *supra* note 45, at art. 17(1)(a).

265 *Id.* Bassiouni, ICC Legislative History, *supra* note 245, at 182 (noting that this presupposes a showing of ineffectiveness or bad faith).

266 Bassiouni, ICC Legislative History, *supra* note 245, at 182. This may be referred to as the *ne bis in idem* exception. For a discussion on *ne bis in idem* in the statute of the ICC, see Bassiouni, ICC Legislative History, *supra* note 245, at 160–161.

267 Rome Statute of the International Criminal Court, *supra* note 45, at art. 16. *See also* Bassiouni, ICC Legislative History, *supra* note 245, at 140–144 (noting that the Security Council's ability to suspend the ICC's jurisdiction is "predicated on the SC's powers under Chapter VII of the UN Charter.")

268 Rome Statute of the International Criminal Court, *supra* note 45, at arts. 72, 93(4). *See also* Bassiouni, ICC Legislative History, *supra* note 245, at 182.

269 *See* Rome Statute of the International Criminal Court, *supra* note 45, at art. 98(1). Article 98 provides:

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

270 *See,* e.g.,David Scheffer, *Negotiator's Perspective on the International Criminal Court*, 167 Mil. L. Rev. 1 (2001) (discussing the U.S. delegation's views on Article 98(2)). James Crawford SC et al., *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by*

8. A Policy-Oriented Inquiry into the Values and Processes of Extradition

8.1. Public Policy Considerations

There are four categories of policy-oriented considerations that should be taken into account in extradition. They are:

1. law and public policy;
2. political factors;
3. human rights and humanitarian concerns; and
4. practical considerations.

Since WWII, the peoples of the world have become more conscious than ever of the need to ensure their collective security and to protect individual human rights. This is due in large part to the extraordinary technological advancements that have been made in communications, their effects on popular attitudes, and their ability to transform world public opinion into an instrument of compliance and sanction in the interactive processes of international relations. The Internet and the electronic media can transmit information around the globe in mere seconds, thereby transforming an event from a local issue into one of worldwide significance. The images of the globe sent from outer space and received almost instantaneously in various parts of the world are vivid reminders of the interdependence of planet Earth. After these images were first broadcast in the 1960s, it was never clearer to all of humankind that we were all part of and within the same Earth. The result was a gradual change in the world community's interaction that is still evolving our awareness of mutual interdependence. Nevertheless, conflicts between states are still rationalized in terms of sovereignty, national interests, and national security, while intervention by major world powers is limited to these powers' self-interest. Regrettably, humanitarian concerns have limited impact on the decision-making processes of most states, and thus whether such concerns are translated into specific domestic and international policies.[271]

The awareness among the peoples of the world that the individual is the ultimate bearer of the consequences of state action has brought about a reappraisal of the framework and structures of international law. Thus concepts of pluralistic democracy and enforcement of individual human rights are gradually acquiring a wider and more prominent position in the development of international values and standards[272] and their enforcement.[273] But to translate these values into a new world order strategy requires first a re-evaluation of the values underlying a world order strategy, which is still affected by the mindset of the Cold War era, particularly in

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the United States under Article 98(2) of the Statute: Joint Opinion, http://www.iccnow.org/documents/SandsCrawfordBIA14June03.pdf?PHPSESSID=467d1c77dbc82ba77f3ff69ba28085d7 (last visited Sept. 25, 2012); Cosmos Eubany, *Justice for Some: U.S. Efforts under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 Hastings Int'l & Conp. L. Rev. 103, 118 (2003) (stating that the term "sending state" is mostly used in SOFA agreements as "it is likely that the use of this term in Article 98(2) was a reference to a Status of Forces Agreements").

271 Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. Legal Ed. 253 (1967).

272 *See* Bassiouni Compendium, *supra* note 228.

273 *See* M. Cherif Bassiouni, *Enforcing Human Rights through International Criminal Law and through an International Criminal Tribunal*, *in* Human Rights: An Agenda for the Next Century 347 (Louis Henkin & John Lawrence Hargove eds., 1994). *See also* Diane F. Orentlicher, *Addressing Gross Human Rights Abuses, Punishments and Victim Compensation, in* Human Rights: An Agenda for the Next Century 425.

the United States.[274] To Professor Myres McDougal, whose views from over forty years ago are still relevant, a strategy of preserving world order is defined as the ability

> to obtain in particular situations and in the aggregate flow of situations the outcome of a higher degree of conformity with the security goals of preservation, deterrence, restoration, rehabilitation and reconstruction (of all societies comprising the world community).[275]

A corollary to this approach, however, is the recognition that the individual is a subject and not merely an object of international law.[276] This implies that the individual has the legal capacity of being a recipient or beneficiary of rights and the subject of obligations conferred upon him or her by international law and enforceable at international, regional, and national levels with or without the intermediation of a state. Thus, modern international law should be perceived as the common law of humankind wherein the state, international organizations, nonstate actors, and individuals are deemed participants, and where the individual is given the recognition of a legal subject.[277]

Notwithstanding the qualified recognition of the individual as a subject of international law, he/she is not yet part of its legal constitutive framework. This is primarily due to the fact that the discipline has historically developed out of the need to regulate state and institutional relationships, rather than out of a need to regulate relations with individuals. However, the realization that individuals commit deeds that threaten the peace and security of humankind and that are violative of international criminal law challenges the assumption that only states are subjects of international law. Indeed, as stated by the International Military Tribunal at Nuremberg, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[278]

The difficulty of fitting the individual into the framework of the discipline of international law, which only grudgingly gives him or her qualified recognition, has been apparent in the changing definition of international law. In fact, even the label describing the discipline is unsettled, as stated by this writer over forty years ago:

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274 *See*, e.g., Granville Clark & Louis B. Sohn, World Peace through World Law (1967); Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order (1961); Strategy of World Order: 1) Toward a Theory of Prevention, 2) International Law, 3) The United Nations, 4) Disarmament and Economic Development (Richard A. Falk & Saul H. Mendlovitz eds., 1966).

275 *See also* M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order*, 36 Tenn. L. Rev. 1, 30 (1968) ("order is the product of a system of action through the inter-reactions of pluralistic values in the perception and realization of the need for an intersocial criteria of an acceptable conduct."); Kenneth S. Carlston, *World Order and International Law*, 20 J. Legal Ed. 127 (1967).

276 For earlier views and debates on this issue, see Hans Kelsen, Principles of International Law (Edwin W. Tucker ed., 2d ed. 1966); Clyde Eagleton, *Some Questions as to the Place of the Individual in International Law of the Future*, 37 Am. J. Int'l L. 642 (1943); Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 Mich. L. Rev. 383 (1947); Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 Am. J. Int'l L. 533 (1956); Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 Law Q. Rev. 438 (1947); Edwin W. Tucker, *Has the Individual Become the Subject of International Law?*, 34 U. Cin. L. Rev. 341 (1965).

277 Wilfred C. Jenks, The Common Law of Mankind (1958); Philip C. Jessup, Transnational Law (1956).

278 *See* Robert H. Jackson, The Nürnberg Case 88 (2d. prtg. 1971) (1947); M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (2d. rev. ed., 1999); M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* Post-Conflict Justice (M. Cherif Bassiouni ed., 2001).

> International law, as a body of law, has changed rapidly with the increased needs of mankind to strengthen its ties in search of objectives highlighting commonality of purpose. Significantly also, the label has changed: *jus gentium, droit des gens, völkerrecht*, transnational law, world law and common law of mankind; and if I may be permitted the license of my own, universal inter-social public order [sic].[279]

None of these labels mean much. Only the enforceable norms of international law applied through effective procedural mechanisms have the potential to achieve the value-oriented goals described above.

The emergence of the individual in the sphere of international law has been attributed to humanistic concerns, which the late Judge Philip Jessup described as follows:

> The international society has come more slowly to recognize that what is involved is really a concern for the individual who has been the victim of barbarous treatment. In our traditional international system of interstate relationships, we were impelled to confine ourselves largely to the legal issue that the state was injured through the injury inflicted upon its citizen. But this was a procedural, not a substantive problem.[280]

This assertion is only partially correct because the recognition given the individual sprang out of the world community's desire to place international responsibility on individual conduct deemed violative of international norms.[281] It was only after international law established the basis for individual responsibility that it turned to the recognition of individual rights. Thus, between humanistic concerns and the desire to impose individual responsibility, the latter has been the more significant factor and has brought about the recognition of the individual as a subject of international law. As individuals became the subjects of international duties, they logically had to be recognized as the beneficiaries of international rights.[282] But the individual's place in international law should now be definitely recognized as intrinsic and not as only derivative of states' rights and states' conferral of rights.[283] The individual should no longer

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279 M. Cherif Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 Rutgers-Cam. L.J. 163, 191 (1969).

280 Philip C. Jessup, *The Conquering March of an Idea, Address Before the 72d Annual Meeting of the American Bar Association* (Sept. 6, 1949), Dep't St. Bull., Sept. 1949 at 432–433.

281 Judge Jessup further stated, "A very large part of international affairs and, thus, of the process of international accommodation, concerns the relations between legal persons known as states. This is necessarily so. But it is no longer novel for the particular interest of the individual human being to break through the mass of interstate relationships." *Id.* at 434. *See also* Bassiouni Compendium, *supra* note 228; Charles de Visscher, Theory and Reality in Public International Law 125 (P. E. Corbett trans., 1957); Myres S. McDougal et al., Human Rights and World Public Order (1980). The Universal Declaration of Human Rights states:

> The General Assembly proclaims the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and educating to promote respect of those rights and freedoms and by progressive measures national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

G.A. Res. 217 A (III) (Dec. 10, 1948). For the United Nations debates, see U.N. GAOR, 3d Sess., 180th meeting, 1st pt., Summary Record at 862 (Dec. 9, 1948). For a collection of human rights conventions, see http://www2.ohchr.org/english/law/ (last visited Sept. 25, 2012).

282 M. Cherif Bassiouni, International Criminal Law: Draft International Criminal Code 1–26 (1980), revised and updated in Bassiouni, Draft Code, *supra* note 47. *See also* Bassiouni, ICL Conventions, *supra* note 47.

283 *See, e.g., supra* note 6; McDougal et al., *supra* note 281.

only be the third-party beneficiary of rights conferred upon him or her by states. Instead, such rights should be no different than those recognized in national constitutions.[284]

Since the end of WWII, the world has witnessed a significant increase in various forms of international and transnational criminality.[285] As a result, extradition has grown in importance as states increasingly seek to control different types and forms of international and transnational criminality.[286] Thus, not since the 1600s when piracy threatened world order has the maxim of Hugo Grotius, *aut dedere aut punire*,[287] been more relevant than it has been in the last twenty years.[288] Its inclusion in international criminal law conventions and in multilateral and bilateral treaties under the formulation *aut dedere aut judicare*[289] (the duty to prosecute or extradite) has added new dimensions to the processes of extradition. Among these is the question of whether extradition is a concurrent or alternative duty to prosecution; this remains to be settled. But, is there a *civitas maxima* to extradite?[290] If so, is that duty the new international legal basis for the practice of states, irrespective of treaties? The practice of extradition, however, does not yet fully bear out this interpretation even though the inter-state practice of international extradition has increased significantly in volume,[291] as has the number of extradition treaties in force.[292] These increases, however, have highlighted the sometimes cumbersome processes of extradition. As a result, the processes of extradition that guarantee individual rights have often been criticized as unnecessary obstacles.[293] Consequently, states have occasionally resorted to lawful but questionable alternative rendition devices,[294] as well as to manifestly unlawful ones.[295]

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284 *See generally*, M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (1993) (correlating internationally recognized human rights and their counterparts in national constitutions). For an update on these rights, see Bassiouni, Introduction to International Criminal Law, *supra* note 47.

285 *See generally*, 1 M. Cherif Bassiouni, International Criminal Law (2d ed. 1999); Bassiouni, Draft Code, *supra* note 47. For the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind, see *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, *in* 11 Nouvelles Etudes Pénales (M. Cherif Bassiouni ed., 1993).

286 *International Procedures for the Apprehension and Rendition of Fugitives*, 74 Proc. Am. Soc'y Int'l L. 274–283 (1980). For information regarding "terrorism," see M. Cherif Bassiouni, International Terrorism and Political Crimes (1973); Christopher L. Blakesley, Terrorism, Drugs, International Law, and the Protection of Human Liberty: A Comparative Study of International Law, Its Nature, Role, and Impact in Matters of Terrorism, Drug Trafficking, War, and Extradition (1991); Alona E. Evans & John F. Murphy, Legal Aspects of Control of International Terrorism (1978); Legal Responses to International Terrorism: U.S. Procedural Aspects (M. Cherif Bassiouni ed., 1988); M. Cherif Bassiouni, *Effective National and International Action against Organized Crime and Terrorist Criminal Activities*, 4 Emory Int'l L. Rev. 9 (1990).

287 Grotius, *supra* note 13, at bk. II, ch. 21, §§ 4(1), 5(3).

288 *See, e.g.*, European Convention of the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90.

289 *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6; Bassiouni, ICL Conventions, *supra* note 47; Costello, *supra* note 48; Wise, *supra* note 51. *See supra* Sec. 3.

290 *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 6; Costello, *supra* note 48; Wise, *supra* note 51. *See also* Christine Van Den Wijngaert, The Political Offense Exception to Extradition 8 (1980).

291 Though there are no officially published figures, the United States usually makes and receives an average of some 300 extradition cases every year.

292 It is estimated that there are over 1000 extradition treaties in effect throughout the world.

293 *See International Procedures for the Apprehension and Rendition of Fugitives*, *supra* note 286.

294 *See* Ch. IV.

295 *See* Ch. V.

Contemporary mechanisms of international cooperation polarize the interests at stake, namely whether to further international cooperation in the prevention and control of international and transnational criminality, or to protect individual human rights and preserve a lawful process in international relations.[296] This polarization underscores the need to re-identify and reappraise the different interests and values involved in the processes of extradition in light of the contemporary framework of extradition and the need for improved inter-state cooperation in penal matters.

This framework depends on the perceived goals and values of the world community during a given period of history. Extradition, however, is still regarded (with some variations in application but not in substance) as an institutional practice between and for the benefit of states, with little or no regard for the rights of individuals, who are still deemed in many legal systems as the objects of its outcome—a position that has been expressed in international extradition by both Andre Billot and John Bassett Moore in the late 1800s, but which still pervades the practice. Additionally, extradition is still not viewed as a process serving the overall interests of the world community. That failing is a consequence of the diverse political interest of states and the absence of commonly shared interests and values in enforcing international criminal law as well as certain violations of national criminal laws.

The individual who is the subject of extradition proceedings is still regrettably viewed as the object of the proceedings and not as one of the parties contemplated within the framework of extradition. With a few exceptions, defenses that exist under extradition law are not fully recognized as primarily designed for the benefit of the individual. Instead, they are viewed as and designed to inure to the benefit of the states involved.[297] Although it is certainly arguable that the individual is the beneficiary of certain protections, such as the "political offense exception"[298] and the "principle of specialty,"[299] the fact that such claims may not be raised by the relator without protest from the requested state,[300] or that they may be limited to the right to raise the issue and not to a particular objective outcome, is indicative of the real center of interest, namely the requested state.[301] Furthermore, the requesting state has the right to accept or reject the relator's contention that the alleged conduct falls within the scope of the "exception" or limitation, and does so in accordance with its own self-serving standards and political interests.[302]

To further emphasize the inter-state nature of the concept of extradition, nowhere in extradition law and practice can the individual—the subject of the proceedings—compel the requesting or requested state to adhere to internationally recognized principles and customary practices of extradition law, or even to adhere to specific treaty provisions if either state wishes not to apply them or wants to circumvent them in accordance with the state's national laws and practice.[303] Many states, in fact, deny that extradition is a subject-matter falling within customary international law, and therefore argue that no international obligations exist other than those specific duties created by treaty or accepted through reciprocal practice between states. Even then, these duties are interpreted in accordance with the judicial or political standards of the states involved.[304] As of yet, international extradition law confers few direct rights upon

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296 *See* M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, *in* Principles and Procedures for New Transnational Criminal Law (Albin Eser & Otto Lagodny eds., 1992), *reprinted in* 1992 Pace Y.B. Int'l L. 123.

297 *See* Ch. V, Sec. 5.

298 *See* Ch. VIII, Sec. 2.1.

299 *See* Ch. VII, Sec. 6.

300 *See* Ch. VII, Sec. 6.

301 *See* Ch. VIII, Sec. 1.

302 *Id.*

303 *Id.*

304 *See* Ch. II.

the individual that the individual can claim and enforce against either of the respective states involved. Even specific violations of rights recognized by the signatory states to the European Convention of Human Rights and Fundamental Freedoms[305] or the Inter-American Convention on Human Rights[306] do not result in the invalidation of improper unlawful state action, but only in the award of damages, a very poor substitute indeed for the specific performance by a state of an internationally recognized right.

The individual is therefore dependent upon the good faith and benevolence of states, because the application and enforcement of individual rights is still considered by many states a matter of municipal law, even though it might involve internationally protected human rights. This problem arises from the fact that the individual is still not yet recognized as a full-fledged subject of international law and still has few practical means for the implementation of internationally declared human rights and international redress of wrongs against an offending state.[307] State sovereignty remains the barrier that some governments use to prevent the effective enforcement of human rights. But also the absence of effective international machinery for the enforcement of internationally protected human rights reduces the opportunities for giving tangible effect to such rights and thus reduces the opportunity for their advancement.

The failure of a given state to abide by its extradition treaty obligations does not yet fully create a right under international law that the individual can raise against that state in opposition to extradition, other than when the municipal laws of the requested or requesting state allow him or her such a right under their respective laws.[308] The mutual or consensual failure by the respective states engaged in the extradition process to abide by a treaty obligation designed to inure to the relator's benefit is not yet fully recognized as constitutive of a breach of international law, as the individual—although bearing consequences of the breach—is not a party to the treaty creating the obligation or establishing the right in question; only the state that can claim the breach is in the position of seeking remedy. However, if the breach is of an internationally protected right, or the result of lack of fairness or good faith by the parties in the application of rights stipulated in favor of third parties, or conceded to individuals as third-party beneficiaries under the particular treaty, then there is a violation of international law.[309] What remains to be articulated are the effective means of enforcement of such obligations in a way that provides effective remedies and not merely the award of damages.

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305 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter European Convention]; Protocol No. 1 to the European Convention, Mar. 20, 1952, 213 U.N.T.S. 262; Protocol No. 2 to the European Convention, May 6, 1963, Europ. T.S. No. 44; Protocol No. 3 to the European Convention (Amendment), May 6, 1963, Europ. T.S. No. 45; Protocol No. 4 to the European Convention, Sept. 16, 1963, Europ. T.S. No. 46, 7 I.L.M. 978 (1986); Protocol No. 5 to the European Convention (Amendment), Jan. 20, 1966, Europ. T.S. No. 55; 6 I.L.M. 27 (1967); Protocol No. 6 to the European Convention, Apr. 28, 1983, Europ. T.S. No. 114, 22 I.L.M. 538; Protocol No. 7 to the European Convention, Nov. 22, 1984, Europ. T.S. No. 117, 24 I.L.M 435; Protocol No. 8 to the European Convention (Amendment), Mar. 19, 1985, Europ. T.S. No. 118, 25 I.L.M. 387; Protocol No. 9 to the European Convention, Nov. 6, 1990, Europ. T.S. No. 140, 30 I.L.M. 693; Protocol No. 10 to the European Convention, Mar. 25, 1992, Europ. T.S. No. 146.

306 *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social & Cultural Rights, Nov. 17, 1988, O.A.S. Official Records, T.S. No. 69; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S. Official Records, T.S. No. 73.

307 Except for awards of damages under the European Convention, *supra* note 288, or the American Convention on Human Rights, *supra* note 306.

308 *See* Ch. II, and Ch. V, Sec. 7.

309 For state responsibility, *see* Ch. V, Sec. 7.

Treaty rights created by states, which contain a stipulation for the benefit of the individual, are, to that extent, rights running in favor of a third party, even though the individual as the purported beneficiary is neither a party to the treaty nor yet a fully recognized subject of international law. A claim can be asserted that a state's failure to grant a relator those rights created for his or her benefit by a treaty, or by "general principles of international law,"[310] calls into question state responsibility.[311] Though rights conferred upon or granted to the individual in extradition treaties may be subject to waiver by the requested state, no state can waive internationally recognized fundamental human rights,[312] nor can a state evade the customary international laws of state responsibility for unlawful conduct that emerges from a breach of an international legal obligation.[313]

A basic policy consideration that must first be examined is what justifies extradition as an institution. Is it a *civitas maxima*, whereby states have mutual complementary duties to combat international and transnational forms of criminality on the grounds that world order rests in part on a level of international and national order? Or is it based exclusively on principles of voluntary cooperation? International law has not yet given a definitive answer, though there is a clear trend toward the first of the two propositions;[314] this writer suggests adherence to the first assumption.[315]

8.2. Law and Public Policy Considerations

Law and public policy considerations are based on constitutional and other national laws that warrant, limit, or qualify the conduct of governmental authorities acting under the color of law in seizing a person and evidence and delivering him or her to another government's representatives. This also involves internationally protected human rights.

The means by which extradition is accomplished affects only the actual processes of obtaining persons, not the substantive nature of extradition. In this regard, the differences between states with common law and the civil law systems are quite telling.[316] Some law and policy considerations in common law states are so outcome determinative of the process that they rise to a level of a substantive limitation.[317]

The first question of law and public policy arises with respect to the relationship between the requested state vis-à-vis the requesting state. The position of the states concerned depends on the legal basis of extradition, that is, whether in the particular case extradition is based: (1) on a treaty, (2) on reciprocity, or (3) on comity. The choice among these bases stems from the original choice of two hypotheses to justify the practice, namely *civitas maxima* or mutual cooperation between states. It is clear that if a state conceives of the practice as a duty of mutual cooperation and assistance in penal matters, it will grant extradition with fewer formalities

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310 *See* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 Mich. J. Int'l L. 768 (1990); Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 Am. J. Int'l L. 279 (1963).

311 *See Draft Articles on State Responsibility*, *in* The Report of the International Law Commission on the Work of Its 46th Session, 2 May-23 July, U.N. GAOR, Supp. (No. 10) at 223, U.N. Doc. A/49/10 (1994).

312 *See* Bassiouni Compendium, *supra* note 228.

313 *Id.*

314 *See supra* note 20. *See also* M. Cherif Bassiouni, *International Extradition and World Public Order: A Conceptual Evaluation, in* Aktuelle Probleme des Internationale Strafrecht 10–15 (Paul Gunter-Potz & Dietrich Oehler eds., 1971); Wise, *supra* note 13.

315 Bassiouni, Bassiouni Compendium, *supra* note 228.

316 *See* Ch. IX, Sec. I.

317 *See* Ch. IX.

than if the state deems extradition a matter of self-serving interest. In the latter case, it may insist on more technical formalities interpreted and applied to best serve the state's interests.[318]

A second set of considerations arises when a state accepts a request for extradition. Law and policy concerns that affect the process at this point in the extradition process include: (1) the choice of jurisdictional theory;[319] (2) requirements of extraditable offenses, interpreted either *in concreto* or *in abstracto*;[320] (3) limitations on the extraditability of certain types of offenses such as political, fiscal, economic, and military offenses (which stem more often from policy rather than humane considerations, even if an element of the latter is implicit in the formulation of the policy);[321] and (4) protection of the rights of the relator, which includes inquiry into how jurisdiction was obtained,[322] the sufficiency of the charge and the evidence presented,[323] and the defenses available to refute the charges or oppose the grant of extradition.[324] The need for a new legal order to enhance peace, security, and human rights under the rule of law should be one of the priorities in this age of globalization.[325]

8.3. Political Considerations

Political considerations have no direct relationship to the practice of extradition or its rationale, but derive from purely political factors and national political determinations, though at times they also reflect concern for individual human rights. They are nevertheless based on a value-oriented judgment frequently grounded in subjective and self-serving political interests. Thus, whether to grant or deny extradition for a real or alleged "political offense exception" depends more on the political relations of the respective states than on objective criteria relating to the offense or the offender.[326] The integrity of the practice is thus affected when, for the political and practical convenience of the interested states, forms of disguised extradition[327] and abduction[328] take place. A distinction must therefore be made between those law and policy concerns considered valid on the basis of objective value-oriented goals and purely national political considerations.

8.4. Individual Human Rights and Humane Considerations

Individual human rights considerations include the manner in which an individual is brought before the jurisdiction of the court and the manner in which evidence is seized and used against the relator.[329] It also refers to the treatment that may await the relator in the requesting state, which in part runs contrary to the "rule of non-inquiry."[330] Human rights considerations

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318 *See* M. Cherif Bassiouni, *The Political Offense Exception Revisited: Extradition between the U.S. and U.K.—A Choice between Friendly Cooperation among Allies and Sound Law and Policy*, 16 Denv. J. Int'l L. & Pol'y 255 (1987); Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 Denv. J. Int'l Pol'y 109 (1986).

319 *See* Ch. VI.

320 *See* Ch. VII, Sec. 2.

321 *See* Ch. VIII, Sec. 1.

322 *See* Ch. V.

323 *See* Ch. X, Sec. 5.2.

324 *See* Ch. IX, Sec. 5.

325 M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and Realpolitik*, 22 Ga. St. U. L. Rev. 541 (2006).

326 *See* Ch. VIII, Sec. 2.1.

327 *See* Ch. IV.

328 *See* Ch. V.

329 *Id. See also* Bassiouni Compendium, *supra* note 228.

330 *See* Ch. VII, Sec. 8.

should allow inquiry into the criminal processes of the state wherein the relator is alleged to have committed a violation and where he/she is expected to be prosecuted or punished.[331] Because of the lack of international consensus as to what constitutes internationally mandated norms and standards of due process and fairness, the requested state will set itself up as a judge or evaluator of another state's legal or judicial processes.[332] Typically, however, the requested state will balance the relator's rights to fairness against the interests of the requesting state in prosecuting or punishing him or her, which invariably involves political considerations and considerations of law and policy.[333] The converse, however, may also occur, and the requested state may not inquire into the anticipated treatment of the relator upon his or her return because of its rigid conception of state sovereignty or because it suits its political interests to honor the request. Some individual human rights are discretionary, but fundamental human rights are not.[334]

8.5. Practical Considerations

Procedures for requesting, granting, and carrying out extradition are some of the practical concerns associated with extradition. The realization that the process is cumbersome, costly, and lengthy raises questions with decision-makers as to the proper balance between such

331 *See* Ch. VII, Sec. 8.

332 Admittedly, there exist international norms and standards of due process and fairness, which arise from international as well as regional human rights treaties. They include: European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 312 E.T.S. 5; American Convention on Human Rights, art. 5, Nov. 22, 1969, *reprinted in* 9 I.L.M. 673 (1970); African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982) ; Arab Charter of Human Rights, art. 8, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005). *See* Bassiouni Compendium, *supra* note 228; Stefan Trechsel, Human Rights in Criminal Proceedings (2006).

333 An example of this is the hesitance of certain countries to extradite individuals to Rwanda on fair trial grounds and human rights grounds, absent certain movement toward reform of the areas of deficiency in the Rwandan legal system. *See generally,* Philip Mayer, *Rwanda and Burundi to Sign Extradition Treaty*, 26 Int'l Enforcement L. Rep. 14–15 (Jan. 2010); Bruce Zagaris, *Switzerland Denies Rwandan Extradition Request of Former Minister on Genocide Charges*, 25 Int'l Enforcement L. Rep. 364–365 (2009); Bruce Zagaris, *Swedish Supreme Court Finds Extraditable to Rwanda Genocide and Crimes against Humanity Suspect as Rwanda House Approves Law to Impose Solitary on Killers*, 25 Int'l Enforcement L. Rep. 317 (2009); Bruce Zagaris, *Finland Denies Extradition to Rwanda of Genocide Suspect*, 25 Int'l Enforcement L. Rep. 142 (2009); Bruce Zagaris, *German Arrest and Extradition of Rwandan Chief Protocol Officer to France Produces Diplomatic Tensions with Rwanda*, 25 Int'l Enforcement L. Rep. 1–2 (2009); Bruce Zagaris, *French Court Grants Extradition Request of Rwanda for Genocide Suspect*, 24 Int'l Enforcement L. Rep. 271 (2008) ("A controversial issue in France with respect to its response to Rwandan extradition requests has been and continues to be a concern for due process and human rights in Rwanda."); Bruce Zagaris, *Uganda Agrees to Sign Extradition Treaty with Rwanda*, 23 Int'l Enforcement L. Rep. 212–213 (2007); Bruce Zagaris, *Rwandan Military Court Convicts Priest of Genocide in Absentia*, 23 Int'l Enforcement L. Rep. 20–21 (2007) (French refusal to extradite the individual tried in absentia). Health concerns have also been raised on behalf of relators as a human rights consideration. *See* Bruce Zagaris, *English High Court Upholds Hacker's Extradition to the U.S.*, 25 Int'l Enforcement L. Rep. 133–134 (2007); Bruce Zagaris, *Indian Magistrate Issues Arrest Warrant for Former Union Carbide Head*, 25 Int'l Enforcement L. Rep. 405–406 (2009); Bruce Zagaris, *France Extradites Former Bank Head to Austria*, 23 Int'l Enforcement L. Rep. 403–405 (2009); The European Court of Human Rights suspended the extradition of a former Croatian general, Vladmir Zagorec, to Croatia pending resolution of the relator's claim of persecution, which raised concerns under Article 3 of the European Human Rights Charter. *See* Bruce Zagaris, *European Human Rights Court Halts Extradition of Croatian General*, 24 Int'l Enforcement L. Rep. 3 (2008).

334 *See* Bassiouni Bassiouni Compendium, *supra* note 228.

procedures. Usually, this results in a reduction in the requirements and formalities required to extradite an individual, and diminishes the procedural rights and protections afforded the individual.

As international, transnational, and national criminality increases, and as the mobility of accused or convicted offenders of national crimes increases, the need for more effective extradition procedures becomes more acute. The danger, however, is that governments and law-enforcement agencies increase informal cooperation at the risk of violating treaty obligations and the human rights of individuals. Thus, informal processes may overtake formal ones to the detriment of the integrity of legal processes. In other words, as the volume of cases increases while resources for international criminal law enforcement remains static, and offenders are more able to evade the process, it is likely that the rules of extradition will be strained and even broken; a prominent example of this is the increased use of "extraordinary rendition" by the United States in the decade following the attacks of September 2001.[335] Formalities and procedural safeguards will give way to the increasing needs of law enforcement and prosecution, particularly in the face of limited resources to act more in concert with legal obligations and professional standards.

9. A Proposed Conceptual Framework in Light of Existing State Practice

As discussed throughout this book, extradition may at times be a cumbersome process. With the increase in international, transnational, and national criminality, the volume of extradition cases has increased significantly in a number of countries. But the staff in the ministries of justice and foreign affairs who handle these cases has not increased commensurately. Resources are also limited. Judges and prosecutors who are experts in extradition are also limited in number. All of these factors, along with the mobility of accused offenders, reduce the effectiveness of the process. Thus, law enforcement and prosecution officials are tempted to seek alternative means, sometimes legal, such as the use of immigration,[336] and sometimes illegal, such as abductions.[337] Concomitantly, there are more multilateral and bilateral extradition conventions establishing the duty to extradite, thus increasing the burdens and pressures on already overburdened, understaffed, and underfunded national systems. This situation also tends to create a disparity in the practice, in that those who can afford expert counsel benefit from greater opportunities to oppose extradition whereas those who cannot frequently end up with less defense than that which might be available under treaties and national laws. Interestingly, however, the existence of international and regional norms and standards on the protection of human rights[338] has only slightly affected the practice of extradition. This is essentially due to the fact that extradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state.[339]

The balance between states' needs to cooperate in penal matters and to provide a fair judicial review process does not mean that extradition should be cumbersome, lengthy, and ineffective. The best way to ensure that extradition runs smoothly, expeditiously, and effectively is to have

335 *See supra* Sec. 3.1 and Ch. 2, Sec. 6.2.

336 *See* Ch. IV.

337 *See* Ch. V.

338 *See generally*, Bassiouni Compendium, *supra* note 228.

339 The Constitutional Court of South Africa has cited this principle. *See Geuking v. President of the Republic of South Africa and others*, 2002 (1) SA 204 35 (CC) (S. Afr.).

clear and detailed national laws, and to train knowledgeable judges and prosecutors who will apply the law fairly and impartially.[340]

This writer's proposed conceptual framework for extradition is premised on five interlocking factors:

(a) the recognition of the national interests of the states who are parties to the extradition proceedings;

(b) the existence of an international duty to maintain world order;

(c) the effective application of minimum standards of fairness and justice to the relator in the extradition process;

(d) a collective duty on the part of all states to combat all forms of criminality, but more particularly international and transnational criminality; and

(e) the balancing of these factors within the juridical framework of the Rule of Law.

The relationship of these five factors is founded on the following propositions:

(a) The existence of a duty to maintain world order does not deny national sovereignty because the interests of the world community can be considered to be within the scope of the national interests;

(b) The enforcement of individual rights in extradition proceedings is not only a matter of humanitarian concern, but also a matter of recognizing that the individual is a party at interest vis-à-vis the respective states and the world community. Such recognition does not detract from state sovereignty because the individual is personally accountable before the world community for his or her violations of international law;

(c) Mutual cooperation and assistance in penal matters between states reinforces the effectiveness of the national public order of all states and does not have to depend for its effectiveness on political compromises or denial of individual rights; and

(d) Adherence to the Rule of Law based on standards of international due process that uphold the integrity of the international and national legal processes is needed to lend legitimacy and credibility to the process of extradition and international justice. It consequently makes acceptance of its results more likely and thus greatly diminishes opportunities for conflict over decisional outcomes.

In our contemporary, politically factionalized world, it would be naive to believe that the five factors will be measured equally during this balancing; some will undoubtedly carry more weight than others. The first of these factors, the nationally perceived interest of states, will remain the foremost consideration. The second factor, the duty to combat criminality, will be largely shaped by considerations ancillary to the first and, therefore will have a lesser impact in the course of the authoritative decision-making process leading to the granting or denial of extradition. The third, concern for the individual, will remain the least weighty factor in the overall balancing of the interests and policies involved, in particular when weighed against the value-oriented goals of institutional authoritative decision-making processes. The fourth, concern for the preservation of world order, is likely to be regarded as part of nationally perceived interests and not as an independent international consideration. Finally, as to the Rule of Law and international due process, it is likely to be treated more frequently in a perfunctory manner by adherence to certain forms and formalities with little regard for its substance whenever state interests are at stake.

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340 For a criticism of the current extradition practices and an argument that the International Court of Justice may be utilized to adjudicate state transnational and international crimes where the offender of state law has fled the borders of that state, see Barbara M. Yarnold, International Fugitives: A New Role for the International Court of Justice (1991).

The solution for a better, more effective process of extradition is the formulation of internationally recognized principles embodied in a universal convention on extradition in the spirit of the following resolution, introduced by this writer at the 1968 Freiburg Preparatory Colloquium on Extradition to the Tenth International Congress on Penal Law,[341] and embodied in a similar resolution adopted by the 1969 International Penal Law Pre-Congress of Siracusa.[342] It states:

> It appears hopeful to substitute to the strictly national concepts of criminality and to the intransigent consequences of national sovereignty an international concept of forms of criminality which (by their very nature) endanger fundamental human and social values and for the preservation of which a closer cooperation between the states is indispensable.
>
> Consequently and in conformity with the contemporary trend to attribute to the individual the quality of subject of International Law, it is suitable to recognize that the individual who is the subject of an extradition procedure may uphold before national and international jurisdictions the prerogatives recognized to him by the international treaties, including of course those referencing human rights.
>
> To this effect and with a view to foresee a general international convention, it might be useful that there be organized regional or international jurisdictions capable of hearing individual recourses directed against the decisions of national authorities rendered in violation of the aforementioned individual rights.
>
> These jurisdictions could also be seized with a procedure inspired by *habeas corpus* which would permit and give a more effective and practical remedy for the establishment of the Rule of Law on a worldwide basis.[343]

Thus, the world community would advance its goals of collective security within the framework of a lawful process, guaranteeing individual human rights, while simultaneously preserving national order and enhancing international cooperation in penal matters.

This appeal, which this writer made in 1968, is still valid today. But then, the same ideas were advanced by Emerich de Vattel in the 1870s and by others since. Some progress, however, has been made. It needs to be made more uniform in its application. The effectiveness of any legal process depends first on its perceived legitimacy, but also on its fair and uniform application. We learned this lesson early in the history of law, but we still have to apply it to international justice processes such as extradition. The words of Aristotle were not utopian when he spoke of laws as being "the right reason," and of its equal application "in Athens and Rome." The ideal approach to extradition is to see it applied uniformly and fairly whether the case arises in Chicago or Cairo. Whether that level of uniformity and fairness will ever be achieved is doubtful, but at least concerned jurists should always be diligent in ensuring the integrity of the process and fairness to the individuals involved.

To achieve that result, however, states must also recognize the existence of a *civitas maxima, aut dedere aut judicare.*[344] Prosecution or extradition should be recognized as a duty for international and transnational crimes—a duty that is predicated on effective and fair prosecution, whether in the requested or requesting state.

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341 39 Rev. Int'le de Droit Pénal 829 (1968).

342 Association International de Droit Pénal, Actes du Pre-Congres International de Siracusa 855 (1969).

343 *Id.*

344 *See* Bassiouni & Wise, Aut Dedere Aut Judicare, *supra* note 6.

Chapter II

Legal Bases for Extradition in the United States

Contents

1. Historical Background[1]

The practice of international extradition in the United States is neither the product of sound legislative policy nor the outgrowth of judicious doctrinal thinking. Instead, it is the outcome of circumstances and events that brought certain legal issues before U.S. courts, and which in turn generated legislative responses that are not particularly in keeping with contemporary needs.

Between 1799 and 1853, three major cases confronted federal district courts and the Supreme Court of the United States,[2] several presidents, and Congress. They are: *In re Robbins,*[3] *In re Metzger*[4] and *In re Kaine.*[5] The first of these cases, the most controversial of the three, involved the administration of President John Adams. John Marshall, later chief justice of the Supreme Court, was a member of Congress at the time of the *Robbins* controversy.

For the young nation that was the United States of America, having only recently fought for its independence, testing the limits of the executive branch's powers in foreign affairs presented major constitutional and political questions.[6] At the heart of that debate, with respect to extradition, was the constitutional doctrine of separation of powers, which still surfaces in many contemporary cases, particularly those involving the political offense exception[7] and the rule of non-inquiry.[8] The young nation was jealous of its newly acquired rule of law and the independence of its judiciary, and the question of whether the federal executive branch could decide on surrendering to a foreign power a person within the United States, particularly a U.S. citizen, without a judicial determination was highly questionable. Underlying that constitutional debate were the politics of federalism, and the ever-suspicious public concern with the expansion of federal executive powers.[9] A little over 200 years later, the reverse occurred. Congress largely gave the president powers that were used to override the Constitution with respect to

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1 This section is based in part and with modifications on an article from an article by the author, *Reforming International Extradition: Lessons of the Past for a Radical New Approach,* 25 Loy. L.A. Int'l & Comp. L. Rev. 389. Reprinted with permission of the Loyola of Los Angeles International & Comparative Law Review.

2 For an insightful scholarly review of these cases and the legal issues they presented, see John Parry, *The Lost History of International Extradition Litigation*, 43 Va. J. Int'l L. 93 (2002) and Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990). For a history of U.S. extradition law and practice, see John Bassett Moore, 2 A Treatise on Extradition and Inter-State Rendition (2 vols. 1891) [hereinafter Moore, Extradition] and Samuel T. Spear, The Law of Extradition, International and Inter-State (3d ed. 1885). For a contemporary perspective on extradition history, see Ethan A. Nadelmann, *The Evolution of U.S. Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U.J. Int'l L. & Pol. 813 (1993).

3 27 F.Cas. 825 (D.S.C. 1799) (No. 16, 175).

4 17 F.Cas. 232 (S.D.N.Y. 1847) (No. 9.511), 46 U.S. (5 How.) 176 (1847). France requested the extradition of Metzger, a decision that Judge Betts made in chambers, without a public hearing. This provoked a public debate over such a procedure that violated the sense of fairness in the due process of law.

5 55 U.S. (14 How.) 103 (1852).

6 *See, e.g.*, Bland Randall Walton, The Black Robe and the Bald Eagle: The Supreme,Court and the Foreign Policy of the U.S., 1789–1953 (1996).

7 *See* Ch. VIII Sec. 2.1.

8 *Id*.

9 *See, e.g.,* Isaac Kramnick, James Madison, Alexander Hamilton and John Jay: The Federalist Papers (1987); The Federalists (Benjamin Fletcher ed., 1961); The Debate on the Constitution, Federalist and Anti-Federalist, Speeches, Articles and Letters during the Struggle over Ratification (1993). *See also* T.M. Cooley, Constitutional History of the U.S. (1889); Andrew McLaughlin, A Constitutional History of the U.S. (1935). It should be noted that President Adams was a federalist. *See* David McCullough, John Adams (2001); John R. Howe Jr.,

arbitrary arrests and detention, interrogations, torture, and the use of military commissions to bypass federal courts and ignore well-established due process guarantees.[10]

The context, in 1799, was laden with the emotionally charged undercurrent of America's suspicion of foreign governments, and the facts of the *Robbins* case were particularly gripping.[11] The fate of a U.S. citizen was at stake, one who was seeking the protection of his country from America's former colonial ruler, England, who unlawfully seized and impressed him on a British ship. The United States was, after all, a country established in the name of freedom and to which people from all over the world, particularly the oppressed, were welcomed. To turn them back to their oppressors was something that rubbed raw American public sensitivities. The continuation of all of these issues and the legislative and jurisprudential void on the subject of extradition made the situation particularly difficult to address by the new nation's executive and judicial branches.

England's request for Robbins was based on Jay's Treaty of 1794, which provided for extradition with England. It was the first international treaty entered into by the United States containing a specific provision on extradition.[12] Jay's Treaty was preceded, however, by the 1788 consular convention with France, which was the basis for extradition between the two countries.[13] Both treaties received the Senate's "advice and consent," but national implementing legislation was only enacted with respect to the 1788 French Treaty.[14] It gave the task of determining extradition, as of 1792 when the national implementing legislation was passed, to "District Judges of the U.S."[15] Thus the judiciary was empowered to determine whether to issue a warrant of surrender based on what was most natural for U.S. courts to rely upon, namely the standard of "probable cause" that was contained in the Fourth Amendment to the U.S. Constitution, adopted in 1791.

The Changing Political Thought of John Adams (1966). He was succeeded by President Thomas Jefferson, who was not. *See* The writings of Thomas Jefferson (Andrew A. Lipscomb ed., 1903). *See also* David P. Currie, The Constitution in Congress: The Federalist Period: 1789–1801 (1907).

10 1–2 International Terrorism: A Compilation of U.N. Documents 1972–2001 (M. Cherif Bassiouni ed., 2002); International Terrorism: A Compilation of U.N. Documents and Regional Conventions, 1970–2000 (M. Cherif Bassiouni ed., 2002); 1 International Terrorism: Multilateral Conventions 1937–2001 (M. Cherif Bassiouni ed., 2002); M. Cherif Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations*, *in* Values and Violence: Intangible Acts of Terrorism (Wayne McCormack ed., 2008); M. Cherif Bassiouni, *Assessing "Terrorism" into the New Millennium*, 12 DePaul Bus. L.J. 1 (2000); M. Cherif Bassiouni, *Legal Controls of International Terrorism: A Policy-Oriented Perspective*, 43 Harv. Int'l. L.J. 83 (2002), U.S.A. PATRIOT Act (U.S. H.R. 3162, 107–156), Title VIII; National Defense Authorization Act of 2012, H.R. 1540.

11 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

12 The Treaty of Amity, Commerce and Navigation with Great Britain (Jay's Treaty), Nov. 19, 1794, [1795] 8 Stat. 116, T.S. No. 105, *reprinted in* 1 William M. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the U.S. of America and Other Powers, 1776–1909, at 590 (1910). *See also* Samuel F. Bemis, Jay's Treaty: A Study in Commerce and Diplomacy (2d ed. 1965) [hereinafter Bemis, Jay's Treaty]. For a discussion of the treaty and its effect on American extradition, see 1 Moore Extradition, *supra* note 2, at 90.

13 Convention Between His Most Christian Majesty of France and the U.S. of America, with the Purpose of Defining and Establishing the Functions and Privileges of Their Respective Consuls and Vice-Consuls, November 14, 1788, 8 Stat. 106, T.S.84. For a contemporary perspective, see Christopher L. Blakesley, *Extradition between France and the U.S.: An Exercise in Comparative and International Law*, 13 Vand. J. Transnat'l L. 653 (1980).

14 An Act Concerning Consuls and Vice-Consuls, 1 Stat. 254 § 1 (1792).

15 *Id.*

This was also a time when one of the United States' most important legislative acts had been adopted, the Judiciary Act of 1789.[16] It vested the powers of the Constitution's Article III in the "Justices of the Supreme" as well as "Justices of the District Court," who had the power to grant writs of habeas corpus for the purpose of an inquiry into the cause of any commitment or deprivation of liberty. Extradition was a commitment resulting in the deprivation of liberty, and thus should have naturally fallen within the meaning of Article III. But that was not so clear then; nor is it now.[17]

At that time, as now, parallel legal tracks dealt with the same subject and were unconnected, even though each implicated the Constitution, treaties, national legislation, and judicial interpretation of all of the above. The constitutional questions presented were: separation of powers, the power of the federal executive branch in matters of foreign affairs, the consequences of the treaty-making powers of the executive, the overlapping congressional power to pass national legislation to implement treaties, federal legislation on the jurisdiction and the powers of the federal judiciary in light of Article III, and the limits of judicial prerogatives in hearing and interpreting of these questions. In time, these issues became more complex as the United States became a state-party to multilateral treaties on international criminal law (ICL), containing extradition provisions[18] and other multilateral treaties on topics such as the 1963 Vienna Convention on Consular Relations.[19] In addition, what used to be deemed a "treaty" at the time has since been enlarged to include inchoate executive agreements entered into by the president without the Senate's "advice and consent."[20]

At the time, these sources of law had some connection to international extradition, but none were explicitly applicable to that subject, and at best dealt with extradition only peripherally or partially. The exceptions are specific treaties, legislation, and judicial decisions.[21]

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16 *See, e.g.,* Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789 (Maeva Marcus ed., 1992). *See also* Paul M. Bater, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 Ind. L.J. 233 (1990). The debate over the constitutional status of extradition hearings, and whether it is within or outside Article III courts is persistent. *See* Kulekowski v. DiLenardi, 947 F. Supp. 741 (N.D. Ill. 1996), *rev'd sub nom.* DeSilva v. DiLenardi¸ 125 F.3d 1110 (7th Cir. 1997); LoBue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *vacated on juris. grounds*, 82 F.3d 1081 (D.C. Cir. 1996). In contrast, *see* Carreno v. Johnson, 899 F. Supp. 624 (S.D. Fla. 1995) (discussing the original ministerial role of the secretary of state prior to 1871); *In re* Suttan, 905 F. Supp. 631 (E.D. Mo. 1995), and Werner v. Hickey, 920 F. Supp. 1257 (M.D. Fla. 1996). These cases go so far as to deny the executive branch the "executive discretion," a proposition fully accepted by various circuit court and district court opinions.

17 To date, review of extradition hearing orders are by means of habeas corpus. See in particular *Matter of Mackin*, 668 F.2d 122 (2d. Cir. 1981) where the government argued for a right of appeal and Judge Friendly went back to *In re Metzger*, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9, 511) and *In re Kaine*, 55 U.S. 103 (1852); *Mackin*, 668 F.2d at 125–130. For a review of early habeas corpus cases and doctrine, see William S. Church, A Treatise on the Writ of Habeas Corpus (1886). For relevant decisions during that period, see *In re Kaine*, 55 U.S. 103 (1852), *Ex parte Milligan*, 71 U.S. (3 vol.) 2 (1867), and *Ex parte Clarke*, 100 U.S. 399 (1879).

18 *See* Appendix I.

19 *Id.*

20 *See* Weinberger v. Rossi, 456 U.S. 25 (1982).

21 But among the latter, treaties and judicial decisions pertaining to them were limited to the provisions of *that* treaty, and thus not extendable to other treaties and cases interpreting them. These legal sources and the legal issues arising from extradition practice have overlapped to create a confused and uncertain body of law. For example, the 1788 Consular Convention with France, which dealt with the surrender of fugitives, specifically provided for a hearing, but a certain ambivalence or uncertainty was evident in the choice of words so that such a hearing before "the courts, judges and officers competent" of the requested state. The statute implementing that Treaty specified that the hearing would be before "the District Judges of the U.S." One can

Jay's Treaty of 1794[22] required a hearing and also reflected the executive's uncertainty as to whether that hearing was to be a judicial adjudication. But Congress did not, as it did with respect to the French Treaty of 1788,[23] provide national implementing legislation for the 1794 Treaty with England.[24] However, Article 27 of the 1794 Treaty required the parties to:

> [D]eliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the country's of the other, provided that this shall only be done on such evidence of criminality, and, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.[25]

Although it is clear that this provision analogized the hearing to that of a "commitment for trial" as contemplated by the 1788 French treaty[26] and the implementing legislation,[27] it was still deemed an open issue. Instead, it should have been treated by analogy to any other "commitment for trial" under U.S. law. Consequently, there should have been no doubt that the hearing was to be a "probable cause" judicial hearing, even though the Fourth Amendment that refers to this standard was adopted only in 1791 along with the rest of the first ten amendments to the U.S. constitution.

Curiously enough, the debate still exists in contemporary practice as to whether the judicial hearing required by Section 3184,[28] which refers to "probable cause," is a reflection of the Fourth Amendment or whether it is purely a statutory requirement that can therefore be statutorily abrogated.[29]

The ambiguity, which could have been easily resolved on the basis of reasoned logic and analogy, soon became the basis of a national controversy in which politics and the then-vibrant American sense of fairness aroused public passion.[30] The case involved one Thomas Nash, alias

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only speculate that those who represented the United States in negotiating the Convention with France were uncertain as to the proper extraditing authority, since the statute referred to "judges and competent officers." The former are part of the judiciary and the latter are members of the exeecutive branch. Assuming that those representing the executive branch at these negotiations were unsure as to whether the power to surrender was an executive or judicial one, Congress had no doubt that such power vested in the judiciary as evidenced by the national implementing legislation of this Treaty. The executive branch's uncertainty however was reflected in the Attorney-General's petition for a writ of mandamus to compel New York federal district judge John Lawrence to issue a warrant for the surrender of a French captain, sought by France pursuant to the 1788 Consular Convention, who had abandoned his ship in New York. The Supreme Court in *United States v. Lawrence* confirmed the judicial nature of the hearing and denied the petition for a writ of mandamus on the grounds that this was not a remedy available to the executive for a case within the jurisdiction of a federal district court judge.

22 Jay's Treaty, *supra* note 12.

23 Convention Between France & the United States, *supra* note 13.

24 *Id.*

25 *Id*.

26 *Id*.

27 An Act Concerning Consuls and Vice-Consuls, *supra* note 14.

28 The judicial hearing controversy was resolved with the adoption of the 1848 Act, Ch. 167 §5, 9 Stat. 302. But the debate about whether the Fourth Amendment constitutional requirement of "probable cause" applies still exists.

29 *But see* Parretti v. United States, 122 F.3d 758 (9th Cir. 1997), *withdrawn on other grounds*, 143 F.3d 508 (9th Cir. 1998), *cert. denied*, 525 U.S. 877 (1998).

30 *S*ee John Parry's detailed and incisive description of the facts and context of this case, *supra* note 2, as well as of *In re Metzger*, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9, 511), and *In re Kaine*, 55 U.S. 103 (1852); Christopher H. Pyle, Extradition, Politics, and Human Rights 24 (2001).

Jonathan Robbins, who was arrested in 1799 in Charleston, South Carolina, for the charge of murder, allegedly committed during the course of a mutiny on the *Hermione*, a British ship, while it was moored in Charleston's port.[31] The British were eager to have Nash surrendered with the ostensible purpose of trying him for mutiny and murder, and hanging him for such offenses, even though he was a U.S. citizen who had been "shanghaied," that is, seized by force and kept against his will to serve on the ship.[32] The British addressed their request to Secretary of State Timothy Pickering, while at the same time the matter was brought before District Court Judge Thomas Bee to order the surrender of the requested person. Secretary of State Pickering advised President John Adams that Judge Bee should be directed to deliver the offender in question because the United States had obligated itself under Jay's Treaty to do so.[33] Having apparently convinced President Adams, Secretary Pickering informed Judge Bee of the President's request that Nash be delivered to a representative of England. But Secretary Pickering was careful to indicate that Judge Bee should do so on the basis of evidence of criminality to be produced by England that would justify, as the Treaty requires, his "commitment for trial."[34] At the outset, it appeared uncertain as to whether President Adams, acting through the secretary of state, was seeking to influence Judge Bee or whether he merely wished to emphasize that it was the Judiciary's prerogative to hear and consider the evidence and to determine whether it was sufficient to constitute, presumably, "probable cause" in order to justify "commitment for trial," after which the judge was to issue an order for the surrender of the requested person. In fact, one can feel this same impatience on the part of the government in many contemporary cases where the government argues that the treaty obligation of the United States would be impaired if extradition were not granted.[35]

Congressman John Marshall took the position in Congress that the judicial branch does not have the power to deal with treaties and that Article III does not cover matters that are within

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31 Pyle, *supra* note 30 at 26

32 The facts are described in Judge Bee's opinion, in Wedgewood, *supra* note 2; Pyle, *supra* note 30.

33 Jay's Treaty, *supra* note 12; For the Adams and Pickering positions, *see* Parry, *supra* note 2, at 109–113 and notes 78–80 and 104 (referring to original sources).

34 Jay's Treaty, *supra* note 12.

35 In this writer's personal experience with over 100 extradition cases, rarely was it not said by the Assistant United States Attorney during or at the end of the proceedings that the treaty obligations of the United States were at stake, and that somehow the judiciary should be conscious of this, the implication being that because of overlapping powers, the judiciary should be mindful of the executive's powers. A more benign interpretation of that directive could be that the judge should order the surrender of the requested person to the requesting state without having to wait for any further action by the executive branch, but that does not seem borne out by the circumstances and context of the case. *See* Parry, *supra* note 2, at 108–124. In today's practice, it is not the judiciary that surrenders an individual to a requested foreign government, but the executive. *See* 18 U.S.C. § 3196 (2003). There could have been a reasonable and logical interpretation of the president's direction as a delineation of the overlapping powers of the judicial and executive branches. The debate over the foreign affairs powers of the executive has remained constant from these early days on. *See*, *e.g.,* Louis Henkin, Foreign Affairs and the Constitution (2d ed. 1996). But at that time there was no legislation concerning extradition and, as stated above, no statute implementing the 1794 Treaty. Judge Bee treated the case as a federal question case under Article III and made the analogy between international extradition and inter-state rendition of a fugitive fleeing from one state to another. He also interpreted the judicial power as extending to treaty interpretation. Consequently, Judge Bee's jurisdictional ruling was intuitively correct, although it was not based on statutory authority. As he viewed the action by Secretary Pickering as executive interference with a judicial function, a constitutional controversy erupted. Nevertheless, Judge Bee ruled that Robbins was to be surrendered to the British Consul. *In re Robbins,* 27 F. Cas. 825, 833 (D.S.C. 1799) (No. 16,175). Robbins was then promptly convicted and executed by British authorities, fueling the controversy in light of his U.S. citizenship.

the jurisdiction of a foreign state's judicial prerogative.[36] He thus concluded that the case was for the executive to decide and not subject to judicial decision by a federal district court judge.[37]

Between 1794, when Jay's Treaty was entered into and the controversial *Robbins* case subsequently decided, and 1848 when the first extradition legislation was enacted,[38] extradition in the United States was carried out without the benefit of national legislation.[39]

In 1847, the Supreme Court revisited the issue of extradition in *In re Metzger*[40] and thereafter in *In re Kaine.*[41] The latter, however, was decided after the 1848 Act.[42] Yet both of these cases

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36 *See* Statement of Representative John Marshall, 10 Annals of Congress 660th Cong., First Session 1st 607 (Mar. 7, 1800). This and other relevant facts and analysis are described in Wedgewood, *supra* note 2, at 229; Pyle, *supra* note 30, at 24–47. More particularly, *see* Parry, *supra* note 2, at 105–120. It should be noted that Chief Justice Marshall in his seminal opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), held that a writ of mandamus was an appropriate remedy under Section 13 of the 1789 Judiciary Act. But in the *Lawrence* case, it was not judged to be an appropriate remedy. *See supra* note 21.

37 In a sense, Congressman Marshall raised the issue that subsequently became known as the "Political Question Doctrine." There is much debate as to what Marshall really advocated, though he supported, in part, Adams's position limiting the role of the judiciary. Marshall did, however, concede that a person sought for extradition had the right to question the legality of his arrest by means of a petition for a writ of habeas corpus. *See* Statement of Representative John Marshall, *supra* note 36. Chief Justice Marshall's majority opinion in *United States v. Rauscher*, 119 U.S. 407 (1886) was most enlightened, solidly upholding the judiciary's role in international extradition. But that was after Congress had enacted the 1848 Act. Cha. 167 §5, 9 Stat. 302. *See also infra* note 39 (noting the legislative history of extradition). The pendulum then swung in favor of a greater role for the executive in matters of extradition, as the constitutional interpretation of the doctrine of separation of powers favored the executive branch in the absence of statutory authority to the contrary. *See* H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 Wm. & Mary L. Rev. 1471, 1511–1528 (1999). The issue of separation of powers was raised in *LoBue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), *vacated on juris. grounds*, 82 F.3d 1081 (D.C. Cir. 1996). That proposition was revisited by the Second Circuit in LoDuca v. United States, 93 F.3d 1100 (2d Cir. 1996). The position was also followed by other circuits in which the issue of the overlapping roles of executive and judicial powers were raised. *See* Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993); Abu Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981).

38 Ch. 167, § 5, 9 Stat. 302.

39 As stated above, the first legislative act concerning extradition was the Act of August 12, 1848. *See* Ch. 167, § 5, 9 Stat. 302 (1848). The Act provided that extradition of relators from the United States could be performed only pursuant to a treaty, and set forth the procedure to be followed by judges or commissioners. During those years, the following legislation was passed: Act of August 12, 1848, Ch. 167, § 5, 9 Stat. 302, 303; Act of June 22, 1860, Ch. 184, 12 Stat. 84 (requiring authentication of documents); Act of March 3, 1869, Ch. 141, §§ 1–3, 15 Stat. 337 (establishing procedure for delivery of relator from United States to requesting state); Act of June 19, 1876, Ch. 133, 19 Stat. 59 (providing that authenticated foreign documents are admissible into evidence); Act of August 3, 1882, Ch. 378, §§ 1–6, 22 Stat. 215 (establishing fees and costs for extradition); Act of June 6, 1900, Ch. 793, 31 Stat. 656 (specifying extraditable offenses and establishing political offense exception); Act of June 28, 1902, Ch. 1301 (judicial), 32 Stat. 419, 475 (providing for collection of costs from requesting state); Act of March 22, 1934, Ch. 73, §§ 1–4, 48 Stat. 454 (establishing procedure for extradition to and from countries or territories controlled by the United States); Act of June 25, 1948, Ch. 645, 62 Stat. 822 (codifying existing practice not previously set forth in statute); Act of May 24, 1949, Ch. 139, 63 Stat. 96 (amending list of extraditable offenses); and Act of October 17, 1968, Pub. L. No. 90-578, Title III, § 301(a)(3), 82 Stat. 1115 (substituting "magistrate" for "commissioner" in extradition statutes). From 1848 to date, the original Act was amended in a piecemeal fashion eleven times.

40 *In re* Metzger, 17 F. Cas 232 (S.D.N.Y. 1847).

41 *In re* Kaine, 55 U.S. 103 (1852).

42 1848 Act, *supra* note 28.

were subsequently misinterpreted.[43] The same debate continued with respect to the "political offense exception,"[44] the role of the executive,[45] and the rule of non-inquiry in respect to violations of internationally protected human rights.[46] In the 1970s and 1980s controversy arose with the United Kingdom over judicial versus executive powers in connection with the United Kingdom's extradition request for persons charged with violent crimes in connection with the conflict in Northern Ireland.[47] The contemporary debate over the executive's power in matters of extradition continues, notwithstanding the existence of legislation regulating the practice. Understandably, the executive is concerned over delays in the extradition process.[48]

One would assume that the existing overlap between executive and judicial powers is not that complex to delineate and distinguish. The executive has the power to enter into treaties, and, if it were not for Section 3184,[49] as discussed below in Sections 2, 3, and 5, the executive could engage in extradition with executive agreements not subject to the Senate's "advice and consent," including on the basis of comity. The executive also has the power to use discretion in conditioning extradition or not surrendering a person otherwise found to be judicially extraditable. As to the judiciary, as discussed in Chapters IX and X, its role is to determine whether a treaty exists, the identity of the person sought, and the existence of "probable cause," and to apply the conditions of the treaty and any conditions arising under customary international law or other relevant applicable treaty, including both substantive conditions and defenses, exceptions, exemptions, and exclusions, and of course any applicable provisions of the Constitution.

Within that context, there are two major legal issues that remain controversial in terms of the overlapping powers of the executive and the judiciary. They are the political offense exception[50] and the rule of non-inquiry[51] with respect to issues concerning the treatment of the relator

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43 For a discussion of this and other misconceptions about extradition, see John G. Kessler, *Some Myths of U.S. Extradition Law*, 76 Geo. L.J. 1441 (1988).

44 *See* Ch. VIII, Sec. 2.1.

45 *See* Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 Corn. Int'l L. Rev. 247 (1982).

46 *See* Ch. VII, Sec. 8.

47 *See In re* Mackin, 668 F.2d 122 (2d Cir. 1981); United States v. Doherty, 786 F.2d 491 (2d Cir. 1986). *In re* McMullen Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979). Since the denial of the United Kingdom's extradition request, the Immigration and Naturalization Service has sought McMullen's deportation. McMullen v. INS, 788 F.2d 591 (9th Cir. 1986) (denying review of finding of ineligibility for asylum), *overruled in part by* Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (relying on the incidental prong of *Quinn v. Robinson*); on rehearing, the appellate court held that the district court erred in classifying the Supplementary Treaty as a prohibited bill of attainder and remanded the case to the district court for resolution of the due process issues that remain unresolved. *In re Extradition of* McMullen, 989 F.2d 603, 604 (2d Cir. 1993); Quinn v. Robinson, 783 F.3d 776 (9th Cir.), *cert. denied,* 479 U.S. 882 (1986). For a contemporary discussion on the executive's power over foreign affairs, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale.L.J. 231 (2001) and Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997), favoring a predominant role for the executive over the judiciary in matters of foreign affairs.

48 Two landmark cases stand out: one in the Second Circuit, *Caltagirone v. Grant*, 629 F.2d 739 (2d Cir. 1980), and one in the Seventh Circuit, *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1980), in which this writer represented the respective relators. The *Caltagirone* case lasted over four years and extradition was denied. The *Assarsson* case lasted almost five years and extradition was granted.

49 18 U.S.C. § 3184 (2003). *See also* Factor v. Laubenheimer, 290 U.S. 276 1933; Valentine v. U.S. *ex. rel.* Neidecker, 299 U.S. 5 (1936); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

50 *See* Ch. VIII, Sec. 2.1.

51 *See* Ch. VII, Sec. 8.

once surrendered, including the penalties that the requesting state may inflict upon him/her. Understandably, the judiciary is reluctant to give up its prerogatives in this matter insofar as it is using its powers to order the surrender of a person, who could also be a U.S. citizen, to a foreign country where his/her treatment and punishment could be contrary to the Eighth Amendment prohibition against "cruel and unusual punishment" or to public policy.[52]

It is astonishing that some of the same issues and debates that occurred in connection with the *Robbins* case and that lasted until the passage of the 1848 legislation still linger on. It is equally astonishing that the 1848 Act has not been comprehensively overhauled since then, notwithstanding congressional efforts between 1981 and 1984.[53]

To a large extent, this stagnation is due to the absence of sufficient congressional interest in the passage of progressive nonpartisan legislation that balances between the justifiable ends of surrendering to other countries persons accused or charged with crimes and the need to observe "due process of law," and where appropriate to uphold international human rights norms as well as constitutional norms and standards. Regrettably, the battle lines have been drawn along ideological lines between what is commonly referred to as conservative and liberal thinking on international human rights and domestic civil rights issues.[54] Instead, the proper balance should be drawn along the lines of efficient and expeditious extradition proceedings—unhampered by undue formalities, but consistent with the application of the same norms and standards the judiciary must apply in ordinary criminal cases. By no means should extradition be converted into a mini-trial, but neither should it become a rubber stamp judicial procedure for the requests of foreign governments that a given administration may support, as in the case of President John Adams's message to Judge Bee in the 1795 *Robbins* case. Although this history is largely overlooked, if not forgotten, by commentators and judicial opinion drafters, it remains the background, if not the foundation of subsequent legislative and major judicial developments.[55]

2. The Relationship among the Executive, Legislative, and Judicial Branches and the Place of Treaties in the Extradition Process[56]

2.1. Introduction

The processes of extradition in the United States involve the executive, legislative, and judicial branches of the federal government.[57] Each of these has a defined constitutional role in the making, the execution, and the interpretation of treaties. The interrelationship of the three branches of government in extradition is dictated by the constitutional grant of powers to them and by the constitutional doctrine of separation of powers.

In *In re Lehming*,[58] a federal district court held that:

> The separation of powers principle is based on the belief that liberty can only be preserved if governmental powers are separated into three coordinate branches of government. *Mistretta v. U.S.*,

52 Ch. VII, Sec. 8.3.

53 *See* M. Cherif Bassiouni, *Extradition Reform Legislation in the U.S.: 1981–83*, 17 Akron L. Rev. 495 (1984).

54 *Id*.

55 For the legislative history and relations between the branches of government, *see infra* Sec. 2.

56 *See infra* Sec. 4.

57 *See generally*, John T. Parry, *The Lost History of International Extradition Litigation*, 43 Va. J. Int'l L. 93 (Fall 2002); Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int'l L. J. 277 (Spring 2002); Christopher D. Man, *Extradition and Article III: A Historical Examination of the "Judicial Power of the U.S.,"* 10 Tul. J. Int'l & Comp. L. 37 (Spring 2002).

58 *In re* Lehming, 951 F. Supp. 505 (D. Del. 1996).

488 U.S. 361, 380, 109 S.Ct. 647 659, 102 L.Ed.2d 714 (1989). However, "the Framers did not require—and indeed rejected—the notion that the three branches must be entirely separate and distinct." *Id.* The proper functioning of our government requires "a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" *Id.* at 381, 109 S.Ct. at 659, quoting *Buckley v. Valeo* 424 U.S. 1, 121 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1976). The concern when analyzing an alleged violation of the separation of powers is not an overlap of responsibility, but rather "the encroachment and aggrandizement of one branch at the expense of another." *Matter of Extradition of Marzook*, 924 F. Supp. 565, 571 (S.D.N.Y. 1996). In the context of issues which specifically involve the Judicial Branch, the Supreme Court expressed grave concern for two dangers, "first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'" *Id.* at 383, 109 S.Ct. at 660. This Court concludes, upon a review of the applicable Treaty and statutes, that the federal statutes are constitutional. Although a contrary position was taken in *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), vacated on jurisdictional grounds, 82 F.3d 1081 (D.C. Cir. 1996) (vacated for lack of jurisdiction and ordering dismissal), the balance of federal court decisions support the conclusion that the statutes are constitutional. *See Lo Duca*, 93 F.3d at 1103–1112; *In the Matter of Extradition of Lui Kin-Hong, a/k/a Jerry Lui*, 939 F. Supp. 934, 962 (D. Mass. 1996); *Sandhu v. Bransom*, 932 F. Supp. 822, 826 (N.D.Tex. 1996); *Marzook*, 924 F. Supp. at 570–71; *Matter of Extradition of Lin*, 915 F. Supp. 206, 211–15 (D. Guam 1995); *Matter of Extradition of Sutton*, 905 F. Supp. 631, 636–37 (E.D. Mo. 1995); *Matter of Extradition of Sidali*, 899 F.Supp. 1342, 1350 (D.N.J. 1995).[59]

2.2. Treaties and Federal Legislation

Extradition in the United States is statutorily based on treaties.[60] Treaties are made by the executive subject to the "advice and consent" of the Senate.[61] The authority to enter extradition treaties and to request or grant extradition rests exclusively with the executive branch by virtue of its constitutional power to conduct foreign relations.[62] This power is only limited by the Senate's power to "advise and consent" to treaties that the executive branch submits to it[63] and by the authority of Congress to enact legislation defining the substantive requirements and procedures to be followed by U.S. courts whenever treaties are deemed to require it, and that is

59 *Id.* at 509. The following cases all raised the constitutionality of the extradition statute regarding the *Lobue* decision, and the issue of whether extradition is a judicial or executive process was raised again. This decision does not depart from precedent on the subject. *See In re Extradition of* Chan-Seong I, 346 F. Supp. 2d 1149 (D.N.M. 2004) (in which the constitutionality of the extradition statute were raised as part of the separation of powers issues). *See also In re Extradition of* Kirby, 106 F.3d 855, 864 (9th Cir. 1996); Carreno v. Johnson, 899 F. Supp. 624 (S.D. Fla. 1995); *In re Extradition of* Lang, 905 F. Supp. 1385, 1401 (C.D. Cal. 1995); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996); *In re Extradition of* Lahoira, 932 F. Supp. 802 (N.D. Tex 1996); *In re Extradition of* Linn (D. Guam 1995). It should be noted as discussed in the context of *LoBue* that the present extradition statute has been enacted originally in 1825. *See* Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), vacated on jurisdictional grounds, 82 F.3d 1081 (D.C. Cir. 1996). *See, e.g.,* Hayburns Case, 2 U.S. 408, 2 Da.. 409 (1792); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Gordon v. United States (2 Wall. 1864); *In re* Kaine, 55 U.S. (14 Howe) (1852).

60 *See infra* Sec. 3.

61 *See infra* Sec. 4.

62 U.S. Const. art. II, § 2, c1. 1.2. *See also* United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318–321 (1936).

63 U.S. Const. art. II, § 2, c1. 1.2.

when treaties are non–self-executing (as discussed below).[64] Federal legislation is developed to regulate the procedures of extradition subject to the provisions of the relevant treaties, which are deemed self-executing.[65]

The federal judiciary has the prerogative of interpreting and applying treaties and general procedural legislative enactments in accordance with the applicable provisions of the U.S. Constitution.[66] The judiciary's role, however, is limited because it cannot enjoin, prohibit, or mandate the executive's negotiation of an agreement or a treaty, nor can it enjoin or mandate the executive's exercise of discretion to request a relator's extradition or to refuse to grant extradition although the terms of the applicable treaty have been satisfied.[67] The judiciary, however, has the authority to enjoin the federal government from extraditing a person if the extradition is in violation of the Constitution, U.S. laws, or the applicable treaty.[68] In the event of a conflict between an extradition treaty and a constitutional provision, the latter prevails.[69]

Federal legislation is subject to extradition treaties, which are deemed to be self-executing. As a result, U.S. legislation is complementary to treaties rather than substitutive of them. In the case of a conflict between a treaty provision and a legislative norm, the former should prevail.[70]

The first stage in the extradition process is the existence of a legal basis upon which the United States may request or grant extradition. Although there are several such bases (i.e., treaties, whether bilateral or multilateral; reciprocity; comity; and national legislation),[71] the United States relies essentially on bilateral treaties. Nothing prevents the United States from relying on multilateral treaties. In fact, the United States has ratified a number of multilateral treaties containing extradition provisions, but still, it does not rely on these treaties to grant or request extradition. This is exclusively a practice based on U.S. foreign policy, which denotes its exclusivist approach to international relations.[72]

The basis of the U.S. practice of extradition has not, however, been consistently limited to bilateral treaties, as some exceptions have occurred whenever it best suits this country's interests. Even in present times, the United States can request extradition from a foreign state with which no extradition treaty exists, or it can rely on a multilateral treaty containing an extradition clause. However U.S. legislation requires that a treaty must exist before extradition can be granted[73] and the Supreme Court and lower courts have frequently referred to the need for a treaty in order for extradition to be granted,[74] even though there is nothing in the Constitution that mandates this requirement.

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64 *Id.*

65 *See infra* Sec. 4.

66 *See* Chs. VII, VIII, and IX.

67 *See* Terlinden v. Ames, 184 U.S. 270 (1902); United States v. Rauscher, 119 U.S. 407 (1886); Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974); Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); Wacker v. Bisson, 370 F.2d 552 (5th Cir.), *cert. denied*, 387 U.S. 936 (1967); United States v. Orsini, 424 F. Supp. 229 (D.C.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir. 1977); United States v. Salzmann, 417 F. Supp. 1139 (D.C.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir. 1976).

68 *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

69 1 Moore, Extradition *supra* note 2, at 97.

70 6 Marjorie Whiteman, Digest of International Law 734 (1968) [hereinafter, Whiteman Digest].

71 *See* Ch. I.

72 Bassiouni, International Criminal Law Conventions and Their Penal Provisions (1997) [hereinafter Bassiouni, ICL Conventions].

73 18 U.S.C. § 3181 *et seq.* (1988). "Extradition Treaties Interpretation Act of 1998" (2000).

74 Valentine v. United States *ex rel.* Neidecker, 229 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Rauscher, 119 U.S. 407 (1886). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

Once the judiciary has established the appropriate basis of extradition, it is then within the sole discretion of the secretary of state to determine whether the relator is extraditable.[75] Rationalizing this bifurcated decision-making system, the First Circuit in *Lui Kin-Hong v. United States* stated:

> extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch.[76]

In *Cheung v. United States*, the Second Circuit posited as follows:

> It has long been part of our settled law that the authority to recognize a foreign government is constitutionally committed to the Executive Branch. *See, e.g.*, *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420, 10 L. Ed. 226 (1839) ("When the executive branch of the government, which is charged with our foreign relations, shall . . . assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department[.] . . . It is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong."); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 32 L. Ed. 2d 466, 92 S. Ct. 1808 (1972) (noting the primacy of the Executive in matters of recognition); *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) (explaining when an issue is nonjusticiable under the political question doctrine and stating that the "recognition of foreign governments . . . strongly defies judicial treatment"); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998) ("Our court held that recognizing foreign states and governments is a function of the executive branch . . . ."), *cert. denied*, 527 U.S. 1003, 119 S. Ct. 2337, 144 L. Ed. 2d 235 (1999). Federal courts lack the authority and institutional competence to make the political judgments involved in ascertaining the legitimacy of foreign systems. Thus, in this case, it is not for the courts to decide whether the HKSAR government is a legitimate government. Instead, our role is limited to answering the prior definitional question: what does the term "foreign government" in the extradition statute mean? More precisely, the question we must address is whether the government of a subsovereign constitutes a "foreign government" or the government of a "foreign country" for purposes of § 3184. Put another way, for most purposes of U.S. foreign relations, the HKSAR government is the government of Hong Kong because it has been recognized as such by the Executive, but it is a "foreign government" within the meaning of the extradition statute only if the judiciary interprets that term to encompass subsovereigns. *See Baker*, 369 U.S. at 212 (noting that while "the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area" (footnotes omitted)). With this clarification, we turn to the text of the extradition statute.[77]

The federal judiciary continues to have a significant role in international extradition processes, but it is not superior to the respective roles of the executive and legislative branches in connection with treaty-making powers and the implementation of treaties, as discussed in this and the next two sections.[78]

The practice of extradition is a part of the foreign relations of the United States. Because it is based essentially on treaties, it reflects the relationship of the United States with foreign states. For these reasons, a change in U.S. foreign policy regarding a certain state can affect its extradition arrangements with that state. Thus, although a treaty is not necessarily suspended by the severance of diplomatic relations, the United States has taken the position that because

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75 United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1997) (relying on 18 U.S.C. § 3184 (1996)).

76 *Lui Kin-Hong*, 110 F.3d at 110.

77 Cheung v. United States, 213 F.3d 82, 88 (2d Cir. 2000).

78 *See supra* Sec. 1. *See also* Appendix I.

extradition is an act of cooperation between governments, it will not engage in the practice if diplomatic relations are severed.[79] This was the case with Cuba, until a memorandum of understanding was signed with Czechoslovakia, which was acting on behalf of Cuba, but only with respect to aircraft hijackers.[80]

A change in government does not abrogate a treaty, however,[81] nor does it suspend the treaty's application unless the treaty is of a political nature or the circumstances are such as to permit the invocation, in treaty interpretation, of the rule *rebus sic stantibus*,[82] namely that radically or significantly charged circumstances may justify reconsideration of certain treaty obligations for the party adversely affected by these changed circumstances.

As mentioned above, between 1794, when Jay's Treaty was entered into, and 1848 when the first extradition statute was adopted, extradition in the United States was carried out without the benefit of national legislation.[83]

The first legislative act concerning extradition was the Act of August 12, 1848.[84] The Act provided that extradition of relators from the United States could be performed only pursuant to a treaty, and set forth the procedure to be followed by judges or commissioners. During those years, the following legislation was passed: Act of August 12, 1848;[85] Act of June 22, 1860;[86] Act of March 3, 1869;[87] Act of June 19, 1876;[88] Act of August 3, 1882;[89] Act of June 6, 1900;[90] Act of June 28, 1902;[91] Act of March 22, 1934;[92] Act of June 25, 1948;[93] Act of May 24, 1949;[94] and Act of

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79 Whiteman Digest, *supra* note 70, at 769; Green Haywood Hackworth, Digest of International Law 37 (1944) [hereinafter Hackworth Digest]. *See also* Restatement of the Law (Third) of the Foreign Relations Law of the United States §§ 202, 203, 336 (1987).

80 Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, agreement effected by exchange of notes between U.S. Department of State and Czechoslovak Embassy (representing Cuban interests), and between the Cuban Ministry of Foreign Affairs and the Swiss Embassy (representing U.S. interests), *signed at* Washington and Havana Feb. 15, 1973, 24 U.S.T. 737, T.I.A.S. No. 7579 (entered into force Feb. 15, 1973).

81 1 Moore, Extradition 98, *supra* note 2. *See* Restatement (Third), *supra* note 79 at § 203 cmt. c (addressing recognition in cases of constitutional succession), § 332 (concerning termination of international agreements), § 333 (regarding suspension of operation of international agreements).

82 Vienna Convention on Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/31, as corrected by A/CONF.80/31/Corr. 2 of Oct. 27, 1978, *reprinted in* 17 I.L.M. 1488 (1978).

83 *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840); *In re* Metzger, 17 F. Cas. 232 (S.D.N.Y. 1847); (No. 9,511) *In re* Sheazle, 21 F. Cas. 1214 (C.C.D. Mass 1845) (No. 12,734); United States *v. Davis*, 25 F. Cas. 786 (C.C.D. Mass. 1837) (No. 14,932); *Ex parte* Dos Santos, 7 F. Cas. 949 (No. 4,016) (C.C.D. Va. 1835); United States v. Robins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175); Commonwealth *ex rel.* Short v. Deacon, 10 Serg. & Rawle 125 (Pa. 1823); *In re* Washburn, 4 Johns. Ch. 106 (Ch. N.Y. 1819). Cheung v. United States, 213 F.3d 82, 93 (2d Cir. 2000).

84 Ch. 167, 9 Stat. 302.

85 Ch. 167, § 5, 9 Stat. 302, 303.

86 Ch. 184, 12 Stat. 84.

87 Ch. 141, §§ 1–3, 15 Stat. 337.

88 Ch. 133, 19 Stat. 59.

89 Ch. 378, §§ 1–6, 22 Stat. 215.

90 Ch. 793, 31 Stat. 656.

91 Ch. 1301 (judicial), 32 Stat. 419, 475.

92 Ch. 73, §§ 1–4, 48 Stat. 454.

93 Ch. 645, 62 Stat. 822.

94 Ch. 139, 63 Stat. 96.

October 17, 1968.[95] From 1848 until 1983, the original Act was amended in a piecemeal fashion ten times.[96]

Since 1981, a number of bills regarding extradition have been introduced in the Senate and the House. In addition, the administration, at that time, although backing the Senate versions, included similar extradition provisions in criminal law bills before the Senate.[97] The first version of the Extradition Reform Act was introduced in the U.S. Senate on September 18, 1981 as S. 1639,[98] ostensibly in order "to modernize the statutory provisions relating to international extradition,"[99] although it did not achieve these far-reaching objectives. The bill was entitled "The Extradition Reform Act of 1981."[100] After hearings before the Senate,[101] the original version was amended and a "clean bill" introduced in the Senate on December 11, 1981 as S. 1940.[102] This clean bill version was favorably reported by the Committee on the Judiciary with Committee amendments on April 15, 1982[103] and sequentially referred to the Senate Committee on Foreign Relations on April 19, 1982.[104] Other than the "political offense exception," the Committee considered in a very cursory way other questions within its competence, and favorably reported the bill, with Committee amendments on June 17, 1982.[105]

During this period, the House of Representatives considered its own version of a new act to revise U.S. extradition law and procedure. H.R. 5227, the original House bill, was introduced on December 15, 1981, before the Subcommittee on Crime of the Committee on

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95 Pub. L. No. 90-578, Title III, § 301(a)(3), 82 Stat. 1115.

96 Act of June 22, 1860, Ch. 184, 12 Stat. 84 (requiring authentication of documents); Act of March 3, 1869, Ch. 141, §§ 1–3, 15 Stat. 337 (establishing procedure for delivery of relator from United States to requesting state); Act of June 19, 1876, Ch. 133, 19 Stat. 59 (providing that authenticated foreign documents are admissible into evidence); Act of August 3, 1882, Ch. 378, §§ 1–6, 22 Stat. 215 (establishing fees and costs for extradition); Act of June 6, 1900, Ch. 793, 31 Stat. 656 (specifying extraditable offenses and established political offense exception); Act of June 28, 1902, Ch. 1301 (judicial), 32 Stat. 419, 475 (providing for collection of costs from requesting state); Act of March 22, 1934, Ch. 73, §§ 1–4, 48 Stat. 454 (establishing procedure for extradition to and from countries or territories controlled by the United States); Act of June 25, 1948, Ch. 645, 62 Stat. 822 (codifying existing practice not previously set forth in statute); Act of May 24, 1949, Ch. 139, 63 Stat. 96 (amending list of extraditable offenses); Act of October 17, 1968, 82 Stat. 1115, Pub. L. No. 90-578, tit. III, § 301(a)(3) (substituting "magistrate" for "commissioner" in extradition statutes). *See also* Bassiouni, *supra* note 53.

97 S. 1639, the first Senate bill introduced in the 97th Congress on U.S. extradition, was also introduced as part of S. 1630 to amend the federal criminal code. *See infra* note 98. S. 220, the first Senate bill introduced in the 98th Congress, was also introduced as part of S. 829 to amend the federal criminal code.

98 *See* S. 1639, 97th Cong., 1st Sess., 127 Cong. Rec. S10032 (daily ed. Sept. 18, 1981) [hereinafter S. 1639]. The provisions in the bill were originally introduced as part of proposed legislation to amend the federal criminal code. *See* S. 1630, 97th Cong., 1st Sess., 127 Cong. Rec. S9916 (daily ed. Sept. 17, 1981).

99 S. Rep No. 331, 97th Cong., 2d Sess. 3 (1982) [hereinafter *Senate Judiciary Report on S. 1940*]. The Senate Judiciary Committee did not issue a report on S. 1639, but did issue one on the amended version of S. 1639, which was numbered S. 1940.

100 *Id.* at 3 n.1.

101 *See The Extradition Reform Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Senate Judiciary Hearings on S. 1639*].

102 *See* S. 1940, 97th Cong., 2d Sess., 127 Cong. Rec. S15101 (daily ed. Dec. 11, 1981) [hereinafter S. 1940].

103 *Senate Judiciary Report on S. 1940*, *supra* note 99.

104 *See* S. Rep. No. 475, 97th Cong., 2d Sess. 2 (1982) [hereinafter *Senate Foreign Relations Report on S. 1940*]. The Senate Foreign Relations Committee did not hold formal hearings on the bill.

105 *Id.*

the Judiciary.[106] It was entitled "The Extradition Reform Act of 1981."[107] The bill "incorporated many of the suggestions of the Administration which [would be] . . . found in Senate bill S. 1940."[108]

In response to suggestions made at hearings on the bill and through written statements,[109] the House Subcommittee on Crime made significant improvements in the bill and approved an amendment in the nature of a substitution to replace H.R. 5227. The resulting "clean bill," H.R. 6046, entitled "The Extradition Reform Act of 1982," was favorably reported by the Committee on the Judiciary on June 24, 1982, with amendments.[110] On that day, it was sequentially referred to the Committee on Foreign Affairs.[111] That Committee, however, declined to entertain any amendments to provisions dealing with matters within its jurisdiction and favorably reported the bill without amendment on July 29, 1982.[112] The Committee's Report expressly noted, however, that it favorably reported the bill without amendment "with the understanding that the members of the committee would be able to offer their amendments to the bill when it [would be] considered by the Committee of the Whole House."[113] Committee members' views were published as "Additional Views" in the Committee's Report.[114]

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106 *See* H.R. 5227, 97th Cong., 2d Sess., 128 Cong. Rec. H9670 (daily ed. Dec. 15, 1981) [hereinafter H.R. 5227].

107 H.R. Rep. No. 627, Part I, 97th Cong., 2d Sess., 1 (1982) [hereinafter *House Judiciary Report on H.R. 6046*]. The House Judiciary Committee did not issue a report on H.R. 5227, but did so on an amended version of H.R. 5277, which was numbered H.R. 6046.

108 *Id.* at 3.

109 *See Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1981) [hereinafter *House Judiciary Hearings on H.R. 5227*].

110 *See* H.R. 6046, 97th Cong., 2d Sess. (1982), 128 Cong. Rec. H 1405 (daily ed. Apr. 1, 1982) [hereinafter H.R. 6046]; *House Judiciary Report on H.R. 6046*, *supra* note 107.

111 H.R. Rep. No. 627, Part II, 97th Cong., 2d Sess. (1982) [hereinafter *House Foreign Affairs Report on H.R. 6046*]. *See The Extradition Reform Act of 1982: Hearings on H.R. 6046 Before the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982) [hereinafter *House Foreign Affairs Hearings on H.R. 6046*].

112 *See House Foreign Affairs Report on H.R. 6046*, *supra* note 107.

113 *Id.* at 2.

114 *Id.* at 6 (remarks of Hon. Geo. W. Crockett, Jr.); *id.* at 7 (remarks of Hon. Paul Findley); *id.* at 8 (remarks of Hon. Arlen Erdahl). Subsequent to the House Foreign Affairs Committee's favorable reporting of H.R. 6046, several members of Congress voiced strong objections to the bill on the floor of the House. Congressman Crockett proposed provisions to: (1) amend the definition of a "political offense;" (2) give the judiciary the authority to deny extradition if it finds that the person, if returned, would be persecuted because of his "race, religion, nationality, membership in a particular group, or political opinion"; (3) impose upon the secretary of state the duty to condition extradition upon compliance with international law, including international protection of human rights; (4) provide explicitly for the relator's right to petition the secretary of state to refuse or condition his extradition; (5) provide explicitly for the "rule of specialty," which requires that the requesting state shall prosecute an individual only for those crimes for which extradition was granted; and (6) require that a requesting state shall be represented only by private counsel at extradition proceedings in the United States. *See* 128 Cong. Rec. H6968-70 (Sept. 14, 1982). The members of Congress, although not proposing specific amendments, voiced disagreement over substantially the same provisions with which Congressman Crockett took issue, most notably the narrowly defined "political offense exception" and the perceived need to have the judiciary determine whether the relator, if returned, would be subjected to persecution because of race, religious, or political beliefs. *See* 128 Cong. Rec. E4128 (daily ed. Sept. 13, 1982) (remarks of Hon. D. Edwards); *id.* at E4145, E4152 (daily ed. Sept. 14, 1982) (remarks of Hon. F. Stork; Hon. J. Conyers, Jr.); *id.* at E4179, E4189, E4192, E4200, E4201 (daily ed. Sept. 15, 1982) (remarks of Hon. A. Moffett, Hon. G. Studds, Hon. W. Fauntroy, Hon. P. Schroeder, Hon. S. Chisholm); *id.* at E4214, E4222, E4233, and E4241, E4245 (daily ed. Sept. 16, 1982) (remarks of Hon. R. Wyden, Hon. B. Frank, Hon. W. Brodhead, Hon. D. Bonioz, and Hon. B. Rosenthal). Congressman Hughes,

On August 19, 1982, the Senate, in accordance with congressional rules, published its enacted version of the Extradition Reform Act of 1981 in the Congressional Record.[115] By error, the enacted bill published in the Record contained, without distinction, both the amendments adopted by the Senate Judiciary Committee and those adopted by the Senate Foreign Affairs Committee, which were contradictory on several important points, including the definition of the "political offense exception" and the court's jurisdiction to determine the applicability of the exception.[116] However, this was later corrected by an insertion in the Record to reflect that the Senate had enacted the bill as approved by the Foreign Relations Committee. This minor technical error was symptomatic of the limited and hurried attention given by the two Senate Committees to this important legislation.

Subsequently, the House was to have enacted its own version of the bill in September 1982 or in the "lame duck" session of November 1982, but it did not. On January 26, 1983, during the first session of the 98th Congress, a Senate bill was introduced before the newly established Senate Sub-Committee on Crime Legislation of the Committee on the Judiciary as S.220. This was the "Extradition Act of 1983,"[117] which is almost identical to S. 1940, which was

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sponsor of H.R. 6046 and Chairman of the Subcommittee on Crime of the House Judiciary Committee, responded to Congressman Crockett's proposed amendments in a letter to Congressman Crockett dated September 22, 1982. In that letter, Congressman Hughes defended the bill's definition of the "political offense exception" and failure to include political persecution in the court's determination of extraditability. He took no issue with the proposals regarding conditional extradition to ensure the protection of the relator's human rights, petition to the secretary of state, and the rule of specialty, because he considered these proposals to be merely codifications of existing practice. He did object to the requesting state's use of private counsel.

115 128 Cong. Rec. S10880–84 (daily ed. Aug. 19, 1982).

116 *Id.* at S10882–83.

117 *See* S. 220, 98th Cong., 1st Sess., 129 Cong. Rec. S385 (daily ed. Jan. 27, 1983) [hereinafter S. 220]. Comparable extradition legislation was also introduced as Part M of Title X of the Comprehensive Crime Control Act of 1983; *see* S. 829, 98th Cong., 1st Sess., 129 Cong. Rec. S3070 (daily ed. Mar. 16, 1983), which was amended and subsequently reintroduced as S. 1762. *See* S. 1762, 98th Cong., 1st Sess., 129 Cong. Rec. S11713 (daily ed. Aug. 4, 1983). This subsequent version was favorably reported by the Senate Judiciary Committee on September 14, 1983; *see* S. Rep. No. 225, 98th Cong., 1st Sess. (1983), and favorably reported by the Senate Foreign Relations Committee on September 20, 1983. *See* S. Rep. No. 241, 98th Cong., 1st Sess. (1983). The Senate removed the provisions regarding extradition from the Comprehensive Crime Control Act bill, however, and considered them separately. *See also* H.R. 2643, 98th Cong., 2d Sess., 129 Cong. Rec. H2249 (daily ed. Apr. 20, 1983) [hereinafter H.R. 2643]. The administration's views were conveyed to the Senate and the House by Michael Abbell, then Director, International Affairs Division, Department of Justice; John Harris of the Division who prepared the administration's drafts; and Daniel McGovern, then Deputy Legal Advisor, Department of State. S. 1639 and S. 1940 were introduced by Senator Strom Thurmond, Chairman of the Committee on the Judiciary; the principal resource person on those bills was Paul Summit, Chief Counsel of the Judiciary Committee. H.R. 2643, H.R. 5227, and H.R. 6046 were introduced by Congressman William Hughes, Chairman, Sub-Committee on Crime of the Committee on the Judiciary. The principal resource person on these bills was David Beier, Counsel, Committee on the Judiciary. S. 220, which was almost identical to S. 1940, was introduced by Senator Paul Laxalt, Chairman of the newly created Sub-Committee on Crime Legislation to the Committee on the Judiciary. The American Society of International Law contributed to the legislative drafting process in 1982 by convening a meeting of the principal resource persons of the Senate and House Committees on the Judiciary, the Senate Committee on Foreign Relations, representatives of the Departments of Justice and State, and a number of experts to discuss the various contending views. The views of the administration were more specifically embodied in the Senate bills. Other views, including many suggestions presented by this writer, found their expression in the House bills. It was the expectation of all concerned that if H.R. 6046 passed the House, a conference on S. 1940 and H.R. 6046 would produce a new Act in 1982. But because the House bill was not passed in 1982, new Senate and House bills had to be introduced in 1983. This occurred in the Senate with S. 220 and in the House with H.R. 2643 and H.R. 3347. There was eventually a conference to reconcile differences

adopted by the Senate on August 12, 1982. On April 20, 1983, during the second session of the 98th Congress, a new House Bill was introduced before the Sub-Committee on Crime of the Judiciary Committee as H.R. 2643, "The Extradition Act of 1983,"[118] which is very similar both to its predecessor in the House, H.R. 6046, and to the new Senate Bill, S. 220. The marked-up copy of H.R. 2643 was reintroduced as H.R. 3347, but was not technically reported out, even after being marked up.[119]

Congressman William J. Hughes, Chairman of the Subcommittee on Crime, described the history of extradition reform legislation in the House:

> The Extradition Act of 1984 [H.R. 3347] is the product of extensive consideration by the Subcommittee on Crime and the Committee on the Judiciary. This consideration began in the 97th Congress and continued into the 98th Congress. The primary impetus for the legislation was the Committee's awareness that the extradition laws of the U.S. are outdated and sorely in need of reform. The extradition laws which are codified in 18 U.S.C. sections 3181 *et seq.*, were last the subject of major legislative action in 1882.
>
> In addition, both the current and previous Administrations requested Congressional review of the extradition laws, so that judicial interpretation of the laws could be codified and so that more recent extradition treaties to which the U.S. is a party could be more effectively implemented.
>
> During the 97th Congress, the Committee considered and favorably reported the Extradition Act of 1982. Unfortunately, because of both the press of legislative business during the post-election session and certain controversies over its substance, the bill was not considered on the floor of the House.
>
> On April 20, 1983, during the 98th Congress . . . Harold S. Sawyer of Michigan, ranking Republican member of the Subcommittee, [and I] introduced H.R. 2643, the Extradition Act of 1983.
>
> The Subcommittee on Crime held two days of hearings on H.R. 2643. The Subcommittee received oral testimony and written statements from the Departments of State and Justice, leading scholars in the fields of international law and extradition, defense attorneys, civil liberties groups and persons concerned with the preservation of international human rights.[120]

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between the two versions before a new Act could be enacted into law entitled the "Extradition Act of 1983." Comparable extradition legislation was also introduced as part of the Comprehensive Crime Control Act of 1983 (*see* H.R. 2013, 98th Cong., 1st Sess., 129 Cong. Rec. H1110 (daily ed. Mar. 9, 1983)), which was amended and subsequently reintroduced as H.R. 2151. *See* H.R. 2151, 98th Cong., 1st Sess., 129 Cong. Rec. H1265 (daily ed. Mar. 16, 1983). H.R. 2643 was the subject of hearings before the Subcommittee on Crime of the Committee on the Judiciary on April 28, 1983 and May 5, 1983. The bill was marked up by the Subcommittee and a clean bill ordered, which was favorably reported to the full Committee on June 8, 1983. It was then reintroduced as H.R. 3347, also entitled the "Extradition Act of 1983," on June 16, 1983, *see* 129 Cong. Rec. H. 4102 (daily ed. June 16, 1983), and forwarded to the full Committee. The Judiciary Committee further amended the bill and ordered it favorably reported to the House on October 4, 1983. *See* Staff of House Committee on the Judiciary, 98th Cong., 1st Sess., Extradition Bill (Comm. Print Oct. 6, 1983). H.R. 3347, as marked up, was technically never reported out to the House, however, as it had to be accompanied by a report and none was ever filed. It is thought that the report was not filed and the bill not reported out to the full House because of opposition to it from the Department of Justice, as well as dissatisfaction with some of its provisions within the Committee, particularly the provisions dealing with the rule of non-inquiry and conspiracy. As to the Department of Justice, it prefers to operate under existing legislation rather than under the new draft, essentially because of the bill's provisions regarding bail, but also, as this writer sees it, because the new legislation provides far less opportunity for ambiguity, which is frequently utilized to the government's advantage, than does existing legislation and its interpretation.

118 H.R. 2643, 98th Cong., 2d Sess (Apr. 20, 1983).

119 *Id.*

120 *See* H.R. Rep. 998, 98th Cong., 2d Sess., 2–7 (1984).

After considering several amendments to H.R. 2643, the Subcommittee on Crime reported a "clean bill," H.R. 3347, which was introduced on June 16, 1983. The Committee on the Judiciary favorably reported the new bill on October 4, 1983. H.R. 3347 went before the whole House as the "Extradition Act of 1984" on September 7, 1984.[121]

It is particularly interesting to note the historical similarity between the 1848 Act,[122] whose structure remains in effect to date subject to the amendments referred to above,[123] and the Act that was intended to replace it. The two reforms were prompted essentially by considerations arising out of the political aspects of extradition rather than its technical aspects. The 1848 Act can be traced to the landmark case of *In re Robbins*,[124] decided in 1799. In that case, President Adams granted England's request that the United States extradite an individual charged in England for a murder he had allegedly committed while in the British navy. Robbins's defense was that he had been impressed into British service, and that he had escaped during the other crew members' mutiny in which the ship's officers had been killed. Many individuals in the United States perceived this to be a justifiable act for which punishment was wholly inappropriate, believing that Robbins should not have been returned to England.[125] Although the exact term "political offense exception" was not used at the time, the underlying concept was already recognized.[126]

The legal basis for Robbins's surrender was President Adams's order that he be arrested and returned to England. In reviewing that order, in *habeas corpus* proceedings, the federal district court, sitting in Charleston, South Carolina, relied on the president's directions through the secretary of state, even though neither Jay's Treaty with England[127] (which was the treaty basis for the request) nor national legislation formed a legal basis for such action.[128] President Adams's decision in the highly publicized and controversial extradition of Robbins was one of the reasons for his failure to be reelected as president.[129]

The political controversy and legal irregularities of the *Robbins* case were not soon forgotten. In 1848, similar factors were brought to the forefront of public attention in the *Metzger* case,[130] which directly prompted Congress to enact the 1848 Extradition Act.[131]

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121 *Id.* at 4.

122 Act of Aug. 12, 1848, ch. 167, § 5, 9 Stat. 302.

123 *See supra* notes 109–114 and accompanying text.

124 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

125 *See* 10 Annals of Congress 580–640 (1800), reprinted following *In re Robbins,* 27 F. Cas. 825, 833–870 (D.S.C. 1799) (No. 16,175).

126 For a historical analysis of the "political offense exception," *see* Ch. VIII, Sec. 2.1. *See also* Christine Van den Wyngaert, The Political Offense Exception to Extradition (1980).

127 The Treaty of Amity, Commerce and Navigation with Great Britain (Jay Treaty), Nov. 19, 1794, 8 Stat. 116, T.S. No. 105, *reprinted in* Malloy, *supra* note 12, at 490.

128 *Robbins,* 27 F. Cas. at 826–827).

129 1 Moore, Extradition, *supra* note 2, at 550–551.

130 *In re* Metzger, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9, 511). In *Metzger*, France requested that the United States extradite an individual charged with forgery in France. The judicial determination of Metzger's extraditability was made by Judge Betts in chambers, who found Metzger's extradition in order. The decision prompted considerable discussion over whether judicial review could be performed in chambers as opposed to in open court.

131 Ch. 167, § 5, 9 Stat. 302, 303. *See In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852) (noting "[t]hat the eventful history of Robbin's case had a controlling influence . . . especially on Congress, when it passed the act of 1848, is, as I suppose, free from doubt."). *See also In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996).

The 1981–1984 Acts were prompted primarily by three highly publicized causes célèbres in which the "political offense exception" was at issue: *In re Mackin*,[132] *In re McMullen*,[133] and *Eain v. Wilkes*.[134]

In *McMullen* and *Mackin*, extradition to the United Kingdom was denied on the basis of the "political offense exception." In the *Eain* case, however, the exception was denied and the relator was extradited to Israel.[135]

The Department of Justice, through some of its officials, made an inordinate issue of these cases before the Senate and the House. Regrettably, the motivations for the revisions of the U.S. extradition statute were presented to Congress on the erroneous assumption that the "political offense exception" had been interpreted or perceived to be a bar to effective extradition. This position was asserted by administration representatives at hearings on the bills before both the Senate and the House,[136] where exaggerated claims were made that a continuation of such a trend would cause the United States to become a haven for terrorists.[137] Such result is unlikely as the "political offense exception" has rarely been argued in the United States as a basis for denying an extradition request. In addition, the "exception" is rarely used as a defense—consistently over the last several decades there has been on average one reported case having any bearing on the "political offense exception." During this same period there have been between fifty and one hundred extradition requests per year, raising a panoply of technical questions much more important to the administration of criminal justice and international cooperation in criminal matters than the rare "political offense exception."[138]

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132 *In re* Mackin, 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), *aff'd*, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981). In *Mackin*, the United Kingdom's request that a member of the Provisional Irish Republican Army be extradited to the United Kingdom in order to face prosecution for the charge of attempted murder and related offenses he allegedly committed against a British soldier (dressed in civilian clothes), standing in a Belfast bus station, was denied on the grounds that these charges were "political offenses" for which extradition could not be granted.

133 No. 3-78-1899 M.G. (N.D. Cal. May 11, 1979). In *In re McMullen*, the United Kingdom's request that a member of the Provisional Irish Republican Army be extradited to the United Kingdom in order to face prosecution for his alleged bombing of a British army installation in England was denied on the grounds that he was being sought for a "political offense" for which extradition could not be granted.

134 Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). In Eain, Israel's request was granted that an alleged member of the Palestine Liberation Organization be extradited to Israel to be prosecuted for his alleged bombing of a bus in Israel. The court refused to entertain the relator's defense that such actions constituted "political offenses." *Id. See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

135 *See* Ch. VIII, Sec. 2.1 (discussing the political offense exception).

136 *See Senate Judiciary Hearings on S. 1639, supra* note 101, at 2, 4, 8, and 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Judiciary Hearings on H.R. 5227, supra* note 109, at 26–27, 32 (testimony of R. Olsen, M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Foreign Affairs Hearings on H.R. 6046, supra* note 111.

137 *See Senate Judiciary Hearings on S. 1639, supra* note 101, at 30 (testimony of W. Hannay). The Senate Judiciary Committee, which supported the view that the political offense exception should be placed outside the court's jurisdiction, placed special emphasis on this testimony and written statement as "an excellent discussion of the 'political offense exception' to extradition and the impact of recent cases," which the Committee adopted as its view. *See Senate Judiciary Report on S. 1940*, *supra* note 99, at 14 nn.59, 60, and 15 n.61.

138 International penal cooperation includes the processes of extradition, judicial assistance, and transfer of offenders. *See generally*, Bassiouni, Draft Code [hereinafter, Bassiouni, Draft Code]; M. Cherif Bassiouni, II International Criminal Law (1999) [hereinafter, Bassiouni, II ICL]; A Treatise on International Criminal Law (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1973) [hereinafter,

These technical questions[139] have received little consideration in the Senate, though somewhat greater attention in the House.

The fundamental controversy giving rise to both the 1848 Act and the 1981–1984 Acts is the respective role of the executive, legislative, and judicial branches in granting a foreign state's extradition request. The outcomes, however, were different on these two historic occasions. The 1848 Act was designed to limit executive power, so that action such as President Adams's ordering an individual's surrender in *In re Robins* would be impermissible. The underlying theory was that the judiciary should have the authority to review executive action so that fundamental individual liberty would not be improperly infringed upon. The 1981–1984 Acts in the original Senate versions intended the opposite. The administration sought to expand the executive's authority to extradite individuals, on the theory that judicial review should not be allowed to interfere with the executive's authority to direct the United States' foreign relations, and to use extradition as a method of fostering friendly relations with foreign states.[140] This philosophical diversity is the essence of the difference between the Senate bills and the House bills, with the administration's view reflected in the Senate's more executive-oriented approach.

The Act did not fulfill all of the administration's requests, although it did curb judicial discretion and review and the increasing safeguards of individual rights, which were manifest in U.S. jurisprudence.[141] The Act represented a technical improvement over existing legislation, and was indeed needed to meet the exigencies of dealing with one hundred requests per year. It was also needed in order to settle some questions with which the judiciary had been wrestling for years due to the lack of a clear legislative mandate. Yet it left many open questions, which it shifted to the judiciary for future interpretation. In many respects, the Act did no more than codify existing jurisprudence. More should have been done, and an opportunity, which, at the time waited 135 years, was not fully utilized.

The relationship between legislative provisions and treaty provisions is of fundamental importance in U.S. extradition law and practice because of the Constitution and the relationship between treaties and legislation.[142] Basically, this relationship can take one of two forms: (1) the legislation can serve as the basis for all or most substantive and procedural matters, while treaties provide for exceptional matters not included in the legislation; or (2) the legislation can serve as a supplement to treaties such that all substantive and procedural matters are regulated primarily by treaties rather than by the legislation. The Act was a hybrid of both approaches.

Bassiouni & Nanda, Treatise]. The practice of extradition originated in early non-Western civilizations, and has now reached the point where it is a common feature of bilateral, regional, and multilateral arrangements between states. *See* Ch. I, Secs. 1, 4, 5, and 6. *See also* M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 Case W. Res. J. Int'l L. 27 (1983) [hereinafter Bassiouni, *Conventional International Criminal Law*]. The concept of the duty to prosecute or extradite originated in the writings of Hugo Grotius, who propounded the maxim *aut dedere aut punire*, which is more appropriately phrased as *aut dedere aut judicaire*. *See* Hugo Grotius, De Jure Belli ac Pacis, Bk. 2, ch. 21, secs. 3, 4 (1624). *See generally* Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 Am. J. Int'l L. 477 (1982).

139 Examples of technical aspects are provisions regarding transit extradition, priority of extradition requests, and the rule of specialty. *See Senate Judiciary Hearings on S. 1639, supra* note 101, at 20–24 (testimony of this writer); *House Judiciary Hearings on H.R. 5227, supra* note 109, at 98–106 (testimony of this writer).

140 This argument was raised unsuccessfully by the U.S. government in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D.Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

141 *See supra*, Sec. 2.

142 *See generally* Louis Henkin, Foreign Affairs and the Constitution (2d ed.1996).

The distinction between these two possible relationships has important ramifications. If the former approach were followed, then national legislation would be controlling with respect to all extradition matters and would regulate both substance and procedure. Treaties would be the exception. That is, treaties would regulate matters not included in the legislation or negotiated in the treaty as an exception to the legislation. If the latter approach were followed, however, then national legislation would not be the general rule. Instead, every treaty would become a separate substantive and procedural statute, more or less different from the legislation. The result of that approach would be to have as many sets of norms applied by the courts as there are treaties. There are at present 160 treaties in force, applicable to 116 countries.[143] The obvious consequence would be a lack of consistency and uniformity in the practice of extradition and potential jurisprudential confusion, leading to increased litigation and prolongation of the process. Precedents would, therefore, usually affect the interpretation of the provisions of each treaty, thus stimulating increased judicial recourses and delays through the review process. In addition to the obvious advantages of uniformity, reduction of litigation, and shortening of delays in the process, a truly national legislation would also reduce the burden on the U.S. government in renegotiating with every foreign government basic substantive and procedural matters already contained in the national legislation. Furthermore, the existence of national legislation, although it would not preclude the government from negotiating treaty provisions that might be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments regarding provisions urged by the foreign government that would differ from national legislation. It would thus maintain greater uniformity among treaties and conformity between treaties and the legislation. The more the legislation, in its specific language, allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses that may differ from the legislation.

Furthermore, national legislation that is comprehensive, covering substance and procedure, would allow extradition to be performed on the basis of "executive agreement" and "reciprocity,"[144] which the Act excludes, presumably in reliance on longstanding and established jurisprudence,[145] although nothing in the Constitution would prevent it.[146]

Regrettably, the general orientation of the Act is that it is a supplement to treaties or that it otherwise applies in the absence of contrary treaty provisions, but only when a treaty does exist between the requesting state and the United States. Consequently, not all substantive and procedural matters that should be regulated by treaties will tend to be regulated in that manner. This approach differs from that of many countries, who attempt to conform their treaties to national legislation, and in fact specify in their treaties that they are applicable in accordance with national legislation.[147]

In addition, the Act is unclear as to reliance on multilateral international criminal law conventions as the basis for a relator's extradition.[148] These treaties provide, inter alia, that state-parties

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143 *See* Extradition Treaties Interpretation Act of 1998, 18 U.S.C. § 3181 (2000), *as amended* Pub. L 104-132 title IV § 443 (a), Apr. 24, 1996, 110 Stat. 1280. *See also* Igor I. Kavass & Adolf Sprudzs, Extradition Laws and Treaties: U.S. (2 vols. 1980); Igor I. Kavass, 1–3 A Guide to the U.S. Treaties in Force (2006).

144 *See infra* Sec. 4.

145 *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 411 (1886).

146 *See infra* Sec. 4.

147 These observations were made by this writer before the Senate and House Judiciary Committee Hearings on their respective proposed bills. *See Senate Judiciary Hearings on S. 1639, supra* note 101, at 20–23; *House Judiciary Hearings on H.R. 5227, supra* note 109, at 101–102.

148 For a bibliography of international criminal law conventions, see Bassiouni, ICL Conventions, *supra* note 72. For duty to extradite or prosecute, *see* Ch. I, Sec. 3.

are obligated to prosecute or extradite individuals who have allegedly committed the proscribed act.[149] They contain no provision for the mechanism by which extradition is to be accomplished, because they remand to the applicable nation. In the instance where the basis for the extradition request is a multilateral international criminal law convention, the provisions of the Act would be applicable. By structuring the Act as an adjunct to treaties rather than as the generally applicable norm, the legislature neglected to take into account the way in which this would affect reliance upon multilateral international criminal law conventions that contain extradition clauses. Thus, in this respect, the Act is ambiguous. As one of Congress's principle objectives in its reform of existing extradition law and practice is to permit the United States to cooperate in combating international and transnational criminality,[150] the Act's failure to specifically provide for reliance upon multilateral international criminal law conventions containing extradition clauses is particularly unfortunate. Yet because of the ambiguity of the relevant language of the Act, the courts could construe it as applicable in such cases, as discussed below.

Neither the administration nor Congress appears willing to pursue comprehensive legislation to modernize the existing provisions of 18 U.S.C. §§ 3181–3196. Instead, U.S. policy since 1981 seems to be intent on pursuing bilateral treaties, embodying whatever provisions could be negotiated that would alter or supplement existing statutory provisions. The problem with this approach is that it does not provide for uniformity and consistency in the extradition law and practice of the United States. In addition, it creates different jurisprudence for different treaties, thus creating a disparity in the law and practice of extradition, depending upon which treaty is applicable at the time and also depending upon how different circuits will interpret certain requirements for extradition. This situation makes it more difficult to ascertain the precedential value of decisions interpreting a given treaty with respect to other treaties. This situation can create inconsistencies. As a result, the most important area of jurisprudential development is that of treaty interpretation and the relationship of treaties to the existing statute, which they may supersede, and the application of constitutional rights. Thus, many issues, which have been solved by reference to the statute,[151] should be reconsidered in light of constitutional provisions that have not heretofore been relied upon because the provisions of the statute or other decisions were deemed sufficient. Among these issues are that of the requirement of "probable cause"[152] and its correspondence to the Fourth Amendment, and bail, which, though not statutorily provided for, has been established by the Supreme Court without reference to the Sixth Amendment.[153]

During the hearings before the Subcommittee on Crime regarding H.R. 5227, this writer spoke of the need for a unified approach to extradition:

> The importance of having a single national legislation providing uniformity in application cannot be underestimated. The Extradition Act should accomplish this purpose by serving as the

149 *See* Ch. I, Sec. 3. Bassiouni, *Conventional International Criminal Law, supra* note 138. *See also* M. Cherif Bassiouni, General Report on the Judicial Status of the Requesting State Denying Extradition, XIth International Congress of Comparative Law, Caracas, Venezuela, August 20–September 5, 1982, Proceedings of XIth International Congress of Comparative Law (analyzing comparatively state law and practice regarding duty to prosecute or extradite).

150 *Senate Judiciary Report on S. 1940*, *supra* note 99, at 4; *House Judiciary Report on H.R. 6046*, *supra* note 107, at 3–4.

151 18 U.S.C. §§ 3181–3196 (2000).

152 18 U.S.C. § 3184 (*Amended* Pub. L. 104-132 title IV § 443 (b) Apr. 24, 1996, 110 Stat. 1281). *See also* Ch. IX.

153 *See* Ch. IX.

> basis for all substantive and procedural matters, while treaties, on the other hand, should include exceptional matters not covered in the legislation.
>
> If the national legislation is not the general rule, then every treaty becomes a separate procedural statute, with the result that there could be as many as one hundred different procedures applied by the courts. The obvious consequence would be lack of consistency in the practice of extradition and potential jurisprudential confusion. Because precedents would only affect the interpretation of the provisions of each treaty individually, this would stimulate and increase judicial recourses with the result that the judicial case load would be significantly increased, especially at the appellate level, for a number of years to come. In addition to the obvious advantages of uniformity and reduction of litigation, a national legislation would also reduce the burden on the U.S. government on renegotiating with every foreign government basic substantive and procedural matters already contained in the Act.
>
> Furthermore, the existence of national legislation, while it would not preclude the government from negotiating treaty provisions that may be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments in maintaining greater uniformity among treaties and conformity between the treaties and the legislation. The more the legislation in its specific language allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses which may differ from the legislation. Thus a true national legislation is what is suggested as it is the trend throughout the world as opposed to our Act which merely supplements treaties which would put the U.S. in a rather unique position among most countries of the world with a tradition in extradition law and practice.[154]

The trend toward bilateralism as opposed to multilateralism is predicated on the assumption that the United States can obtain more favorable extradition bilateral treaties from friendly states and from those states it can influence. The embodiment of this approach is the United States–United Kingdom Supplementary Extradition Treaty of 1985,[155] which carves out limitations to the political offense exception only as between the United States and the United Kingdom.[156]

2.3. Defining a "Foreign Government" for Purposes of Extradition Treaties

In *In re Extradition of Coe*, the authority of a foreign government to enter into agreements with the United States was discussed.

> The authority of a foreign government to enter into any agreement with the U.S. is a political question on which the Court must defer to the political branches of the government. This Court agrees with the Second Circuit, as it found in Cheung, that the political question doctrine prevents the courts from determining the legitimacy of the government of the HKSAR. The Second Circuit further found that there was "no doubt that in enacting the Agreement, both the Executive Branch and the Senate intended to conclude a treaty with the government of HKSAR,

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154 *House Judiciary Hearings on H.R. 5227, supra* note 109, at 102. The same observation was made by this author before the Senate Judiciary Committee on S. 1639. *See Senate Judiciary Hearings on S. 1639, supra* note 101.

155 Supplementary Treaty Concerning Extradition, June 25, 1985, U.S.–U.K., T.I.A.S. (not yet numbered), 24 I.L.M. 1105 (1985), *superseded by* Extradition Treaty, U.S.–U.K., March 31, 2003, S. Treaty Doc. No. 108-23, 2003 WL 23527406. *See also* M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice between Friendly Cooperation among Allies and Sound Law and Policy*, 15 Denv. J. Int'l L. & Pol'y 255 (1987); M. Cherif Bassiouni, *U.S.–United Kingdom Extradition Treaty, Statement Before the Senate Foreign Relations Committee*, 99th Cong., 1st Sess., 276 (1985).

156 *See* Ch. VIII, Sec. 2.1 (discussing the political offense exception).

> rather than with its sovereign, the PRC." *Cheung*, 213 F.3d at 93. As argued by the U.S. here, it is uncontroverted that the President entered into the extradition agreement with the HKSAR and that he did so with the advice and consent of the Senate. (Position at 7-9). Therefore, the President and Senate have unequivocally indicated that they believe that the government of the HKSAR has the authority to enter into an extradition agreement with the U.S.
>
> In an analogous case, the Ninth Circuit found in *Then v. Melendez,* 92 F.3d 851 (9th Cir. 1996), that the actions of the government indicating an intention by the U.S. to negotiate and approve the continuation of an extradition treaty are sufficient to "establish the existence of a constitutionally valid extradition treaty between Singapore and the U.S.." *Then,* 92 F.3d at 854; *see also Schroder v. Bush,* 263 F.3d 1169, 1174 (10th Cir.2001) (noting that the President alone has the power to negotiate treaties and the Constitution does not contemplate participation by "the Judiciary in any fashion in the making of international agreements"), *cert. denied,* 534 U.S. 1083, 122 S.Ct. 817, 151 L.Ed.2d 700 (2002); *Miami Nation v. U.S.,* 255 F.3d 342, 346–47 (7th Cir. 2001) (noting that the recognition of a government is traditionally an executive function and "lies at the heart of the doctrine of 'political questions."), *cert. denied,* 534 U.S. 1129, 122 S.Ct. 1067, 151 L.Ed.2d 970 (2002). Similarly, in determining whether Taiwan was bound by the Warsaw Convention, which was signed by the PRC, but not by Taiwan, the Ninth Circuit recognized that the Constitution "commits to the Executive Branch alone the authority to recognize, and to withdraw recognition from, foreign regimes." *Mingtai Fire & Marine Ins. Co. v. UPS,* 177 F.3d 1142, 1145 (9th Cir.1999), *cert. denied,* 528 U.S. 951, 120 S.Ct. 374, 145 L.Ed.2d 292 (1999). Thus, the question of the sovereignty of Taiwan was found to be a political question, which could not be addressed by the courts. *Id.* In order to determine the applicability of the Convention in that case, the Ninth Circuit held that it would merely "look to the statements and actions of the 'political departments' in order to answer whether, following recognition of China and derecognition of Taiwan, China's adherence to the Warsaw Convention binds Taiwan." *Id.* Finding evidence of executive and legislative intent to deal separately with Taiwan, the Ninth Circuit found that "Taiwan is not bound by China's adherence to the Warsaw Convention." *Id.* at 1147.
>
> Here, this Court is not in a position to intrude into the political sphere and find, contrary to every indication of executive and legislative intent, that the HKSAR is not a foreign government capable of entering into a treaty with the U.S.. Because the recognition of foreign regimes is solely within the power of the Executive branch, this Court must defer to the decision by the President and State Department that the HKSAR was a proper foreign entity with which to enter into an extradition agreement.[157]

The relator in this case also argued that a treaty must be with a sovereign state. The district court, however, found that a treaty can also be with a "subsovereign entity." The court articulated its reasoning as follows:

> Coe argues that the Court is not precluded by the political question doctrine from examining the enforceability of the Agreement because the key question governing its validity is whether the President has the constitutional authority to enter into a "treaty" with a subsovereign entity. Because the Second Circuit in *Cheung* did not address this question, Coe claims that its analysis is incorrect. Coe contends that the President's actions in entering into the Agreement violated the Constitution because the Constitution only authorizes treaties with sovereign entities. Further, Coe asserts that this Court must examine the fundamental question of whether the President's actions exceeded the scope of his Constitutional authority. If the Agreement was not Constitutionally authorized, Coe argues, it is not a valid treaty and the Court lacks subject matter jurisdiction to grant the request of the HKSAR for his extradition. (Response at 9–11).
>
> Coe's argument rests on his assertion that 'a treaty can only be maintained between nations, not between a nation and a city or region of a country.' (Response at 5). In support of this position,

157 *In re Extradition of* Coe, 261 F. Supp. 2d 1203, 1208–1209 (C.D. Cal. 2003).

he cites *Valentine v. U.S.,* 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5 (1936), as standing "for the proposition that treaties may be maintained only between sovereign nations." (Response at 6). But the Supreme Court's statement in *Valentine* that the "power to provide for extradition is a national power; it pertains to the national government and not to the states," was made in reference to the fact that the Constitutional power to negotiate treaties in this country is reserved for the federal government rather than left to the states. 299 U.S. at 8, 57 S.Ct. 100. The issue before the Supreme Court was the validity of an extradition treaty with France that excluded extradition of each country's own citizens. Because the Supreme Court found that it was limited to interpreting the terms of the existing treaty, which clearly excluded the citizens of each country, the Supreme Court concluded that the President was without power to agree to the request of France to extradite two citizens of the U.S.. In *Valentine,* both the U.S. and France were unquestionably sovereign entities and, thus, the Supreme Court had no occasion to even touch upon the issue presently before this Court. Similarly, in *U.S. v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), also cited by Coe, the issue before the Supreme Court was whether a defendant could be tried in the U.S. on a different crime than the one for which Great Britain had extradited him. Coe points to the Supreme Court's quote that "[a] treaty is primarily a compact between independent nations" (*Rauscher,* 119 U.S. at 418, 7 S.Ct. 234), as supporting his position that treaties must be "contracts between nations" and the U.S. is not authorized to enter into a treaty with a non-sovereign entity. (Response at 6–7). But the issue of the degree of sovereignty required in a foreign government to constitutionally permit the U.S. to enter into a treaty with it was not relevant to the decision therein, and the quoted language sheds no light on this question.

Coe also references the Ninth Circuit's decision in *Stevenson v. U.S.,* 381 F.2d 142 (9th Cir.1967). (Response at 6). The Ninth Circuit in *Stevenson* did adopt the definition of "extradition" as being the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands his surrender." *See Stevenson,* 381 F.2d at 144 (citing *Terlinden v. Ames,* 184 U.S. 270, 289, 22 S.Ct. 484, 46 L.Ed. 534 (1902)). This definition, however, does not pertain to the question herein of whether such a "nation" must be a sovereign entity. In *Stevenson,* the issue before the Ninth Circuit was again unrelated to this issue. There, the Ninth Circuit found that the treaty in question was "irrelevant" because "extradition, as contemplated by the treaty, was not involved" where the individuals were deported by Mexican immigration authorities as undesirable aliens and no extradition proceedings were ever commenced by the U.S.. *Id.* at 143–44.

Coe also asserts that the Ninth Circuit in *Then* found that a treaty between the U.S. and Singapore was a valid treaty because "Singapore became a sovereign state" prior to ratification of the continuation of an existing treaty that the U.S. had entered into with the former colonial power of Singapore, the United Kingdom. (*See* Response at 6). But Coe misconstrues the holding of *Then.* The Ninth Circuit did in fact note that Singapore had become a sovereign state because the change in sovereignty of Singapore was the basis for the challenge to the validity of the extradition treaty in question. But the Ninth Circuit stated this fact in recounting the history of the relations between the U.S. and the government of Singapore. *See Then,* 92 F.3d at 853. The Ninth Circuit went on to hold that "[t]he continuing validity of the Treaty after Singapore's independence from the United Kingdom presents a political question, and we must defer to the intentions of the State Departments of the two countries." *Id.* at 854. The Ninth Circuit found that "the existence of a constitutionally valid extradition treaty between Singapore and the U.S." was based on the "respective State Departments' actions evincing an intent to continue the Treaty between the two nations." *Id.* The fact that Singapore has become a sovereign county was not determinative of the holding. Thus, none of the cases cited by Coe support his argument that treaties are constitutionally limited to sovereign entities.

Article II, section 2 of the Constitution provides that the President has "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators

> present concur." Coe's argument that the power given to the President by Article II is limited to treaties executed with sovereign entities is belied by the extensive history of treaties between the U.S. and the various Indian nations. *See, e.g., County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 231–32, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (detailing the history of treaties entered into with the Oneida Indian Nations and noting that the 1793 revision of the Indian Trade and Intercourse Act provided that no purchase of tribal lands was valid unless "made by a treaty or convention entered into pursuant to the constitution"); *Cheung,* 213 F.3d at 89–90 (noting that at the time the federal extradition statute was passed, the U.S. had "ratified hundreds of treaties with Indian tribes or nations"). An Indian nation, while retaining some inherent sovereign powers, is not an independent sovereign entity. *See, e.g., Nevada v. Hicks,* 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.") (citing *Worcester v. Georgia,* 31 U.S. 515, 6 Pet. 515, 561, 8 L.Ed. 483 (1832)); *Montana v. U.S.,* 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").[158]

In *Cheung v. United States*,[159] the Second Circuit addressed the treaty issue in connection with Hong Kong. Until July 1, 1997, Hong Kong was legally a part of the United Kingdom, and therefore the United States–United Kingdom Extradition Treaty and Protocols applied. Despite coming under China's sovereignty in 1997, Hong Kong's maintains its self-governing status until 2047.[160]

> Cheung challenged the court's jurisdiction on the ground that the Hong Kong Extradition Agreement was not a treaty between the U.S. and a "foreign government" as that term is used in § 3184. *See Cheung II*, slip op. at 6–7. He argued that a "foreign government" refers to the government of a foreign sovereign. *See id.* Because the HKSAR government is a subsovereign of the PRC, he asserted that the HKSAR government is not a cognizable party under § 3184, and, therefore, no enforceable treaty exists which authorizes his extradition to the HKSAR. *See id.* In the absence of such a treaty, he contends that the magistrate judge lacked jurisdiction under § 3184 to certify his extraditability.
>
> The magistrate judge held that the Hong Kong Extradition Agreement is valid and enforceable. *See id.* at 7–8. She noted that, notwithstanding the PRC's ultimate control of foreign affairs relating to the HKSAR, Article 151 of the Basic Law provides that the HKSAR government "may, on its own, using the name 'Hong Kong, China,' maintain and develop relations and conclude and implement agreements with foreign states and regions." *Id.* at 4. The magistrate judge also observed that the Basic Law created executive, judicial, and legislative bodies which govern Hong Kong, authorized an economic system independent of the PRC, and preserved civil and political rights. *See id.* at 4. Based largely on these factors, the magistrate judge concluded that:

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158 *Id.* at 1209–1211.

159 Cheung v. United States, 213 F.3d 82 (2d Cir. 2000).

160 The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government for the People's Republic of Chin on the Question of Hong Kong, December 19, 1984, entered into effect May 27, 1985. The date of transfer of UK control to China occurred on July 1, 1997. Hong Kong will remain self-governing for fifty years (until 2047). 1399 U.N.T.S. 33. The United States entered into a treaty on Extradition with Hong Kong that provides reciprocal extradition. *See* Agreement Between the Government of the United States and the Government of Hong Kong for the Surrender of Fugitive Offenders, December 20, 1996, entered into effect January 21, 1998. TIAS 105-3.

> with its own legislative body, its "high degree of autonomy on all matters other than defense and foreign affairs," and its unique "one country, two systems" for economic and legal matters, under the Basic Law and the U.S.–Hong Kong Policy Act, HKSAR does constitute a "foreign government" for purposes of § 3184.

Id. at 7.

Having found at a prior proceeding probable cause to believe that Cheung is guilty of the charged offenses, *see Cheung I*, 968 F. Supp. at 805–09, the magistrate judge granted the Government's request for extradition . . . [161]

On a petition for *habeas corpus* before the District Court:

> The court construed "such foreign government" to refer to the government of the "foreign country" where the charged crime was allegedly committed. *See Cheung III*, slip op. at 2–3. It held that because the HKSAR is not a "foreign country," the Hong Kong Extradition Agreement did not satisfy the § 3184 condition precedent for federal jurisdiction over Cheung's extradition. *See id.* at 6. In so holding, the district court implicitly equated a "foreign country" with a "foreign sovereign." *See id.* at 2–3.

The court also reasoned that Congress was unlikely to have intended to extradite foreign nationals to subsovereigns. *See id.* at 4. In support of this conclusion, the court noted several cases which have referred to extradition as a process between sovereign nations. *See id.*

Moreover, the district court held that neither the Hong Kong Extradition Agreement nor the Hong Kong Policy Act can be construed to have modified or repealed the federal extradition statute. *See id.* at 4–5. As to the Agreement, the district judge reasoned that this effort "by the Executive branch and the Senate does not supplant the prior legislation of the entire Congress." *Id.* at 5. Where Congress has exercised its authority to limit the Executive's latitude in conducting foreign relations by enacting the extradition statute, extradition contrary to the terms of the statute would "pose[] a substantial threat to the separation of powers." *Id.* at 6. As to the Policy Act, the district court found no "repugnancy" between the Act and the statute since the Act merely affirmed Congress's intent to fulfill existing treaty obligations, but did not itself authorize extradition. *See id.* at 5.

Accordingly, the district court held that Cheung may not be extradited to the HKSAR pursuant to § 3184 and ordered his release from custody. *See id.* at 6–7.[162]

The government sought review of this decision before the Second Circuit, which held:

> The extradition statute confers jurisdiction on federal judicial officers to conduct extradition proceedings based on "a treaty or convention for extradition between the U.S. and any foreign government." 18 U.S.C. § 3184. Although the term "treaty" is commonly understood in modern usage as a "contract[] between independent nations," *Santovincenzo v. Egan*, 284 U.S. 30, 40, 76 L. Ed. 151, 52 S. Ct. 81 (1931), the term was not necessarily so limited in the mid-19th century (or now) when the federal extradition statute was enacted. It is true that at the time Congress passed the act, the U.S. had ratified only two extradition treaties, both with sovereign nations—France and England. *See* Moore, *supra* note 2, § 74, at 84 (discussing Treaty of 1843 with France), § 78, at 84 (Treaty of 1794 with Great Britain), § 79, at 92–93 (Treaty of 1842 with Great Britain). However, the U.S. had also ratified hundreds of treaties with Indian tribes or nations. *See* Francis Paul Prucha, *American Indian Treaties* 1, 67 (1994) (noting that between 1778–1868, there were 367 ratified Indian treaties); *Worcester v. Georgia*, 31 U.S. 515, 549-53, 8 L. Ed. 483 (1832) (discussing post-Revolutionary War treaties with the Delaware and Cherokee Nations); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 8 L. Ed. 25 (1831) (noting the numerous treaties between the Cherokee Nation and the U.S.); *U.S. v. Claus*, 63 F. Supp. 433, 434 (W.D.N.Y. 1944) (discussing the impact of the Selective Service Act on treaties with various Indian tribes signed

161 *Cheung*, 213 F.3d at 86–87.

162 *Id.* at 87

between 1784 and 1794). From the first years of our constitutional republic, the Indian treaties have enjoyed a status "on a par with foreign treaties," *id.* at 67; *see* Felix S. Cohen, *Handbook of Federal Indian Law* 33-34 (1988) ("That treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view which has been repeatedly confirmed by the federal courts[.]"). This has been the case even though Indian treaty partners have been described as "domestic dependent nations" insofar as they had ceded powers generally associated with sovereignty, including the right freely to carry out foreign relations and trade. *Cherokee Nation*, 30 U.S. at 17; *see* Prucha, *supra*, at 5, 7.

Thus, it is clear that the term "treaty" had a meaning broader than an agreement between fully sovereign or independent entities. Indeed, at the time the extradition statute was enacted in 1848, "treaty" was also defined as "the treating of matters with a view to settlement; discussion of terms, conference negotiations" and "[a] settlement or arrangement arrived at by treating or negotiation." *Oxford English Dictionary* 465 (2d ed. 1991) (providing annotations about the uses of words in different historical eras); *see* Prucha, *supra*, at 24. Nothing in these definitions suggest that only a sovereign nation can enter into treaties, as Cheung contends.

We consider next the § 3184 requirement that the treaty be between the U.S. and "any foreign government." We believe the district court correctly construed "foreign government" by reference to § 3181, which clarifies that the relevant foreign government is the government of the foreign country where the alleged extraditable crime was committed.[3] This provision expressly applies to the entire chapter 209 of title 28. Moreover, the title of § 3184—"Fugitives from foreign country to U.S."—also indicates that the term "any foreign government" within the text means the government of any foreign country. "Although mindful of the limited role of statutory headings in textual interpretation," this Court has recognized that statutory headings may be used to resolve ambiguities in the text. *U.S. v. Baldwin*, 186 F.3d 99, 101 (2d Cir.) (per curiam), *cert. denied*, 120 S. Ct. 558 (1999). Thus, federal courts have jurisdiction over extradition complaints only when a valid treaty exists between the U.S. and the government of the foreign country where the alleged offense occurred.. .

If § 3184 contains a sovereign nation requirement, that requirement would have to derive from the term "foreign country," because it cannot be implied from the term "treaty." The district court, without discussion, equated "foreign country" with a foreign sovereign or foreign central government. The Government contests this interpretation, arguing that if a "foreign country" means only a foreign sovereign government, then the word "any" in "any foreign government" would be rendered meaningless. *See* 18 U.S.C. § 3184. It maintains that the HKSAR government is indisputably both "foreign" and a "government" and therefore falls within the meaning of "any foreign government." It argues further that if Congress had intended to restrict the authority of the Executive to enter into extradition treaties with foreign sovereigns only, it would have used the modifiers "national," or "central," or "fully autonomous" foreign government.

We agree with the Government that a "foreign country" does not refer solely to a foreign sovereign or independent nation.. .

The Supremacy Clause declares the Constitution, federal law, and treaties to be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is well-established that under the Supremacy Clause a self-executing treaty—one that operates of itself without the aid of legislation—is to be regarded in the courts as equivalent to an act of the legislature. *See Whitney v. Robertson*, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888) (to the extent that treaties are self-executing, they "have the force and effect of a legislative enactment."); *see also* Bassiouni, *supra*, at 72 ("Treaties of extradition are deemed self-executing and therefore equivalent to an act of the legislature." (footnote omitted)); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 199 (2d ed. 1996) (same).[163]

163 *Id.* at 89–95.

3. The Different Constitutional Types and Meanings of "Treaties"

A strict interpretation of the Constitution would require that a treaty be defined as it was understood in customary international law at the time of the Constitution's drafting. But that was not the case, as evidenced in federal legislation and federal jurisprudence.

What constitutes a "treaty" under U.S. law is largely based on a constitutional interpretation of Article VI section 2 and Article II section 2 clause 2. Thus, whether a "treaty" is considered to be such under Article VI clause 2 will depend on Congress's intent in connection with the specific legislation in question. This means that what constitutes a "treaty" under a given congressional enactment may not necessarily be construed as such in another. Moreover, what constitutes a "treaty," for purposes of both Article VI para. 2 and Article II para. 2 as compared to an executive agreement and therefore not requiring "advice and consent" of the Senate pursuant to Article II may still be construed as a treaty for purpose of interpreting that agreement.

The Supreme Court held that there are various types and meaning of treaties for constitutional purposes. Specifically, in *Weinberger v. Rossi,* the Court was presented with the issue "…whether 'treaty' includes executive agreements concluded by the President with the host country, or whether the term is limited to those international agreements entered into by the President with the advice and consent of the Senate pursuant to Article II, § 2, cl. 2, of the U.S. Constitution." In this case, the Court stated that the "issue is solely one of statutory interpretation," and in *Weinberger v. Rossi* it resolved the issue:

> The word "treaty" has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. 206 U. S. App. D. C., at 151, 642 F.2d, at 556. Under the U.S. Constitution, of course, the word "treaty" has a far more restrictive meaning. Article II, § 2, cl. 2, of that instrument provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."
>
> Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements. For example, in the Case Act, 1 U. S. C. § 112b(a) (1976 ed., Supp. IV), Congress required the Secretary of State to "transmit to the Congress the text of any international agreement,…other than a treaty, to which the U.S. is a party" no later than 60 days after "such agreement has entered into force." Similarly, Congress has explicitly referred to Art. II treaties in the Fishery Conservation and Management Act of 1976, 16 U. S. C. § 1801 *et seq*. (1976 ed. and Supp. IV), and the Arms Control and Disarmament Act, 22 U. S. C. § 2551 *et seq*. (1976 ed. and Supp. IV). On the other hand, Congress has used "treaty" to refer only to international agreements other than Art. II treaties. In 39 U. S. C. § 407(a), for example, Congress authorized the Postal Service, with the consent of the President, to "negotiate and conclude postal treaties or conventions." A "treaty" which requires only the consent of the President is not an Art. II treaty. Thus it is not dispositive that Congress in § 106 used the term "treaty" without specifically including international agreements that are not Art. II treaties.
>
> The fact that Congress has imparted no precise meaning to the word "treaty" as that term is used in its various legislative Acts was recognized by this Court in *B. Altman & Co*. v. *U.S.*, 224 U.S. 583 (1912). There this Court construed "treaty" in § 5 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, to include international agreements concluded by the President under congressional authorization. 224 U.S., at 601. The Court held that the word "treaty" in the jurisdictional statute extended to such an agreement, saying: "If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the U.S., negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act…." *Ibid.*. .
>
> It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), that "an act of congress ought never to be construed to violate

> the law of nations, if any other possible construction remains . . . ." In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21 (1963), this principle was applied to avoid construing the National Labor Relations Act in a manner contrary to State Department regulations, for such a construction would have had foreign policy implications. The *McCulloch* Court also relied on the fact that the proposed construction would have been contrary to a "well-established rule of international law." *Id.*, at 21. While these considerations apply with less force to a statute which by its terms is designed to affect conditions on U.S. enclaves outside of the territorial limits of this country than they do to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way, they are nonetheless not without force in either case.[164]

It is important to note that the Supreme Court has held consistently since 1804 in *Murray v. The Charming Betsy*[165] that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.[166] This is reflected in the Restatement of the Foreign Relations Law of the United States,[167] which is in keeping with the Vienna Convention on the Law of Treaties of 1969 even though the United States is not a state party to that Vienna convention.

4. The Legal Bases of Extradition

4.1. Introduction

In accordance with Title 18 U.S.C. § 3181, extradition can only be requested or granted on the basis of a treaty. Such a treaty can be: (1) a bilateral extradition treaty, (2) a multilateral extradition treaty, (3) a multilateral treaty containing an extradition clause, (4) a military rendition agreement, or (5) a treaty for the transfer of offenders containing a return clause.

Thus far, the practice of the United States has been to rely on bilateral extradition treaties, military rendition agreements, and transfer of offenders agreements, the latter two not being construed in the nature of formal extradition. Nevertheless, nothing in existing legislation precludes reliance on multilateral extradition treaties, whether they are specialized extradition treaties or other general treaties containing an extradition clause.[168]

In the past, the United States has requested or granted extradition on the basis of reciprocity or comity. Currently, it will only grant extradition on the basis of a treaty, although it can and does on occasion request extradition on the basis of comity.[169]

The 1981–1984 Draft Extradition Acts, in defining the term "treaty" (section 3191), permit reliance on multilateral treaties, but not on executive agreements. The testimony of this writer before the Senate and House Committees on the Judiciary, as published in the Senate Hearings and restated in the House Report and debates on this issue, reveals that reliance on multilateral treaties was intended by Congress, through the definition of the term "treaty." Although the proposed legislation was not passed, nothing precludes reliance on multilateral treaties.

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164 Weinberger v. Rossi, 456 U.S. 25, 29–36 (1982) (footnotes omitted).

165 Murray v. The Charming Betsy, 6 U.S. 64 (1804).

166 *Id.* at 118.

167 Restatement (Third), *supra* note 79 at § 115.

168 *See* Ch. I, Secs. 4 and 5.

169 *See infra* Sec. 4.5.

4.2. Bilateral Treaties (See Appendix II)

The United States relies on bilateral treaties as the legal basis of extradition,[170] although reliance on multilateral treaties is equally valid.[171] The United States deems itself bound only by such extradition treaties or undertakings as it may elect,[172] and considers the process and practice of extradition subject to federal legislation. As a result, it is reluctant to apply customary international law to extradition though it does so with treaty interpretation. A classic example of this view can be found in the Supreme Court's *United States v. Rauscher* decision:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties . . . Prior to these treaties, and apart from them . . . there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity . . . [It] has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.[173]

The United States' almost exclusive reliance on bilateral extradition treaties caused it to develop a burdensome practice of treaty-making. The resulting necessity of updating them was a major undertaking, leading to an almost constant process of negotiating new treaties or renegotiating supplementary ones. As a result, U.S. practice relying on bilateral treaties had all of the problems pertaining thereto, such as state succession, the effects of war, the severance of diplomatic relations, and the perennial dilemma of maintaining a network of treaties with a growing number of states. These treaties provide in detail for all matters ranging from extraditable offenses to modes of delivery of the relator.

With respect to the need for a treaty duly submitted to the Senate for its "advice and consent" and then ratified by the president, the contemporary position is that this is not specifically required. Thus, by signing an executive agreement, the president may act in a manner that parallels the conclusion of a treaty. This position was enunciated by the Fifth Circuit in *Ntakirutimana v. Reno*:

> Ntakirutimana alleges that Article II of the Constitution of the U.S. requires that an extradition occur pursuant to a treaty. It is unconstitutional, he claims, to extradite him to the ICTR pursuant to a statute in the absence of a treaty. Accordingly, he claims it is unconstitutional to extradite him on the basis of the Agreement and Pub.Law 104-106 (the "Congressional–Executive Agreement"). The district court concluded that it is constitutional to surrender Ntakirutimana in the absence of an "extradition treaty," because a statute authorized extradition. We review this legal issue *de novo. See U.S. v. Luna,* 165 F.3d 316, 319 (5th Cir.1999), *cert. denied,* 526 U.S. 1126, 119 S.Ct. 1783, 143 L.Ed.2d 811 (1999) (reviewing constitutionality of extradition statute *de novo*).
>
> To determine whether a treaty is required to extradite Ntakirutimana, we turn to the text of the Constitution. Ntakirutimana contends that Article II, Section 2, Clause 2 of the Constitution requires a treaty to extradite. This Clause, which enumerates the President's foreign relations power, provides in part that "[the President] shall have Power, by and with the Advice and

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170 *See* Whiteman Digest, *supra* note 70, at 732–737. *See also* Restatement (Third), *supra* note 79 at § 476; *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 1980 Proc. Am. Soc'y Int'l L. 277 (remarks of M. Cherif Bassiouni).

171 *See infra* Sec. 4.3.

172 *See* Whiteman Digest, *supra* note 70, at 732–737.

173 *See* United States v. Rauscher, 119 U.S. 407 (1886). *See also* Factor v. Laubenheimer, 290 U.S. 276 (1933). Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

> Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. Const. art. II, § 2, cl. 2. This provision does not refer either to extradition or to the necessity of a treaty to extradite. The Supreme Court has explained, however, that "[t]he power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." *Terlinden v. Ames,* 184 U.S. 270, 289, 22 S.Ct. 484, 492, 46 L.Ed. 534 (1902) (citation omitted).

Yet, the Court has found that the executive's power to surrender fugitives is not unlimited. In *Valentine v. United States* the Supreme Court considered whether an exception clause[174] in the United States' extradition treaty with France implicitly granted to the executive the discretionary power to surrender citizens. The Court first stated that the power to provide for extradition is a national power that "is not confided to the Executive in the absence of treaty or legislative provision."[175] The Court explained:

> [The power to extradite] rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.[176]
>
> The Court then considered whether any statute authorized the Executive's discretion to extradite. The Court commented that:
>
> > Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory "occupied by or under the control of the U.S.." Aside from that limited provision, the Act of Congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.
>
> *Id.* at 9, 57 S.Ct. at 102–03 (citations omitted). The Court concluded that no statutory basis conferred the power on the Executive to surrender a citizen to the foreign government. *See id.* at 10, 57 S.Ct. at 103. The Court subsequently addressed whether the treaty conferred the power to surrender, and found that it did not. *See id.* at 18, 57 S.Ct. at 106. The Court concluded that, "we are constrained to hold that [the President's] power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without the power to surrender the respondents." *Id.* The Court added that the remedy for this lack of power "lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens." *Id.*
>
> *Valentine* indicates that a court should look to whether a treaty *or statute* grants executive discretion to extradite. Hence, *Valentine* supports the constitutionality of using the Congressional–Executive Agreement to extradite Ntakirutimana. Ntakirutimana attempts to distinguish *Valentine* on the ground that the case dealt with a *treaty* between France and the U.S.. Yet, *Valentine* indicates that a statute suffices to confer authority on the President to surrender a fugitive. *See id.* Ntakirutimana suggests also that *Valentine* expressly challenged the power of Congress, independent of treaty, to provide for extradition. *Valentine,* however, did not place a limit on Congress's power to provide for extradition. *See id.* at 9, 57 S.Ct. at 102 ("Whatever may be the power of the Congress to provide for extradition independent of treaty . . . "). Thus, although

174 Valentine v. United States, 299 U.S. 5 (1936).

175 *Id.* at 8.

176 *Id.* at 9.

some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor *Valentine* require that the authorization come in the form of a treaty.

Notwithstanding the Constitution's text or *Valentine,* Ntakirutimana argues that the intent of the drafters of the Constitution supports his interpretation. He alleges that the delegates to the Constitutional Convention intentionally placed the Treaty power exclusively in the President and the Senate. The delegates designed this arrangement because they wanted a single executive agent to negotiate agreements with foreign powers, and they wanted the senior House of Congress—the Senate—to review the agreements to serve as a check on the executive branch. Ntakirutimana also claims that the rejection of alternative proposals suggests that the framers believed that a treaty is the only means by which the U.S. can enter into a binding agreement with a foreign nation.

We are unpersuaded by Ntakirutimana's extended discussion of the Constitution's history. Ntakirutimana does not cite to any provision in the Constitution or any aspect of its history that requires a treaty to extradite. Ntakirutimana's argument, which is not specific to extradition, is premised on the assumption that a treaty is required for an international agreement. To the contrary, "[t]he Constitution, while expounding procedural requirements for treaties alone, apparently contemplates alternate modes of international agreements." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4–5, at 228–29 (2d ed.1988) (explaining that Article 1, § 10 of the Constitution refers to other international devices that may be used by the federal government). "The Supreme Court has recognized that of necessity the President may enter into certain binding agreements with foreign nations not strictly congruent with the formalities required by the Constitution's Treaty Clause." *U.S. v. Walczak,* 783 F.2d 852, 855 (9th Cir. 1986) (citations omitted) (executive agreement). More specifically, the Supreme Court has repeatedly stated that a treaty or statute may confer the power to extradite. *See, e.g., Valentine,* 299 U.S. at 18, 57 S.Ct. at 106; *Grin v. Shine,* 187 U.S. 181, 191, 23 S.Ct. 98, 102, 47 L.Ed. 130 (1902) ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." (citation omitted)); *Terlinden,* 184 U.S. at 289, 22 S.Ct. at 492 ("In the U.S., the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision." (citation omitted)).

Ntakirutimana next argues that historical practice establishes that a treaty is required to extradite. According to Ntakirutimana, the U.S. has never surrendered a person except pursuant to an Article II treaty, and the only involuntary transfers without an extradition treaty have been to "a foreign country or territory 'occupied by or under the control of the U.S.' " *Valentine,* 299 U.S. at 9, 57 S.Ct. at 102. This argument fails for numerous reasons. First, *Valentine* did not suggest that this "historical practice" limited Congress's power. *See id.* at 9, 57 S.Ct. at 102–03. Second, the Supreme Court's statements that a statute may confer the power to extradite also reflect a historical understanding of the Constitution. *See, e.g., id.* at 18, 57 S.Ct. at 106; *Grin,* 187 U.S. at 191, 23 S.Ct. at 102; *Terlinden,* 184 U.S. at 289, 22 S.Ct. at 492. Even if Congress has rarely exercised the power to extradite by statute, a historical understanding exists nonetheless that it may do so. Third, in some instances in which a fugitive would not have been extraditable under a treaty, a fugitive has been extradited pursuant to a statute that "filled the gap" in the treaty. *See, e.g., Hilario v. U.S.,* 854 F.Supp. 165 (E.D.N.Y.1994) (upholding extradition pursuant to a post-*Valentine* statute that granted executive discretion to extradite). Thus, we are unconvinced that the President's practice of usually submitting a negotiated treaty to the Senate reflects a historical understanding that a treaty is required to extradite.

We are unpersuaded by Ntakirutimana's other arguments. First, he asserts that the failure to require a treaty violates the Constitution's separation of powers. He contends that if a treaty is not required, then "the President alone could make dangerous agreements with foreign governments" or "Congress could legislate foreign affairs." This argument is not relevant to an Executive–Congressional agreement, which involves neither the President acting unilaterally nor Congress negotiating with foreign countries. Second, Ntakirutimana argues that "statutes

> cannot usurp the Treaty making power of Article II." The Supreme Court, however, has held that statutes can usurp a treaty. This is confirmed by the "last in time" rule that, if a statute and treaty are inconsistent, then the last in time will prevail. *See, e.g., Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888) ("if the two are inconsistent, the one last in date will control the other"). This rule explicitly contemplates that a statute and a treaty may at times cover the same subject matter. Third, Ntakirutimana contends that not requiring a treaty reads the treaty-making power out of the Constitution. Yet, the treaty-making power remains unaffected, because the President may still elect to submit a negotiated treaty to the Senate, instead of submitting legislation to Congress. *See* the Restatement (Third) of Foreign Relations Law, § 303 cmt. e (1986) ("Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty."). Thus, we conclude that it is not unconstitutional to surrender Ntakirutimana to the ICTR pursuant to the Executive–Congressional Agreement.[177]

The first international treaty entered into by the United States containing a specific provision on extradition was Jay's Treaty in 1794.[178] Article 27 of that treaty states:

> It is further agreed that His Majesty and the U.S. on mutual requisition, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.[179]

International extradition in U.S. law and practice remains a subject of periodic controversy and debate.[180] The contemporary state of U.S. extradition law and practice gives rise to the following definition of extradition:

> [A] process by which, in accordance to treaty provisions and subject to its limitations, one state requests another to surrender a person charged with a criminal violation of the law of the requesting

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177 Ntakirutimana v. Reno, 184 F.3d 419, 424–427 (5th Cir. 1999) (footnotes omitted)

178 The Treaty of Amity, Commerce and Navigation with Great Britain (Jay's Treaty), Nov. 19, 1794, [1795] 8 Stat. 116, T.S. No. 105, *reprinted in* Malloy, *supra* note 12, at 590. *See also* Bemis, Jay's Treaty, *supra* note 13; 1 Moore Extradition, *supra* note 2, at 90.

179 Jay's Treaty, art. 27, *reprinted in* Malloy, *supra* note 12.

180 *See* Bruce Zagaris, *Argentina Again Asks U.S. to Extradite Antonini*, 24 Int'l Enforcement L. Rep. 89–91 (Mar. 2007) (discussing the controversial nature of U.S. and Argentine criminal cases and the U.S. review process of the Argentine application for consistency with a 1997 extradition between the United States and Argentina). Where the United States indicted a Colombian resident for charges with respect to which there was no operative extradition treaty, the United States worked with Trinidadian authorities to secure his extradition upon the relator's entry into Trinidad. *See* Bruce Zagaris, *Trinidad Extradites Colombian to the U.S. on Money Laundering Charges*, 24 Int'l Enforcement L. Rep. 266–267 (July 2008). Symposium, *International Law and Extradition*, 16 N.Y.L.F. 315–525 (1970) [hereinafter Symposium]. *Compare* Alona E. Evans, *Legal Bases for Extradition in the U.S.,* 16 N.Y.L.F. 525 (1970), *with* Brendan F. Brown, *Extradition and the Natural Law*, 16 N.Y.L.F. 578 (1970) *and* O. John Rogge, *State Succession*, 16 N.Y.L.F. 378 (1970). *See also* M. Cherif Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposal*, 39 Rev. Int'le de Droit Pénal 494 (1968), *reprinted in* 15 Wayne L. Rev. 733 (1968); Edward M. Wise, *Prolegomenon to the Principles of International Criminal Law*, 16 N.Y.L.F. 562 (differing from the position of Evans and Rogge, but remaining consistent with his views expressed in *Some Problems of Extradition*, 39 Rev. Int'le de Droit Pénal 518 (1968), *reprinted in* 15 Wayne L. Rev. 709 (1969)).

> state who is within the jurisdiction of the requested state, for the purpose of answering criminal charges, standing trial or executing a sentence arising out of the stated criminal violation.[181]

In comparison with other modes of penal cooperation between states, the definition offered above, though correctly interpreting the United States' position, is nonetheless a narrow one. As one author stated:

> [Extradition] includes not only modes by which a state effects the return of a fugitive offender to the demanding state against whose laws he may have committed some offense, but also the acts or processes by which one sovereign state, in compliance with a formal demand, prepares to surrender to another state for trial the person of criminal character who has sought refuge in its boundaries.[182]

Extradition treaties may be deemed declarative of an existing reciprocal relationship or creative of the substantive basis of the very process. The choice of theory relied upon will determine its applicability.[183] As stated by Marjorie Whiteman:

> Extradition treaties do not, of course, make acts crimes. They merely provide a means whereby a State may obtain the return to it for trial or punishment of persons charged with or convicted of having committed acts which are crimes at the time of their commission and who have fled beyond the jurisdiction of the State whose laws, it is charged, have been violated.[184]

4.2.1. Bilateral Extradition and Mutuality of Obligation[185]

Bilateral treaties do not necessarily require a treaty to enter into effect simultaneously in both countries, in other words, after the treaty has been ratified and entered into effect in each country. It is frequently the case that a bilateral treaty may enter into force with respect to one of the contracting parties before the other. This is the case with respect to the 2003 UK–U.S. treaty,[186] whereby the United Kingdom ratified the treaty and adopted it into its national legislation,[187] while the United States ratified the treaty, bringing it into force as to the United States, in April 2007.[188] In the United Kingdom, prior to the United States' ratification, the issue had been raised in a number of extradition cases concerning the unilateral nature of the

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181 For a similar definitional approach, see 6 Whiteman Digest, *supra* note 70, at 727–728. *See also* Terlinden v. Ames, 184 U.S. 270 (1902).

182 Satya D. Bedi, Extradition in International Law and Practice 15–16 (1968).

183 Thus, if an extradition treaty is considered a reflection of reciprocal relationships, then it is nullified by the breaking of diplomatic relations between the state-parties to the treaty. This is the position of the United States. *See* Whiteman Digest, *supra* note 70, at 769; 6 Hackworth Digest, *supra* note 80, at 37.

184 Whiteman Digest, *supra* note 70, at 753.

185 *See* Ch. VII, Sec. 1.

186 Extradition Treaty, U.S.–U.K., March 31, 2003, S. Treaty Doc. No. 108-23, 2003 WL 23527406. *See generally*, Robert Osgood & Nathy Dunleavy, *UK–US Extradition for Antitrust Offenses*, 19-SPG Int'l L. Practicum 35 (Spring 2006); The Law of Extradition and Mutual Legal Assistance (Clive Nicholls, Clare Montgomery & Julian Knowles eds., 2002); Satyadeva Bedi, Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders and with the Commonwealth Countries (2002); John T. Parry, *No Appeal: The U.S–U.K. Supplementary Extradition Treaty's Effort to Create Federal Jurisdiction*, 25 Loy. L.A. Int'l & Comp. L. Rev. 543 (Summer 2003); Alun Jones, Jones on Extradition (1995); V.E. Hartley-Booth, British Extradition Law and Procedure (1980).

187 Extradition Act of 2003, Ch. 41, entered into force January 1, 2004. Part 1 implements the EU Framework decision on the EAW. Part II governs all other countries that have bilateral extradition agreements with the United Kingdom. The United States is considered a category 2 country, falling under Part 2 of the Act.

188 U.S. Department of State London U.S. Embassy Press release, *UK/U.S. Extradition Treaty Ratified,* Apr. 26, 2007, *available at* http://london.usembassy.gov/ukpapress48.html (last visited September 10,

United Kingdom's extradition to the United States on the basis of the 2003 treaty without mutuality of obligation. The treaty provides for reciprocity, but the United Kingdom cannot obtain reciprocity from the United States as long as the treaty has not entered into force in the United States, although a number of Courts of Appeals have granted extradition by lower courts.[189] The House of Lords has heard testimony regarding the Extradition Act of 2003, including calls for its repeal.[190]

4.3. Multilateral Treaties

The legislation of the United States is not explicit as to the type of treaty required as a legal basis for extradition. As indicated in Section 4.2, U.S. practice is to rely solely on bilateral treaties, although nothing excludes reliance on multilateral treaties as the legal basis for extradition.[191]

There are two types of multilateral treaties that may serve as the basis for extradition: those treaties that deal exclusively with extradition, and those that deal with international crimes and impose on the signatories the duty to extradite the accused or convicted offender.

The United States is a party to two multilateral extradition treaties: the 1933 Montevideo Convention on Extradition[192] and the 1981 Inter-American Convention on Extradition.[193] The Montevideo Treaty between other American states and the United States could serve as a legal basis for extradition in the absence of a bilateral treaty, but has not yet been used. There are, however, a number of non-extradition multilateral treaties on international crimes containing an extradition provision,[194] and thus permitting the United States and other signatory states to rely on them as a substitute for bilateral treaties.[195]

2011). *See also* Jed Borod, *US Senate Holds Second Hearing on Controversial UK Extradition Treaty*, 22 Int'l Enforcement L. Rep. 345 (Sept. 2006).

189 *See Bermingham & Others v. Sec. of State for the Home Dept. of the U.S.*, [2006] EWHC (QBD Admin) 200 (Eng.); *Welsh, Thrasher v. Sec. of State for the Home Dept. of the U.S.*, [2006] EWHC (QBD Admin) 156 (Eng.); *Stepp* v. *Sec. of State for the Home Dept. of the U.S.*, [2006] EWHC (QBD Admin) 1033 (Eng.); *Norris v. Sec. of State for the Home Dept. of the U.S.*, [2006] EWHC (QBD Admin) 280 (Eng.); *Bentley v. Government of the U.S. of America*, [2005] EWHC (QBD Admin) 1078 (Eng.); *Bermingham & Others v. Sec. of State for the Home Dept. of the U.S.*, [2005] EWHC (QBD Admin) 647 (Eng.); *Jenkins v. Government of the U.S. of America,* [2005] EWHC (QBD Admin) 1051 (Eng.); *Bohning v. Government of the U.S. of America*, [2005] EWHC (QBD Admin) 2613 (Eng.); *McCaughey v. Government of the U.S. of America*, [2005] EWHC (QBD Admin) 248 (Eng.); *Raffle v. Government of the U.S. of America*, [2004] EWHC (QBD) 2913, (Eng.).

190 *See* Transcript of Oral Evidence, House of Commons, Before the Home Affairs Committee, Extradition, Jan. 18, 2011, HC-644-ii (statement of Ms. Gareth Pierce and Mr. Ashfaq Ahmad; statement of Mr. Julian Knowles), *available at* http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/uc644-ii/uc64401.htm (last visited Sept. 10, 2011).

191 *See Senate Judicial Hearings on S. 1639* (remarks of this writer). *See Senate Judiciary Hearings on S. 1639, supra* note 101. Section 3199(a)(2) of S. 1639 defines "treaty" as including present and future multilateral treaties ratified by the Senate.

192 Convention on Extradition, signed at Montevideo, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882.

193 Adopted at Caracas, Feb. 25, 1981, O.A.S. Doc. OEA/Ser.A/36(SEPF), *reprinted in* 20 I.L.M. 723 (1981).

194 *See* Ch. I, Sec. 4.

195 This author has identified 27 categories of international crimes covered in 281 international instruments between 1815 and 2012. A number of these instruments contain a provision on which the parties can rely for purposes of extradition in the absence of a bilateral treaty. M. Cherif Bassiouni, Introduction to International Criminal Law (2d ed. 2012). *See also* M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 Nouvelles Etudes Pénales 46 (1992). *See* Bassiouni, ICL

The European Union has moved in the direction of enhanced judicial integration and harmonization of its criminal laws and procedure. Although the harmonization part is a natural consequence of the greater affinity of the member states' legal systems, it also reflects the greater degree of cooperation existing between these countries where physical national boundaries have been eliminated to ensure the free movement of people and goods. However, the European Union has gone beyond that on the basis of the Maastricht[196] and Schengen[197] agreements, which delegate to the European Commission the power to develop Framework Directives that have a direct effect on the national legal systems of the member states. One of these Framework

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Conventions, *supra* note 72. Since 1985, however, several new conventions entered into effect, leading to a new categorization of crimes with a new hierarchy. The crimes are:

1. Aggression;
2. Genocide;
3. Crimes against humanity;
4. War crimes
5. Unlawful possession, use, emplacement, stockpiling and trade of weapons, including nuclear weapons;
6. Nuclear terrorism;
7. Apartheid;
8. Slavery, slave-related practices and trafficking in human beings;
9. Torture and other forms of cruel, inhuman or degrading treatment;
10. Unlawful human experimentation;
11. Enforced disappearances and extrajudicial execution;
12. Mercenarism;
13. Piracy and unlawful acts against the safety of maritime navigation and safety of platforms on the high seas;
14. Aircraft hijacking and unlawful acts against international air safety;
15. Threat and use of force against internationally protected persons and United Nations personnel;
16. Taking of civilian hostages;
17. Use of explosives;
18. Unlawful use of the mail;
19. Financing of terrorism;
20. Unlawful traffic in drugs and related drug offenses;
21. Organized crime and related specific crimes;
22. Destruction and/or theft of national treasures;
23. Unlawful acts against certain internationally protected elements of the environment;
24. International traffic in obscene materials;
25. Falsification and counterfeiting;
26. Unlawful interference with international submarine cables; and
27. Corruption and bribery of foreign public officials.

See M. Cherif Bassiouni, Introduction to International Criminal Law, ch. III (2d ed., 2012).

196 (Treaty on European Union), February 7, 1992, Official Journal C 325, December 24, 2002.

197 Schengen Agreement, June 14, 1985 (gradual abolition of checks at common borders); Schengen Convention, March 1995 (abolished checks at internal borders and created a single exterior border); Schengen Acquis, Council Decision 1999/435/EC of May 20, 1999, OJ L 176, 10.7.1999, p. 1. (compilation of the agreement, convention, protocols, decisions, and declarations regarding the Schengen documents).

Decisions is the European Arrest Warrant (EAW),[198] which reflects the notion of a common European judicial space.[199] Although this is applicable to EU member states, there is also the question of how the European Union as a unit deals with non–member states. Part of the answer is found in a multilateral agreement, which essentially represents a block of EU member states and a non-EU member state. In 2003, the European Union and the United States signed an agreement on extradition, which provides a new legal basis for extradition between the United States and E.U. member states.[200] The extradition agreement removes the legislative and certification requirements and simplifies the documentation in order to expedite the extradition process. By facilitating direct contact between the central authorities, it attempts to improve the channels of transmission, especially for cases concerning provisional arrest. It further enlarges the number of extraditable offenses, by allowing extradition for any offense that has a sentence of more than one year in prison, thus avoiding many legal issues pertaining to "dual criminality."[201] At the same time, EU member states can rely on grounds for refusal contained in their respective bilateral extradition treaties with the United States, since the extradition agreement does not totally replace the bilateral treaties, but supplements them or only replaces some provisions. European Union member states also can stipulate that the death penalty will not be imposed and the right to a fair trial by an impartial tribunal is guaranteed.

There is also another European multilateral extradition regime by the Council of Europe, namely the European Convention on Extradition and its three protocols.[202] It should be noted that EU member states are also Council of Europe members. Therefore, the states that are parties to the United States–European Union extradition treaty are also parties to the European

198 Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L190/1 (July 18, 2002).

199 *See* Régis de Gouttes, *Vers un Espace Judiciare Pénal Pan-Européen?* 22 Recueil Dalloz Sirey 154 (1991); Régis de Gouttes, *Variations sur L'Espace Judiciare Pénal Européen?* 33 Recueil Dalloz Sirey 245 (1990); Christine Van den Wyngaert, *L'Espace Judiciare Européen: Vers une Fissure au Sein du Conseil de L'Europe?* 61 Rev. Int'le de Criminologie et de Police Technique 289 (1980); Christine Van den Wyngaert, *L'Espace Judiciare Européen Face à L'Euro-Terrorisme et la Sauvegarde des Droits Fondamentaux*, 3 Rev. Int'le de Criminologie et de Police Technique 289 (1980).

200 Agreements on Extradition and on Mutual Legal Assistance between the European Union and the U.S. of America, signed June 25, 2003, Council of Europe doc. 9153/03, CATS 28, USA 4. *See also* Council Decision of June 6, 2003 concerning the signature of the Agreements between the European Union and the United State of America on extradition and mutual legal assistance in Criminal Matters, 2003/516/EC, OJ L181 (July 19, 2003).

Current Council of Europe Members include (in order of succession): Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, United Kingdom, Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Malta, Portugal, Spain, Liechtenstein, San Marino, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovak Republic, Romania, Andorra, Latvia, Albania, Moldova, Republic of Macedonia, Ukraine, Russia, Republic of Croatia, Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Republic of Serbia, Monaco and Montenegro.

Current EU members include: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Netherlands, and the United Kingdom.

201 *See* Ch. VII, Sec. 2.

202 December 12, 1957, Europe T.S. No.24; First Additional Protocol, Oct. 15, 1975, Europe T.S. No. 86 (thirty-seven states have ratified); Second Additional Protocol, Mar. 17, 1978, Europe T.S. No. 98 (forty states have ratified); Third Additional Protocol, Jul. 7, 2010, Europe T.S. No. 209 (two states have ratified). *See generally* Michael Plachta, *Third Additional Protocol to the 1957 European Convention on Extradition*, 27 Int'l Enforcement L. Rep. 831–835 (Aug. 2011). The Convention and protocols are open to signature and ratification by non-EU countries, but the United States has not signed or ratified them.

Convention on Extradition. However, because the United States–European Union treaty comes after the convention, it supersedes it.

4.3.1. Relationship between Multilateral and Bilateral Treaties

The United States may be a party to a multilateral convention whose other state-parties have a bilateral treaty with the United States, as is the case of the United States–European Union treaty.[203] This treaty specifically states that it supersedes and replaces some of the provisions of the bilateral treaties,[204] and the United States has entered into protocols with the EU member states to amend them in a manner consistent with the United States–European Union treaty.[205] The EU agreement and its protocols were submitted together to the Senate for advice and consent and entered into effect on February 1, 2010.[206]

It is difficult to understand the rationale of the U.S. government in developing protocols with the EU member states, every one of which requires Senate advice and consent, when the multilateral United States–European Union treaty would apply to all of these states and contain the same treaty language. This would clearly avoid the risk of having different treaty language as it presently exists with respect to these bilateral treaties. Logically, a single multilateral treaty employing the same language and applying to all EU member states would greatly enhance the uniformity of application and provide for judicial economy.[207]

As stated above, the United States has as a matter of policy, particularly since the Reagan administration in the 1980s, explicitly rejected reliance on multilateral treaties as a legal basis for extradition, though there is of course nothing in U.S. legislation that calls for such a practice. Moreover the United States has ratified the 1931 Montevideo Convention.[208] But the policy of not relying on multilateral treaties has been applied rather consistently as a political choice. This means that different policies can change that initial one. Indeed since 1988 with the United States' ratification of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United States has adopted a new policy, and that is to rely on a multilateral treaty as a way of supplementing bilateral treaties providing that the counterpart in the bilateral treaty is also a state-party to the multilateral convention. This policy shift subsequently extended to the provisions of the corruption convention, the organized crime convention, and the United States–European Union Framework convention.

The United States still does not rely on any of these multilateral treaties as the basis for extradition, rather than relying on the bilateral treaty. However, if a provision of the multilateral treaty expands extraditable offenses or contains other provisions affecting the modalities of

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203 EU–U.S. Extradition Treaty, *supra* note 201. The twenty-five EU states are party to this treaty. Agreement on extradition between the European Union and the U.S. of America, July 19, 2002, Article 3(1).

204 Twenty-three European states have entered into extradition treaties, amendments, or supplementary treaties with the United States since 2004. *See* Appendix IV.

205 Article 3(2)(a) states: "The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the U.S. of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the U.S. of America."

206 *See* European Commission Treaties Office Database, Agreement on Extradition between the European Union and the U.S. of America 2003 O.J. 27 (L 181), *available at* http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=5461 (last visited Sept. 24, 2012) (summary of treaty); U.S. Department of Justice, Office of Public Affairs, *U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter Into Force*, Feb. 1, 2010, *available at* http://www.justice.gov/opa/pr/2010/February/10-opa-108.html (last visited Sept. 10, 2011).

207 *See* Ch. I, Sec. 4.2.

208 Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19, *reprinted in* 28 Am. J. Int'l L. (Supp.) 75 (1934).

extradition, the United States has considered the multilateral treaty as automatically supplementing the bilaterals (with respect to the state-parties of the multilaterals who are also a party to the bilateral). This practice is not based on legislation, nor is there anything explicitly stated in the treaties in question that specifically authorizes their interpretation to be construed as permitting a selective use of multilateral treaty provisions to implicitly amend bilateral treaty provisions without even an exchange of letters by and between the representatives of the states having bilateral treaties with the United States.

There is no logical explanation for what appears to be an anomalous practice, other than the reluctance of various administrations over the last twenty years from seeking to amend the provisions of Title 18 applicable to extradition, or, for that matter, to adopt a standalone act to authorize this type of treaty practice.

4.4. The United States' Non-Surrender Agreements with Certain States in Order to Avoid ICC Jurisdiction

Since 2002, the United States, which is not a state-party to the Rome Statute of the International Criminal Court (ICC), has entered into agreements with both state-parties and non–state-parties to the ICC pursuant to Article 98, aimed at preventing the surrender of any U.S. national to the court.[209] These agreements are based on an expanded reading of Article 98 of the ICC statute and have become a part of the current U.S. policy, which is opposed to the ICC. The Bush administration was inconsistent in its treatment of the agreements, submitting some for ratification, while considering others as executive agreements, which do not need to go to the Senate for advice and consent. Very few of these agreements have been submitted for parliamentary approval in the countries that have signed them.

As of 2011, ninety-six bilateral non-surrender agreements are listed as being in force with the Department of State,[210] of which twenty-one have been ratified and eighteen are considered executive agreements, which do not need ratification.[211] Since the signing of the first "non-surrender"

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209 *See* Appendix V for a list of countries with which the United States has concluded Article 98 Agreements. M.Cherif Bassiouni, 1 The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text at 123 (2005); M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History (1998); M. Cherif Bassiouni, *International Criminal Court Ratification and National Implementing Legislation*, 71 Rev. Int'l de Droit Pénal (2000).

210 *See* Appendix V for a complete list of countries with which the United States has concluded Article 98 agreements. However, there seems to be a discrepancy in the number of such agreements between the State Department's press release and the number found in the Treaties in force. *See U.S. Signs 100th Article 98 Agreement,* U.S. Department of State Press Statement (released May 3, 2005). For the collection of these non-surrender agreements, see the Georgetown University Law Library at the following website http://www.ll.georgetown.edu/intl/guides/article_98.cfm. *See also* Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements, *available at* http://www.iccnow.org/documents/CICCFS_BIAstatusCurrent.pdf (last visited Sept. 24, 2012). The Coalition for the ICC has documented "102+" such agreements, which is also questionable. The difficulty in ascertaining the exact number is due to the fact that some of these purported agreements are in the nature of an exchange of diplomatic notes that may not fulfill the criteria needed to be considered a treaty. Moreover, the reader should bear in mind exchanges of diplomatic notes or Memoranda of Understanding (MOU) must not only conform to the international understanding of what constitutes a treaty under the Vienna Convention on the Law of Treaties and customary international law, but that due regard should be given to national constitutional requirements of the states with which the United States entered into these Article 98 Agreements. In many of the cases these agreements have not been submitted for ratification in the foreign countries listed by the U.S. Department of State. All of this raises questions about the reliability of these purported agreements.

211 S*ee* Coalition for the International Criminal Court, Status of US Bilateral Immunity Agreements, *available at* http://www.iccnow.org/documents/CICCFS_BIAstatusCurrent.pdf (last visited Sept. 24, 2012).

agreement between the United States and Romania on August 1, 2002, the U.S. effort to secure the agreements has been criticized by both governments and nongovernmental organizations (NGOs) alike.[212]

Despite a large number of agreements, the structure of the non-surrender agreements is similar.[213] At their core, each one of the agreements is aimed at prohibiting the surrender of any persons (defined broadly to include any nationals of one or both parties to the non-surrender agreement) to select international tribunals, absent the express consent of the other party. The vast majority of the agreements specifically prohibit the surrender of U.S. nationals to the ICC specifically, while a much smaller number prohibits the surrender of U.S. nationals to any international tribunal, unless the tribunal has been established by the UN Security Council, or surrender to any other tribunal, except if the obligation to surrender or transfer comes from an agreement to which both the United States and the other state are parties.[214] The agreements also contain provisions requiring the foreign state to ensure the non-surrender (to the ICC, or any other tribunal) in cases where the U.S. national is extradited, surrendered, or otherwise transferred, to a third country, pursuant to some other agreement. Thus, a party to the non-surrender agreement is precluded from transferring an individual to a third state if that third state may surrender the individual to the ICC.

In addition to the questionable legality of the agreements,[215] they are essentially the opposite of extradition because they restrict surrender, rather than facilitate the surrender of an individual falling within the purview of the agreement. However, despite their restrictive nature, state-parties to these agreements retain the ability to investigate and prosecute individuals who have committed crimes within the jurisdiction of the ICC on their territory, which stems from the application of the territoriality principle. Thus, if a crime is committed on the territory of a state that has concluded a non-surrender agreement with the United States, it cannot rise above the jurisdiction of that state which has primary jurisdiction in the case. The territorial state may relinquish jurisdiction to the United States (as the state of nationality) or another state that may have jurisdiction through active or passive personality doctrine,[216] which allows for the exercise of jurisdiction in cases where citizens or the national interest of the state have been harmed and the state exercises extraterritorial jurisdiction.[217]

As of 2006, agreements from the following countries have been ratified: Gambia, Ghana, Sierra Leone, Angola, Cape Verde, Mauritania, Mozambique, Guyana, Panama, El Salvador, Cambodia, East Timor, Bhutan, Albania, Bosnia-Herzegovina, Georgia, Macedonia, Tajikistan, Kazakhstan, and Jordan. Agreements from the following countries are considered executive orders: Botswana, Democratic Republic of the Congo, Malawi, Nigeria, Uganda, Cameroon, Equatorial Guinea, Sao Tome and Principe, Antigua and Barbuda, Columbia, Afghanistan, India, Philippines, Turkmenistan, Algeria, Israel, and United Arab Emirates.

212 The European Union, for example, has rejected the U.S. practice of concluding these agreements and has developed a set of guidelines to be used by member states in reference to these agreements. *See* International Criminal Court (ICC)—Council Conclusions, *in* General and External Relations, 2450th Sess., at 9–10, Doc. 12134/02-Press 279 (2002), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/gena/72321.pdf (last visited Sept. 24, 2012). For the views of the NGO community, see the web page of the Coalition for the International Criminal Court, *available at* http://www.iccnow.org/?mod=bia (last visited Sept. 24, 2012).

213 *See* Attila Bogdan, *The U.S. and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98*, 8 Int'l Crim. L.R. 1 (2006).

214 See Appendix V for a list of countries with which the United States has concluded Article 98 agreements.

215 Bogdan, *supra* note 214.

216 *See* Ch. VI.

217 *See* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* II International Criminal Law: Procedural and Enforcement Mechanisms (M. Cherif Bassiouni ed., 2d ed., 1999).

The U.S. government has pursued an active campaign against the ICC, threatening every state, whether an ICC member or not, with loss of U.S. aid, both military and economic, should they not agree to a non-surrender agreement under Article 98. In pursuing this course, the United States has adopted the American Service-Members' Protection Act (ASPA) on August 2, 2002, which provides that U.S. military assistance to ICC state parties will be withheld unless they sign a bilateral non-surrender agreement.[218] As a result of this act, at least eighteen ICC member states have lost all U.S. military assistance. In 2004, the United States amended the Foreign Operations Appropriation Bill ("Nethercutt Amendment").[219] The Nethercutt Amendment allows Congress to deny economic assistance to countries that are ICC members if they fail to sign a bilateral non-surrender agreement. At the same time, countries that sign a bilateral non-surrender agreement are awarded large aid packages almost immediately.[220] Fifty-three countries have refused to sign these bilateral non-surrender agreements, and several of them had already lost large portions of their aid.[221] NATO members have been exempted from these cuts, and none of them have requested economic assistance from the United States.

4.5. Reciprocity and Comity

Although the view has been expressed that the United States will grant or request extradition only pursuant to a treaty, there have been several instances where it has deviated from that practice. In these instances, extradition was granted or requested on the basis of comity or reciprocity.[222]

There are few recorded instances where the United States granted extradition to a requesting state in the absence of a treaty.[223] The most well-known case is that of Arguelles, which occurred in 1864.[224] Arguelles, an officer in the Spanish army, had been accused in Spain of selling individuals into slavery for his own personal gain. Although the United States had no extradition treaty with Spain, it granted Spain's extradition request on the basis of comity because the crime was an international one. The secretary of state defended the decision as follows:

> There being no treaty of extradition between the U.S. and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in the

218 American Service-Members' Protection Act of 2002, §§ 2001–2015, Pub. L. No. 107-206, 116 Stat. 820 (2002). The Act was satirically dubbed the "Hague Invasion Act" by its critics.

219 Limitation on Economic Support Fund Assistance for Certain Foreign Governments That Are Parties to the International Criminal Court, §574, Pub. L. No. 109-102 (2005).

220 U.S. Bilateral Immunity Agreements or So-Called "Article 98" Agreements, Questions & Answers, last updated Aug. 5, 2005, *available at* http://www.iccnow.org/documents/FS-BIAsAug2005.pdf (last visited Sept. 24, 2012).

221 Coalition for the International Criminal Court, Countries Opposed to Signing a US Bilateral Immunity Agreement: US Aid Lost in FY04 and FY05 and Threatened in FY06, http://www.iccnow.org/documents/CountriesOpposedBIA_AidLoss_current.pdf (last visited Sept. 24, 2012). *See also* U.S. State Department, Congressional Budget Justification for Foreign Operations, *available at* http://www.state.gov/s/d/rm/rls/cbj/ (last visited Sept. 24, 2012). In 2005, Kenya lost 98 percent of its international military education and training and foreign military financing funding after becoming a party to the ICC. In 2004, Malta lost 83 percent of all foreign aid from the United States, approximately $1.25 million dollars.

222 The Constitutional Court of South Africa has discussed this principle. *Harksen v. President of the Republic of South Africa and others*, 2000 Constitutional Court CCT41/99, 2000 (2) SA 825 (CC) at 53–55 (S. Afr.).

223 *See* 1 Moore, Extradition, *supra* note 2, at 33–35 (discussing the *Arguelles* case); Whiteman Digest, *supra* note 70, at 744–745 (discussing the *Koveleskie* case).

224 *See* 1 Moore, Extradition, *supra* note 2, at 33–35.

> case referred to in the resolution of the Senate is understood by this Department to have been made in virtue of the law of nations and the Constitution of the U.S.. Although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government by surrendering, at its request, one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender on a demand therefore, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and it is believed that if, in any case, the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise.[225]

In 1996, the Third Circuit in *Saroop v. Garcia* relied on principles of comity to determine the validity of the extradition treaty between Trinidad and Tobago and the United States.[226] Saroop, a citizen of Trinidad and Tobago, was indicted in the United States on charges of drug trafficking and conspiracy. In her defense, Saroop contended that the extradition treaty between the United States and the United Kingdom, signed in 1931, was never ratified by Trinidad and Tobago; therefore, the United States lacked a valid treaty supporting her extradition.[227] To determine the validity of the extradition treaty, the Third Circuit relied on a decision from the High Court of Justice of Trinidad and Tobago, which stated:

> the [Extradition] Act qualified as one of the existing laws of the Colony of Trinidad and Tobago immediately before the commencement of [the 1962 Act]. It was consequently preserved by the provisions of that section as part of the law of the independent Dominion of Trinidad and Tobago . . . [228]

The High Court of Justice explicitly held that the extradition treaty was incorporated into the laws of Trinidad and Tobago, and, therefore, binding upon Saroop. Recognizing that "the comity doctrine does not reach the force of obligation," the Third Circuit stated that "[comity] creates a strong presumption in favor of recognizing foreign judicial decrees."[229] As a result, the Third Circuit upheld the validity of the extradition treaty between the United States and Trinidad and Tobago based on the decision of the High Court of Justice, and the overt intent and actions of the two countries to be bound by the extradition treaty.[230]

Although the United States has rarely granted extradition on the basis of comity or reciprocity, it has on occasion requested extradition on these bases. Usually, its request on the basis of comity has been coupled with the observation that the United States would be unable to reciprocate if the requested state sought extradition from the United States in the absence of a treaty.[231] The United States has resorted to this basis to supplement treaty relations when the applicable extradition treaty does not include, as an extraditable offense, the offense for which the relator has been indicted. For example, in *Fiocconi v. Attorney General of United States,*[232] Italy surrendered the relators to the United States in an act of comity. The United States' request was not based on its extradition treaty with Italy because the treaty did not list the crime of conspiracy to import heroin, the offense for which extradition was requested, as

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225 *Id.* at 35.

226 Saroop v. Garcia, 109 F.3d 165 (3d Cir. 1996).

227 *Id*. at 167.

228 *Id*. at 169.

229 *Id*.

230 *Id*. at 171.

231 For earlier cases where the United States requested extradition on the basis of comity, *see* 1 Moore, Extradition, *supra* note 2, at 41–42.

232 Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972).

an extraditable offense.[233] However, Italy granted extradition and surrendered the relators to the United States.[234]

In a few instances occurring in the 1800s, the United States requested extradition with the assurance that it would reciprocate, even though the United States had no extradition treaty with the requested states. For example, in 1855 the United States requested that Spain extradite an individual charged with murder in New York, and noted that the extradition "would be considered as an act of courtesy which would be appreciated and reciprocated."[235] Similarly in 1878, the United States requested that Portugal extradite an individual who had been charged with embezzlement in the United States.[236] The Portuguese government responded that it would be willing to comply if the proper documents were provided, and expressed the hope that "if at any time [the Portuguese government] has to address a requisition of like nature to the government of the United States, the same would be received with equal good will."[237] The U.S. government answered that "such application will meet with an equally prompt and effectual response." "[We] are fully alive to the courtesy shown by [the Portuguese government] in this instance, and will not fail to give a like evidence of its good feeling to any similar application made to it."[238] The relator was extradited to the United States. These commitments of reciprocity were of questionable legal validity in the absence of a treaty, as evidenced by the fact that in 1833 and 1888, when the Portuguese government requested that the United States extradite a fugitive and referred to the case discussed above, the United States refused extradition on the grounds that no extradition treaty existed with Portugal.[239]

It should be noted that the United States relies on other forms of ad hoc arrangements to secure extradition in the absence of a formal treaty. This has been the case with Egypt, where in at least one matter, the United States relied on a "letter of understanding" to obtain the surrender of an Israeli citizen arrested in Egypt at the request of the U.S. government.[240] The United States would not be able to surrender anyone from this country on such a basis, however, as it would violate Title 18 § 3183, which requires a treaty as a precondition of extradition.[241]

In *Munaf v. Geren*, U.S. forces in Iraq had arrested two naturalized U.S. citizens of Iraqi origin who had been captured by U.S. forces in that country and held on a U.S. base. Even though

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233 *See* Ch. VII.

234 The United States also resorted to comity as the basis of its requests when it asked Lebanon to extradite an individual to face charges of drug trafficking, as there was no extradition treaty between Lebanon and the United States at that time. *See* United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), *aff'd on other grounds*, 319 F.2d 661 (2d Cir. 1963), *cert. denied*, 375 U.S. 981 (1964). Similarly, the United States requested that Italy extradite Sam Accardi to face prosecution on drug smuggling charges as an act of comity, because its extradition treaty did not include these charges as an extraditable offense. *See* United States v. Accardi, 241 F. Supp. 119 (S.D.N.Y. 1964), *aff'd*, 342 F.2d 697 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965). *See also* Alona Evans, *Legal Bases of Extradition in the U.S.*, 16 N.Y.L.F. 525, 532–533 (1970). For a Commonwealth position, *see* Ivan A. Shearer, *Extradition without a Treaty*, 49 Austl. L.J. 116 (1975).

235 *See* 1 Moore Extradition, *supra* note 2, at 43 (discussing the *Baker* case).

236 *Id.* at 43–45 (discussing the *Angell* case).

237 *Id.* at 45.

238 *Id.*

239 *Id.*

240 *See* United States v. Levy, 947 F.2d 1032 (2d Cir. 1991); United States v. Levy, 1991 U.S. Dist. LEXIS 6332 (E.D.N.Y. May 8, 1991); United States v. Levy, 1994 U.S. App. LEXIS 13380 (2d Cir. June 3, 1994).

241 *See, e.g.,* United States v. Rauscher, 119 U.S. 407 (1886).

an extradition treaty between the United States and Iraq had existed since 1935, the United States opted to simply surrender these two individuals to Iraqi authorities, without reference to the existence of an extradition treaty. This can therefore be referred to as a form of extradition outside of a treaty with the consent of the interested states.[242]

On August 30, 2009, the United States secured the surrender from the government of Cambodia three U.S. citizens who had entered that country as sex tourists. All three had been charged with the federal crime of "sex tourism" under Title 18 § 2423(f). They had previously been charged or convicted of sex-related crimes in the United States. What was unusual in this case is that the formal request submitted by the U.S. embassy to the prime minister of Cambodia was delivered on August 21, 2009, and that the order for the surrender of these three requested individuals was approved by the Minister of Justice four days later on August 25. This is probably the fastest extradition case in the history of U.S. extradition practice.[243]

4.6. Military Rendition

4.6.1. Status of Forces Agreements

The United States relies on status of forces agreements (SOFAs) as an alternative basis for rendition,[244] but does not consider the practice as part of extradition. A SOFA is an agreement between the United States and a host state of U.S. armed forces regarding, inter alia, the criminal jurisdiction that either state may have over U.S. armed services personnel who are alleged to have engaged in criminal conduct in the host state. The typical SOFA provides that the United States has the primary right to submit the accused service-person or civilian employee to criminal prosecution if the alleged offense was committed in the performance of official duty or if it was directed against the property or person of the U.S. military community. All other offenses, on the other hand, are within the primary criminal jurisdiction of the host country. Either state may, however, relinquish its primary jurisdiction to the other state-party.[245]

The SOFAs also set forth rendition procedures. Usually, a member of the U.S. armed services who is accused of a criminal offense in the host state will be held in custody by U.S. armed forces until the imposition of a criminal sentence by the judiciary of the host state. The detention by U.S. military authorities is based on the Uniform Code of Military Justice.[246] The convicted service-person is delivered by the U.S. military authorities to the host state to serve the judicially imposed sentence.[247]

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242 *See* Ch. I, Sec. 6.

243 Raja Abdulrahim, *U.S. Charges Three Men with Having Sex with Children in Cambodia*, L.A. Times, Sept. 1, 2009, *available at*: http://articles.latimes.com/2009/sep/01/local/me-cambodia1.

244 *See generally* James R. Coker, *The Status of Visiting Military Forces in Europe: NATO–SOFA, A Comparison*, *in* A Treatise on International Criminal Law 115 (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1973). For a more recent appraisal of new trends in U.S. bilateral status of Forces Agreements *see* John W. Egan, *The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 Emory Int'l L. Rev. 291 (2006).

245 *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces [NATO SOFA], June, 19 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, art. VII. *See also* William J. Norton, *United States Obligations under Status of Forces Agreements: A New Method of Extradition?*, 5 Ga. J. Int'l & Comp. L. (1975).

246 10 U.S.C. § 810 (1994).

247 *See* Norton, *supra* note 246, at 17–18.

Surrender of a member of U.S. armed forces for foreign trial pursuant to a SOFA has been upheld by the U.S. Supreme Court.[248] A landmark case is *Holmes v. Laird*.[249] In *Holmes*, American servicemen stationed in Germany requested a U.S. federal court to enjoin their surrender to Germany to serve criminal sentences imposed upon them by German courts. The servicemen had been convicted of attempted rape and related offenses committed in Germany. Shortly before the pronouncement of the German appellate court decision affirming their convictions, they left West Germany without authorization and returned to the United States. Thereafter, they surrendered to U.S. Army officials and initiated litigation in a federal district court to prevent their rendition to Germany. They claimed primarily that the German court's failure to provide the procedural guarantees set forth in the applicable SOFA rendered their convictions invalid.

The federal court rejected these claims on the grounds that it did not have the authority to review the sufficiency of the German courts' determinations. In reaching this conclusion, the court relied upon *Neely v. Henkel*,[250] where a U.S. citizen contended that a federal statute authorizing extradition pursuant to a treaty was unconstitutional because it failed to secure to the accused surrendered to a foreign state for trial in its tribunals those constitutional rights provided in the United States. The *Holmes* court determined that the *Neely* court's rejection of such a claim was controlling:

> What we learn from *Neely* is that a surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials. We do not believe that [this] teaching has been eroded by time, nor that the slight factual differences between the pretrial extradition there and the post-conviction surrender here removes the instant situation from *Neely's* ambit.
>
> We conclude, then, that the Constitution erects no barrier to appellants' surrender to the Federal Republic.[251]

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248 *See* Wilson v. Girard, 354 U.S. 524 (1957). *See also* Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972); Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); Cozart v. Wilson, 236 F.2d 732 (D.C. Cir.), *vacated*, 352 U.S. 884 (1956); United States *ex rel.* Stone v. Robinson, 309 F. Supp. 1261 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970); Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968). In Plaster v. United States, 720 F.2d 340 (1983), the Fourth Circuit considered the return of a former U.S. serviceman to West Germany pursuant to the NATO SOFA. Under that agreement, the United States would retain jurisdiction only over those offenses committed by servicemen on a U.S. military base or that arose out of the performance of an official duty. Germany could thus claim jurisdiction over Plaster for the crime of murder. However, the treaty allowed Germany to waive its jurisdiction in favor of the United States. In 1959, the United States and Germany signed a Supplementary Agreement to the SOFA Treaty, July 1, 1963, T.I.A.S. No. 5351. The agreement provided, inter alia, that Germany would automatically waive its jurisdiction in favor of U.S. military courts at the request of the United States. Germany could recall its waiver only by notifying the United States within twenty-one days of receipt of a request for waiver. Plaster, a serviceman, had been suspected of murder in Germany, but had fled to the United States. While in custody for a murder committed in Wisconsin, Plaster allegedly confessed to the German murder. The United States formally notified Germany of its request of a waiver of Germany's jurisdiction. Germany urged the trial of Plaster and another serviceman for the German murder by an American military court, but did not recall its waiver. The Army filed formal court-martial charges against Plaster and the other serviceman. The Army ceased its pursuit of the prosecution when the Supreme Court handed down the *Miranda* decision, thus rendering the confession potentially inadmissible. Ultimately the Army promised Plaster transnational immunity from prosecution for the German murder if he agreed to testify against the other serviceman. Miranda v. Arizona, 396 U.S. 868 (1969).

249 Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972).

250 Neely v. Henkel, 180 U.S. 109 (1901).

251 *Holmes*, 459 F.2d at 1219.

The *Holmes* decision demonstrates the similarity between SOFAs and extradition treaties. Although SOFAs and extradition treaties are similar in some respects, there are several important distinctions between them.[252] For example, SOFAs do not require a judicial determination by a U.S. tribunal before surrender of the national to the host state, nor do they allow the U.S. executive's exercise of discretion to refuse surrender.[253] Both of these provisions are usually included in extradition treaties, however, and are required by U.S. legislation.[254] In addition, SOFAs generally cover an entire range of criminal conduct that permits the host country's exercise of primary jurisdiction.[255] Extradition treaties, on the other hand, are applicable only to those criminal offenses specifically enumerated in the treaty.[256] Furthermore, although an extradition treaty may prohibit a state's surrender of its own nationals to face prosecution in a foreign state, a SOFA may nevertheless permit such surrender if the accused was a member of the armed forces or a civilian employee of the armed forces when the alleged offense was committed in the host country.[257] As one commentator has noted:

> It is . . . apparent that extradition may be totally ineffective in a large number of cases where an individual encompassed by a SOFA manages to leave the receiving state before the alleged crime is adequately disposed of by the state. Some of the cases may be resolved by the exercise of American jurisdiction (if any exists) since the SOFAs do not prohibit such outside the receiving state. The difficulty of obtaining witnesses may, however, make this possibility practically ineffective. Since the U.S. follows the principle that individuals will not be surrendered to a foreign state absent a treaty obligation to do so or an authorizing statute, and there is no statute presently permitting extradition to any SOFA country, any requirement to return the fugitive individual to the receiving state must be found, if at all, in the SOFA.[258]

4.6.2. Occupational Forces

There have been instances during the history of the United States when its military was present in a foreign state or territory and rendition in the absence of a treaty was undertaken.[259] Rendition in these cases is subject to U.S. extradition legislation.[260] Statutory enactments authorizing the removal of individuals to or from areas under U.S. military control in order to face prosecution or punishment can replace an extradition treaty as the legal basis for such rendition.[261] Such cases were quite rare, as the United States had no occupying forces in any foreign state and had SOFAs with states in which it has troops stationed.[262]

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252 *See generally* Norton, *supra* note 246.

253 *Id.* at 26.

254 18 U.S.C. § 3184 *et seq.* (1988).

255 *See* Norton, *supra* note 246, at 26.

256 *Id.* at 39–40.

257 *Id.* at 26–27.

258 *Id.* at 27.

259 *See* Neely v. Henkel, 180 U.S. 109 (1901). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re* Kraussman, 130 F. Supp. 926 (D.C. Conn. 1955); 4 Hackworth Digest, *supra* note 79, at 16–19, 22; Whiteman Digest, *supra* note 70, at 745–746.

260 18 U.S.C. §§ 3183, 3185 (2000).

261 *See* Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969); United States *ex rel.* Perez-Varela v. Esperdy, 187 F. Supp. 378 (S.D.N.Y. 1960), *aff'd*, 285 F.2d 723 (2d Cir. 1960); *but see* United States *ex rel.* Martinez-Angosto v. Mason, 344 F.2d 673 (2d Cir. 1965), *reversing* 232 F. Supp. 102 (S.D.N.Y. 1964) (imprisonment of Spanish deserter by INS agents and Navy was illegal because they were not competent national or local authorities under the Treaty of General Relations and Friendship with Spain).

262 *See supra* Sec. 4.6.1.

The United States has for the last fifty years engaged itself militarily in a number of countries, usually for short-duration military operations, such as in the Dominican Republic (1965) and Panama (1990). During the operation in Panama, U.S. forces seized the then head of state, General Manuel Noriega, brought him to Miami, Florida, where he was prosecuted and convicted for drug trafficking.[263]

Since then, the United States has engaged in long-term military occupation in such countries as Afghanistan as of 2001 and Iraq as of 2003 without a SOFA agreement until 2008.[264] In both of these countries, U.S. troops have been accused of committing crimes against the local population. The United States has claimed that the Uniform Code of Military Justice and Title 10 apply exclusively to the U.S. military personnel abroad.[265] The U.S. military and the CIA have operated in these two theaters including bringing in and removing persons without any legal process and in disregard of the Constitution and U.S. law.[266] The United States has entered into defense cooperation agreements (DCAs), which unlike SOFAs are sometimes classified documents.[267]

In *Munaf v. Geren*, the Supreme Court held that two naturalized U.S. citizens of Iraqi origin, who had voluntarily gone back to Iraq, could be turned over from U.S. military custody to Iraqi custody without the formality of going through the existing extradition treaty between the two countries.[268] The Supreme Court identified that the two individuals had been in one case charged with a crime under Iraqi law, and in another case suspected of a crime under Iraqi law.[269] The fact that they were held in the custody of the U.S. military did not remove them from the exercise of territorial sovereignty by Iraq.[270] Arguments by and on behalf of the petitioners were to the effect that because they were held on a U.S. military base, which was under the exclusive jurisdictional control of the U.S. military, they should be treated, for purposes of their surrender to the territorial state, as if they were members of the U.S. armed forces or accompanying civilian personnel.[271] The argument was akin to saying that on these U.S. bases U.S. law applied, and there was no rational distinction as between U.S. citizens, namely military and civilians, when it came to their surrender to the territorial state.[272] The United States is assumed to exercise limited jurisdiction within these bases and should not simply turn over

263 *See* United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992); subsequent appeal at 117 F.3d 1206 (11th Cir. 1997); related proceeding at Noriega v. Pastrana, 2008 U.S. Dist. LEXIS 108682 (S.D. Fla. Jan. 14, 2008); *aff'd* by 564 F.3d 1290 (11th Cir. 2008). It is interesting to note that the United States considered Manuel Noriega a prisoner of war within the meaning of the Geneva Conventions, thus justifying his seizure in Panama and his transfer to the United States. The United States considered his prosecution during his detention as a prisoner of war (POW) justifiable because it was for common criminal acts preceding his seizure as a POW.

264 *See infra* note 552.

265 For the situation in Afghanistan, *see* M. Cherif Bassiouni, *Report to the General Assembly and to the United National Committee on Human Rights*.

266 Leila N. Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 Case W. Res. J. Int'l L. 309 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2006); Jordan J. Paust, Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror 36–38 (2007).

267 *See, e.g.,* the U.S.–Kuwaiti Defense Cooperation Agreement discussed in the Memorandum in Support of Defendant Ali Hijazi's Motion to Dismiss the Second Superseding Indictment in *U.S. v. Hijazi,* Case No. 05-40024, (C.D. Il, 2007) (on file with author). *See also* John W. Egan, *supra* note 245.

268 Munaf v. Geren, 553 U.S. 674, 674–706 (2008).

269 *Id.* at 681.

270 *Id.* at 686.

271 *Id.*

272 *Id.* at 684–687.

a U.S. citizen to the Iraqi government without going through the formalities of the extradition treaty.[273] The Supreme Court recognized the validity of the petitioner's challenges by means of the defendants filing a habeas corpus petition to oppose their transfer from U.S. custody to Iraqi custody.[274] The court held:

> Given these facts, our cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil. As Chief Justice Marshall explained nearly two centuries ago, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *The Schooner Exchange* v. *M'Faddon*, 11 U.S. 116, 7 Cranch 116, 136, 3 L. Ed. 287 (1812). See *Wilson, supra*, at 529, 77 S. Ct. 1409, 1 L. Ed. 2d 1544 ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction"); *Reid* v. *Covert*, 354 U.S. 1, 15, n. 29, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (opinion of Black, J.) ("[A] foreign nation has plenary criminal jurisdiction . . . over all Americans . . . who commit offenses against its laws within its territory"); *Kinsella* v. *Krueger*, 351 U.S. 470, 479, 76 S. Ct. 886, 100 L. Ed. 1342 (1956) (nations have a "sovereign right to try and punish [American citizens] for offenses committed within their borders," unless they "have relinquished [their] jurisdiction" to do so).
>
> This is true with respect to American citizens who travel abroad and commit crimes in another nation whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U.S. 109, 123, 21 S. Ct. 302, 45 L. Ed. 448 (1901).[275]

Since then, however, the United States and Iraq have signed a SOFA[276] as well as a Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq.[277]

In Article 12 of the SOFA, the United States recognizes the primary right to exercise jurisdiction of Iraq over members of U.S. forces and the civilian component accompanying U.S. forces

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273 See *Extradition Treaty Between the United States and Iraq* (June 7, 1934, Bagdad) TIAS 907.

274 *Munaf*, 553 U.S. at 684.

275 *Id.* at 694–695.

276 *Id.* at 693.

277 Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq Pec 14, 2008 ("Iraq SOFA"); Stephen Farrell, *Security Agreement Deja Vu*, N.Y. Times, Nov. 20, 2008, *available at* http://baghdadbureau.blogs.nytimes.com/2008/ll/20/security-agreement-deja-vu/?partner=rss&emc=rss (last visited Sept. 24, 2012). *See* Jomana Karadsheh & Arwa Damon, *Security Pact Runs into Discord in Iraqi Parliament*, CNN, Nov. 17, 2008, *available at* http://articles.cnn.com/2008-11-17/world/iraq.security_1_parliament-security-agreement-sadrists?_s=PM:WORLD (last visited Sept. 24, 2012) (reporting that Iraqi lawmakers decried the U.S.–Iraq security agreement). *See also* Karen DeYoung, *U.S., Iraq Scale Down Negotiations Over Forces*, Wash. Post, July 13, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/12/AR2008071201915.html (last visited Sept. 24, 2012); *but see Rubaie Denies Hall of Iraq–US Security Pact*, Alsumaria Iraq, July 15, 2008, *available at* http://www.alsumaria.tv/en/Iraq-Newsl-20093-Rubaie-denies-halt-of-Iraq-US-security-act.html (last visited Apr. 1, 2010). The Iraqi Cabinet approved the agreement on November 16, 2008 and the agreement was thereafter submitted to the Parliament. Parliamentary reaction to the agreement was mixed, with the Sadr party vocally opposing the plan and staging demonstrations to disrupt the voting process in Parliament. The agreement was finally reached on December 4, just prior to the December 31 sunset deadline of the UN Resolution that gave the United States the fig-leaf cover of legitimacy to have a military presence in Iraq.

stationed in Iraq.[278] Article 12 however limits Iraqi jurisdiction to "grave premeditated felonies" that are committed by U.S. forces and civilian components whether on or off duty outside U.S. installations.[279]

4.6.3. United States Military Personnel as a Part of UN Peacekeeping Missions

The United States has contributed military personnel to UN missions and peacekeeping operations, but no thought has been given to the questions raised in Sections 4.5.1 and 4.5.2. Such contributions of military personnel are presumably based on a "contract" between the United States and the United Nations. Consequently, U.S. military personnel may not benefit from the United Nations Treaty on Privileges and Immunities.[280] As things now stand, U.S. military personnel remain under U.S. military jurisdiction and the Uniform Code of Military Justice applies. Presumably, the law that applies to their extradition from the United States is the same as for civilians, but this has never been addressed by U.S. official policy or decided by U.S. courts.

4.7. Return of Transferred Offenders

Under the Foreign Offenders Transfer Act,[281] an individual who is a U.S. citizen may be returned to the United States to serve a sentence imposed by a foreign state for a crime committed in that state. In accordance with Title 18 § 4114, a transferred offender may be subsequently returned to the sentencing state to serve the remainder of his or her sentence. Section 4114 provides:

> Section 4114. Return of transferred offenders
>
> (a) Upon a final decision by the courts of the U.S. that the transfer of the offender to the U.S. was not in accordance with the treaty or the laws of the U.S. and ordering the offender released from serving the sentence in the U.S. the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the U.S. ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall not be longer than thirty days.
>
> (b) Upon receiving a request from the sentencing country that the offender ordered released be returned for the completion of his sentence, the Attorney General may file a complaint for the return of the offender with any justice or judge of the U.S. or any authorized magistrate within whose jurisdiction the offender is found. The complaint shall be upon oath and supported by affidavits establishing that the offender was convicted and sentenced by the courts of the country to which his return is requested; the offender was transferred to the U.S. for the execution of his sentence; that the offender was ordered released by a court of the U.S. before he had completed his sentence because the transfer of the offender was not in accordance with the treaty or the laws of the U.S.; and that the sentencing country has requested that he be returned for the

278 Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq ("Framework Agreement") (Nov. 17, 2008).

279 M. Cherif Bassiouni, *Legal Status of U.S. Forces in Iraq from 2003–2008*, 11 Chi. J. Int'l L. 1, 20–25 (2008).

280 Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 16 (entered into force Sept. 17, 1946).

281 18 U.S.C. §§ 4100–4115 (1988). *See also* M. Cherif Bassiouni, *Transfer of Prisoners: Policies and Practices of the U.S.*, *in* Bassiouni, II International Criminal Law 239 (1999).

> completion of the sentence. There shall be attached to the complaint a copy of the sentence of the sentencing court and of the decision of the court which ordered the offender released.
>
> A summons or a warrant shall be issued by the justice, judge or magistrate ordering the offender to appear or to be brought before the issuing authority. If the justice, judge, or magistrate finds that the person before him is the offender described in the complaint and that facts alleged in the complaint are true, he shall issue a warrant for commitment of the offender to the custody of the Attorney General until surrender shall be made. The findings and a copy of all the testimony taken before him and of all documents introduced before him shall be transmitted to the Secretary of State, that a Return Warrant may issue upon the requisition of the proper authorities of the sentencing country, for the surrender of offender.
>
> (c) A complaint referred to in subsection (b) must be filed within sixty days from the date on which the decision ordering the release of the offender becomes final.
>
> (d) An offender returned under this section shall be subject to the jurisdiction of the country to which he is returned for all purposes.
>
> (e) The return of an offender shall be conditioned upon the offender being given credit toward service of the sentence for the time spent in the custody of or under the supervision of the U.S..
>
> (f) Sections 3186 through 3188, and 3195 of this title shall be applicable to the return of an offender under this section. However, an offender returned under this section shall not be deemed to have been extradited for any purpose.
>
> (g) An offender whose return is sought pursuant to this section may be admitted to bail or be released on his own recognizance at any stage of the proceedings.[282]

This scheme is not considered to be an extradition procedure, although it is similar to it. The distinctions between these two rendition methods are noteworthy, as the choice of device employed to effect the offender's return could have substantial impact on the offender's rights and liberty. As this writer has previously noted:

> The implementing statute purports to create a mechanism that would operate speedily and smoothly to return transferred offenders released by U.S. courts before their sentences are completed to the state that convicted and sentenced them. On its face, this provision would appear to render attacks on the validity of the transfer or collateral attacks on conviction and sentence useless, since success in such attack would merely result in return of the offender to the state from whence he or she came. The validity of section 4114 is questionable, however. To examine its validity the provision should be considered in relation to extradition as that practice is followed in all three treaty signatory states [U.S., Canada, and Mexico].
>
> Extradition under the U.S.–Mexico and the U.S.–Canada treaties of extradition requires not only that the offense for which the relator is sought be criminal in both states (double criminality), but also that it be among those offenses expressly listed in the Extradition Treaty. The treaties on transfer of prisoners, however, permit transfer whenever the offense in question is criminal in both states, regardless of whether it is listed in any treaty as an extraditable offense. Thus, the possibility exists under section 4114 of the Act that an offender could be returned for an offense which is not among those listed in the extradition treaty between the parties. While a state may make a request for extradition at any time, under section 4114, the request for return must be made within six months of the offender's release. Finally, as a precondition to extradition, federal law requires that probable cause be shown in a hearing. That is, it must be shown that there is sufficient evidence of the offender's guilt of the crime in question as would justify holding him for trial under U.S. law. Under section 4114, it is sufficient to produce a certified copy of the conviction rendered by the court of the state seeking the offender's return. Should a U.S. court find that such "return" procedures are merely a form of extradition under another

282 18 U.S.C. § 4114 (1994).

> label, it may consider that section 4114 discriminates against returnees as opposed to extraditees who are governed by sections 3181 *et seq.* without any rational basis and consider that provision a denial of equal protection.
>
> Probable cause as required by 18 U.S.C. section 3184 for extradition may be deemed inapplicable to "return" procedures under section 4114 because, in this case, the return is predicated on a conviction rather than an accusation. If, however, the release was due to a finding by the releasing U.S. court that the conviction was in violation of minimum criminal justice standards, the question remains how another U.S. court could rely on the validity of that judgment to order the offender's return. Should the Sending State request extradition of the transferred offender rather than requesting his or her return under section 4114, the Requesting State could have met a variety of requirements not included in the simple return mechanism of section 4114. Therefore, release without return is a possibility.[283]

In the first decision interpreting the return provision of this legislation, the Fifth Circuit, in *Tavarez v. U.S. Attorney General*,[284] equated the status of a transferred prisoner to that of an escaped convict held in legal custody. The court reasoned as follows:

> Generally, the legal custodian of an escaped convict can return the fugitive to custody without a warrant or a hearing. *See, e.g., Rush v. U.S.,* 290 F.2d 709 (5th Cir. 1961) (federal authorities may reacquire custody of escaped convict from state authorities and return him to federal penitentiary in another state without a removal warrant and without a hearing before a magistrate), *followed in Bandy v. U.S.,* 408 F.2d 518, 521 (8th Cir. 1969), *cert. denied,* 396 U.S. 890, 90 S. Ct. 180, 24 L. Ed.2d 164 (1969); *U.S. v. Mensik,* 440 F.2d 1232, 1234 (4th Cir. 1971) (FBI need not serve warrant on prisoner in escape status); *U.S. v. Reed,* 413 F.2d 338, 340 (10th Cir. 1969) (recapture of escaped convicts not an arrest requiring appearance before magistrate), *cert. denied,* 397 U.S. 954, 90 S. Ct. 982, 25 L. Ed.2d 137 (1970). The reason that the custodian need not normally resort to the judicial process is that the escaped convict "may be . . . confined under the authority of the original judgment until the term of his imprisonment has been accomplished." *U.S. ex rel. Nicholson v. Dillard,* 102 F.2d 94, 96 (4th Cir. 1939).
>
> Thus, the resolution of our first question turns on the scope of the Attorney General's authority as custodian of Tavarez. Under the statute,
>
> The Attorney General is authorized—
>
> > (3) to transfer offenders under a sentence of imprisonment . . . to the foreign countries of which they are citizens or nationals;
> >
> > . . .
> >
> > (6) to make arrangements by agreement with the States for the transfer of offenders in their custody who are citizens or nationals of foreign countries to the foreign countries . . .
>
> 18 U.S.C. section 4102. To effectuate his power to transfer Tavarez, and to hold a consent verification proceeding before a federal judicial officer, as required by 18 U.S.C. section 4107(a), the Attorney General made an agreement with the state of Texas in which the state surrendered custody of Tavarez to the Attorney General.
>
> Inherent in the power to transfer an offender to a foreign country is the power to exercise custody over the offender for the purpose of effecting the transfer. Had Tavarez escaped from federal custody while awaiting the consent verification proceeding, or while *en route* through the U.S. to Mexico, we have no doubt that the Attorney General could recapture him for the purpose of completing the transfer. The question, therefore, is whether the Attorney General's authority to exercise custody for the purpose of effecting the transfer is lost once the initial transfer is

283 M. Cherif Bassiouni, *Perspectives on the Transfer of Prisoners between the U.S. and Canada*, 11 Vand. J. Transnat'l L. 249, 265–267 (1978).

284 Tavarez v. U.S. Attorney General, 668 F.2d 805 (5th Cir. 1982).

> completed. We hold that the authority is not lost. A sovereign does not lose its power to keep a convict in custody by turning the convict over to another sovereign for service of a sentence. *Floyd v. Henderson*, 456 F.2d 1117 (5th Cir. 1972) (federal government did not waive its power to resume custody over convict for completion of federal sentence by transferring him to state prison for concurrent service of state and federal sentences); *Mitchell v. Boen,* 194 F.2d 405, 407 (10th Cir. 1952). "[T]he question of jurisdiction and custody is one of comity between the two governments and not a personal right of the prisoner." *Jones v. Taylor*, 327 F.2d 493, 493–94 (10th Cir.), *cert. denied*, 377 U.S. 1002, 84 S. Ct. 1937, 12 L. Ed.2d 1051 (1964), *cited with approval in Floyd v. Henderson*, 456 F.2d at 1119.
>
> Tavarez argues that the Attorney General's power to exercise custody applies only to the initial transfer. But there is no provision of the statute that requires this result. To the contrary, the only indication the statute gives is that the federal and state governments retain their power—within the limits imposed by principles of jurisdiction and comity—to regain custody if the sentence is not completed. *See* 18 U.S.C. section 4107(b)(3). We hold, therefore, that the Attorney General's statutory power to exercise custody for the purpose of transfer includes the power to apprehend an offender who escapes from the confinement to which he has been transferred.
>
> May the Attorney General return the offender to Mexico without a hearing?
>
> Tavarez asserts that the government must commence extradition proceedings. The government's return of Tavarez to Mexico, however, is not an "extradition." "Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289, 22 S. Ct. 484, 492, 46 L. Ed. 534 (1902). The procedures of 18 U.S.C section 3184, which contains a similar definition of extradition, are simply inapplicable to this case. The government is not surrendering Tavarez for a crime committed in Mexico; to the contrary, it is attempting to enforce its own laws concerning the proper place of confinement for crimes committed in this country.
>
> While we hold the extradition process inapplicable, we do not therefore conclude that the apprehended individual is entitled to no procedural protection. Granting the government power to remove an individual from the street and surrender him to foreign confinement without judicial process creates a grave danger of erroneous deprivation of liberty. While the courts have held that no hearing is required prior to a return to imprisonment within this country, *see Rush v. U.S., supra*, this rule does not fully control the present case.. .
>
> We hold that a person who is apprehended as an escapee from a foreign prison after transfer pursuant to the Act must be given the opportunity—as Tavarez was here—to consult with a lawyer and to petition a federal habeas court for a stay of his return to the foreign nation pending the resolution of any issue concerning the legality of his return. *See In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975) (district court has "inherent power" to control custody of prisoner pending its decision on habeas petition); *Jimenez v. Aristiguieta*, 314 F.2d 649, 652 (5th Cir. 1963) (district court has "inherent power" to stay extradition of petitioner pending his appeal of court's denial of habeas corpus).[285]

The first two major decisions upholding the constitutionality and validity of transfer of prisoner agreements and the implementing legislation, 18 U.S.C. §§ 4100 *et seq.*, were *Pfeifer v. U.S. Bureau of Prisons*[286] and *Rosado v. Civiletti*.[287]

The United States has expanded its relations with other countries in the area of transfer of prisoners, but all of the treaties, as well as the implementing legislation (18 U.S.C. §§ 4100 *et*

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285 *Id.* at 808–811 (citations omitted).

286 Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980), *cert. denied*, 447 U.S. 908 (1980).

287 Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), *cert. denied*, 449 U.S. 856 (1980).

seq.), require that the transfer be based on the consent of the prisoner, as well as on the consent of both the sending and receiving states. Such consent by the prisoner must also be accompanied by a waiver of the prisoner's right to challenge the conviction upon which the transfer is to be based. As a result, transfer of prisoners under U.S. law and practice cannot be viewed as an alternative to extradition unless a given treaty does not make the transfer contingent upon the prisoner's consent. In such an event, the prisoner could be transferred to the United States for trial or for execution of another sentence imposed upon him in the United States, and his only remedy would be to challenge the foreign conviction upon which he was transferred, as he would not have waived that right prior to the transfer. As U.S. law now stands, however, this would not invalidate his trial, detention or incarceration in the United States on the basis of a U.S. court order.[288]

It must be noted that if the conviction is not for a federal crime, transfer of prisoners must be subject to state legislation authorizing such a transfer.[289]

5. The Constitution, Treaty-Making, and Treaty Interpretation[290]

5.1. Extradition: A Federal Prerogative

In the United States, international extradition is regarded as an exclusive power of the federal government, which is denied to the states.[291] The power to make treaties rests specifically with the president,[292] but is subject to the advice and consent of two-thirds of the Senate.[293]

The treaty-making power shared by the president and the Senate is limited only by other articles of the Constitution itself or by federal legislation. As the Supreme Court stated in 1890 in *De Geofroy v. Riggs*:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or one of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.[294]

Thus, the determination of the extent of this treaty-making power requires an analysis of the substantive national rights that are created or proscribed under the terms of the treaty. In 1794, for example, the case of *In re Robbins*[295] raised the question of whether Article III of the

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288 *See* Bassiouni, *Transfer of Prisoners: Policies and Practices of the U.S.*, *supra* note 282 (citing numerous authorities on the question of transfer of prisoners, and listing the bilateral treaties of the United States, and the European Convention on the Transfer of Sentenced Prisoners, Mar. 21, 1983, T.S. No. 112, ratified by the U.S. Senate in 1984, thus linking the United States to a number of European states that have ratified the Convention).

289 The following states have passed such legislation: Alaska, Arizona, California, Colorado, Florida, Hawaii, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

290 *See supra* Secs. 1 and 2.

291 *See* Whiteman Digest, *supra* note 70, at 731–738.

292 U.S. Const. art. II, § 2, cl. 2.

293 *Id.*

294 De Geofroy v. Riggs, 133 U.S. 258, 267 (1890). *See also* Reid v. Covert, 354 U.S. 1, 17–18 (1957).

295 *In re* Robbins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

Constitution permitted judicial review in extradition proceedings. The issue arose because no statutory provision authorizing the court to act pursuant to presidential mandate existed, nor did the treaty make any provision for a judicial hearing or the manner in which the proceedings were to be undertaken. The president ordered the case heard in the U.S. district court. The court held that its judicial power under Article III extended to the interpretation and application of extradition treaties, and did not require federal legislation specifically implementing procedures for judicial review in extradition proceedings. Having thereby established its jurisdiction over the subject matter, the court ruled that the terms of the treaty had been satisfied and ordered the relator surrendered to the requesting state.

The central question presented in *Robbins* was whether extradition treaties are self-executing, in reliance on international law doctrine, or are non–self-executing and require national legislation for their implementation, in reliance on constitutional law doctrine.[296] The debate lasted from 1794 to 1848. During that period, the proponents of the view that extradition treaties are self-executing prevailed and extradition proceedings were adjudicated by federal district courts on request of the president or the secretary of state. It was not until 1848 that Congress passed the first extradition statute setting forth that extradition is to be undertaken by virtue of a treaty and subject to judicial proceedings in federal district court in accordance with the provisions of the statute.[297] Since then the federal extradition statute has been revised several times.[298] The 1948 statute states: "[t]he provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."[299]

Since the resolution of this controversy, the judiciary has determined that the executive branch has the authority to do only that which is granted in federal legislation or in an extradition treaty. This doctrine is founded on the principle that executive prerogative alone cannot dispose of a person's liberty. The government's right to restrict personal freedom in a manner consistent with the Constitution must derive from a treaty that has become part of the law of the land through the consent of the Senate. The U.S. Supreme Court reiterated this view in 1936, when it stated:

> [A]pplying, as we must, our law in determining the authority of the President, we are constrained to hold that his power, in the absence of a statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.[300]

The treaty-making power shared by the president and the Senate is an exclusive national power. The Supreme Court emphasized this point as early as 1886, when it stated:

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296 *See infra* Sec. 5.2.

297 Act of Aug. 12, 1848, ch. 167, 9 Stat. 302 (1898).

298 *Id. See also supra* Sec. 2.

299 18 U.S.C. § 3181 (2000).

300 Valentine v. U.S. *ex. rel.* Neidecker, 299 U.S. 5, 18 (1936). In *Williams v. Rogers*, 449 F.2d 513 (1971), the Eighth Circuit held that *Valentine* meant that the holding there requires only that there be a showing of some authority, whether in the form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives from justice by this country to another. *Id.* at 521. In this case, a U.S. military person had been reassigned from the United States to a U.S. base in the Philippines where he had once been and was under indictment by the Philippine courts for the crime of rape. Under the agreement between the United States and the Philippines, the latter had jurisdiction to prosecute for common crimes committed by U.S. military personnel. The reassignment order was construed by this decision as a form of surrender akin to extradition, but as quoted it apparently need not rest on a treaty.

> There is no necessity for the states to enter upon relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives.
>
> At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.[301]

Thus, it is firmly established that the various states have no power to negotiate extradition treaties, that international extradition is regarded as an exclusively federal power, and that there can be no extradition under present practice without a treaty.[302] This doctrine is also at the basis of "Executive Discretion,"[303] which permits the president or whomever he/she may delegate (i.e., the secretary of state) to refuse to surrender a person who was ordered delivered to a requesting state by the judiciary.

Although the Constitution clearly grants the treaty-making power to the president with the advice and consent of the Senate, it does not designate the branch having the authority to terminate a treaty in all instances. One commentator has noted that:

> [A]t various times the power to terminate treaties has been claimed for the President, the President-and-Senate, the Congress. The Presidents have claimed authority, presumably under their foreign affairs power, to act for the U.S. to terminate treaties, whether in accordance with their terms, or in accordance with or in violation of international law. Franklin Roosevelt, for example, denounced an extradition treaty with Greece in 1933 because Greece had refused to extradite the celebrated Mr. Insull . . . Without formal termination, Presidents in conducting foreign relations have acted contrary to treaty obligations, even where the treaty had domestic effect as the law of the land, sometimes inviting the other party to terminate the treaty.[304]

The U.S. government, in carrying out its treaty obligations, must conform its conduct to the requirements of the Constitution. However, a treaty entered into subsequent to the date in which national legislation[305] has entered into force will supersede the provisions of the legislation.

Restatement (Third) section 326 states:

> (1) The President has authority to determine the interpretation of an international agreement to be asserted by the U.S. in its relations with other states.
>
> (2) Courts in the U.S. have final authority to interpret an international agreement for purposes of applying it.

The Comments and Reporters' Notes to Restatement (Third) section 326 expand upon the relationship between branches of the federal government and the treaty-making process. They state:

> a. *Presidential authority to interpret.* The President has authority to interpret international agreements for the purpose of U.S. foreign relations since he is the country's "sole organ" in its international relations and is responsible for carrying out agreements with other nations. See sec. 1, Reporters' Note 2. The Senate, whose consent is necessary for the U.S. to conclude a treaty, has

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301 United States v. Rauscher, 119 U.S. 407, 414 (1886).

302 *See* Whiteman Digest, *supra* note 70, at 734.

303 *See* Ch. XI.

304 Henkin, *supra* note 142, at 168.

305 18 U.S.C. §§ 3181–3196 (2000).

no special role in the implementation of the treaty after it is made, though, of course, it participates equally with the House of Representatives in enacting implementing legislation or appropriating funds. Interpretation by the Senate of a treaty after it has been concluded may have no special authority, but understandings expressed by the Senate in giving its advice and consent must be respected. See sec. 314, Comments *b* and *d*.

b. *Executive and judicial interpretation.* In exercising the authority stated in Subsection (1), the President will take into account interpretations by the courts of the U.S., but he may adopt a different interpretation vis-à-vis other states. For their part, courts in the U.S. give "great weight" to interpretations of an agreement by the President in his conduct of U.S. foreign relations. Subsection (2).

International agreements are law of the U.S., sec. 111, and the President "Shall take Care that the Laws be faithfully executed." U.S. Constitution, Article II, Section 3. Execution of an international agreement as domestic law often requires interpretation of the agreement, and the President determines what the agreement means in the first instance. The courts, however, have the final say as to the meaning of an international agreement insofar as it is law of the U.S. applicable to cases and controversies before the courts.

c. *Communication of Executive views to courts.* In a case in a U.S. court to which the U.S. is not a party, the Executive Branch sometimes makes suggestions to the court about the interpretation of an agreement. Compare the former practice in immunity cases, Introductory Note to Part IV, Chapter 2. The Department of Justice may file a brief *amicus curiae* to present the views of the government, sometimes at the request of the court.

d. *Interpretation as federal law.* An international agreement to which the U.S. is a party is the supreme law of the land under Article VI of the Constitution, sec. 111(1). The interpretation of such an agreement, therefore, is a matter of federal law and binding on the courts of the several States. Interpretations by State courts are subject to review by the Supreme Court in the exercise of the judicial power of the U.S., defined in Article III, Section 2 of the Constitution as extending to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the U.S., and Treaties made, or which shall be made, under their Authority . . . " See sec. 112, Comment *a.*

Reporters' Notes

1. *Subsequent Senate interpretation*. The Senate's understanding of a treaty to which it gives consent is binding, sec. 314, Comments b and d, but later interpretations by the Senate have no special authority. Comment *a.* In *Fourteen Diamond Rings v. U.S.*, 183 U.S. 176, 180, 22 S.Ct. 59, 60, 46 L.Ed. 138 (1901), the Court ignored a Senate resolution purporting to clarify the status of the Philippines as to customs duties under the treaty of peace between the U.S. and Spain to which the Senate had previously consented. The Court said: "[t]he meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."

2. *Differing interpretations by Executive and courts.* The Supreme Court has given great weight to the interpretation of an agreement by the Executive Branch. Increasingly, it has invited the Solicitor General to file an amicus brief giving the views of the Executive Branch. E.g., *Kolovrat v. Oregon*, 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961); *Zschering v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). However, the Supreme Court also has differed from the Executive Branch on various occasions. Compare *Kolovrat v. Oregon*, *supra*, with *Perkins v. Elg*, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (1939). Courts are more likely to defer to an Executive interpretation previously made in diplomatic negotiation with other countries, on the ground that the U.S. should speak with one voice, than to one adopted by the Executive in relation to a case before the courts, especially where individual rights or interests are involved. See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984). Compare the discussion of determinations of international law in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33, 84 S.Ct. 923, 942, 11 L.Ed.2d 804 (1964).

In *Sumitomo Shoji America, Inc. v. Avagliano*, *supra*, the Supreme Court followed the Department of State's interpretation of a treaty with Japan, though the lower courts had not done so. In *Spiess v. C. Itoh & Co. (America), Inc.,* 469 F.Supp. 1, 9-11 (S.D.Tex.1979), the district court refused to follow the Department of State's interpretation of a treaty but, recognizing the seriousness of doing so, certified the question to the Court of Appeals, which reversed, 643 F.2d 353 (5th Cir. 1981). Occasionally, judicial interpretations seem to create difficulties for the Executive Branch. *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 29 S.Ct. 424, 53 L.Ed. 792 (1909), interpreted a clause in a treaty with Italy giving aliens access to courts of justice so as to deny an Italian the protection of a State's wrongful death statute. This caused the Executive Branch to renegotiate a broader clause in 1913, but the Court also gave that clause a restrictive reading. *Liberato v. Royer*, 270 U.S. 535, 46 S.Ct. 373, 70 L.Ed. 719 (1926). Those cases were effectively superseded by later treaties of friendship, commerce, and navigation. See *Blanco v. U.S.*, 775 F.2d 53, 61-63 (2d Cir. 1985). Recent cases expressing doubts as to Executive interpretations of agreements include *U.S. v. Decker*, 600 F.2d 733 (9th Cir.1979), certiorari denied, 444 U.S. 855, 100 S.Ct. 113, 62 L.Ed.2d 73 (1979); *U.S. v. Enger*, 472 F.Supp. 490 (D.N.J.1978).

3. *Interpretation not a "political question."* It might be argued that an agreement should not have one meaning for the U.S. in its international relations and another in litigation in U.S. courts, and that therefore the meaning of an international agreement is a "political question." The courts have been clear, however, that interpretation of a treaty for purpose of a case before them is a legal and not a political question. See the discussion of "political questions" in section 1, Reporters' Note 4.

4. *Interpretation of agreement and determination of international law.* Courts give "particular weight" to Executive views on customary international law (section 112, Comment c), and "great weight" used in this section has the authority of the Supreme Court of the U.S.. See *Factor v. Laubenheimer*, 290 U.S. 276, 294–95, 54 S.Ct. 191, 196, 78 L.Ed. 315 (1933); *Kolovrat v. Oregon*, Reporters' Note 2.

5. *Evidence of U.S. interpretive practice.* Whether the U.S. has taken a position as to the meaning of an international agreement might be ascertained by examining the successive Digests of International Law edited by Wharton, Moore, Hackworth, and Whiteman, the more recent annual digests, and The Papers Relating to the Foreign Relations of the U.S.. As of 1986, the latter compilation was complete to 1954, with volumes relating to Vietnam up to 1959.[306]

5.2. The Relationship of Treaties to National Legislation

Generally, treaties are either self-executing and therefore require no implementing legislation in order to become effective and executory, or non–self-executing and require implementing legislation.[307] The test for determining if a treaty requires implementing legislation is whether its terms impart an obligation or need that must be executed by the legislature in order for it to become enforceable by both the executive and judicial branches.[308]

306 Restatement (Third), *supra* note 79 at § 326.]

307 *See generally* Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760 (1988); Charles H. Dearborn III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 Tex. L. Rev. 233 (1979).

308 Foster & Elam v. Neilson, 27 U.S. 253, 314 (1829), *overruled by* United States v. Percheman, 32 U.S. 51 (1883). *See generally* Restatement (Third) Restatement (Third), *supra* note 79 at § 111;] Richard Cohen, Comment, *Self-Executing Agreements: A Separation of Powers Problem*, 24 Buff. L. Rev. 137 (1974).

Extradition treaties are deemed self-executing and therefore do not need legislation.[309] Thus, they are effective and enforceable by the executive and judicial Branches as of the time the iven treaty has been ratified by the president, subsequent to the Senate's "advice and consent." As a result, they are incorporated into the municipal law of the United States and are binding upon the federal judiciary pursuant to Article III, which is under the same obligation to enforce extradition treaties as it is to enforce the Constitution and the laws of Congress. As the Supreme Court stated in the *Head Money Cases*:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country . . . The Constitution of the U.S. places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the U.S., shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.[310]

Because extradition treaties and federal legislation regarding extradition carry the same weight and force, conflict between the two raises difficult questions of judicial interpretation and enforcement. Although the courts generally attempt to interpret the two in a manner that avoids inconsistency and conflict, the prevailing view in the United States is that federal legislation enacted after the ratification of a self-executing treaty is controlling over conflicting treaty provisions. In its *Head Money Cases* decision, noted above, the Court went on to state:

> But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.
>
> A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.
>
> In short, we are of opinion that, so far as a treaty made by the U.S. with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.[311]

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309 Terlinden v. Ames, 184 U.S. 270, 288 (1902). Unless a treaty is self-executing, "it does not, in and of itself, create individual rights that can give rise to habeas relief." Wang v. Ashcroft, 320 F. 3d 130, 140 (2d Cir. 2003). *See also Antwi v. U.S.*, 349 F. Supp. 2d 663 (S.D.N.Y.2004).

310 Head Money Cases, 112 U.S. 580, 598–599 (1884).

311 *Id.*

The court reaffirmed this view in its interpretation of an extradition treaty in *Grin v. Shine*.[312] There, the relator unsuccessfully argued that the extradition treaty with Russia, which required proof of probable cause by the production of an arrest warrant from the requesting state, should take precedence over subsequent congressional legislation, which did not require that the arrest warrant be issued by the requesting state. The Court reasoned that:

> [w]hile the treaty contemplates the production of a copy of a warrant of arrest or other equivalent document, issued by a magistrate of the Russian Empire, it is within the power of Congress to dispense with this requirement, and we think it has done so by Rev. Stat. sec. 5270 . . . The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian government and of further negotiations. But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. De Uriarte*, 16 Fed. Rep. 93 (S.D.N.Y. 1883).[313]

The United States' view on this issue is contrary to the practice of many other states. One commentator has noted that:

> in civil law systems international law is generally of superior force to municipal law. Thus, in the event that an extradition treaty should impose an obligation on these countries to extradite a national [for example] this obligation must be discharged, notwithstanding the contrary provisions of municipal law.[314]

National legislation may supersede treaty obligations. Because an extradition treaty is in the nature of an international agreement stating the parties' obligations, it is only logical that the precise extent of these obligations should be contained in the treaty. Therefore, regardless of the method by which U.S. courts resolve a conflict between treaty obligations and legislation, "by international law it is no defense to plead conflicting municipal law in answer to a breach of an internationally binding obligation."[315]

The U.S. Supreme Court in *Medellin v. Texas* was presented with the issue of whether a decision by the International Court of Justice (ICJ) had automatic domestic legal effect in the United States.[316] Medellin raised the argument that the ICJ's judgment in *Avena* constituted a binding obligation on the U.S. federal courts by virtue of the Supremacy Clause of the U.S. Constitution.[317] According to Medellin, the underlying treaty by which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes created a domestically enforceable obligation on U.S. federal courts, which could not be defeated by state limitations on successive habeas petitions.[318] The Supreme Court was presented with the issue of whether a judgment issued by the ICJ pursuant to an underlying treaty had "automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts."[319]

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312 Grin v. Shine, 187 U.S. 181 (1902).

313 *Id.* at 191. The doctrine was affirmed in *Charlton v. Kelly*, 229 U.S. 447, 465 (1913). *See also In re Extradition of* Rafael Eduardo Pineda Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. 1998), *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

314 Ivan A. Shearer, Extradition in International Law 115 (1971).

315 *Grin,* 187 U.S. at 195. The 1984 Extradition Act maintains the traditional position of the United States that national legislation supersedes treaties. This position was criticized by this writer before the Senate and House Committee hearings on their respective proposed bills. *See Senate Judiciary Hearings on S. 1639, supra* note 101, at 20; *House Judiciary Hearings on H.R. 5227, supra* note 109.

316 Medellin v. Texas, 552 U.S. 491 (2008).

317 *Id.* at 504.

318 *Id.*

319 *Id.* (emphasis in original).

The Supreme Court began its analysis on this point by setting forth the long-established rule on the self-executing nature of treaties presented by Chief Justice Marshall in *Foster v. Neilson* as follows: that a treaty is "equivalent to an act of the legislature," "the 'courts' must regard 'a treaty . . . as equivalent to an act of the legislature,' " and hence self-executing, when it "operates of itself without the aid of any legislative provision."[320]

The Supreme Court summarized the issue as follows: "In sum, while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.' "[321] Absent legislation or language in a treaty to make it self-executing, a treaty is not automatically enforceable by U.S. courts and depends on the respective governments to carry out its provisions.[322] The majority responded to the dissent's suggestion that a multi-factored approach was the proper approach to determining the self-executing nature of a treaty by reaffirming the longstanding analysis set forth in *Foster v. Neilson*, discussing the policy goals of consistency and predictability in treaty application; a "context-specific" inquiry could have the result that the same treaty may be self-executing in one context but non–self-executing in another.[323]

The underlying treaty at issue in *Medellin* was the UN Charter and the ICJ Statute, which is part of the Law of the Charter. The Supreme Court held that both required implementing legislation to become binding federal law.[324] The UN Charter, as a treaty, was ratified by the United States. After considering the plain language of the treaties, the Supreme Court reasoned that there was a distinction between submitting to the ICJ's jurisdiction and being bound by its decisions under U.S. law.[325] In other words, a duality exists as to the U.S. federal government being bound under international law, and that aspect of international law being enforceable domestically under U.S. constitutional Law. The Supreme Court concluded that "The most natural reading of the Optional Protocol [to the Vienna Convention, which pertains to acceptance of compulsory jurisdiction of the ICJ by state parties] is as a . . . grant of jurisdiction," and that "The Protocol says nothing about the effect of an ICJ decision [domestically] and does not itself commit signatories to comply with an ICJ judgment."[326] This reasoning is indeed challenging to legal logic, but it is the only approach the Supreme Court could follow to reach the

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320 *Id.* (citations omitted).

321 *Id.* at 504–505 (citations omitted).

322 *Id.* at 505–506.

323 *Id.* at 513. The majority also raised a separation-of-powers concern. As the president with the advice and consent of the Senate enters into treaties with a given understanding, allowing the judiciary to reason that a treaty was sometimes self-executing and sometimes not would create much uncertainty regarding the application of treaties and adversely affect the United States' ability to negotiate and sign international agreements. The majority summarized the point by stating:

> The point of a non-self-executing treaty is that it "addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court." *Foster*, 27 U.S. 253, 2 Pet., at 314, 7 L. Ed. 415 (emphasis added); *Whitney*, 124 U.S., at 195,8 S. Ct. 456, 31 L. Ed. 386. See also *Foster*, 27 U.S. 253, 2 Pet., at 307, 7 L. Ed. 415 ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided").

Id. at 515–516.

324 *Id.* at 506.

325 *Id.* at 507. The Supreme Court considered the language of the optional protocol, which stated "that '[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice' and 'may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol.' Art. I, 21 U.S.T. at 326."

326 *Id.* at 507–508.

outcome it sought.[327] Furthermore, Article 94 of the UN Nations Charter, which addresses the effect of ICJ decisions, requires a commitment on the part of member states to comply with ICJ decisions, and specifies that the sole remedy for noncompliance is referral to the UN Security Council by an aggrieved party.[328] The Court concluded that this remedy evidences that Article 94 did not aim at making ICJ decisions automatically enforceable in domestic courts.[329] The Supreme Court also considered the executive's understanding of the binding nature of ICJ judgments against the United States.[330] Had the Court accepted Medellin's Supremacy Clause argument, the UN Charter's remedial scheme would have been rendered meaningless, and this outcome could not have been intended at the time of drafting of the UN Charter. The Supreme Court concluded that a different interpretation would undermine "the ability of the political branches to determine whether and how to comply with an ICJ judgment," meaning that "Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law . . . This result would be particularly anomalous in light of the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments.' *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918)."[331] Thus, the Supreme Court held that the ICJ decision was not automatically enforceable domestically, and further reasoned that pursuant to Article 59 of the Charter, ICJ decisions could only be binding on states and not individuals, implying that individuals lacked standing in national courts to raise an argument based on a claim of rights arising under an ICJ decision.[332] This lack of standing applies only to ICJ decisions, which are proceedings involving states and international organizations and not individuals. It does not extend to

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327 It is reminiscent of the same approach followed by the Court in *Alvarez-Machain v. United States*, where the Court upheld the kidnapping of a Mexican citizen at the behest of the U.S. Department of Justice in order to prosecute him on the proposition that the United States–Mexico bilateral extradition treaty did not specifically exclude kidnapping. Consequently, U.S. jurisdiction attached.

328 *Id.* at 508–509.

329 The Supreme Court also considered the post-ratification understanding of signatory nations, noting that of the 47 nations parties to the Optional Protocol and 171 nations parties to the Vienna Convention, none had treated ICJ judgments as domestically binding. *Id.* at 516–517.

330 *Id.* at 510 (citations omitted). The Court provided the following summary of the executive's understanding of this point:

> This was the understanding of the Executive Branch when the President agreed to the U.N. Charter and the declaration accepting general compulsory ICJ jurisdiction. See, *e.g.*, The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., 124–125 (1945) ("[I]f a state fails to perform its obligations under a judgment of the [ICJ], the other party may have recourse to the Security Council"); *id.*, at 286 (statement of Leo Pasvolsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council"); A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 before the Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 2d Sess., 142 (1946) (statement of Charles Fahy, State Dept. Legal Adviser) (while parties that accept ICJ jurisdiction have "a moral obligation" to comply with ICJ decisions, Article 94(2) provides the exclusive means of enforcement).

331 *Id.* at 510. The Court also stated in dicta that giving an ICJ judgment automatic binding domestic effect would allow the ICJ to override contrary state and federal law without any means of domestic review of the ICJ's judgment. The Court further noted that, in prior decisions, it "held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect," as the Court's interpretation had always begun with the language of the treaty at issue. *Id.* at 517–519.

332 *Id.* at 511.

treaty rights conferred upon individuals by states, either in multilateral or bilateral treaties, whereby individuals are third-party beneficiaries entitled to claim such conferred rights and see their enforcement in national legal proceedings.[333]

5.2.1. The Effect of Self-Executing Provisions of Multilateral Treaties on Preexisting Bilateral Treaties and the Requirement of National Implementing Legislation.

Certain multilateral treaties, such as the United Nations Convention Against Corruption[334] ("United Nations Convention on Corruption") raise a peculiar issue as to whether a purportedly self-executing provision within that multilateral treaty can operate as a self-executing modification of preexisting bilateral extradition treaties. For example, this issue arises as to whether Article 44(4) of the United Nations Convention on Corruption applies as a self-executing provision and whether the Senate's Declaration on national implementing legislation is unambiguous about the automatic applicability of Article 44(4), namely as an automatic amendment to each and every pre-existing bilateral treaty the United States has with a state-party to the convention.[335] On its face, this does not seem very plausible insofar as a bilateral treaty requires the agreement of both parties to it, while the convention posits the automatic inclusion of other offenses as extraditable offenses in every U.S. bilateral treaty without any consideration as to whether another state to a given bilateral treaty also includes the said crime in its domestic criminal code. In other words, it is incongruous to say the least to have one state include a given crime in a bilateral treaty on the basis of a multilateral treaty without any assurance that the counterpart state in that bilateral treaty is also willing to do the same even when that state is a party to a multilateral treaty. This interpretation is consistent with Title 18 § 3181(a) that "[t]he provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of a treaty of extradition with such foreign government," and that it is well established that the United States relies exclusively on bilateral treaties, though essentially as a matter of policy as there is no constitutional impediment to relying on multilateral treaties. This policy is supported by the consistent reservations and declarations made by the U.S. Senate in multilateral treaties such as the declaration made with respect to Article 44(5) of the United Nations Convention on Corruption.

The Senate Committee on Foreign Relations' Report stated that the provisions of the United Nations Convention on Corruption "will be implemented by the United States in conjunction with applicable federal statutes. The lack of a private cause of action does not affect the ability of a person whose extradition is sought to raise any available defense in the context of an extradition proceeding."[336] What is required to operationalize Article 44(4) of the United Nations Convention on Corruption, and arguably for similar multilateral treaty provisions, is an additional provision to Title 18 §§ 3181–3196 of the U.S. Code whereby with respect

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333 See Ch. VII, Sec. 6, concerning the Rule of Specialty about which U.S. circuit courts are divided as to whether individuals have standing to object to violators of that Rule in the absence of a protest by the surrendering state.

334 United Nations Convention Against Corruption, 2349 U.N.T.S. 41 (Oct. 31, 2003).

335 Article 44(4) states:

> Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in every extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention as a political offence.

336 Report on the United Nations Convention Against Corruption, Mr. Lugar's Report from the Committee on Foreign Relations, S-Exec. Rep. 109-18 at 8–9 (2006).

to § 3184 (discussing the hearing process for issuance of a U.S. arrest warrant for a fugitive in a foreign state) that would clearly state that a bilateral treaty can be automatically amended by a multilateral treaty without the need for further legislation and without the need for a specific amendment in the bilateral treaty in question. But this would have to be subject to a reciprocal action by the counterpart state in the bilateral treaty. If that were not the case the incongruous situation would exist of the United States including in its understanding of extraditable offense a given crime that the counterpart may not include in its understanding. If nothing else, either the legislation or the practice should reflect an exchange of understanding between the two parties to the bilateral treaty. Although the multilateral United Nations Convention on Corruption requires parties to amend their bilateral treaties to include certain offenses that may not have been part of preexisting bilateral extradition treaties, it does not state how each state shall do so in accordance with its constitutional order and other legal requirements. Notwithstanding the strong language of Article 44(4), there is no assurance that a state-party will in fact amend its national laws and its bilateral treaties to conform to the requirements of that provision. In short, there is a link missing in the chain going from the multilateral treaty obligation to the bilateral treaties. That link has to be made by means of an amendment to the U.S. extradition statute Title 18 §§ 3181–3196 or by means of some other bilateral understanding between the respective states.

The United States did inform the Secretary-General of the United Nations that it elected not to take the United Nations Convention on Corruption as the legal basis for cooperation on extradition with other states-parties.[337] Generally, all other treaties, excluding extradition treaties, are deemed non–self-executing, which means that they cannot be deemed part of U.S. law unless national implementing legislation is enacted. It is possible for a given treaty to be self-executing as to some parts and non–self-executing as to others. In other words, a given treaty may be considered by the U.S. Congress as being self-executing subject, however, to certain specific provisions that may be designated as being non–self-executing. With respect to these treaties, it would be necessary for Congress to pass national implementing legislation. Without such legislation, the provisions of that treaty would have no application in the United States because they would not be deemed part of U.S. law.

The language of the U.S. Senate's declaration means that insofar as the Senate is concerned, there is no need to adopt national legislation in order to make effective Articles 44 and 46 of the United Nations Convention on Corruption. Nevertheless, this declaration by the Senate is not binding on the U.S. government if it elects not to exercise the prerogative of deeming Articles 44 and 46 of the convention to be self-executing. Nothing prevents the U.S. government from officially changing its position by notifying the Secretary General of the United Nations in his/her capacity as the depository of the United Nations Convention on Corruption that it has elected, as of a given date, to rely on Articles 44 and 46 with respect to extradition. The questions of the enforceability of multilateral treaties in national courts and its correlative question of an individual's standing to raise such an issue obviously arises under rules of treaty-information as discussed below in Section 5.3.

5.3. Standing

In *Medellin v. Dretke*, the Supreme Court in 2005 held:

> While treaties are compacts between nations, a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.[338]

337 The U.S. declaration states as follows: "(2) The U.S. declares that the provisions of the Convention (with the exception of Articles 44 and 46) are not self-executing." *See* S. Exec. Rep. No. 109-18 (2006).

338 Medellin v. Dretke, 544 U.S. 660, 680 (2005), quoting Edye v. Robinson ("Head Money Cases"), 112 U.S. 580 (1884).

If the Supreme Court recognizes that treaties not only create obligations for the benefit of the contracting states, but also rights and privileges for the benefit of individuals, as third-party beneficiaries, relators should be able to raise issues without having to rely on a protest by the originally requested state, such as issues relating to specialty, enhancement of penalties, length of sentence, and good faith of prosecutors.[339]

The Vienna Convention on the Law of Treaties has not been ratified by the United States; consequently, it does not confer a justiciable individual right in U.S. courts even though it embodies customary international law. However, customary international law is justiciable before U.S. courts. As most of the Vienna Convention on the Law of Treaties' provisions are contained in the Restatement (Third) of the Foreign Relations Law of the United States, one could argue that the treaty provisions are a reflection of both customary international law and U.S. law for purposes of simplifying the issues of treaty interpretation presented by litigants before U.S. courts. This is not, however, the position that U.S. courts have taken. Instead, the circuits have tended either to rely on the provisions of the Restatement (Third), or what they perceive to be customary international law.

In *United States v. Jiminez-Nava*,[340] the Fifth Circuit reviewed the question of treaty interpretation with respect to the Vienna Convention on Consular Relations and held:

> This court reviews a district court's interpretation of a treaty de novo. *Kreimerman v. Casa Veerkamp,* 22 F.3d 634, 639 (5th Cir.1994).
>
> The Vienna Convention is a 79-article, multilateral treaty negotiated in 1963 and ratified by the U.S. in 1969. *See U.S. v. Lombera-Camorlinga,* 206 F.3d 882, 884 (9th Cir.2000). Mexico is a signatory nation. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving nation." *U.S. v. Alvarado-Torres,* 45 F.Supp.2d 986, 988 (S.D.Cal.1999). Jimenez-Nava asserts that Article 36 of the treaty bestows a private, judicially-enforceable right on foreign nationals to consult with consular officials. He argues that because this right was violated, his post-arrest statements and tangible evidence should have been suppressed. These are issues of first impression for this circuit. *See Flores v. Johnson,* 210 F.3d 456, (5th Cir.2000).
>
> ***A. Whether The Vienna Convention Confers An Enforceable Individual Right***
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> Ratified treaties become the law of the land on an equal footing with federal statutes. U.S. Const. art. VI, cl. 2. They are to be construed initially according to their terms. *U.S. v. Alvarez-Machain,* 504 U.S. 655, 663, 112 S.Ct. 2188, 2193, 119 L.Ed.2d 441 (1992). Treaty construction is a particularly sensitive business because international agreements should be consistently interpreted among the signatories. "Treaties are contracts between or among independent nations." *U.S. v. Zabaneh,* 837 F.2d 1249, 1261 (5th Cir.1988). As such, they do not generally create rights that are enforceable in the courts. *U.S. v. Li,* 206 F.3d 56, 60 (1st Cir. 2000); *see also Goldstar v. U.S.,* 967 F.2d 965, 968 (4th Cir.1992) ('International treaties are not presumed to create rights that are privately enforceable'); *Matta-Ballesteros v. Henman,* 896 F.2d 255, 259 (7th Cir.1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").
>
> For enforcement of its provisions, a treaty depends "on the interest and honor of the governments which are parties to it." *Head Money Cases,* 112 U.S. 580, 598, 5 S.Ct. 247, 254, 28 L.Ed. 798 (1884). "[I]nfraction becomes the subject of international negotiations and reclamations." *Id.* ("It is obvious that with all this the judicial courts have nothing to do and can give no redress."). *See also U.S. v. Williams,* 617 F.2d 1063, 1090 (5th Cir.1980) ("[R]ights under international common law must belong to sovereign nations, not to individuals, just as treaty rights are the rights of the sovereign.").

339 *See* Ch. VII, Sec. 6.5.

340 United States v. Jiminez-Nava, 243 F.3d 192 (5th Cir. 2001).

Against the backdrop of these general principles, the Vienna Convention appears to be a standard treaty whose purpose is to facilitate consular activity in receiving states. The Preamble states: Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, [and] Realizing that the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . (emphasis added).

This language would appear to preclude any possibility that individuals may benefit from it when they travel abroad, even, perhaps, if they are among the consular corps. Moreover, only one article out of 79 in the Treaty even arguably protects individual non-consular officials. Article 36, titled "Communication and Contact With Nationals of Receiving State," provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> . . .
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking an action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Principally because of the references to "rights" in Article 36, the circuit courts have so far declined to decide whether the Vienna Convention intended to enact individually enforceable rights of consultation. The Supreme Court, *in dicta,* has also held the question open. *Breard v. Greene,* 523 U.S. 371, 376, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529 (1998).

A strong argument has been made that such diffidence is unnecessary and that the Vienna Convention is not ambiguous as to whether it creates private rights. In *Li,* Judges Selya and Boudin stated:

> Nothing in [the] text explicitly provides for judicial enforcement of . . . consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a "right" of access, but these references are easily explainable. The contract States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations as between States. Any other way of phrasing the promise as to what will be said to detainees would be artificial and awkward. *Li,* 206 F.3d at 60, 66. (Selya, J. & Boudin, J., concurring). In any event, as these judges pointed out, even if the treaty is ambiguous, the presumption against implying private rights comes into play. Finally, as both the majority and concurring judges in *Li* recognized, the U.S. State Department has consistently taken the position that the Vienna Convention does not establish rights of individuals, but only state-to-state rights and obligations. The State Department's view of treaty interpretation is entitled to substantial deference. *Li,* 206 F.3d at 63-66.

Jimenez-Nava's arguments in support of individually enforceable rights ultimately emphasize the treaty's ambiguity First, by dwelling on the plain language concerning "rights" in Article 36, Jimenez-Nava must discount the equally plain language in the Preamble that the treaty's purpose "is not to benefit individuals." Appellant would confine the limitation to consular officials, but that interpretive route hardly assists him, since consular officials are the specific beneficiaries of many of the treaty provisions. If the treaty cannot benefit them by creating individually enforceable rights, how can it intend to confer enforceable rights on all foreign nationals detained in the receiving state?

Second, while acknowledging the general rule against implication of personal rights in treaties, Jimenez-Nava notes that, like any agreement, treaties may explicitly confer individual rights.[] He cites as an example Supreme Court's construction of an extradition treaty in *U.S. v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886). That case is inapposite, however, for an explicit purpose of the treaty in *Rauscher* was to govern "the giving up of criminals, fugitives from justice in certain cases" *Id.* at 410, 7 S.Ct. at 236. Unlike the Vienna Convention, the purpose and provisions of the extradition treaty related directly to the individual right asserted. *Id.* at 410, 7 S.Ct. at 236. *Rauscher* demonstrates at most the necessity for careful interpretation of each treaty[341]

A more liberal position was expressed by the Sixth Circuit in *U.S. v. Emuegbunam,*[342] which held:

Proper interpretation of a treaty presents a question of law that this court reviews de novo. *U.S. v. Page,* 232 F.3d 536, 540 (6th Cir.2000) (citing *U.S. v. Morgan,* 216 F.3d 557, 561 (6th Cir.2000)), *cert. denied,* 532 U.S. 935, 121 S.Ct. 1389, 149 L.Ed.2d 312 (2001). Under the Supremacy Clause of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the U.S., shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under federal law treaties have the same legal effect as statutes. *See, e.g., Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888); *Page,* 232 F.3d at 540 (citing *Breard v. Greene,* 523 U.S. 371, 378, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (per curiam)). As a general rule, however, international treaties do not create rights that are privately enforceable in the federal courts.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884). *See also Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 306, 7 L.Ed. 415 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."), *overruled in part on other grounds by U.S. v. Percheman,* 32 U.S. (7 Pet.) 51, 8 L.Ed. 604 (1833). "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts . . . ." Restatement (Third) of the Foreign Relations Law of the U.S. § 907, cmt. a (1987). In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them. *See, e.g., Goldstar (Panama) S.A. v. U.S.,* 967 F.2d 965, 968 (4th Cir.1992) ("International treaties are not presumed to create rights that are privately enforceable."); *Matta-Ballesteros v. Henman,* 896 F.2d 255, 259 (7th Cir.1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").

341 *Id*. at 195–198 (footnotes omitted).

342 268 F.3d 377 (6th Cir. 2001).

Nonetheless, the Supreme Court has recognized that treaties can create individually enforceable rights in some circumstances. *See, e.g., U.S. v. Alvarez-Machain,* 504 U.S. 655, 667–68, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) (citing *U.S. v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886)); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 442-43, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). "Whether or not treaty violations can provide the basis for particular claims or defenses thus appears to depend upon the particular treaty and claim involved." *U.S. v. Lombera-Camorlinga,* 206 F.3d 882, 885 (9th Cir.) (en banc), *cert. denied,* 531 U.S. 991, 121 S.Ct. 481, 148 L.Ed.2d 455 (2000). Absent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution. *See, e.g., Page,* 232 F.3d at 540–41.

Acknowledging that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," the Supreme Court has left open the question of whether the Vienna Convention creates an individual right enforceable by the federal courts. *Breard,* 523 U.S. at 376, 118 S.Ct. 1352.[4]

C. Dismissal of the Indictment

With respect to Emuegbunem's claim that violation of his rights under the Vienna Convention requires dismissal of the indictment, we need not determine whether private individuals can enforce the treaty or whether Emuegbunem in fact suffered a violation of the rights conferred by the treaty. In *Page,* 232 F.3d at 540, we held that "although some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36." *See also U.S. v. Chaparro-Alcantara,* 226 F.3d 616, 618 (7th Cir.) (holding that dismissal of an indictment is not available to remedy a violation of the Vienna Convention), *cert. denied,* 531 U.S. 1026, 121 S.Ct. 599, 148 L.Ed.2d 513 (2000); *U.S. v. Cordoba-Mosquera,* 212 F.3d 1194, 1196 (11th Cir. 2000) (per curiam) (absent a showing of prejudice a violation of the Vienna Convention cannot be remedied through dismissal of the indictment), *cert. denied,* 531 U.S. 1131, 121 S.Ct. 893, 148 L.Ed.2d 800 (2001); *U.S. v. Li,* 206 F.3d 56, 66 (1st Cir.) (en banc) (dismissal of indictment is not an available remedy), *cert. denied,* 531 U.S. 956, 121 S.Ct. 379, 148 L.Ed.2d 292 (2000). Even if Defendant has suffered a violation of his rights under the Vienna Convention and even if he can enforce those rights in federal court, *Page* forecloses dismissal of the indictment as a remedy.

D. Reversal of the Conviction

In *Page* we addressed only the availability of suppression of evidence or dismissal of an indictment as remedies to redress a violation of the Vienna Convention. Accordingly, we must turn to consideration of whether reversal of a conviction can remedy a violation of the Vienna Convention. As a threshold matter, the government contends that the Vienna Convention does not create rights individually enforceable in the federal courts. We agree.

Confronted in recent years with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from the Supreme Court, federal courts whenever possible have sidestepped the question of whether the treaty creates individual rights—typically by concluding that remedies such as suppression of evidence or dismissal of an indictment are not available even if the treaty creates individual rights. *See, e.g., U.S. v. Santos,* 235 F.3d 1105, 1108 (8th Cir.2000); *Page,* 232 F.3d at 540; *U.S. v. Lawal,* 231 F.3d 1045, 1048 (7th Cir.2000), *cert. denied,* 531 U.S. 1182, 121 S.Ct. 1165, 148 L.Ed.2d 1024 (2001); *Chaparro-Alcantara,* 226 F.3d at 621; *Lombera-Camorlinga,* 206 F.3d at 885; *Li,* 206 F.3d at 66. On other occasions courts have concluded that a defendant must show prejudice to establish a violation of the Vienna Convention. *See, e.g., U.S. v. Minjares-Alvarez,* 264 F.3d 980, 987–88 (10th Cir. 2001); *U.S. v. Chanthadara,* 230 F.3d 1237, 1256 (10th Cir.2000), *petition for cert. filed,* No. 00-9757 (May 2, 2001); *Cordoba-Mosquera,* 212 F.3d at 1196; *U.S. v. Pagan,* 196 F.3d 884, 890 (7th Cir. 1999); *U.S. v. Ademaj,* 170 F.3d 58, 67–68 (1st Cir.1999). One circuit has held that the

Vienna Convention does not establish any judicially enforceable right of consultation between a detained foreign national and the consular representatives of his nation. *U.S. v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir.), *cert. denied,* 533 U.S. 962, 121 S.Ct. 2620, 150 L.Ed.2d 773 (2001). *See also Santos,* 235 F.3d at 1109 (Beam, J., concurring) (concluding that the Vienna Convention does not confer on private citizens rights enforceable in federal court); *Li,* 206 F.3d at 66–67 (Selya, J. & Boudin, J., concurring) (same). No federal appellate court has yet accepted a claim based upon violations of the treaty.

"In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *Alvarez-Machain,* 504 U.S. at 665, 112 S.Ct. 2188 (citing *Air France v. Saks,* 470 U.S. 392, 397, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985), and *Valentine v. U.S. ex rel. Neidecker,* 299 U.S. 5, 11, 57 S.Ct. 100, 81 L.Ed. 5 (1936)). *See also Eastern Airlines, Inc. v. Floyd,* 499 U.S. 530, 534, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991); *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 699, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). Of the seventy-nine articles of the Vienna Convention, only Article 36 arguably protects individual non-consular officials. *Jimenez-Nava,* 243 F.3d at 196. The argument that the treaty confers rights upon criminal defendants who are foreign nationals originates in the language of individual rights that appears throughout the Article among the treaty's protections for the ability of the consular officials of a sending State to communicate with a detained national. *See, e.g.,* Vienna Convention art. 36, § 1(a) ("Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State."); § 1(b) ("[Arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph."). Yet the Preamble to the Vienna Convention expressly disclaims the creation of any individual rights: "[T]he purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention, 21 U.S.T. at 79, 596 UNITED NATIONST.S. at 262 (emphasis added). Similarly, Chapter II of the treaty, in which Article 36 appears, concerns the privileges and immunities of consular officers, not detained foreign nationals. Moreover, consistent with the background presumption against implying personal rights in international treaties, the rights contained in Article 36 belong to the party states, not individuals.

Of course, there are references in the [treaty] to a "right" of [consular] access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligations *as between States.* Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward.

Li, 206 F.3d at 66 (Selya, J. & Boudin, J., concurring). Accordingly, we conclude that the Vienna Convention does not create in a detained foreign national a right of consular access.

To the extent the treaty admits of any ambiguity on the question, nontextual sources, "such as a treaty's ratification history and its subsequent operation," *U.S. v. Stuart,* 489 U.S. 353, 366, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989), dispel any doubt about whether the Vienna Convention creates individual rights. In resolving doubts about the interpretation, "the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight." *Factor v. Laubenheimer,* 290 U.S. 276, 295, 54 S.Ct. 191, 78 L.Ed. 315 (1933). *See also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Kolovrat v. Oregon,* 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

Since 1970 the State Department has consistently taken the view that the Vienna Convention does not create individual rights. *Li,* 206 F.3d at 63–64. *See also Jimenez-Nava,* 243

F.3d at 197; *Lombera-Camorlinga,* 206 F.3d at 887–88. In the view of the State Department, "the only remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law." *Page,* 232 F.3d at 541 (quoting *Li,* 206 F.3d at 63) (alterations omitted). This position accords with the view of the Department and the Senate during the ratification proceedings. *Li,* 206 F.3d at 64–65. In practice the parties to the Convention have attempted to remedy violations of Article 36 through investigations and apologies. "The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement to prevent future violations when necessary." *Lombera-Camorlinga,* 206 F.3d at 886. In turn "[m]any, if not most, of the countries with which the U.S. raises concerns that consular notification obligations have been violated with respect to U.S. citizens will undertake to investigate the alleged violation and, if it is confirmed, to apologize for it and undertake to prevent future recurrences." *Li,* 206 F.3d at 65. Apparently, no country remedies violations of the Vienna Convention through its criminal justice system. *Id.* "These practices evidence a belief among Vienna Convention signatory nations that the treaty's dictates simply are not enforceable in a host nation's criminal courts[.]" *Id.* at 66.

In support of his argument that the Vienna Convention creates individually enforceable rights, Emuegbunem cites *Faulder v. Johnson,* 81 F.3d 515 (5th Cir.1996), and *Breard v. Pruett,* 134 F.3d 615 (4th Cir.1998). This reliance is misplaced. In *Faulder,* the Fifth Circuit stated that the Vienna Convention "requires an arresting government to notify a foreign national who has been arrested, imprisoned or taken into custody or detention of his right to contact his consul." 81 F.3d at 520. Although state authorities admitted that they had failed to comply with the Vienna Convention, the court affirmed a capital murder conviction because on the facts presented there the violation did not merit reversal of the conviction. *Id.* Subsequently, the Fifth Circuit explained that its ruling in *Faulder* had not expressed a view on the question of whether the Vienna Convention confers rights enforceable by individuals. *Flores v. Johnson,* 210 F.3d 456, 457–58 (5th Cir. 2000) (per curiam), *cert. denied,* 531 U.S. 987, 121 S.Ct. 445, 148 L.Ed.2d 449 (2000).

We do not read our opinion in *Faulder* as recognizing a personal right under the Convention. Rather, the panel dispatched the claim with its conclusion that any violation was harmless. Any negative implication inherent in rejecting the claim as harmless lacks sufficient force to support a contention that the panel held that the Convention created rights enforceable by individuals. While we conclude that *Faulder* has not decided the question, we do not reach its merits because at best Flores's assertion is *Teague* barred. *Id.* at 457. Accordingly, after *Flores* whether the Vienna Convention created individual rights remained an open question in the Fifth Circuit, *Jimenez-Nava,* 243 F.3d at 195 n. 2 (concluding in the wake of *Faulder* and *Flores* that the question was one of first impression in the circuit), and in *Jimenez-Nava* the court resolved the issue adversely to the position advocated by Defendant. *Id.* at 198.

Like *Faulder,* the Fourth Circuit's opinion in *Breard* simply attempts a description of the Vienna Convention and takes no position on the rights and remedies of criminal defendants in the U.S. who are foreign nationals. *Breard v. Pruett,* 134 F.3d 615, 619 (4th Cir. 1998) (setting forth Breard's argument that the court should overturn his conviction and death sentence because the "authorities failed to notify him that, as a foreign national, he had the right to contact the Consulate of Argentina or the Consulate of Paraguay pursuant to the Vienna Convention"), *cert. denied,* 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (per curiam). Two features of the Fourth Circuit's decision in *Breard* confirm this conclusion. First, noting that Breard had failed to raise this claim in state court, the Fourth Circuit concluded that he had procedurally defaulted the claim and that he could not show cause to excuse the default. Accordingly, the court declined to consider the merits of Breard's Vienna Convention claim. *Id.* at 619–20. Second, the court quoted *Murphy v. Netherland,* 116 F.3d 97, 100 (4th Cir.1997), in which it rejected an argument that a habeas petitioner's Vienna Convention claim was so novel that he

> could not have raised it in state court proceedings, because a reasonably diligent attorney should have discovered "the existence and applicability (*if any*) of the Vienna Convention." *Breard,* 134 F.3d at 620 (emphasis added). This procedural posture and the quotation from *Murphy* demonstrate that the Fourth Circuit in *Breard* took no position on the question of whether the Vienna Convention creates individual rights.
>
> For the foregoing reasons, we hold that the Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce. A contrary conclusion risks aggrandizing the power of the judiciary and interfering in the nation's foreign affairs, the conduct of which the Constitution reserves for the political branches. *See Lombera-Camorlinga,* 206 F.3d at 887 ("The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches."). Significantly, the Supreme Court has twice held that the Vienna Convention does not provide a signatory nation a private right of action in the federal courts to seek a remedy for a violation of Article 36. *Federal Republic of Germany v. U.S.,* 526 U.S. 111, 111–12, 119 S.Ct. 1016, 143 L.Ed.2d 192 (1999) (per curiam); *Breard,* 523 U.S. at 377, 118 S.Ct. 1352. If a foreign sovereign to whose benefit the Vienna Convention inures cannot seek a judicial remedy, we cannot fathom how an individual foreign national can do so in the absence of express language in the treaty.[343]

The U.S. Supreme Court was presented in *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*[344] with the issue of whether Article 36 of the Vienna Convention on Consular Relations[345] grants rights that may be invoked by individuals in a judicial proceeding. Both Sanchez-Llamas and Bustillo petitioned the Supreme Court to suppress evidence of their confessions, in light of the *Case Concerning Avena and Other Mexican Nationals*by the ICJ.[346] The Court, however did not decide the issue but rather stated that "Because Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioner's claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights."[347]

Likewise in *Medellin v. Texas*,[348] the Supreme Court in March 2008 stated in a footnote that it did not need to resolve the issue whether an individual could enforce rights conferred by Article 36 of the Vienna Convention on Consular Relations.[349] In *Medellin*, the Court was presented with the ICJ's *Avena* decision, which mandated that the United States provide a remedy for failure to enforce Medellin's Article 36 consular rights.[350] The Supreme Court responded that "The question is whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute and U.N. Charter. Consequently, it is unnecessary to resolve whether the Vienna Convention . . . grants Medellin individually enforceable rights."[351]

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343 *Id.* at 389–394 (footnote omitted).

344 548 U.S. 331 (2006).

345 Vienna Convention on Consular Relations, April 24, 1963 (Vienna), *entered into force* on March 19, 1967. 596 U.N.T.S. 261.

346 *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.) I.C.J. 128 (March 31, 2008).

347 *Sanchez-Llamas*, 548 U.S. at 343.

348 552 U.S. 491 (2008).

349 *Id.* at 505 n.4.

350 Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) I.C.J. 128 (March 31, 2008).

351 *Medellin*, 552 U.S. at 505 n. 4.

In *United States v. Osagiede*,[352] a Seventh Circuit case decided after *Medellin*, the defendant raised a Sixth Amendment constitutional claim that his legal counsel failed to notify him of his Article 36 consular rights.[353] The government argued that no court has ever recognized that Article 36 confers individual rights in a criminal proceeding and that even if those rights do exist, no remedy is available.[354] The Seventh Circuit responded that because the claim was constitutional and not treaty-based, Article 36 rights and remedies were relevant only to the extent that it helped prove or disprove the elements necessary under *Strickland v. Washington*.[355] The Court went on to state that "we have always assumed that Article 36 confers individual rights, even in the criminal setting, and we stand by that position today. Furthermore, we believe that there was a viable (and simple) remedy for the Article 36 violation alleged in this case: counsel could have informed Osagiede of his right to consular assistance and the violation could have been raised with the judge presiding at trial."[356]

The issue of standing is related to the nature of the right invoked, its source, its relationship to other sources of national law, and the ranking of these sources of law. In *Sanchez-Llamas*, Sanchez argued that the Convention implicitly required a judicial remedy and was therefore self-executing.[357] The Supreme Court dismissed this, stating "there is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions."[358] The Court emphasized that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose on the States through lawmaking of their own,"[359] and although the Court did not directly say that Article 36 of the Vienna Convention on Consular Relations is not self-executing, it can be clearly inferred through its holding.[360]

In *Medellin*, the Supreme Court stated that it was also "unnecessary to resolve whether the Vienna Convention is self-executing…" because the Court was concerned with the ICJ Statute, the Protocol, and the UN Charter.[361]

The Supreme Court held in *Sanchez-Llamas* that ICJ opinions deserve "respectful consideration" but that they do not have binding effect on U.S. domestic courts.[362] The Court reasoned that nothing in the "structure or purpose"[363] of the ICJ suggests that its interpretations were intended to be binding on "our courts,"[364] particularly since the expressed remedy for a national legal system to implement ICJ opinions is a referral to the Security Council for enforcement or sanction.[365] The Court, therefore, implies that because such a remedy exists, U.S. domestic courts are not directly bound by ICJ decisions.[366]

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352 543 F.3d 399 (7th Cir. 2008).

353 *Id.* at 406.

354 *Id.*

355 *Id.*

356 *Id.* at 407.

357 Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006).

358 *Id.* at 346.

359 *Id.*

360 *Id.*

361 *Medellin*, 552 U.S. at 505 n.4.

362 *Sanchez-Llamas*, 548 U.S. at 353.

363 *Id.* at 355.

364 *Id.* at 355.

365 *Id.*

366 *Id.*

Following *Sanchez-Llamas*, the Supreme Court in *Medellin* reasoned that because the ICJ Statute and Optional Protocol are not self-executing, the *Avena* decision did not have automatic domestic legal effect.[367] According to the Court, the Statute and Protocol are not self-executing because no enforcement mechanism is provided in the legal instruments mentioned by the Court.[368] Rather, Article 94 of the UN Charter addresses the consequences of a failure to follow an ICJ opinion, namely that state's referral to the Security Council.[369] The Supreme Court pointed to the language of the ICJ Statue and the Protocol stating that "…Article [I] is not a directive to domestic courts. It does not provide that the United States, 'shall' or 'must' comply with an ICJ decision, nor indicate to vest ICJ decisions with immediate legal effect in domestic courts."[370]

5.4. Treaty Interpretation[371]

In the constitutional scheme of separation of powers and the respective powers granted each branch of government, the judiciary does not have the power to terminate treaties,[372] nor that of preventing the executive branch from terminating a treaty,[373] or of ordering the executive branch to extradite a person pursuant to treaty.[374] Treaties are the "Supreme Law of the Land,"[375] and the judiciary has the authority to interpret a treaty duly ratified after the Senate's advice and consent whenever the treaty is relevant to the resolution of a dispute over which the court has jurisdiction.[376] Thus, "[t]he interpretation of treaties is essentially a judicial process," and a related principle is that " '[T]he judiciary serves an independent review function delegated to it by the Executive and defined by statute.' "[377]

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367 *Medellin*, 552 U.S. at 507.

368 *Id.*

369 *Id.* at 507–508.

370 *Id.* at 508.

371 *See generally* Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969) *and in* 63 Am. J. Int'l. L. 875 (1969) [hereinafter Vienna Convention] (although the United States is not a party to the Vienna Convention, it has incorporated most of its provisions into the Restatement (Third) of the Foreign Relations Law of the United States (1987), *see* Restatement (Third), *supra* note 79 at on Foreign Relations); T.O. Ellis, The Modern Law of Treaties (1974); Louis Henkin, Treaty Interpretation (1972); Farhad Malekian, The System of International Law (1987).

372 *See* Henkin, *supra* note 142, at 170.

373 *See* Charlton v. Kelly, 229 U.S. 447 (1913); The Chinese Exclusion Case, 130 U.S. 581, 602–603 (1889). *See also In re Extradition of Rafael Eduardo Pineda Lara*, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. 1998), *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

374 *See* Sabatier v. Dambrowski, 586 F.2d 866 (1st Cir. 1978); Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977); Shapiro v. Secretary of State, 499 F.2d 527, 530–531 (D.C. Cir. 1974), *aff'd on other grounds sub nom.*, Comm'r of Internal Revenue v. Shapiro, 424 U.S. 614 (1976).

375 U.S. Const. art. VI, § 1, cl. 2.

376 29 Am. J. Int'l L. Supp. 946, 973 (1935). *See* Condition of Admission of a State to Membership in the United Nations, [1947–1948] I.C.J. Reports 57, 61. *See also* United States v. Decker, 600 F.2d 733, 737 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979) (stating that it is the responsibility of the court to interpret treaties).

377 *In re Extradition of* Tawakkal, 2008 U.S. Dist. Lexis 65059 at *11 (E.D. Va. 2008).

The rules of treaty interpretation can be summarized as follows:

1. The purpose of treaty interpretation is to ascertain the plain meaning[378] of the language that comports with the parties' intentions.[379]
2. Sources of evidence which indicate this are:
   a. Negotiating history;[380]

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378 *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1981); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); Hu Yau-Lueng v. Soscia, 649 F.2d 914 (2d Cir. 1981); *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980); Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976); United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974); United States v. Vreeken, 603 F. Supp. 715 (Utah 1984); Hurtado v. Holder, 401 Fed. Appx. 453, 455 (11th Cir. 2010) (unpublished opinion).

Restatement (Third), *supra* note 79 at § 329. General Rule of Interpretation:

> (1) An international agreement shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of an agreement shall comprise, in addition to the text, including its preamble and annexes
>
> (a) any agreement relating to the international agreement which was made between all the parties in connection with the conclusion of the agreement;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the agreement and accepted by the other parties as an instrument related to the agreement;
>
> (3) There shall be taken into account, together with the context
>
> (a) any subsequent agreement between the parties regarding the interpretation of the agreement or the application of its provisions
>
> (b) any subsequent practice in the application of the agreement which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended.

Section 329 is based on Article 31 of the Vienna Convention on the Law of Treaties, *supra* note 372. The Restatement (Third) of the Foreign Relations Law of the United States embodies most provisions that are contained in the Vienna Convention, of which the United States is not a party. *See* Restatement (Third), *supra* note 79.

379 *See Sumitomo Shoji Am.*, 457 U.S. 176; Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Ford v. United States, 273 U.S. 593 (1927); *In re* Gambino, 421 F. Supp. 2d 283 (D. Mass. 2006); United States v. Wiebe, 733 F.2d 549 (8th Cir. 1984); Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); United States v. Kember, 685 F.2d 451 (D.C. Cir. 1982); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980); Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977); Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975); Denby v. Seaboard World Airlines, Inc., 575 F. Supp. 1134 (E.D.N.Y. 1983), *rev'd* 737 F.2d 172 (2d Cir. 1984); Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc., 562 F. Supp. 232 (N.D. Ill. 1983).

380 *See Factor*, 290 U.S. 276; Greci v. Birkens, 527 F.2d 956 (1st Cir. 1976); *Day*, 528 F.2d 31 (2nd Cir. 1975). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). The Restatement (Third) of the Foreign Relations Law of the United States similarly allows for consideration of supplemental materials. Section 330 states: Recourse may be had to supplementary means of interpretation, including the preparatory work of the international agreement and the circumstances of its conclusions, in order to confirm the meaning resulting from the application of section 329 or to determine the meaning when the interpretation according to section 329: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result

b. Interpretation of the parties;[381] and

c. Subsequent conduct of the parties.[382]

3. These sources are then construed according to the following criteria:

a. Consistent interpretation of the terms;[383]

b. Liberal construction of terms;[384]

c. Rule of liberality;[385]

d. *Expressio unius est exclusio alterius*;[386]

e. *Ejusdem generis*;[387]

f. Retroactive application;[388] and

g. International law principles regarding treaty interpretation.[389]

5.4.1. Plain Meaning of the Words and Parties' Intentions

Generally, the provisions of the treaty itself are the starting point of its construction.[390] The language in these provisions should be construed according to its plain, ordinary meaning

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which is manifestly absurd or unreasonable. *See* Restatement (Third), *supra* note 79. Section 330 is based upon Article 32 of the Vienna Convention, *supra* note 372. Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978)

381 *See Sumitomo Shoji Am.*, 457 U.S. 176; Kolovrat v. Oregon, 366 U.S. 187 (1961); *Factor*, 290 U.S. 276; Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985); Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983), *superseded by statute*; Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996); Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954).

382 *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984); Terlinden v. Ames, 184 U.S. 270 (1902); *Day*, 528 F.2d 31; Argento v. Horn, 241 F.2d 258 (6th Cir. 1957); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954); *In re Extradition of* D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959).

383 *See* Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980). *See also* Sabatier v. Dambrowski, 453 F. Supp. 1250 (D.C.R.I.), *aff'd*, 586 F. 2d 866 (1st Cir. 1978).

384 *See Factor*, 290 U.S. 276; Jordan v. Tashiro, 278 U.S. 123 (1928); *Wiebe*, 733 F.2d 549; Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980); Vardy v. United States, 529 F.2d 404 (5th Cir. 1976); United States *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726 (9th Cir. 1975); *In re* Sindona, 584 F. Supp. 1437 (E.D.N.Y. 1984); Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc., 562 F. Supp. 232 (N.D. Ill. 1983); Hurtado v. Holder, 401 Fed. Appx. 453, 455 (11th Cir. 2010) (unpublished opinion); *In re Extradition of* Sainez, 2008 U.S. Dist. Lexis 9573 at *28 (S.D. Cal. 2008).

385 *See* Melia v. United States, 667 F.2d 300 (2d Cir. 1981). *See also* United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985).

386 *See* Hu Yau-Lueng v. Soscia, 649 F.2d 914 (2d Cir. 1981); Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977); *In re* Chan Kam-shu, 477 F.2d 333 (5th Cir. 1973).

387 *See* Factor v. Laubenheimer, 290 U.S. 276 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

388 *See* Galanis v. Pallanck, 568 F.2d 234 (2nd Cir. 1977).

389 *See* United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *overruled in part by* United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir 1983); Day v. Trans World Airlines, Inc., 528 F.2d 31 (2nd Cir. 1975); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972).

390 *See* Vienna Convention, *supra* note 372, at art. 31, para. 1.

"as understood in the public law of nations."[391] The Vienna Convention on the Law of Treaties states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[392] The ICJ expressed this rule of construction in the following terms:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context of which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.[393]

The seminal case of *Wright v. Henkel*[394] is exemplary of this practice. Pursuant to its extradition treaty with the United States, the United Kingdom requested the extradition of Whitaker Wright on the basis of an arrest warrant charging him with circulating and publishing false corporate statements with the intent to defraud corporate shareholders. Wright objected to the extradition request on the grounds that the offense was not criminal under U.S. law. The U.S. Supreme Court began its analysis with the observation that "[t]reaties must receive a fair interpretation, according to the intention of contracting parties, and so as to carry out their manifest purpose."[395] After comparing the relevant statutes of both England and Wales, and New York, the U.S. state in which Wright had been found, the Court looked to the kind of conduct the parties sought to prohibit under their respective criminal codes.

> We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating or publishing with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent, but even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.[396]

The court therefore denied Wright's writ of habeas corpus.[397]

5.4.2. Sources: Negotiating History, Executive View, and Subsequent Conduct

Because the parties' intentions are clear only if the particular treaty's context and history are considered, courts often look to the circumstances surrounding its culmination.[398] negotiations, preparatory works, and diplomatic correspondence, which are an integral part of these surrounding

391 Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

392 Vienna Convention, *supra* note 372, at art. 31, para. 1.

393 Advisory Opinion, Competence of the General Assembly for Admission of a State to the United Nations, [1950] I.C.J. 4, 8.

394 *See* Wright v. Henkel, 190 U.S. 40 (1903). *See* also Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); *In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

395 *Wright,* 190 U.S. at 57.

396 *Id*. at 58.

397 *Id.*

398 *In re* Ross, 44 F. 185 (C.C.N.D.N.Y. 1890).

circumstances, and often are relied on by courts in ascertaining the intentions of the parties in interpreting the relevant provisions of the treaty.[399] In addition, the parties' own interpretations of the treaty, such as that of the executive branch, may be used as a guide in construction.[400] The Vienna Convention on the Law of Treaties provides that:

> [t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> …
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of [the above rules], or to determine the meaning when the interpretation according to [the above rules]:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[401]

The negotiating history of a treaty reflects the parties' intentions and their expectations. It is relevant, indeed important, to clarify ambiguities and inconsistencies where these may appear in the language of the treaty. As the very words "negotiating history" imply, the term refers to the period of the negotiations and events surrounding the negotiations (including, at times, the signature and ratification process). The negotiating history is evidenced by formal exchanges of notes or memoranda between the parties, memoranda in the files of the respective parties, explanatory records, and clarifying position papers. All of these constitute a written record of the negotiating history.

In *Sullivan v. Kidd*,[402] the U.S. Supreme Court stated:

> Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purpose of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, *International Law Digest*, vol. 5, p. 249. *At the time of the negotiation of the treaty* Great Britain had numerous colonies and possessions, and the U.S. had recently acquired certain islands beyond the seas. Concerning these the contracting parties made the stipulations contained in Article IV, adding the right to give like notice in behalf of any British protectorate, or sphere of influence, or on behalf of the island of Cyprus…[403]

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399 *See, e.g., Arizona v. California*, 373 U.S. 546 (1963), *amended* 383 U.S. 268 (1966), *amended* 466 U.S. 144 (1984), *subsequent determination* 530 U.S. 392 (2000), *supplemented by* 531 U.S. 1 (2000).

400 *See* Zschernig v. Miller, 389 U.S. 429 (1968); Kolovrat v. Oregon, 366 U.S. 187 (1961); Factor v. Laubenheimer, 290 U.S. 276 (1933).

401 Vienna Convention, *supra* note 372, at arts. 31, 32.

402 Sullivan v. Kidd, 254 U.S. 433 (1921).

403 *Id.* at 439 (emphasis added).

In *Sullivan* the issue with respect to treaty interpretation was whether a Canadian citizen could inherit property in the United States under a provision in a treaty. The treaty required a notice of adherence to be given. The notice of adherence for the Dominion of Canada was not given. It was the position of the U.S. government that a treaty had to be interpreted on the basis of the express language of the treaty, and if the express language of the treaty provided for notice, the absence of notice was conclusive. It was held sufficient not to allow a Canadian resident to inherit in the United States. The subsequent expectation and intent of the parties are irrelevant particularly in the face of the plain language and meaning of the treaty.

An example of the use of these factors in interpreting extradition treaty provisions is *Factor v. Laubenheimer*.[404] Factor had been apprehended and held in Illinois in response to an extradition request from the United Kingdom. He challenged the sufficiency of the extradition request on the grounds that the offense for which he was sought in England was not criminal under Illinois law. The issue was therefore whether the provisions of the extradition treaty required finding that the offense was criminal under Illinois law specifically, or whether the treaty required the offense to be criminal in any state in the United States. The Supreme Court conceded that the relevant treaty provision was unclear, and determined that additional information was required to clarify its meaning:

> In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it. And in resolving doubts the construction of a treaty by the political departments of the government, while not conclusive upon courts called to construe it, is nevertheless of weight . . . From . . . ensuing diplomatic correspondence it clearly appears that this government then asserted that the Treaty of 1842 obligated both parties to surrender fugitives duly charged with any of the offenses specified in Article X without regard to the criminal quality of the fugitive's acts under the law of the place of asylum. This contention was supported by full and cogent argument in the course of which it was specifically pointed out that the proviso of Article X relates to the procedure to be followed in asserting rights under the treaty and is not a limitation upon the definition of the offenses with respect to which extradition might be demanded . . . The diplomatic history of the treaty provisions thus lends support to the construction which we think should be placed upon them when read without extraneous aid, but with that liberality demanded generally in the interpretation of international obligations.[405]

Thus, the Court determined that the requirements of the treaty had been satisfied and ordered Factor's delivery to the United Kingdom.

In *Plaster v. United States*,[406] the Fourth Circuit interpreted the extradition treaty between the United States and the Federal Republic of Germany[407] to require that the United States be obligated to extradite its nationals, while Germany was not similarly bound.[408] The court relied upon "the various documents accompanying the treaty during its formation and ratification."[409] The court held that although there is no symmetry in the reciprocal undertakings of the two states because Germany has a constitutional provision prohibiting the extradition of its nationals and the United States does not, there are other provisions in the respective laws of the two countries that are not symmetrically identical but act to balance the respective obligations

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404 *Factor*, 290 U.S. 276. *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

405 *Factor,* 290 U.S. at 294–298 (citation omitted).

406 Plaster v. United States, 720 F.2d 340 (4th Cir. 1983).

407 Treaty Between the U.S. and the Federal Republic of Germany Concerning Extradition, Aug. 8, 1980, 32 U.S.T. 1485, T.I.A.S. No. 9785.

408 *Plaster*, 720 F.2d at 347.

409 *Id.*

of the parties. In particular, under German law, a national may be prosecuted for a crime committed in the territory of another state. A similar law did not exist in the United States. Thus there is a complementary balance between the obligations of the two states. The United States would extradite its nationals to Germany because it could not prosecute a U.S. national for committing a crime in Germany, while Germany, which could not extradite its nationals to the United States, could prosecute its nationals in Germany for a crime committed in the United States.[410]

The case of *Ivancevic v. Artukovic*[411] is illustrative of the great weight courts have given to the practice and conduct of the parties to the relevant treaty in order to determine whether an obligation to extradite was created by the agreement.[412] In *Ivancevic*, the government of the People's Federal Republic of Yugoslavia requested the extradition of Andrija Artukovic from the United States for the crime of murder, under the Treaty of Extradition of 1902 between the United States and the Kingdom of Serbia. The federal district court held that no extradition treaty existed between the United States and Yugoslavia. The Ninth Circuit reversed on the ground that the Treaty of 1902 was still in force. It reasoned that the People's Federal Republic of Yugoslavia had evolved as a nation from the Kingdom of Serbia through internal political changes and was, therefore, not a new country but merely one formed as a result of the desire of the Slav people for self-determination. The court decided that these internal changes did not affect the validity of the treaty with the Kingdom of Serbia, which provided the core of the Yugoslav nation, a party to the pending extradition proceedings. Furthermore, the court noted that both the United States and Yugoslavia had continued to act under the premise that "the entity as it existed after the union was the political successor of the original Serbia with international political compacts continuing."[413]

Subsequent practices of the parties must be immediate and directly related to the terms of the treaty. There is therefore an element of timeliness and clarifying relevance that is indispensable. Subsequent practice must be reasonably related in time to the date of entry into force of the treaty. It must clarify in a relevant way the intentions of the parties and their expectations as they existed at the time of the treaty's entry into force. Subsequent practices cannot contravene the express language of the treaty, lest the subsequent practices of states become an informal amending process of their treaties. Such a result would be unconstitutional in the United States, as it would violate the Senate's ratification power. It would also violate "due process" and "equal protection" of the law if, by virtue of such changes in the application of treaty provisions to individuals, they would be detrimentally affected by such changes without prior notice.[414] Subsequent practice cannot, therefore, add or include new meaning contrary to the express language of the treaty or its plain meaning.

The judiciary, relying on the president's "[p]ower, by and with the Advice and Consent of the Senate, to make Treaties,"[415] looks to executive practice to determine the existence and

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410 *See* Ch. VI.

411 Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954), *later proceeding at* Artukovic v. Boyle, 140 F. Supp. 245 (D. Cal. 1956), *aff'd Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated,* 355 U.S. 393 (1958), *on remand,* 170 F. Supp. 383 (D. Cal. 1959), *habeas proceeding,* 628 F. Supp. 1370 (C.D. Cal. 1986), *stay denied*, Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986), *overruled by* Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir. 1997).

412 *See* Rogge, *supra* note 181, at 381.

413 *Ivancevic*, 211 F.2d at 572. In 1985, Artukovic was extradited to Yugoslavia on the basis of the Treaty Between the United States and the Kingdom of Serbia, which was held to be applicable under the doctrine of state succession. Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986).

414 *See* Kolender v. Lawson, 461 U.S. 352 (1983).

415 U.S. Const. art. II, § 2, cl. 2. In 1936, the U.S. Supreme Court stated: "Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm . . . the President

applicability of treaty obligations. Adherence to this view was illustrated in *Charlton v. Kelly*.[416] In this case, the question before the Supreme Court was whether Italy's refusal to permit the extradition of its own citizens abrogated the extradition treaty between the Kingdom of Italy and the United States. The treaty provided for the surrender of "persons" convicted of or charged with specific crimes. Italy maintained that this term did not include its own citizens and that it would try its own citizens in its own courts. The United States contended that the term "person" did include Italian citizens.[417] The Court, following the interpretation of the Department of State, held that the treaty was not abrogated:

> The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.[418]

Thus, the judicial position of the United States is to defer judgment on this issue to the executive as a matter falling within the prerogatives of that branch of government in its exercise of the powers to conduct foreign affairs.[419]

Last, it should be noted that the interpretation of treaty language should also take into account the meaning of a legal term in the respective laws of the two contracting states.[420]

5.4.3. Interpretative Criteria

(1) Consistent Interpretation of Terms

Once the court has determined the relevant sources of a treaty's meaning, it must choose which interpretation will be applied to the case at bar. Usually, the court will first attempt to interpret the relevant provision such that it is consistent with the other terms of the treaty.[421] Oppenheim has stated this rule in the following terms:

> It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognized principles of International Law, nor with previous

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alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

416 Charlton v. Kelly, 229 U.S. 447 (1913). *See also In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. 1998), *In re Extradition of* Powell, 4 F.Supp. 2d 945 (S.D.Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

417 *Charlton*, 229 U.S. at 451–455.

418 *Id.* at 476. Also in *Terlinden v. Ames*, 184 U.S. 270 (1902), the Supreme Court rejected the fugitive's contention that the creation of the German Empire in 1871 terminated the extradition treaty between the United States and the Kingdom of Prussia, holding that intervention by the courts on the theory that the treaty had been abrogated by the formation of the German Empire was improper, in light of the contrary judgment of both governments. The Court further stated that "the decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision." *Id.* at 290.

419 *See Curtiss-Wright*, 299 U.S. at 304 (1936); Missouri v. Holland, 252 U.S. 416 (1920). *See also* Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. Pa. L. Rev. 903 (1959). *See generally* Edward S. Corwin, The President: Office and Powers (4th ed. 1957); C. Herman Pritchett, The American Constitution (1959). For a parallel analysis of presidential powers in the conduct of foreign affairs, see M. Cherif Bassiouni, *The War Power and the Law of War: Theory and Realism*, 18 DePaul L. Rev. 188 (1968); M. Cherif Bassiouni & Eliot A. Landau, *Presidential Discretion in Foreign Trade and Its Effects on East–West Trade*, 14 Wayne L. Rev. 494 (1968).

420 *See* Ch. VIII, Sec. 4.3.

421 *See, e.g.*, Sabatier v. Dambrowski, 453 F. Supp. 1250 (D.C.R.I.), *aff'd*, 586 F.2d 866 (1st Cir. 1978).

> treaty obligations towards third States. If, therefore, the meaning of a treaty is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations toward third States.[422]

The Second Circuit applied this maxim in *Caltagirone v. Grant*.[423] There, Italy requested that the United States provisionally arrest an individual pursuant to Article XIII of the 1975 Extradition Treaty between Italy and the United States, pending a possible request for his extradition to Italy to face prosecution for fraudulent bankruptcy. In compliance with the Italian request, the United States prepared a complaint alleging the existence of Italian warrants for the individual's arrest and applied to the appropriate magistrate for a warrant. The United States made no showing to establish probable cause to believe that a crime had been committed in Italy, or that the individual requested had committed it. Nevertheless, the magistrate issued a warrant for the individual's arrest. The relator moved to quash the arrest warrant on the ground that it was issued without probable cause. This motion was denied. The relator then petitioned the appropriate federal district court for a writ of habeas corpus. When this was denied, the relator appealed to the Second Circuit. The appellate court granted the relator's petition, applying the following analysis:

> Article XIII of the Treaty provides that an application for provisional arrest must contain four elements: a description of the person sought; an indication of intent formally to request the extradition of the person; an allegation that a warrant for the person's arrest has been issued by the requesting state; and, finally, "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party."
>
> The language of Article XIII closely tracks the text of Article XI, the Treaty article governing formal requests for extradition. That article expressly requires all requests for extradition to provide "such evidence as . . . would justify [the relator's] arrest and committal for trial if the offense had been committed [in the territory of the requested party] . . . " Article XIII, in turn, requires applications for provisional arrest to set forth "such further information as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party." Clearly, the parallelism was intended by the Treaty's draftsmen, and this suggests that in all cases where the U.S. is the "requested Party," a showing of probable cause is required under both articles.[424]

The problem of inconsistency of terms in the two languages of a treaty arises in connection with words referring to whether a person was "charged" with a crime as including the meaning of accused as opposed to a technical meaning of formally charged (i.e., indicted).[425] It also

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422 1 Lhassa Oppenheim, International Law 952–953 (Hersch Lauterpacht ed., 1955) (citations omitted) [hereinafter, 1 Oppenheim].

423 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); Looking at *travaux preparatoires* for intent of the parties, *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 119 S. Ct. 662 (1999) and *Air France v. Saks*, 470 U.S. 392, 105 S. Ct. 1338 (1985). "The meaning of a treaty cannot be controlled by subsequent explanations" of members of the Senate, *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 22 S. Ct. 59 (1901), but the interpretation of a treaty by the executive branch is to be given weight by the judiciary. *See* United States v. King-Hong, 110 F.3d 103 (1st Cir. 1997); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191 (1933), Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945 (1913) 60 (1901) ("The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.").

424 *Caltagirone,* 629 F.2d at 744–745.

425 *See In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980).

arises with respect to *ne bis in idem* when one treaty language refers to the "same facts" and the other to the "same acts."[426]

(2) Liberal Interpretation of Terms

Where a provision is capable of two interpretations, either of which would comport with the other terms of the treaty, the judiciary will choose the construction which is more liberal and which would permit the relator's extradition, because the purpose of the treaty is to facilitate extradition between the parties to the treaty. The Permanent Court of Justice stated the general rule in the following manner:

> [I] do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.. .
>
> [S]ince the words have no value save as an expression of intention of the Parties, it will be found either that the words have been used in a wider sense than normally attaches to them (broad interpretation) or that they have been used in a narrower sense than normally attaches to them (narrow interpretation).
>
> The first question which arises therefore is what is the subject and aim of the convention in which occurs the article to be interpreted.[427]

The rule of liberal interpretation of terms was applied to an extradition treaty in *Brauch v. Raiche*.[428] In that case, the relator challenged the request for his extradition on the grounds that the applicable treaty required a finding that the conduct for which his extradition was sought was criminalized under the laws of the state where he was found, rather than under the laws of the United States. In rejecting his claim, the court made the following observation regarding *Factor v. Laubenheimer*, discussed above:

> Although it is clear that *Factor* held criminality in the asylum state was not a necessary precondition to extraditability, it is not clear whether the Court also meant that a finding of criminality under that state's law was always sufficient to justify extradition. Part of the rationale offered by the Court for its decision in *Factor* was a desire to avoid construing that treaty so that "the right to extradition from the U.S. may vary with the state or territory where the fugitive is found." *Id.* at 300, 54 S. Ct. at 198.... In light of the importance the Court placed on preserving reciprocity, we do not believe the Court's disapproval of extraditability varying with state law would extend to the situation in which one state's law might confer extraditability, while that of the preponderance of the states would not. A prerequisite under the Treaty for an extradition request by Great Britain is that the offense be one for which Britain would be willing to extradite. Thus, even if the asylum state from which Britain requests extradition is the only state criminalizing the conduct in question, the policy of reciprocity would be served since that state could presumably obtain extradition for the same acts in Britain.[429]

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426 *See infra* Sec. 5.4. *In re* Gambino, 2006 WL 709445 (D. Mass. 2006), *dismissed in* Gambino v. Winn, Case No. 06-10552-RCL (D. Mass 2006); Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980), *aff'g* 461 F. Supp. 199 (S.D.N.Y. 1978).

427 Whiteman Digest, *supra* note 70, at 370.

428 Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980). *See also* United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984); *In re* Sindona, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

429 *Brauch,* 618 F.2d at 848–849. *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

Thus, the court adhered to the language of the text, but gave the wording the widest reasonable meaning and scope.

(3) Rule of Liberality

It is important to note that liberality cannot be stretched to allow extradition notwithstanding specific treaty and statutory requirements. Liberality is a rule of interpretation that has to remain within reasonable bounds, and is not a license to extradite. At times the judiciary will interpret terms beyond their actual meaning to encompass their spirit and intent. Judge Hersch Lauterpacht, for example, has noted that:

> the whole of a treaty must be taken into consideration, if the meaning of any one of its provisions is doubtful; and not only the wording of the treaty, but also its purpose, the motives which led to its conclusion and the conditions prevailing at the time.[430]

This rule was applied in *Melia v. United States*.[431] Canada requested the extradition of an individual charged with "procuring a murder." The United States' extradition treaty with Canada specified as extraditable offenses those that charged an individual with conspiracy or "being party to any"[432] of the enumerated offenses. The court found that the word "procuring," although not specifically listed as an extraditable offense, could be deemed within the meaning of "being a party to." A narrow construction would not have allowed the word "procuring" to be equated with "being a party to," whereas liberality permits such a construction by analogy.

Treaties must be interpreted in a liberal way and in good faith in order to give effect to the intentions of the parties.[433] The Supreme Court stated so in *Jordan v. Tashiro*[434]

> The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligation should be liberally construed so as to effect the apparent intentions of the parties to secure equality and reciprocity between them. *See Geofroy v. Riggs, supra; Tucker v. Alexandroff*, 183 U.S. 424, 437; *Wright v. Henkel*, 190 U.S. 40, 57; *In re Ross*, 140 U.S. 453, 475.[435]

The issue of liberality versus restrictive interpretation arises when terms in question are ambiguous enough to create a doubt in the mind of the treaty interpreter.

The interpretation of the treaty in *Sumitomo Shoji America, Inc. v. Avagliano*[436] was the Treaty of Friendship, Commerce, and Navigation between the United States and Japan. The purposes

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430 1 Oppenheim, *supra* note 423 at 953. Treaty construction implicates questions of foreign policy. *See* United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997). The executive branch's construction of a treaty, although not binding on the courts, is entitled to great weight. *See* Factor v. Laubenheimer, 290 U.S. 276, 295, 54 S. Ct. 191, 196 (1933); Charlton v. Kelly, 229 U.S. 447, 468, 33 S. Ct. 945, 952 (1913); Restatement (Third), *supra* note 79 at § 326(2) and reporters' note 2.]

431 Melia v. United States, 667 F.2d 300 (2d Cir. 1981). *See also* United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997).

432 Treaty on Extradition with Canada as amended by exchange of notes of June 28 and July 9, 1974, 27 U.S.T. 983, T.I.A.S. No. 8345, art 2, sec. 2 (entered into force Mar. 22, 1976).

433 *See generally In re Extradition of Lara*, 1998 U.S. Dist. Lexis 1777 (S.D.N.Y. 1998).

434 Jordan v. Tashiro, 278 U.S. 123 (1928).

435 *Id.* at 127. *See also* Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); *In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

436 Sumitomo Shoji Am. Inc. v. Avagliano, 457 U.S. 176 (1982). Treaties should be liberally construed to effect their purpose, namely, "the surrender of fugitives to be tried for their alleged offenses." Ludecke v. U.S. Marshal, 15 F.3d 496, 498 (5th Cir. 1994) (quoting Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980)) (quoting Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10, 57 S. Ct. 100, 103 (1936)); *accord* United States v. Cancino-Perez, 151 F.R.D. 521, 523 (E.D.N.Y. 1993). *See*

of such treaties are particularly relevant to the meaning of the language of the treaties because they confer benefits, especially corporate and tax benefits, to those who fall within their purview. It is completely different from the context of extradition treaties. Extradition treaties detrimentally affect the rights of individuals, whereas treaties of commerce, friendship, and navigation beneficially affect the rights of individuals. Thus, to err in favor of liberality in the cases of treaties of commerce, friendship, and navigation is to err in favor of granting more benefits to individuals, whereas to err in the liberality of interpreting extradition treaties is in fact to place individuals in greater jeopardy of their lives and liberties.

It must also be reemphasized that to allow extradition treaties to be reinterpreted in light of subsequent developments and expectations of the parties creates an unequal application of the law with respect to any and all individuals who would fall within the purview of that treaty at the different times when such interpretation may change without notice to the persons to whom it is intended. This would constitute a denial of due process of law in that individuals would not receive the appropriate notice that is necessary to know which conduct is deemed violative of the law in terms of whether that conduct is extraditable or not.[437]

(4) *Expressio Unius Est Exclusio Alterius*

In contrast to the rule of liberality, courts have also relied upon the maxim *expressio unius est exclusio alterius*; namely, that which is specifically stated excludes anything else by implication. As Professors Myres McDougal, Harold Lasswell, and James Miller observed:

> [t]his principle . . . prescribes that whenever a given reference has been expressly included in an agreement, all other related references must be regarded as having been excluded . . . The rule of *expresso unius* may be stated in implicative form as follows: If any given individual or class expression (X) occurs in an agreement, then it must be inferred that any other similar individual or class expression (Y), (Z), etc., was intentionally excluded from the operation of the agreement by the parties.[438]

This method of interpretation can be employed with respect to the terms of a given treaty or between treaties when a certain provision is absent in one treaty but is present in other treaties regarding extradition. In these instances, the judiciary must resolve the ambiguity of the treaty's silence and determine whether the particular provision of other treaties may be read into the terms of the treaty that is silent on the question. In *Hu Yau-Leung v. Soscia*,[439] for example, the applicable treaty required that an extradition request be based upon a charge that the relator was to be prosecuted for the commission of a crime classified as a felony under U.S. law. The relator challenged the request for his extradition on the grounds that because he was sixteen at the time he allegedly committed the crime, the crime for which he was being sought would not be considered a felony under U.S. law. The applicable treaty had no provision stating that the prosecution of juveniles could not result in a felony conviction, although other extradition treaties contain such provisions. The court reasoned that its absence in the treaty in question required a determination that the relator's age at the time the crime was allegedly committed

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also Factor, 290 U.S. at 293–294, 54 S. Ct. at 196 ("(I)f a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."). "The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." *Factor*, 290 U.S. at 298–299, 54 S. Ct. at 197 (citations omitted).

437 *See,* e.g., Kolender v. Lawson, 461 U.S. 352, 357 (1983).

438 Myres S. McDougal et al., The Interpretation of Agreements and World Public Order 330–331 (1967).

439 Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir. 1981).

was not relevant, and did not bar his extradition to the requesting state. Thus, the court refused to read such a provision into the treaty in question.

In *Kamrin v. United States*,[440] the Ninth Circuit similarly interpreted the silence of the Treaty of Extradition between the United States and Australia[441] regarding the applicability of the relevant U.S. statute of limitations as rendering that statute unavailable to the relator as a bar to his extradition.[442] The court stated:

> Generally, absent a specific treaty provision, the statute of limitation may be raised as a defense to criminal proceedings only after return to the requesting state . . . Given the general rule, the absence of a contrary provision should be interpreted as an intention by the party states that the statute of limitation of the requested state does not apply.[443]

(5) *Ejusdem Generis*

The rule *ejusdem generis* has also been referred to as the rule of *generalia specialibus non derogant.* Its most familiar restatement is by McNair, who characterized it as "a useful doctrine or presumption, well recognized and frequently applied in English, Scottish, and American law, to the effect that general words when following (and sometimes when preceding) special words are limited to the *genus* if any, indicated by the special words."[444] The Permanent Court of International Justice has stated that the *ejusdem* maxim requires that "special words, according to elementary principles of interpretation, control the general expressions."[445]

The *ejusdem* rule was applied by the Supreme Court in *Factor v. Laubenheimer*.[446] In *Factor*, the United Kingdom requested the relator's extradition in order to prosecute him for the charge of receiving sums of money, "knowing the same to have been fraudulently obtained." The relator challenged the extradition order on the grounds that this offense was not listed as an extraditable offense in the treaty between the United Kingdom and the United States. The Supreme Court rejected his claim:

> Paragraph 18 of Article 3 of the Dawes-Simon Treaty includes among the offenses for which extradition may be demanded "receiving any money, valuable security or other property, knowing the same to have been stolen or unlawfully obtained." It is insisted that "receiving money," knowing the same to have been stolen or unlawfully obtained, is not the equivalent of receiving money, knowing the same to have been fraudulently obtained. It is not denied that the phrase "unlawfully obtained," standing alone, is as broad as the phrase "fraudulently obtained." But it is asserted that its use in association with the word "stolen" restricts its meaning to offenses of the same type of unlawfulness as stealing, which it is said involves only those forms of criminal taking which are without the consent or against the will of the owner or the possessor. But we think the words of the treaty present no opportunity for so narrow and strict an application of the rule of *ejusdem generis.* The rule is at most one of construction, to be resorted to as an aid only when words or phrases are of doubtful meaning. Extradition treaties are to be liberally, not strictly construed. The words "steal" and "stolen" have no certain technical significance making them applicable only with respect to common law larceny. They are not uncommonly used as implying also a taking or receiving of property by embezzlement or false pretenses, offenses which are often embraced in modern forms of statutory larceny. Whatever was left vague or uncertain by

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440 Kamrin v. United States, 725 F.2d 1225 (9th Cir.), *cert. denied*, 469 U.S. 817 (1984). *See also* Murphy v. United States, 199 F.3d 599 (2nd Cir. 1999).

441 Treaty of Extradition between the United States and Australia, 27 U.S.T. 957, T.I.A.S. No. 8234 (1974).

442 *Kamrin*, 725 F.2d at 1227.

443 *Id.*

444 Arnold D. McNair, The Law of Treaties 393 (1961).

445 The Payment of Various Serbian Loans Issued in France, 1929 P.C.I.J. (Ser. A) No. 20.

446 Factor v. Laubenheimer, 290 U.S. 276 (1933).

> the use of the word "stolen" was made certain by the added phrase "or unlawfully obtained," as indicating any form of criminal taking whether or not embraced within the term larceny in its various connotations. Even if the word "stolen" were to be given the restricted meaning for which the petitioner contends, it would be so precise and comprehensive as to exhaust the genus and leave nothing essentially similar on which the general phrase "or unlawfully obtained" could operate. This phrase, like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to render it meaningless or inoperative. See *Mason v. U.S.*, 260 U.S. 545, 553.[447]

(6) Retroactive Application

As a general rule treaties are not retroactive. This is reflected in the 1969 Vienna Convention on the Law of Treaties Article 28, which states that the provisions of a treaty "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Thus a treaty cannot have retroactive effect unless the parties specifically agree to retroactive application. An extradition treaty can therefore be made retroactive if it contains a specific provision to that effect. Such retroactivity would not, in the United States, be deemed a violation of the Constitution's prohibition of ex post facto because extradition is not deemed a criminal trial, nor does it inflict any penalty on the requested person.[448]

Aside from the issue of the entire treaty's retroactivity, a subsequent treaty or an amending treaty can have retroactive application of some of its provisions even without a specific provision allowing retroactivity.[449] In *Extradition of Ernst*, the court, in reliance on *McMullen*, held thusly:

> *In re Extradition of McMullen*, 769 F. Supp. 1278 (S.D.N.Y.1991), *aff'd sub nom., McMullen v. U.S.*, 953 F.2d 761 (2d Cir. 1992), *aff'd in part, rev'd, in part on other grounds*, 989 F.2d 603 (2d Cir.1993), involved closely analogous facts. In that case, the United Kingdom sought McMullen's extradition as a result of his alleged involvement in the bombing of an army barracks. The U.S. District Court for the Northern District of California denied the request, find that the offense charged was political in nature and, therefore, not extraditable. 769 F. Supp. at 1982.
>
> Subsequent to the decision of the California Court, the extradition treaty between the U.S. and the United Kingdom was amended to narrow the scope of the political offense exception. 769 F.Supp. at 1282-83. The United Kingdom then sought McMullen's extradition under the amended treaty. McMullen contested the extradition request, arguing, among other things, that prior to the amended treaty he had a complete defense to extradition and that application of the amended treaty to him would violate the prohibition against ex post facto laws.
>
> Judge Ward rejected McMullen's argument, explaining:
>
> > McMullen argues that the retroactive change in the law inflicts punishment upon him by depriving him of the substantive defense that he successfully asserted in the earlier extradition proceeding, "thereby rendering conduct which was protected by the political offense doctrine when done, now unprotected."
>
> The elimination of McMullen's defense to extradition—the alleged punishment must be viewed in light of the cases construing punishment under the ex post facto clauses and the nature of an extradition proceeding. As noted above, the ex post facto clauses have been narrowly construed to apply only to retroactive criminal penalties. Moreover, the ex post fact ban does not apply

447 *Id.* at 302–304.

448 *In re* De Giacomo, 7 Fed. Cas. 366 (C.C.S.D.N.Y. 1874) (No. 3747); Hilario v. United States, 854 F. Supp. 165, 175–176 (E.D.N.Y. 1994); *In re Extradition of* Ernst, 1998 WL 30283 (S.D.N.Y. Jan. 27, 1998).

449 *Ernst*, 1998 WL 30283 (rejecting the relator's argument that the U.S.–Swiss Extradition Treaty could not apply retroactively because his extradition was commenced under the 1900 Treaty).

> to every change in law that "may work to the disadvantage of a defendant." *Dobbert v. Florida*, supra, 432 U.S. at 293, 97 S. Ct. at 2298 . . . .[450]

During McMullen's extradition proceedings the 1985 United States–United Kingdom Supplementary Extradition Treaty entered into effect. The Treaty significantly reduced the "political offense exception."[451] McMullen argued in vain that this new Treaty reduced the defense he had under the previous treaty.

It is a basic tenet of extradition law that a treaty providing for the extradition of individuals accused of specified crimes does not make an act a crime, but rather merely provides the means by which a state can obtain persons charged with those specified acts in order to try them where the act was committed. As a result, a treaty of extradition that includes a particular crime, but that was passed after the commission of that crime by the accused, still applies to the earlier act unless there is a specific treaty provision to the contrary,[452] thus in effect providing for some form of retroactivity.

The U.S. government, in both the executive and judicial branches, has adhered to this basic tenet. In 1933, the acting secretary of state sent a telegram to the chairman of the American Delegation to the 7th International Conference of American States in Montevideo informing him that extradition treaties applied to a previously committed offense unless the treaty expressly stated otherwise.[453] The Supreme Court reaffirmed this rule of law in *Factor v. Laubenheimer*,[454] where the Court stated that a later extradition treaty extended to proceedings concerning an offense not included in a previous treaty, regardless of the date of the offense. The Court added that a later treaty also would apply where there had been no previous extradition treaty.

However, this retroactivity provision can also be applied against the government. For example, in *Galanis v. Pollanck*,[455] a treaty of extradition between the United States and Canada contained a double jeopardy provision, which forbade extradition under the treaty where an accused had already been tried for the offense in the United States. The earlier extradition treaty lacked this provision. The defendant argued that as a result of the retroactivity rule, the provision applied even to a crime committed before the effective date of the treaty. The Second Circuit agreed, pointing out that the drafters of the treaty must have been aware of this basic rule, and their failure to include a provision excluding retroactive effect manifested their intent to give the article that force.

(7) Resort to Customary International Law Principles

In addition to the criteria enumerated above, U.S. courts also rely on customary international law principles in construing the meaning of treaty provisions. The recognition of customary international law is found in the much-quoted language of Justice Horace Gray in the *Paquete Habana* case:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[456]

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450 *Id*. at *4–5.

451 *See* Ch. VIII, Sec. 2.1.

452 Whiteman Digest, *supra* note 70 at 753. For a treaty provision excluding retroactive effect, *see* Extradition Convention of 1856 between U.S. and Austria-Hungary, art. I, U.S.T. 9, 11 Stat. 691, 692–693.

453 M.S. Dept. of State, file 710. G. International Law 5; 1933 Foreign Rel., vol. IV, 185.

454 Factor v. Laubenheimer, 290 U.S. 276 (1933). *See also In re* De Giacomo, 7 F. Cas. 366 (S.D.N.Y. 1874) (No. 3,747).

455 Galanis v. Pollanck, 568 F.2d 234 (2d Cir. 1977); United States v. Flores, 538 F.2d 939 (2d Cir. 1976). *See* Ch. VIII, Sec. 4.3.

456 The Paquete Habana, 175 U.S. 677, 700 (1900).

As Professor Louis Henkin has stated: "Like treaties, customary international law is law for the Executive and the courts to apply."[457] The Vienna Convention on the Law of Treaties,[458] although not yet ratified by the Senate, is already recognized as the "authoritative guide to current treaty law and practice."[459] Because the Convention essentially codifies customary international law governing international agreements, it may be used by the United States in interpreting treaties, even though the United States is not a party to the Convention. Many of its provisions have been included in the Restatement (Third) as being part of customary international law, binding on the United States.[460] In fact, U.S. courts have already treated certain provisions of the Vienna Convention as authoritative.[461]

A new debate has arisen between conservatives and neo-conservatives and traditional academics, the latter challenging the proposition that customary international law is binding on U.S. courts, or even relevant sources.[462]

(8) Resort to General Principles of Law

"General principles of law" are a source of international law. Consequently, as stated by this writer, they can be used for purposes of treaty interpretation:

> The best evidence that international law has not only accepted but relied on "General Principles" is the Vienna Convention on the Law of Treaties, which contains a number of such "principles" in its rules of treaty interpretation. Although that Convention codifies customary rules of international law, it nonetheless incorporates such principles as good faith and others as part of customary international law, even though their origin is found in "General Principles."[463]

Furthermore, this writer has also stated that:

> "General Principles" have been primarily used to clarify and interpret international law. For example, as Schlesinger notes, "General Principles" must be considered in determining the meaning of treaty terms. Lauterpacht points out that recourse by the ICJ to "General Principles" has constituted "no more than interpretation of existing conventional and customary law by reference to common sense and the canons of good faith." This interpretive function is the most widely recognized and applied function of "General Principles" and the one that is evidently the most needed and useful, in contrast to the use of "General Principles" as a method to supplant or remedy deficiencies in conventional and customary international law.

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457 Henkin, *supra* note 142, at 221.

458 Vienna Convention, *supra* note 372.

459 S. Exec. Doc. L., 92d Cong., 1st sess. 1 (1971).

460 Restatement (Third), *supra* note 79 at § 325] (interpreting international agreements).

461 *See* United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978) (applying Art. 36 to interpret High Seas Convention), *overruled in part by* United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983); Day v. Trans World Airlines, 528 F.2d 31, 33, 36 (2d Cir. 1975) (applying Art. 31 to interpret Warsaw Convention).

462 For a traditional view, see Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 St. John's L. Rev. 551 (1993); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the U.S.*, 12 Mich. J. Int'l L. 59 (1990); Jordan J. Paust, *Rediscovering the Relationship between Congressional Power and International: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 Va. J. Int'l L. 393 (1988); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the U.S.*, 20 Mich. J. Int'l L. 301 (1999); and for the neoconservative view, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 816 (1997).

463 M. Cherif Bassiouni, *A Functional Approach to "General Principles" of International Law*, 11 Mich. J. Int'l L. 768, 786–787 (1990) (citation omitted).

> "General Principles" can be utilized to interpret ambiguous or uncertain language in conventional or customary international law, but, foremost, they can be relied upon to determine the rights and duties of States in the contextual, conventional, or customary law. This is particularly the case, for example, with respect to such principles as "good faith" and "equitable performance."
>
> The extent to which one can resort to "General Principles" for interpretative purposes has never been established. Consequently, "General Principles" can logically extend to fill gaps in conventional and customary international law and serve as a supplementary source thereto. From that basis, "General Principles" can be interpreted as a source of law that overreaches other positive sources of international law, and eventually supersedes it.
>
> This interpretative approach can be applied *in extenso*. "General Principles" thus become not only a source of new norms, but also a source of higher law, i.e., *jus cogens*.[464]

For example, with respect to determining double criminality, research may be required in comparative criminal law systems so that "general principles" can be determined and applied.

(9) Resort to National Legislation

Neither the Vienna Convention on the Law of Treaties nor the Restatement (Third) specifically addresses the issue of terminological inconsistencies in the official languages of treaties when the treaty in question states that all languages are equally binding and effective. Bilateral treaties almost always contain provisions that the text in both languages is binding and effective, but sometimes the translation of terms may have a different legal meaning in different languages.

In *In re Assarsson*,[465] the Seventh Circuit decided a case involving the United States–Sweden bilateral extradition treaty,[466] where the key difference was that the English text uses the term "charged," referring to an extraditable person, whereas the Swedish text used a term that in English means "accused." If the word "charged," a precondition to extradition, is interpreted in accordance with U.S. law, it would mean that an indictment or complaint has been returned, evidencing the beginning of formal criminal proceedings. If the word "accused," used in the Swedish text, were to be used, an arrest warrant would be sufficient.

Similarly, the 1983 United States–Italy Extradition Treaty[467] contains a provision in Article VI, which states that extradition is not permissible in cases where the requested person has been acquitted or convicted of the "same acts" in English and the "same facts" in the Italian text.[468] This change was made in the 1983 treaty because the language of the prior 1973 treaty spoke of the "same offense" in Article VI, which caused significant difficulties in determining what constituted the same offense. The 1973 treaty provided in Article VI: "Extradition shall not be granted

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464 *Id.* at 776–777 (citations omitted).

465 *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980).

466 Convention on Extradition, U.S.–Sweden, Oct. 24, 1961, T.I.A.S. No. 5496, 14 U.S.T. 1845.

467 Extradition Treaty, U.S.–Italy, Sept. 24, 1984, T.I.A.S. 10837, 35 U.S.T. 3023.

468 The International Association of Penal Law, the oldest and most distinguished penal law organization in the world, at its XVIIth International Congress of Penal Law held in Beijing, China, Sept. 12–19, 2004, adopted the following text in a resolution on the topic of *ne bis in idem*:

> 2.1 The *idem*, in terms of the "same act" in the proceedings at issue, should be identified according to the facts established in the preceding process and, in particular, by the indictment and/or the final decision as governed by the applied law. This factual approach provides a more objective and clearer criterion than that of juridical equivalence, which is very much affected by the differences between the respective national penal provisions and the rules on concurrence of offences. (emphasis added).
>
> 2.2 If substantially the same facts constitute additional serious offences according to the second law applicable pursuant to Section 1.3, which offences are not punishable and, thus, have not been dealt with in the first proceedings, a new proceeding may be admissible only if, according to the principle of dedication, the first sentence, in so far as fully or partly enforced is accounted for. (emphasis added).

in any of the following circumstances: 1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the Requested party for the *offense* for which his extradition is requested…" (emphasis added). The language was intensely debated in *Sindona v. Grant* because the term "offense" meant the same or substantially the same crime.[469] It was as a result of the terminological problems raised by the word "offense" in the 1973 treaty that the 1983 treaty reverted to a choice of terms reflecting Italian criminal law and practice, which is fact-based.[470]

It should be noted that Italy ratified the European Convention on Extradition,[471] which in Article 9 contains the same ground for refusal of extradition as that which is reflected in Article VI of the 1984 Treaty. Article 9 refers to the sameness of "fact" or "facts" of the prior acquittal or conviction and the extradition request. Italian jurisprudence as noted in numerous writings of scholars is fact-based with respect to *ne bis in idem* in extradition matters.[472]

It is obvious that any exercise in treaty interpretation needs to ascertain the parties' intention by relying on the plain language and meaning of the words, if possible.[473] Thus, the real inquiry must be into the parties' intentions. In the cases of Sweden and Italy, the parties intended to reflect in the respective treaties their national legislation. For example, Italy's law prohibiting *ne bis in idem*, specifically uses the words *stessi fatti*,[474] which are the same words used in the Italian version of Article VI, which mean "same facts." Understandably, Italy could not ratify a treaty that was inconsistent

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XVIIth International Congress of Penal Law, Minutes of the Congress and Resolutions, 75 Revue Internationale de Droit Penal 804 (2004).

469 *See* Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980), *aff'g* 461 F. Supp. 199 (S.D.N.Y. 1978).

470 *See* Daniele Striani, *L'extradizione con gli Stati Uniti*, 36 Quaderni Della Giustizia 45 (1984).

471 European Convention on Extradition, ETS No 24 (Dec. 3, 1957).

472 *See* Novella Gallantini, *Evoluzione del Prinipo del Ne Bis In Idem Europeo Tra Norme Convenzionale E norme Interne Di Attrazione*, 12 Diritto Penale E Processo 1567 (2005); M. Pisani, *Il Ne Bis In Idem Internazionale E Il Processo Penale Italiano*, *in* Studi Di Diritto Processuale Civile In Onore Di G. Tarzia 553 (2005); M. Pisan, *Le Principe Ne Bis In Idem au Niveau International et la Procedure Penal Italienne*, Revue Internationale de Droit Penal 1017 (2002); G. Dean, *Profili di un Indagine Sul Ne Bis In Idem Extradizionale*, Rivisa di DIritto Procedurale 58 (1998); E. Amodio & O. Dominioni, *Le'estradizione e il Problema Del Ne Bis In Idem*, Rivisa Di Diritto Matrimoniale 362 (1968).

473 1 Restatement (Third), *supra* note 79 at Comment (f) states:

> *Interpretation of agreements authenticated in two or more languages.* When an international agreement has been authenticated in two or more languages, the text in each language is equally authoritative, unless it has been agreed that a particular text will prevail. A version of the agreement in a language other than one in which the text was authenticated is authentic only if it has so been agreed. The terms of the agreement are presumed to have the same meaning in each authentic text. Except where a particular text prevails, when a comparison of the authentic texts discloses a different meaning which is not removed by resorting to the rules of interpretation stated elsewhere in this section, the meaning that best reconciles the texts, having regard to the object and purpose of the international agreement, is to be adopted. Vienna Convention, Article 33.

see also Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27; T.O. Elias, Modern Law of Treaties (1974); Peter Germer, *Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties*, 11 Harv. Int'l L. J. 400, 413 (1970).

474 An indication of the intent of the parties is the choice of heading for Article VI, which is *Ne Bis In Idem,* which derives from Roman law and is contained in the Italian Code of Criminal Procedure in Article 649. Article 649 states (translation by author):

> Prohibition of a second judgment.
>
> 1. The accused who is acquitted or condemned with a judgment or penal decree which has become final cannot be subjected again to a criminal proceeding for the same fact, even when

with its national legislation. Therefore, they must have the "same facts" to prevail, as opposed to the more narrow meaning of "same acts," because *fatti*, or "facts," may include multiple acts.[475]

This problem has arisen in the case of *In re Gambino*.[476] On September 11, 2006, the district court ruled on Gambino's habeas corpus petition that the magistrate's order granting extradition was in violation of the treaty's Article VI in that the facts upon which he was requested were the same "facts" on which he had been previously prosecuted on in the federal district court in New York. Thus Article VI, which uses the word "same acts" in English, *stessi fatti* in Italian, is interpreted to mean same facts of the 1983 treaty with Italy. The magistrate misunderstood the issue and confused the two concepts reflected in the 1973 United States–Italy treaty with its replacement, the 1983 United States–Italy Extradition Treaty. The federal district court judge, unlike the magistrate, understood the difference between a fact-driven concept of *ne bis in idem* and a law-driven one.

The same issue arose in *United States v. Jurado-Rodriguez*,[477] involving the 1883 United States–Luxembourg Extradition Treaty, which contains in Article III, a similar provision on *ne bis in idem*, as Article VI of the 1983 United States–Italy Extradition Treaty. In that case, the distinction as in *Sindona v. Grant*,[478] distinguishes between "same offense and same conduct." The "same offense" approach is driven by the crime charged while the "same conduct" terminology is fact driven, irrespective of what the charge may be. Considering that most modern treaties adopt a fact-driven approach to double criminality, it would be consistent with that approach for the interpretation of double jeopardy provisions such as Article III in the Luxembourg treaty and Article VI in the Italian treaty to be interpreted on a fact-driven basis. Moreover, the diversity in labeling crimes that exists between different legal systems would make it more fair to follow a fact-driven approach.

In re Aguilar[479] is an extradition case involving the interpretation of the 1908 United States–Portugal Extradition Treaty, and whether the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances constitutes a modification of the 1908 extradition treaty. This issue in this case was the interpretation of Article I of the treaty, which specifically states that in order for jurisdiction to vest the person must be "actually within such

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this fact is considered differently as to its label or degree or for the circumstances, save for what is provided for in Article 69, para. 2 and Article 345.

2. If, notwithstanding the above, a new criminal proceeding is initiated, the judge at all stages [of the proceeding] and irrespective of the [judicial] level of the trial [shall] pronounce a judgment of acquittal or dismissal, enunciating the reasons for the order.

It should be noted that Article 69 and 345 of the Italian Code of Criminal Procedure mentioned in Article 649 make exception for cases where a person was presumed dead, but was later found to be alive. Thus, these exceptions do not apply to the general rule enunciated above. There is no term such as *ne bis in idem* in U.S. criminal law, federal or state. Its counterpart is double jeopardy, which derives from common law and exists in federal criminal law, as well as state law. Although there is a doctrinal difference between *ne bis in idem* and double jeopardy, the two concepts have evolved in similar ways, both doctrinally and jurisprudentially. They relate to the preclusion of repeated prosecution and punishment of the same person for crimes arising out of the same or substantially the same facts. U.S. federal and state jurisprudence interpreting double jeopardy has long been based on the proposition that the facts control and not the specific acts or crimes.

475 This problem has arisen in the case of *In re Gambino,* 2006 WL 709445 (D. Mass. 2006), *dismissed in Gambino v. Winn*, Case No. 06-10552-RCL (D. Mass 2006). S*ee* Ch. VIII, Sec. 4.3.

476 *In re* Gambino, 2006 WL 709445 (D. Mass. 2006), *dismissed in* Gambino v. Winn, Case No. 06-10552-RCL (D. Mass 2006).

477 907 F. Supp 568 (E.D.N.Y. 1995).

478 619 F.2d 167 (2d Cir. 1980).

479 *In re* Aguilar, 17 Fla. L. Weekly Fed. D. 477 (S.D. Fla. 2004).

jurisdiction when the crime was committed."[480] The Court held that the Vienna Convention on the Law of Treaties' plain language and meaning is explicit and that since Aguilar was not in Portugal at the time of the crime, he was not extraditable. The government argues that the 1988 UN Narcotic Convention (referred to above) modifies the language of the 1908 extradition treaty nd removes the requirement of physical presence. The issue of physical presence under Article I of the 1908 treaty has been previously adjudicated in *Gouveia v. Vokes*.[481] The court in that case concluded that the 1988 Narcotics Convention merely added extraditable offenses to the 1908 extradition treaty with Portugal, but did not amend other provisions of the treaty, as the government contended.

The trend in Europe, Canada, and the United States is for such issues as *ne bis in idem* and dual criminality to be fact driven and not law driven. In the end, this approach serves the interest of the government and the relators, as well as provides judicial economy.

5.4.4. Contemporary Jurisprudential Trends: The Restatement's Position

Since the 1980s, federal judges have tended to be more conservative while the zeal of federal prosecutors sometimes stretches the limits of propriety. The combination of these two realities has had a strong impact on the way treaties have been interpreted. Suffice it to note that the Supreme Court, the last bastion of justice and fairness, interpreted the United States–Mexico Treaty[482] as permitting abduction because the treaty did not exclude it.[483]

The Restatement (Third) of Foreign Relations states:

> § 325 Interpretation of International Agreement
>
> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

Source Note:

Subsection (1) follows Article 31(1) of the Vienna Convention; Subsection (2) follows Article 31(3).

Comment:

a. *Customary international law of interpretation*. Customary international law has not developed rules and modes of interpretation having the definiteness and precision to which this section aspires. Therefore, unless the Vienna Convention comes into force for the U.S., this section does not strictly govern interpretation by the U.S. or by courts in the U.S.. But it represents generally accepted principles and the U.S. has also appeared willing to accept them despite differences of nuance and emphasis. See comment *g* as U.S. practice.

b. *Context of the agreement.* For the purpose of interpreting an agreement, the context comprises, in addition to the text, including its preamble and annexes, (i) any other agreement between the parties in connection with the conclusion of the agreement and (ii) any instrument made by one

480 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 I.L.M. 492 (1989).

481 Gouveia v. Vokes, 800 F. Supp. 241 (E.D. Pa. 1992).

482 Extradition Treaty, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656; Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context and the Current Situation in Mexico and the U.S.*, 11 Sw. J.L. & Trade Am. 1 (Winter 2005).

483 *See* Ch. IV, Sec. 6 (discussing Stevens's dissent).

of more parties in connection with the conclusion of the agreement and accepted by the other parties as an instrument related to the agreement. Vienna Convention, Article 31(2).

c. *Subsequent practice and interpretation.* Subsection (2) addresses subsequent agreements that purport to interpret an earlier agreement; agreements that amend an earlier agreement are dealt with in § 334. The distinction may be imperceptible in some instances. Subsection (2) conforms to U.S. modes of interpretation, affirming that subsequent practice of the parties can be taken into account in interpreting international agreements.

d. *Interpretation of different types of agreements.* Different types of agreements may call for different interpretive approaches. Agreements creating international organizations have a constitutional quality, and are subject to the observation in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819), that "we must never forget that it is a *constitution* that we are expounding." Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems. Agreements involving a single transaction between governments, such as a transfer of territory or a grant of economic assistance should be construed like similar private contracts between private parties. Different approaches to interpretation have developed for particular categories of agreements such as extradition treaties, tax treaties, etc.

e. *Recourse to* travaux préparatoires. The Vienna Convention, in Article 32, requires the interpreting body to conclude that the "ordinary meaning" of the text is either obscure or unreasonable before it can look to "supplementary means." Some interpreting bodies are more willing to come to that conclusion than others. (Compare, for example, the experience in the U.S. with the parole evidence rule in interpreting contracts.) Article 32 of the Vienna Convention reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (*travaux préparatoires*) as a guide to the interpretation of the agreement. The Convention's inhospitality to *travaux* is not wholly consistent with the attitude of the International Court of Justice and not at all with that of U.S. courts. See comment *g*.

f. *Interpretation of agreements authenticated in two or more languages.* When an international agreement has been authenticated in two or more languages, the text in each language is equally authoritative, unless it has been agreed that a particular text will prevail. A version of the agreement in a language other than one in which the text was authenticated is authentic only if it has so been agreed. The terms of the agreement are presumed to have the same meaning in each authentic text. Except where a particular text prevails, when a comparison of the authentic texts discloses a difference of meaning which is not removed by resorting to the rules of interpretation stated elsewhere in this section, the meaning that best reconciles the texts, having regard to the object and purpose of the international agreement, is to be adopted. Vienna Convention, Article 33.

g. *Interpretation by U.S. courts.* This section suggests a mode of interpretation of international agreements somewhat different from that ordinarily applied by courts in the U.S.. Courts in the U.S. are generally more willing than those of other states to look outside the instrument to determine its meaning. In most cases, the U.S. approach would lead to the same result, but an international tribunal using the approach called for by this section might find the U.S. interpretation erroneous and U.S. action pursuant to that interpretation a violation of the agreement.

Reporters' Notes:

1. *Resort to* travaux préparatoires. Some states at the Vienna Conference objected to resort to *travaux* as contrary to their traditions, in which resort to legislative history to interpret domestic statutory questions is impermissible, or at least uncommon. Some were concerned that if resort to *travaux* were accepted, a state might be deterred from acceding to a multilateral convention negotiated at a conference that it had not attended. Others feared that resort to *travaux* would favor nations with long-maintained and well-indexed archives. The International Court of Justice, particularly as compared with the Permanent Court of International Justice, has been

rather liberal in referring to *travaux*. The International Court of Justice did refuse to consider the *travaux* in its advisory opinion, Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. Rep. 4, 8. In other cases, it has considered arguments based on negotiating documents. See, *e.g.*, North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), [1969] I.C.J. Rep. 3, 32; Reservations to the Convention on Genocide (Advisory Opinion), [1951] I.C.J. Rep. 15, 22; see H. Lauterpacht, The Development of International Law by the International Court 124–27 (1958); Gordon, "The World Court and the Interpretation of Constitutive Treaties," 59 Am. J. Int'l L. 794(1965). Even the earlier court sometimes recognized the relevance of *travaux*. See Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J. ser. A, No. 23 (1929), p. 42. The Court states that, as to those states that had not participated in the Versailles conference, the record of the Conference "cannot be used to determine, insofar as they are concerned, the import of the Treaty." The Court appeared to assume the relevance of that record as to other parties.

Other international tribunals have varied in their readiness to use such materials. The European Court of Human Rights has resorted to them liberally but the Court of Justice of the European Communities has not. Sorensen, "Autonomous Legal Orders," 32 Int'l & Comp.L.Q. 559, 573 (1983). For use by an ad hoc arbitral tribunal, see Young Loan Arbitration (Belgium v. Federal Republic of Germany), 59 Int'l L.Rep. 495, 543 (1980).

U.S. courts, accustomed to analyzing legislative materials, have not been hesitant to resort to *travaux préparatoires*. See, *e.g.*, *Air France v. Saks*, 470 U.S. 392, 105 S. Ct. 1338, 84 L.Ed. 2d 289 (1985); *TWA v. Franklin Mint*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed. 2d 273 (1984). British courts, although reluctant to use domestic legislative materials, have not been inhibited in the use of *travaux*. *E.g.*, *Fothergill v. Monarch Airlines*, [1981] A.C. 251 (H.L. 1980).

2. *Agreements in two or more languages*. Comment *f* recognizes the equality of texts in two or more languages and presumes that each text has the same meaning. An international tribunal, therefore, may consider any convenient text unless an argument is addressed to some other text. Judges of the International Court of Justice often refer to only one or two texts. See Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties," 11 Harv. Int'l L. 400, 413 (1970). However, the Court of Justice of the European Communities has warned that since the text of the Treaty of Rome is equally authentic in each of several languages, it is unlikely that a question of treaty interpretation will be so clear under all of them that national courts are justified in not referring the question to the Court of Justice for clarification. Srl CILFIT v. Ministry of Health, [1982] E.C.R. 3415.

In developing Article 33 of the Vienna Convention, the negotiators rejected amendments that would have given preference to the language in which the treaty had been originally drafted; they provided instead that the meaning that best reconciles the different texts, having regard to the agreement's object and purpose, should prevail. The original language may of course prevail on account of its greater clarity, either because the other text represents a faulty translation or because particular phraseology is more meaningful in the language of the legal system in which it originated. Such guides to the meaning of an agreement may emerge from the *travaux préparatoires*. Thus, in *Air France v. Saks*, Reporters' Note 1, the court stated "[w]e look to French legal meaning because the Warsaw Convention was drafted in French by continental jurists."

3. *Evidence of interpretive practice*. Ascertaining state interpretive practice may present difficult problems of research. A few countries, including the U.S., publish digests of their international practice, which ordinarily include diplomatic notes and other actions reflecting treaty interpretation. These compilations may not be complete, however, particularly as to interpretation by agencies of the government other than the one that publishes them. Furthermore, their publication is often delayed. In most countries no systematic reports of practice are available.

4. *U.S. and international interpretive approaches*. Courts and administrative agencies in the U.S. frequently interpret international agreements. The courts seek to avoid giving to an international agreement a meaning in domestic law different form its international meaning.

Nonetheless, in a science as inexact as the interpretation of agreements, differences will inevitably emerge. To some extent these are due to differences in the approaches to interpretation in different legal systems. Subsection (1) emphasizes interpretation in accordance "with the ordinary meaning" of the text of the agreement; the "object and purpose" of the agreement is ancillary, casting light on the "ordinary meaning." By way of contrast, in U.S. tradition the primary object of interpretation is to "ascertain the meaning intended by the parties"; "the ordinary meaning of the words of the agreement" is a factor to be taken into account, as are the preparatory materials. See previous Restatement §§ 146–47. The previous Restatement reflected the strong tendency in U.S. case law to reject literal-minded interpretation of statutes, a tendency that is not dominant in the jurisprudence of many other countries.

The difference in result between the international and the U.S. approaches, however, should not be exaggerated. On the one hand, a U.S. court has said: "It seems elementary to us that the language [of a treaty article] must be the logical starting point." *Day v. Trans World Airlines*, Inc., 528 F.2d 31,33 (2d Cir. 1975), *certiorari denied*, 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed. 2d 172 (1976) (citing Article 31(1) of Vienna Convention). On the other hand, both the Vienna Convention and the U.S. approach seek to determine the intention of the parties; neither favors "teleological interpretation" to achieve some purpose overriding that intention. "The meaning intended by the parties" and "the ordinary meaning to be given to the terms" normally do not differ. Moreover, since the "ordinary meaning" of terms is to be determined in context and in the light of the object and purpose of the agreement, both "context" and "the object and the purpose" may have to be identified and often cannot be determined without recourse to the preparatory materials and to other "extraneous" evidence. Nevertheless, there may be a difference in emphasis and presentation. A U.S. lawyer trying to anticipate or influence the interpretation of an international agreement by an international tribunal will have to be aware of these preferences. For classic statements of the European tradition on interpretation, see C. de Visscher, Problèmes d'Interprétation Judiciaire en Droit International Public (1963); Degan, L'Interprétation des Accords en Droit International (1963).

For other reasons, too, different national courts may place different construction on the same language or arbiters may find several different national readings of the same international agreement. An international tribunal interpreting an agreement seeks to determine its meaning as a matter of international law. A U.S. court interpreting the same agreement seeks to determine its meaning for purposes of its application as domestic law. See § 362(2). The agreement has status as domestic law by virtue of its being an international agreement (§ 111, Comment *b*), and the interpretation of the agreement by other nations, or by international tribunals in cases to which the U.S. is not a party, will be given due weight, but such "foreign" interpretations ordinarily are not binding on the U.S. as a matter of international law and are therefore not binding on U.S. courts. The U.S. and its courts and agencies, however, are bound by an interpretation of an agreement of the U.S. by an international body authorized by the agreement to interpret it. *E.g.*, *Matter of International Bank for Reconstruction and Development*, 17 F.C.C. 450, 461 (1953).

The international law on the interpretation of international agreements is binding on the U.S., and is part of the law of the U.S.. Insofar as this section reflects customary law, or if the U.S. adheres to the Vienna Convention, courts in the U.S. are required to apply those rules of interpretation even if the U.S. jurisprudence of interpretation might have led to a different result.

5. *Use of domestic sources.* A court or agency of the U.S. is required to take into account U.S. materials relating to the formation of an international agreement that might not be considered by an international body such as the International Court of Justice. These may include:

(i) Committee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement which, as a matter of internal law, requires the assent of the Senate or of Congress. See § 314, Comment *b*, as to the obligation of the President with respect to qualification upon such assent.

> (ii) The history of the negotiations leading to the agreement, including unilateral statements of understanding not included in the President's proclamation or otherwise communicated to the other party, and, probably, internal official correspondence and position papers prepared for use of the U.S. delegation in the negotiation. Some of this evidence of intention may not be given great weight internationally, but domestic courts may have to consider it in view of the weight to be given to Executive interpretations of an agreement. See § 326(2).[484]

5.4.5. Judicial Deference to the Executive Branch

It is understandably common practice for the government to represent in extradition proceedings that the judiciary must give deference to the executive in connection with treaty interpretation insofar as the power to conduct foreign relations is granted by the Constitution to the executive branch. In addition, the government also properly adds that extradition treaties should be liberally interpreted. However, the problem arises when representations are made to the effect that what is considered a liberal interpretation should be the province of the executive and that the judiciary should simply accept whatever interpretation the government offers under these two combined approaches to treaty interpretation. What is more appropriate is to distinguish them. An extradition treaty should be interpreted liberally in order to achieve the goals of extradition but subject to the treaty language and in accordance with other applicable treaties, statutes, and the jurisprudence of the courts. Liberality of interpretation becomes important when there is ambiguity, either in the language in the treaty, or arising out of the facts. Liberality should not be construed as authorizing the government to, in a sense, rewrite the language of a treaty, or go against its plain language and meaning. If an issue of the intent of the parties arises, then clearly the judiciary must give deference to the executive and this of course has bearing on the interpretation of treaty provisions.[485]

5.5. The Effects of State Succession and War on U.S. Extradition Treaties

5.5.1. Introduction

State succession and war cause the United States' treaty obligations regarding extradition to lapse or be suspended either until a new treaty comes into force or until hostilities are ended. During the interim, the United States has no legal basis upon which extradition may be requested or granted, because it chooses to reject the applicability of customary international law to matters of extradition and asylum. This self-imposed restriction condemns the practice to exclusive dependence upon one source of international law, namely treaties, and to lose the benefit of the alternative sources. The suspension of a treaty obligation because of war or its abrogation by a successor state would have definitive effect on extradition if the United States were to accept the existing alternatives under international law (i.e., reciprocity or comity). For example, instead of attempting to continue applying the previous treaty to which a state's predecessor had agreed, the United States could urge the negotiation of a new treaty; in the interim, the United States could rely on comity as a legal basis of extradition.

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484 *See* Restatement (Third), *supra* note 79 at § 325, Source Note, Comment, and Reporters' Notes.

485 *See* Hoxha v. Levi, 371 F. Supp. 2d 651 (E.D. Pa. 2005) (giving deference to the Department of State); Best v. United States, 304 F.3d 308 (3rd Cir. 2002); *In re Extradition of* Platko, 213 F. Supp. 2d 1229, 1233 (S.D. Cal. 2002); El-Al, Ltd. v. Tsiu Yuan Tseng, 525 U.S. 155 (1999); Sumitomo Shoji Am. Inc. v. Avagliano, 457 U.S. 176 (1982). The "state doctrine" has applied to prevent U.S. federal courts of appeals from considering the validity of a foreign head of state's action in extraditing a relator. *See* Reyes-Vasquez v. U.S. Attorney General, 304 Fed. Appx. 33, 35–36 (3d. Cir. 2008) (unpublished opinion).

Furthermore, there is nothing that requires the suspension of treaty obligations during times of war. The effect of war on extradition treaties depends on whether the procedure is considered an aspect of foreign policy furthering the national interest, or whether it is considered a form of international cooperation against common criminality. If the former approach is adopted, extradition will be deemed dependent upon the friendly relations of the signatories; thus, treaty obligations would be suspended during unfriendly periods. If the latter approach is adopted, the international community's interest in combating common criminality would override political conditions between states. The United States adheres to the narrower position of self-interest; this explains the preponderant role played by the executive in extradition matters.

5.5.2. State Succession

State succession is a doctrine by which a successor state is bound by the treaty obligations undertaken by the legal entity called the prior state. It is designed to preserve world public order through predictability by maintaining treaty obligations. Although it is the privilege of the successor state to reject the application of the treaty concluded by the prior state, the same privilege also exists with respect to the counterpart state with respect to treaties that have a political content or political nature.

The practice of states has varied over the years and more particularly as between developed and developing states. In the decolonization era of the 1960s and early 1970s there was a presumption favoring continuation of treaties under state succession for newly independent states if the treaty was not of a political nature. Conversely, if the treaty was of a political nature the presumption was that state succession did not apply unless the successor state specifically acknowledged the binding legal effect of the treaty in question. In the last two decades, however, the practice has become more stable in favor of a presumption of state succession unless the successor state explicitly rejects a given treaty. However, some states such as China have taken a consistent position that they are not bound under the doctrine of state succession and they are only bound by the treaties they specifically undertake.

With respect to extradition treaties, state succession has been consistently recognized and practiced. Nevertheless, because an extradition treaty is premised on certain assumptions, the state that was an original party to it may elect not to be bound by state succession even if the successor state elects to accept the continued application of the extradition treaty. The assumptions upon which states rely in their extradition relations are: (1) that mutual and reciprocal interests in law enforcement and cooperation in penal matters are preserved; and, (2) that the criminal justice systems of the two states are not in contradiction with one another or contain such elements that may be contrary to the public policy of one another. The latter assumption is particularly significant in view of the "rule of non-inquiry,"[486] which prohibits a state with whom extradition relations exist from judging another state's criminal justice system in connection with an extradition request or the surrender of the individual. Thus, if either of these two assumptions is deemed by the original party to the extradition treaty not to exist with respect to the successor state, that original party may refuse to accept the continued application of the treaty under state succession.

The two cases discussed in Section 2, *Ivancevic v. Artukovic* and *Charlton v. Kelly*, reveal much about the constitutional framework of the United States' separation of powers. In these cases the judiciary determined to what extent it will defer to the executive in matters of treaty interpretation and state succession in order to abstain from interfering in the powers of an equal branch of government.

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486 *See* Ch. VII, Sec. 8.

The major concern with respect to the state succession doctrine focuses on the question of how extradition relations are affected "when a state or territory covered by such a treaty changes its form of government, or becomes a part of a nation other than that with which the [United States has] the formerly applicable treaty."[487] If the treaty is deemed abrogated by such changes, the United States will not grant an extradition request, because its extradition practice is based exclusively on the existence of a treaty in force.[488]

Generally, the question of state succession arises whenever there is a change in the country's status, rather than in its government. This question recurs whenever former colonies of a given state become independent.[489] Upon gaining independence, several states have voluntarily assumed the treaty obligations applicable to their respective territories and that were formerly binding on the parent state. As an illustration, the Provisional Government of Burma assumed all applicable obligations of the United Kingdom, agreeing with the United States that:

> All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international agreement shall henceforth, insofar as such instrument may be held to have application to Burma, devolve upon the Provisional Government of Burma. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Burma shall henceforth be enjoyed by the Provisional Government of Burma.[490]

Although some newly independent states specifically assume the treaty obligations of the predecessor states,[491] others do not.[492] For example, Israel proclaimed its statehood in 1948. In 1949, it announced that the Extradition Treaty of 1931 between the United States and the United Kingdom (Palestine) was not in force with respect to Israel. As a result, the United States and Israel were compelled to negotiate a new extradition treaty. The new treaty was signed in 1962, thirteen years after Israel denounced the previous treaty.[493] The Israeli government's rejection of the treaties applicable to Palestine illustrates the controlling principle operative in such state succession situations: the government of the successor state determines whether or not a given treaty remains effective with that state.[494]

The prevailing position of the United States is that a treaty remains in force until it is abrogated and that it binds the successor state unless that state repudiates it.[495] In *Sabatier*

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487 *See* Rogge, *supra* note 181, at 378. *See generally* Vienna Convention of Succession of States in Respect of Treaties, U.N. Doc. A/CONF.80/31, *as corrected by* A/CONF.80/31/Corr.2 of Oct. 27, 1978, *reprinted in* 17 I.L.M. 1488 (1978).

488 Whiteman Digest, *supra* note 70, at 727.

489 *See* Rogge, *supra* note 181, at 383. *See also* State v. Bull, 52 I.L.R. 84 (Sup. Ct., Transvaal Provincial Division 1966) (S. Afr.), where it was held that the extradition treaty between South Africa and Malawi, which became independent following the dissolution of the Federation of Rhodesia and Nyasaland, was in full force and effect.

490 Treaty between the United Kingdom and Burma Regarding Recognition of Burmese Independence, Oct. 17, 1947, art. 2, 70 U.N.T.S 184, 186. *See* also Whiteman Digest, *supra* note 70, at 763; Rogge, *supra* note 181, at 383.

491 Treaty between the United Kingdom and Burma Regarding Recognition of Burmese Independence, *supra* note 491.

492 Rogge, *supra* note 181, at 374.

493 Convention relating to Extradition, Dec. 5, 1963, 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283.

494 *Harvard Research in International Law Extradition, in* 29 Am. J. Int'l L. 360 (Supp. 1935).

495 *See* Sabatier v. Dambrowski, 586 F.2d 866 (1st Cir. 1978) (concerning Canada's succession to treaty with England); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962) (concerning Lebanon's succession to treaty with France); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954) (concerning Yugoslavia's succession to treaty with the Kingdom of Serbia); Jhirad v. Ferrandina,

v. Dambrowski,[496] for example, the relator challenged the order certifying his extradition on the grounds that no extradition treaty between Canada and the United States was in force at the time he allegedly committed the offense for which his extradition was requested. In rejecting his contention, the court reasoned as follows:

> Sabatier's major contention is that the offense of armed robbery committed in 1975 is not extraditable under any valid treaty between Canada and the U.S. The government seeks to extradite Sabatier under Article X of the Webster–Ashburton Treaty, 8 Stat. 572, T.S. No. 119, signed by Great Britain and the U.S. in 1842 and incorporated into subsequent conventions with Britain and Canada. It relies on the fact that the weight of authority is "that new nations inherit the treaty obligations of the former colonies." *Jhirad v. Ferrandina*, 355 F. Supp. 1155, 1159-61 (S.D.N.Y.), *rev'd on other grounds*, 486 F.2d 442 (2d Cir.), *cert. denied*, 429 U.S. 833, 97 S. Ct. 97, 50 L.Ed.2d 98 (1976). Sabatier argues that Canada is an exception to this rule and that the Webster–Ashburton Treaty therefore is not applicable. In effect, he would have us hold that no extradition treaty between Canada and the U.S. covering the offense of armed robbery was effective until 1976, when the current treaty with Canada was ratified by the Senate. This disputes the conduct of the governments of both countries, to which we must give great deference. *Terlinden v. Ames*, 184 U.S. 270, 288, 22 S. Ct. 484, 46 L.Ed. 534 (1902). The history of the relations between the two countries, the terms of the current extradition treaty, the official position of the Department of State, and the relevant rules of law all point to the conclusion that Canada should be regarded as a party to the Webster–Ashburton Treaty and that treaty permits her to seek Sabatier's extradition for an armed robbery committed in 1975. *Cf. Terlinden v. Ames*, 184 U.S. 270, 22 S. Ct. 484, 46 L.Ed. 534 (1902) (treaty with Germany); *Jhirad v. Ferrandina*, 436 F.2d 443, n.3 (treaty with India); *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.) *cert. denied*, 348 U.S. 818, 75 S. Ct. 28, 99 L.Ed. 645 (1954) (treaty with Yugoslavia).

In the last twenty years, U.S. courts have faced a number of issues dealing with state succession issues. State succession issues started appearing in U.S. courts after the 1989 breakup of the Soviet Union and the establishment of fifteen new republics, which was followed in 1991 by the breakup of the former Yugoslavia and the resulting establishment of four different republics, and then in 1993, by the breakup of Czechoslovakia into the Czech Republic and the Slovak Republic.[497]

In a classic case of state succession, the breakup of Czechoslovakia presented no difficulties as to the applicability of the extradition and supplemental treaties signed between it and the United States in 1925 and 1935 respectively.[498]

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355 F. Supp. 1155 (S.D.N.Y. 1973), *rev'd on other grounds*, 486 F.2d 442 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976) (concerning India's succession to treaty with England).

496 *Sabatier,* 586 F.2d at 868.

497 Sean D. Murphy (ed.), *Continuance of Extradition Treaty with Czech Republic, in Contemporary Practice of the U.S. Relating to International Law*, 98 Am. J. Int'l L. 850 (Oct. 2004); Paul Williams, *Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?* 23 Denv. J. Int'l L. & Pol'y 1 (1994). *See also In re Extradition of* Sacirbegovic, 03 Crim. Misc. 01 Page 19, 2005 U.S. Dist. LEXIS 707 (S.D.N.Y. 2005); Hoxha v. Levi, 371 F. Supp. 2d 651 (E.D. Pa. 2005) (holding no extradition treaty between the United States and the Republic of Albania exists, even though there was a treaty with the former Kingdom of Albania, which is no longer in existence); Ven v. Malendez, 92 F. 3d 851 (9th Cir. 1996) (concerning the continued validity of the treaty of Singapore as being part of the 1931 treaty with the United Kingdom under the doctrine of state succession).

498 U.S.–Czechoslovakia Extradition Treaty, July 2, 1925, with the supplementary treaty signed on April 29, 1935. *See* United States v. Justik, Case No. 8:05-MJ-319-T-EAJ, 2005 U.S. Dist. LEXIS 29944 (M.D. Fla. 2005); Kastnerova v. United States, 365 F.3d 980 (11th Cir.), *cert denied* 541 U.S. 1090 (2004); United States v. Peterka, 307 F. Supp 2d 1344 (2003); *In re Extradition of* Platko, 213 F. Supp. 2d 1229 (S.D. Ca. 2002); United States v. Garcia, 109 F.3d 165 (3rd Cir. 1997) (state succession of Trinidad and Tobago to the United Kingdom). *See also* Then v. Melendez, 92 F.3d 851 (9th Cir. 1996).

With respect to the former Yugoslavia, the problem was more significant. In this case, the Kingdom of Serbia signed a treaty in 1902, which then applied through state succession to the Socialist Federal Republic of Yugoslavia after World War II. In 1991, Yugoslavia broke up and its official state successor became the Federal Republic of Yugoslavia. In 2003, it became the Union of Serbia and Montenegro and subsequently split into the two separate states of Serbia and Montenegro.

For more than a decade after the dissolution of Yugoslavia the Department of State failed to update the status of its "Treaties in Force," and thus the status of states that were part of the former Socialist Federal Republic of Yugoslavia were still listed under Yugoslavia. The problem arose because the 1902 treaty that applied to the Kingdom of Serbia did not include all of the territories that became part of the Socialist Federal Republic of Yugoslavia after World War II.

The problem arises under the doctrine of state succession when a state was never part of the original state, which had the original treaty obligations, such is the case of Bosnia, which was not part of the original Kingdom of Serbia in 1902.

In other words, state succession has traditionally applied to the first inheritor states of the original state. If the inheritor state subsequently encompasses additional territory, as was the case when the Federal Republic of Yugoslavia incorporated Bosnia after World War II, then the obligations inherited by the Federal Republic from the Kingdom of Serbia apply during the period in which it is part of the Federation. But once Bosnia was no longer part of the Federation it could not be held to be a state successor to the treaty with Serbia, because it is legally twice removed and never had the option of choosing whether it wanted to be bound by that treaty.

This issue arose in the case of *Sacirbey*, where the extradition magistrate ruled as follows:

> Sacirbey contends that the Treaty originally entered into between the U.S. and the Kingdom of Serbia is not in force between the U.S. and BiH. (Relator's Brief in Opposition to Extradition, dated Nov. 14, 2003 ('Relator's Br.'), at 6). He argues that the Government has failed to meet its burden by "produc[ing] a legal document that clearly encompasses the *express* agreement of the U.S. and the government of Bosnia and Herzegovina to be bound by the 1902 Extradition Treaty." (*Id.* at 7) (emphasis added).
>
> The "question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard." *Terlinden v. Ames,* 184 U.S. 270, 288 (1902) (considering the validity of the 1852 extradition treaty between the U.S. and Prussia). Accordingly, circuit courts that have considered whether a treaty has lapsed have typically deferred to the executive branch's determination. *See Kastnerova v. U.S.,* 365 F.3d 980, 986-87 (11th Cir.) (holding that the conduct of the U.S. and the Czech Republic evinced their intent to adhere to a 1925 extradition treaty between the U.S. and Czechoslovakia), *cert. denied,* 124 S.Ct. 2826 (2004); *U.S. ex rel. Saroop v. Garcia,* 109 F.3d 165, 171 (3d Cir.1997) (holding that Trinidad and Tobago succeeded to an extradition treaty between the U.S. and Great Britain based upon the conduct and intent of their governments despite the lack of an express confirmation treaty or exchange of diplomatic letters); *Then v. Melendez,* 92 F.3d 851, 854 (9th Cir.1996) ("The continuing validity of the [extradition treaty between the U.S. and Singapore] after Singapore's independence from the United Kingdom presents a political question, and we must defer to the intentions of the State Departments of the two countries."); *New York Chinese T.V. Programs, Inc. v. U.E. Enters., Inc.,* 954 F.2d 847, 852 (2d Cir. 1992) (observing, in a copyright action, that "the judiciary should refrain from determining whether a treaty has lapsed, and instead should defer to the wishes of the elected branches of government"); *Sabatier v. Dabrowski,* 586 F.2d 866, 868 (1st Cir.1978) (noting that courts must give "great deference" to the conduct of the governments concerned in deciding a treaty's applicability).

> The courts also have recognized a presumption that emerging nations inherit the treaty obligations of their predecessors. *See Jhirad v. Ferrandina,* 355 F.Supp. 1155, 1159 (S.D.N.Y.1973), *rev'd on other grounds,* 486 F.2d 442 (2d Cir.1973); *U.S. ex rel. Saroop,* 109 F.3d at 172 (citing *Jhirad*); *see also Arnbjornsdottir-Mendler v. U.S.,* 721 F.2d 679, 682 (9th Cir.1983) (holding that the extradition treaty between the U.S. and Denmark applied to Iceland after it gained its independence); *Ivancevic v. Artukovic,* 211 F.2d 565, 573–74 (9th Cir.1954) (holding that the Treaty was valid and effective between the U.S. and the Federal Peoples' Republic of Yugoslavia).
>
> Here, the evidence shows that the Treaty was signed at Belgrade on October 25, 1901, that it later was ratified by the U.S. and the Kingdom of Serbia, and that it entered into force on June 12, 1902, thirty days after the signatories exchanged instruments of ratification. (*See* Ex. 8 (Decl. of Robert E. Dalton, dated Dec. 19, 2003 ('Dalton Decl.')), ¶ 3). It also appears undisputed that the Treaty has continued in force through a series of successor nations, including the Federal People's Republic of Yugoslavia, later renamed the Socialist Federal Republic of Yugoslavia ('SFRY'), which consisted of six republics, including Bosnia, Herzegovina, and Serbia. (*Id.* ¶¶ 4-6 (citing *Ivancevic*)).
>
> Although Sacirbey contends that BiH has not expressly ratified the Treaty, in April 1992, President Izetbegovic advised the U.S. Secretary of State that "Bosnia is ready to fulfill the treaty and other obligations of the former SFRY." (*Id.* ¶ 7). Since then, the U.S. has considered the Treaty to be in effect between the U.S. and BiH. (*Id.;* Ex. 1 (Decl. of Kenneth Propp, dated Apr. 2, 2002 ("Propp Decl.")), ¶ 2).
>
> Additionally, in both this proceeding and other proceedings, BiH's request for extradition has expressly relied on the Treaty. (*See* Ex. 8 ¶ 10; Ex. 5 at 1 (noting that the Request is made "[i]n accordance with . . . Articles II and III of the Convention on Extradition of Offenders concluded between the former Kingdom of Serbia and the U.S. of America . . . , taken over by Bosnia and Herzegovina from the former Socialist Federal Republic of Yugoslavia[.]")).
>
> Sacirbey's reliance on the Restatement (Third) of Foreign Relations, as support for his contention that the Treaty has not properly been ratified, is wholly misplaced. Indeed, the Restatement provides that "[w]hen a part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was a party unless, expressly *or by implication,* it accepts such agreements and the other party or parties thereto agree or acquiesce." (Relator's Br. at 8 (quoting *Restatement (Third) of Foreign Relations* § 210 (1987)) (emphasis added). Here, President Izetbegovic's 1992 letter to the State Department *expressly* bound Bosnia to the Treaty. In addition, by making formal requests for extradition under the Treaty in this and other cases, BiH has *implicitly* conceded that it is bound by the Treaty. By certifying those requests, the U.S. also has impliedly agreed that BiH is bound. *See* M. Cherif Bassiouni, *International Extradition: U.S. Law and Practice* 144 (4th ed. 2002) (Bassiouni) ("The prevailing position of the U.S. is that a treaty is in force *sua sponte* and binds the successor state unless that state repudiates it.").
>
> In sum, there is ample evidence that BiH has adopted the Treaty, if not expressly, then impliedly. Accordingly, the Government has made the first showing necessary to secure Sacirbey's extradition.[499]

In *Arambasic v. Ashcroft,* the court also discussed state succession:

> The doctrine of state succession, by which a successor state is bound by the treaty obligations undertaken by the prior state, is applicable to the case at hand. State succession has been

499 *In re Extradition of* Sacirbegovic, 03 Crim. Misc. 01 Page 19, 2005 U.S. Dist. LEXIS 707 (S.D.N.Y. 2005). For issues surrounding state succession in the Former Yugoslavia, see *In re* Bilanovic, 2008 U.S. Dist. Lexis 97893 (W.D.Mich. 2008) (*citing* International Extradition: U.S. Law and Practice (5th ed. 2007)); *Sacirbegovic*, 2005 U.S. Dist. LEXIS 707 (*citing* International Extradition: U.S. Law and Practice (4th ed. 2002)).

> consistently recognized and practiced with regard to extradition treaties. See, e.g., Sabatier v. Dabrowski, 586 F.2d 866 (1st Cir.1978) (Canada deemed successor to Webster–Ashburton treaty with England); Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.1954) (Yugoslavia deemed successor to treaty with the Kingdom of Serbia). The trend is to favor the presumption of state succession unless the successor state explicitly rejects a given treaty. See generally, M. Bassiouni, International Extradition: U.S. Law and Practice, Ch. II, § 5.4.2 (4th Ed.2002). Petitioner has presented no evidence that the Republic of Croatia has rejected the treaty between the U.S. and Serbia. In fact, the request for extradition, which was submitted by the Minister of Justice of the Republic of Croatia, bases the request on the October 12, 1902, Convention on Extradition which produced the Extradition Treaty between the U.S. and Serbia.'[500]

Similarly, in *Ivancevic v. Artukovic*,[501] the Ninth Circuit determined that the Treaty of Extradition of 1902 between the United States and Serbia[502] was a sufficient legal basis for the relator's extradition to Yugoslavia, which succeeded to the treaty when it became a separate state. The court reasoned that:

> the combination of countries into the Kingdom of the Serbs, Croats and Slovenes, and then by internal political action into "Federal Peoples Republic of Yugoslavia" was formed by a movement of the Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation. Great changes in the going government were in the planning, and were brought about, but the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a new country, the fact that it started to function under the Serbian constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular treaty, is conclusive proof that if the combination constituted a new country it was the successor of Serbia in its international rights and obligations.[503]

The court in *In re Extradition of Bilanovic*, in considering whether the relator could be extradited to Bosnia-Hercegovina under the United States–Serbia extradition treaty of 1902, surveyed the extensive case law on the issue of state succession in the Former Yugoslavia and relied on the principle of judicial deference to the executive in extradition.[504] In response to the relator's arguments regarding the continuing existence of the 1902 Extradition Treaty, the court stated:

> These arguments suffer from three substantial flaws. First, no court has ever accepted these arguments. In fact, those district courts that have examined the continued existence of the 1902 Extradition Treaty have found that the U.S. and BiH have adopted the treaty by implication. Second, the State Succession Doctrine is not limited to new governments but extends to "new

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500 Arambasic v. Ashcroft, 403 F. Supp. 2d 951, 955 (D.S.D., 2005).

501 Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954).

502 T.S. No. 406, 32 Stat. 1890 (1902).

503 *Ivancevic*, 211 F.2d at 572–573. The Ninth Circuit again considered the issue of state succession in *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679 9th Cir. (1983). The court held that a treaty concluded in 1902 between the United States and Denmark was binding upon Iceland, which in 1902 was part of Denmark, even though Iceland subsequently became an independent state with no ties to Denmark. The court affirmed the applicability and validity of the treaty as applied to Iceland, even though Denmark had terminated the treaty in 1968. The court noted that in the 1918 Act of Union, by which Iceland declared itself a sovereign state, Iceland explicitly accepted all treaty obligations between Denmark and other countries that had been applicable to Iceland. The court also gave weight to the endorsement of the treaty by the governments of both Iceland and the United States. *See also In re the Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. 1997); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1999).

504 *In re Extradition of* Bilanovic, 2008 U.S. Dist. Lexis 97893 at *17–22 (W.D. Mich. 2008).

> states" as well. *See Kasternova*, 365 F.3d at 986 (holding that the conduct of the U.S. and the Czech Republic showed their intent to adhere to a 1925 extradition treaty between the U.S. and Czechoslovakia); RESATEMENT § 210(3). Consequently, the distinction that Mr. Bilanovic relies upon is no longer accepted in modern extradition law. Finally, and most basically, these arguments invite the court to overrule the judgment of the Department of State on this political question. The conclusion of the Department of State is well supported and is entitled to deference by the courts. The "question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard." *Terlinden v. Ames*, 184 U.S. 270, 288, 22 S.Ct. 484, 46 L. Ed. 534 (1902) (considering the validity of the 1852 Extradition Treaty between the U.S. and Prussia).[505]

The determination of whether a treaty applies by state succession is to be made by the executive branch because it derives from the Constitution's Article II, § 2, which confers the treaty-making power to the president with the "Advice and Consent of the Senate."[506] The same rule applies for when a treaty is terminated.[507] The rule also applies with respect to determining whether a treaty is still in force.[508] The scope of judicial inquiry is therefore limited to the position of the executive branch on these questions, but it does not exclude evidence of the foreign government's position on the same questions. The Ninth Circuit reaffirmed the rule while allowing limited judicial inquiry in *Then v. Melendez*.[509]

Probably the most exhaustive inquiry into an extradition treaty question was made in the question of Lui King-Hong, also known as Jerry Lui, whose extradition was sought by Hong Kong, a former Crown Colony of the United Kingdom before it reverted to Chinese control. The extradition was made by Hong Kong pursuant to two bilateral treaties, the primary one entered into by and between the United States and the United Kingdom in 1972[510] and the supplemental treaty applicable to Hong Kong[511] and entered into by and between the United States and the United Kingdom in 1984. That supplemental treaty was annexed to the 1984 Hong Kong reversion treaty between the United Kingdom and China whereby Hong Kong was set to revert to Chinese sovereignty on July 1, 1997. The First Circuit reviewed this case twice and found the 1984 supplemental treaty of extradition to be valid notwithstanding the reversion treaty between the United Kingdom and China to which it was appended even though the United States was not a party to that treaty and could not therefore insist that China observes its terms. The issue was whether Hong Kong could surrender Lui to the mainland Chinese authorities after Hong Kong reverted to Chinese control, even though the reversion treaty forbade it.[512]

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505 *Id.* at *20–22.

506 United States v. *ex rel.* Neidecker, 299 U.S. 5, 57 S.Ct. 100 (1936); Terlinden v. Ames, 184 U.S. 270, 22 S.Ct. 484 (1902).

507 *In re Extradition of* Tuttle, 966 F.2d 1316 (9th Cir. 1992).

508 Ivanceinc v. Artukonic, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818, 75 S.Ct. 28 (1954).

509 Then v. Melendez, 92 F.3d 851 (9th Cir. 1996). *See also* Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983); Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999).

510 U.S.–U.K. Extradition Treaty, 28 U.S.T. 227 (1972).

511 Supplemental Treaty U.S.–Hong Kong, T.I.A.S. No. 12050 (1984).

512 United States v. Lui King-Hong, 110 F.3d 103 (1997 U.S. App. LEXIS 5225); United States. v Lui King-Hong (1997 U.S. App. LEXIS 7587). *See also* Wang v. Masaitis, 416 F.3d 992 (9th Cir. 2005), *affirming* 316 F. Supp. 2d 891 (C.D. Cal. 2004); United States v. Sai-Wah, 270 F. Supp. 2d 748, 749–750 (W.D.N.C. 2003) (denying motion to dismiss, which was based on alleged invalidity of U.S.–Hong Kong Extradition treaty); *In re Extradition of* Coe, 261 F. Supp. 2d 1203 (C.D. Cal. 2003); Ntakirutimana v. Reno, 184 F.3d 419, 426 (5th Cir. 1999), *cert. denied* 528 U.S. 1135 (2000); Cheung v. United States, 213 F.3d 82 (2d Cir. 2000).

5.5.3. War

There are widely divergent views in international law regarding war's effect on treaty obligations, ranging from the view that war totally abrogates a treaty to the view that it has no effect on treaty enforcement. Early writers asserted that war ipso facto abrogated all treaties between the warring parties.[513] The contemporary view is that whether treaty provisions are annulled by war depends upon the provisions' extrinsic character.[514] It is obvious that war must extinguish certain treaties because of their very nature, such as those of friendship and alliance, whereas it only suspends rather than abrogates treaties contemplating a permanent arrangement of rights.[515]

Section 336 of the Restatement does allow termination following a fundamental change in circumstances in the relationship of the parties. Section 336 states:

> A fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of an international agreement, and which was not foreseen by the parties, may generally be invoked as a ground for terminating or withdrawing from the agreement but only if
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> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the agreement; and

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513 *See* James J. Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions*, 34 Geo. L.J. 129 (1946) (containing, in footnote 9, citations to the views of the earlier writers upon this question). The reasoning in support of this view is expressed in Emmerich de Vattel, The Law of Nations, sec. 175 at 877 (trans. 1758, C. Fenwick, 1916):

> Conventions and treaties are broken and annulled when war breaks out between the transacting parties, either because such agreements imply a state of peace, or because each party, having a right to deprive the enemy of his property, may take from him such rights as have been given him by treaties.

514 In *Karnuth v. United States*, 279 U.S. 231 (1929), the Supreme Court stated: "There seems to be a fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which is to promote relations of harmony between nation and nation, are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war." 279 U.S. 231, 236–237 (1929).

515 *In Society for the Propagation of the Gospel in Foreign Parts v. New Haven,* 21 U.S. (8 Wheat) 464 (1823), the Supreme Court declared:

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, declaring in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

21 U.S. (8 Wheat). *See generally* 1 Moore, Extradition *supra* note 2, at 799.

> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the agreement.

Authorization to suspend or terminate an agreement is part of the powers of the president. Section 339 states:

> Under the law of the United States, the President has the power
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> (a) to suspend or terminate an agreement in accordance with its terms;
>
> (b) to make the determination that would justify the U.S. in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the U.S.; or
>
> (c) to elect in a particular case not to suspend or terminate an agreement.

United States courts have determined that extradition treaties are only suspended rather than abrogated by war. In *Argento v. Horn*,[516] for example, Italy requested the return of an individual who had been convicted in absentia and sentenced to life imprisonment in Italy in 1931 for a murder committed there in 1922. The relator challenged his extradition on the grounds that, despite the purported "revival" of the United States' extradition treaty with Italy pursuant to the peace treaty of 1947, the treaty had been abrogated by the outbreak of war and could be replaced only by a new treaty. Therefore, the relator argued, there was no legal authority for his extradition.

The court avoided the theoretical question by basing its decision on a consideration of the "background of the actual conduct of the two nations involved, acting through the political branches of their governments."[517] The court found that in light of the peace treaty's provision inviting notification of revival of treaties, the notification by the Department of State of its intention to revive the treaty, and the subsequent conduct of the parties evidencing an understanding that the treaty was in force, the treaty had been merely suspended during the war, not abrogated by it.[518]

A subsequent landmark decision on the effect of war on extradition treaties is *In re Extradition of D'Amico*.[519] On the application of the Republic of Italy, extradition proceedings were begun against the relator before the U.S. Commissioner for the Southern District of New York. The Commissioner found that the relator was the same Vito D'Amico who had been convicted in absentia in Italy in 1952 for robbery and kidnapping committed in Italy on or about April 15, 1946, and that there was probable cause to believe that D'Amico had committed the crime charged. The Commissioner therefore committed D'Amico to custody pending surrender to the Republic of Italy. D'Amico petitioned for a writ of habeas corpus, contending: (1) that the convention between the United States and the Kingdom of Italy of 1868 for the surrender of criminals was abrogated by the outbreak of war between the parties in 1942, and was not validly revived by the notification of the United States to Italy on February 6, 1948; (2) that the revival of the Treaty of 1868 did not make it applicable retroactively to crimes committed during the existence of a state of war between the parties; and (3) that the offense was not committed in a territory subject to the jurisdiction of the demanding state because it was committed while the Italian government was subject to Allied control.[520] In discharging the

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516 Argento v. Horn, 241 F.2d 258 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957).

517 *Id.* at 262.

518 *Id.* at 263. *See also* Clark v. Allen, 331 U.S. 503 (1947); Gallina v. Fraser, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 51 (1960); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y., July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y., Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, 99 Cal. Daily Op. Serv. 200 (9th Cir. 1990) (No. 98-55069).

519 *In re Extradition of* D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959).

520 *Id.* at 650.

writ of habeas corpus and remanding D'Amico to the custody of the U.S. marshal, the court concluded that the extradition treaty was merely suspended by the outbreak of war between the parties and was revived by the formal cessation of hostilities. In effect, the court held that an extradition treaty could operate retroactively to apply to offenses committed while the treaty was suspended.[521] It would seem that this decision violates the principle *nulla poena sine lege nullum crimen sine lege.*[522]

The U.S. practice in connection with its use of force in other countries has, since World War II, been to not seek a congressional "Declaration of War" as required by the Constitution. Instead the various administrations have used other legal bases to accomplish the same objective.[523]

6. The Duty to Extradite and to Refrain from Unlawful Means of Surrender

6.1. The Duty to Extradite

As discussed in this chapter, the United States has a duty to extradite based on certain multilateral treaty obligations, especially with respect to international crimes, and more particularly *jus cogens* international crimes.[524] The United States is also obligated under its bilateral treaties. Under Title 18 § 3183 of the U.S. Code, the United States may extradite persons within its territory only pursuant to an extradition treaty between the United States and the state requesting extradition. Under § 3184, this treaty must be in force when the request for extradition is made.[525] Read in conjunction, these two sections permit surrender of an accused only in accordance with the applicable treaty in force. Although these provisions set forth the requirements to permit the United States to extradite an individual within its territory, they do not indicate whether satisfaction of these requirements creates a duty to extradite.

United States' jurisprudence reflects the view that an extradition treaty does not per se create an obligation to extradite, but a different view exists as to *jus cogens* international crimes as discussed in Chapter I, Section 3.3. The first view is founded on the notion that the state's right to protect its sovereignty and its freedom to provide asylum to whomever it chooses may override the state's obligation under the treaty.[526] It is for this reason that the secretary of state, exercising executive discretion through delegation of this authority by the president, may refuse to

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521 In support of this view, the court stated, in United States *ex rel*. Oppenheim v. Hecht: "The status of relations between the demanding nation and the asylum nation at the time of the commission of the offense for which extradition is sought has never been deemed so critical, as we read the cases bearing on this issue; rather it is the status at the time of the demand that is determinative of whether or not extradition will be allowed." 16 F.2d. 955, 956 (2d. Cir. 1927).

522 *See* M. Cherif Bassiouni, Substantive Criminal Law 25–26 (1978).

523 G.A. Res. 438, U.N. GAOR, 5th Sess., U.N. Doc. A/1435 (Oct. 7, 1950) (War in Korea); Joint Congressional Resolution, "Gulf of Tonkin Resolution," H.J. RES. 1145 (Aug. 7 1964) (Vietnam War); The War Powers Act of 1973, Pub. L. 93-148, 93rd Congress, H. J. Res. 542 (Nov. 7, 1973) (Concerning the War Powers of Congress and the President); U.N. Sec. Council Res. 678 (Concerning the Implementation of Security Council Resolution 660), S.C. res. 678, 45 U.N. SCOR at 27, U.N. Doc. S/RES/678 (1991); U.N. Security Council Res. 1441 (Iraq disarmament) (based on Resolution 660, Resolution 661, Resolution 678, Resolution 686, Resolution 687, Resolution 688, Resolution 707, Resolution 715, Resolution 986, and Resolution 1284); Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1497-1502 (Oct. 16, 2002); Security Council Res. 1373 para. 3(f) (2001); Security Council Res. 1526, para. 1 (2004).

524 *See* Ch. I, Sec. 3.

525 *See* United States *ex rel*. Donnelly v. Mulligan, 74 F.2d 220, 221 (2d Cir. 1934). *See* also 1 Oppenheim, *supra* note 423, at § 327.

526 *See* 1 Oppenheim, *supra* note 423, at 800–801.

extradite a relator despite a judicial determination that extradition would be compatible with the terms of the applicable treaty.[527]

The United States is of the view that executive discretion negates any duty to extradite under treaty obligations, which may be in contradiction to international law. According to the doctrine of state responsibility, an internationally wrongful act of a state exists when:

> (a) Conduct consisting of an act or omission is attributable to the State under international law; and
>
> (b) That conduct constitutes a breach of an international obligation of the State.[528]

The United States' treaty commitments are binding international obligations.[529] Under these treaties, the United States is obligated to extradite in accordance with the treaties' terms and conditions those persons who have been charged with or convicted of offenses enumerated in the treaties. The United States' practice of allowing executive discretion to override treaty obligations, therefore, may be in violation of its international duty.

Thus, the United States' view of the permissible scope of executive discretion conflicts with the obligations of the nation to satisfy its obligations in good faith. In addition, this doctrine contradicts the emerging customary international law principle of *aut dedere aut judicare*,[530] whereby a state's duty to extradite in the absence of prosecution cannot be subject to executive discretion.[531] Furthermore, this duty to extradite is present in international criminal law conventions.[532] The United States has faced demands from Venezuelan and Cuban officials to try or prosecute a former CIA operative wanted by Venezuela in connection with the 1976 bombing of a Cuban airliner.[533] However, despite its noncompliance with the Venezuelan extradition request, the United States has called on Panama to extradite a Panamanian accused of murdering U.S. soldiers despite the fact that the individual had been tried in Panamanian courts for the same offense.[534] Even more questionable is the U.S. government's refusal to honor Italian and German extradition requests for CIA operatives alleged to have been involved in the kidnapping of a radical Muslim cleric in Milan and a German citizen in Macedonia.[535] The failure to comply with the principle of *aut dedere aut judicare* may adversely affect the willingness of other states to cooperate with the United States in counterterrorism and other sensitive matters of international concern.

The argument that the principle *aut dedere aut judicare* (discussed in Chapter I, Section 3) is applicable in the United States is founded on the notion that the U.S. Constitution recognizes

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527 *See* Ch. IX, Sec. 2.

528 *See generally* The Report of the International Law Commission on the Work of Its 53rd Session, April 23–Aug. 10, 2001, U.N. GAOR, 53 Sess., Supp. (No. 10), A/49/10 (1994); Ian Brownlie, System of the Law of Nations: State Responsibility (1983); International Law of State Responsibility for Injuries to Aliens (Richard B. Lillich ed., 1983); *Draft Articles on State Responsibility*, 1984 Y.B. Int'l L. Comm'n 259.

529 *See* Statute of International Court of Justice, art. 38, 59 Stat. 1055 (1945), T.S. No. 993.

530 *See* Ch. I, Sec. 3.

531 *See* Ch. I, Sec. 3. *See also* Appendix I.

532 *Id.*

533 *See* Bruce Zagaris, *U.S. Court Frees Alleged Anti-Castro Terrorist as CARICOM Calls for Prosecution*, 23 Int'l Enforcement L. Rep. 262–263 (July 2007).

534 *See* Bruce Zagaris, *Election of Panamanian Accused of Murdering U.S. Soldiers Clouds Prospects for Ratification of FTA*, 23 Int'l Enforcement L. Rep. 419–420 (Nov. 2007).

535 *See* Bruce Zagaris, *State Department Legal Adviser Says U.S. Will Not Extradite CIA Defendants to Italy*, 23 Int'l Enforcement L. Rep. 181–182 (May 2007).

customary international law.[536] Indeed, customary international law is a source of law under the Constitution, which U.S. courts have followed and applied.[537]

Mindful of the difficulties of extradition, particularly in connection with limitations established by treaty or customary international law, such as the principle of specialty,[538] and the difficulties in interpreting diplomatic assurances,[539] the U.S. government has sought ways of avoiding extradition as a formal process. On occasion, it has engaged in abduction and unlawful seizure of persons as an alternative to extradition,[540] only to find itself facing legal difficulties before U.S. courts and internationally. It has trended toward seeking disguised means, such as the use of immigration techniques such as deportation and expulsion.[541]

On occasion, it has sought to obtain extradition from a requested state without labeling it a request for "extradition," but using such terms as "return" or "surrender" in order to create a constructive ambiguity with the authorities of the requested state but also eventually with U.S. courts if the person is in fact surrendered to the United States.

The use of such ambiguous terms that do not include "extradition" can only be interpreted by the requested state as an extradition request whenever there is no bilateral treaty and national law provides a basis for extradition. The U.S. government can then argue in U.S. courts that it did not seek the surrendered person by means of extradition because no extradition treaty existed, even though the surrender occurred on the basis of the requested state's national extradition law. The purpose of such deceptive approaches is to avoid the application of the principle of specialty.[542] That means that the U.S. prosecuting authority can amend the original indictment on which extradition was sought and add charges, which if known to the requested state may not have been included in the extradition order if they did not satisfy the requirement of double criminality in the requested state.[543] Such a practice could not have been deemed legally valid if the surrender is characterized as an extradition based on comity.

The legal characterization of any form of surrender based on the national extradition law of the requested state can be based on either reciprocity if the United States provides such an undertaking, or on the basis of comity if it is unilateral.

No matter whether extradition is obtained on the basis of a multilateral treaty, bilateral treaty, ad hoc, or specific reciprocity agreement, general reciprocity undertaking, the national legislation of the requested state either based on reciprocity or comity, or simply on the basis of

536 *See* The Paquette Habana, 175 U.S. 677 (1900); Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (construing the Alien Tort Act, 28 U.S.C. § 1350). *See also* the Torture Victim Protection Act (TVPA) (limiting the Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. § 1630). For a discussion of the applicability of customary international law, see Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 St. John's L. Rev. 551 (1993); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the U.S.*, 12 Mich. J. Int'l L. 59 (1990); Jordan J. Paust, *Rediscovering the Relationship between Congressional Power and International: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 Va. J. Int'l L. 393 (1988); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the U.S.*, 20 Mich. J. Int'l. L. 301 (1999); Restatement (Third), *supra* note 79 at §§ 102, 103, and 702; *contra.* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 816 (1997).

537 *Id.*

538 *See* Ch.VII, Sec. 6.

539 *See* Ch. VII, Sec. 7.

540 *See* Ch. V.

541 *See* Ch. IV.

542 See Ch. VII, Sec. 6.

543 See Ch. VII, Secs. 2 and 3.

comity without a treaty or legislation if permitted under the law of the requested state, this falls within the category of "a rose by any other name is still a rose," to paraphrase Shakespeare.[544]

The contemporary practice of the United States has increasingly been, where there is no bilateral extradition treaty, to present the matter to both the requested state and to U.S. courts as being legally ambiguous in order to avoid, as stated above, the application of the principle of specialty and other limitations that may apply under customary international law and the treaty practice of the United States. Mostly, it has sought to rely on the cooperation of foreign states to secure the expulsion or deportation of the person sought.

6.2. Extraordinary Rendition and Other Forms of Extralegal Rendition[545]

Extraordinary rendition is a euphemism for the unlawful practice of abduction.[546] Other extralegal forms of seizure of persons and their transfer from one country to another by U.S. military or CIA personnel, or by their private contractor agents, are simply within the purview of the law. In some cases they are illegal under Title 10, the Uniform Code of Military Justice, or under the provisions contained in Title 18 U.S.C. on kidnapping, torture, and other crimes. Because of this subject's extensive legal ramifications, it is covered in a separate chapter.[547]

The basic legal assumption for both the practice of "extraordinary rendition" and the use of "black sites" is that if certain acts are committed outside the boundaries of the United States and the persons seized and transferred for torture are not U.S. citizens, then the acts in question are not crimes under U.S. law. Government lawyers exploited a gap in the jurisprudence of the Supreme Court that limits U.S. constitutional protections under the Fourth, Fifth, Sixth, and Eighth Amendments extraterritorially, particularly when those affected are non-U.S. citizens. This approach strictly construes the Constitution as providing rights applicable in the United States and perhaps abroad, but only to U.S. citizens. It does not construe the Constitution as establishing legal limitations on U.S. public agents acting no matter where.

Over the last fifty years, the Supreme Court in a number of decisions has ruled that the Constitution does not extend extraterritorially, and as a consequence that which is prohibited by the Constitution in the United States does not apply extraterritorially. The four major decisions on point are *Reid v. Covert*,[548] *Wilson v. Girard*,[549] *Verdugo v. Urquidez*,[550] and *United States v. Alvarez-Machain*.[551]

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544 William Shakespeare, Romeo and Juliet (Dover Thrift Edition, 1993). A good example of this was a 2010 incident in which the United States made arrangements with Panama to expel the defendant, a U.S. citizen. The district and the circuit courts did not find the expulsion to be in violation of the extradition treaty between the United States and Panama, and also found that his deportation, even though in the direction of the United States, did not constitute a violation of the extradition treaty. *See* United States v. Struckman, 611 F.3d 560 (9th Cir. 2010). The court cited *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952), *cert. denied* 343 U.S. 937 (1952). The court also cited United States v. Matta Ballesteros, 71 Fed. 3d 754 (9th Cir. 1995) "the manner by which a defendant is brought to trial does not affect the government's ability to try him" at 762.

545 *See* Ch. V.

546 *See id.*

547 *See* Ch. V, Sec. 4.

548 Reid v. Covert, 354 U.S. 1 (1957) (addressing the non-applicability of the right to trial by jury, Sixth Amendment extraterritorially).

549 Wilson v. Girard, 354 U.S. 524 (1957).

550 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (on the non-applicability of the Fourth Amendment, unreasonable search and seizure extraterritorially).

551 United States v. Alvarez-Machain, 504 U.S. 655 (1992) (on the recognition of valid U.S. jurisdiction over a person abducted abroad and brought by force to the United States, a position previously taken

The Supreme Court has historically been reluctant to extend constitutional rights extraterritorially and also reluctant to extend constitutional restraints on U.S. public agents extraterritorially. There are valid arguments to sustain this position, but there is also a policy argument expressed by the Second Circuit highlighted in *United States v. Toscanino*, namely that the Supreme Court's narrow rulings on what was essentially jurisdictional grounds left a wide door open for what several cases referred to as egregious illegal practices by U.S. public agents.[552] The Supreme Court has never directly addressed whether the Constitution limits illegal conduct by U.S. public agents outside the territory of the United States. While some argue that its position on the non-applicability of the Constitution extraterritorially is all-encompassing, others, including this writer, argue that it does not cover conduct that is illegal under U.S. law when perpetrated by U.S. public agents abroad, and when the fruits of that illegal conduct can be used in U.S. courts by a defendant. Another policy argument is the preservation of the integrity of the U.S. system by extending certain limitations to U.S. public agents abroad, whether that conduct is directed against U.S. or non-U.S. citizens.[553] The Second Circuit in *Toscanino* added another limitation, namely, when the U.S. public agents' conduct is egregious or that the conduct "shocks the conscience."[554] The threshold test is therefore different than when applied in the United States whenever a public agent violates a given constitutional standard (i.e., unreasonable search and seizure under the Fourth Amendment, or evidence obtained by coercion in violation of the Fifth Amendment). This was a higher threshold, but a threshold nonetheless. The Second Circuit subsequently renewed its *Toscanino* ruling in *United States ex rel Lujan v. Gengler*,[555] while other circuits also did the same or rejected the *Toscanino* approach in connection with forceful seizures of persons abroad and bringing them before U.S. courts.

The policies supporting the extension of constitutional limitations on U.S. public agents' conduct abroad are: the preservation of the integrity of U.S. legal processes, deterrence of public misconduct, and the continued protection of U.S. citizens irrespective of whether the violation stems from official misconduct by U.S. public agents. All three policies, however, stop short of encompassing within their reach unlawful extraterritorial conduct by U.S. public agents when the victim is not a U.S. citizen. However, these policies should cover such conduct against non-U.S. citizens whenever their evidentiary fruits are to be used in U.S. legal proceedings. Even so, there is some legal leeway for U.S. public agents—the CIA in this case—to kidnap non-U.S. citizens abroad, and to forcefully transfer them to another state that would engage in acts of torture against them. It cannot be assumed that the Supreme Court would extend constitutional limitations abroad when the evidence obtained is not going to be used in U.S. courts.[556] That is something for Congress to legislate or for the president to take action upon by executive order.

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in Ker v. Illinois, 11 9 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952)). For kidnapping as a substitute to lawful extradition, see M. Cherif Bassiouni, International Extradition in U.S. Law and Practice 273–375 (5th ed.2007). *But see United States v. Alvarez-Machain*, rejecting the defendant's claim that the extradition treaty in effect between the United States and Mexico prohibited the United States from forcibly abducting a fugitive within the borders of Mexico. The Supreme Court, however, subsequently upheld Alvarez-Machain's right to file an action under the Alien Tort Claims Act, and to obtain damages for the kidnapping. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

552 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

553 This writer argued before the Fifth Circuit in *Escabedo v. United States*, 623 F.2d 1098 (5th Cir. 1980) that on the basis of public policy, evidence secured by torture in Mexico should not be allowed in U.S. courts, in that torture is inherently offensive to U.S. public policy and to the Constitution. The Fifth Circuit rejected the argument, but this was before the United States ratified the Convention against Torture (CAT).

554 *Toscanino*, 500 F.2d at 273, *citing* Rochin v. California, 342 U.S. 165 (1952).

555 United States *ex rel*. Lujan v. Gengler, 550 F.2d 62 (2d Cir. 1975).

556 *See supra* note 544.

The use of "black sites" raises a particular issue with respect to the extraterritorial application of the Constitution, insofar as those sites are effectively under U.S. control. They are no different than U.S. military bases in foreign countries. As a rule, the United States negotiates a SOFA with the country in which it has military bases in order to preserve U.S. jurisdiction over the personnel on that base. However, in the case of the "black sites" there were no SOFA agreements, or for that matter any other legitimate agreements between the United States and the sovereign state within which these "black sites" were located. They were there because the CIA had developed a secret cooperation arrangement with the local intelligence services, allowing it to use a certain location as a facility to secretly interrogate persons usually illegally flown into the given country. It can therefore be said that the "black sites" are illegal facilities controlled by a foreign government, namely, the United States in the country in which they are located. The question is therefore one of attribution and agency relationship. The CIA is an agency of the U.S. government and its operatives are U.S. agents for purposes of any conduct abroad that they engage in. In other words, if a CIA agent violates the laws of another country, the civil responsibility is attributed to the United States; thus a foreign state that has been negatively affected by the work of U.S. public agents may have a claim against the U.S. government. This issue was raised before the International Court of Justice in the *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, where the Court ruled against the United States for the actions of paramilitary organization of the Contras, as well as covert CIA actions against Nicaragua.[557] Should "black sites" be considered foreign territory under the control of the United States, the Constitution would apply. The Supreme Court in a recent case involving Iraq probably anticipated this situation and ruled that in Iraq, U.S. military bases are not considered U.S. territory, and therefore the Constitution does not extend to them.[558] Nevertheless, it is valid to raise the question, particularly because the Supreme Court is likely to rule differently with respect to U.S. military bases in Iraq in accordance with the U.S.–Iraq SOFA agreement.[559]

Against this legal backdrop, the CIA felt legally free from constitutional restraints. However, although this gap arises under U.S. constitutional law, it does not arise under the Convention against Torture and All Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which applies to the public officials of state parties, without geographic limitation. The policy underpinning the CAT is not jurisdictional, but the universal prohibition of torture. This was evidenced in the Charles Taylor, Jr. case in which the extraterritorial reach of the 1994 Torture Convention Implementation Act was applied. Taylor, an American citizen and son of the infamous Liberian dictator who was tried before the Special Court for Sierra Leone in The Hague for crimes against humanity, was sentenced to 147 years in prison for acts of torture committed in Liberia.[560] In a decision overruling the defendant's petition to dismiss, Federal District Judge Cecilia M. Altonaga wrote

> As to Defendant's second argument, that the Torture Act is presumed not to reach conduct that occurred extraterritorially, the argument finds no support from the plain words used in the statute, the starting and ending point here for any inquiry into its extraterritorial reach. Generally, courts are to presume that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States. *See E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248,*

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557 Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

558 *See* Munaf v. Geren, 553 U.S. 674, 684 (2008).

559 Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq ("Iraq SOFA") (Dec. 14, 2008). *See* M. Cherif Bassiouni, *Legal Status of U.S. Forces in Iraq from 2003–2008*, 11 Chicago J. Int'l L. 1 (2010).

560 *See* Elizabeth Dickinson, *Chuckie Taylor Sentenced to 97 Years*, Foreign Policy, Jan. 9, 2009.

> *111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)*. That presumption, however, ceases to exist where a contrary intent appears. *Id.; see also Foley Bros. v. Filardo, 336 U.S. 281, 285, 69 S. Ct. 575, 93 L. Ed. 680 (1949)* (presumption that "legislation . . . is meant to apply within the territorial jurisdiction of the United States" may be invoked "unless a contrary intent appears").[561]

It should be noted that extraterritorial legislation for crimes in addition to torture exist in connection with genocide,[562] child soldiers,[563] and the human rights accountability act,[564] as well as under a draft statute presently under review by Congress on trafficking in persons[565] and crimes against humanity.[566] President Bush signed all three existing legislations. The fact that these acts are committed outside the United States does not bar prosecution in the United States.

"Extraordinary rendition" occurs where a citizen is kidnapped or illegally arrested and then transferred to the authorities of another state, where he or she may be tortured.[567] The CIA employs this technique when it kidnaps, sequesters, and transfers non-U.S. nationals and delivers them to governments whose secret services engage in torture in order to obtain information of interest to the CIA.[568] Such an act by U.S. agents is in violation of the CAT, Article 3, which states:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[569]

Thus, state-parties cannot extradite or surrender by other means such as "extraordinary rendition" a person to another state that is known or reasonably believed to subject persons to

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561 United States v. Charles Emmanuel, 2007 U.S. Dist. LEXIS 48510 (S.D. Fla. July 5, 2007)

562 Genocide Accountability Act of 2007, Pub. L. 110-151 § 1 (Dec. 21, 2007), 121 Stat. 1821, amending Title 18 U.S.C. § 1091.

563 Child Soldiers Accountability Act of 2008, Pub. L. 110-340 (Oct. 3, 2008).

564 Human Rights Enforcement Act of 2009, Pub. L. 111-122 (Dec. 22, 2009). This legislation established a section within the Criminal Division of the DOJ to enforce human rights laws, and to make technical and conforming amendments to criminal and immigration laws pertaining to human rights violations.

565 Trafficking in Persons Accountability Act of 2008, introduced by Sen. Richard Durbin in June 2007, and passed the Senate in Oct. 2008, at which time it was referred to the House Judiciary Committee for review.

566 Crimes Against Humanity Act of 2009, introduced by Sen. Richard Durbin in June 2009 and referred to the Senate Committee on the Judiciary.

567 *See* Ch. V, Sec. 4.

568 *See* Howard Bell, Bush, The Detainees, and the Constitution: The Battle over Presidential Power in the War on Terror 78 (2007). "[A]n April 2006 report issued by the European Parliament concluded that Air CIA had flown 1,000 undeclared flights over European territory since 2001." "Many times these planes stopped to pick up terrorism suspects who had been kidnapped to take them to countries that use torture." *See also* Dan Bilefsky, *European Inquiry Says C.I.A. Flew 1,000 Flights in Secret*, N.Y. Times, Apr. 27, 2006; Stephen Grey, *CIA Prisoners "Tortured" in Arab Jails*, BBC News, Feb. 8, 2005 (providing comments by Michael Scheuer, a twenty-two–year veteran of the CIA, on the rendition practices of the CIA). In February 2006, the House International Relations Committee of Congress defeated three resolutions that would have required investigations into these practices. James Risen, State of War: The Secret History of the CIA and the Bush Administration (2006).

569 Convention against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85 at art. 3.

torture. The U.S. practice of "extraordinary rendition" is therefore a violation of the CAT.[570] Prior to the National Defense Authorization Act for 2005 (the McCain Amendment), the CAT could be interpreted as applying only to acts committed outside the territorial jurisdiction of the United States, thus allowing acts of extradition or kidnapping to fall outside the jurisdiction of the CAT if they were initiated at a U.S. facility abroad. However, pursuant to Section 1089 of the McCain Amendment, the "territorial jurisdiction" of the United States was limited to territories and possessions of the United States; thus the CAT then applied to acts that occur at U.S. facilities. Because Title 18 § 2340A also criminalizes conspiracies to commit torture outside the United States, it arguably could also apply in situations where a U.S. national conspired to transfer an individual outside U.S. territory so that he/she might be tortured.[571] However, the USA PATRIOT Act once again expanded the special maritime and territorial jurisdiction of the United States to include:

> premises of any diplomatic, consular, *military*, or other United States government missions or entities in foreign states, including the buildings, part of the buildings, and land appurtenant or ancillary thereto, or used for the purposes of these missions or entities, irrespective of ownership.[572]

This means that all the locations mentioned above can be deemed part of the territorial jurisdiction of the United States, and, thus, these locations are no longer outside the territorial jurisdiction of the United States, rendering the CAT provisions inapplicable.[573]

In addition to obligations under the CAT, "extraordinary rendition" is considered a violation of customary international law, as reflected in both the International Convention for the Protection of All Persons from Forced Disappearance[574] and the Inter-American Convention on the Forced Disappearance of Persons,[575] even though the United States has not acceded to either one of these conventions. The International Convention defines forced disappearance as:

> . . . the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment

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570 It could be argued that "extraordinary rendition" of detainees to countries in which torture is regularly practiced " . . . Does not violate U.S. obligations under the CAT because, at the time of ratification, the U.S. appended an understanding that 'substantial grounds' under Article 3(1) means that it is 'more likely than not' that a person would be tortured. Yet, because the 'more likely than not' standard is framed as an 'understanding' as opposed to a 'reservation' to the torture convention, presumably it was not intended to actually modify US obligations under the treaty." Leila Sadat, *Extraordinary Rendition, Torture and Other Nightmares from the War on Terror*, 75 Geo. Wash. L. Rev. 1200, 1221 (2007). Sadat goes on to note that " . . . [A]ll treaties must be interpreted in accordance with their 'object and purpose,' and an 'understanding' that was inconsistent with that object and purpose would presumably be tantamount to an illegal reservation to the treaty in question. Were an 'actual knowledge' standard to be read into the CAT, it would contravene the plain language of the treaty and undermine its broad, humanitarian purpose . . . " *Id. at* 1221–1222.

571 *See* John Garcia, CRS Report RL32438, *UN Convention against Torture (CAT): Overview and Application to Interrogation Techniques* (Congressional Research Service, Library of Congress, Jan. 25, 2006).

572 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001) (codified at 18 U.S.C.A. § 7(9)(A) (2001)).

573 *Id.*

574 International Convention for the Protection of All Persons from Forced Disappearance, GA Res. 61/177, U.N. Doc. A/Res/61/177 (Dec. 20, 2006).

575 Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (1994).

> of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[576]

The Inter-American Convention defines forced disappearance as:

> the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[577]

Although the United States is not a signatory to the CAT, the prohibitions contained therein have long been considered part of customary international law.[578] The CAT, like the Inter-American Convention, does not provide for any exceptions to the prohibition on kidnappings, nor does it allow states to claim any "exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."[579] The CAT also requires an up-to-date register of all persons held at every place of detention and that the register be available to family members and legal counsel of the detainees.[580]

The CAT is a reflection of the evolution of international reactions against this type of practice in tyrannical regimes, particularly as they have been practiced in Latin America and in some Asian and African countries. These types of regimes have engaged what is euphemistically referred to as making a person "disappear," which simply means to assassinate him/her. International human rights law has been unable for decades to bring a stop to these practices, and that is why they have been criminalized, as is the case with other persistent human rights violations whose elimination has proven to be difficult by non-criminal means, such as torture. Enforced disappearance usually involves torture, and it ultimately results in death. It also inflicts psychological pain and suffering on the members of the family of the victim, as well as members of the community. For obvious reasons, the United States has elected not to sign on to the International Convention, but as the prohibition of its practices becomes more recognized in customary international law, it will become binding upon the United States, notwithstanding its decision not to accede.

Kidnapping and transferring of persons from one country to another, even though occurring outside of the territorial jurisdiction of the United States, is almost always likely to occur within the territorial jurisdiction of another state. As kidnapping is a crime under the laws of all countries of the world, and as many countries have ratified the CAT or have provisions within their criminal laws criminalizing torture, actions by CIA operatives and private contractors would constitute a crime under the laws of the state where the kidnapping or torture took place.[581]

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576 International Convention, *supra* note 567, at Art. II.

577 Inter-American Convention, *supra* note 568, at Art. II.

578 What constitutes customary international law and how it is recognized as applicable to the United States is a subject of debate among academics reflecting not only different perspectives on the relationship between international law and U.S. law, but also ideological perspectives. For a more expansive view, see Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999). For a contrary position, see Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L.R. 815 (1997).

579 International Convention, *supra* note 567, at Art. 1.

580 *Id*. at Art. 17.

581 For example, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, C.E.T.S. no. 126, *entered into force* Feb. 1, 1989.

As Professor Jordan Paust reminds us,

> the Restatement of the Foreign Relations Law of the United States recognizes, "causing the disappearance of individuals" is absolutely prohibited under international law (Restatement, § 702c); constitutes a violation of the customary human rights of the persons who disappear (Restatement § 702, cmnts a, c, n); and constitutes a violation of a peremptory prohibition *jus cogens* (Restatement, cmnt n).[582] The U.S. Army also recognizes that "causing the disappearance of individuals" is a violation of customary international law.[583]

The practice of summary, arbitrary, and extrajudicial executions is of the same nature as enforced disappearance and torture.[584] It involves illegal conduct by public agents resulting in the disappearance and subsequent assassination of an individual based exclusively on the abuse of power of the executive branch. For all practical purposes, enforced disappearance, summary and extrajudicial executions, and torture resulting in death are all on the same continuum, the distinctions between them having more to do with the manner in which the unlawful conduct is carried out. Abusive governments and those that have on occasion resorted to these practices have resisted their criminalization, for example, the elaboration of the CAT, which was consistently opposed by a number of major governments. Although the United States was supportive of the CAT, as mentioned above it has been opposed to the International Convention for the Protection of All Persons from Forced Disappearance, as well as the counterpart Inter-American Convention, and has consistently blocked efforts within the United Nations for the development of a convention against summary, arbitrary, and extrajudicial executions.

6.3. The Problems of Enforcing the Principle of Specialty and Assurances in Light of Governmental Interests[585]

The U.S. government has engaged in a number of diplomatic practices in connection with the surrender of individuals whose return it seeks from foreign countries, but by means other than formal extradition.[586] One of these approaches has been for the U.S. government to encourage foreign states to use their immigration laws or other administrative proceedings to expel or deport persons, and more particularly U.S. citizens, instead of initiating formal extradition proceedings. Under this approach, the United States is free from any limitations under the principle of specialty, as they cannot be imposed by the requested state under this approach, and that essentially means that the U.S. government can upon the return of the surrendered person charge him/her with any crimes it deems appropriate without the limitations that would otherwise be imposed by the principle of speciality.[587] This process frequently begins with the transmission of a diplomatic note from the U.S. embassy to the government of the requested state, in which the surrender of the sought person is requested. These diplomatic notes studiously avoid using the term "extradition" or any other language that might suggest or require the use of traditional extradition mechanisms.

Depending upon the country in question, the requested state may respond to the diplomatic note by using either its extradition procedures or its immigration and deportation procedures.

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582 Jordan J. Paust, Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror 36–38 (2007).

583 *See, e.g.,* U.S. Dep't of Army, Operational Law Handbook 39–40 (2003).

584 *See* Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, E.S.C. Res. 1989/65, U.N. ESCOR Supp. No. 1, at 300, U.N. Doc. E/1989/89 (1989); United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/.12 (1991).

585 *See also* Ch. VII, Sec. 6.11 and Ch. VIII, Sec. 6.

586 *See* Ch. IV.

587 *See* Ch. VII, Sec. 6.

The requested state may on its own elect to rely on its extradition procedures to effectuate the surrender of the person to the United States, despite the U.S. government's attempt to use non-extradition procedures. In these cases the surrender is still an extradition, irrespective of the U.S. government's characterization of the process as being different, namely an immigration or deportation procedure. If the requested state uses its national extradition laws to surrender a person, extradition is the only proper legal characterization of the surrender, and the U.S. government should act in good faith to recognize this legal characterization and not misrepresent before U.S. courts the procedure undertaken by the requested state. The operative question is not the label the U.S. government gives to the surrender, but rather the actual procedure used by the requested state. In other words, the manipulation of the formal name for the procedure does not eviscerate the process of its essential legal characteristic and properties, with all that this entails for the relator in U.S. courts. If, on the other hand, the requested state uses its immigration laws to expel or deport a person, then the characterization cannot be extradition, and the protections and procedures afforded him/her under the extradition regime cannot be pled in U.S. courts. But if the legal bases in the requested state are its extradition laws, then the customary international law of extradition applies in accordance with comity, and that is binding upon the United States.

The essential difference between extradition, irrespective of whether the legal basis is a multilateral or bilateral treaty, or national legislation, and expulsion and deportation is that U.S. courts are bound by the principle of specialty in extradition matters. The principle of specialty limits possible charges against the relator by establishing limits on the requesting state, and that means that the person cannot be prosecuted for a crime other than that for which he/she was surrendered.[588]

Where the requested state includes the specific charges for which extradition was granted in its judicial or administrative extradition order, U.S. courts will be bound under the principle of specialty to limit prosecution to that which is specified. If there is no clear specification of the charges for which extradition was granted the U.S. courts will have to rely on the charges contained in the request made by the U.S. government to the surrendering state. In so doing, U.S. courts will have to ensure that these charges are not subsequently enlarged to include other crimes, even though related to the original crime charged, if this addition does not satisfy dual criminality as it would be applied in the requested state. In other words, U.S. courts would find themselves in the position of having to substitute themselves to the courts of the requested state in order to determine the scope of double criminality in that state. This issue, whenever it would arise, would be treated in accordance with the Federal Rules of Civil Procedure as a question of fact that the parties will have to prove to the court's satisfaction.[589] These situations may also be further complicated whenever the U.S. government provides assurances with respect to certain penalties or the treatment of the surrendered person. With respect to penalties, this is mostly the case with respect to the death penalty, as most states in the United States are retentionist and a number of countries have become abolitionists.[590]

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588 *See* Ch. VII, Sec. 6.

589 *See* Ch. VII, Sec. 5.

590 Eighteen states in the United States have abolished the death penalty, as well as the District of Columbia and Puerto Rico. It should be noted that in some of the following states the death sentences of existing death row inmates have not been commuted to life terms, as the abolition was not applicable retroactively. The abolitionist states of the United States are: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

The death penalty is undoubtedly one of the most complicated aspects of modern extradition practice. Although the death penalty has been a historically recognized punishment when imposed by a competent court after a trial for the most serious crimes, its practice is in quick decline. International law still

provides for its imposition, however. Article 6(2) of the International Covenant on Civil and Political Rights states:

> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

The European Convention on Human Rights similarly provided for use of the death penalty—Article Article 2(1) of the European Convention states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."—but beginning in the early 1980s the Council of Europe, which is responsible for promoting human rights and the rule of law in Europe began advocating the harmonization of laws concerning the abolition of the death penalty. This included the adoption of Protocol 6 of the European Convention, which abolished the death penalty in times of peace, and Protocol 13 of 2002, which abolished the death penalty at all times.

As indicated above, the imposition of the death penalty is in decline. The global trend since the 1980s has been toward the abolition of the death penalty for all crimes, and Amnesty International—Amnesty International, Death Sentences And Executions 2012 (2012)—estimates that as of April 2013, 140 countries are either abolitionist for all crimes, abolitionist for ordinary crimes, or abolitionist in practice. Contrariwise, fifty-eight countries retain the death penalty and have executed individuals within the last decade, but only twenty-one states actually executed individuals in 2012. In practice the use of the death penalty is centered on five states, namely China, Iran, Iraq, Saudi Arabia, and the United States, with China executing more than the rest combined. In 2012, the number of documented executions per country was at least: Afghanistan: 14; Bangladesh: 1; Belarus: 3; China: unknown; Gambia: 9; India: 1; Iran: 314; Iraq: 129; Japan: 7; North Korea: 6; Pakistan: 1; Gaza (Hamas): 6; Saudia Arabia: 79; Somalia: 6; Sudan: 19; South Sudan: 5; Taiwan: 6; United Arab Emirates: 1; United States: 43; and, Yemen: 28. There are no accurate figures for China, but it appears that several thousand were executed there.

In 2012, forty-three executions were carried out in the United States, making it the only country in the Americas to do so. Belarus executed at least three individuals in 2012, making it the only country in Europe or Central Asia to have carried out an execution in 2012. Russia, although not a signatory to Protocol 13, has not executed anyone since 1997 in order to satisfy the mandatory moratorium on the practice, as required by membership in the Council of Europe. The moratorium has been extended repeatedly, including by the Russian Constitutional Court, and it seems unlikely that it will re-introduce the practice especially after the Constitutional Court ruling.

A series of decisions by the European Court of Human Rights, most notably the *Kirkwood*, *Soering*, and *Einhorn* cases, have made clear that European Convention member states cannot extradite individuals to retentionist states without first securing diplomatic assurances that the extradited individual will be safe from execution. In order to continue to effectuate extraditions from these European states, the United States has increasingly turned to diplomatic assurances, in effect statements from the U.S. Department of State and Department of Justice to the requested state that the relator will not be exposed to the death penalty upon extradition. In certain instances, for example the United States–Germany extradition treaty, there is an explicit obligation for the provision of assurances in any extradition involving a capital case.

Given the federal nature of the U.S. system of government, these assurances must also be made by the relevant local prosecutor; an assurance solely from the federal government would be insufficient to guarantee the security of the relator following the jurisprudence of the European Court, as the federal government cannot make a binding commitment concerning the ultimate treatment of the extradited individual at the hands of the local judiciary.

Although at present European states continue to extradite individuals to the United States with the aforementioned assurances against the application of the death penalty, there is a general trend within the practice of European states against the practice, and this is slowly apparent in their extradition practice. For instance, the Italian Constitutional Court in the *Venezia* case refused extradition to any country that still maintains capital punishment for certain offenses. Although at present applicants

Most of the problems presented in U.S. courts have to do with enforcing the principle of specialty, for which the relator has standing to raise in some circuits and not in others.[591] In addition, however, the situation becomes more complex whenever the U.S. government makes diplomatic assurances to the original requested state and these assurances are ambiguous, vague, or difficult to enforce.[592] The U.S. government has been less than forthcoming when making assurances to foreign states, in particular with respect to punishments, by failing to make clear to the requested state the nature of American federalism and its constitutional limits when giving assurances, which also makes it difficult for the U.S. courts that are called upon to adjudicate the meaning and scope of the assurances. It is obvious that the U.S. government's purpose is to gain as much flexibility for the prosecution as possible, and to reduce the rights of relators in U.S. courts in order to assure convictions. The problem with this approach, however, is that the credibility of the U.S. government is reduced in foreign countries, and there is a greater awareness that the U.S. government's diplomatic assurances have to be examined carefully. This frequently leads to counterproductive situations by prolonging litigation in the requested state and eventually in litigation before regional human rights institutions.

before the European Court must show a "real risk" that the death penalty would be applied, and not the "mere possibility" of such a punishment, the long-term trajectory for the practice of the European Court and members states is clearly toward an absolute ban on extradition to any state that maintains capital punishment on its statute books. As stated above, eighteen U.S. states have abolished the death penalty, and in 2012 Arizona, Delaware, Florida, Idaho, Mississippi, Ohio, Oklahoma, South Dakota, and Texas carried out executions. If the trend toward denying extradition continues, those and other U.S. states that maintain the death penalty and continue to execute individuals will lose access to individuals in European states, a process that may result in what Professor William Schabas has called "indirect abolition."

591 *See* Ch. VII, Sec. 6.6.

592 *See* Ch. VII, Sec. 7.

Chapter III

Asylum and Extradition

Contents

1. Introduction

The practice of asylum predates extradition. Asylum is deemed part of a state's sovereign prerogative, and is a determination made historically by the head of state and later by the executive branch of government. Even though asylum was historically discretionary, the 1967 Protocol Amending the 1951 Refugee Convention[1] placed a legal obligation on states to grant asylum

1 Convention Relating to Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199; Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267, 19 U.S.T. 6223, T.I.A.S. No. 6577.

under certain treaty-established conditions. Some states have made the asylum process a matter for the executive branch to decide alone, while others have implemented a dual approach similar to that of extradition, whereby some determinations are made by the executive and others by quasi-judicial or judicial processes. Not infrequently a person who has sought asylum in a given state is thereafter the subject of an extradition request, thus raising potential conflicts between two different legal and administrative processes. Extradition and asylum have become competing international duties that have not been resolved or reconciled through an international convention or the development of a customary hierarchy of priorities.

The differences between extradition and asylum account for their distinct processes and legal standards. These differences have often been used by both a person deemed a fugitive in extradition terms and the government of a requested state in order to shift the process from extradition to immigration, as discussed in Chapter IV. In most cases, a person will seek asylum in another state for valid political reasons or for fear of persecution. Sometimes such a person will have committed a crime in his state of nationality before having sought asylum in another state, leading the state of nationality to seek his/her extradition. In this situation, there is interplay between asylum granted on political persecution grounds and the "political offense exception" to extradition.[2] It is possible for a person to be declared non-extraditable from the requested state on the basis of the "political offense exception,"[3] and to thereafter seek asylum. Asylum may or may not be granted, as the two determinations are made in different legal processes using different legal standards.

After September 11, 2001, the United States passed the USA PATRIOT Act[4] and the Homeland Security Act,[5] which added new processes and legal standards to an area already burdened by procedural and normative overlaps. Neither Act remedied the problems outlined above concerning the conflicting duties established by extradition law and asylum law.

2. Historical Introduction

The word "asylum" is Latin, but it was derived from the Greek for "inviolable place."[6] The concept of inviolability extends to the asylum seeker, who by virtue of this distinction becomes as inviolable as the place so considered. Historically, asylum was a place where a state could not exercise its jurisdiction over an individual granted the inviolability of his/her person. This gave rise to the legal connection between asylum and jurisdiction.

Asylum was not practiced by all civilizations; in fact, the practice of asylum was spotty, uneven, and selectively applied, even by states that recognized it. But asylum was essentially deemed a privilege to be requested by an individual rather than a right to be claimed. Nonetheless, its application throughout the ages have been increasingly relied upon to give credence to the theory espoused by Hugo Grotius (1583–1645) and before that by Canonists including Francisco

2 *See* Ch. VIII, Sec. 2.1.

3 *Id.*

4 The USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act of 2001, Title IV, Subtitle B, § 411(c), Pub. Law 107-56 (Oct. 26, 2001) (amended 2006), (amended and extended in 2011). For a detailed historical analysis of the more controversial provisions of the USA PATRIOT Act, *see* The USA PATRIOT Sunset Extension Act of 2011, S. Rep. 112-13 (Apr. 5, 2011).

5 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. For the history and development of the Department of Homeland Security, *see Brief Documentary History of the Department of Homeland Security 2001–2008*, *available at* https://www.hsdl.org/homesec/docs/dhs/nps36-050709-02.pdf&code=977f5225b6f2ab7a422428510a589137 (last visited Sept. 28, 2012).

6 R. Caillemer, *Asylia, in* Charles Daremberg, Dictionnaire des Antiquitiés Grecques et Romaines d'Après les Textes et les Monuments 505 (Paris, Hachette 1877).

Suárez (1548–1617) and Balthasar de Ayala (1548–1584), that asylum is an inherent human right derived from natural law.[7] Among history's recorded civilizations, only those along the Mediterranean basin recognized and practiced asylum with some degree of consistency and applied common rules. The practice flourished in that area between the fifth century B.C.E. and the sixteenth century C.E., and the practice of that time provided the philosophical bases of the contemporary notion of asylum.

In Greece, asylum was institutionalized in two forms: (1) as applicable to certain places, and (2) as applicable to certain persons.[8] The persons to whom asylum first applied were athletes who participated in the Olympic Games, Dionysian artists, and ambassadors. The contemporary corollary would be diplomatic immunity, which is a form of exemption from the application of jurisdictional authority over the person enjoying that privileged status. Currently, such persons are protected by the 1963 Vienna Conventions on the protection of diplomats, consular officers, members of the family of diplomats and consular officers, and diplomatic and consular staff.[9]

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7 The human rights theory of asylum is now well-established, as several international conventions establish the right of asylum and require states to protect refugees. James C. Hathawy, Rights of Refugees under International Law (2005); Regina Germain, Aila's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure (2005); Julie Farnam, U.S. Immigration Laws under the Threat of Terrorism (2005); Stephen Legomsky, Immigration and Refugee Law and Policy (3d ed. 2002); Stephen Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 Geo. Imm. L.J. 619 (2000); Ira J. Kurzban, Immigration Law Sourcebook 247 (7th ed. 2000); Karen Musalo et al., Refugee Law & Policy 57 (1997); Atle Grahl-Madsen, The Status of Refugees in International Law (1996); Guy S. Goodwin-Gill, The Refugee in International Law (2d ed. 1996). Atle Grahl-Madsen, The Emergent International Law Relating to Refugees: Past, Present, Future (1985); S. Prakash Sinha, *An Anthropocentric View of Asylum in International Law*, 10 Colum. J. Transnat'l L. 78, 86 (1971); Prakash Sinha, Asylum and International Law 5–49 (1971). *See also* Manuel R. Garcia-Mora, International Law and Asylum as a Human Right 5 (1956).

8 In the Greek tragedy *The Supplicant Maidens* by Aeschylus in 470 B.C., fifty women, daughters of Danaiis, sought refuge in Argos and sanctuary in the temple of Zeus from Pelasgus, whose fifty sons were to marry them. The play dealt with the concepts of sanctuary, the right of asylum, the penalty for their violation, and the right of the requesting king to obtain the return of the fugitives. The popularized knowledge of these concepts in ancient Greece indicates how common and generalized it was. It came to Egypt with the Ptolemaic Dynasty, though for several centuries earlier the Temples of Osiris and Amon had been sanctuaries for fugitive slaves. In the founding of Rome, Romulus and Remus made provisions in the city for a sanctuary. *See* Aeschylus, The Suppliant Maidens (H. Weir Smyth trans., 1973); Thomas Bulfinch, Mythology 57–60 (1979).

9 Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261, T.I.A.S. No. 6820; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227, T.I.A.S. No. 7502. *See also* Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Mar. 13, 1975, A/Conf.67/16; Optional Protocol to the Convention on Special Missions Concerning the Compulsory Settlement of Disputes, Dec. 16, 1969, G.A. Res. 2530 (XXIV) annex; United Nations Draft Convention on Special Missions, Dec. 18, 1968, U.N. Doc. A/Res/2419 (XXIII); Fourth Protocol to the General Agreement on the Privileges and Immunities of the Council of Europe, July 16, 1961, 544 U.N.T.S. 328; Third Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Mar. 6, 1959, 544 U.N.T.S. 294; Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Dec. 15, 1956, 261 U.N.T.S. 410; Additional Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Nov. 6, 1952, 250 U.N.T.S. 32; General Agreement on Privileges and Immunities of the Council of Europe, Oct. 2, 1949, 250 U.N.T.S. 12; Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261, T.I.A.S. No. 521; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900. *See generally* Leonard V.B. Sutton, *Jurisdiction over Diplomatic Personnel and International Organizations' Personnel for Common Crimes and for Internationally Defined Crimes*, *in* 2 A Treatise on International Criminal Law 97 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

The places of asylum were historically temples, where, for reasons discussed below, sanctuary was always recognized. The historical inviolability of a sanctuary was respected even to the extent of protecting persons sentenced to death, as long as they remained on the premises of the sanctuary.

Throughout the early history of asylum, and particularly in ecclesiastic asylum in temples, a common concept of the relationship between punishment and transcendental beliefs existed. Thus, sanctuary was not violated because the pursuers believed that they would become subject to the vengeance of the divinity whose sanctuary had been violated, and in some cases would be subject to temporal punishment by humans as well. In ancient Greece and in the Egyptian Ptolemaic Dynasty (305 B.C.E.–30 B.C.E.), the penalty for violating a sanctuary was death, and in Christian Canon Law after 409 C.E., violating a sanctuary was deemed a *crimen laesae maiestatis* (offenses against the sovereign).

Starting in the sixteenth century a doctrinal shift appeared in scholarly writings regarding asylum. A state or church thereafter did not grant asylum to a fugitive solely because he/she had found his/her way into a sanctuary. Instead, governmental and religious authorities considered the individual's reasons for seeking asylum. In fact, this notion had existed in Greco-Roman and Talmudic asylum law and practice, but had been limited to the practice of ecclesiastic asylum, which relied more on the sanctity of the locus than on the individual who sought its sanctuary. This emphasis was due, in no small measure, to inhumane, punitive measures levied against offenders and fugitives, a reason that is still a valid basis for asylum under prevailing international law.

The pre-Islamic Arab tradition, long in existence in the Arabian Peninsula, was consecrated by the Prophet Muhammad who, upon entering Mecca in 623 C.E. proclaimed two sites as sanctuaries.[10] Mentions of asylum in the Talmud, the Bible, and the Qur'an are indeed among the most noteworthy records of that right.

By the sixteenth century, ideas about the reform of criminal justice arose in Europe. By the seventeenth century, as religious wars and unremitting religious feuds abated, particularly after the Treaty of Westphalia in 1648, the need for cooperation in criminal matters grew as territorial sovereignty became absolute and limited the jurisdictional reach of states. By the eighteenth century, penal reform and concern for world order started to emerge in the writings of Cesare Beccaria (1738–1794). These developments brought new considerations to asylum: (1) places no longer conferred absolute immunity to all types of fugitives, because states were deemed to have a duty to prosecute common criminals, following the *aut dedere aut judicare principle*; and (2) states were deemed to have a reciprocal duty to each other to further the development of world order. These two considerations are as valid today as when they emerged in the writings of Hugo Grotius's *De jure belli ac pacis* in the seventeenth century. Interestingly enough, these developments coincided with the period in which penal reformers mustered enough support for their enlightened views to make criminal justice more humane. These penal developments arose in parallel to those of publicists who sought to develop a framework for a new world order.

Eighteenth-century political philosophies, including the doctrine of separation of church and state, brought about new rationales and practices of asylum for political and religious reasons, as religious and secular state institutions increasingly came into conflict with each other. Religious authorities declared churches, monasteries, and convents sanctuaries, and gave asylum to fugitives from secular authorities, especially when a religious matter was involved, and states increasingly gave political asylum to religious and political dissidents of other countries. But states did not distinguish between these and other reasons for granting asylum, which was

10 M. Cherif Bassiouni, *Protection of Diplomats under Islamic Law*, 74 Am. J. Int'l L. 609 (1980).

tantamount to the modern justification for the denial of extradition on grounds of the "political offense exception."[11]

3. Rationale for Asylum and Its Different Forms

Religious asylum declined with the emergence of the non-ecclesiastic state in most of Europe, the development of theories of separation of church and state, and the decline of the divine right of kings, particularly after the Reformation. These developments gave rise to modern asylum practice—a form of immunity from foreign legal processes granted by the state of refuge to an alien who has become subject to its jurisdiction.

In its modern formative stages, the theory of asylum provided a basis for many extrapolations. One of these was the doctrine of *ius quarteriorum* (the law of quarter), a form of asylum by extraterritoriality, which shielded aliens from the authoritative decision-making processes of states in which they were and which would otherwise have had jurisdiction over them.[12] European states used this doctrine to further their colonial rule in the Middle East through the system of "capitulations" and in the Far East through "concessions." By implementing these mechanisms, European aliens in the Turkish Ottoman Empire and in parts of China enjoyed *ius quarteriorum*, which brought them outside the scope of local law. The result of this practice was outrageous, as it placed aliens above and beyond the reach of the law of the situs. Both of these colonial manifestations ended during or after WWII.

The foregoing survey suggests that after the decline of ecclesiastical asylum—with the exception of Rule 1179 of the *Codex Iuris Cononici* (Canon Law)—all types of asylum flourished in the Middle Ages. Further, the survey illustrates that with the elimination of the colonial doctrines of "concessions" and "capitulations," the only forms of asylum that exist in contemporary practice are forms of territorial asylum.

Thus, the concept of asylum remains one of personal immunity from the authoritative processes of a decision-maker other than that of the jurisdictional authority under whose power the alien falls. As such, it has two forms: (1) *territorial asylum* (e.g., denying the authoritative process of another state the ability to exercise jurisdiction over an asylee through extradition, or other modes of rendition); and (2) *extraterritorial asylum* (e.g., granting asylum in an embassy or on a vessel of one state that is situated in another state).[13] However, it should be noted that because of the long and complex evolution of asylum, the process has yet to reach a high level of clarity.[14]

Most publicists who treat the subject consider territorial asylum to be different from extraterritorial or diplomatic asylum. The rationale advanced for this distinction is that extraterritorial asylum denies the sovereignty of the state on whose territory it is exercised, while territorial asylum affirms the sovereignty of the state on whose territory it is practiced. The distinction is, however, without difference as to its effect because each of these aspects reaffirms the *rationae materiae* of the practice, which stems from the same source. However, the development of this distinction brought about the dichotomy between extraterritorial asylum, which is within the scope of customary and conventional international law, and territorial asylum, which is encompassed by national law. The distinction between territorial and extraterritorial asylum[15]

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11 *See* Ch. VIII, Sec. 2.1.

12 *See, e.g.,* 6 Marjorie Whiteman, Digest of International Law 278–427 (1963) [hereinafter Whiteman Digest].

13 *See* Ch. VI (discussing theories of extraterritorial jurisdiction).

14 *See supra* note 7.

15 6 Whiteman Digest, *supra* note 12: Asylum in foreign embassies and legations within a country is known as "diplomatic asylum." Where granted, and recognized by the local sovereign, it thus constitutes in effect an exemption from the territorial jurisdiction of that state. It may, of course, be argued that a foreign embassy or legation is in some respects extraterritorial, but this is true only to the limited extent

caused many countries, including the United States, to consider territorial asylum to be a matter of national law and to reject any application of customary international law to it, though conventional international law still applies.

Asylum has several facets but its most significant consequence occurs when one state denies another state the opportunity to exercise authority over an individual whom the asylum state is shielding. This may occur either prior to or after extradition proceedings are set in motion. When asylum is granted before extradition proceedings are set in motion, it serves to place the requesting state on notice that its request for extradition is likely to be denied. However, this is not necessarily always the case, as the asylum-granting state can withdraw the privilege of asylum from the beneficiary, particularly after the asylum-granting state becomes fully appraised of the facts supporting the extradition request, which may negate the legal grounds upon which asylum was granted. When asylum is granted after extradition proceedings are initiated, however, the granting of asylum results in denial of the extradition request on grounds of either the political offense exception or executive discretion.[16]

The traditional basis for granting asylum and denying extradition is a concern for the fate of the individual. The theory of humane concern is predicated on two factors: (1) altruistic humanitarian considerations relating to the treatment to which the relator may be subjected upon his/her return to the requesting state, and (2) a commitment in principle by the asylum-granting state to the values of personal freedom. Both criteria, although defensible in principle, constitute value judgments by a political entity predicated on ideology. As stated by one authority with respect to the United States:

> Those who have fled religious, racial or political persecution and who may be described as "political refugees"…have found territorial asylum in the United States, not by right, for the "…United States does not recognize or subscribe to, as part of international law, the so-called

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and in the sense that the receiving state may not exercise acts of jurisdiction within the premises of the foreign state. The concept of "diplomatic asylum" is to be distinguished from that of "political asylum" or "territorial asylum," which is granted by a receiving state to such refugees or fugitives from justice as that state may receive or permit. Thus, "political" or "territorial" asylum does not constitute an exemption from the jurisdiction of the local sovereign state. Although "diplomatic asylum," where granted and recognized, is accorded to "political offenders," as distinguished from common criminals, it does not thereby become "political asylum" as herein used. *Id.* at 428.

16 For the relationship among the law of asylum, the political offense exception, and the penal policies of some foreign countries, see Legomsky, Immigration and Refugee Law and Policy, *supra* note 7; Legomsky, *An Asylum Seeker's Bill of Rights supra* note 7; Sinha, *supra* note 7; Prakash Sinha, Asylum and International Law 5–49 (1971). *See also* Bernabe Africa, Political Offenses in Extradition (1927); Otto Kircheimer, Gegenwartsprobleme der Asylgewahrung (1959); Gerard V. Laforest, Extradition to and from Canada (2d ed. 1977); Francis T. Piggott, Extradition: A Treatise on the Law Relating to Fugitive Offenders (1910); P. Papathanassion, L'Extradition en Matiere Politique (1954); S. Planas-Suarez, Estudio Juridico y Politico el Asilo Diplomatico: Sobre Este Execrable Uso Latino Americano Destructor de la Soberania Nacional y de la Cordialidad Internacional (1953); L. Quintana, Derecho de Asilo (1952); C. Neale Ronning, Diplomatic Asylum, Legal Norms and Political Reality in Latin American Relations C. (1965); Manual Vieria, Derecho de Asilo Diplomatico (1962); Leslie C. Green, *Recent Practice in the Law of Extradition*, 6 Current Legal Probs. 274 (1953); R.B. Greenburgh, *Recent Developments in the Law of Diplomatic Asylum*; 41 Transactions of the Grotius Soc'y 103 (1955); Heinrich Grutzner, *Staatspolitik und der Kriminal-Politik im Auslieferungsrecht*, 68 Zeitschripft fur die Gesamte Strafrechtswissenschaft 501 (1956); Edvard Hambro, *New Trends in the Law of Extradition and Asylum*, 5 W. Pol. Q. 1 (1952); Arnold D. McNair, *Extradition and Extraterritorial Asylum*, 28 Y.B. Int'l L. Comm'n 172 (1951); Felice Morgenstern, *Extraterritorial Asylum*, 25 Y.B. Int'l L. Comm'n 236 (1958); Felice Morgenstern, *Diplomatic Asylum*, 67 Law Q. Rev. 362 (1951); Felice Morgenstern, *The Right of Asylum*, 26 Brit. Y.B. Int'l L. 327 (1949); Charles Rousseau, *Preface to* L. Bolesta-Koziebrodzki, Le Droit d'Asile (1962). *See also* Ch. VIII, Sec. 2.1 and Ch. XII, Sec. 2.

> doctrine of asylum," but by grant of the government *for humanitarian reasons, in recognition of the obligation of a free people toward the politically oppressed or for considerations of foreign policy*.[17]

The contemporary rationale for asylum must be examined in light of its duality: *rationae materiae* (or jurisdiction over a subject matter) and *rationae personae* (or jurisdiction over a person).

3.1. *Rationae Materiae*

Sovereignty over a territory confers upon the sovereign the right to exclude the exercise of jurisdiction over that territory by any other sovereign. Territorial asylum emanates from the assertion of that right. By extension, its applicability encompasses embassies, legations, military bases, territorial enclaves, vessels, and aircraft belonging to the sovereign. The extraterritorial application of sovereignty implies the same exclusive jurisdictional control as does the principle of territoriality of which it is a legal extension. The source of legal authority is said to differ in both because territorial asylum finds its basis in national law, whereas extraterritorial asylum is said to have its legal basis in international law, whether customary or conventional. Extraterritorial asylum is also an extension of territorial asylum, and therefore grounded in international law.

Although clearly established in international law, extraterritorial or diplomatic asylum is not frequently used in practice, in order to avoid political confrontations between the host country and the foreign state whose diplomatic mission is located in the host country. Where diplomatic asylum is granted, it is often contentious and raises problems between the host state and the foreign state granting extraterritorial asylum.

There are a number of prominent examples of diplomatic asylum over the past fifty years. One of the most famous is the case of Cardinal József Mindszenty, a prominent Hungarian anti-communist, who sought refuge in the U.S. embassy in Budapest in November 1956 to escape persecution by invading Soviet troops. Mindszenty was granted diplomatic asylum by the United States and remained in the embassy for fifteen years before it was arranged for him to leave the country. Later that decade, in November 1979, Iranians captured the U.S. embassy in Tehran and held fifty-two U.S. citizens. Six U.S. diplomats were able to escape arrest, however, and took refuge in the Canadian embassy, where they were hidden until January 1980, when they were spirited out of the country. Thus, they were given diplomatic asylum by Canada despite the fact that Iran, the host country, had no knowledge of the grant of asylum. In 1989, Panamanian president Manuel Noriega was ousted from power by U.S. forces. Noriega fled to the Vatican embassy, where he stayed for more than a week; American troops blared music into the embassy until Noriega surrendered.

In 2012 there were several prominent examples of diplomatic asylum. Two of these involved U.S. embassies in China. In the first, a regional police chief in Chengdu named Wang Lijun entered the U.S. consulate seeking protection after apparently falling out with the regional party chief whose wife was later convicted for the killing of a British businessman. Wang stayed in the U.S. consulate for a day before leaving again. The second involved the prominent Chinese "Weiquan lawyer" and activist Chen Guangcheng, sought refuge in the U.S. embassy in Beijing in April, where he stayed until May, when a diplomatic arrangement was reached allowing his departure to the United States.

A prominent example of diplomatic asylum is that of Julian Assange, the founder of the Wikileaks organization. In July 2012 Assange sought refuge in the Ecuadorian embassy in London after his extradition was approved from the United Kingdom to Sweden on what appears to be questionable complaints of sexual abuse that Sweden claims to be investigating but for which no official charge has been issued. Assange's extradition from the United

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17 Alona E. Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 Int'l Law. 204, 204–205 (1969) (emphasis added).

Kingdom, on the sole basis that he is sought in Sweden for "questioning" with respect to allegations without any further evidence, is certainly a legal stretch. But when the order did not include any limitations on Sweden's possible subsequent extradition of Assange to the United States, it strongly raised the suspicion that the United States is seeking Assange's extradition for having published leaked government correspondence. The process indicates what may be a conspiracy among the United States, the United Kingdom, and Sweden to punish Assange for what is essentially a political offense. Assange sought asylum in the Ecuadorian embassy in London, and on August 16 the foreign minister of Ecuador gave Assange asylum. The United Kingdom considered revoking the permission granted to the Ecuadorian embassy to occupy the premises as a way of stripping it of its diplomatic immunity, and thus to be able to effectuate the arrest and extradition of Assange. Clearly this stratagem would constitute a breach of the Vienna Convention on the Law of Diplomatic Immunity. The United Kingdom, on the other hand, argues that Ecuador is violating the spirit of the Vienna Convention by giving asylum to what could be considered a fugitive from justice. If Assange had committed a common crime such as homicide, the United Kingdom would be justified in its claim, but as the legal basis for its claim is the extradition to Sweden, which on its face appears to be a subterfuge to achieve indirectly something it could not achieve directly, namely to extradite Assange to the United States to face charges for the release of the diplomatic messages (an act that would be protected by freedom of opinion under UK law, the European Convention, and Article 17 of the ICCPR), clearly the United Kingdom could not claim that Ecuador is in breach of the spirit of the Vienna Conventions when the United Kingdom itself is also in breach.

The practice of extraterritorial immunity has also been extended to international organizations in recognition of their need to pursue their functions. Arguably, this extension may fall into a special jurisdictional category. An important question that has never been adjudicated is whether an international organization can grant territorial asylum. The answer is negative, because an international organization does not need that legal prerogative to fulfill its functions, as would a state. The accredited representatives to such organizations and its staff enjoy immunity, however.[18]

3.2. *Rationae Personae*

Certain individuals, by reason of an immunity granted them in their private person or capacity, are beyond jurisdictional control of a state that would otherwise exercise jurisdiction over them by reason of territorial sovereignty. The capacity of the individual characterizes the immunity, not the place where the person may be located, and thus determines whether asylum is granted. This immunity applies to heads of state, senior government officials on mission, accredited diplomats, and qualified members of international organizations. It is predicated on an extension of the doctrine of sovereignty to secure the exercise of their representative functions. It should be noted, however, that immunity for heads of state does not extend to the commission of certain crimes such as genocide, crimes against humanity, war crimes, and torture.[19] Furthermore, diplomats only enjoy diplomatic immunity in the country in which they are accredited, and while in transit to and from that country and their country of origin.[20]

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18 Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 UST 1418, T.I.A.S. No. 6900, 1 UNTS 15; I.C.J. Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, 38 I.L.M. 873 (1999); Peter H.F. Bekker, *Advisory Jurisdiction—Convention on the Privileges and Immunities of the United Nations—Immunity from Legal Process of Expert on Mission Appointed by U.N. Commission on Human Rights—Effect of U.N. Secretary-General's Assertion of Immunity—Procedural Priority to Be Accorded Assertion of Immunity in Municipal Courts*, 93 Am. J. Int'l. L. 913 (1999).

19 See Ch. VI, Sec. 8 for a more detailed evaluation of immunities.

20 The purpose of immunity is to enable representatives to fulfill their function fully. In other matters they should yield entire respect to the jurisdiction of the territorial government. *See* 4 Green Haywood Hackworth, Digest of International Law 77–78 (1944).

3.3. Difference between *Rationae Materiae* and *Rationae Personae*

It is said that *rationae materiae* affirms territorial sovereignty, whereas *rationae personae* is said to deny it. This explanation may, however, be misleading. Affirming territorial sovereignty by a grant of territorial asylum is to render a person in that territory immune from another jurisdictional authority. Denying territorial sovereignty by reason of personal immunity is also to render a person immune from jurisdictional authority, although regardless of the situs where territorial jurisdiction is otherwise exercised. Both have the same outcome—personal immunity from the reach of another authoritative process—even though their premises differ. The foundation of the legal prerogative in both cases is the doctrine of sovereignty, which in one case applies to the individual by reason of *where* he/she is and in the other case because of *who* he/she is or *what* his/her function is.

It may be argued that diplomatic asylum derogates from the principle of territoriality in order to secure the purposes and functions of accredited foreign officials in their capacity as representatives of another sovereign. However, if the principle of diplomatic extraterritoriality is accepted without qualification, the distinction between "diplomatic" and "territorial" asylum is no longer valid.[21]

4. Legal Bases for Asylum

Two sources of law support the practice of asylum: national law and international law. Proponents of the right of asylum find support for the existence of that right in each of these sources.[22]

4.1. The International Law of Asylum

Developments in international law and national laws have given rise to a general principle of international law of asylum. This body of law is shaped by the basic values underlying asylum and by the principle of protection of human rights, both of which are embodied in the 1951 Refugee Convention and its 1967 Protocol, which applies to asylum.[23] The duty of states to protect refugees inures to the benefit of the individual. When states choose to follow a given practice that is pursued and relied upon by its intended beneficiaries, they create rights in favor of such beneficiaries. More significant,, by following a certain practice, states not only bind themselves but may create customary international law.[24]

Despite references to asylum in extradition treaties and in domestic legislation on the subject, some writers consider it insufficient to constitute customary international law as evidenced by consistent state practice. They argue that a self-imposed limitation, such as a state's grant of asylum, is a discretionary privilege that can be abrogated unilaterally, and therefore a grant of

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21 That view was put forward by many nineteenth-century authors who used the "fiction" of extraterritoriality as a useful descriptive term, but denied that it was "so absolute" as to justify a right of asylum. Travers Twiss, 1 The Law of Nations 218, 408 (Oxford, Clarendon 2d ed. 1884). Among twentieth-century writers, Fauchille claims that modern theory has "completely rejected" the idea of extraterritoriality. *See* Paul Fauchille, 1 Traité de Droit International Public 64, 78 (1926). His view is supported by the report of the League of Nations Codification Sub-Committee on Diplomatic Privileges and Immunities stating that "[I]t is perfectly clear that extraterritoriality is a fiction which has no foundation either in law or in fact… The mere employment of this unfortunate expression is liable to lead to legal consequences which are absolutely inadmissible." League of Nations Doc. C.196 M.70 1927 V, at 79 (1927).

22 *See supra* note 16. *See also* Ch. VIII, Sec. 1 and Ch. XII, Sec. 2.

23 Convention Relating to Status of Refugees, *supra* note 1; Protocol Relating to the Status of Refugees, *supra* note 1.

24 Sinha, *supra* note 7.

asylum does not create a legally enforceable right in favor of the individual but merely affords him/her a qualified privilege. These scholars fail to take into account that asylum provisions in constitutions, treaties, and domestic legislation are binding on the states that adopt them, even though these states have discretion in their application.

Thus, customary law is created inferentially as well as explicitly. The Permanent Court of International Justice in the *Lotus* case stated that in the case of negative—as opposed to positive—conduct, customary international law is created only if the abstention is based on consciousness of a duty to abstain.[25] The essence of the binding nature of custom is evidenced by consistent practice and the sense of legal obligation by the given state. However, as stated by Judge Rafael Altarmira in his dissenting opinion in *Lotus*:

> In the process of the development of a customary rule there are often moments in time in which the rule, implicitly discernible, has not yet taken shape in the eyes of the world, but is so forcibly suggested by precedents that it would be rendering service to the cause of justice and law to assist its appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category.[26]

Several years later, this position became clear when the International Court of Justice, in its only opinion on the subject of asylum,[27] stated that the practice was laden with:

> so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definite qualification of the offense.[28]

The broadly diffused, though inconsistent, practice of asylum evidences some recognition of the historical practice or privilege. In whatever way it may have existed and developed in the course of its lengthy evolution, it now embodies certain basic common values of the world community. This recognition is thus sufficient for asylum to be deemed part of those general principles of international law recognized by civilized nations, which, under Article 38 of the Statute of the International Court of Justice, constitute a source of international law. Asylum is thus a part of international law.

Asylum is considered a human right that developed in international law in two forms: (1) that of granting minorities the right to petition an international decision-making body for protection from political persecution, and (2) that of leaving the jurisdiction and becoming a refugee in another state.[29] To implement the latter form, it was indispensable that the refugee be

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25 The Lotus Case (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 28; Manley O. Hudson, The Permanent Court of International Justice, 1920–1942 (1943).

26 Hudson, *supra* note 25, at 610. *See* also Oppenheim's International Law (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

27 Asylum Case (Colom. v. Peru), 1950 I.C.J. 266. *See also* Manuel R. Garcia-Mora, *The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights*, 37 Va. L. Rev. 927 (1951).

28 Asylum Case (Colom. v. Peru), 1950 I.C.J. at 277. But see dissenting opinion of Judge Alvarez in the Asylum Case, who stated that "A principle, custom, doctrine, etc., need not be accepted by all of the states of the New World in order to be considered as a part of American international law. The same situation obtains in this case as in the case of universal international law." *Id.* at 294 (Alvarez, J., dissenting).

29 The human rights approach to asylum was prevalent in the Havana Convention on Asylum. Manley O. Hudson, 4 International Legislation 2412 (1932); 22 Am. J. Int'l L. 158 (Supp. 1928). *See also* American Declaration of the Rights and Duties of Man, adopted at the Ninth International Conference of American States held in Bogota in 1948, *reprinted in* 43 Am. J. Int'l L. 133 (Supp. 1949); The Institute of International Law Resolution of September, 1950, *reprinted in* 45 Am. J. Int'l L. 15

granted the right to such a status, that it would be sanctioned by international law, and that it be subject to protection in domestic legislation.

As outlined above, there is considerable ambiguity as to the source, development, and legal basis for the contemporary human right to asylum. It does, however, appear that there are two applications of asylum: (1) as granted to refugees, displaced persons, and, in general, to a community or group of people subjected to persecution in one country by reason of race, religion, nationality, membership in a particular social group, or political opinion; and (2) as granted to individuals singled out by a given state for any one of the above reasons. Accordingly, it recognizes a collective and an individual right to asylum.

It is noteworthy that the Universal Declaration of Human Rights recognizes a right to asylum, as expressed in Article 14: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[30] This right was included in the Universal Declaration as a response to the concern for refugees and stateless persons after WWII. This concern brought about the 1951 Convention[31] and the 1967 Protocol Relating to the Status of Refugees.[32] The same concern for refugees and the need to protect their human rights was also embodied in the 1966 International Covenant on Economic Social and Cultural Rights.[33] The right to asylum is also expressed in Article 2 of the Organization of African Unity Refugee Convention,[34] in Article 22 of the Inter-American Human Rights Convention of 1969,[35] and in Article 40(1) of the Arab Charter on Human Rights.[36]

It is also noteworthy that the General Assembly of the United Nations unanimously adopted Resolution 2312 (XXII) of December 14, 1967. The Declaration of Territorial Asylum states:

(Supp. 1951); The International Law Commission of the United Nations, Draft Declaration on Rights and Duties of States, *reprinted in* 44 Am. J. Int'l L. 8 (Supp. 1950); 1933 Montevideo Convention on Political Asylum, *reprinted in* Manley O. Hudson, 6 International Legislation 607 (1937); the international instruments cited *supra* note 9 and accompanying text. As to the doctrine on the subject, see Garcia-Mora, *supra* note 7, at 120–139 (1956) (referring to decisions upholding the right of asylum); Frank E. Krenz, *The Refugee as a Subject of International Law*, 15 Int'l & Comp. L.Q. 90, 104 (1966); Paul Weis, *The International Protection of Refugees*, 48 Am. J. Int'l L. 193, 198 (1954).

30 Article 14 of the Declaration, *reprinted in* 43 Am. J. Int'l L. 127, 129 (Supp. 1949); The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/811 (1948); Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 Am. J. Int'l L. 316 (1949); Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 Brit. Y.B. Int'l L. 354 (1948). The Draft of the International Declaration on Asylum, prepared by the Commission on Human Rights of the United Nations and transmitted to the United Nations General Assembly in July, 1960, declares in article 3 that

> [n]o one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the frontier, face return or expulsion which would result in compelling him to return or remain in a territory, if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

U.N. Doc. ECN.4/804 (E/3335) (1960).

31 *See* United Nations Convention Relating to Status of Refugees, *supra* note 1; Convention Relating to the International Status of Refugees, *supra* note 1.

32 Protocol Relating to the Status of Refugees, *supra* note 1.

33 G.A. Res. 2200, 21 U.N. GAOR Supp. 16, U.N. Doc. A/6316 (1966).

34 Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1967, 1001 U.N.T.S. 45, CAB/LEG/24.3.

35 Inter-American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

36 Council of the League of Arab States, Arab Charter on Human Rights, Sept. 15, 1994, *reprinted in* 18 Hum. Rts. L.J. 151 (1997).

> (1) the granting of asylum does not constitute an unfriendly act and shall be respected by other States;
>
> (2) the situation of persons seeking asylum is of concern to the international community, which shall assist the State on which the granting of asylum is too heavy a burden; and
>
> (3) no one shall be subjected to measures such as rejection at the frontier, expulsion, or compulsory return to any state where he may be subjected to persecution, i.e., the principle of *non-refoulement* in its wider sense, including persons seeking admission at the border.

The Declaration, however, as a Resolution of the General Assembly is recommendatory rather than obligatory. Ten years later it gave way to the Draft Convention on Territorial Asylum.

The 1977 Draft Convention on Territorial Asylum[37] was designed to overcome some shortcomings of the 1951 Convention and the 1967 Protocol.[38] However, the Draft Convention was aimed more at increasing the protection of those falling within the existing definition of a refugee than at broadening the definition to include more of those who are currently excluded therefrom. There is as yet no agreement on the text of the Convention, which has been tabled[39] at the United Nations. The major stumbling block in adopting a text of the Convention is the provision dealing with temporary asylum, Article 4, which states:

> A person seeking asylum at the frontier or in the territory of a Contracting State shall be admitted provisionally to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a competent authority.

This text limits states in their initial decision to reject refugees and thus curtails their resort to immigration laws to do what they may deem politically expedient.[40]

Under the definitions of the 1951 Convention and the 1967 Protocol, only about half of the world's displaced persons are eligible for the protection of the office of the United Nations High Commissioner for Refugees (UNHCR) on the basis that they have crossed an international boundary; the 1951 Convention and the 1967 Protocol had no effect on Internally Displaced Persons (IDP) who have not crossed an international boundary. The exclusion of so many individuals should concern much of the world community, even though it cannot be presumed that those fugitives from persecution who do not fall within the mandate of UNHCR are in all instances deprived of international protection.[41]

4.2. National Law and Asylum

In national law, asylum can be found in constitutional provisions or legislative enactments, particularly immigration laws and regulations. It may also exist in practice without legislative authority. It is frequently mentioned in extradition treaties, either directly or indirectly, particularly with reference to the political offense exception.

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37 30 U.N. GAOR Supp. (No. 31) 38, U.N. Doc. A/10177 (1975).

38 *See* Richard Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 San Diego L. Rev. 45 (1977).

39 For the materials and proceedings of the Conference, see U.N. Doc. A/Conf.78/DC 2-5 (1977); U.N. Doc. A/Conf.78/DC R.1 (1977); U.N. Doc. A/Conf.78/C.1/L.104/Add 1-7 (1977); U.N. Doc. A/Conf. 78/C.1/SR 1-28 (1977) and Corrigenda; U.N. Doc. A/Conf.78/SR 1-9 (1977) and Corrigenda; U.N. Doc. A/10177 (1975).

40 *See* N.Y. Times, Feb. 3, 1977, at A9. *See also* Kay Hailbronner, *Molding a New Human Rights Agenda*, 8 Wash. Q. 183 (1985) (noting that the difficulty with the Draft Convention on Territorial Asylum has been that "[i]n an era of mass exodus, states were not prepared to accept far-reaching obligations without being able to measure the consequences.").

41 Plender, *supra* note 38, at 47.

An individual right to asylum exists, for example, under the constitutions of the Federal Republic of Germany,[42] the Czech Republic,[43] Italy,[44] and France,[45] as well as of those African countries whose constitutions are based on the French Constitution. It is noteworthy that the French Constitution of 1793 first recognized an individual's right to asylum.[46] In addition, the aliens' legislation of the Scandinavian countries contains provisions obliging the authorities to admit persons who otherwise would be subject to persecution, thus according them a right to asylum.

The uneven development of a practice—including asylum—means that it is likely to acquire characteristics based on more than one source of international law. Conversely, it would likely fail to attain a level that would satisfy the requirements of each source independently. Such a condition may, however, be capable of satisfying a single source through the cumulative effect of all its international characteristics. Thus, a combination of some characteristics of customary international law, bilateral and multilateral treaties on asylum and refugees, and the writings of distinguished publicists supporting the practice as an enforceable human right is sufficient to warrant the conclusion that asylum has become part of customary international law and a part of those "general principles of international law recognized by civilized nations." Asylum, therefore, constitutes an enforceable right under international law, in addition to its binding effect on those states who are parties to conventions on the subject.

5. Asylum in the United States

5.1. Asylum Process

Asylum and refugee status are based on the same legal standard, namely a well-founded fear of persecution in the country of nationality based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[47]

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42 The Basic Law of the Federal Republic of Germany, the Constitution of the Republic, provides at article 16(2) that "[p]ersons persecuted on political grounds shall enjoy the right of asylum." 6 Constitutions of the Countries of the World (Gisbert H. Flanz & Albert P. Blaustein eds., 1991). This provision has been interpreted by the German Federal Constitutional Court as directly enforceable law binding on the legislative, executive, and judicial branches of the government. Hailbronner, *supra* note 40, at 183.

43 The Czechoslovak Constitutional Law of January 1991 enacting the Bill of Basic Rights and Freedoms provides at article 43 that the Republic "grants asylum to foreigners prosecuted for pursuit of political rights and freedoms. Asylum can be denied only to someone who has acted contrary to basic human rights and freedoms." Although the Czech and Slovak Federal Republic dissolved as of January 1, 1993, the new Constitution of the Czech Republic provides at Article 112(1) that the Bill of Basic Rights and Freedoms constitutes a part of the present constitutional order.

44 6 Constitutions of the Countries of the World, *supra* note 42. Article 10 of the Italian Constitution provides: "A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law." *Id.*

45 *Id*.

46 *Cismigiu v. Seicaru*, 47 I.L.R. 272 (Trib. gr. inst. de la Seine 1966) (Fr.).

47 INS v. Cardoza-Fonseca, 480 U.S. 421, 4 Immigr. Rep. A1-1 (1987); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 3 Immigration Law & Procedure, § 33.04[1][b], Release No. 113 (rev. ed. June 2006). *See also* Legomsky, Immigration and Refugee Law and Policy, *supra* note 7; Legomsky, *An Asylum Seeker's Bill of Rights*, *supra* note 7; Sinha, *supra* note 7; Garcia, *supra* note 7; Hathawy, *supra* note 3; Germain, *supra* note 3; Farnam, *supra* note 7. *See* Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DePaul L Rev 19, 20 (2003) (summarizing immigration statutes: under federal law, a person who is convicted of an "aggravated felony" has fewer grounds for avoiding deportation than a person who is convicted of a felony); *see* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool 481–497 (12th ed. 2010) (collecting cases).

In the United States, statutory recognition of asylum first appeared in 1980 with the passage of the Refugee Act.[48] Final regulations were not adopted until 1990, when they were incorporated into the Immigration and Nationality Act (INA).[49] The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)[50] subsequently amended the Refugee Act. Today, the Refugee Act and the federal regulations promulgated under it govern the asylum process in the United States, but must be considered in conjunction with other legislation, including the USA PATRIOT Act.

Contemporary asylum law differs from prior statutes in several respects. It allows refugees from any country, eliminates the requirement of having fled the country of nationality, and also adopts the language of Article I of the United Nations Convention Relating to the Status of Refugees, which provides that the basis of a refugee claim is "persecution or a well-founded fear of persecution."[51]

The Attorney General or Secretary of Homeland Security is authorized by Section 208 of the INA to establish an asylum application procedure for an asylum-seeking alien who is physically present in the United States, or at land borders or ports of entry, and to grant asylum.[52] The asylum procedure promulgated by the Attorney General directs the asylum-seeking alien to file an asylum application with an asylum office, United States Citizenship and Immigration Services (USCIS) district director, immigration judge, or the Board of Immigration Appeals (BIA).[53]

Two types of asylum applications can be filed. First, a noncitizen with valid non-immigrant status may file an affirmative application through the USCIS. Second, a noncitizen can file a defensive application with an immigration judge in response to a deportation or other action taken against the noncitizen.[54] An alien must submit an application to the asylum office, where an asylum officer, who is an immigration officer with specialized asylum training, reviews the application for merit.[55] As a part of the merit review, the asylum officer is required to request an advisory opinion from the Department of State.[56] If the asylum officer finds that the alien is

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48 INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), *as added by the* Refugee Act of 1980, Pub. L. No. 96-212 § 201(a), 94 Stat. 102 (1980). *See* Gordon et al, Immigration Law & Procedure, *supra* note 47, at §34.02[2]. *See also* Stephen H. Legomsky, Immigration Law and Policy 819, 840 (1992) ("In 1974 the Justice Department issued regulations providing asylum criteria and procedures . . . but not until 1980 did asylum receive statutory recognition."). *See also* Kurzban, *supra* note 7.

49 55 Fed. Reg. 30,680-87 (July 27, 1990). *See* Gordon et al, Immigration Law & Procedure, *supra* note 47 at § 34.02[2].

50 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Div. C., Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §601 (a)(1), 110 Stat. 3009-689 (codified as amended in various sections of 8 U.S.C.).

51 Convention Relating to Status of Refugees, *supra* note 1; INA §101(a)(42), *as added by* The Refugee Act of 1980, Pub. L. No. 960212, § 201(a), 94 Stat. 102; Gordon et al, Immigration Law & Procedure, *supra* note 47, at §34.02.

52 INA § 208 (b)(1), 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1158(a) (1994), *amended by* Pub. L. 104-32, title IV, § 421(a), April 24, 1996, 110 Stat. 1270; Pub. L. 104-208, div. C, title VI, § 604(a), Sept. 30, 1996, 110 Stat. 3009-690.

53 INA § 208 (d)(1), 8 U.S.C. § 1158 (d)(1), 8 C.F.R. § 208.4(b) (2011). Also the Attorney General can promulgate Asylum regulations; *see* 55 Fed. Reg. 30, 674–688 (1990).

54 Gordon et al, Immigration Law & Procedure, *supra* note 47, at §34.02.

55 8 C.F.R. §208.2(a) (The Office of International Affairs has initial jurisdiction over the asylum applications.) (2011); Richard K. Preston, *Asylum Adjudication: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 Md. L. Rev. 91, 108 (1986) (citing I.N.S. Operations Instruction § 208.9(d) (1980)).

56 8 C.F.R. § 208.11 (2011), 62 Fed. Reg. 10,337 (Mar. 6, 1997), *as amended by* 64 Fed. Reg. 8477 (Feb. 19, 1999). The Department of State procedure is as follows:

> After an asylum application is received, it will be reviewed and then placed into one of three categories. The first category consists of applications that the Department of State believes the Country

eligible for asylum,[57] the officer may then grant asylum or refer the application to an immigration judge for adjudication in deportation, exclusion, or removal proceedings.[58]

Expedited removal was introduced in 1997 through the IIRAIRA.[59] This process expedites the removal of inadmissible arriving aliens, excepting only those who indicate an intent to apply for asylum.[60] After the alien applies for asylum, an asylum officer makes a determination of whether the alien has a "credible fear of persecution."[61] If, after interviewing the noncitizen,[62] the asylum officer determines that the alien does not have a credible fear of persecution, then the alien can request a review of the decision by an immigration judge who will issue a final determination that is not subject to review.[63] If either the asylum officer or immigration judge determines that the alien has a credible fear of prosecution, the alien will move forward in a regular asylum proceeding.[64]

When the alien applies for asylum while in exclusion, deportation, or removal proceedings, he/she submits the asylum application to the immigration judge who has jurisdiction over the case.[65] Upon receipt of the asylum application, the immigration judge can seek a Department of State advisory opinion, which was formerly a requirement, but due to budget constraints is now available only on only select applications.[66] However, State Department submissions are only advisory, and the Attorney General and Secretary of Homeland Security make the final

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> Reports on Human Rights Practices ("Country Reports") provides sufficient information for an asylum officer to determine the applicant's eligibility for refugee status. The Department of State will then refer the asylum officer to the Country Reports noting that the Department of State has nothing further to add. The second category consists of cases where the Country Reports do not provide enough information for an asylum officer to determine the applicant's eligibility for refugee status. In these cases, the Department of State will supplement the Country Reports by adding a "boiler-plate generic" opinion. This type of opinion provides more specific information on a certain group of persons (i.e. Christians in Iran) or note major changes in the government since the publication of the Country Reports. The third category includes asylum applications which the Department of State has information regarding the individual applicant or believes that the application is so unique that special treatment is warranted. In these cases the Department of State will submit an individualized advisory opinion to the asylum officer.

Letter from Edward H. Wilkinson, Director of Asylum Affairs, to Chief Immigration Judge William R. Robie and Delia Combs, INS Assistant Commissioner, (Oct. 21, 1987), *reprinted* in 64 Interpreter Releases 1215 (1987). *See also* 6 Immigration Law and Procedure § 138.06(3) (Ellen Gittel Gordon & Charles Gordon eds., 1995).

57 *See supra* Sec. 5.3 (discussing asylum eligibility grounds).

58 8 C.F.R. § 208.14(b), (c) (2006).

59 INA § 235(b)(1)(A)(ii) (2010), 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4) (2006); Gordon et al, Immigration Law & Procedure, *supra* note 47, at § 34.02[3][a].

60 INA § 235(b)(1)(A)(ii) b (2010), 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4) (2006). *See also* 8 C.F.R. § 208.30; 8 C.F.R. § 235.3(b)(4) (2006). *See* Kurzban, *supra* note 47, at 510–519.

61 Under INA § 208, a credible fear of persecutions means that "there is a significant possibility, taking into account the credibility of the statements made by the non-citizen in support of the person's claim and such other facts as are known to the [asylum] officer that the non-citizen could establish eligibility for asylum under [INA] section 208." INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v); *see* Kurzban, *supra* note 47, at 505–510 (collecting cases on a well-founded fear of persecution and asylum). *Id.* at 497–505 (collecting cases on past persecution).

62 8 C.F.R. § 208.30 (2006); 8 C.F.R. §235.3(b)(4) (2006).

63 INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(f) (2010).

64 8 C.F.R. § 235.6 (a)(1)(ii), (iii) (2009).

65 8 C.F.R. § 208.4(b)(3) (2006).

66 8 C.F.R. § 208.11; The State Department's role was reduced to one of "providing detailed and current country conditions and information"; *see* 59 Fed. Reg. at 62,293 (Dec. 5, 1994). *See also* Gordon et al, Immigration Law & Procedure, *supra* note 47, at § 34.02[8][c].

decisions on asylum.[67] The alien, or the USCIS on behalf of the government, may administratively appeal the immigration judge's decision on asylum to the BIA.[68]

The BIA, like the immigration courts, is a quasi-judicial body established by federal regulation.[69] If the BIA affirms the decision to deny asylum and affirms or enters a final order of deportation against the alien, the alien may appeal to a federal court by a petition for review.[70]

If the alien succeeds in obtaining asylum, he/she may remain in the United States for one year.[71] At the end of the one-year period, the USCIS examines the alien for admission to the United States as an immigrant.[72] Unless the alien's status as a refugee has been terminated within that one-year period,[73] the alien is eligible for an adjustment of status from refugee to lawful permanent resident.[74] As a lawful permanent resident, the alien enjoys the privilege of remaining in the United States, and qualifies for naturalization.[75] If, however, the alien fails to secure asylum, or if, for any reason, his/her asylum is revoked,[76] the USCIS may bring exclusion or deportation proceedings against him/her.[77] If the alien satisfies the standards for withholding of removal,[78] the Attorney General must withhold the alien's removal, but may return the alien to his/her country of origin if he/she meets the requirements of the INA in § 241(b)(3)(B).

The USA PATRIOT Act amended immigration, banking, and money laundering laws, as well as the Foreign Intelligence Surveillance Act (FISA). The provisions of the Act supplement provisions in 18 U.S.C. § 2339A, B, and criminalize "material support" to terrorists and foreign

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67 Shah v. INS, 220 F.3d 1062, 1069 (9th Cir. 2000).

68 8 C.F.R. § 1003.3(a)(2006).

69 8 C.F.R. § 1003.1 (2006).

70 8 U.S.C. § 1252 (a)(1), (b) (2011). All petitions must be filed within thirty days (after Oct. 30, 1996) after date of final order.

71 Specifically, the alien will not be removed to the country of nationality. INA § 208 (c)(1)(A), 8 U.S.C. § 1158 (c)(1)(A).

72 8 U.S.C. § 1159(a) (1994), *amended by* Pub. L. 104-208, div. C, title III, §§ 308(g)(3)(a), 4(a), 371(b)(2), Sept. 30, 1996, 110 Stat. 3009-662.

73 8 U.S.C. § 1158(b) (2000 and Supp. 2004); Other grounds for termination of asylum are fraud in the alien's application for asylum or occurrence of one of the specific circumstances listed in 8 C.F.R. § 208.13(c) (2011), or the circumstances listed under INA § 208(c)(2).

74 8 U.S.C. § 1159(a)(2) (2000 and Supp. 2004). In order to effectuate the adjustment of status to lawful permanent resident, the alien must apply for the adjustment and meet specific requirements. *See* 8 C.F.R. § 209.2(a) (2006). The regulation requires that the alien must have been physically present in the United States for at least one year after receiving asylum, continues to be a refugee within the meaning of the Refugee Act, is admissible as an immigrant at the time of the application for adjustment, and has not been firmly resettled in another country. *Id.*

75 8 U.S.C. § 1429 (2000 and Supp. 2004).

76 8 C.F.R. § 208.24(a) (2006). Asylum may be revoked if the USCIS establishes any of the following: (1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted; (2) As to applications filed on or after April 1, 1997, one or more of the conditions described in § 208(c)(2) of the Act exist; or (3) As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return, due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed an act that would have been grounds for denial of asylum under § 208.13(c)(2).

77 8 C.F.R. § 208.24 (2006). *See also* 8 C.F.R. §208.22 (Effect on exclusion, deportation, and removal proceedings) (2006).

78 8 U.S.C. § 1231(b)(3) (2000 and Supp. 2004); 8 C.F.R. § 208.16 (2006). In various sections of 8 U.S.C. (the codification of the INA) it is called "restriction on removal," while in various portions of the USCIS regulations (8 C.F.R.), it is called "withholding of removal."

terrorist organizations.[79] The USA PATRIOT Act created a new category of crime, domestic terrorism, in addition to "international terrorism."[80] Domestic terrorism is defined in the Act as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the territorial jurisdiction of the United States.[81]

The definition of international terrorism in the Act is identical to domestic terrorism, except that it occurs outside the territorial jurisdiction of the United States, or transcends national boundaries.[82] In addition, the USA Act, which is now a component of the USA PATRIOT ACT, allows federal investigations of an alleged terrorist, provided he/she is not an agent of a foreign power, based on foreign intelligence.[83] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was the precursor to the USA PATRIOT Act, and many of its provisions were taken over by the USA PATRIOT Act, including terrorism, immigration and the Foreign Intelligence Surveillance Act (FISA).[84]

In the largest government reorganization since WWII, the Homeland Security Act (HSA)[85] reorganized large portions of the federal government, bringing 185,000 federal employees and 22 federal agencies under the Department of Homeland Security (DHS). On March 1, 2003, the HSA abolished the Immigration and Naturalization Service (INS), thereby bringing it under the control of the DHS and splitting it into three parts (initially called bureaus).[86] The first component, the United States Citizenship and Immigration Services (USCIS), administers immigration benefits and services, and includes the Asylum and Refugee Affairs

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79 In 2007, DHS exercised its discretionary authority with regard to individuals who provided material support to certain Tier II and Tier III terrorist organizations. *See* Rachel G. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. Int'l. L.J. 61, 92 (2009). For another case discussing how individuals may be forced to supply assistance to the FARC, see *Escobar v. Holder,* 657 F. 3d 537 (7th Cir. 2011) (petitioner started a small trucking company in Colombia, and the FARC hijacked his trucks at gunpoint multiple times and forced him to carry cargo to FARC locations, and the FARC later burned some of the petitioner's trucks). *See* United States v. Pineda, Cr. No. 04-232 (TFH), 2006 U.S. Dist. LEXIS 17509 (D.D.C. 2006) (providing material assistance to FARC). *See also* Cheung v. United States, 213 F.3d 86 (2d Cir. 2000).

80 18 U.S.C. § 2331 (2000 and Supp. 2004).

81 *Id.*

82 *Id.*

83 USA Act, Pub. Law No. 107-56 (amended 2006), (amended and extended in 2011). For a detailed historical analysis of the more controversial provisions of the USA PATRIOT Act, *see* The USA PATRIOT Sunset Extension Act of 2011, S. Rep. 112-13 (Apr. 5, 2011).

84 *See also* Interim Rule of Nov. 14, 2001, Continued Detention of Aliens Subject to Final Orders of Removal (INA); Interim Rule of Oct. 31, 2001, Prevention of Act of Violence and Terrorism (DOJ); Final Rule of Oct. 4, 2001, Aircraft Security under General Operating and Flight Rules (DOT).

85 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. For the history and development of the Department of Homeland Security, see *Brief Documentary History of the Department of Homeland Security 2001–2008*, *available at* http://permanent.access.gpo.gov/lps118010/brief-documentary-history-of-dhs-2001-2008.pdf (last visited Aug. 1, 2013).

86 Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at Special Alert to Chapter 1.

Operations.[87] The United States Immigration and Customs Enforcement (USICE), the second component, enforces customs laws and protects federal buildings and property. In addition, USICE is responsible for immigration investigations, detention, removal, and intelligence.[88] The final component, the United States Customs and Border Protection (USCBP), enforces immigration and customs laws at the ports of entry into the United States.[89] The USICE and USBCP operate under the Directorate of Border and Transportation Security (BTS). Although most immigration and asylum matters are under the jurisdiction of the USCIS, some immigration procedures are still under the Department of State and the Department of Justice, such as the Executive Office for Immigration Review (EOIR), which remains under the Department of Justice.

Because of the changes in the structure of the federal government under the HSA, the Department of Justice has changed the location of the regulations relating to immigration in the Code of Federal Regulations (CFR).[90]

There were several last-minute changes in immigration laws at the end of 2004 and the start of 2005. First, the Intelligence Reform and Terrorism Prevention Act of 2004[91] increases the penalty for "harboring aliens" in aggravated cases, establishes deportability on a new basis of terrorist-related training, and mandates studies of the U.S. asylum process.[92] Second, the Consolidated Appropriations Act of 2005 affects non-immigrant immigration procedures generally, as well as certain other features regarding regional concerns and terrorism.[93] Third, the REAL ID Act was enacted in 2005 as a component of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief.[94] The most pertinent part of the REAL ID Act is section 101, entitled Preventing Terrorists from Obtaining Relief from Removal, which deals with general eligibility and the admissibility of evidence during asylum and withholding of removal on grounds of persecution.[95] This provision redefines the term "refugee," and shifts the burden to require the asylum seeker to establish his/her

87 *Id.*

88 *Id.*

89 *Id.*

90 *See* 68 Fed. Reg. 9824 (Feb. 28, 2003) (Dep't of Justice published the realignment of immigration functions within the federal government). Although there are no substantive hanges, there is now a ch. V in vol. 8 of the C.F.R. Provisions on asylum, now located in 8 C.F.R. 1208, ch. V, pt. 1208 (formerly 8 C.F.R. 208). *See also* 68 Fed. Reg. 10350 (Mar. 5, 2003). However, some asylum provisions remain in 8 C.F.R. 208, because of the possibility of both affirmative and defensive asylum applications. *See* Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at Special Alert to Chapter 1. Immigration laws are in section 101(a)(17) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(17), and all laws, conventions, and treaties of the United States relating to immigration, deportation, expulsion, or removal of aliens are incorporated into sec. 8 of the U.S.C. by 8 C.F.R. 1.1(a). *See* Immigration Laws, 68 Fed. Reg. pt. 44, p. 10922.

91 Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-408 §§ 7211–7214, 118 Stat. 3638, 3825–3832 (2004).

92 *See* Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at Special Alert to Chapter 1.

93 *Id.* The Act extends the deadline for adjusting paroled Indochinese and defines the eligibility of certain Vietnamese as refugees. Consolidate Appropriations Act, 2005, Pub. L. No. 104-477, tit. V, § 534(m), 118 Stat. 2809 (Dec. 8, 2004). It also defines the eligibility of certain Vietnamese and members of their families as refugees with special humanitarian concerns. *Id.* Further, it requires a study of how persons who are terrorists or connected to terrorism have exploited our asylum system

94 REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, signed on May 11, 2005. *See* Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at Special Alert to Chapter 33. *See also* Gregory H. Siskind, *REAL ID Act Becomes Law*, 10 Bender's Imm. Bull. 1057 (June 15, 2005); Stanley Mailman & Stephen Yale-Loehr, *The REAL ID Act—The Real Winners*, New York L.J. (June 27, 2005).

95 *See* Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at Special Alert to Chapter 33.

persecution and present corroborating evidence, as well as making an asylum decision much more difficult to appeal.[96] The Act renders inadmissible any alien who is determined to be a terrorist, endorses or espouses terrorist activity, persuades others to commit terrorist acts, or has received military training from any organization that has been determined to be a terrorist organization.[97]

5.2. Judicial Review of Attorney-General Discretion

In *Kucana v. Holder*, the U.S. Supreme Court addressed the issue of "whether the proscription of judicial review stated in 8 U.S.C. § 1252 (a)(2)(B) applies not only to Attorney General determinations made discretionary by statue, but also to determinations declared discretionary by the Attorney General himself through regulation."[98] Section 1252(a)(2)(B) (of the INA) states that "…no court shall have jurisdiction to review (ii) any other decision or action of the Attorney General…the authority for which is specified under this subchapter to be in the discretion of the Attorney General…"[99] This provision was added to the INA by the IIRIRA. Prior to the enactment of IIRIRA in 1996, one of its regulations was amended to state that "the decision to grant or deny a motion to reopen…is within the discretion of the Board."[100]

The defendant in *Kucana* had moved the court to reopen his removal proceedings by asserting new evidence about worsening conditions in his homeland in support of his plea for asylum.[101] An immigration judge denied his motion, the BIA sustained the ruling, and the Seventh Circuit of Appeals held that the court lacked jurisdiction to review the administrative determination.[102] The Supreme Court granted a writ of certiorari to settle a split between the Seventh Circuit and the remaining circuits regarding the proper interpretation of § 1252,[103] as the remaining circuits ruled that the courts do in fact have jurisdiction to review a denial of a reopening motion.[104]

The Supreme Court held that the language of the statute did not delegate to the executive branch the authority to use regulations to limit judicial review.[105] The Court interpreted the statutory language "under this subchapter" to refer to "discretion" specifically mentioned in the statute because it found that other sections of the INA specifically made references to discretion granted to the Attorney General.[106] The Court stated that "If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute, moreover, Congress could easily have said so…[and that] Where Congress includes particular language in one section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

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96 *Id.* These new standards will also apply to the cancellation of removal or suspension of deportation under the Violence Against Women Act, H.R. 3402 (2005) and to relief under the Convention against Torture and the Cuban Adjustment Act.

97 REAL ID Act, *supra* note 94, at § 103. For a critical, comparative analysis of antiterrorism concerns and the asylum process in the United States, the United Kingdom., Canada, and Australia, *see* Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 Fordham Int'l L.J. 300 (2010).

98 130 S. Ct. 827, 831 (2010)

99 8 U.S.C. § 1252 (a)(2)(B)(ii); *quoted by* Kucana v. Holder, 130 S. Ct. 827, 831 (2010).

100 8 CFR § 1003.2(a)(2009).

101 *Kucana*, 130 S. Ct. at 831.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 839.

106 *Id.* at 834–835.

exclusion."[107] The Court also stressed the precedential presumption that judicial review of administrative action is favored where statutory language appears vague.[108]

5.3. Restriction on Removal (Formerly Withholding of Deportation)

The internationally protected right of *non-refoulement*,[109] the right of a person not to be returned to a country where he or she would face persecution, is codified in the INA as "Restriction on Removal."[110] In the United States, restriction on removal is an alternative to asylum for refugees ho are unqualified or unwilling to apply for asylum.[111] However, a restriction on removal application is usually considered at the same time as an asylum application, in part because the asylum application itself is considered an application for restriction on removal.[112] The threshold for restriction on removal is higher than for asylum, as a noncitizen must show "a clear probability of persecution." Accordingly, the INA provides that

> [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.[113]

The INA, however, expressly excludes from restriction on removal certain classes of aliens, such as aliens who assisted in Nazi persecution or engaged in genocide.[114] Section 241(b)(3)(B) additionally excludes from eligibility for restriction on removal any alien if the Attorney General determines that:

> i. the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
>
> ii. the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States;
>
> iii. there are serious reasons to believe that the alien committed a serious non-political crime outside the United States before the alien arrived in the United States; or
>
> iv. there are reasonable grounds to believe that the alien is a danger to the security of the United States.[115]

One case involving the so-called "persecutor bar" to an asylum claim in (i), above, involved a former Peruvian military officer who was guarding a path while, unbeknownst to him, military units were massacring sixty-nine civilians during Peru's struggle against the Shining Path.[116]

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107 *Id.* at 837 (internal quotations omitted).

108 *Id.* at 838.

109 United Nations Convention Relating to the Status of Refugees, *supra* note 1, at Art. 33.

110 INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(a) (1994 and Supp. 1999); 8 C.F.R. § 208.16 (2006), *as enacted by the* IIRAIRA § 304(a)(3).

111 Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at § 33.05[7].

112 *See* 8 C.F.R. §§ 208.3(b) "An asylum application shall be deemed to constitute at the same time an application for withholding of removal." Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at § 34.03[1].

113 INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A).

114 8 U.S.C. § 1231(b)(3)(B) (Supp. 1999).

115 *Id.*

116 *See generally*, Castaneda-Castillo v. Holder, 638 F.3d 354, 359 (1st Cir. 2011) (noting that the BIA held that the "persecutor bar" did not apply as there was little evidence that the alien had "prior or contemporaneous knowledge of the . . . massacre"). This case also set forth the analysis of whether the alien faces

The original Withholding of Deportation (now Withholding of Removal) provision of the Refugee Act, which removed that remedy from the Attorney General's discretion, was based on Articles 32 and 33 of the 1951 Convention. These articles became binding on the United States in 1968 upon the country's accession to the 1967 Protocol that incorporated substantially all provisions of the 1951 Refugee Convention.[117]

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persecution as a member of a particular social group when he claims persecution based on status as an officer. *Id.* at 362–365. The Court stated:

> Castañeda's asylum claims have previously been before this court, having already been the subject of a 2006 panel opinion, Castañeda-Castillo v. Gonzáles, 464 F.3d 112 (1st Cir. 2006) ("Castañeda I"), as well as an en banc decision a year later, ("Castañeda II").[2] In Castañeda II, we vacated the decisions of the Immigration Judge ("IJ") and Board of Immigration Appeals ("BIA") applying the "persecutor bar" to Castañeda's asylum claims, and held that the persecutor bar could not be applied to block asylum claims absent a finding that the individual involved had actual knowledge that he or she was engaged in the persecution of others. Castañeda II, 488 F.3d at 22. We remanded the case for further proceedings. [*357] The instant appeal is from the decision of the BIA reviewing the IJ's decision on remand. For reasons explained below, we conclude that the IJ and BIA adjudication of Castañeda's asylum petition was marred by legal error. Consequently, we again vacate the denial of Castañeda's asylum petition and remand for further proceedings
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> . . .
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> The government points out that when asylum and extradition "proceedings are contemporaneous, they are related inasmuch as they both involve a determination as to whether a foreign national will be required to return to his country of nationality." This argument ignores the fact that[2]asylum and withholding of removal proceedings are governed by different sources of statutory authority than extradition proceedings. The law governing asylum and withholding of removal was initially established by Congress in sections 208 and 241(b)(3), respectively, of the Immigration and Nationality Act (INA) of 1952, subsequently amended by the Refugee Act of 1980. See Act of March 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), codified at 8 U.S.C. §§ 1158 and "In enacting the Refugee Act, Congress sought to bring United States refugee law into conformity with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." Barapind v. Reno, 225 F.3d 1100, 1106 (9th Cir. 2000) (citing United Nations Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577); Matter of Acosta, 19 I. & N. Dec. 211, 219 (BIA 1985) (same). Extradition, in contrast, is governed by 18 U.S.C. § 3184, which in turn rests on "treat[ies] or convention[s] for extradition between the United States and any foreign government." Id. In this case, the relevant treaty is the bilateral extradition treaty between the United States and Perú. See Extradition Treaty, U.S.–Perú, July 26, 2001, S. Treaty Doc. 107-6. In short, although asylum and extradition proceedings are related insofar as they both bear on whether Castañeda will ultimately be forced to return to Perú, they are rooted in distinct sources of law, governed by procedures specified in distinct statutory regimes, and responsive to different sets of policy concerns.

Castaneda-Castillo, 638 F. 3d at 356, 361.

117 The Protocol provides in article I:

> 1. The State Parties to the present protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined. 2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . . " and the words " . . . as a result of such events," in article 1A(2) were omitted. 3. The present Protocol shall be applied by the State Parties hereto without any geographic limitations, save that existing declarations made by States already Parties to the Convention in accordance with article IB(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol.

Protocol Relating to the Status of Refugees, *supra* note 1.

Article 32 of the 1951 Refugee Convention, entitled "Expulsion," states:

> 1. The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.[118]

Article 33 of the 1951 Refugee Convention, entitled "Prohibition of Expulsion or Return ('*Refoulement*')," states:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[119]

Even aside from its inclusion in Article 33 of the 1951 Refugee Convention, the principle of *non-refoulement* has long been considered a customary norm of international law,[120] and has been suggested to have risen to the status of *jus cogens*.[121] United States courts have not agreed on whether customary international law, in the case of *non-refoulement*, controls and takes precedent over U.S. national policy.[122]

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118 Convention Relating to Status of Refugees, *supra* note 1.

119 *Id*.

120 For example, the 1969 American Convention on Human Rights ("Pact of San Jose, Costa Rica") prohibits the deportation or return of any alien to a country where his or her life or freedom would be in danger of being violated. The OAS Official Records of the 1969 American Convention specifically reads: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." OEA/Ser.K/XVI/1.1. Article 22(8). Furthermore, the Organization of African Unity likewise recognized the right to *non-refoulement* in its 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 14 U.N.T.S. 691. Article II(3) of the 1969 African Convention provides: "No person shall be subjected . . . to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for [reasons for which the OAU recognizes a person as a refugee]." *Id*. *See also* Guy Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 896, 902 (1986) (arguing that obligations arising from the principle of *non-refoulement* come from both conventional and customary law).

121 1985 Report of the United Nations High Commissioner for Refugees, U.N. Doc. E/1985/62 (1985).

122 *See* Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at § 33.07[3]; Customary International Law, Release No. 113, June 2006. An immigration judge in 1990 ruled that customary international law mandated that aliens coming from El Salvador must be granted safe haven in the United States until the threat ceased. *Matter of Santos*, File A29-564-781 (IJ Aug. 24, 1990), *summarized in* 67 Interpreter Releases 945, 982 (Aug. 1990). However, an appellate judge ruled that customary international law could not "preempt national policy reflected in statutes dealing with refugees." The judge further stated that there was no uniform practice that could be seen as customary international law. Echeverria-Hernandez v. U.S. INS, 923 F.2d 688, 692, 11 Immigr. Rep. A2-318 (9th Cir. 1991).

5.4. Asylum Distinguished from Restriction on Removal

Although asylum and restriction on removal differ procedurally and in their relief, persons granted restriction on removal will not be returned to the country where they fear persecution, as with asylum. Asylum applies only to refugees applying for sanctuary at a port of entry or while physically present in the United States. Moreover, asylum is a discretionary remedy, and applicants can be denied even if they meet substantive requirements,[123] whereas, restriction on removal is mandatory.[124] Although a person granted restriction on removal under § 241(b)(3) of the INA does not become an asylee by the virtue of such grant (i.e., he/she does not gain the privilege to remain in the United States permanently), the person nonetheless will not be returned to the country where he/she fears persecution.

Although there is this similarity between a grant of asylum pursuant to § 208 and restriction on removal pursuant to § 241(b)(3), the legal standards for securing either remedy and the effects of meeting such standards differ from each other. An alien seeking asylum under § 208 has a lower standard of persuasion than does an alien seeking withholding of removal. In *INS v. Stevic*,[125] the U.S. Supreme Court held that an applicant for withholding of removal (now restriction on removal)[126] must prove his/her claim by showing a "clear probability" of persecution should he/she be returned to his/her country of origin. Subsequently, in *INS v. Cardoza-Fonseca*,[127] the Court held that the standard of persuasion for asylum is lower. The Court decided that to qualify for asylum, an applicant only needs to show a "well-founded fear" of persecution, and noted that this is a lower standard than the "clear probability" showing required for withholding of deportation.[128]

The effects of successful persuasion with respect to asylum and withholding of deportation also differ. An alien who succeeds in persuading the adjudicator of a "clear probability" of persecution should the alient return to his/her country of origin *must* receive restriction on removal unless he/she fails to qualify for this remedy by virtue of one or more of the exclusionary clauses of § 241(b)(3). This is because § 241(b)(3) unambiguously provides that the Attorney General *may not* deport any alien if the alien would be persecuted upon his/her return. On the other hand, an alien who shows a "well-founded fear" of persecution merely qualifies for a *discretionary* grant of asylum. This too is clear from the statute, which at § 208 provides that "the Attorney General *may* grant asylum to an alien . . . if the Attorney General determines that such alien is a refugee . . . "[129] The INA defines a refugee as an alien who is unable or unwilling to return to his/her country of origin because of a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion.[130]

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123 Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at § 33.05[2]. Applicants can be denied for persecution of others (INA 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i)), criminal activities (INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158 (b)(2)(A)(ii)), nonpolitical crimes outside the United States (INA § 208(b)(2)(A)(iii), 8 U.S.C. § 1158(b)(2)(A)(iii)), or terrorist activities (INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v)).

124 *In re* Salim, 18 I & N Dec. 311 (BIA 1982). *see* Kurzban, *supra* note 47, at 520–528 (collecting cases on withholding of removal).

125 INS v. Stevic, 467 U.S. 407 (1984).

126 *Id.*

127 INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

128 The Court observed that "[o]ne can certainly have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place." *Id.* at 431. To show a "clear probability," however, one must prove a chance higher than 50 percent. *Id.*

129 8 U.S.C. § 1158 (6)(1) (2000 and Supp. 2004).

130 8 U.S.C. § 1101(a)(42)(A) (1994), amended by Pub. L. 104-208, § 601(a)(1), Sept. 30, 1996, 110 Stat. 3009-689.

Following the U.S. Senate ratification of the Convention against Torture (CAT),[131] the government implemented CAT through § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998.[132] The implementation of CAT created a new section in the Code of Federal Regulations that provides a temporary form of relief from removal.[133] This section provides for the deferral of removal of an alien who has been ordered removed, who was found by the immigration judge to be "more likely than not to be tortured in the country of removal,"[134] and who is subject to the mandatory denial of withholding of removal provisions,[135] which are derived from the exception provision to withholding of removal in the INA.[136] As mentioned above, the procedure of deferral of removal is a temporary one, which means that the deferral is subject to termination through an administrative hearing by the immigration judge, during which the alien bears the burden of proving that he/she is more likely than not to be tortured if sent back to the country of removal.[137] The deferral of removal will not grant the alien any lawful status, which will mean that the alien will likely be detained until the deferral is terminated or until a third country will accept the alien.[138]

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131 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/708, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984).

132 Pub. L. 105-277 112 Stat. 2681, 2681–2821.

133 8 C.F.R. §208.17 (2006); 8 C.F.R. §208.16(c) (2006). *see* Kurzban, *supra* note 47, at 528–538 (collecting cases involving CAT and asylum).

134 8 C.F.R. § 208.17(b)(2006).

135 8 C.F.R. § 208.16(d)(2)–(3), 17(a) (2006).

136 8 C.F.R. § 243(h)(3)(2006).

137 8 C.F.R. § 208.17(d)(2006). For a case involving an application for asylum and withholding from removal based on the CAT, see *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (discussing whether a woman who would be subjected to an "honor killing" was entitled to relief under the CAT or withholding of removal):

> Withholding of removal is mandatory under the INA if an applicant establishes that it is more likely than not that she would be persecuted in the country of removal "because of [her] race, religion, nationality, membership in a particular social group, or political opinion."; see also *Benitez Ramos v. Holder*, 589 F.3d 426, 430–31 (7th Cir. 2009). The requirements for obtaining relief under the CAT are also stringent, but they differ in some respects from those for withholding. "To obtain protection under CAT, one must show that '"it is more likely than not that one would be tortured if removed to the proposed country of removal.'" *Toure v. Holder*, 624 F.3d 422, 429 (7th Cir. 2010) (quoting from *Rashiah v. Ashcroft*, 388 F.3d 1126, 1131 (7th Cir. 2004)). "Torture" for these purposes is defined as:
>
> > any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> 8 C.F.R. § 208.18.
>
> Unlike the remedy of withholding of removal, relief under the CAT is not conditioned on proof that the alien has been persecuted because of one of the five grounds listed in the INA. On the other hand, the need to prove "torture," as so defined, sets a high bar for relief. Relief under both the CAT and the withholding provisions requires the applicant to prove that it is "more likely than not" that the adverse consequences will occur if she is returned to the country in question.
>
> *Sarhan*, 658 F. 3d at 652.

138 8 CFR § 208.17(c)(2006).

The Third Circuit in *Khouzam v. Chertoff* considered a petition for deferral on removal based on the CAT.[139] Khouzam, a Coptic Christian, was granted a deferral of removal after lengthy legal proceedings, based on a finding that it was more likely than not that he would be tortured if returned to Egypt.[140] In 2007, the DHS, based on Egyptian diplomatic assurances that Khouzam would not be tortured on his return, prepared to remove him.[141] Khouzam filed an emergency habeas corpus and stay of removal petition arguing that DHS's action violated the prior order granting him CAT relief, and also violated his due process rights by failing to give him an opportunity to review and challenge the decision to remove him based on the diplomatic assurances.[142] After discussing the relevant legal provisions of the CAT as implemented by the Foreign Affair Reforms and Restructuring Act (FARR), the court considered the Department of Justice's regulations regarding the use of diplomatic assurances and termination of deferral of removal.[143] The court noted that once the Attorney General determines that a deferral of removal should be terminated based on diplomatic assurances, there is no guidance on procedures due to the alien in such circumstance.[144] After finding that the 2007 DHS order was a final order of removal, the court concluded it had jurisdiction to review the order removal pursuant to section 1252 of the REAL ID Act.[145] The court, after rejecting Khouzam's argument that it should adopt a categorical rather than individualized approach to deferral of removal to Egypt based on a history of consistent use of torture, considered whether to satisfy due process requirements the FARR required affording aliens in Khouzam's situation with notice and a hearing prior to removal.[146] After reviewing the DOJ's regulations regarding the

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139 Khouzam v. Chertoff, 549 F.3d 235 (3d Cir. 2008).

140 Khouzam was wanted by Egyptian authorities for homicide, and was not granted withholding of removal due to "serious reasons" to believe that he had committed the homicide. He was granted a deferral of removal based on evidence of general torture and abuse of suspects by the Egyptian authorities as well as scars indicating that Khouzam was himself subjected to torture and abuse. *Id.* at 239–240.

141 *Id.* at 239.

142 *Id.* at 240–241.

143 *Id.* at 241–244. 8 C.F.R. § 1208.18(c) governs the use of diplomatic assurances and provides:

> Diplomatic assurances against torture obtained by the Secretary of State.
>
> (1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.
>
> (2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.
>
> (3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

Section 1208.17(f) discussed the termination of deferral of removal based on diplomatic assurances and states:

> Termination pursuant to § 1208.18(c) [diplomatic assurances]. At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 1208.18(c).

144 Khouzam v. Chertoff, 549 F.3d 235, 243–244 (3d Cir. 2008).

145 *Id.* at 244, 246–249.

146 *Id.* at 254–255. The court considered and rejected the government's arguments regarding the political question doctrine and rule of non-inquiry. *Id.* at 249–254.

use of diplomatic assurances in termination of a deferral of removal, the court found that those regulations neither permitted nor prohibited an alien's challenge of those diplomatic assurances, and considered what process Khouzam was due under his circumstances.[147] The court determined that Khouzam was entitled to due process, specifically stating that:

> In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court explained that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Id. at 333. We have found that due process guarantees three basic things in the removal context. First, an alien facing removal "is entitled to factfinding based on a record produced before the decisionmaker and disclosed to him or her." Abdulai, 239 F.3d at 549 (internal quotation marks omitted). This includes a "reasonable opportunity to present evidence on [his or her] behalf." Abdulrahman, 330 F.3d at 596. Second, the alien "must be allowed to make arguments on his or her own behalf." Abdulai, 239 F.3d at 549. Third, the alien "has the right to an individualized determination of his or her interests." Id. (brackets and internal quotation marks omitted). These elements are predicated upon the existence of a "neutral and impartial" decisionmaker. See Abdulrahman, 330 F.3d at 596 (internal quotation marks omitted).[148]

As Khouzam was unable to raise any arguments on his behalf, the government failed to engage in any fact-finding, and there was no neutral and impartial decision-maker tasked with making an individualized determination of Khouzam's circumstances, the court concluded that the government failed to afford Khouzam sufficient process to comport with his constitutionally required due process rights.[149] Last, the court found that Khouzam had suffered "substantial prejudice" as the complete lack of process was inherently prejudicial.[150] As such, the court vacated the termination of Khouzam's deferral of removal and remanded the case to the BIA for additional proceedings.[151]

5.5. Parole

In addition to securing a grant of asylum or restriction on removal, parole is another means by which a person may forestall a potential return to his/her country of origin, as it allows a temporary harbor in the United States for urgent humanitarian reasons or for reasons rooted in public interest.[152] Parole is a purely discretionary matter and a legal fiction that considers parolees to be outside the United States' borders, although they are usually physically in the country. It does not confer any legal residence status on the grantee. Parole is a device of wide flexibility.[153] Because of this flexibility, the power to admit aliens on parole has been used in a constantly increasing variety of cases. It has been used to admit thousands of refugees, many of whom were eventually given the right to acquire a permanent resident status in the United States.

The parole provision of the INA provides that:

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such

147 *Id.* at 255–256.

148 *Id.* at 257.

149 *Id.* at 257–258.

150 *Id.* at 258.

151 *Id.* at 259–260.

152 IIRAIRA, INA § 212(d)(5)(A), 8 C.F.R. § 212.15(a) (2006); *see* Kurzban, *supra* note 47, at 538–539 (collecting cases on parole).

153 Gordon et al, 5 Immigration Law & Procedure, *supra* note 47, at § 62.01[3].

> alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.[154]

The parole provision was originally intended to aid high-level communist defectors, or someone extremely ill or shipwrecked at sea, in order to allow the person to gain admission into the United States without going through the bureaucracy associated with regular admission procedures.[155] When the exigencies of the moment have appeared to require it, the Attorney General's parole authority has been exercised according to the broadest possible interpretation, and it appears that the parole authority will continue to be broadly construed when the situation warrants it.

Parole can be terminated upon the fulfillment of its conditions or limitations, or if it is no longer warranted, or upon the individual's departure from the United States.[156] Once parole is terminated, the parolee reverts to a normal applicant for admission to the United States, who is subject to the normal admissibility proceedings, usually removal proceedings.[157]

In the case of extradition, a noncitizen who is extradited to the United States for prosecution is admitted on parole, which is not considered an application for admission to the United States.[158] After the noncitizen is acquitted or has served his sentence and the criminal process is completed, the noncitizen is given a reasonable opportunity to voluntarily leave the country, and if he/she fails to do so is considered an applicant for admission to the United States and will be processed through removal proceedings.[159]

The United States has also used a process of "silent parole" to allow the temporary entry of wanted individuals into the United States so that they may be detained in the United States. In one case, the U.S. district attorney obtained an arrest warrant, which was kept under seal, and coordinated with the DHS to allow the subject of the arrest warrant to enter the United States under "silent parole." At no time was the accused aware of any of the charges against him, and the United States never pursued a formal extradition request with the accused's country of nationality. The U.S. court of appeals, considering whether there was a violation of the relevant extradition treaty, found none, as the extradition treaty did not specify that extradition was the sole means by which an individual may be obtained.[160]

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154 8 U.S.C. § 1182(d)(5)(a) (1994), *amended by* Pub. L. 104-208, § 602(a), Sept. 30, 1996, 110 Stat. 3009-689. *See also* 8 C.F.R. § 212.5 (2006).

155 Congress reaffirmed its original intent with regard to the parole provision in 1965 when it amended the INA. Act of October 3, 1965, 79 Stat. 911.

156 8 C.F.R. § 212.5(e) (2006); Gordon et al, 5 Immigration Law & Procedure, *supra* note 47, at § 62.01[3].

157 *Id.*

158 *Id*. *See In re* Badalamenti, 19 I & N Dec. 623, 6 Immigr. Rep. B1-43 (BIA 1988) (United States requests that a noncitizen be allowed to enter the United States as parole in the public interest); *see also* 8 C.F.R. § 212.5(a)(2).

159 *Id. See also* 8 C.F.R. §215.5(b)(5) (2006).

160 For a more detailed discussion of the facts, see David C. Levenson, *Court of Appeals of the State of Oregon Rejects Turkish Man's Claims of Violation of United States–Turkey Extradition Treaty*, 25 Int'l Enforcement L. Rep. 360–363 (Sept. 2009). The Supreme Court of Canada also considered this issue. *See* Németh v. Canada (Ministre de la Justice), [2010] SCC 56, at 193 (Can.).

6. The Interrelationship between Asylum and Extradition[161]

6.1. Two Different but Related Processes

In the United States, extradition is a judicial determination, while asylum is an executive one. As a result of the constitutional doctrine of separation of powers, extradition and asylum proceedings are not related, and the legislative authority on which extradition relies is different from that of asylum. Title 18 U.S.C. § 3181 *et seq.* regulates the substance and procedure of extradition, along with provisions of the applicable treaty. The INA, §§ 208, 241(b)(3), § 601 of IIRAIRA, govern the domestic provisions for asylum and restriction removal. Due to oversight, the two processes, asylum and extradition, overlap and deal concurrently with some common issues without legislative coordination.

First, judicial findings of political persecution in extradition proceedings are not binding on the USCIS in asylum proceedings, and similarly USCIS decisions to grant asylum on either a political or a humanitarian basis are not binding upon a court sitting in extradition proceedings. Thus, though grounds for granting asylum may be the same as those for denying extradition, they are not conclusive as to each of the respective procedures because they derive from different statutory authorities and are subject to separate authoritative decision-making processes.

Second, although the prospect of persecution is a key factor in asylum and withholding of deportation determinations, in extradition determinations the rule of non-inquiry compels courts to ignore the prospective treatment of the relator in the requesting state.[162] Consequently, courts in extradition proceedings may rely on different considerations from those upon which the administrative agency empowered to grant asylum or upon which withholding of deportation relies.

It should also be noted that asylum proceedings, though essentially administrative and subject to limited judicial review, are subject to political influence, which broad administrative discretion usually permits. Extradition, being initially a judicial determination, is less affected by political influence.

Also noteworthy is the fact that although an administrative judge may decide, in accordance with a statute, that an individual is entitled to asylum, the granting of asylum itself may be blocked by the executive branch of the government. The Attorney General, or the Department of State as an advisor to the Attorney General, would prevail in opposing a particular grant of asylum in such a situation. Executive discretion would prevail to the limits of countervailing mandatory statutory pronouncements that remove specific discretionary powers from the Attorney General or the executive branch.[163] With respect to extradition it must be noted that a decision to deliver a relator judicially deemed extraditable is also ultimately an executive branch decision, in that the court merely certifies the individual to be extraditable, whereas the decision to deliver the relator to the requesting state is one that is made by the president through the secretary of state. Therefore, it is possible at that juncture for the secretary of state to exercise "executive discretion."[164] In this respect, political considerations may become a factor, and ultimately extradition may not be effectuated. Thus, although the extradition and

161 For discussion of the use of immigration as an alternative to extradition, *see* Ch. IV. *See also In re Extradition of* Kapoor, 2011 U.S. Dist. Lexis 65054 (E.D.N.Y. June 6, 2011).

162 *See* Ch. VII, Sec. 8.

163 *See* 8 U.S.C. § 1231(b)(3) (Supp. 1999) (making mandatory withholding of deportation in certain cases).

164 *See* Ch. IX, Sec. 2.

asylum procedures differ from each other and are grounded in different statutory authorities, both are ultimately subject to a determination made by the executive branch of the government.

There is also a relationship between removal (deportation) proceedings and extradition. Normally, removal proceedings are kept on hold until the extradition proceedings have concluded.[165] However, even though a noncitizen may have his/her extradition proceedings discharged, this decision will not bind the immigration courts in removal proceedings.[166] Furthermore, extradition will not preclude removal proceedings.[167]

However, there are two instances when executive discretion does not apply. When, in extradition proceedings, a court decides that an individual is not extraditable, it is not in the discretion of the executive to surrender him/her. Similarly, when an alien faces persecution in his/her country of origin if returned there, the restriction on removal under § 241(b)(3) of the INA is mandatory and the executive may not return the alien.[168]

Because the statutory bases and procedures for asylum and extradition are different and unrelated, both procedures may be pursued concurrently, though at times they could deal with the same subject matter. Should this indeed occur, the result would be confusion and delay, as well as potential conflict in legal findings. To illustrate, consider the following hypothetical cases:

1. An individual arrives in the United States and applies for asylum. He/she is not at that point sought by a foreign state, and thus there are no extradition proceedings pending. The case proceeds in accordance with the Refugee Act until the individual either receives asylum under § 208 or restriction on removal under § 241(b)(3)(B) on the grounds that he/she would be subjected to persecution in his/her country of origin because of his political beliefs. Subsequent to the grant of asylum or restriction on removal, the individual becomes the subject of an extradition request by his/her country of origin. At the extradition hearing, the relator, relying on his/her asylum or restriction on removal status, argues that his/her extradition is sought on political grounds. The extradition court would not be bound by the administrative decision granting the alien asylum or restriction on removal, nor by the alien's proven well-founded fear or clear probability of persecution in his/her country of origin as conclusive with respect to the issue of denial of extradition on the grounds of the "political offense exception."[169] The extradition judge would be free to make his/her own findings of fact and conclusions of law, which could be contrary to the earlier findings upon which asylum or withholding of deportation was granted. The secretary of state, acting for the executive branch, would have to resolve the conflict.

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165 Gordon et al, 1 Immigration Law & Procedure, *supra* note 47, at § 72.01[5]. *See also In re* Kam-Shu, 477 F.2d 33 (5th Cir. 1973) (paroled for extradition); *In re* Perez-Jiminez, 10 I & N Dec. 309 (BIA 1963) (deportation order withdrawn and case held in abeyance pending conclusion of extradition process).

166 Gordon et al, 6 Immigration Law & Procedure, *supra* note 47, at § 72.01[5]. *In re* McMullen, 17 I. & N. Dec. 542 (BIA 1980) (conviction was political and thus not controlling in passing on persecution claim in deportation proceedings). *See also* 71 Interpreter Releases 746 (June 6, 1994) (reviewing extradition and deportation proceedings for John Demjanjuk).

167 Gordon et al, 6 Immigration Law & Procedure, *supra* note 47, at § 72.01[5]; Linnas v. INS, 790 F.2d 1024, 1031–1032, 3 Immigr. Rep. A2-277 (2d Cir. 1986) (court rejected contention that deportation was effectively extradition in absence of an extradition treaty); Doherty v. Thornburgh, 943 F.2d 204, 208 (2d Cir. 1991) (eight-year detention awaiting deportation and extradition was not unconstitutional).

168 However, it is within the discretion of the Attorney General to determine whether the alien applies for the exception under § 241(b)(3)(B).

169 *See* Ch. VIII, Sec. 2.1.

From a public policy point of view, this is clearly a situation that is detrimental to the United States. If the United States refuses to surrender the individual by using executive discretion, it will anger the requesting state, which would have relied on the judiciary's grant of extradition. If the United States does surrender the individual, it will violate the individual's right to asylum and his internationally and domestically protected right not to be returned to a place where he would be persecuted. This situation is a result of the duality of extradition and asylum procedures that are dysfunctionally separate by reason of a legislative oversight.

2. In the second hypothetical case, an extradition request has been filed in a federal district court, the individual is subject to the extradition proceedings, and the court finds the individual not extraditable on the grounds that the crime for which he/she is requested constitutes a "political offense." The individual then files for political asylum in the United States, but the immigration authorities find that he/she does not fall within the meaning of the statute, or exercise administrative discretion and deny his/her asylum. The individual who is found not extraditable for political reasons would still not be able to obtain the status of political asylum in the United States because the extradition decision is not conclusive with respect to the asylum decision. The individual could then face return to his/her country of origin unless he/she would be able to invoke the protection of § 241(b)(3) of the INA and have his/her removal restricted by proving that, if returned, he/she would be persecuted in his/her country of origin on the basis of his/her political opinion. Again, the United States would risk embarrassment arising from the extradition–asylum conflict.

Indeed, this situation has transpired in the case involving Joseph Doherty.[170] The United Kingdom sought to extradite Doherty from the United States, where he was illegally, for his participation in the killing of a British Security Forces captain in Belfast, Northern Ireland. The federal district court for the Southern District of New York ruled that Doherty's extradition was barred because the crime for which the United Kingdom sought his extradition constituted a "political offense" within the meaning of the extradition treaty between the United States and the United Kingdom.[171] The then INS resumed deportation proceedings that had been pending against Doherty since the time of the extradition request. After eight years of litigation, the INS deported Doherty to the United Kingdom where he began serving a life sentence, but was later released in 1998 under the provisions of the Good Friday Agreement. Clearly, in Doherty's case, a finding of non-extraditability on grounds of a "political offense" did not preclude his eventual deportation on immigration grounds. The United States deported Doherty to the United Kingdom although, because of the life sentence for his political offense, Doherty faced a clear probability of persecution there.[172] Thus, what could not be achieved through extradition was accomplished through deportation.

As asylum and extradition are independent of each other, neither one can prevent the other. Thus, assuming that an extradition request or an asylum request is pending, does the fact that one of the two procedures is in progress mean that the other cannot proceed? The answer is negative, as there is no statutory provision on this point. In one decision, the First Circuit Court of Appeals rejected the U.S. government's argument that there should be no merits adjudication of an asylum claim until extradition proceedings are resolved.[173] The court reasoned,

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170 For a thorough discussion of this case, see Ch. VIII, Sec. 2.1.

171 *In re* Doherty, 599 F. Supp. 270, 277 (S.D.N.Y. 1984).

172 Note, however, that what was at the time § 243(h) of the Refugee Act, which was titled "withholding of deportation," was not directly implicated in the decision concerning Doherty's deportation. Although Doherty at one time had filed applications for asylum and withholding of deportation, subsequently he had withdrawn these applications. INS v. Doherty, 502 U.S. 314 (1992), *rev'g* Doherty v. INS, 908 F.2d 1108 (2d Cir. 1990).

173 Castaneda-Castillo v. Holder, 638 F.3d 354 (1st Cir. 2011).

in part, that the government's argument that an adjudication of the merits of the asylum claim would unduly interfere with the sensitive foreign policy considerations in the extradition process ignored "the fact that asylum and withholding of removal proceedings are governed by different sources of statutory authority than extradition proceedings," and that "asylum and extradition proceedings are 'separate and distinct,' in the sense that 'the resolution of even a common issue in one proceeding is not binding in the other.' "[174] Of course, the asylum applicant or extradition relator can seek the other procedure. It could be assumed that the court in an extradition hearing would have no reason to stay its proceedings pending an asylum decision, which would not be binding upon it anyway. But the court may do so for the purpose of allowing a determination of asylum. This could produce the practical effect that the "executive discretion" of the executive branch in the asylum case would prevail and once the judiciary decision regarding extradition were reached, the relator would not be extradited in any case. In fact, that would be a practical solution that would enhance judicial economy. It may be more likely, however, that the asylum proceedings would be stayed pending the extradition hearing so as to find out whether the crime for which extradition is requested is one for which extradition cannot be granted. This solution would give the government an opportunity to rely on the judicial decision rather than an administrative decision that could be politically bothersome. In any event, there is always the possibility of executive discretion in refusing to surrender the relator.

The interrelationship between asylum and extradition also involves the "rule of non-inquiry."[175] Under this rule, extradition proceedings do not consider the subsequent treatment of the relator after he has been returned to a requesting state. In determining whether to grant asylum or to withhold removal, however, the adjudicator must precisely consider the individual's treatment upon return to his country of origin.[176] However, with the United States' accession to the 1967 Refugee Protocol, courts in extradition cases have started to look into the issue of treatment upon return as well,[177] though it is and should remain an issue to be considered by the executive branch in accordance with the appropriate legislation enacted especially to that end. Because of a lack of coordinating legislation between the related issues and procedures, the consideration of subsequent treatment injects into the extradition proceedings a dimension that does not properly belong there.

Under the draft of the 1982 Extradition Act, a question relating to the motives of a requesting state, particularly as to whether extradition is sought for purposes of persecuting the relator, is left to the discretion of the secretary of state.[178] The Act does not make a distinction between the political motives of the requesting state and a possible violation of internationally protected human rights norms. Both are dealt with in the same context and are left to the secretary of state for his/her unreviewable discretion, without authority for the judiciary (the extradition magistrate or judge) to inquire into such considerations.[179]

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174 *Id.* at 360–361.

175 *See* Ch. VII, Sec. 8. For an argument that the rule of non-inquiry should not apply to removal cases, *see* Aaron S.J. Zelinsky, *Comment:* Khouzam v. Chertoff: *Torture, Removal, and the Rule of Noninquiry*, 28 Yale L. & Pol'y Rev. 233 (2009).

176 *See supra* Sec. 4.2.

177 *See* Nicosia v. Wall, 442 F.2d 1005 (5th Cir. 1971); Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978); *but see* Eain v. Wilkes, 641 F. 2d 504 (7th Cir. 1981).

178 *See generally* M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981–1983*, 17 Akron L. Rev. 495 (1984) (discussing the 1981, 1982, and 1983 Extradition Reform Acts).

179 The contrary position was taken by this writer before congressional hearings on the proposed 1981 and 1982 Extradition Acts. *See Hearings on S. 1639 and S. 1940 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 20 (1981) (remarks of M. Cherif Bassiouni); *Hearings on H.R. 5227 Before the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (remarks of M. Cherif Bassiouni); *Hearings*

A classic case involving the interplay of extradition and asylum proceedings is that of *Barapind v. Reno*.[180] Kulvir Singh Barapind, who attempted to enter the United States under a false name, was detained for an INA violation and deemed an excludable alien. He then applied for asylum pursuant to § 208(a) of the Refugee Act of 1980.[181] While these proceedings were pending before the INS, the government of India sought his extradition. The immigration judge, in reliance upon India's extradition request, found Barapind excludable and ineligible for asylum. Several other proceedings followed before the BIA and the federal district court for the Eastern District of California to consider Barapind's petition for declaratory, injunctive, and habeas corpus relief to suspend his deportation and to deny his extradition. The federal district court in *Barapind v. Reno*[182] denied Barapind's motion and the Ninth Circuit affirmed,[183] holding: "we confront the question of whether the Board of Immigration Appeals (BIA) may hold the adjudication of a petitioner's asylum application in abeyance pending the resolution of his parallel extradition proceedings in federal district court. We conclude that the BIA may do so, and affirm the judgment of the district court, albeit on different grounds."[184] The Ninth Circuit also affirmed the separate nature of INS proceedings for removal or exclusion, irrespective of the course of extradition proceedings. The Ninth Circuit outlined the interplay between asylum and the "political offense" exception to extradition.[185]

Somewhere in determining the "political offense" exception during an extradition request, the court should examine each of the relator's alleged crimes in respect to each of the relator's acts. The existence of the "political offense" exception with respect to one of the crimes charged as it relates to one of the acts committed does not necessarily apply to another crime charged based on the same or other facts if the legal tests of the "political offense" exception are not satisfied with respect to each of the crimes charged.[186] Thus, if the theory is relying on the "incidental test" established in *Quinn v. Robinson*, that test has to be satisfied with respect to each of the crimes charged.[187]

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on H.R. 6046 Before the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. (1982) (remarks of M. Cherif Bassiouni). *See also* Ch. VI, Sec. 7; Ch. IX, Secs. 7 and 8.

180 Barapind v. Reno, 225 F.3d. 1100 (9th Cir. 2000) (appeal from 72 F. Supp. 2d. 1132 (E.D. Cal. 1999)).

181 8 U.S.C. §§ 1158 and 1253(h) (2000 and Supp. 2004). The Act incorporates the relevant provisions of the 1967 Protocol Relating to the Status of Refugees, which was ratified by the United States. 19 U.S.T. 6223. *See also* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

182 *Barapind,* 225 F.3d 1100.

183 *Id.*

184 *Id.* at 1103.

185 *See generally,* Hansdeep Singh, *Bringing Fairness to Extradition Hearings: Proposing a Revised Evidentiary Bar for Political* Dissidents, 38 Cal. W. Int'l L. J. 177 (2007) (discussing the proceedings involving Barapind and arguing for a broader right of defendants to contest foreign governments' evidence during an extradition hearing). *See inter alia*, McMullen v. INS, 788 F.2d. 591 (9th Cir. 1986), *overruled in part by Barapind v. Enomoto,* 400 F.3d 744 (9th Cir. 2005). *McMullen* is overruled with respect to applicability of the "incidental test," established in *Quinn* in dicta, but which under this case became the court's holding. The court also emphasized in *Barapind* that the burden of showing a factual nexus between the crime and the political goal lies with the requested person. The court for all practical purposes looks at it as if it were an affirmative defense in a criminal case. It should be noted that in the dissent by J. Rymer, the Ninth Circuit is still divided as whether to follow *Quinn* or whether to follow the "incidental" test by the Supreme Court in *Ornelas v. Ruiz*, 161 U.S. 502 (1896). This is clear in this case where five judges are dissenting on one issue, namely the different test enunciated in *Quinn* and *Ornelas.*

186 Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005).

187 Quinn v. Robinson, 783 F.2d 776, 809–810 (9th Cir. 1986). The "incidental to" prong inquires into whether a defendant's crimes are "causally or ideologically related" to a political uprising, focusing on the motivation for the acts, rather than the type of acts. *Barapind*, 400 F.3d at 750, *citing Quinn,* 783 F.2d at 809–810.

Under the USA PATRIOT Act and other new antiterrorism legislation, those who are guilty of a felony can be removed (deported). Accordingly, this status can be used for removing an individual instead of using extradition procedures.[188]

6.2. An Appraisal of the Relationship between Asylum and Extradition

The granting of asylum is distinguished from the decision to refuse extradition even though the two are at times intertwined. This is due to the fact that the state of refuge may decide the issue of allowing extradition irrespective of, and separate from, the issue of allowing the relator to remain on its territory or to grant him/her asylum, unless there are other grounds for expulsion such as compliance with the CAT. The extradition question may be decided on narrow, technical grounds, particularly where treaty interpretation may be involved. The extradition decision is usually left to the judiciary, while the asylum issue is, at least initially, dealt with by the executive and is frequently resolved on political or pragmatic grounds. It is apparent that any argument to sever asylum from extradition, whenever both questions are presented in the same case, is difficult. Whenever political or humanitarian asylum is granted and extradition proceedings are pending, the extradition request should be denied on the same grounds. However, asylum and extradition are not so intricately linked that a state cannot deny extradition on the basis of the "political offense exception" and also refuse to grant asylum to the fugitive.[189] In such a case the requested state will allow the relator the opportunity to choose the destination of departure (known as voluntary departure) or force the person to go to a given country. The United States frequently resorts to this technique to send the individual to the country of his/her nationality, which is on its face valid, even when the state of nationality was the requesting state in the extradition proceedings, and to which extradition was denied. In other words, this approach becomes a way of achieving extradition by other means. It must be remembered that denial of an extradition request does not confer asylum status on the relator.

It is likely that a person seeking to avoid extradition will, therefore, first seek asylum as a tactic for blocking the extradition request. Such a person is likely to seek refuge in a state that has the least interest in preserving the political interests of the requesting state from which the individual fled. Whatever the offender's prior conduct was, he/she is least likely to receive refuge in a state that has close political ties or interests with the state of nationality.

The decision to seek extradition of a fugitive is usually made by the executive of the requesting state. The decision to recognize or reject the requesting state's petition, either for political or humanitarian reasons, lies with the executive in the state of refuge, even though a judicial intervention may occur in the interim. Thus, conflicting policies of distinct authoritative decision-making bodies are likely to clash during the process.

Since WWII, many states have revised their immigration laws to provide asylum for political refugees, however differently asylum may be defined. But the 1967 Protocol has imposed a certain harmonization in the laws and practices of states.[190] This has been done for the avowed purpose of protecting individuals from persecution in the country from which they fled. The decision to request extradition by the requesting state, or to grant or deny extradition by the asylum state may, however, involve the whole spectrum of their political relations. The

188 *See* Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DePaul L Rev 19, 20 (2003) (summarizing immigration statutes: under federal law, a person who is convicted of an "aggravated felony" has fewer grounds for avoiding deportation than a person who is convicted of a felony).

189 For a discussion of the "political offense exception," see Ch. VIII, Sec. 2.1.

190 *See, e.g.*, Kucana v. Holder, 130 S. Ct. 827; 175 L. Ed. 2d 694 (2010); Nemeth v. Canada (Justice), 2010 SCC 56, [2010] 3; R v. Secretary of State for the Home Department, 1988 AC 958.

standard by which the relator's conduct will be evaluated and whether he/she will be extradited or granted asylum will depend on the overall political relations between the states involved.

7. Conclusion

The multiplicity of legal processes, norms, and standards applicable ostensibly to the same or similar issues and based on the same or similar facts is, at best, confusing. However, it does serve the government's interests in that the removal of a person from the United States can be achieved in more than one way. Extradition is, so far, the process that offers the greatest due process protections and legal standards and the right to judicial review. The asylum and immigration processes, as discussed in this chapter and in Chapter IV, offer much less protection in terms of due process for the person, including substantive and procedural norms that favor the government, much more than in respect to extradition. Moreover, the legal and evidentiary standards are lesser, thus giving the government additional advantages in obtaining the intended outcome of forceful removal and even surrender to a state whose extradition request has been denied or may be denied.[191] The USA PATRIOT Act[192] and the Homeland Security Act[193] reduce due process protections for a person in the process of asylum and immigration, and the substantive norms and procedural norms are also more favorable to the government, as are legal standards. In short, the right of asylum can easily be circumvented, and there are now several alternative mechanisms to forcefully remove a person from the United States without substantial due process.

191 *See* Ch. IV.

192 *See* USA PATRIOT Act, *supra* note 4.

193 *See* Homeland Security Act, *supra* note 5.

Chapter IV

Disguised Extradition: The Use of Immigration Laws as Alternatives to Extradition

Contents

1. Introduction

Disguised extradition is a means by which states achieve jurisdiction over a person without going through official extradition processes. These procedures are lawful but they are sometimes used abusively to circumvent an otherwise accepted ground for denying the return of an individual to a requesting state.[1] This is primarily achieved through the use of immigration law. Such parallel processes are resorted to as a way of avoiding extradition if, in a given case,

1 *See generally* Steven Coren, Note, *Disguised Extradition and Abuse of Process*, 110 Law Q. Rev. 393 (1994).

extradition might be denied or delayed. In other words, if extradition is deemed unlikely and the authorities of the host states are unwilling to accept such a legal outcome, they seek other means more likely to procure the desired outcome. The same may occur in cases where extradition has been denied, and the executive branch subsequently resorts to immigration procedures to achieve the outcome that the extradition process could not.

Immigration law is the alternative regime by which a person can be delivered to a foreign state without resorting to formal extradition proceedings. Immigration law is used by the Department of Homeland Security (DHS) and its specialized immigration organ, the United States Citizenship and Immigration Services (USCIS)[2] in three ways: (1) to deny an alien's admission into the United States, (2) to deport an alien who has entered the United States lawfully, and (3) to denaturalize an individual who had become a U.S. citizen. The first two procedures were formerly known as exclusion and deportation, respectively, but since April 1, 1997, have been combined into a single procedure, known as "removal."[3] Although "removal" is the formal nomenclature for excluding and removing individuals, it is important to note that some removal proceedings are for individuals attempting to enter the United States while other removal proceedings are for individuals who lawfully entered the country, and the procedures employed prior to April 1997 are substantially the same as those employed now. As such, in order to distinguish between the two variants of removal the text may refer to "removal (exclusion)" and "removal (deportation)" to keep the underlying grounds distinct. For cases occurring before 1997 the original terminology is maintained. Removal has its own sub-regime arising under special "terrorism" measures. These practices are separate and distinct from abduction and "extraordinary rendition," which are addressed in Chapter V. The difference between them is the legality or quasi-legality of the former and the illegality or the quasi-illegality of the latter.

It should be remembered that "rendition" refers to the process of surrendering a person from one state to another or to an international tribunal, provided it is done in accordance with the legal and administrative requirements of the surrendering state. Rendition is therefore a synonym for extradition. If the rendition bypasses extradition or other legal processes, it is legally questionable although usually practiced by some states. This form of rendition is still subject to international and regional human rights law norms, however. "Extraordinary rendition" is a term used since 2001 to describe the kidnapping and transfer of individuals by the United States for purposes of interrogation and torture. Although this practice violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and other international human rights law norms, it has not been successfully challenged as a violation of the U.S. Constitution, as the U.S. Supreme Court continues to consider the Constitution and Bill of Rights applicable only on U.S. territory. This interpretation has two effects: first, U.S. and other nationals can be unlawfully seized abroad by U.S. agents or by agents of another state working for or on the behest of U.S. agents, and deprived of the protections afforded by the Constitution; second, the U.S. agents carrying out the questionable act are shielded from accountability.

Since 2001, the United States has made extensive use of immigration and other quasi-legal processes in order to obtain the surrender of persons it seeks from foreign countries without going through formal extradition processes. This is in addition to the increased U.S. domestic practice of delivering persons by and between law enforcement and intelligence officers without employing formal legal processes. In a 2001 report submitted by the Bush administration to Congress with respect to the Foreign Relations Act, it is asserted that over the preceding five years the United States had

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2 The USCIS replaced the Immigration and Naturalization Service (INS) in 2003. In this chapter all cases prior to 2003 maintain the INS terminology, while subsequent cases refer to the USCIS. Generic references to USCIS and INS practice refer solely to the USCIS.

3 INA §§ 239, 240; 8 C.F.R. §§ 1003.12 *et seq.*, 1240.1 *et seq*. For a detailed discussion of the removal process, see Ira J. Kurzban, Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool 45–453 (12th ed. 2010).

obtained the extradition of 600 persons, but during that same period of time, 200 persons were surrendered to the United States outside the extradition process through immigration, deportation, or expulsion, or without the use of any legal process whatsoever.[4] Since 2001, it is estimated that the number of persons surrendered to the United States by means other than by extradition has increased, although the exact number is unknown.

The process of surrender by means other than extradition is a dangerous trend, which is led worldwide by the United States, and which is likely to undermine international extradition as the primary legal process through which states surrender to each other a person accused or convicted of a crime. This is a dangerous trend because of the extrajudicial manner in which people are seized in one country and transferred to another, thereby denying individuals the opportunity, whether in the receiving or sending country, to challenge the process of surrender. Also, this process often involves physical use of force against the person surrendered by such means. Such physical abuses may include torture. These practices would thus thrust individuals into a legal black hole where torture and other forms of physical mistreatment are not subject to judicial scrutiny and protection.

2. Modalities of Disguised Extradition Evidenced in Certain Landmark Cases

Disguised extradition occurs when one state uses its immigration laws and police powers in such a way as to make it likely that an individual will fall under the control of the authorities of another state. In essence, it is a method by which a state makes use of its immigration laws to deny an alien the privilege of entering the state or remaining in it by means of administrative and/or judicial proceedings. In the United States this entails removal (exclusion), removal (deportation), and denaturalization. As a result of these proceedings, which sometimes test the legal limits of reasonableness and good faith, the individual in question is placed directly or indirectly in the control or reach of agents of another state that is seeking him without resorting to more burdensome extradition processes.

Disguised extradition is not per se illegal under international law because the fugitive is not abducted,[5] and because it is conducted under color of national judicial and/or administrative proceedings. However, certain aspects of the practice may nonetheless violate international and U.S. law.

The practice of disguised extradition is carried out through active or tacit cooperation between law enforcement and administrative agencies. Its success depends upon the fact that administrative proceedings in most countries confer significant discretionary power upon its authorities with respect to the removal (exclusion) and removal (deportation) of aliens. The administrative review process for such decisions, where available, is slow, and judicial review, if it is available, usually requires exhaustion of administrative remedies and is limited in scope. Administrative processes frequently lack adequate judicial oversight and remedy, and their occurrences also evidence a certain bias against unwanted aliens. The U.S. judiciary has been traditionally deferential to the executive branch in immigration matters.[6]

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4 Report on International Extradition submitted to Congress pursuant to Section 211 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (Pub. L. 106-113).

5 *See* Ch. V.

6 For a somewhat critical position of U.S. practice, see Alona E. Evans, *Extradition and Rendition: Problems of Choice, in* International Aspects of Criminal Law: Enforcing United States Law in the World Community (Richard B. Lillich ed., 1981); Alona E. Evans, *The Apprehension and Prosecution of Offenders, in* Legal Aspects of International Terrorism 493 (Alona E. Evans & John F. Murphy eds., 1978); Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 Brit. Y.B. Int' L. 77 (1960). *Contra* James W.

Disguised extradition exists because the processes of extradition and removal (through immigration law) move along two completely separate and independent tracks, and the principles, norms, processes, and evidentiary standards of each are different. Thus, law enforcement and prosecutorial officials can exploit the gap between these two processes and the differences between their norms and evidentiary standards to their benefit and achieve with one what they cannot achieve with the other.

The right of a state to admit and extend residence privileges to an alien is part of its immigration law and thus subject to national law. Some states, including the United States,[7] consider removal (exclusion) and removal (deportation) of aliens to be within their sole authority and not subject to international law. However, this position is highly questionable in light of several treaties and other sources of international law that govern the rights of refugees and that supersede national law.[8] A compelling case can be made under existing international law showing that rights conferred upon refugees entitles them to treatment equal to that granted non-refugees and that injuries to aliens subjects states to international responsibility.[9] Professor Evans, writing about this problem, stated that:

Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation*, 25 Va. J. Int'l L. 793, 814 n.102 (1985).

7 *See* Scales v. United States, 367 U.S. 203, 222 (1961) (discussing Congress's plenary power over aliens); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (extending the governmental power over aliens to deportation); Ekiu v. United States, 142 U.S. 651, 659 (1892) (holding that as "an accepted maxim of international law," the powers of exclusion and expulsion are inherent in sovereignty); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation."). *See also* Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) (stating that Congress's plenary power in those cases "bristles with severity"); Campos v. INS, 961 F.2d 309 (1st Cir. 1992) (holding that the government has power over admission and exclusion of aliens); Correa v. Thornburgh, 901 F.2d 1166 (2d Cir. 1990) (holding that the government has power over admission and exclusion of aliens); Flores v. Meese, 906 F.2d 396 (9th Cir. 1990) (holding that the government has power over admission and exclusion of aliens); Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987) (holding that the government has power over admission and exclusion of aliens); Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985) (holding that the government has power over admission and exclusion of aliens); Karmali v. INS, 707 F.2d 408 (9th Cir. 1983) (holding that the government has power over admission and exclusion of aliens); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982) (holding that the government has power over admission and exclusion of aliens); Adams v. Howerton, 673 F.2d 1036 (9th Cir.) (holding that the government has power over admission and exclusion of aliens), *cert. denied*, 458 U.S. 1111 (1982); Charles C. Hyde, Digest of International Law 216–218 (1922).

8 *See* Ch. III. *See also* Guy S. Goodwin-Gill, The Refugee in International Law (2d ed. 1996); Atle Grahl-Madsen, The Status of Refugees in International Law (1966).

9 For a state's responsibility toward aliens in international law, compare 6 Marjorie Whiteman, Digest of International Law 221 (1963) [hereinafter Whiteman Digest] with John B. Moore, 1 Digest of International Law 95 (1901) [hereinafter Moore Digest]. *See also* S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int'l L. 863 (1961); Hans W. Spiegel, *Origin and Development of Denial of Justice*, 32 Am. J. Int'l L. 63 (1938). On the United States' position on aliens' rights with respect to due process in exclusion cases, see *Chin Yow v. United States*, 208 U.S. 8 (1908), *cited in* Comment, *The Alien and the Constitution*, 20 U. Chi. L. Rev. 547, 551 (1953); Developments Recent in the Law, *Immigration and Nationality*, 66 Harv. L. Rev. 643, 661–676 (1953); Note, *Constitutional Restraint on the Expulsion and Exclusion of Aliens*, 37 Minn. L. Rev. 440 (1953); Note, *The Right to Judicial Review of Deportation Orders under the Administrative Procedure Act*, 62 Yale L. J. 1000 (1953). See also the following recent cases, each holding that classifications based on alienage are subject to relaxed scrutiny and are valid unless wholly irrational: Legalization Assistance Project v. INS, 976 F.2d 1198 (9th Cir. 1992), *app. granted* 510 U.S. 1301

> The potentiality of expulsion [or removal (deportation)] as a method for the rendition of fugitive offenders has been recognized by government officials for many years. The long borders with Canada and Mexico, the relative ease of crossing them, and the generally friendly relations prevailing between the United States and these two states have been conducive to the use of this method of rendition. For example, where a fugitive from justice in the United States has been known to be in prison in Canada, an indication to Canadian authorities of American interest in the prisoner's whereabouts upon the completion of his sentence might lead to his deportation with prior notice to interested federal or state officials of the time and place of his departure from Canada. Again, Mexican authorities, having been alerted by United States authorities to the presence in that country of a fugitive from the United States, might order his deportation on grounds of illegal entry into Mexico. Expulsion might be suggested where extradition was not available as in the case of a known "confidence man" whose offense of using the mails to defraud was not covered by treaty with the United Kingdom, or as a relatively inexpensive and more convenient alternative to extradition. It might also be held in reserve in the event that extradition should fail.
>
> Apart from deliberate rendition by expulsion, it is possible that the strict execution of a deportation order would result in placing an individual in jeopardy of criminal process in the states of destination; however, both judicial and administrative authorities have held that such ultimate result constitutes no bar to expulsion.[10]

In 1896, J.B. Moore, with what turned out to be a prophetic insight, drew attention to the possibility of the use of immigration laws for the purpose of extradition:

> It is, however, worthy of notice that the immigration laws of the United States require the return to the country from which they came, of all non-political convicts. Though this measure is not in the nature of an extradition treaty, the execution of which another government may require, its full significance, as affecting the subject of extradition, has, perhaps, hardly been appreciated. With such a provision in our statutes, it is difficult to set a limit to which the system of extradition may logically be carried.[11]

The person most vulnerable to this use and occasional abuse of immigration laws is the person who is sought by a friendly government for political reasons, or is the object of political

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(1993), *vacated, remanded* 510 U.S. 1007 (1993); Campos v. INS, 961 F.2d 309 (1st Cir. 1992); Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987); Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985).

10 Alona E. Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 Int'l law 204 (1969). *See also* 1 Moore Digest, *supra* note 9, at 259; United States *ex rel.* Giletti v. Comm'r of Immigration, 35 F.2d 687 (2d Cir. 1929); Moraitis v. Delaney, 46 F. Supp. 425 (D.C. Md. 1942); *In re* Banjeglav, Interim Doc. No. 1298, 10 I & N Dec. 351 (BIA 1963); *In re S.C.,* 3 I & N Dec. 350 (BIA 1949); Dep't of State Misc. File No. 211.55 D 47 (Belg. 1926); Dep't of State Misc. File No. 242.11 Finkelstein, Sam (Can. 1937) (concerning individual wanted in Illinois for parole violation); Dep't of State Misc. File No. 242.11 Cerafisi, Michael (Can. 1935) (regarding individual wanted in New York for parole violation); Dep't of State Misc. File No. 242.11 B 17 (Can. 1922) (involving individual wanted for obtaining money under false pretenses); Dep't of State Misc. File No. 259.11 Rosen, Samuel (Den. 1931-33); Dep't of State Misc. File No. 212.11 Steele, Robert (Mex. 1940-41); Dep't of State Misc. File No. 211.41 (U.K. 1932); Dep't of State Misc. File No. 248.11 Long, John M. (S. Afr. 1931); Hackworth Digest 30. In *Johnson v. Eisentrager*, Justice Jackson noted that a "resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a `declared war' exists," 339 U.S. 763, 775 (1950). In the *Kendler* case, deportation was ordered on grounds that the alien had concealed a previous criminal record in Canada; he was "turned over to the Royal Canadian Mounted Police, who wanted him on forgery charges." Immigration and Naturalization Service, Annual Report 9 (1962).

11 1 The Collected Papers of John Bassett Moore 277 (1945).

pressures in the asylum state.[12] The same channels are also used to favor and facilitate law enforcement cooperation between friendly states to combat certain forms of criminality such as drug trafficking, terrorism, and organized crime.[13]

A landmark English case is *Regina v. Secretary of State of Home Affairs*, ex parte *Duke of Chateau Thierry*,[14] in which a challenge was brought against the validity of the use of the power of deportation in order to secure the return of the duke to France to face military charges for desertion. It was argued on his behalf (1) that the Home Secretary had no power to order the deportation of an alien to a particular country; and (2) that the duke was, in fact, a political refugee and would be punished for a political offense in France. The English Divisional Court agreed with the duke that immigration laws gave no power to the secretary of state to order deportation to any particular country.[15] Although the deportation order did not, on its face, purport to prescribe the destination of the alien upon deportation, it was nonetheless shown that immigration authorities admitted to the court that the decision to deport had been made for the purpose of returning the duke to France. Viscount Reading, C.J., concluded that:

> In form the order is correct, but this Court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that this is the object and intention of the Executive in making the order, we must treat it as if the order did in effect state that the alien was to be deported to France.[16]

The Court of Appeal reversed, however, and affirmed the deportation.[17] Its judgment is authority for a number of important principles:

> (i) The Home Secretary has no power to order the deportation of an alien to a foreign state specified in the deportation order;
>
> (ii) The Aliens Act did, however, entitle the Home Secretary to cause an alien to be detained and placed on board a particular ship selected by the Secretary of State and there detained until the ship finally left the United Kingdom. The result being that the alien would be

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12 *See* Ch. VIII, Sec. 2.1 (discussing the "political offense exception"). *See also* Evans, *The Political Refugee in United States Immigration Law and Practice, supra* note 10, at 205; Henry P. DeVries & Jose R. Novas, *Territorial Asylum in the Americas—Latin American Law and Practice of Extradition*, 5 Inter-Am. L. Rev. 61 (1963). Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253 (1988), provides that a person who has been admitted into the country and is then found to be deportable may request a temporary withholding of deportation on the plea that he would be subjected to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in the country to which he is to be deported. Section 208(a), added to the Act in 1980, 8 U.S.C. § 1158(a) (1988), provides for a discretionary grant of asylum to, among others, political refugees. For a thorough discussion of extradition and asylum *see* Ch. III.

13 *See* M. Cherif Bassiouni, *Effective National and International Action against Organized Crime and Terrorist Criminal Activities*, 4 Emory Int'l L. Rev. 9 (1990).

14 *Regina v. Secretary of State of Home Affairs*, ex parte *Duke of Chateau Thierry*, 1 K.B. 552 (Eng. K.B. Div'l Ct. 1917); 1 K.B. 922 (Eng. C.A. 1917).

15 5 B.I.L.C. 203. In this case the Attorney General admitted on behalf of the Home Office that there was no power to order deportation to a particular named country. Nonetheless, the police and other authorities had indicated to the intended deportee that it was proposed to deport him to Czechoslovakia. *Cf.* Papadimitriou v. Inspector-General of Police and Prisons, 12 Ann. Dig. 231 (Palestine Sup. Ct. 1944).

16 1 K.B. at 555–556 (1917). Compare Lord Reading's judgment in *Regina v. Governor of Brixton Prison, ex parte* Sarno, 2 K.B. 742, 749 (Eng. K.B. Div'l Ct. 1916), where dealing with the validity of an order for the deportation of a Russian, he said: "If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, this court would have jurisdiction to deal with the matter."

17 1 K.B. 922 (Eng. C.A. 1917). *See also* C. v. E., 13 I.L.R. 146 (1946).

obliged to disembark at the port to which the vessel sailed. Thus, the Secretary of State could lawfully, but indirectly by selecting the means of departure, effectuate what he had no power to do directly, namely secure an alien's deportation to a particular state. In the case of the Duke of Chateau Thierry, the order for his deportation was valid, as it did not purport to order his deportation specifically to France. Although it was admitted that the Home Secretary intended under the order to send the Duke to France, this was immaterial because the procedure employed was to specify the Duke's departure by a particular ship (which happened to be sailing for France) and not to require in the order itself that he be deported to France;

(iii) The fact that an alien is a political refugee, or is likely to be punished for a political offense in the country to which it is intended that he should, albeit indirectly, be deported, does not invalidate a deportation order made against him.[18] However, the Home Secretary expressly disclaimed the intention of using deportation proceedings against political refugees.[19] The same view is held by the British Government today.[20] It should be noted that the Duke of Chateau Thierry failed to satisfy the court that he was a political refugee; and

(iv) A court can invalidate a deportation order only on very limited grounds. Because deportation (or removal in the United States) is within the powers of the executive branch as it concerns aliens, judicial review is before the administrative court and it is limited to abuse of discretion by the administration.

The court of appeal took the view that the use of deportation proceedings to secure, in effect, the surrender of military deserters is lawful.[21] Subsequently, in *Regina v. Superintendent of Chiswick Police State*, ex parte *Sacksteder*,[22] the court of appeal again upheld the validity of the use of deportation orders to secure the return of military deserters to France.

Significantly, in the surrender of the Duke of Chateau Thierry, it was admitted on behalf of the states concerned that the principles of specialty and non-surrender of political offenders should apply. The states themselves treated the surrender as a special form of extradition to which the general rules governing extradition should be applied.[23]

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18 *Cf. Regina v. Governor of Brixton Prison ex parte Sliwa*, 1 K.B. 169 (K.B. Div'l Ct. 1952), I.L.R. 310 (1951).

19 1 K.B. 922, 929 (1917) (Swinfen Eady L.J.).

20 Elihu Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law: Survey and Comment, VI*, 7 Int. & Comp. L. Q. 514, 553–555 (1958).

21 1 K.B. at 928–932 (1917). This can readily be seen from the following extracts from the judgments:

> In July, last inquiry was made at the request of the French Government as to the failure of the respondent (who is a Frenchman, within military age, whether reckoned according to the French or the British standard) to discharge his military duties… These [French] authorities dispute that he is a political refugee; they state that his return to France is sought in connection with his "irregular military situation" and for no other cause, and that he is not known to the French police for any other offense. An assurance has been given by the French Government that the respondent, if returned to France, would be treated as a military absentee, and not as liable to prosecution for any other offense. We were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that country who are of military age and liable to military service, and that it was by reason of this agreement that the Secretary of State made this (deportation) order.

Id.

22 *Regina v. Superintendent of Chiswick Police Station,* ex parte *Sacksteder*, 1 K.B. 568 (Eng. K.B. Div'l Ct. 1918). *See* also *Regina v. Secretary of State for Home Affairs,* ex parte *Venicoff*, 3 K.B. 72 (Eng. K.B. Div'l Ct. 1920).

23 *Id.*

Notwithstanding the apparent ease and convenience of the removal (deportation) device as a substitute for a formal process of extradition, the fugitive is still entitled to the benefits of national legal processes. Prior to removal (deportation), the alien must first be found deportable, but that determination is subject to limitations.

These limitations are illustrated by the *Horn* case.[24] Horn, a prisoner in a U.S. federal penitentiary, was wanted by Canadian authorities during WWI on charges of sabotage. The Department of Justice was at first inclined to deport him to Canada upon completion of his sentence, as an enemy alien and a threat to the safety of the United States. The Department of Justice, however, decided against this procedure, apparently on grounds of its doubtful legality as an alternative to extradition. Removal (deportation) is not an available remedy where the fugitive can show that he entered the country legally and has not otherwise violated immigration laws, or that he is a national of the state from which he is under threat of deportation, or where the immigration authorities are satisfied that he was not actually implicated in an offense in the requesting state as alleged by the state's authorities. Horn was not surrendered to Canada because he was not deportable for violating immigration laws and was not extraditable under the treaty.

It is always possible, however, for the alien to elect "Voluntary Departure" to a country of his/her own choice and thereby avoid compulsory removal to a country in which he/she might be subject to criminal prosecution. The discretionary power of the executive in such cases is likely to be used to make a bargain with the foreign authorities. Such was the case in 1961 in the deportation of Mikhail Gorin to the Soviet Union and the exchange of Colonel Rudolf Abel and the U-2 pilot Francis Gary Powers between the Soviet Union and the United States.[25]

A counterpart to the device of removal (deportation) is removal (exclusion), which is designed to prevent the alien from entering the country, on the grounds that he/she is inadmissible under the terms of the INA. A means of carrying out disguised extradition by the use of exclusion is to limit the options to the alien's departure, thus causing him/her to fall into the control of agents of the foreign state. A state desiring to secure an individual without resorting to extradition, or after an extradition request fails to effectuate extradition of the individual, can request the state of refuge and its surrounding states to exclude the individual by denying his/

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24 Horn v. Mitchell, 232 F. 819 (1st Cir. 1916), *appeal dismissed*, 243 U.S. 247 (1917). *But see* Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967), wherein the court stated:

> While the formalities of extradition may be waived by the parties to the treaty, *Glucksman v. Henkel*, 221 U.S. 508, 31 S. Ct. 704, (1910), a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens. See *Fung Yue Ting v. United States*, 149 U.S. 698, 709, 13 S. Ct. 1016, (1893).
>
> In the instant case the evidence shows that the removal of the appellants from Mexico was not initiated by the United States. At the hearing in the district court on the appellants' motion to dismiss, the Sonora Chief of Police who had arrested the appellants in Mexico testified that to his knowledge no demand for extradition was ever made by the United States; that the appellants were deported by Mexican immigration authorities as undesirable aliens found in Mexico under suspicious circumstances; that it is the Mexican practice to refuse, in such circumstances, to permit aliens to remain in Mexico; that regardless of any interest of the United States in the appellants, they would have been returned to the Mexican–American border. The evidence showed that it was the Mexican authorities who first contacted American officials with regard to the appellants.

25 10 Foreign Relations of the United States 937 (1958–1960). The exchange of Colonel Abel, convicted in the United States on espionage charges, was for U-2 pilot Francis Gary Powers. J. Donovan, Strangers on a Bridge: The Case of Colonel Abel 371 (1964). The return to Mexico of Lopez, who had been kidnapped from Mexico by Hernandez and Villareal, in exchange for Mexico's dropping its extradition request for Hernandez, was suggested to the Mexican Government in 1935. Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934).

her entry into the state. This leaves no alternative to the state of refuge that excludes the alien but to remand the individual to the country that is seeking him/her.[26]

The landmark exclusion case remains *Soblen*.[27] Dr. Robert Soblen was accused of espionage against the United States. Released on bond, he fled to Israel, claiming asylum and citizenship as a Jew under the Israeli Law of Return. Israel, under U.S. pressure, found that Dr. Soblen did not qualify for Israeli citizenship, and placed him on a flight bound for New York. Interestingly, there were no other passengers aboard except U.S. marshals. In flight, close to England, Dr. Soblen attempted suicide. The plane made an emergency landing in Great Britain, and Dr. Soblen was taken to a hospital. The United States still wanted Dr. Soblen, but the crime of which he was accused was clearly a "political offense" and thus, non-extraditable under the Anglo–American extradition treaty of 1931.[28] Great Britain, however, found that Dr. Soblen had not been "legally admitted" into the country and ordered his departure on the first available flight of the day, presumably to be returned to Israel. It so happened that there were no flights bound for Israel that day and that the first flight out was to New York aboard the plane that had brought Dr. Soblen from Israel. En route to the airport, Dr. Soblen committed suicide. Thus, in *Soblen* the legal process of extradition was avoided, while the result desired by the states involved was basically attained. It is interesting to note that a British court reviewing the *Soblen* case found that the deportation order was valid.[29] The court recognized the possibility of the use of deportation in place of extradition, but held that the burden of showing abuse of discretion in deportation lies with the party who was ordered deported, which is difficult in practical terms.

Another cause célèbre was that of Klaus Barbie, an SS officer in Lyon, France, during WWII, who in 1945 was tried in absentia by a Lyon court and found guilty of war crimes.[30] With the help of the United States, Barbie concealed his identity, and lived in South America after the end of the war. France eventually sought Barbie's extradition from Bolivia, where he had been residing under a false identity. In 1973, the Bolivian Supreme Court refused the extradition request. After a change in government in Bolivia, Barbie was expelled on February 4, 1983, to Cayenne, French Guiana, from where he was flown to Lyon to stand trial. After a long and highly publicized trial he was found guilty on July 3, 1987, of "crimes against humanity" and was sentenced to life imprisonment. The Lyon court rejected Barbie's argument that it had no jurisdiction over him because he was unlawfully expelled from Bolivia to a French-controlled territory. The court held that it had jurisdiction even though it was secured by disguised extradition after a formal extradition request had been refused.

Another variant of disguised extradition involves the intentional misrepresentation of facts by one state to secure the deportation of an individual from another state. A prominent example of this is the case of Samuel Evans, general counsel to Adnan Khashoggi (a leading figure in the Iran-Contra affair), who was deported from Bermuda to the United States where he and others were tried for arranging arms sales to Iran.[31] In order to secure Evans's deportation, the United

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26 The *Insull* case provides a good example of the use of requests for exclusion addressed to countries in the vicinity of Greece in order to force the fugitive to return to face charges in the United States. 2 Foreign Relations of the United States 566 (1934); 2 Foreign Relations of the United States 552 (1933).

27 Paul O'Higgins, *Disguised Extradition: The Soblen Case*, 27 Mod. L. Rev. 521 (1964). The converse can also occur whenever expulsion is used to defeat extradition. *See In re* Esposito, 7 Ann. Dig. 332 (STF 1932) (Braz.).

28 47 Stat. 2122 (1933).

29 *R. v. Brixton Prison (Governor),* ex parte *Soblen*, 3 W.L.R. 1154 (Q.B. Div'l Ct. 1962).

30 Matter of Barbie, Judgment of Oct. 6, 1983, G.P. 710 (Fr). *See also* M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law 543–544 (2d ed. 1999) (discussing the Barbie case); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L 289 (1994).

31 *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1987).

States had not advised Bermuda that the supposed buyer of the arms was not in fact an Iranian representative but a U.S. agent playing a role in a U.S. sting operation.

Evans and the other defendants moved to dismiss for lack of jurisdiction, arguing that jurisdiction had been improperly obtained through fraud on the government of Bermuda.[32] The defendants claimed that the offenses with which they had been charged were not extraditable and that the United States gained jurisdiction over them by convincing Bermuda through misrepresentations to deport them to the United States.[33] The court observed that "absent protest by Bermuda as to a violation of international law and where Bermuda has not sought defendants' return, defendants have no standing to assert that a fraud has been committed upon Bermuda."[34] Because Bermuda did not protest the misrepresentation, the court denied the defendants' motion and affirmed its jurisdiction. Thus, in the *Evans* case deportation replaced extradition, which could not have been effectuated as the offenses charged were non-extraditable.

Disguised extradition is not limited to instances involving well-known persons. The Mexican police arrested two men, Douglas Stevenson and Elbert Nero, after the two had attempted to sell tires in Mexico from a vehicle stolen in Arizona. Following communication between the Mexico and Arizona police authorities, the Mexican police transferred Stevenson and Nero to Mexican immigration authorities, who transported them to the border and delivered them to sheriff's deputies from Maricopa County, Arizona. Stevenson and Nero were tried for and convicted of a federal crime of transporting a stolen motor vehicle in foreign commerce. The two men appealed on the grounds that because their surrender to the U.S. authorities by the Mexican authorities constituted an extradition proceeding in violation of the provisions of the Extradition Treaty between Mexico and the United States, the court lacked jurisdiction over them. The Ninth Circuit Court of Appeals denied the motion to dismiss on the grounds that the surrender of Stevenson and Nero did not violate any applicable laws, including the Extradition Treaty.[35] The court held that because the United States did not demand the surrender of Stevenson and Nero, their surrender by Mexico was not an act of extradition but rather a unilateral action of Mexico, which allowed that state to rid itself of undesirable aliens.[36] The disguised extradition through deportation was thus successfully effectuated.

This overview of disguised extradition would not be complete without a discussion of the *Tang* case. Although *Tang* did not involve disguised extradition *strictu sensu*, as it involved no use of the immigration procedures ordinarily used to effectuate delivery of a person to a state seeking him, the case did involve use of summary judicial proceedings allowing United States marshals to deliver Tang to the Hong Kong authorities that sought him.

The United Kingdom, on behalf of the Crown Colony of Hong Kong, sought the extradition of Tang from the United States on charges of fraudulent trading and accounting practices.[37] After a hearing, Judge Edmund Palmieri of the Southern District of New York certified to the secretary of state that sufficient evidence existed to sustain the charges against Tang and that he was extraditable.[38] Tang subsequently filed a habeas petition that Judge Palmieri, the same judge who certified Tang's extraditability, considered and denied.[39]

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32 *Id.* at 978.

33 *Id.*

34 *Id.* at 979.

35 *Stevenson v. United States*, 381 F.2d 142, 143 (9th Cir. 1967).

36 *Id.* at 144.

37 United States v. Tang, 657 F. Supp. 1270, 1271 (S.D.N.Y. 1987).

38 *In re Extradition of* Tang Yee-Chun, 674 F. Supp. 1058, 1070 (S.D.N.Y. 1987).

39 Tang Yee-Chun v. Immundi, 686 F. Supp. 1004, 1013 (S.D.N.Y. 1987).

Tang then filed an appeal with the Second Circuit from Judge Palmieri's denial of the habeas petition along with a motion for stay of execution of the extradition order. As there is a right to appeal from a district court's denial of a habeas corpus petition, it would follow that a stay should be granted as a matter of right pending the determination of the habeas denial appeal. The motion for stay of execution was denied in an oral decision, and on Friday afternoon Tang's counsel sought through the clerk of the emergency judge of the Second Circuit an order for a stay of execution. The clerk reported that the motion was denied, thus allowing U.S. marshals to put Tang on a plane and send him to Hong Kong over the weekend. Once Tang left the United States it was too late to appeal the oral denial of the stay of execution.

Such a device, which in a sense constitutes a violation of the petitioner's rights when done over a holiday period, creates a window of opportunity for U.S. marshals to effectuate the delivery of a person under sufficient color of law to make it appear legal but which, in a sense, may also be counted as a form of disguised extradition even though it does not involve the use of immigration procedures.

3. U.S. Immigration Procedures as Alternatives to Extradition

3.1. Introduction

In light of the cumbersomeness and the difficulties that have characterized the process of extradition, particularly the time delays and numerous procedural requirements,[40] which sometimes transform extradition proceedings into mini-trials, the tendency of states has been to turn to alternative forms of rendition. Although states still resort to abduction,[41] it violates world public order and the individual human rights of the persons abducted. For these reasons, states are probably more loathe to use abduction than they are to use other legal or quasi-legal approaches to rendition. An alternative approach often is the use of immigration procedures.

In the United States, the practice has not been very frequent but has been resorted to at times when attempts to extradite have failed, such as in the *Doherty*,[42] *Mackin*,[43] or *McMullen*[44] cases, or where extradition was not possible, such as in the *Badalamenti* case.[45] The greatest frequency in the use of disguised extradition by the United States is with Mexico[46] and Canada.[47] In practice, this means that citizens of Mexico, Canada, and the United States whose visas have expired are sent across the border to the waiting hands of the federal or state agents of the neighboring state.

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40 *See* Chs. IX—XII.

41 *See* Ch. V.

42 *See infra* Sec. 3.2.2 (discussing the *Doherty* case) and Ch. III (discussing Doherty's asylum claim).

43 *In re* Mackin, No. 86 Cr. Misc. 1, at 47, 1988 U.S. Dist. LEXIS 7201, at *1 (S.D.N.Y. 1981), *appeal dismissed,* 668 F.2d 122 (2d. Cir. 1981).

44 *In re* McMullen, 989 F.2d 603, 604 (2d Cir. 1993).

45 *See infra* Sec. 3.2.1 (discussing the *Badalamenti* case).

46 *See* Bruce Zagaris, *Mexico Deports Ohio Executive Fugitive Convicted of Fraud*, 27 Int'l Enforcement L. Rep. 515–517 (Jan. 2011); Bruce Zagaris, *Extraditions between the U.S. and Mexico Increase Significantly*, 24 Int'l Enforcement L. Rep. 47–49 (Feb. 2008) (discussing the deportation of a Mexican fugitive to Mexico by the United States); Rodrigo Labardini, *Deportation in Lieu of Extradition from Mexico*, 20 Int'l Enforcement L. Rep. 239 (June 2004); Rodrigo Labardini, *Life Imprisonment and Extradition: Historical Development, International Context, and the Current Situation in Mexico and the United States*, 11 Sw. J.L. & Trade Am. 1 (2005).

47 Contrary to the practice during the Vietnam War in the 1960s, *Canada is now deporting U.S. military deserters* from the Iraq war back to the United States. *See* Bruce Zagaris, *Canada No Longer a Haven for U.S. Military Deserters*, 24 Int'l Enforcement L. Rep. 399–401 (2008); Bruce Zagaris, Canada

In the *Luster* case, Andrew Luster was expelled from Mexico to the United States, where he had been convicted in absentia.[48] Luster was the heir to Max Factor and was charged in Ventura County, California, with eighty-seven counts of rape, sodomy, and poisoning.[49] He fled to Mexico mid-trial, but was convicted in absentia and sentenced to 124 years in prison.[50] Because of his conviction in absentia, Mexico most likely would have refused his extradition. After he was captured by bounty hunters, Mexico expelled him to the United States and charged the bounty hunters with kidnapping.[51]

Another example is that of Victor Tafur, who was arrested in 2000 and announced as the first Colombian to be extradited from the United States.[52] At the time of Tafur's arrest, the Immigration and Naturalization Service (now the United States Customs and Immigration Service)[53] served Tafur with a notice of deportation while he was in his jail cell.[54] The service of the notice assured that if he was released on his extradition warrant, then removal proceedings would begin.[55]

The United States has not yet developed a systematic, consistent policy on the use of immigration laws as an alternative to extradition. One exception is the denaturalization and deportation of Nazi war criminals, where the process is well developed.[56] At various times this policy has been directed against members of the Communist Party[57] and members of organized

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Deports U.S. Military Deserter and U.S. Sentences Him to 15 Months, 24 Int'l Enforcement L. Rep. 436–437 (2008).

48 Labardini, *supra* note 46.

49 *Id*.

50 *Id.*

51 *Id.*

52 Ann Power, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int'l L. J. 277 (2002); Douglas Waller & Cathleen Farrell, *The DEA's Big Bust: Did They Get the Wrong Guy?*, Time, Apr. 17, 2000.

53 In 2003 the Immigration and Naturalization Service was incorporated into the Department of Homeland Security as the United States Customs and Immigration Service. *See* Ch. III, Sec. 5.1 for more information.

54 Notice to Appear, *In re* Tafur-Dominguez (File No. A077 626 394, Case Nol PMI0003000060) (INS Mar. 17, 2000). After the magistrate denied extradition, the INS warrant was still pending.

55 Power, *supra* note 52.

56 *See infra* Secs. 3.2.2 and 3.2.3.

57 Following the end of WWII, during the developing period of the Cold War, as part of a program to drive communists from positions of power in the United States, the Department of Justice intensified its campaign to deport alien communists. The undertaking was, however, frustrated by a number of stumbling blocks. The deportation statute then in effect made no reference to communists or Communist Party members, as such. It provided only for the deportation of aliens who personally advocated, or belonged to an organization that advocated, the violent overthrow of the U.S. government. In the wake of the Supreme Court's analysis of the Communist Party in *Schneiderman v. United States*, 320 U.S. 118 (1943), the lower courts refused to take judicial notice that the Communist Party fell within the meaning of the deportation statute. Thus, the question of whether the Communist Party had a violent nature needed to be addressed in every deportation proceeding. This turned out to be a costly and time-consuming process, resulting in the production of former Communist Party members to authenticate and testify as experts on the voluminous literature of the Party. In desperation, the Justice Department sought legislative relief, and the deportation statute was ultimately amended to its present form, which specifically names the Communist Party, among others, as a proscribed organization. Maurice A. Roberts, *The Grounds of Deportation, Statute of Limitations on Deportation, and Clarification of the Nature of Deportation*, 57 Interpreter Releases 157 (1980).

crime, particularly the Mafia.[58] More recently, the focus of denaturalization and deportation proceedings has been on terrorists.

There have been numerous examples of deporting alleged terrorists over recent years, both to and from the United States. One of the individuals behind the 1993 World Trade Center bombing, Ramzi Ahmed Yousef, was apprehended by Pakistani authorities in February of 1995, and turned over to the FBI, who transported him to the United States the next day, bypassing formal extradition processes.[59] In 2003, Khalid Shaikh Mohammed, the alleged terrorist behind the September 11 attacks, the 1993 World Trade Center Bombing, and the 2002 attack on the USS *Cole* was also captured by Pakistani authorities and turned over to the United States, who detained him at the U.S. air base in Bagram, Afghanistan.[60]

When another state does not want to cooperate with the United States' attempt to attain terrorists, the United States proceeds with alternatives outlined in a Presidential Decision Directive, which states:

> If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.

When a suspect's location is ascertained, an asylum state may cooperate by extraditing the suspect pursuant to a treaty, or handing him/her over to U.S. authorities by deportation or expulsion. A problem emerges when the asylum state does not cooperate with methods of rendition, including, but not limited to, extradition. In the case of Alvarez-Machain, Mexico denied the United States' requests for extradition.[61] After Mexico's decision, U.S. agents abducted Alvarez-Machain, without the consent of the Mexican government, and returned him to the United States for trial.

Another possibility is where the United States does not have an extradition treaty with an asylum state. Without an extradition treaty, a state has no general duty under international law to extradite.[62] For example, the asylum state may be providing sanctuary for criminal suspects, such as Afghanistan's harboring of Osama bin Laden and al Qaeda operatives. In the aftermath of the September 11th attacks, evidence pointed to Osama bin Laden and al Qaeda as potential

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58 *See Costello v. United States*, 365 U.S. 265 (1961); United States v. Galato, 171 F. Supp. 169 (M.D. Pa. 1959); United States v. Palmeri, 52 F. Supp. 226 (E.D.N.Y. 1943).

59 Matthew Slater, *Trumpeting Justice: The Implications of U.S. Law and Policy for the International Rendition of Terrorists from Failed or Uncooperative States*, 12 U. Miami Int'l & Comp. L. Rev. 151, 168–169 (2004); U.S. Department of Justice, Terrorism In The United States 9 (1997), *available at* http://www.fbi.gov/stats-services/publications/terror_97.pdf.

60 Slater, *supra* note 59, at 168–169. *See* Liz Sly, *Threat from bin Laden's Followers Is Lower, Officials Say*, Chi. Trib, Mar. 21, 2003, at 16, *available at* 2003 WL 17254163; Testimony of Robert S. Mueller, III, Director, FBI, Before the U.S. Senate Committee on the Judiciary on Mar. 4, 2003. The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. 1 (2003), *available at* http://judiciary.senate.gov/testimony.cfm? id=612&wit_id=608; Michael Daly, *In Our Grasp Years Earlier*, N.Y. Daily News, Mar. 2, 2003, at 2, *available at* 2003 WL 4067029.

61 *See* Royal J. Stark, *Comment: The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and United States Sponsored Kidnapping of Foreign Nationals Abroad*, 9 Conn. J. Int'l L. 113, 149 (1993) (discussing that Mexico did not violate international law by declining to extradite Alvarez-Machain to the United States).

62 *Id.* at 149–150.

suspects. However, Afghanistan's Taliban regime, which was sympathetic to al Qaeda, refused to cooperate with U.S. authorities in extraditing those suspected of involvement in those attacks.

In the case of an uncooperative state, the United States first tries to induce cooperation through diplomacy, economic sanctions, or even through disguised extradition, such as luring. PDD-39 indicates that the United States may return suspects by force, without the cooperation of an asylum state.[63] Although forcible abduction of criminal suspects from foreign states will not divest U.S. courts of jurisdiction, it nonetheless violates international law.[64]

There could be serious international consequences for the United States if it were to forcibly abduct a suspect from an uncooperative foreign state. For instance, it could face a claim before the International Court of Justice for violating the asylum state's territorial integrity.[65] The UN Security Council could also take up the matter and condemn the abduction, as it did following Israel's abduction of Eichmann from Argentina in 1960.[66] However, it is unlikely that the Security Council could pass such a resolution, as the United States is a permanent member and has veto power. Another possibility is a military response by the asylum state to the unauthorized abduction.[67]

Immigration laws provide a simple and easily accomplished alternative to extradition. To use this method of rendition, one would have to find out on what basis a person has established status in the United States, and then determine on what grounds, under the immigration laws, that status can be terminated or revoked. For example, persons whose status in the United States derives from any type of a visa other than an immigration visa do not have the same due process guarantees under the Fourteenth Amendment as do permanent residents or citizens of the United States, though permanent residents are allowed lesser rights under the amended Immigration and Nationality Act (INA) §§ 235(c), 240(b), and Title V. Consequently, non-immigrants' rights are determined exclusively by the INA, and their due process rights are limited to the appropriate application of the INA's provisions. It is clear, with respect to these individuals, that once their visas expire, nothing obligates the United States to renew or extend them. In the exercise of his or her discretion, the executive may or may not grant visa renewals and extensions. If the executive does not renew or extend an alien's visa, the individual has no legal basis for remaining in the United States and will be required to leave the country.

The question then arises whether the individual's departure will be voluntary or involuntary, and whether the individual will be free to leave for a destination of his/her choice. If he/she leaves prior to the termination of his/her lawful status in the United States, he/she has the right to leave for any destination of his/her choice. If the visa holder overstays his/her lawful status, he/she becomes deportable under the INA. He/she may seek voluntary departure under § 240B of the INA, but the voluntary departure grant is discretionary, and

63 See Presidential Decision Directive-39: U.S. Policy on Counterterrorism (June 21, 1995), *available at* http://www.fas.org/irp/offdocs/pdd39.htm.

64 *See* M. Cherif Bassiouni, International Extradition: United States Law and Practice 17 (3d ed. 1996).

65 *See* Michael Gunlicks, *Citizenship as a Weapon in Controlling the Flood of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 Geo. Wash. L. Rev. 551, 566 (1995) (discussing potential consequences for violations of international law).

66 U.N. SCOR, 15th Sess., 865th mtg, at 4, U.N. Doc. S/INF/15/Rev.1 (1960).

67 Slater, *supra* note 59, at 181–183.

final authority rests with the executive.[68] At this juncture, the individual may file a petition for asylum[69] so long as the petition is made within one year of the individual's arrival in the United States.[70]

If the individual's application for voluntary departure, and any other remedy he/she may have applied for, is denied, the individual will be found to be a deportable alien and subject to removal. Under the INA, a deportable alien has a right to designate a country of deportation.[71] The executive, however, has the authority to refuse deportation to the country of the alien's choice if such deportation would be prejudicial to the interests of the United States.[72] The alien can thus be sent to his/her country of origin, and if his/her country of origin is the one seeking him/her, then, clearly, removal would obviate the need for extradition. On the other hand, he/she may be deported to any other country on an involuntary basis, provided such country would accept him/her, unless it is to a country where the alien fears for his/her life or freedom because of his/her race, religion, nationality, membership in a social group, or political opinion, as described by INA § 241(b)(3)(A). This process would also obviate the need for extradition proceedings. Thus, deportation is one of the ways by which extradition can be circumvented.

As Professor John Murphy has noted,

> [Exclusion and deportation] are not designed for the purpose of cooperation in furthering the international criminal justice system. Rather, both exclusion and deportation are civil processes, designed for immigration control and dominated by the executive. As a consequence, exclusion and deportation proceedings utilized for rendition purposes do not apply criminal justice standards, either with respect to the interests of the states involved or to the protection of the accused.[73]

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68 8 C.F.R. 240.25 states that if the alien is permitted voluntary departure in lieu of removal proceedings, then to be eligible for voluntary departure, an alien must show, among other things, that he is able to leave the United States at his own expense. However, if the immigration judge orders voluntary departure in lieu of removal after removal proceedings have taken place, then the alien, in order to be eligible for that voluntary departure, has to have been a person of good moral character for the past five years. 8 U.S.C. § 1229c(b)(1)(B) (2000, as amended in 2006). Additionally, an alien found deportable because of a conviction for an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), or for terrorist activity under 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. 1999), is ineligible for voluntary departure. In making its decision as to the exercise of discretion in a request for voluntary departure, the executive also considers the alien's immigration history, nature of her entry into the United States, violation of immigration and other laws, length of residence in the United States, family ties in the United States, and humanitarian needs. *In re* Seda, 17 I & N Dec. 550 (BIA 1980). Decisions concerning voluntary departure are reviewed under an abuse of discretion standard. Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991). For an overview of the development of voluntary departure in U.S. law and its relationship to removal proceedings, see Michael P. Bracken, Comment: The Proper Interplay of the Voluntary Departure and Motion to Reopen Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act, 57 Cath. U. L. Rev. 511 (Winter 2008).

69 *See* Ch. III.

70 INA § 208(a)(2)(B).

71 8 U.S.C. § 1231(b)(2)(a) (2000).

72 This decision, absent fraud, lack of jurisdiction, or unconstitutionality, is not reviewable. Doherty v. United States, 908 F.2d 1108, 1113–1114 (2d Cir. 1990), *rev'd on other grounds,* 502 U.S. 314 (1992); Doherty v. Meese, 808 F.2d 938 (2d. Cir. 1986).

73 John Murphy, Punishing International Terrorists: The Legal Framework for Policy Initiatives 81–82 (1983).

3.2. Exclusion, Deportation, and Denaturalization Procedures

INA removal (exclusion) provisions apply to persons deemed not to have entered the United States yet, while the removal (deportation) provisions apply to persons who lawfully entered into the country. Distinguishing between those who have been admitted from those seeking admission has been defined by the amended INA § 101(a)(13)(A).[74] Because aliens in removal (deportation) proceedings are afforded more rights and procedural safeguards than aliens in removal (exclusion), it may make a difference in which of the two proceedings the alien is placed. Prior to the passage of the 1980 Refugee Act, there was no forum for claims of refugee status except in deportation proceedings under § 243(h) of the pre-1996 amended INA, the provision for temporary withholding of removal to countries where the deportee fears persecution. At present, the reformed INA § 241(b)(3) replaced § 243(h) by granting a conditional withholding of removal to a country where the alien would be unsafe. On the other hand, asylum requests may be filed by the alien inter alia during removal proceedings, and the immigration judge may adjudicate both proceedings regardless of whether asylum was granted.[75]

The INA specifies procedures for adjudicating removal through excludability and deportability. Because aliens in the United States have more rights than those merely "knocking at the gates," aliens are afforded greater protection in removal (deportation) hearings than in removal (exclusion) hearings. Additionally, aliens in removal (deportation) proceedings have more avenues of relief available to them than aliens in removal (exclusion) proceedings, and the government bears the burden of proof in showing them removal (deportable).[76] On the other hand, in removal (exclusion) proceedings, except for returning resident aliens, the alien bears the burden of establishing admissibility into the United States.[77] Historically, aliens already in the United States were entitled to more protection under the Due Process Clause of the Constitution, whereas those "knocking at the gates" did not enjoy the same benefits.[78] After the 1996 amendments to the INA this is no longer the case.

It is clear that a host country would want to allow itself flexibility and discretion in its efforts to filter out unwanted persons from the masses that flow to its ports. However, this flexibility may cause immigration procedures to be used beyond their designated purposes, and immigration law may thereafter become a viable rendition device alternative to extradition.

3.2.1. The Removal (Exclusion) Process[79]

If a requested country wishes to extradite an alien who seeks entry to its territory but finds extradition procedures to be too cumbersome, it may resort to removal (exclusion) procedures

74 The INA defines "admission" and "admitted" as "the lawful entry of an alien into the United States after inspection and authorization by an immigration officer" under 8 U.S.C. § 1101(a)(13) (2000, as amended in 2006). Additionally, "entry" has been administratively and judicially construed as (1) a crossing into the United States territory, (2)(a) inspection and admission by an immigration officer, or (b) intentional evasion of inspection by an immigration officer, and (3) freedom from restraint. *In re* Patel, Interim Dec. 3157 (BIA 1991); *In re* Ching and Chen, 19 I & N Dec. 203 (BIA 1984); *In re Lin*, 18 I & N Dec. 219 (BIA 1982); *In re* Pierre, 14 I & N Dec. 467 (BIA 1973).

75 8 C.F.R. § 208.16(a) (1990). *See also* Ch. III (discussing asylum procedures and extradition).

76 8 U.S.C. § 1229a(c) (Supp. 1999). *Also see generally* Woodby v. INS, 385 U.S. 276 (1966); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963) (holding that the INS must prove the alien's deportability by "clear, unequivocal and convincing evidence"). Additionally, relying on a Supreme Court decision, the Attorney General has said that "[m]atters of doubt should be resolved in favor of the alien in deportation proceedings. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)." *In re* G., 9 I & N Dec. 159, 164 (A.G. 1961).

77 8 U.S.C. § 1229a(c) (Supp. 1999).

78 Plyler v. Doe, 457 U.S. 202 (1982); Bridges v. Wixon, 326 U.S. 135 (1945).

79 The exclusion proceeding, as with deportation, has been replaced by removal for actions commencing after April 1997. For a discussion of grounds of inadmissibility as related to the removal process, see

to accomplish the desired end. As the alien seeking entry is not yet within the jurisdiction of the requested state, he/she is not entitled to the benefits of due process that could hamper the efforts of the requested state in removing him/her.

Immigration judges are authorized to conduct removal (exclusion) hearings;[80] administer the oath to witnesses; introduce evidence; and interrogate, examine, and cross-examine the alien and the other witnesses.[81] In removal (exclusion) the alien bears the burden of proving his/her admissibility.[82]

If the alien fails to prove his/her admissibility to the United States, he/she is excluded and is inadmissible for a period of five years.[83] The alien may appeal the exclusion decision to the Attorney General, and while the appeal is pending, any final action with respect to the alien is stayed.[84] Upon a final decision as to the alien's inadmissibility, he/she is to be immediately removed to the country in which he/she boarded the vessel or aircraft on which he/she arrived in the United States.[85]

There are ten categories of grounds comprising thirty-five classes of aliens currently excludable at entry.[86] An alien may be found excludable for fitting into one or more of the thirty-five classes and may be subsequently ordered removed on such grounds. There are thus ample means of using removal (exclusion) for rendition purposes. For example, a Nazi war criminal could fit into at least three removal (exclusion) classes: (1) the use[87] or threat, attempt or conspiracy to use[88] explosive or firearm with intent to endanger the safety of one or more individuals; (2) participation in Nazi persecutions;[89] and (3) willful misrepresentation of a material fact to procure visa or entry to the United States.[90]

The case of Vito Badalamenti provides a good example of how exclusion can be used where extradition is unavailable as a vehicle of rendition. Vito Badalamenti, the son of Gaetano Badalamenti,

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generally, Kurzban, *supra* note 3, at 60–133 (collecting cases involving grounds of inadmissibility); *id.* at 133–161 (discussing procedures governing inadmissibility and collecting cases).

80 8 U.S.C. § 1229a(b)(1) (2000).

81 *Id.*

82 8 U.S.C. § 1229a(c)(2) (2000). Relying on *In re Walsh & Pollard*, Kurzban notes that if a consular official issued a visa to the alien, it is prima facie evidence of the alien's admissibility sufficient to shift the burden of proof to the DHS to show inadmissibility. Kurzban, *supra* note 3, at 62 (citing Interim Dec. 3111 (BIA 1988)).

83 8 U.S.C. § 1182(a)(6)(B) (2000), *as amended* Pub. L. 104-208, § 301(c)(1), 110 Stat. 3009-567.

84 8 U.S.C. § 1229a(c)(5) (2000).

85 8 U.S.C. § 1231(b)(1)(a) (2000), *as amended* Pub. L. 104-208, Sept. 30, 1996, 110 Stat. 3009-590, 3009-607, 3009-63. The Federal Regulations provide that:

> [the excludable alien] shall be deported to the country where the alien boarded the vessel or aircraft on which the alien arrived in the United States. If that country refuses to accept the alien, the alien shall be deported to:
>
> (1) The country of which the alien is a subject, citizen, or national;
>
> (2) The country where the alien was born;
>
> (3) The country where the alien has a residence; or
>
> (4) Any country willing to accept the alien.

8 C.F.R. § 241.25(b) (2001).

86 8 U.S.C. § 1182 (2000).

87 8 U.S.C. § 1182(a)(3)(B)(iii)(V) (2000).

88 8 U.S.C. § 1182(a)(3)(B)(iii)(VI) (2000).

89 8 U.S.C. § 1182(a)(3)(E) (2000).

90 8 U.S.C. § 1182(a)(6)(C) (2000).

was identified as a former leader of the Sicilian Mafia.[91] In 1984, Vito Badalamenti and his father were arrested in Spain at the request of the United States and in 1985 extradited to the United States to stand trial in the "Pizza Connection" heroin trafficking case.[92] While his father and seventeen other defendants were convicted of different charges in the "Pizza Connection" case, Vito Badalamenti was acquitted.[93]

Following his acquittal, Vito Badalamenti was unlawfully kept in detention instead of being allowed to leave voluntarily to a country of his choice, a violation of the United States–Spain Extradition Treaty. He was held on the grounds that because he was an alien paroled into the United States solely for the purpose of standing trial, that ground of parole expired with his acquittal, and the INS assumed jurisdiction over him.[94] Vito Badalamenti petitioned for a writ of habeas corpus. In deciding on his petition, Judge Thomas Griesa of the U.S. District Court for the Southern District of New York summarized Badalamenti's situation in the following way:

> One would normally expect that a person extradited to the United States would, upon acquittal of the criminal charges here, be free to return to the country from which he had been extradited. However, in the present case it quickly became apparent that the matter was not so simple. Spain would not receive him back. Italy, the country of his citizenship, would receive him, but petitioner did not wish to go to Italy because he faces criminal charges there. The extradition treaty between the United States and Spain provides that a person extradited under the treaty cannot be tried by the requesting nation for another offense and cannot be extradited to a third nation unless he has not left the territory of the requesting nation within 45 days after "being free to do so." This provision places limits upon further prosecution in the United States and upon extradition to Italy, but otherwise does nothing to solve the problems about petitioner's status.
>
> On March 10, 1987 the INS sent the petitioner a letter stating that he was free to leave the United States for a country that demonstrated a willingness to accept him. The letter stated that petitioner should notify the INS by March 13 of arrangements to depart by March 17, and that otherwise the INS would commence exclusion and deportation proceedings. By March 17 there was no country willing to receive petitioner which he was willing to go to.. .
>
> On March 30, 1987 the Immigration Judge handed down a ruling that petitioner was inadmissible. Presumably the effect of this ruling is to give the INS the right to exclude and deport him.. .
>
> On April 23 petitioner's attorneys advised the INS that Paraguay would accept the petitioner. Petitioner made a reservation on a flight from Miami to Paraguay departing April 26, but he was not transported by the INS to take that flight. There is a question about whether the INS was at fault in this . . . Another possibility which was explored was having petitioner leave April 27 on a flight to Paraguay via Brazil. Petitioner refused to take this flight because of possible problems in Brazil.
>
> On April 29 the INS took petitioner to an airport for a flight to Paraguay which did not involve Brazil. However, the Commissioner of the INS interceded at the last minute and directed that petitioner not be allowed to leave.
>
> *The record shows that the Italian government had been in touch with the Office of International Affairs of the Department of Justice about the possibility of having petitioner deported to Italy. It was this which ultimately caused the INS to prevent the petitioner's departure for Paraguay. The Justice Department has now concluded that he should be deported to Italy.*[95]

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91 Ralph Blumenthal, *Acquitted in "Pizza Connection" Trial, Man Remains in Prison*, N.Y. Times, July 28, 1988, at 3. *See generally* Shana Alexander, The Pizza Connection (1988).

92 Badalamenti v. Sava, 1987 U.S. Dist. LEXIS 4925, at *1 (S.D.N.Y. June 15, 1987).

93 Blumenthal, *supra* note 91.

94 *See* Blumenthal, *supra* note 91.

95 *Badalamenti*, 1987 U.S. Dist. Lexis 4925, at *1–4 (emphasis added).

In May, Paraguay withdrew its offer to admit Vito Badalamenti, forcing Judge Griesa to deny his habeas petition, and to hold that:

> Regardless of whether the United States Government was to some extent at fault in this regard, the fact is that petitioner can offer no country of his choice where he can go.
>
> There is no basis at the present time for this court to order petitioner's release from custody since he does not have any viable proposal for leaving the country and it would be wholly inappropriate to have him at liberty in the United States.[96]

Judge Griesa's opinion shows clearly that the government, not being able to extradite Vito Badalamenti to Italy due to provisions in the United States–Spain Extradition Treaty, resorted to exclusion to achieve the desired result.[97]

3.2.2. The Removal (Deportation) Process[98]

The INA[99] contains removal (exclusion) and removal (deportation) provisions intended to protect the United States from aliens considered actually or potentially undesirable. While the general concept is widely accepted, the grounds and procedures relating to exclusion and deportation are matters of some controversy. The provisions are characterized by some as unduly harsh and inhumane and are criticized for not providing a fair hearing.[100] Others claim the provisions are so highly technical as to be vulnerable to sophisticated legal maneuvering that renders them ineffective.[101]

It is more difficult for the requested state to use the removal (deportation) process as an alternative rendition device than the removal (exclusion) process because an alien in removal (deportation) proceedings has the benefit of due process rights.[102] Essentially, once an alien is deemed to have entered the United States, his/her removal is difficult. Not only is the alien allowed the benefits of due process, but the decision of the immigration judge as to the alien's deportability must be based on reasonable, substantial, and probative evidence and must be established by clear, convincing, and unequivocal evidence.[103] It is thus difficult to establish an alien's deportability. The next difficulty is that the alien is allowed to designate a

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96 *Id.* at 5.

97 Upon his return to Italy, Vito Badalamenti was acquitted and released.

98 For a more detailed discussion of deportation grounds and procedures, see Kurzban, *supra* note 3, at 65–157. For a discussion on the usefulness of a Freedom of Information Act Request to obtain information about deportation as an alternative to extradition, *see* Bruce Zagaris, Freedom of Information Act Request Illumines Use of Deportation as Alternative to Extradition, 23 Int'l Enforcement L. Rep. 344–345 (2007). *See also* Christopher H. Pyle, Extradition, Politics, and Human Rights 207–217 (2001).

99 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

100 For example, the U.S. Supreme Court has equated deportation with banishment. *See* Rosenberg v. Flueti, 374 U.S. 449 (1963); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).

101 Departments of Justice, Labor and State, Interagency Task Force on Immigration Policy: A Staff Report 411 (1979).

102 Plyler v. Doe, 457 U.S. 202 (1982); Bridges v. Wixon, 326 U.S. 135 (1945). However, the 1996 IIRIRA, 110 Stat. 3009-641 Public Law 104-208 Sept. 30, 1996, § 354, significantly affected the due process rights of alien residents by allowing the use of "secret evidence" in certain removal proceedings.

103 Woodby v. INS, 385 U.S. 276 (1966) (stating that the INS must prove the alien's deportability by "clear, unequivocal and convincing evidence"). Furthermore, matters of doubt are to be resolved in favor of the alien. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948). Additionally, considerable precedent exists for the proposition that deportation statutes must be construed in favor of aliens. Rosenberg v. Flueti, 374 U.S. 449 (1963); Bonetti v. Rogers, 356 U.S. 691 (1958).

country to which he/she wishes to be removed (deported) under the "voluntary departure" system.[104] If the country of designation accepts him/her, and it does not happen to be the requesting state, then the use of the removal (deportation) process as a rendition device has been unsuccessful. Finally, an alien in removal (deportation) proceedings may apply for various means of relief, including asylum.[105] These factors make it difficult for the requested state to remove (deport) aliens lawfully present in the country. To obtain relief from removal (deportation), however, the alien must first qualify for the particular means of relief he/she seeks and, if that means of relief is discretionary, he/she must receive the favorable discretion of the immigration judge.

There is a wide range of grounds justifying removal (deportation), which are divided into six general categories including: (1) aliens excludable at the time of entry,[106] (2) other violations of lawful alien status,[107] (3) economic grounds,[108] (4) security and political grounds,[109] (5) failure to register and falsification of documents,[110] and (6) criminal grounds.[111]

A removal (deportation) case generally begins with an investigation by the USCIS to establish whether an individual is an alien and whether he/she is deportable. The USCIS seeks to ascertain alienage, whether the alien is subject to removal (deportation), whether he/she will depart promptly from the United States without removal (deportation) proceedings, and whether he/she should be arrested. Provided the USCIS decides to proceed against the alien, it files a notice to appear with the immigration court.[112] An immigration officer then issues a notice to appear to be served to the alien, which contains, among other things, the "charge against the alien."[113] The Attorney General may issue an arrest warrant, arrest the alien, and take him/her into custody pending a decision on his/her deportability.[114] The arrested alien may be released on bond in an amount not less than $1,500,[115] or without bond on conditional parole.[116]

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104 8 U.S.C. § 1231(b)(2)(A) (2000). An alien may designate one country to which she wishes to be deported. Provided that the country is willing to accept her and "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States," the alien will be deported to such country. *Id.*

105 Relief from deportation includes voluntary departure under § 240B of the INA (8 U.S.C. § 1229c(a),(b) (2000)), cancellation of removal and adjustment of status under § 240A of the INA (8 U.S.C. § 1229b (2000)), waiver of inadmissibility under § 212 of the INA (8 U.S.C. § 1182(e) (2000)), and asylum or withholding of removal under §§ 208(a) and 241(b)(3)(B) of the INA respectively (8 U.S.C. §§ 1158, 1231(b)(3)(B) (2000)).

106 8 U.S.C. § 1227(a)(1) (Supp. 1999).

107 These include entry without inspection or presence in the United States in violation of law (8 U.S.C. § 1227 (a)(1)(c)(i) (2000)), failure to maintain non-immigrant status (8 U.S.C. § 1227 (a)(1)(c)(i) (2000)), termination of conditional permanent residence (8 U.S.C. § 1227(a)(1)(D) (2000)), encouragement of or aid in illegal immigration (8 U.S.C. § 251(a)(1)(E) (2000)), and marriage fraud (8 U.S.C. § 1251(a)(1)(G) (2000)).

108 8 U.S.C. § 1227(a)(5) 1994 (2000).

109 8 U.S.C. § 1227(a)(4) 1994 (2000).

110 8 U.S.C. § 1227(a)(3) 1994 (2000).

111 8 U.S.C. § 1227(a)(2) 1994 (2000).

112 8 C.F.R. § 239.1(a) (2001).

113 *Id.*

114 8 U.S.C. § 1226(a) (2000).

115 *Id.* (with security approved by, and containing conditions prescribed by, the Attorney General.)

116 *Id.*

Every detained alien, according to regulations, shall be notified that he/she may communicate with the diplomatic officers of the country of his/her nationality.[117] Existing treaties with certain countries listed in the regulations require immediate notification to appropriate diplomatic officers on behalf of the alien, whether or not he/she requests such communication.[118]

When an alien is dissatisfied with the bond or custody decision of the USCIS, he/she may apply to an immigration judge for redetermination as to bond or custody.[119] The bond or custody redetermination proceeding is conducted separately from the removal (deportation) hearing, and the redetermination may be appealed by the alien and by the INS to the Board of Immigration Appeals (BIA).[120]

A deportation hearing follows the issuance of the Order to Show Cause. The deportation hearing is conducted before an immigration judge[121] and, in almost all cases, with an INS trial attorney.[122] The hearing should be held in the district of the alien's arrest or residence. Deportation hearings are open to the public; however, the immigration judge may, at his/her discretion, exclude particular individuals or the general public from the hearing.[123] Removal proceedings may take place in person, in the absence of the alien (where agreed to by the parties), through video conference, or, subject to the alien's consent, via telephone conference.[124] As noted above, the decision of the immigration judge must be based upon reasonable, substantial, and probative evidence on the issue of removal (deportability),[125] and the USCIS must establish alienage and deportability by clear, convincing, and unequivocal evidence.[126]

In his/her removal (deportation) hearing, the alien, known as the respondent, has the right to a reasonable notice of the charges against him/her,[127] the right to a reasonable opportunity to present evidence and to cross-examine witnesses,[128] the right to counsel,[129] and the right to a fair hearing under the language of the statute and the Due Process Clause of the Fifth

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117 8 C.F.R. § 236.1(e) (2001).

118 *Id.*

119 8 C.F.R. § 236.1(d)(1) (2001).

120 *Id.*

121 8 U.S.C. § 1229a (2000) (governing proceedings to determine deportability); INA § 240.1(b)(1) (regarding authority of immigration judges in deportation proceedings).

122 INA § 240.1(b)(4)(a) (concerning aliens privilege to be represented by a trial attorney).

123 8 C.F.R. § 240.10(a)(7)(b) (2001); 8 C.F.R. § 1003.27 (2011).

124 INA § 240.1/(b)(2)(A)(B). For a detailed discussion of U.S. removal proceedings, and a comparative analysis of the discretion afforded to U.S. immigration judges and Canadian immigration judges, particularly with regard to considering family ties in removal proceedings, *see* Adam Collicelli, Note, Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada, 32 B.C. Int'l & Comp. L. Rev. 115 (2009).

125 8 U.S.C. § 1229a(c)(3)(A) (2000).

126 Woodby v. INS, 385 U.S. 276 (1966).

127 8 U.S.C. § 1229a(a)(2) (2000). *See also* 8 CFR 1240.10.

128 8 U.S.C. § 1229a(b)(4)(B) (2000).

129 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362 (2011) (regarding right to representation by counsel at no expense to the government). *See also* 8 C.F.R. § 292.5(b) (1995) (concerning right to representation). In the United States Code, the alien has a privilege of representation. However, that privilege becomes a right in the Code of Federal Regulations in the context of the examination of a person at various points in removal proceedings. The result of this is that approximately two-thirds of noncitizens in removal proceedings proceed *pro se,* even during periods of examination of the person. *See* Michael Kaufman, Note: Detention, Due Process, and the Right to Counsel in Removal Proceedings, 4 Stan. J. C.R. & C.L. 113, 114, 124 (2008).

Amendment.[130] Due process is not guaranteed for those aliens who have unlawfully entered.[131] In *Shaughnessy* the court quoted approvingly that "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[132] With the adoption of the INA, Congress abolished the concept of entry in favor of admission, which is now the standard terminology used in U.S. immigration law.

In removal hearings, the immigration judge opens the hearing by reading the "factual allegations and the charges in the notice to appeal" as described by Title 8 of the CFR, Part 240.10(a)(6), and 8 CFR, Part 1240.10(a)(6).[133] The alien is generally called as the first witness, after which adverse witnesses may be called. Upon completion of the government's case, the alien may rebut. At any time prior to the immigration judge's decision as to removal (deportability), the alien may request relief from removal (deportation).[134]

The decision of the immigration judge is final.[135] No appeal is possible where voluntary departure is denied, but such denial does not prejudice the alien's right to apply for voluntary departure under section 240.26 or relief from removal under any provision of law.[136] All other cases involving removal (deportability) are appealable to the BIA within thirty days of the final removal decision.[137] An alien may file a motion to reconsider within thirty days of the final removability decision, and one motion to reopen within ninety days.[138] After the order of removal (deportation) achieves administrative finality, the alien may seek judicial review or take further administrative steps. Provided appeals have been waived or exhausted, the USCIS will complete the arrangements for the alien's deportation.

The removable (deportable) alien has the right to specify a country to which he/she would prefer to be removed.[139] The alien will be removed to a country of his/her designation, provided that the country is willing to accept him/her, and that deportation to such country would not be, in the discretionary determination of the Attorney General, prejudicial to the interests of the United States.[140] The alien may not, however, designate a country contiguous to the United States or adjacent islands unless the alien is a citizen or subject of, or had a residence in, such place.[141] If the country designated by the alien refuses to accept him/her, he/she is ordered removed to the country of his/her citizenship; if that country also refuses to accept him/her, then the removal will be to any country willing to accept him/her.[142] It should be noted that

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130 Plyler v. Doe, 457 U.S. 202 (1982); Bridges v. Wixon, 326 U.S. 135 (1945) (except under the special removal procedure of alien terrorists pursuant to INA § 504(e)(1)(A)).

131 Bridges v. Wixon, 326 U.S. 135 (1945); Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206 (1953).

132 *Id.* at 212, *quoting* Knauff v. Shaughnessy, 338 U. S. 544 (1950).

133 The 2011 C.F.R. has removed and reserved part 240.10 of Title 8. This provision can be found in the 2001 version of part 240.10 of Title 8 of the C.F.R. For the federal regulations on the conduct of removal hearings, see 8 C.F.R. §1240.1 *et. seq.* (2011).

134 *See supra* note 76 (listing various means of relief from deportation and referencing statutory provisions).

135 8 C.F.R. § 240.14 (2001) (covering finality of order); 8 C.F.R. § 1003.39 (2011) (finality of decision); 8 C.F.R. § 3.39 (1995) ("[An] Immigration Judge's decision becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken.").

136 8 C.F.R. § 240.25(e) (2011).

137 8 C.F.R. § 240.15 (2001) (regarding appeals). This provision has been removed and reserved in the 2011 C.F.R. and is no longer defined as it was in the 2001 version. However, for the provision regarding appeals of orders of removal, see 8 C.F.R. § 1240.15 (2011).

138 8 U.S.C. § 1229a(c)(6) (motion to reconsider) (7) (motion to reopen) (2011).

139 8 U.S.C. § 1231(b)(2)(A) 1994 (2000).

140 *Id.*

141 *Id.*

142 *Id.*

unless there is a country willing to accept the alien, deportation cannot take effect and the alien will remain in custody. Because the alien may designate only one country of deportation and because it is within the discretion of the Attorney General to not deport him/her to such country if it would be prejudicial to the interests of the United States, the government enjoys substantial flexibility in the deportation of an alien. This means that deportation proceedings can be manipulated as an irregular rendition device.

An example of how deportation proceedings could replace extradition as a means of surrendering an individual can be seen in the handling of former Nazi war criminals who immigrated to the United States after WW II. Consider the following hypothesis: a foreign nation is seeking the extradition of a former Nazi war criminal and extradition proceedings prove too cumbersome or are unavailable due to treaty provisions; in this case deportation proceedings may be substituted. Through removal (deportation), an individual may be delivered to the requesting foreign state without employing extradition proceedings. The Justice Department has created a special unit to coordinate war crimes litigation, including removal (deportation) proceedings against alleged former war criminals living in the United States as aliens, as well as denaturalization of former war criminals currently living in the United States as naturalized citizens.[143]

The removal (deportation) of Nazi war criminals is not the only example of how immigration laws have been manipulated to serve as an alternative means of rendition.[144] Maurice A. Roberts, the former Chairman of the BIA, in a discussion on the use of deportation to remove communists from the United States, explained that:

> responding to periodic tensions, Congress has from time to time added fresh groups of aliens to the excludable and deportable classes, followed some time later by additional avenues of discretionary relief as new hardships were exposed by the over-broad new restrictions. None of the new restrictions, however, are ever repealed.[145]

Roberts also mentioned that unusual excesses can be contemplated by the INS (now the USCIS) in a time of crisis, in reliance on the plenary power of Congress in the immigration area. This has become readily apparent with the push for broader executive discretion in the wake of the tragic attacks suffered by the United States on September 11, 2001.[146]

Uneasy relations between the United States and Iran in the early 1980s presented a similar crisis. Iranians seeking political asylum in the United States made their appeal under what was at the time § 243(h) of the INA, on the grounds that they would be subject to persecution if they were returned to Iran. Almost without exception, asylum requests from Iranians were denied.[147] An illustrative case of the manipulation of immigration laws to serve a specific

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143 For a full discussion, see Robert A. Cohen, Note, United States Exclusion and Deportation of Nazi War Criminals: The Acts of October 30, 1978, 13 N.Y.U. J. Int'l L. & Pol. 101 (1980). The INS unsuccessfully attempted to operate a Special Task Force to denaturalize and deport Nazi war criminals. The Attorney General eventually transferred the Task Force to the Criminal Division of the Department of Justice. Moeller, *supra* note 6, at 817–818.

144 *See infra* Sec. 3.2.3 (Denaturalization).

145 Roberts, *supra* note 57, at 158.

146 *See* Narenji v. Civiletti, 481 F. Supp. 1132, 1139 (D.D.C. 1979), wherein it is stated "It is not surprising then that the Supreme Court has also declared that `over no conceivable subject is the legislative power of Congress more complete that it is over' the immigration and naturalization of aliens." *Accord* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972). *See also* Oceanic Steam Navigation Co. v. Stranaham, 214 U.S. 320, 330 (1909). Congressional power is so broad in such matters as to entitle Congress to "make rules that could be unacceptable if applied to citizens." Mathews v. Diaz, 426 U.S. 67, 80 (1976); USA PATRIOT Act of 2001, Title IV, Subtitle B ("Enhanced Immigration Provisions").

147 *See* Christopher T. Hanson, Note, Behind the Paper Curtain: Asylum Policy versus Asylum Practice, 7 N.Y.U. Rev. Law & Soc. Change 107, 117–121 (1978). Under the Shah, Iran strenuously objected to

purpose is *Narenji v. Civiletti*.[148] The case was brought by the Attorney General in response to a regulation issue by the Attorney General (8 C.F.R. 214.5), which was effective only against Iranian students. Contrary to general trends in the adjudication of such regulations, the district court in *Narenji* declared the regulation unconstitutional for singling out Iranian students and thus violating their Fifth Amendment right to equal protection of the laws.[149] But the effect of the district court decision was short-lived as a month and a half later the U.S. Court of Appeals for the District of Columbia reversed it. The appellate court rejected the district court's conclusion that the INA "does not empower [the Attorney General] to draw distinctions among nonimmigrant alien students on the basis of nationality."[150] The appellate court specifically affirmed a reasonable basis test for discrimination, stating: "Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. So long as such distinctions are not wholly irrational they must be sustained."[151]

Given the broad discretionary power of Congress with respect to removal by exclusion and deportation, flexibility of immigration laws, lack of effective judicial review, and foreign policy considerations, it is likely that if extradition proves fruitless the United States will use immigration laws as an alternative rendition device. This alternative has been pursued with success on several occasions.[152]

A prominent example of this occurred with respect to Peter McMullen and Joseph Doherty.[153] McMullen, a former member of the Provisional Irish Republican Army (PIRA), entered the United States illegally in 1978 using false documents. That year, the United Kingdom requested his extradition from the United States for various acts McMullen had allegedly committed on behalf of the PIRA. A U.S. magistrate denied the extradition request on the grounds of the political offense exception.[154] Following the denial of extradition, the United States attempted to deport McMullen, before finally obtaining a deportation order to Ireland in 1986.[155] While McMullen was in the process of being deported to Ireland, the United Kingdom again requested his surrender, this time under a new extradition treaty that eliminated the political offense exception contained in the earlier treaty that had served as the basis for the denial of

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the granting of asylum to Iranian citizens, and the United States bowed to these objections, regardless of the possibility of persecution of those sent back to Iran.

148 Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

149 *Narenji*, 481 F. Supp. at 1145.

150 *Narenji*, 617 F.2d at 745, 747.

151 *Id.* at 747 (citations omitted).

152 McMullen v. United States, 953 F.2d 761, 763 (2d Cir. 1992). *See also* Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000).

153 *See supra* notes 42–44 and accompanying text. *See also* Ch. III.

154 *Id.*

155 McMullen v. INS, 788 F.2d 591 (9th Cir. 1986) (affirming Board of Immigration Appeals' denial of request for asylum and withholding of deportation). The final deportation order was preceded by the following proceedings: (1) in 1980, an immigration judge found McMullen deportable but granted his application for asylum and withholding of deportation; (2) the BIA reversed the decision, not believing that McMullen would suffer persecution were he to return to Ireland (*In re McMullen*, 17 I & N Dec. 542 (BIA 1980)); (3) the Ninth Circuit found that BIA's finding of no likelihood of persecution was not supported by substantial evidence (*In re* McMullen, 658 F.2d 1312 (9th Cir. 1981)); (4) the BIA, again considering McMullen's request for asylum and withholding of deportation, found that by participating in PIRA activities, McMullen had participated in the persecution of others and could thus not be considered a refugee or a person eligible for withholding of deportation, and ordered him deported to Ireland (*In re* McMullen, 19 I & N Dec. 90 (BIA 1984)); (5) the Ninth Circuit reviewed the BIA's decision and affirmed (McMullen v. INS, 788 F.2d 591 (9th Cir. 1986)).

the United Kingdom's earlier extradition request for McMullen.[156] McMullen sought to have the new extradition request dismissed on the grounds that it was barred by the statute of limitations, but the U.S. District Court for the Southern District of New York denied his motion, and he was extradited to the United Kingdom.[157] As noted in Chapter III, the United Kingdom sought to extradite Doherty from the United States for his participation in a PIRA killing of a British Army captain. When a court barred Doherty's extradition on political offense exception grounds,[158] the INS deported him to the United Kingdom over his objection and his expressed designation of Ireland as the country to which he wished to be deported. These are good examples of the successful use of deportation as an alternative to extradition.

There are several examples of the United States working with foreign governments to gain the surrender of individuals to the United States through foreign immigration processes.[159] For example, in *United States v. Struckman*, Rian Stuckman, a U.S. citizen, fled to Panama to avoid charges of tax evasion and conspiracy to defraud the United States.[160] United States and Panamanian authorities chose to remove Struckman from Panama through various visa revocations and denials rather than through the use of formal extradition procedures.[161] In other situations, the United States has filed an Interpol red notice and subsequently worked with the country where the alleged criminal was present to obtain that criminal's surrender via expulsion proceedings,[162] or obtained surrenders from other countries via their deportation procedures.[163]

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156 *In re Extradition* of McMullen, No. 86 Cr. Misc. 1, at 47, 1988 U.S. Dist. LEXIS 7201, at *1 (S.D.N.Y. June 24, 1988).

157 *See* McMullen v. United States, 989 F.2d 603 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 301 (1993) (reversing the earlier holding that the subsequent extradition treaty is an unlawful bill of attainder as applied to McMullen); *reversing in part,* McMullen v. United States, 953 F.2d 761 (2d Cir. 1992) (affirming the district court's holding); McMullen v. United States, 769 F. Supp. 1278 (S.D.N.Y. 1991) (holding that the subsequent extradition treaty is an unlawful bill of attainder as applied to McMullen).

158 *In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984).

159 The Council of Europe recently issued a document discussing this process of U.S. "disguised extradition." For the European perspective on this issue, see *Opinion of the European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters on "Disguised Extradition i.e. Surrender by Other Means, Some Ideas to Start a Discussion,"* PC-OC (2011) 09rev, May 16, 2011, *available at* http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/PC-OC%20_2011_%2009%20rev%20E%20Mr%20Eugenio%20Selvaggi%20%20Disguised%20Extradition%20and%20Comments%20%20Cz%20Rep-Belgium.pdf (last visited Sept. 28, 2012). *See also Mohamed & Another v. Pres. of the Rep. of South Africa* 2001 (17) CCT 01 (CC) (S. Afr.)

160 United States v. Struckman, 611 F.3d 560, 564 (9th Cir. 2010). *See also* United States v. Liersch, 2006 U.S. Dist. LEXIS 98439 (S.D. Cal. June 26, 2009) (involving an individual accused of money laundering and tax evasion removed from Guatemala without formal extradition proceedings. As extradition was not involved, the relator was not able to raise defenses under the United States–Guatemala extradition treaty).

161 *Id.*at 565–566 (the Ninth Circuit upheld the district court's ruling that Struckman was under its jurisdiction and discussed the Ker/Frisbie doctrine; *see* Chs. V and VI).

162 *See* United States v. Gardiner, 279 Fed. Appx. 848, 849–850 (11th Cir. 2008) (unpublished opinion) (upholding the expulsion and reasoning that "for extradition to be the sole method of transfer, the treaty must expressly prohibit any other method."); Yousef v. United States, 2011 U.S. Dist. LEXIS 79295 at *2–3, *21 (S.D.N.Y. 2011) (the Honduran Department of Immigration and Alien Affairs issued an order of deportation less than a month after the U.S. submitted an Interpol Red Notice application for the alleged criminal's arrest. The court reasoned, "A lawful arrest and expulsion, even if performed by armed, masked agents, is simply not a kidnapping."). The United States has also removed aliens to foreign states after the foreign state issued an international arrest warrant for the alien. *See* Bruce Zagaris, U.S. Surrenders to Costa Rica a Former Police Officer Wanted for Murder, 24 Int'l Enforcement L. Rep. 134–135 (Apr. 2008).

163 *See* Bruce Zagaris, Cuba Deports American Fugitive Wanted for Sexual Crimes against a Minor, 24 Int'l Enforcement L. Rep. 315–316 (Aug. 2008).

3.2.3. The Denaturalization Process[164]

The fact that an individual has become a naturalized citizen of the United States does not mean that he/she is no longer subject to possible removal (deportation). A naturalized citizen of the United States may lose his/her citizenship through denaturalization, at which time he/she can be subjected to removal proceedings.[165] Denaturalization may play a significant role in extradition as well. For example, if a foreign country sought a naturalized citizen of the United States and extradition proceedings proved fruitless or too cumbersome, denaturalization followed by removal (deportation) provides an alternative.

In order to facilitate the surrender of naturalized U.S. citizens, the INA provided for the creation of the Office of Special Investigations (OSI). The OSI, which is a unit of the Criminal Division of the U.S. Department of Justice, has the authority to find, investigate, and denaturalize aliens.[166] An example of how denaturalization and removal (deportation) proceedings operate in place of extradition proceedings can be found in cases involving Nazi war criminals.[167] Denaturalization cases are few, but as evidenced by the *Demjanjuk* case discussed below, they reveal the possibility of abuse of the process in order to achieve desired results.[168]

Of the INA's many requisites for naturalization, the most important is that the applicant, during the period of his permanent residence in the United States, has been a person of good moral character.[169] A material misrepresentation of an applicant's moral character can be found if the applicant failed to provide the INS with information concerning his association with the Nazi government of Germany. Additionally, the Government may consider any past conduct of the alien in appraising his present moral fitness.[170]

The Justice Department has brought denaturalization proceedings in several prominent cases against naturalized citizens for alleged Nazi war crimes.[171] Perhaps the most famous of these

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164 *See* Kurzban, *supra* note 3, at 670–676 (discussing loss of citizenship). For an analysis of international law regarding denaturalization of individuals with multiple nationalities, as well as the processes of denaturalization, see William Thomas Worster, International Law and the Expulsion of Individuals with More than One Nationality, 14 U.C.L.A. J. Int'l L. & For. Aff. 423 (Fall 2009).

165 *See* 8 U.S.C. § 1451 (2000) (concerning revocation of naturalization).

166 *See* Eli M. Rosenbaum, *An Introduction to the Work of the Office of Special Investigations*, 54 U.S. Attorneys' Bulletin 1 (Jan. 2006), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5401.pdf (last visited Sept. 28, 2012).

167 Cohen, *supra* note 143, at 129. *See also* International Procedures for the Apprehension and Rendition of Fugitive Offenders, 1980 Am. Soc'y Int'l L. Proc. 279; Moeller, *supra* note 6, at 817–843.

168 Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) (holding that the Office of Special Investigations of the Department of Justice Criminal Division engaged in prosecutorial misconduct that "seriously misled the court" and led to Demjanjuk's forced departure from the United States and trial on capital charges in Israel). *See generally* Alfred de Zayas, Human Rights Implications of the Demjanjuk Case, 31 The Globe 3 (1994). *See also* Christopher H. Pyle, Extradition, Politics, and Human Rights 235–262 (2001).

169 8 U.S.C. § 1427(a) (2000).

170 *See* United States v. Palciauskas, 734 F.2d 625 (11th Cir. 1984); United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981). *See also* 56 Interpreter Releases 340, 340–342 (1979); Moeller, *supra* note 6, at 820 nn.143, 145.

171 *See,* e.g., United States v. Spogiris, No. CV-82-1804 (E.D.N.Y. May 18, 1984), *aff'd*, 763 F.2d 115 (2d Cir. 1985), *appeal docketed*, No. 85-4163 (2d Cir. Feb. 26, 1985); United States v. Kungys, 571 F. Supp. 1104 (D.N.J. 1983), *rev'd*, 793 F.2d 516 (3d Cir. 1986); United States v. Kowalchuk, 571 F. Supp. 72 (E.D. Pa. 1983), *rev'd*, 744 F.2d 301 (3d Cir. 1984), *aff'd* 773 F.2d 488 (3rd Cir. 1985); United States v. Palciauskas, 559 F. Supp. 1294 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984); United States v. Koziy, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984); United States v. Schellong, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); United States v. Dercacz, 530 F. Supp. 1348

cases involved John Demjanjuk, who was alleged to be Ivan Grozny, also known as "Ivan the Terrible," a notorious guard at the Treblinka extermination camp in Poland. Demjanjuk was admitted for lawful permanent residence in the United States in 1952 and became a citizen of the United States in 1958.[172] Nearly thirty years later, the OSI, brought an action under the INA to revoke Demjanjuk's Certificate of Naturalization. The government alleged that Demjanjuk had willfully concealed the fact that he had served with the Nazis as an armed guard at the extermination camp and that this made him ineligible for an immigration visa and for citizenship in the United States.[173] In 1981, following a trial, a district court entered an order revoking Demjanjuk's Certificate of Naturalization and vacating the order admitting Demjanjuk to U.S. citizenship.[174]

After his denaturalization, the INS commenced deportation proceedings against Demjanjuk.[175] An immigration judge found Demjanjuk deportable and designated the Soviet Union as the country of deportation.[176] The judge, however, also granted Demjanjuk the option of voluntary departure from the United States.[177] The BIA affirmed the finding of deportability, but reversed the grant of voluntary departure.[178]

In the meantime, Israel requested Demjanjuk's extradition from the United States pursuant to an Israeli arrest warrant charging him with "crimes of murdering Jews."[179] "[B]ased largely on the District Court's finding in the denaturalization case that Demjanjuk was Ivan the Terrible,"[180] the District Court held that sufficient evidence existed to conclude that there was probable cause that Demjanjuk committed the acts alleged in the Israeli arrest warrant.[181] Consequently, the court certified to the secretary of state that Demjanjuk was extraditable to Israel.[182]

Demjanjuk was then extradited to Israel where he was tried, convicted, and sentenced to death by the Jerusalem District Court.[183] After Demjanjuk had spent seven years in an Israeli prison, the Israeli Supreme Court reversed his conviction and ordered his acquittal and release after considering evidence that cast doubt on the allegation that Demjanjuk was, in fact, Ivan the Terrible.[184] Upon release, Demjanjuk returned to the United States, though not before

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(E.D.N.Y. 1982); United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.) (mem.), *cert. denied*, 459 U.S. 995 (1982); United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982); United States v. Osidach, 513 F. Supp. 51 (E.D. Pa. 1981); United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981). *See also* Moeller, *supra* note 6, at 831–833; Irene A. Steiner, Note, Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot, 48 Fordham L. Rev. 471 (1980).

172 United States v. Demjanjuk, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

173 *Demjanjuk*, 518 F. Supp. at 1363.

174 *Id.* at 1386.

175 *In re Extradition of* Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985), *aff'd*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

176 *In re Extradition of* Demjanjuk, 612 F. Supp. at 544.

177 *Id.*

178 *Id.*

179 *Id.*

180 Demjanjuk v. Petrovsky, 10 F.3d 338, 356 (6th Cir. 1993).

181 *In re Extradition of* Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985), *aff'd*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

182 *Id.*

183 The trial and appeal are discussed in *Demjanjuk v. Petrovsky*, 10 F.3d 338 at 356 (6th Cir. 1993).

184 *Id.*

overcoming the efforts of the Department of Justice to keep him from exercising his right of return.

In 1993, the U.S. Sixth Circuit Court of Appeals, on its own motion, considered whether attorneys of the OSI engaged in prosecutorial misconduct by failing to disclose exculpatory evidence in their possession casting doubt on the assertion that Demjanjuk was the man known as Ivan the Terrible.[185] The court held that the OSI attorneys engaged in prosecutorial misconduct and that their actions constituted fraud on the court. The court specifically stated:

> [W]e hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.[186]

The Court also stated:

> The attitude of the OSI attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be . . . We do not believe their personal conviction that they had the right man provided an excuse for recklessly disregarding their obligation to provide information specifically requested by Demjanjuk . . . the withholding of which almost certainly misled his counsel and endangered his ability to mount a defense . . .[187]

Finally, the court acknowledged the political pressure exerted on OSI from outside forces, noting that:

> In August of 1978 Congressman Eilberg, the Chairman of an important committee, wrote then Attorney General Bell a letter insisting that Demjanjuk be prosecuted hard because "we cannot afford the risk of losing" the case. The trial attorney then in charge of the case, Mr. Parker, wrote in his 1980 memorandum that the denaturalization case could not be dismissed because of factors "largely political and obviously considerable." Other lawyers in OSI wrote memos discussing this case as a political "hot potato" that if lost "will raise political problems for us all including the Attorney General." Mr. Ryan, Director of the office, wrote the Assistant Attorney General of the Criminal Division in 1980 that OSI had "secured the support in Congress, Jewish community organizations, public at large for OSI—press coverage has been substantially favorable and support from Jewish organizations is now secure," but he went on to say that "this support can't be taken for granted and must be reinforced at every opportunity." Mr. Ryan also testified that "in 1986, which was the year before the [Israeli] trial [of Demjanjuk], I went to Israel for about 10 days on a lecture tour that was sponsored by the Anti-defamation League . . . " It is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various interest groups because their continued existence depended upon it.[188]

The court then vacated the judgment of the district court and its own judgment in Demjanjuk's extradition case "on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the Court."[189] Neither Demjanjuk's return to the United States nor the prosecutorial misconduct addressed by the Sixth Circuit, however,

185 *Id.* at 339.

186 *Id.* at 354.

187 *Id.* at 349–350.

188 *Id.* at 354–355 (citations omitted).

189 *Id.* at 356.

ipso facto invalidated Demjanjuk's denaturalization, nor did they preclude renewed extradition proceedings against him at a later point. In fact, Demjanjuk was deported to Germany in 2009 to face trial, and was sentenced by a German court to five years in prison after being found guilty of taking part in the murder of tens of thousands of individuals while working as a guard at the Sobibor concentration camp.[190] The *Demjanjuk* case highlights the fact that in cases involving denaturalization and extradition, the government can effectively pick and choose the proceeding that will most easily accomplish its objective.

Denaturalization has been used on numerous occasions to deal with naturalized U.S. citizens who were Nazis.[191] In *United States v. Walus*,[192] the defendant, Frank Walus, was denaturalized on May 30, 1978, after Judge Julius Hoffman held that the record established that the defendant had been a member of the Gestapo during WWII and committed criminal acts of violence. Judge Hoffman found that Walus had gained his citizenship illegally by concealing these facts, which reflected his lack of good moral character.[193]

In *United States v. Fedorenko*,[194] the defendant, Feodor Fedorenko, was a Russian soldier captured by German forces in 1941. He had been trained by the Germans to serve as an armed concentration camp guard and had been sent to the Treblinka extermination camp. In 1949, Fedorenko applied for admission to the United States. In his visa application he deliberately falsified his whereabouts during the war years and did not reveal his service as a concentration camp guard. Fedorenko was naturalized in 1970. However, in August 1977, the government filed a denaturalization complaint against Fedorenko under § 340(a) of the INA. Fedorenko admitted that he had falsified his visa application, but asserted that he had done so out of fear of repatriation to the Soviet Union. The district court found in favor of Fedorenko, but the court of appeals reversed, stating that:

> There is a crucial distinction between a district court's authority to grant citizenship and its authority to revoke citizenship. In the former situation, the court must consider facts and circumstances relevant to determining whether an individual meets such requirements for naturalization as good moral character and an understanding of the English language, basic American history, and civics. The district courts must be accorded some discretion to make these determinations. Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defeat and grant citizenship. The denaturalization

190 Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. Times, May 12, 2011.

191 In the past, there have been a number of denaturalization cases of Nazi war criminals' *see* United States. v. Tittjung, 235 F.3d 330 (7th Cir. 2000); *United States v. Dailide*, 227 F.3d 385 (6th Cir. 2000); Breyer v. Meissner, 214 F.3d 416 (3rd Cir. 2000); United States.v. Szehinskyj, 104 F.Supp.2d 480 (E.D. Pa. 2000); Tittjung v. Reno, 199 F.3d 393 (7th Cir. 1999); Hammer v. INS, 195 F.3d 836 (6th Cir. 1999); United States. v. Lindert, 142 F.3d 437 (6th Cir. 1998); United States. v. Hajda, 135 F.3d 439 (7th Cir. 1998); United States v. Balsys, 524 U.S. 666, 118 S.Ct. 2218 (1998); United States.v. Stelmokas, 100 F.3d 302 (3rd Cir. 1996); United States v. Lileikis, 929 F. Supp. 31 (D. Mass. 1996); United States v. Koreh, 59 F.3d 431 (3d Cir. 1995); United States v. Gecas, 50 F.3d 1549 (11th Cir. 1995), *vacated by* 81 F.3d 1032 (11th Cir. 1996), *reh'g on banc,* 120 F.3d 1419 (11th Cir. 1997); United States v. Ragouskas, 1995 WL 86640 (N.D. Ill. 1995); United States v. Breyer, 41 F.3d 884 (3d Cir. 1994); United States v. Hutyrczyk, 803 F. Supp. 1001 (D.N.J. 1992); Kairys v. INS, 981 F.2d 937 (7th Cir. 1992).

192 United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978), *rev'd*, 616 F.2d 283 (7th Cir. 1980). *See also* David Kreig, *Hunting Nazis: Trying Task for Immigration Service,* Nat. L.J., Nov. 6, 1978.

193 *Walus*, 453 F. Supp. at 716.

194 United States v. Fedorenko, 597 F.2d 946, *aff'd*, 449 U.S. 490 (1981). It was the first Supreme Court decision in a denaturalization case. *See generally* Moeller, *supra* note 6, at 820–822.

> statute, 8 U.S.C. Section 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship.[195]

In *Linnas v. Immigration and Naturalization Service*,[196] the Second Circuit upheld the deportation of Karl Linnas as a Nazi war criminal. Linnas had entered the United States in 1951 and was naturalized in 1960. In 1979, the government began proceedings to revoke his citizenship on the grounds that he had procured it fraudulently, arguing that Linnas had not been a university student during WWII, as he had claimed in 1951, but rather that he had been chief of the Nazi concentration camp in Tartu, Estonia. After Linnas's denaturalization[197] the government sought his deportation. Linnas selected the independent Republic of Estonia as his destination, although Estonia was at that time a part of the Soviet Union.[198] The immigration judge disregarded Linnas's request and designated the Soviet Union as the country to which Linnas was to be deported. Linnas had earlier been tried in the Soviet Union in absentia and sentenced to death. Linnas appealed on the grounds that his deportation constituted disguised extradition and violated his rights to equal protection and due process.[199] The Second Circuit denied both challenges and upheld the deportation on the grounds that Nazi war criminals are not a class within the meaning of the Equal Protection Clause of the Constitution and that the federal judiciary cannot require that U.S. constitutional protections be applied to persons who are outside federal jurisdiction.

United States law does not provide for the automatic extradition of persons found guilty of war crimes.[200] The rendition of such persons is achieved in practice, however, through reliance upon immigration laws, in particular the INA.[201] This statute has been applied by the courts both to deport noncitizens who are seeking asylum on political or humanitarian grounds or to denaturalize persons who have become U.S. citizens.[202]

As a consequence of these practices, persons who are denied entry or whose citizenship has been revoked are returned to their country of origin. In most cases in the past this meant return to communist-bloc countries where prosecution and punishment had been heavily influenced by political considerations. Additionally, because the alleged crimes dated to WWII, the deported individuals may have suffered further hardship because of advanced age and infirmity.

The dilemma that confronts the immigration judge in these cases consists, on the one hand, of the need to bring such individuals to justice, and on the other of the realization that

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195 *Fedorenko*, 597 F.2d at 953–954 (citations omitted). Fedorenko was deported to the Soviet Union in 1984 and his execution for treason and war crimes was announced on July 27, 1987. *See Ex-Nazi Fedorenko Executed,* Chi. Trib, July 28, 1987, § 1, at 5.

196 Linnas v. INS, 790 F.2d 1024 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986). Linnas was deported to the Soviet Union on April 20, 1987. *See* Kenneth B. Noble, *U.S. Deports Man Condemned to Die in Soviet Union,* N.Y. Times, Apr. 21, 1987, § 1, at 1.

197 United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982).

198 Linnas apparently intended to designate an office building in New York that then housed the representatives of the Republic of Estonia. *Linnas,* 790 F.2d at 1027.

199 Linnas also claimed that the amendment to the INA that allows the deportation of former Nazis constituted a bill of attainder. This ground was also denied by the Second Circuit. 790 F.2d at 1028–1030.

200 For a discussion of war crimes and crimes against humanity as exceptions to exemption from extradition, see Ch. VIII, Sec. 2.1.7.

201 8 U.S.C. § 1101 *et seq.* 1994 (2000).

202 *See* United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981); United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978), *rev'd*, 616 F.2d 283 (7th Cir. 1980).

prosecution may result in a harsh penalty.[203] As an alternative to this practice, a jurisdictional basis should be established in the United States to prosecute persons accused of war crimes and crimes against humanity. This would ensure that courts could make objective determinations of these grave charges and guarantee equitable punishment, taking into account such mitigating factors as the age and health of the accused, and the years he/she has spent as a law-abiding United States citizen.[204]

The USCIS determines citizenship status where issues involving possible denaturalization are concerned. These issues include instances where prior findings of loss of citizenship were reversed, and anywhere a previously issued citizenship document was either destroyed or replaced. Where the subject was not entitled to a citizenship document, the case reflects the USCIS' decision regarding citizenship status.

The law provides for denaturalization in cases where the subject obtained the document by fraud or illegality.[205] The denaturalization procedure protects the holder's interest by assuring that he/she is accorded due process of the law. The INA provides for the revocation of citizenship and the cancellation of the certificate of naturalization where they were procured illegally, or by concealment of a material fact or by willful misrepresentation.[206] The naturalized citizen has sixty days upon the service of notice to answer the government's petition alleging fraud or misrepresentation.[207]

Under the provisions of § 340 of the INA, not only can the naturalized person lose his/her citizenship by a showing of illegality or misrepresentation in the procurement of the naturalization, but the naturalized person can also be subjected to possible revocation of naturalization by joining or becoming affiliated with various organizations.[208]

Procedure for the revocation of naturalization is as follows:

1. The USCIS district director, having jurisdiction over the area where the naturalized citizen resides, reviews the evidence and makes a report to the USCIS regional commissioner.

2. The USCIS regional commissioner prepares an "affidavit of good cause" stating why action should be taken to denaturalize—that is, remove the citizenship of—the naturalized citizen.

3. The affidavit of good cause is forwarded to the General Counsel of the USCIS at the USCIS headquarters in Washington, DC.

4. The USCIS General Counsel recommends to the Justice Department Criminal Division that proceedings be initiated to revoke citizenship.

5. The Criminal Division, if it concurs in the recommendation, advises the United States Attorney having jurisdiction over the area where the naturalized citizen resides to file a suit in the U.S. district court seeking to have the naturalization revoked.

6. The action is "for the purpose of revoking and setting aside the order admitting such person to citizenship."[209]

7. The holder of a naturalization certificate then has sixty days to show why the revocation should not take place.

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203 M. Cherif Bassiouni, International Procedures for the Apprehension and Rendition of Offenders, 1980 Proceedings of the Am. Soc'y of Int'l L. 277 (1980).

204 *Id.*

205 8 U.S.C. § 1451(a), (f) (2000).

206 8 U.S.C. § 1451(a) (2000).

207 8 U.S.C. § 1451(b) (2000).

208 8 U.S.C. § 1451(c) (2000).

209 8 U.S.C. § 1451(a) (2000).

8. The naturalized citizen has the full right of appeal through the judicial system.

If successful in having naturalization revoked, the USCIS must initiate separate proceedings to remove (deport) the alien.

In the cases of *Walus* and *Fedorenko*, there is reason to believe that the certificates of citizenship were illegally procured by concealment and, therefore void ab initio, justifying revocation and cancellation. In these cases there has been no questionable use of immigration laws. However, on consideration of underlying factors, the use of immigration laws is in reality a disguised substitute for extradition: the defendants in these two cases were alleged war criminals and subject to prosecution for their crimes. On discovery of these defendants, the correct procedure for their removal for prosecution would be through extradition, as in the *Demjanjuk* case, although there the government abused the extradition process. This is significant, because the defendants then would be subject to the benefits and limitations specific to extradition proceedings.

This problem could be resolved by an application of the jurisdictional basis of universality to which the United States does not subscribe. If the United States had universal jurisdiction for these crimes,[210] individuals such as the ones involved in the above cases could be prosecuted in the United States for war crimes and crimes against humanity. This exercise of jurisdiction and subsequent prosecution would act as a legitimate alternative to extradition and would be in keeping with the maxim *aut dedere aut judicare*.[211]

3.3. Immigration and Naturalization Act Reforms

As discussed above, immigration laws, whether through removal (exclusion) or removal (deportation) proceedings, have been used by the government to remove persons from the United States and deliver them to states that have either sought to extradite them unsuccessfully or who have an interest in obtaining their custody but are unable to do so through extradition. This practice is made possible by the absence of legislative linkage between the extradition and immigration statutes, respectively contained in title 18 U.S.C. §§ 3181–3196 and 8 U.S.C. §§ 1101–1537. Because extradition proceedings are judicial and INA's proceedings are administrative, the latter gives the government greater discretion. As they became effective in 1997, INA amendments made by both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[212] and by the Anti-Terrorism and Effective Death Penalty Act 1996 (AEDPA)[213] have sharply circumscribed the rights of aliens, including permanent residents of the United States.[214] Unprecedented discretion given to the Attorney General and the USCIS, coupled with a curtailment of due process rights and the abhorrent practice of "secret evidence," may make disguised extradition even easier when other mechanisms would be rejected.

3.3.1. Removal (Deportation)

Reformed INA § 101(a)(43) permits deportation of an alien including a permanent resident who was found guilty of an "aggravated felony," which includes crimes of moral turpitude with an accompanying sentence of one year or longer.[215] Under the reformed statute, high-speed flight,

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210 *See* Ch. VI.

211 *See* Ch. I, Sec. 3.

212 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in various sections of 8 U.S.C.).

213 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in various sections of 8 U.S.C.).

214 With respect to permanent residents, it is a departure from the traditional "equal protection" between the civil rights of citizens and permanent residents of the United States, as well as the right to the due process of law to all persons within the United States, as discussed below.

215 *See* AEDPA § 440(e), 110 Stat. at 1276–1278; AEDPA § 435(a), 110 Stat. at 1274 (codified as amended at 28 U.S.C. §§ 2244-66).

domestic violence, stalking, and violations of protective orders can all be considered crimes involving moral turpitude, and therefore grounds for removal (deportation).[216] The IIRIA also amended the INA § 101(a) by redefining an aggravated felony as a serious crime with an accompanying sentence of one year or longer,[217] a significant reduction from the previous requirement that the sentence be for five years or longer. This change renders a permanent resident alien removable (deportable) if he/she commits a less serious crime, such as theft, even if that crime was committed prior to the two acts. The IIRIRA and the AEDPA amendments to INA § 101 have retroactive effect with respect to the definition of an aggravated felony.[218] Thus, for the first time in U.S. history, a sanction, namely removal (deportation), has been added to the sanction received after a criminal conviction, notwithstanding Article I § 8(3) of the Constitution, which prohibits congress from passing ex post facto laws.[219] The issue of the constitutionality of the retroactivity of the new provisions was dealt with by the Second Circuit Court of Appeals in *Domond v. U.S. INS*,[220] which upheld the provision in AEDPA making aliens convicted of

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216 *See* Gabrielle M. Buckley, Immigration and Nationality, 32 Int'l Lawyer 471, 475 (1998).

217 *See* IIRIRA § 321(a), Pup. L. No. 104-208, 110 Stat. 3009-546, 3009-627 (codified as amended at various sections of 8 U.S.C.).

218 *See* Ira J. Kurzban & Raquel M. Chaviano, Immigration Law: 1997 Survey of Florida Law, 22 Nova L. Rev. 149, 156 (1997) ("Ancient convictions for relatively minor matters will now result in the deportation of long-term residents without relief.") For a discussion of cases involving crimes of moral turpitude, *see* Kurzban, *supra* note 3, at 75–95 (discussing, among others, *In re* Almanza, 24 I&N Dec. 771 (BIA 2009) and Vasquez-Hernandez v. Holder, 590 F.3d 1053 (9th Cir. 2010) where petty offenses were crimes of moral turpitude). For a case discussing the analytical framework that the immigration judge, Board of Immigration Appeals, and Department of Homeland Security must apply to determine if a conviction involves a crime of moral turpitude, see *In re* Silva-Trevino, 24 I&N Dec. 687 (AG 2008).

219 *See* M. Cherif Bassiouni, Substantive Criminal Law (1977), explaining the prohibition against ex post facto laws:

> These laws undertake to define as offenses acts committed before the adoption of the statute prohibiting such conduct and to punish acts committed prior to the enactment of the statute sought to be applied. The United Stated Constitution prohibits such laws because they seek to make a person accountable for conduct that could not have been known to constitute a criminal act. Thus, no criminal statute can be retroactive, and no person can be found to be guilty of a crime which was not a crime at the time when the alleged offense was committed. Any such offence, defined after its commission, lacks "legality" because the law on its face violates the constitutional principle limiting the power of the sovereign in the enactment of such criminal statutes . . . In the landmark case of *Calder v. Bull*, the Court defined *ex post facto* laws as:
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> > (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes that action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that alters the legal rules of evidence and receives less or different testimony, than the law required at the time of commission of the offence, in order to convict the offender.
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> . . . In *Bouie v. City of Columbia*, the Supreme Court held that the prohibition against *ex post facto* laws extended to the retroactive application of law by judicial decision: "If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." . . . As to other procedural changes, the Supreme Court applies the following test: Does the change adversely affect a substantial right existing at the time of the offence? Among those changes held to be "substantial" are the reduction of the number of trial jurors, the reduction in the number of jurors needed for a guilty verdict, and the abolition of the right to trial by jury in certain cases.

Id. at 30–32 (citing Calder v. Bull, 3 U.S. 386, 390 (1878); Bouie v. City of Columbia, 378 U.S. 347, 353–354 (1964)). *See also* USA PATRIOT Act of 2001, Title IV, Subtitle B, § 411(c) (applying broader definitions of terrorist activities retroactively).

220 Domond v. U.S. INS, 244 F.3d 81 (2d Cir. 2001).

certain specified crimes ineligible for discretionary relief if they had been convicted for a qualifying crime based on acts occurring prior to AEDPA's effective date. The court also held that the application of AEDPA's provisions to aliens did not violate the ex post facto clause of the Constitution. However, in the 2001 *INS v. St. Cyr*[221] decision, the Supreme Court struck down only the retroactively applicable provisions that denied discretionary relief from removal (deportation) of an alien who pled guilty to an aggravated felony prior to the statutes' enactment.

The IIRIRA provides, also for the first time in the history of the United States, for the removal (deportation) of a permanent resident who has committed an aggravated felony whether under state or federal law, where the conviction is based on an admission of facts sufficient to find guilt, without requiring an actual sentencing by a judge.[222] This establishes what appears on its face to be an unconstitutional presumption of the removability (deportability) of aliens who commit aggravated felonies (as defined by the Act) with retroactive application. Furthermore, the Act does not even give permanent residents, who heretofore were in the same class as U.S. citizens for purposes of civil rights under the Equal Protection Clause,[223] the right to judicial review.[224] However, the USCIS bears the burden of proving the conviction by clear and convincing evidence as stated by the U.S. Supreme Court in *Nijhawan v. Holder*: "... [A] deportation proceeding is a civil proceeding in which the Government does not have to prove its claim 'beyond a reasonable doubt.' At the same time the evidence that the Government offers must meet a 'clear and convincing' standard. 8 U.S.C. § 1229a(c)(3)(A)."[225]

The same deprivation of the right to judicial review is contained in AEDPA § 440(a), which provides that once a final order of removal is entered by the USCIS for an alien who was found removable (deportable) on the grounds that he/she committed a criminal offense covered by INA statute,[226] that order is final and is not, under the Act, subject to review by any court.[227] The IIRIRA adds that the alien cannot have access to judicial review of orders detaining him/her pending his/her removal.[228] Amended INA § 242(a)(2)(B) also denies judicial review of all discretionary relief other than asylum.[229]

For the first few years following the enactment of the 1996 Acts, the Supreme Court was reluctant to grant certiorari in cases that dealt with judicial review.[230] This resulted in lower

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221 INS v. St. Cyr, 121 S.Ct. 2271 (2001).

222 *See* IIRIRA § 322(a), 110 Stat. at 3009–3628 (codified as amended at various sections of 8 U.S.C.). *See also* Kurzban, *supra* note 3, at 169–193 (collecting cases involving aggravated felonies).

223 U.S. Const. amend. XIV, § 1.

224 *See infra* notes 225–232.

225 INA §240(c)(3)(A); Nijhawan v. Holder, 557 U.S. 2294, 129 S. Ct. 2294, 2303 (2009) (concluding that, where deportation proceedings are instituted under the $10,000 monetary threshold in the aggravated felony provision of 8 U.S.C. §1101(a)(43)(M)(i), that statutory provision applies to the specific circumstances surrounding the commission of a fraud and deceit crime on a specific occasion, and not to a category of crimes defined to include the monetary threshold); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1128–1129 (10th Cir. 2005). *See also* Kurzban, *supra* note 3, at 169.

226 *See* 8 U.S.C § 1252(a)(2)(C) (1999) for a list of sections that defined criminal offenses for removal purposes.

227 *See infra* notes 228–232.

228 C.F. David Cole, No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions, 12 Geo. Immigr. L.J. 429 (1998).

229 INA § 240A (cancellation of removal and adjustment of status) greatly limits the availability of discretionary relief to begin with; it combines the earlier §§ 244, 212(c) (suspension of deportation, and waivers, respectively) to produce a much harsher standard to obtain relief, therefore, rendering an alien convicted of an aggravated felony requesting relief to have to pass the "exceptional and extremely unusual hardship" standard. *See also* Ch. III for a discussion of asylum.

230 *See* John Assadi & Craig Donovan, Immigration and Nationality, 34 Int'l Lawyer 646 (1999).

courts dealing with the constitutionality of the reform Acts' provisions that deprived petitioners from obtaining federal courts habeas corpus review. Consequently different courts reached different results, which resulted in a split in the circuits. For example, in *Dunbar v. INS*[231] the federal district court of Connecticut held that the IIRIRA did not deprive the court of habeas jurisdiction over aliens' claim. A similar result was reached by the court of the Eastern District of New York.[232] However, in *Moore v. District Director, INS*,[233] the district court of Nebraska stated that "Congress has repealed all statutory habeas jurisdiction."[234] Eventually, the Supreme Court, in *INS v. St. Cyr*[235] resolved the issue of whether federal courts have jurisdiction under 28 U.S.C. § 2241 to review a decision denying the aliens discretionary relief, holding that under § 2241, the federal courts are allowed to grant writs of habeas corpus when the government unlawfully deprives a petitioner of his/her liberty.[236] However, in 2005, Congress unambiguously eliminated habeas review of alien removal orders through the passage of the REAL ID act.[237] However, it should be noted that the REAL ID Act's legislative history makes it clear that habeas corpus relief will not be barred by the REAL ID Act in contexts other than challenges to removal orders.[238]

Under the IIRIRA and the AEDPA a permanent resident will not only lose his/her status, if found eligible for removal (deportation), because of an "aggravated felony" he/she committed, even in the past, but he/she is also potentially subject to removal (deportation) to a country where the alien would fear for his/her life or freedom based on the alien's race, religion, nationality, or political opinion.[239] This provision appears on its face to violate the 1967 Protocol amending the 1951 Refugee Convention discussed in Chapter III on asylum.

Using the removal (deportation) provisions, §§ 231–244, 501–507, the USCIS could remove (deport) a person to a country that seeks to obtain custody over that person, but has been unable to obtain custody through extradition, or unwilling to go through extradition because of anticipated failure. It is possible for the USCIS to do so by anticipating the country to which the person may be removed (deported), or for which the person has expressed a preference. Through informal or formal diplomatic channels the USCIS can arrange for that country to decline accepting that person, thus eliminating possible countries to which the alien can be removed (deported) and thereby secure removal to the country that USCIS ultimately wants to deport him/her to.

In some cases the USCIS is unable, in good faith, to find a country willing to accept the removable (deportable) person, and that has led to prolonging the detention of that person without any constitutional basis, as the person in question has already served the full prison term of

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231 Dunbar v. INS, 64 F. Supp. 2d 47 (D. Conn. 1999), *aff'd* 229 F.3d 406 (2d Cir. 2000), *cert. granted* 531 U.S. 1107 (2001), *aff'd* 553 U.S. 289 (2001).

232 Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997).

233 Moore v. District Director, INS, 956 F. Supp. 878 (D. Neb. 1997).

234 *Id.* at 882.

235 INS v. St. Cyr, 121 S. Ct. 2271 (2001).

236 *Id.*. *See* Assadi & Donovan, *supra* note 230, at 643.

237 *See* Jennifer Norako, Comment, Accuracy or Fairness?: The Meaning of Habeas Corpus after Boumediene v. Bush and Its Implications on Alien Removal Orders, 58 Am. U. L. Rev. 1611, 1622–1624, 1647–1648 (2009). For a critical analysis of the REAL ID's shortcomings in providing review of alien removal decisions, see *id.* at 1640–1647. For a detailed discussion of the effect of the REAL ID Act on habeas corpus review, and for the availability of habeas corpus relief generally, see Kurzban, *supra* note 3, at 1226–1234 (collecting cases involving habeas corpus actions and related proceedings).

238 *See also* Kurzban, *supra* note 3, at 1227–1229 (collecting cases involving habeas corpus proceedings). *See also* Ch XI (discussing habeas corpus proceedings).

239 INA § 241(b)(3)(b)(ii) (codified as amended at 8 U.S.C. § 1227 (a)(2)(A)(iii) (2000)).

his/her conviction under state or federal law. The Supreme Court, in *Zadvydas v. Davis*,[240] held that after serving their sentences, removable (deportable) aliens cannot be detained for a period longer than six months despite the fact that no country would receive them. The Supreme Court, however, failed to offer any valid constitutional basis for detaining a person who has not been sentenced by a court of law. The Supreme Court in this case acted ultra vires and in a quasi-legislative capacity when it arbitrarily selected a six-month maximum additional detention period, and this matter needs to be remedied.

3.3.2. Secret Evidence

The INA, AEDPA, and IIRIRA further facilitate the surrender of persons outside the extradition process through the use of secret evidence in certain situations. As discussed below, both Acts include sections that allow the use of classified information or "secret evidence" in order to remove (exclude) arriving aliens and to remove (deport) aliens, including permanent residents. These provisions are, on their face, unconstitutional and perhaps Congress will repeal them soon. But for now they are in effect.[241]

Section 235(c) of the INA provides for the automatic denial of admission of "arriving aliens"[242] who are suspected, possibly based on "secret evidence," of being inadmissible because of a connection to a terrorist group, as determined by the Attorney General in his/her discretion, or because they are suspected of terrorist activity.[243] Problematically, however, that determination may be made without sufficient statutory legal standards. Section 235(c) outlines the relatively simple process of removing/excluding the arriving alien suspected of such "terrorist" connections. The process begins when an immigration officer suspects that an alien may be inadmissible based on the security grounds specified in INA.[244] The officer then issues and serves the alien with a Notice of Temporary Inadmissibility. The alien has the right to submit a written response, including any additional facts he/she may choose to disclose. The case is then referred to the USCIS Regional Director who makes the final determination to: (1) issue a declaration of "Permanent Inadmissibility"; (2) conduct further investigation; or (3) refer the case to an immigration judge for removal proceedings pursuant to INA § 240.[245] If the case is referred to an immigration judge for § 240 removal proceedings the alien cannot examine the "secret evidence" that was relied upon as the basis of his/her removal (exclusion),[246] and thus is unable

240 Zadvydas v. Davis, 121 S. Ct. 249 1 (2001). An arbitrary six-month detention for aliens who may "threaten the national security of the United States" (regardless of eligibility for relief from removal or grant of relief from removal) was also introduced into the USA PATRIOT Act of 2001, Title IV, Subtitle B, § 412 as within the discretion of the Attorney General. *See also* Marks v. Clark, 2009 U.S. Dist. LEXIS 72456 (W.D. Wa. Jul. 13, 2009) (finding detention claim moot on alien's release, and finding lack of jurisdiction to review of citizenship in the context of removal proceeding where sole relief is direct petition for appellate review).

241 It is noteworthy that a number of congressional representatives are opposed to the use of secret evidence, and as a result have introduced the Secret Evidence Repeal Act, which deems the use of secret evidence in immigration actions unconstitutional. However, this movement suffered a tremendous setback on September 11, 2001; it appears now that the INS will seek greater authority than ever before to use secret evidence. *See* Stephen Franklin & Ken Armstrong, *Secret Evidence Bill Raises Concerns*, Chi. Trib., Sept. 30, 2001.

242 A term that includes aliens who were not "admitted" to the United States; however, for purposes of § 235(c) aliens who were not admitted prior to April 7, 1997, are not applied to § 235(c) excludability procedure.

243 INA § 212(a)(3)(A)(i) and (iii), (B), and (C) (codified as amended by 8 U.S.C. § 1182 (a)(3)(A)(i) and (iii), (B), (C) (2000)). These definitions were actually broadened by amendments in the USA PATRIOT Act of 2001, § 411.

244 *Id.* The USA PATRIOT Act of 2001 now calls for mandatory detention of suspected terrorist aliens with the addition of § 236A to the INA.

245 The implementing regulations for INA § 235(c) appear at 8 C.F.R. § 235.8 (2001).

246 INA § 240(b)(4)(B) (codified as amended at 8 U.S.C. § 1229 a (b)(4)(B) (2000)).

to defend himself/herself against the allegations, let alone to confront and cross-examine his/her accusers, which violates the Sixth Amendment.

Aliens who are not deemed to be "arriving aliens" are subject to special removal proceedings contained in Title V of INA, which was added by the 1996 IIRIRA. Under this authority, a new Star Chamber[247] has been established, called the Alien Terrorist Removal Court, which decides on the issue of whether the alien is removable on due to the determination that he/she is an "alien terrorist" on the basis of "secret evidence." Before the commencement of the special removal proceedings, the immigration judge must decide whether there is probable cause that the alien is an "alien terrorist," namely, an alien who has engaged, is engaged, or at any time after admission was engaged in any terrorist activity.[248] The judge must also decide whether the alien "would pose a risk to the national security of the United States."[249] After making such a finding, the special proceeding commences. The government can present "secret evidence," and the alien can present whatever defense he/she can, even though he/she has no access to the "secret evidence" relied upon by the USCIS and immigration judge. The alien is entitled, however, to an unclassified summary of the "classified information" as long as it is determined by the immigration judge that the "unclassified summary" will not cause harm to the national security of the United States.[250] If the alien was a lawful permanent resident, he/she is entitled to a representation by a "special attorney" who can review the "unclassified summary" even if it is not provided to the alien on national security grounds.[251] This procedure is not only contrary to the principles that this country as espoused since its inception, but it is unique in the world, except for some authoritarian regimes.

Moreover, the IIRIRA, through INA Title V, authorizes the government to use "the fruits of electronic surveillance and unconsented physical searches" in removal proceedings.[252] On its face this constitutes a clear violation of the Fourth Amendment and the Due Process Clause of the Fifth Amendment. It also violates the Equal Protection Clause of the Fourteenth Amendment as applied to permanent residents and other aliens present in the United States.[253] Section 240(b)(4)(B) of the INA, which applies to all other removal proceedings, deprives the alien of the fundamental right to examine evidence, manifested in "national security information," that is presented by the government against the alien's admission or the alien's application for discretionary relief. Title V of the INA also contains a number of other constitutionally questionable provisions. But perhaps the most questionable provision is the use of "secret evidence" before a special judicial proceeding, which clearly violates the right to due process and fairness, and offends the notion of justice and fair play that this country has long recognized.[254]

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247 The Star Chamber was an English court established in the seventeenth century to try aristocrats and powerful merchants, but soon became a tool of oppression used by the Crown to try opponents in secret and without legal protections such as the issuing of indictments, the calling of witnesses, or other means for the defendant to rebut the Crown's charges. Michael Stuckey, The High Court of Star Chamber (1998).

248 As defined in INA § 212(a)(3)(B)(iii) (codified as amended at 8 U.S.C. § 1182 (a)(3)(B)(iii) (2001)).

249 INA § 503(a)(1) (codified as amended at 8 U.S.C.S. § 1533 (a)(1) (2001)).

250 INA § 504(e)(3) (codified as amended at 8 U.S.C.S. § 1534 (e)(3) (2001)).

251 INA §§ 501(7), 504(e)(3)(F) (codified as amended at 8 U.S.C.S. §§ 1531 (7), 1534 (e)(3)(F) (2001)).

252 INA § 504 (e)(1)(A) (codified as amended at 8 U.S.C.S. § 1534 (e)(1)(A) (2001)).

253 U.S. Const. amend. IV; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. *See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (treating actions by the federal government that would be considered as Equal Protection Clause violations, if done by a state, as violations of the Fifth Amendment's Due Process Clause, which is a clause that directly applies to the federal government).

254 *See* M. Cherif Bassiouni, Substantive Criminal Law (1977):

> Due process is a living concept that embodies the idea of "fair play and substantive justice." It . . . is essential to the maintenance of certain "immutable principles of justice." The concept of "due process of law" was well expressed by Justice Frankfurter in the following words:

The constitutionality of the use of secret evidence in immigration proceedings was considered by the Supreme Court in *Mathews v. Diaz*,[255] but for all practical purposes it left the patently unconstitutional procedure in place. Nevertheless, the Court affirmed that both the Fifth and Fourteenth Amendments of the U.S. Constitution protect an alien's right to due process of law. The Court defined an alien as someone within the jurisdiction of the United States, even if the alien's presence was unlawful.[256] In another case, *Mathews v. Eldridge*,[257] the Supreme Court established a balancing test between the rights of the alien and the government's interest, which, also includes an element of examining the "risk of erroneous deprivation of [the alien's] interest";[258] on its face it would appear that this element should assume that the use of "secret evidence" always poses a high risk of error that will result in the deprivation of the alien's right, but this logical conclusion was not reached. Following the test laid out in *Mathews v. Eldridge*[259] courts have found, in the cases mentioned below, that whenever an alien's due process rights under the Constitution are affected, the use of secret evidence is likely to be held unconstitutional.

In *Kiareldeen v. Reno*,[260] the petitioner, Hany Kiareldeen, a Palestinian who was in the process of adjusting his status to a permanent resident, was detained by the INS and held without bond for overstaying his student visa—an unusually harsh and rarely resorted to measure. When petitioner sought discretionary adjustment of status and mandatory relief the INS presented "secret evidence" that linked him to a designated "terrorist" group.[261] There was no evidence presented that he had actually committed any wrongdoing. The federal district court of New Jersey[262] held that the INS's use of "secret evidence," both at the alien's bail hearing and throughout his removal proceedings, violated the alien's right to "due process." The court found that "…[t]he government's reliance on secret evidence violates the due process

> The "due process" clause embodies a system of rights based on moral principles so deeply embedded in the tradition and values of our people as to be deemed fundamental to a civilized society as conceived by our whole history. "Due process" is that which comports with the notion of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is the very essence of the "due process" clause.
>
> These principles are precisely the standards that society has a right to expect from those entrusted with the sovereign prerogatives. Justice Stanley Mathews, speaking for the Supreme Court in *Hurtado v. California*, declared:
>
> > Arbitrary power enforcing its edicts to the injury of persons and property of its subjects is not law. Whether manifested as decrees of a personal monarch or of an impersonal multitude…the enforcement of these limitations by judicial process is the devise of self-governing countries to protect the rights of individuals and minorities, as well as against the powers of its members, against the violence of public agents transcending the limits of lawful authority, even when acting in the same wielding force of the government.
>
> Thus, no offense is lawful unless it satisfies the requirements of the principles of legality and complies with certain canons of statutory construction as embodied in the meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 27–28 (citing *Solesbee v. Balkcom*, 339 U.S. 9 at 16 (1949); *Hurtado v. California*, 110 U.S. 516, 536 (1884)).

255 Mathews v. Diaz, 426 U.S. 67 (1976).

256 *Id.* at 77.

257 Mathews v. Eldridge, 424 U.S. 319 (1976).

258 *Id.* at 335.

259 *Id.*

260 Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999).

261 *Id.* at 404. Such harsh decisions will undoubtedly become more commonplace with the implementation of the "Foreign Student Monitoring Program" established by the USA PATRIOT Act of 2001, Title IV, Subtitle B, § 416. This program is actually an expansion of the program authorized by the IIRIA of 1996, § 641(a).

262 *Kiareldeen*, 71 F. Supp. 2d at 402.

protections that the constitution directs must be extended to all persons within the United States citizens and resident aliens alike."[263] Judge William Walls held in the *Kiareldeen* case that "reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness."[264]

The Ninth Circuit Court, in *American-Arab Anti-Discrimination Committee v. Reno*[265] (*AAADC*), found that the government's reliance on "secret information" in legalization proceedings constituted a violation of "due process." The court also held that INS procedures failed the *Mathews v. Eldridge* test of constitutionality.[266] In *AAADC*, two resident aliens, among others, applied to the INS to legalize their status. The INS charged them with membership in the Popular Front for the Liberation of Palestine (PFLP), and denied their applications on the basis of undisclosed classified information. No evidence of wrongdoing was presented. The court affirmed that "[a]liens who reside in this country are entitled to full due process protections."[267] In applying the test used in *Mathews v. Eldridge*, the court held that "the very foundation of the adversary process assumes that the use of undisclosed information will violate due process because of the risk of error."[268] The court went on to say that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[269]

It is clear from actual practice that the use of "secret evidence" results in manipulation and bias against vulnerable groups. By April 2001 there were twenty-eight persons detained under the "secret evidence" provisions of the INA;[270] all of them were Arabs or Muslims.[271] This in itself shows the racial discrimination[272] pattern evident in this procedure.[273]

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263 *Id.* at 414.

264 *Id.* at 413.

265 Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995), *appeal after remand* 119 F.3d 1367 (9th Cir. 1997), *reh'g en banc denied* 132 F.3d 531 (9th Cir. 1997), *vacated remanded* 525 U.S. 471 (1999).

266 *Id.* at 1067.

267 *Id.* at 1069.

268 *Id.*

269 *Id.*

270 The detention of Mazen Al Najjar, a U.S. resident for almost twenty years, is another example of the use of "secret evidence" by the government to detain U.S. residents without bond during deportation proceedings. Najjar's case was heard by the Southern District Court of Florida. In *Najjar v. Reno*, 97 F. Supp. 2d 1329 (S.D. Fla. 2000), the court held that the government's reliance on "secret evidence" to detain Najjar violated his constitutional right to due process, furthermore, his association with a known "terrorist" organization was not reasonable grounds for his continued detention pending his removal hearing. *Appeal after remand at* Najjar v. Ashcroft, 257 F 3d 1262 (2001), *vacated, appeal dismissed by* 273 F.3d 1330 (11th Cir. 2001). Petitions for review denied.

271 The use of secret evidence to designate a certain organization as "terrorist" has been authorized by INA § 219. Further, secret evidence can also be used to designate an alien to be linked to a "terrorist" organization, rendering that alien removable on security grounds.

272 As the content of previous "secret" documents is being gradually accessed by certain people, such as the former CIA director James Woolsey, "serious errors" in Arabic–English translations have been found in such documents, as well as statements that are the product of stereotyping based on religion or ethnicity. Michael J. Whidden, Unequal Justice: Arabs in America and United States Antiterrorism Legislation, 69 Fordham L. Rev. 2825, 2848 (2001).

273 The politicized nature of the deportation process is evident in the invocation of issues of "national security," particularly relying on secret evidence. For instance, the Department of Justice withheld deporting the Irish nationals, who were members of the IRA, as a result of the Northern Ireland peace

3.3.3. Mandatory Bars to Asylum and Withholding of Removal

There are several categories that constitute a bar to asylum, most of which have been enacted since 2001:[274] particularly serious crimes,[275] aggravated felonies for asylum,[276] aggravated felonies for withholding of removal,[277] serious nonpolitical crimes,[278] participation in the persecution of others,[279] danger to the security of the United States,[280] and terrorism.[281]

The list of aggravated felonies in the INA was subsequently expanded, and now includes many minor, nonviolent offenses, such as theft.[282] Even if a sentence is for fewer than five years, the BIA official may now find the offense sufficient to constitute a bar.[283] In *Matter of Y-L*, the Attorney General ruled that all drug trafficking offenses are now presumptively considered particularly serious crimes.[284] In *Matter of Q-T-M-T,* the BIA held that a categorical classification

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negotiations. Niels W. Frenzen, National Security and Procedural Fairness: Secret Evidence and the Immigration Laws, 76 No. 45 Interpreter Releases 1677, 1685 (1999).

274 8 C.F.R. §§ 208.16(d)(2), 1208.16(d)(2).

275 INA §§ 208 (b)(2)(A)(ii), 241(b)(3)(B)(ii), 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231 (b)(3)(B)(ii). *See*, e.g.,Choeum v. INS, 129 F.3d 29, 40–43 (1st Cir. 1997); Hamama v. INS, 78 F.3d 233, 240 (6th Cir. 1996); Ahmetovic v. INS, 62 F.3d 48, 52–53 (2d Cir. 1995). For a critical analysis of the process of determination of a "particularly serious crime," *see* Michael McGarry, Note: A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal, 51 B.C. L. Rev. 209 (2010). *See also* Kurzban, *supra* note 3, at 522–525 (collecting cases involving particularly serious crimes, including *In re Frentescu,* 18 I&N Dec. 244 (BIA 1982) (setting forth criteria to determine whether someone was convicted of a particularly serious crime); *In re N-A-M-,* 24 I&N Dec. 336 (BIA 2007) *aff'd N-A-M- v. Holder*, 557 F.3d 1052 (10th Cir. 2009), and *Gao v. Holder*, 595 F.3d 549 (4th Cir. 2010)).

276 For asylum cases: IIRAIRA, INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i). *See generally,* Kurzban, *supra* note 3, at 524–525 (collecting cases involving aggravated felonies).

277 For withholding of removal: INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B). *See generally* Kurzban, *supra* note 3, at 524–525 (collecting cases involving aggravated felonies).

278 INA §§ 208(b)(2)(A)(iii), 241(b)(3)(B)(iii), 8 U.S.C. §§ 1158(b)(2)(A)(iii); *In re* McMullen, 19 I&N Dec. 90, 97 (1984). *See generally* Kurzban, *supra* note 3, at 525–526 (collecting cases involving serious nonpolitical crime, including the recent decision of Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004), Pronsivakulchai v. Gonzales, 461 F.3d 903 (7th Cir. 2006), Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010), Guo Qi Wang v. Holder, 583 F.3d 86 (2d Cir. 2009)).

279 INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). *See also* Hernandez v. Reno, 258 F.3d 806, 813–814 (8th Cir. 2001); Negusie v. Holder, 555 U.S. 511 (2009). *See also* Kurzban, *supra* note 3, at 462–464 (collecting cases involving the persecutor bar, including Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009); Parlak v. Holder, 578 F.3d 457 (6th Cir. 2009); Yan Yan Lin v. Holder, 584 F.3d 75 (2d Cir. 2009); and Wang v. Holder, 562 F.3d 501 (2d Cir. 2009)).

280 INA §§ 208(b)(2)(A)(iv), 241(b)(3)(b)(iv), 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231 (b)(3)(B)(iv) for asylum. *See also* Yusupov v. Attorney General of the United States, 2011 U.S. App. Lexis 12110 (3d Cir. Jun 16, 2011). *See generally* Kurzban, *supra* note 3, at 526–527 (collecting cases involving danger to U.S. security, including Khan v. Holder, 584 F.3d 773 (9th Cir. 2009) and Malkandi v. Mukasey, 576 F.3d 906 (9th Cir. 2009)).

281 USA PATRIOT ACT of 2001; INA §§ 208(b)(2)(A)(v), 241(b)(3)(B), 8 U.S.C. §§ 1158(b)(2)(A)(v), 1231(b)(3)(B). *See also* Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 Geo. Immigr. L.J. 505 (2002).

282 IIRAIRA, INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i); Regina Germain, AILA's Asylum Primer 76 (3d ed. 2003).

283 Germain, *supra* note 282, at 76.

284 23 I&N Dec. 270 (A.G. 2002); *but see In re* Santos-Lopez, 23 I&N Dec. 419 (BIA 2002) (finding that two misdemeanor offenses for possession under state law do not fall under the federal definition of drug

of particularly serious crimes did not violate the Refugee Convention.[285] In determining the seriousness of the offense, the UNHCR has suggested that a fact-finder look at: whether the offender was a minor, on parole, whether there had been a lapse of five years since the conviction or completion of sentence, general good character, whether the offender was merely an accomplice, and other circumstances surrounding the offense.[286]

The government can use these processes instead of extradition because they have fewer due process guarantees than in any criminal or quasi-criminal process and lower substantive mores and evidentiary standards than in any other legal process in the United States. For all practical purposes, the government has used the PATRIOT Act and other "terrorism" measures to bypass the extradition process whenever it suits the government to label a case as involving "terrorism," particularly when extended to include "material support."[287]

(a) Terrorism Excusing Extradition

Since September 11, 2001, the U.S. government has consistently used the classification of an individual as a "terrorist" to avoid extradition proceedings. Through the PATRIOT ACT and the REAL ID Act, the definition of terrorist activities in INA § 212 was expanded. Immigration officials can return individuals with "terrorist" connections to countries from which they are seeking asylum with fewer obstacles. Both the PATRIOT Act and the REAL ID Act are applicable retroactively.[288] The REAL ID Act is applicable to any group of more than one individual that has engaged in terrorist activities, whether organized or not.[289] Many individuals who would normally qualify for asylum have been denied under this broad category. For example, two women, one from Liberia and the other from Sierra Leone, were attacked by rebels in their respective countries, raped, and held captive in their own homes.[290] Upon evaluation, the UNHCR decided that they were refugees. However, the USCIS determined that these women provided "material support" for terrorist groups by providing the rebels with shelter, food, and laundry services while they were being held hostage.[291]

For terrorism cases, a mandatory bar can be set for danger to the security of the United States or for terrorism. Under an asylum claim and request for withholding of removal, an individual

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trafficking); Germain, *supra* note 282, at 76. *See generally* Kurzban, *supra* note 3, at 522–525 (collecting cases involving particularly serious crimes).

285 *In re* Q-T-M-T, Int. Dec. 3300 (BIA 1996).

286 G. Goodwin-Gill, The Refugee in International Law 107 (1996). *See also* Germain, *supra* note 282, at 77. *See also In re* Frentescu, 18 I & N Dec. 244, 245 (1982) (holding that a particularly serious crime is more serious than a serious nonpolitical crime.)

287 *See* White House, National Strategy for Combating Terrorism (2006), http://georgewbush-whitehouse.archives.gov/nsc/nsct/2006/. *See also* Human Rights Watch, In the Name of Counter-Terrorism: Human Rights Abuses Worldwide, Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights (Mar. 25, 2003), http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf.

288 REAL ID § 103, 8 U.S.C. § 1182(a)(3).

289 *Id.*

290 U.S. Dep't of State, Bureau of Population, Refugees and Migration (PRM), Case Summaries. *See also Terrorists or Victims?*, N.Y. Times, Apr. 3, 2006.

291 Under INA § 212 (a)(3)(B)(iv)(VI), the USCIS said that the two women provided "services" and "housing," which qualifies as material support. *See also* Jennie Pasquarella, Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support for Terrorism" Bar on Refugees, 13 Human Rights Brief 28 (2006).

is barred if there are reasonable grounds to assume he/she is a danger to the United States.[292] Further, under the withholding of removal procedure, an applicant who has engaged in terrorist activity is barred as well.[293] Engaging in a terrorist activity is defined as committing, inciting, preparing, planning terrorist activities, soliciting funds and individuals, and providing material support for a terrorist organization.[294] Most of the recent cases rest on the material support bar.

Individuals who are barred from asylum can still apply for relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in the form of deferral of removal.[295] However, the material support for terrorism claim will totally bar an asylum claim.

3.3.4. Convention against Torture[296]

The CAT was implemented by the Foreign Affairs Reform and Restructuring Act (FARR Act).[297] The FARR Act states that "[t]o the maximum extent consistent with the obligations of the United States under the Convention," the regulations should remove individuals barred from relief under the withholding of removal section of the INA.[298] Both the CAT and the FARR Act require "substantial grounds for believing [the person] would be in danger of being subjected to torture."[299] Unlike the asylum and withholding of removal procedures, the CAT does not have any bars to relief.[300] Under Article 3(1) of the CAT, no one can be returned to a country where there are "substantial grounds" to believe that the individual would be subjected to torture. Thus, in *Matter of G-A*,[301] the BIA held that no matter how serious an applicant's criminal convictions were, they did not constitute a bar to deferral of removal under the CAT. However, the USCIS barred individuals from withholding of removal under § 241(b)(3) of the INA.[302] These individuals are only entitled to "deferral of removal."[303] Deferral of removal under the CAT is available to individuals who establish that it is "more likely than not" that they will be tortured if removed to their home country.[304] Unlike other provisions, under deferral of removal there are no bars to relief.[305] Where deferral of removal claims are presented in the context of an asylum and removal proceedings with concurrent extradition proceedings,

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292 INA §§ 208(b)(2)(A)(iv), 241(b)(3)(b)(iv), 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1251(b)(3)(B)(iv) for asylum.

293 *See definition of terrorism* INA § 212(a)(3)(B); INA § 241(b)(3)(B), 8 U.S.C. § 1251(b)(3)(B); Germain, *supra* note 282, at 80. *See also* 1951 Refugee Convention, art. 33(2). *See, e.g.,* Ali v. Reno, 829 F. Supp. 1415, 1434 (S.D.N.Y. 1993); Azzouka v. Meese, 820 F.2d 585 (2d Cir. 1987); Avila v. Rivkind, 724 F. Supp. 945 (S.D. Fla. 1989).

294 8 U.S.C. § 1182(a)(3)(B)(iv); *In re U-H*, 23 I&N Dec. 355 (BIA 2002).

295 64 FR 8478, § 208.17. *See also* Germain, *supra* note 282.

296 *See* Ch. VII, Secs. 7 and 8 for more information about the relationship between extradition and torture.

297 Pub. L. No. 105-277, 112 Stat. 2681, Div. G., Oct. 21, 1992.

298 FARR Act, §1242(c); Germain, *supra* note 282, at 80.

299 Art. (3)1 of the CAT; FARR Act § 1242(a); Germain, *supra* note 282, at 80; *In re* M-B-A, 23 I&N Dec. 474 (BIA 2002); *In re* J-E, 23 I & N Dec. 291, 303 (BIA 2002); *In re* Y-L, 23 I&N Dec. 270 (AG 2002)

300 Germain, *supra* note 282, at 206.

301 23 I&N Dec. 366, 368 (BIA 2002).

302 *See* 8 C.F.R. § 208.16(d)(2); Germain, *supra* note 282, at 206.

303 8 C.F.R. § 208.17

304 *Id.*

305 *Id. See also In re* G-A, 23 I & N Dec. 366, 368 (BIA 2002). For a detailed analysis of the relevant regulations related to CAT/Deferral of Removal, see generally Kurzban, *supra* note 3, at 528–538 (collecting cases and detailing regulations, procedures, and judicial review).

the asylum and removal proceedings will generally be deferred pending the secretary of state's decision on the claims in the extradition proceedings.[306]

3.3.5. Equal Protection

The 1996 legislation discussed above constitutes a marked departure from Supreme Court pronouncements on the application of the "Equal Protection" Clause of the U.S. Constitution[307] to permanent residents. Under the guise of combating terrorism, there is for all practical purposes no longer a constitutional privilege of equal protection of aliens lawfully in the United States, including permanent residents. What is particularly astonishing is the absence of empirical data to support this historically unprecedented reversal: there is no factual data to support the presumed preventative impact of legal measures whose discriminatory nature smacks of racism, and ethnic and religious discrimination.

In a leading case on the matter that detailed the long-standing jurisprudence, the Supreme Court held, in *Mathews v. Diaz*,[308] that aliens within the United States were protected by the Fifth and Fourteenth Amendments' "due process" clauses of the Constitution "from deprivation of life, liberty, or property without due process of law."[309] The Court clearly stated that "[e]ven one whose presence in the country is unlawful, involuntary, or transitory is *entitled to that constitutional protection*."[310] Although the Fourteenth Amendment Equal Protection Clause does not explicitly require the federal government to provide equal protection of the laws, the Supreme Court in *Bolling v. Sharpe*,[311] treated actions by the federal government (which would be considered as Equal Protection Clause violations if done by a state) as violations of the Fifth Amendment. As to what constitutes an equal protection violation by the federal government, the Supreme Court held in *Plyler v. Doe*,[312] that "[t]he Equal Protection, Clause directs that 'all persons similarly circumstanced shall be treated alike.' "[313] It is this writer's contention that permanent resident aliens are "similarly circumstanced" with U.S. citizens with respect to civil rights, as they share a significant part of the rights and duties of U.S. citizens. And because deporting a U.S. citizen for committing an "aggravated felony"[314] or based on "secret evidence" will never be a permissible form of sanctioning a citizen, an alien resident who is eligible for citizenship (after three years for some and five years for others) should be treated the same. The government argues that because aliens are not a "suspect" or a "quasi-suspect" class, they should not be afforded such "equal protection." The government bases that argument on Supreme Court language that was used in deciding the constitutionality of some forms of discrimination against minorities and unpopular groups.[315] However, it is important to note that the Court's approach to the classification of these groups is essentially a procedural one, as the Court, in order to prevent a flood of litigation, set a number of procedural hurdles before cases can reach it. The argument that permanent residents are not a "suspect class" is a "boot strapping" argument that seeks to transform a procedural standard of access to the federal courts for relief to a substantive standard for denial of a constitutional right.

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306 *See* Masopust v. Fitzgerald, 2010 U.S. Dist. LEXIS 5414 (W.D. Pa. Jan. 21, 2010) (providing an overview of the case law regarding concurrent removal and extradition proceedings).

307 U.S. Const. amend. XIV, § 1; U.S. Const. amend. V.

308 Mathews v. Diaz, 426 U.S. 67 (1976).

309 *Id.* at 77.

310 *Id.* (emphasis added.)

311 Bolling v. Sharpe, 347 U.S. 497 (1954).

312 Plyler v. Doe, 457 U.S. 202 (1982).

313 *Id.* at 216 (*quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

314 As defined by INA § 101(a) (codified as amended at 8 U.S.C. § 1101(a) (2001)).

315 *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

On another note, the exclusive use of "secret evidence" provisions against persons of Arab or Muslim origin triggers the argument that a violation of equal protection exists because the government is using a "suspect classification" against that particular group based on their national origin or religion. The Supreme Court repeatedly scrutinized those kinds of classifications with respect to citizens, and the Court almost always struck down the governmental act as a violation of the Equal Protection Clause. A distinction between citizens and permanent residents that permits discrimination based on ethnicity or religion is constitutionally unjustified.

3.3.6. Assessment

Never before in the legal history of the United States has there been such a blatant disregard of the Constitution, which touches on the prohibition of ex post facto laws, violations of "equal protection," and violations of "due process." But probably most egregious is the deprivation of the right to judicial review.[316] The deprivation of constitutional principles and judicial review from individuals leaves very little for totalitarian regimes to envy, as they similiarly deprive people of fundamental legal rights.

The interplay between extradition and immigration is discussed throughout this chapter, but a case from the mid-1990s merits mention, namely the extradition request by Israel of Dr. Mousa Abu Marzook,[317] one of the leaders of the political wing of Hamas. Hamas modeled itself after the IRA by separating its political wing, which engages in legal political activities, from the organization's military wing, which engages in acts of violence.[318] Dr. Marzook was a permanent resident of the United States, and his children were born in the United States. His movements and activities were known to U.S. authorities, with whom he had contacts, and there was never a claim that he was involved in "terrorist" activities. For reasons heretofore unknown, Israeli and U.S. security agencies thought that his arrest would deal a blow to Hamas and that it would intimidate the organization's leaders. As a result, Dr. Marzook was placed on a "terrorist" watch list in U.S. airports and was detained at JFK airport under the INA. Shortly thereafter, an extradition request from Israel appeared charging him with a broad and undefined theory of criminal conspiracy, which curiously does not even exist under Israeli law. It was beyond doubt that this extradition request was politically motivated as it was intended to eliminate effective political representatives of Hamas, and to eliminate those who wish to be active in its political wing without having any connection with the military wing. The Israeli request made no mention of any direct or indirect involvement by Dr. Marzook in any criminal activity. However, it alleged that as one of the leaders of Hamas he was responsible for all of the acts of violence committed by Hamas, irrespective of whether he planned them, participated in them, or even knew of them. While extradition proceedings went on, INS proceedings were instituted so that in the event extradition was not successful, immigration proceedings could then result in deporting him to Israel even though it was not his country of citizenship. The plan was to consider him a Palestinian by birth and thus to deport him to that territory, which was under Israeli control. The collusion between Israel and the U.S. government, as well as between officials in the Justice Department and the INS was obvious, and the hostility of the Orthodox Jewish Assistant United States Attorney (AUSA) assigned to the extradition case was evident throughout the case.

Federal district court Judge Kevin Duffy, who sat as the extradition judge, accepted the charges made without making an inquiry into the evidence. He even labeled the charges, *sua sponte*, as "crimes against humanity," even though Israel did not make mention of that. Judge Duffy

316 Although under *INS v. St. Cyr*, 121 S.Ct. 2271 (2001), habeas corpus relief was available, the REAL ID Act of 2005 removed habeas corpus as an avenue of relief for aliens facing removal.

317 *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

318 The political wing of the IRA, the "Sinn Fein," is headed by Gerry Adams, who is perceived, at least by the U.S. government, as a legitimate political actor and as a negotiating figure.

disallowed defenses provided for in the extradition treaty and in the relevant provisions of Title 18. Meanwhile, in Israel, officials in the foreign affairs and justice ministries responded to media inquiries in perplexed ways, raising doubts whether Dr. Marzook could be successfully prosecuted in Israel under the broad conspiracy theory contained in the extradition request. Judge Duffy made short shrift of the case and decided on extradition. On habeas corpus, his colleague rubber-stamped the extradition decision without any effort to support the order. A review of the habeas corpus petition's denial was filed with the Second Circuit,[319] but during its pendency, petitioner Dr. Marzook withdrew the petition, and agreed to be surrendered to Israel for the charges proffered in its extradition request. Under § 3188,[320] the United States is obliged to deliver a person adjudged extraditable within two months of the extradition order's date. It was this writer's conviction, as Dr. Marzook's co-counsel, on the basis of the pronouncements of Israeli foreign and justice ministry officials, that Israel would not conduct a trial. After the statutory two months passed, a motion was filed for Dr. Marzook's release as he had not been surrendered. But the judge, in clear violation of the statute's language, prolonged Dr. Marzook's detention a few more days at the request of the U.S. government.

During this time Israel formally renounced its request for Dr. Marzook's extradition, which meant that he should have been released forthwith. By then, Dr. Marzook had spent twenty-eight months in solitary confinement, being kept twenty-three hours a day in his cell and one hour a day on the roof of New York's Metropolitan Correctional Center (MCC). However, even after that he was not released because the INS had a "hold" on him at the MCC. Dr. Marzook's defense team proceeded to seek his release by habeas corpus, but the federal district court judge (a former AUSA) did not grant it, even though she lacked a valid legal basis to deny the pettition. At this point, on advice of counsel, Dr. Marzook renounced his permanent residency in the United States, thus rendering unnecessary the deportation proceedings. The INS was caught by surprise, but insisted that deportation proceedings continue, even though there is nothing in the INA that provides for deportation of someone who has renounced being a permanent resident. Under such a condition the alien is entitled to return to his/her country of origin, to the country from which he/she came if deemed inadmissible at the border, or to a country of his/her choice that would accept him/her. The INS, however, resisted that in order to keep Dr. Marzook for a longer period in solitary confinement at the MCC while it searched for another way to deport him. Because the country from which he came at the time of his arrest at JFK airport was Jordan, he was entitled to be returned to that country, if its government permitted it. Jordan made a diplomatic démarche to have him returned, but the INS continued holding Dr. Marzook in solitary confinement for a few more days until diplomatic efforts resulted in allowing him to leave the United States and return to Jordan. As an ultimate sign of gratuitous vindictiveness, he was not allowed to board a Jordanian plane to return to Jordan, but was placed on a U.S. plane dressed in his prison garb with handcuffs on during the fourteen-hour flight.

This case is not only illustrative of the abusive interplay of extradition and immigration proceedings, it is also an example of how far the abusive process can be carried out in a way that inflicts severe hardship on persons targeted in the United States, essentially for political reasons.

4. Remedies

The question that arises in regard to the use of immigration laws as an alternative rendition device to extradition is whether it is contrary to the universal ideal of justice. It is clear that the administrative processes of removal (exclusion) and removal (deportation) allow for a wide use of discretion. In some instances, the laws are arbitrary and discriminatory, and infringe upon

319 Marzook v. Christopher, Case No. 96-2841 (2d Cir. 1996).

320 18 U.S.C. § 3188.

the rights of aliens to enjoy freedom of movement and residence within the United States.[321] Balanced against the rights of aliens is the need and privilege of a state to allow itself discretion, in essence, to pick and choose among those who wish to enter and/or remain within its boundaries. The concepts of justice and equality must play a role in the balancing process. As Jack Wasserman noted:

> Our American heritage of equality has given us prestige among the nations of the world and a strong feeling of pride at home. However, our heritage and our aspirations have fallen short of our goals in relation to our immigration laws.[322]

Although those words were written over fifty years ago, they still reflect the shortcomings of the present immigration laws.

The USCIS has come under close scholarly and legislative scrutiny in recent years due to a great influx of aliens into the United States. The plight of Haitian aliens[323] is an example of the due process problems of aliens seeking refuge in the United States; the discretionary power in the administrative processes of the USCIS tips the scales against the traditional humanitarian concerns of the United States.

The practice of using immigration laws for purposes of rendition as an alternative to extradition raises not only issues of justice and equality, but also questions of the integrity of judicial, legislative, and administrative processes. Whereas every attempt should be made to safeguard the rights of an alien who may be subject to expulsion, we find instead that immigration laws and the discretionary powers built into them are being used against the alien. In a discussion of then INS operation instructions, Leon Wildes concluded that

> With the weight of the entire government against the alien, he should be entitled to rely upon the fact that the government will at least be bound by its own directives. Only by doing so will any petitioner or applicant before the Immigration Service be assured that the Immigration Service's own proposal will be fulfilled "to assure that all applicants and petitioners receive fair and equal treatment before the Service."[324]

To lose one's citizenship and be deported from one's adopted homeland or to be turned away at the borders of a state of refuge is a serious loss for any individual, and the laws that bring about such losses must be examined strictly to insure their fairness.[325] These laws must be applied with care, and the discretion afforded by them must be used carefully to avoid infringement on the rights of aliens and naturalized citizens, as well as universal concepts of justice. These concerns highlight the questionability of the use of immigration laws as an alternative to extradition. In the face of the cumbersomeness and expense of extradition, the use of immigration

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321 *Hearings Before the Subcomm. on Immigration Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 39, 182 (July 19–21, 1978).

322 Jack Wasserman, The Universal Ideal of Justice and Our Immigration Laws, 34 Notre Dame L. Rev. 1, 2 (1958).

323 *See also* Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993) (addressing the conditions of Haitian asylum-seekers at the U.S. Naval Base in Guantanamo, Cuba, and holding that the detained asylum-seekers are entitled to access to counsel during interviews, to medically adequate conditions of confinement, to not being arbitrarily or indefinitely detained, and to not being subjected to "administrative segregation," that is, to punishment by removal to a special camp apart from the general camp population, without procedural safeguards). *See generally* Jane M. Kramer, Note, Due Process Rights for Excludable Aliens under United States Immigration Law and the United Nations Protocol Relating to the Status of Refugees: Haitian Aliens, A Case in Point, 10 N.Y.U. J. Int'l L. & Pol. 203 (1977).

324 Leon Wildes, The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?, 17 San Diego L. Rev. 99, 119 (1979).

325 Kurzban, *supra* note 3, at 402.

laws may be appealing, but one must ask whether the convenience is outweighed by the possible loss of rights of aliens and naturalized citizens.

The vehicle of disguised extradition, other than abduction,[326] is the assortment of immigration devices that are within the jurisdiction of the state that engages in such practices. Two issues arise with regard to these practices: (1) whether there is a violation of an international legal obligation; and (2) whether there is a violation of national law. Although a given conduct may involve both types of violations, the issues are severable.

4.1. Violations of International Law

When disguised extradition is used, three types of violations of international law can occur:

(a) a violation of a specific treaty provision that is binding upon the state and eventually enforceable within that state;

(b) a violation of a specific treaty provision binding upon the state that engages in the violation that is enforceable in the receiving state (to which an individual may have been deported); and

(c) a violation of a specific treaty provision that is not enforceable either under the laws of the state engaging in the violative conduct or in the receiving state.

At the outset, it must be noted that the various conventions protecting human rights are not always enforceable within national legal systems. There exists at present no international enforcement mechanism to redress such violations except under certain regional conventions and systems of complaint, namely the African, European and Inter-American human rights systems,[327] and complaint and reporting mechanisms under some multilateral conventions.[328] It is important first to distinguish among these conventions.

4.2. Multilateral Conventions

4.2.1. International Conventions

(a) Universal Declaration of Human Rights[329]

The Universal Declaration of Human Rights contains a number of articles that relate to the protection of the rights of individuals in regard to the use of immigration devices and the violations that may result from their use. If an alien is precluded from returning to his own country through the use of immigration laws, he may invoke Article 13(2), which states that: "[e]veryone has the right to leave any country, including his own, and return to his country." For violations of individual rights, the Declaration is explicit in allowing for both a determination of rights and an effective remedy for violations. Article 8 enunciates the right of

326 *See* Ch. V.

327 *See* African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, (1981) *reprinted in* 21 I.L.M. 58; American Convention on Human Rights, Nov. 22, 1969, Organization of American States Official Records Der. K/XVI/1.1, Doc. 65, Rev. 1, Corr. (Jan. 7, 1970); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

328 *See* United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 197, 198 U.N. Doc. E/CN.4/1984/72 (1984); International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); Optional Protocol of the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966).

329 Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 A (III).

equal protection: "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

These provisions indicate that remedies must be available for violations of an individual's rights on both international and national levels. They have the effect of giving the alien within the United States the right to a fair hearing and an effective remedy for violations of universally recognized human rights. The Universal Declaration enumerates specific rights relevant to disguised extradition in Articles 3, 7, 9, 12, 14(1), and 25(1). These provisions are designed to protect the integrity of the individual against arbitrary actions of the host state.

> Article 3: "Everyone has the right to life, liberty and security of person."
>
> Article 9: "No one shall be subjected to arbitrary arrest, detention or exile."
>
> Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

These individual rights belong to *all* persons regardless of their legal status in the host country. Article 7 states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Aliens who flee to the United States consist mostly of refugees escaping from hunger, economic plight, and political oppression. They often come from circumstances of extreme hardship and seek a better, more secure life for themselves and their families. Article 25(1) recognizes this quest as a right:

> Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The concepts of this provision were brought to life in *Doe v. Plyler*,[330] where Mexican children who had entered the United States illegally and resided illegally in Texas were excluded by Texas law from attending state schools.[331] The Supreme Court described the situation of the illegal alien thus:

> The hope of obtaining jobs, coupled with the unwillingness or inability of the federal government to enforce its immigration laws has enticed thousands of young Mexicans to leave their native country and illegally enter the United States. It is undisputed that, compared to United States citizens as a whole, illegal aliens constitute a disadvantaged group. But bad as their living and working environment is in the United States, it is apparently better than what they would experience in Mexico; thus these aliens continue to illegally cross the border. Because they are within this country illegally, they often do not receive the benevolent protections of the law, for they know that to invoke government protection would subject them to possible identification and deportation to their native country. Hence, the rights of these native aliens and the corresponding responsibilities of the states toward them have not been litigated to an appreciable degree.[332]

Aliens who wish to escape from other lands to seek freedoms that are lacking in their homelands are considered in Article 14(1), which provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." The problem that arises, however, with

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330 Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

331 *Id.*

332 *Id.* at 451. The Texas law excluding illegal aliens from attendance at public schools was held unconstitutional by the Supreme Court, the Fifth Circuit Court of Appeals, and the District Court for the Eastern District of Texas.

regard to the fundamental rights and remedies enumerated in the Declaration, is enforcement. This is because no international or national enforcement mechanism exists, and because the enforceability of the Declaration itself is still in question.

(b) International Covenant on Civil and Political Rights[333]

This multilateral convention reiterates many of the rights enumerated in the Universal Declaration. Similar to the Universal Declaration, the International Covenant recognizes the rights enumerated in its provisions as belonging to all members of the human family.[334] Explicit in this convention are remedies available to *every* individual.

Article 2(1) provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The first Optional Protocol permits individual complaints against state-parties.[335] The procedure permits the filing of individual complaints before the Human Rights Committee,[336] but affords no other remedies.[337]

Article 2(3) continues:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9 protects the individual against arbitrary arrest and detention. Part 4 of this article entitles the individual to an effective remedy: "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Finally, Article 12 at parts 2 and 4 grants the individual freedom of movement from and between countries. Part 2 of Article 12 stipulates "[e]veryone shall be free to leave any country, including his own." Part 4 of the same article provides "[n]o one shall be arbitrarily

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333 International Covenant on Civil and Political Rights, *supra* note 328.

334 *Id.* at Preamble.

335 Note for example that although the United States ratified the International Covenant on June 8, 1992, and the Covenant entered into force for the United States on September 8, 1992, the United States did not become a party to the First Optional Protocol and the individual complaint mechanism is thus not applicable to it. *See* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (1993). *See generally* Symposium, The Ratification of the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1167 (1993) (discussing the United States' ratification of the International Covenant).

336 Optional Protocol, *supra* note 328, at art. 2.

337 *See also* E. Kamenka & A. Ehr-Soon Tay, Human Rights 126–127 (1978); Richard B. Lillich & Frank C. Newman, International Human Rights: Problems of Law and Policy 324 (1979); Arthur H. Robertson, Human Rights in Europe 149–154 (1977) (discussing right of individual petition).

deprived of the right to enter his own country." These provisions mirror Article 13(2) of the Universal Declaration.

As with the rights enumerated in the Universal Declaration, however, the International Covenant does not provide for a universal enforcement mechanism of the rights it purports to guarantee. The Optional Protocol[338] of the International Covenant, which provides an individual complaint mechanism, is applicable only to states that ratified it. This does not include the United States, which ratified the ICCPR subject to developing national legislation to implement it, which it has not done to date.

(c) Convention Relating to the Status of Refugees[339]

This Convention extends to refugees, inter alia, access to courts and legal assistance in seeking remedy for violations of human rights in all contracting states the same as that afforded to nationals of such states. Article 16 states:

> (1) A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> (2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.
>
> (3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

The rights of refugees in the country of refuge are specified in Articles 31 and 32 of the Convention. These articles are designed specifically to avoid any kind of manipulation of immigration laws toward ends to which they were not designed. It is in these provisions that it becomes clear that using immigration as an alternative rendition device to extradition is a violation of the individual's rights.

Article 31 states:

> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The drafters of this convention recognized the harsh nature of expulsion of an alien from a country of refuge, and, through Articles 32 and 33, imposed restrictions on the host state to protect the alien.

Article 32, entitled Expulsion, provides:

> (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be

338 Optional Protocol of the International Covenant on Civil and Political Rights, *supra* note 328.

339 Convention Relating to the Status of Refugees, Apr. 26, 1954, G.A. Res. 526A (XVII).

> represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 concerned with *non-refoulement* provides:

> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The rights of the refugee are clearly stated in this convention; however, again, an enforcement mechanism is lacking. There is no international enforcement mechanism for violations, save for the United Nations High Commissioner for Refugees and U.N. administrative action, which is of a diplomatic, political nature that does not give rise to individually enforceable legal rights.

With respect to those states that have adopted this convention, a remedy could lie under their national laws. In the United States, for example, remedies arising out of this convention can be found in the 1980 Refugee Act.

It must be pointed out that a violation committed by a given state has not so far been recognized as giving rise to a legal action in a receiving state once the individual has been removed from the territory of the state that committed the original violation. In particular, that individual could not challenge the jurisdiction that the receiving state may wish to exercise upon him/her.[340]

4.2.2. Regional Conventions

Although remedies under the following conventions exist in the applicable regions, they are not applicable in the United States, because the United States is not a party to any of the following conventions.

(a) The European Convention for the Protection of Human Rights and Fundamental Freedoms[341]

This Council of Europe Convention provides for many of the rights recognized in the Universal Declaration of Human Rights. Article 13 provides for effective remedy for violations of these rights:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The drafters of the Convention also established enforcement mechanisms. Having defined the rights to be guaranteed, the Convention goes on to set up international machinery, which is designed to make the guarantees effective. The authors of the Convention did not consider it sufficient to have only domestic mechanisms to enforce the different rights and freedoms: they required some measure of international control. In other words, national obligations were not enough, and international machinery to reinforce them was also required. In this respect the Council of Europe followed the principle already established by the General Assembly of the

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340 *See* Ch. VI.

341 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

United Nations in 1948, which intended that the proclamation of the Universal Declaration would be followed by a covenant containing legal obligations and by another instrument providing for "measures of implementation." This is made clear in Article 19 of the Convention, which established a European Commission and a Court of Human Rights "to ensure the observance of the engagements undertaken by the High Contracting Parties in the . . . Convention . . . " The member governments of the Council of Europe accepted the idea that a European Commission should be created for this purpose, as an impartial, international organ to which complaints could be made in the event of any failure by a member state to secure to anyone within its jurisdiction the rights and freedoms defined in the Convention. Today forty-seven European states have ratified the European Convention and accepted the jurisdiction of the European Court, the successor to the earlier commission.[342]

In 1998 the powers of the European Court of Human Rights (ECtHR) were expanded significantly and the Commission abolished under Protocol 11 to the European Convention on Human Rights.[343] Since 1998 all complaints under the European Convention have been dealt with by the ECtHR, and since 1994 individual complaints can be considered after the adoption of of Protocol 11. Under Article 35 of Protocol 11, a precondition to the ECtHR's jurisdiction is the exhaustion of domestic remedies; complaints must be filed within six months of the final ruling in the domestic judicial system. Article 35 also limits the ECtHR's competence to complaints against states, and precludes anonymous submissions. Since the adoption of Protocol 14[344] the ECtHR has adopted a standard by which in order to gain standing before the court, the complainant must show that he/she suffered "significant damage." In 2011 the ECtHR received approximately 64,500 complaints. In 2011 the ECtHR issued 1,511 judgments and ruled that 50,677 were inadmissible. At present there are approximately 151,600 applications pending before the ECtHR.[345]

(b) The American Convention on Human Rights[346]

This convention again reaffirms the principles set forth in the Universal Declaration of Human Rights.[347] The Convention declares the right of freedom of movement in Article 22, entitled Freedom of Movement and Residence:

> (1) Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.
>
> (2) Every person has the right to leave any country freely, including his own.

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342 *Impact in 47 Countries*, Council of Europe, http://human-rights-convention.org/impact-of-the-european-convention-on-human-rights/. The states are: Albania, Germany, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Croatia, Denmark, Spain, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Iceland, Italy, Latvia, "The former Yugoslav Republic of Macedonia," Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Poland, Portugal, Czech Republic, Romania, United Kingdom, Russia, San Marino, Serbia, Slovakia, Slovenia, Sweden, Switzerland, Turkey, and Ukraine. Belarus and the Vatican are not state-parties to the European Convention and are not within the jurisdictional competence of the European Court of Human Rights.

343 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, E.T.S. 155, *entered into force* November 1, 1998.

344 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, E.T.S. 194, *entered into force* June 1, 2010.

345 European Court of Human Rights, Annual Report 151 (2011).

346 American Convention on Human Rights, Nov. 22, 1969, Organization of American States Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

347 *Id.* at Preamble.

> (3) The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society in order to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
>
> (4) The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
>
> (5) No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
>
> (6) An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
>
> (7) Every person shall have the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
>
> (8) In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
>
> (9) The collective expulsion of aliens is prohibited.

Note that parts 3 and 4 of the foregoing article allow for discretion on the part of the state in recognition of the rights of each state as a national sovereign, although these parts should not have the effect of diminishing the rights of individuals.[348]

This convention again provides for equal protection under the law and effective remedy for violations of individual human rights. Article 24, entitled Right to Equal Protection, provides:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

And Article 25(1), entitled Right to Judicial Protection, continues:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal, for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the enforcement bodies designated to take action on alleged violations of individual human rights. An individual has the right to bring a petition before the Commission but not before the Inter-American Court. The Commission may, however, bring a case before the Inter-American Court after investigating the matter and attempting to resolve it directly with the relevant state. The Inter-American Court also has jurisdiction over complaints brought by one state against another state over violations of the Inter-American Convention.

(c) The African Charter on Human and Peoples' Rights[349]

Similar to other human rights conventions, the African Charter reaffirms the principles set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.[350] In

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348 Similar language can be found in other human rights conventions, that is, art. 22(2) of the International Covenant on Civil and Political Rights, *supra* note 328; art. 29(2) of the Universal Declaration of Human Rights, *supra* note 329.

349 African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1981).

350 *Id.* at Preamble.

setting forth the rights it guarantees, the Charter provides that "[e]very individual shall be equal before the law" and that "[e]very individual shall be entitled to equal protection of the law."[351]

In similar terms to the American Convention, the African Charter guarantees the right to freedom of movement. Article 12 provides:

> 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
>
> 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
>
> 3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
>
> 4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
>
> 5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.[352]

The African Charter obliges state parties to it to "recognize the rights, duties and freedoms enshrined in [the] Charter and . . . undertake to adopt legislative or other measures to give effect to them."[353] Clearly, the rights guaranteed by the Charter were not meant to be hollow. However, the enforcement system has a weak structure, and the African Commission on Human and Peoples' Rights set up under the Charter has no authority to act on individual petitions unless such "reveal the existence of *a series* of serious or massive violations of human and peoples' rights."[354] In 2004 the African Court on Human and Peoples' Rights was established to complement the work of the Commission;[355] to date twenty-six states have accepted the court's jurisdiction.[356] However, Article 5 of the African Court's statute limits jurisdiction to complaints filed by the African Commission, state-parties, and African Intergovernmental Organizations; individuals may submit cases if the relevant state has accepted the African Court's competence over such petitions. In this respect the African Court is similar to the Inter-American Court and the ECtHR prior to 1998. Since 2008 the African Court has received twenty complaints and issued judgments in ten.

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351 *Id.* at art. 3.

352 *Id.* at art. 12.

353 *Id.* at art. 1.

354 *Id.* at art. 58(1) (emphasis added).

355 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

356 Through June 2012, state-parties to the protocol include Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda. *See* African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, *available at*: http://www.african-court.org/en/images/documents/Court/Court%20Establishment/Members.pdf. Only Cape Verde, Eritrea, Sahrawi Arab Democratic Republic, and Sao Tome and Principe have not signed the Protocol.

(d) The Draft Charter on Human and People's Rights in the Arab World[357]

The Draft Charter is a comprehensive instrument for the protection of human rights covering civil and political rights; economic, social, and cultural rights; and collective rights of the Arab people. The Draft Charter seeks to secure these rights by creating the Arab Commission on Human Rights and the Arab Court of Human Rights. Article 53(4) of the Draft Charter allows for the review of individual petitions by the Arab Commission on Human Rights.

With respect to the right of movement, the Draft Charter provides in Article 8 the following:

> 1. Everyone has the right to liberty of movement within his country and freedom to choose his residence.
>
> 2. Everyone who is a citizen of an Arab country or of Arab origin has the right to leave his country and return to it and to enter any other Arab country.
>
> 3. No citizen shall be expelled from his country.

Additionally, the Draft Charter addresses the right of asylum in Article 40.

> 1. Every citizen who is subjected to persecution on political grounds has the right to seek and obtain asylum in any Arab country in accordance with the law and the provisions of this Charter.
>
> 2. No person enjoying asylum or seeking it shall be expelled to an Arab or foreign country where his life would be in danger or where he may be persecuted.

The Draft Charter thus could be a useful tool in the protection of individuals in regard to the use of immigration devices and violations that may result from their use or abuse.

5. The International Law Commission's Principles of State Responsibility[358]

Below are several relevant Articles of the ILC's Principles of State Responsibility, which were adopted in 2001 and subsequently submitted to the General Assembly.

> *Article 1, Responsibility of a State for its internationally wrongful acts*. Every internationally wrongful act of a State entails the international responsibility of that State.
>
> *Article 2, Elements of an internationally wrongful act of a State*. There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> a. Is attributable to the State under international law; and
>
> b. Constitutes a breach of an international obligation of the State.
>
> *Article 3, Characterization of an act of a State as internationally wrongful*. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.
>
> *Article 4, Conduct of organs of a State*. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever

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357 Draft Charter on Human and People's Rights in the Arab World, 1987, *in* International Institute of Higher Studies in Criminal Sciences, Draft Charter on Human and People's Rights in the Arab World (1987). Various websites containing information on the subject refer to it as a draft even though it was adopted by the Standing Committee on Human Rights at the Summit Meeting of the Heads of State in Tunis in January 2004. For the text in English, see 12 Int'l Human Rts. Rep. 893 (2005).

358 *See* Report of the International Law Commission on the Work of the Fifty-Third Session, April 23–August 10, 2001, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53rd Session, A/CN.4/L.602/Rev.1, July 26, 2001.

its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5, Conduct of persons or entities exercising elements of governmental authority. The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8, Conduct directed or controlled by a State. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 12, Existence of a breach of an international obligation. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 28, Legal Consequences of an internationally wrongful act. The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the Provisions of Part One involves legal consequences as set out in this Part [Two].

Article 30, Cessation and non-repetition. The State responsible for the internationally wrongful act is under an obligation:

a. To cease that act, if it is continuing;

b. To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31, Reparation. 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32, Irrelevance of internal law. The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 58, Individual responsibility. These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

6. Particular Remedies within the United States

Three principal avenues of remedies exist in the United States for disguised extradition. The first is under the INA in the context of its procedures, particularly deportation and denaturalization.[359] The second is an action under § 1985 of the Civil Rights Act of 1964,[360] which provides for injunctive relief as well as damages. The third mechanism exists under the Alien Tort Claims Act (ATCA),[361] which provides for a remedy in the United States for violations committed abroad. The latter two statutes offer a unique remedy unparalleled in most, if not all, foreign legal systems in that they grant jurisdiction to U.S. courts to entertain claims for tortious conduct committed against a non-U.S. citizen (who could even be a citizen of the offending country) for an act deemed to be a violation of the law of nations. Under these statutes, the remedy is limited to monetary recovery. Additional avenues of remedies exist in actions

359 *See supra* Secs. 3.2.2 and 3.2.3.

360 Pub. L. No. 88-352.

361 28 U.S.C. § 1350 (2000). *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Rasul v. Bush, 542 U.S. 466 (2004). For a discussion of the post-*Sosa* cases and procedures under the ATCA, s*ee generally* Kurzban, *supra* note 3, at 1370–1373 (12th ed. 2010) (collecting cases involving aggravated felonies).

arising under the U.S. Constitution (*Bivens* claims), the Privacy Act (5 U.S.C. § 552a(g)), the Tucker Act (28 U.S.C. § 1491(a)(1)), and the Federal Tort Claims Act (28 U.S.C. § 2674).[362]

In recent cases, the U.S. Supreme Court has relied upon the concept that the Due Process Clause is territorial in basis and is to be applied to everyone within the borders of the United States. An alien's physical presence within the United States thus endows him/her with due process rights. Although an alien's illegal status subjects him/her to deportation, it does not strip him/her of the rights granted by the Constitution.[363]

The ATCA is designed specifically to give courts jurisdiction over torts committed against aliens in violation of the law of nations or a treaty to which the United States is party. It provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This action is designed to give federal district courts original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or of a treaty (as long as the treaty is relevant to the plaintiff's case).[364] A violation of the "law of nations" within the meaning of this provision relates to the jurisdiction of the court and arises when there has been conduct by one or more individuals of one state that violates those standards, rules, or customs affecting the relationship between states or between an individual and a foreign state.[365] The "law of nations" may be ascertained through the general usage and practice of nations, judicial decisions recognizing and enforcing that law, or the writings of the most distinguished publicists.[366] The "law of nations" in U.S. jurisprudence refers more to relations between states than to relations between individuals.[367]

Sources relevant to the law of nations are enumerated under Article 38(1) of the Statute of the International Court of Justice, which states, in pertinent part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[368]

It should be noted that judicial decisions and scholarly writings are secondary sources of law that are relevant only insofar as they interpret conventional, customary, and general international law. Because the Statute of the International Court of Justice is part of the Charter of the United Nations and the United States is a signatory of the Charter, it is binding on the United States.

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362 For a discussion of these avenues of remedies, including collected cases and procedures, see generally Kurzban, *supra* note 3, at 1364–1369, 1374 (collecting cases involving aggravated felonies).

363 Plyler v. Doe, 457 U.S. 202 (1982); Bridges v. Wixon, 326 U.S. 135 (1945). *See also* Peter S. Munoz, The Right of an Illegal Alien to Maintain a Civil Action, 63 Cal. L. Rev. 762 (1975).

364 Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324 (E.D. Pa. 1966).

365 *See,* e.g., ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

366 United States v. Smith, 18 U.S. 153 (1820). *See also* Lopes v. Schroder, 225 F. Supp. 292 (E.D. Pa. 1963).

367 Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

368 Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993 (June 26, 1945).

Articles 55 and 56 of the U.N. Charter promote international protection of human rights:

> Article 55
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> (c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> Article 56
>
> All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purpose set forth in Article 55.[369]

What constitutes the "law of nations" is readily ascertainable, but what constitutes a violation of such law is more problematic. The conventions protecting human rights cover a wide range of rights that vary significantly and qualitatively. Surely, cruel, inhuman, and degrading treatment—which appears in the Universal Declaration of Human Rights (Art. 5), the International Covenant on Civil and Political Rights (Art. 7), and the Inter-American Convention (Art. 5)—may amount to torture, and is a clear violation.[370] It may not be the same with respect to social security, which, in various formulations, is also provided for in these documents. Nevertheless, this qualitative issue has never been addressed, and the assumption could be made that even though these rights are not predicated on the protection of equal human values, they are nonetheless equal in that they constitute an international obligation upon the signatory states.

In U.S. domestic law, the ATCA was revitalized in the case of *Filartiga v. Peña-Irala*,[371] where federal jurisdiction was established for a tort suffered by an alien outside the United States. The Act had not previously been used as a basis for jurisdiction in cases involving human rights violations. The principle espoused in *Filartiga* was not, in retrospect, as powerful and as universally applied as had been hoped.[372]

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369 U.N. Charter, Oct. 24, 1945, 59 Stat. 1931, T.S. No. 993, 3 Bevans 1153.

370 *See* M. Cherif Bassiouni, An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture, 48 Rev. Int'le de Droit Pénal 23 (1977).

371 Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). *See* Bruce A. Barenblat, Note, Torture as a Violation of the Law of Nations: An Analysis of 28 U.S.C. Section 1350, 16 Texas Int'l L.J. 117 (1981).

372 That it has done so to the present is not at all clear. *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (affirming dismissal of action for lack of subject matter jurisdiction brought by survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel), *cert. denied*, 470 U.S. 1003 (1985) *and* Sanchez-Espinosa v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (affirming dismissal of action brought by members of Congress, citizens of Nicaragua, and two U.S. residents against the U.S. president and other defendants alleging claims arising out of the United States' actions in Nicaragua and holding that the alien tort statute does not constitute a waiver of sovereign immunity) *with In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) (holding that the alien tort statute provided jurisdictional basis for a claim of an alien for the tort of wrongful death, committed by Filipino military intelligence officials through torture), *cert. denied*, 113 S. Ct. 2960 (1993). *See also* Helen C. Lucas, Comment, The Adjudication of Violations of International Law under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court, 36 DePaul L. Rev. 231 (1987).

In *Filartiga,* the plaintiff, Dr. Joel Filartiga, joined by his daughter, claimed that his son, a seventeen-year-old Paraguayan boy, had been tortured to death in March 1976 by members of the Asuncion Police in retaliation for political activities. At the time Peña-Irala was the Inspector General of Police of Asuncion. The plaintiff alleged that his son was whipped repeatedly and subjected to high voltage electrical shocks that resulted in his death.

In 1978, the alleged perpetrator, Peña-Irala, entered the United States under a visitor's visa. The daughter of the plaintiff learned of Peña-Irala's presence and caused him to be personally served at the Brooklyn Navy Yard where he was being held pending deportation for overstaying his visa. The district court dismissed the complaint on jurisdictional grounds. Although stays of deportation were sought in the Second Circuit and in the Supreme Court, they were denied as well, and Peña-Irala returned to Paraguay. Subsequently, however, the district court's dismissal of Filartiga's claim was overturned by the Second Circuit Court of Appeals, which found that torture is a violation of the law of nations and thus within the scope of ATCA.[373] *Filartiga* marked an important change from earlier cases[374] in that the tortious actions complained of in *Filartiga* were not clearly violations of the law of nations at the time, and the courts had previously assumed a narrow interpretation of the Act.[375]

The immediate effect of the *Filartiga* decision was to recognize torture as a violation of the law of nations and to bring such a violation within the reach of the ATCA. However, on an international level, the decision expands U.S. jurisdiction for the protection of aliens for tortious actions that constitute violations of the law of nations, and could be an effective weapon against such violations.

However, as indicated above, the practical effect of *Filartiga* was not as great as might have been hoped and causes of action were slowly limited.[376] In 2004 the Supreme Court mandated in *Sosa v. Alvarez-Machain* that under ATCA courts should engage in "vigilant doorkeeping" and limit jurisdiction to crimes under international law.[377] It should be noted that all cases of "extraordinary rendition" that have been brought in U.S. courts have been dismissed or denied.[378] Relatedly, in 2012 the Supreme Court ruled in *Mohamed v. Palestinian Authority*[379] that the Torture Victim Protection Act[380] does not apply to organizations.

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373 *Filartiga,* 630 F.2d at 878.

374 *See, e.g.,* Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976); Salimoff & Co. v. Standard Oil Co., 186 N.E. 679 (N.Y. 1933) (holding that international law is not violated when the aggrieved parties are nationals of the acting state), *cited with approval in* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

375 *See,* e.g., Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976) (concerning wrongful confiscation of property); ITT v. Vencap Ltd., 519 F.2d 1001 (2d Cir. 1975) (regarding fraud, conversion and corporate waste); Cohen v. Hartman, 490 F. Supp. 517 (S.D. Fla. 1980) (involving embezzlement). *See also* Kenneth C. Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); Kenneth C. Randall, Further Inquiries into the Alien Tort Statute and a Recommendation, 18 N.Y.U. J. Int'l L. & Pol. 473 (1986).

376 *See also* Ch. V, Sec. 8.

377 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

378 *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009). *See also* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). Although the Fourth Circuit denied damages to El-Masri, his case proceeded before the ECtHR, which resulted in a finding by the Grand Chamber of several violations of the European Convention of Human Rights, including the prohibitions on torture, arbitrary detention, the duty to investigate, the right to the truth, and the right to an effective remedy. El-Masri v. The Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. (2012).

For an overview, *see* Open Societies Institute, El-Masri v. Macedonia, *available at*: http://www.soros.org/initiatives/justice/litigation/macedonia (last visited May 8, 2012).

379 Mohamed v. Palestinian Authority et al, 566 U. S. ____ (2012).

380 Torture Victim Protection Act of 1991, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73.

7. Conclusion

It is clear upon review of the foregoing that the flexibility of immigration procedures can, and at times does, result in the circumvention of extradition procedures and their attendant safeguards. Although the use of immigration procedures as an alternative means of rendition is at present an exception and not the rule, it nonetheless circumvents the intent of states who enter into extradition treaties for the specific purpose of avoiding disguised extradition, which detrimentally affects the international rule of law and violates individual human rights of those subjected to such means of rendition.

The use of immigration procedures for the purpose of rendition is in part possible because: (1) a substantial amount of discretion is vested in the executive branch that is administering such procedures; (2) there is an unclear hierarchical relationship between the judicial and administrative processes of national legal systems, which regulate extradition and immigration proceedings, respectively; (3) there is an unclear hierarchical relationship between international and national laws; (4) the notion of international due process is not yet well established and its normative content still lacks specificity;[381] and (5) there is at present no internationally agreed process of extradition binding upon all states.

In short, the failures of extradition and the insufficient protections afforded by immigration laws as separate legal and administrative processes make the abusive practice of disguised extradition possible.

The tragic events of September 11, 2001, redefined the traditional liberal approach to immigration laws, and the rights of aliens in this country. This is, undoubtedly, an unfortunate development as it betrays the best of what the American legal tradition has to offer.

28 U.S.C. § 1350 (1994).

381 *See* The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards (M. Cherif Bassiouni ed., 1994).

Chapter V

Abduction and Unlawful Seizure as Alternatives to Extradition

Contents

1. Typology and Rationale

The title of this chapter does not suggest that alternatives to extradition include the lawful surrender of a person other than by treaty, namely by means of reciprocity, comity or on the basis of national legislation.[1] Alternatives to extradition are therefore methods that do not fall within the framework of extradition.[2] This chapter addresses the rendition of a person, against his/her will, from one state to another through unlawful means. It includes abduction and other forms of unlawful seizure for purposes of extralegal rendition and the more recent U.S. practice of "extraordinary rendition," which also involves kidnapping and torture.

Extradition is the Rule of Law approach to rendition. Abduction and other forms of unlawful seizure are the antithesis to the observance of the Rule of Law. Rule of Law–oriented states consider abduction and other methods of unlawful seizure for rendition purposes illegal. The United States regrettably is not among states that respect this aspect of the Rule of Law. Since 2002, the United States has developed an even more abhorrent practice that is euphemistically called "extraordinary rendition," whereby persons are not only abducted, but flown to countries where they are tortured for purposes of obtaining information.[3] The practice also includes abductions to what the United States calls "black sites" where U.S. agents torture individuals.[4] These practices exist because of the complacency of the U.S. judiciary that turns a blind eye to all these unlawful practices, as discussed in this chapter. The Supreme Court has unfortunately paved the way for such practices by refusing to extend the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution extraterritorially, even when the effects of the violation are given legitimacy within the United States.

In *Mapp v. Ohio*,[5] Justice Tom Clark, speaking for the majority, dismissed the argument that observance of the law allows criminals to go free. Instead, he wrote: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[6] Unfortunately, these wise words have been lost on those who have upheld unlawful abductions and seizure of persons, and their subsequent delivery to other states, particularly when these practices involve torture as described below.

The unlawful techniques used by some states, including the United States, fall essentially into four categories:

1. abduction of a person by agents other than those of the territorial state, with or without the knowledge or consent of the territorial state;

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1 *See* Chs. I and II.

2 These lawful alternatives include the use of immigration laws to deport non-nationals. *See* Ch. III.

3 *See* Ch. IV.

4 *See* Open Societies Institute, Globalizing Torture: CIA Secret Detention and Extraordinary Rendition (2013). *See also* Peter Taylor, *"Vomiting and Screaming" in Destroyed Waterboarding Tapes*, BBC News, May 9, 2012, *available at* http://www.bbc.co.uk/news/world-us-canada-17990955 (The head of the CIA's Counterterrorism Center, Jose Rodriguez, has conceded that "It's not a pretty sight when you are waterboarding anybody or using any of these techniques, let's be perfectly honest." Rodriguez, a proponent of the CIA's program, disputes that torture victims were screaming and vomiting—something that was recorded on the tapes that Rodriguez later ordered destroyed—but agrees that irrespective of the consequence, "it's not a pretty sight." The CIA's chief legal counsel at the time stated that one of his staff members saw the destroyed tapes and that "the tapes, particularly those of [Abu] Zubaydah being waterboarded, were extraordinarily hard to watch.")

5 Mapp v. Ohio, 367 U.S. 643 (1961).

6 *Id.* at 659. Justice Clark later writes that "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest." *Id.* at 660.

2. seizure of a person by the agents of the territorial state and his/her surrender to the agents of another state outside any formal legal process either within the territorial state or across its borders to a neighboring state;

3. seizure of a person in any state by agents of that state or another state, and his/her delivery to yet another state, outside legal processes;[7] and

4. cooperation among agents of several states, outside their respective states' legal process to abduct a person in one state and deliver him/her to another state, which then formally extradites the person to a third state.[8]

This typology is important to determine the existence and extent of the violation of individual human rights and breaches of national and international law, and their consequences on state responsibility.

These techniques exist because of the application of the maxim *mala captus bene detentus*, whereby national courts assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured.[9] Thus, as they produce legally valid results, there is no deterrent for state agents to engage in these techniques. Aside from subverting the

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7 Over the past decade the United States has euphemistically referred to this process as "extraordinary rendition."

8 This was the case with respect to Bozano who was unlawfully seized in France (after that state had denied his extradition to Italy), and delivered by French agents to Swiss agents inside Switzerland. While Bozano was under arrest in Switzerland, Italy requested his extradition from Switzerland, and he was then lawfully extradited to Italy. Thus, Italy accomplished his surrender, which it had been unable to do formally and legally while Bozano was in France. The European Court of Human Rights condemned the process. *See infra* note 54 and accompanying text (discussing the *Bozano* case).

9 S*ee* United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Lazore, 90 F. Supp. 2d 202 (N.D.N.Y. 2000); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886) (cited by numerous countries as a landmark for the *mala captus bene detentus* rule). *See* also Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 Va. J. Int'l L. 151 (1991); Edwin D. Dickinson, *Jurisdiction following Seizure or Arrest in Violation of International Law*, 28 Am. J. Int'l L. 231 (1934); Charles Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678 (1953); D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 Tex. Int'l L.J. 1 (1988); Manuel R. Garcia-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); Mark Gibney, *Policing the World: The Long Reach of U.S. Law and the Short Arm of the Constitution*, 6 Conn. J. Int'l L. 103 (1990); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l L. 444 (1990); G. Gregory Schuetz, *Apprehending Terrorists Overseas under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 Harv. Int'l L.J. 499 (1988); Austin W. Scott, Jr., *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 Minn. L. Rev. 91 (1953); Wade A. Buser, *Note, The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition*, 14 Ga. J. Int'l & Comp. L. 357 (1984); Andrew B. Campbell, *Note, The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 Vand. J. Transnat'l L. 385 (1990); Andrew K. Fletcher, *Note, Pirates and Smugglers: An Analysis of the Use of Abductions to Bring Drug Traffickers to Trial*, 32 Va. J. Int'l L. 233 (1991); Theodore C. Jonas, *Note, International "Fugitive Snatching" in U.S. Law: Two Views from Opposite Ends of the Eighties*, 24 Cornell Int'l L.J. 521 (1991); Andreas F. Lowenfeld, *Note, Kidnapping by Government Order: A Follow-Up*, 84 Am. J. Int'l L. 712 (1990); Edmund S. McAlister, *Note, The Hydraulic Pressure of Vengeance: U.S. v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DePaul L. Rev. 449 (1994); Lawrence Preuss, *Note, Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l L. 502 (1935); Lawrence Preuss, *Note, Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l L. 123 (1936); Kristofer R. Schleicher, *Note, Transborder Abductions by American Bounty Hunters—The Jaffe Case and a New Understanding between the United States and Canada*, 20 Ga. J. Int'l & Comp. L. 489 (1990).

lawful extradition process, such practices violate the subject's internationally protected human rights and occasionally infringe upon the sovereignty of other states.

The rendition techniques listed above are extraordinary in the legal sense, as extradition exists as an ordinary legal process. However, recourse to these techniques may well be due to the frustration of a requesting state that follows formal channels to no avail. This led one writer to ask: "When extradition fails, is abduction the solution?"[10] Indeed, there are numerous examples that illustrate this unfortunate dilemma. Some states who seek a fugitive or convicted offender resort to these alternatives because their efforts fail, for reasons that may or may not be justified, especially when the denial of extradition violates the principle of *aut dedere aut judicare* discussed in Chapter I, Section 3. The solution, however, should be to make extradition more efficient, not to subvert it by resorting to unlawful or legally questionable means to replace it. To place states in a position where they can benefit from the alternative rendition practices encourages further violations and erodes compliance with international law. At this stage in the development of international law, it is no longer possible to rationalize violations of international law on grounds of expediency or to allow such violations to be perpetrated without an adequate deterrent-remedy. The United States' "War on Terror" following the tragic events of September 11, 2001, tends to justify the abduction of suspected "terrorists" in total disregard for the Rule of Law or the human rights of the individual, no matter how abhorrent the crime he/she is suspected of committing may be.[11]

2. The Policy of Abduction in Comparative Law and Practice

When employed to the ends of rendition, abduction is carried out by agents of one state acting under color of law who unlawfully seize a person within the jurisdiction of another state and deliver that person to the state seeking him/her. The abduction can therefore be carried out entirely by foreign agents, or by cooperation between foreign and domestic agents acting for and on behalf of their respective states. This involves several issues, namely: (1) violations of the domestic laws of the states involved, (2) infringement on the sovereignty and territorial integrity of a given state, (3) violation of the internationally protected human rights of the unlawfully seized individual, and (4) disruption of world order. This technique must be distinguished from any other formal or quasi-formal means of rendition or even from the erroneous exercise of a formal process, such as when a public official, acting under color of law, surrenders or causes to be surrendered a person seeking refuge in that state to the agents of another state.[12]

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10 Michael H. Cardozo, *Note, When Extradition Fails, is Abduction the Solution?*, 55 Am. J. Int'l L. 127 (1961).

11 *See, e.g.,* M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (2010).

12 *Compare* the classic *Savarkar* case *in* Hague Court Reports 276 (L. Scott, ed., 1916) (this text contains the text of a treaty establishing an arbitration tribunal to determine whether Savarkar should be returned to French authorities. It does not contain the disposition of the tribunal.) *with* D.S.M.S. File No. 211.12 *Hinojos, Efren/2* (Mexico, 1936) (indicating that apparently the governor of Chihuahua mistakenly assumed that he was empowered by Article IX of the Extradition Treaty of 1899, 31 Stat. 1818, to extradite fugitives to the United States). Where a fugitive was removed to Canada without court order "by the precipitate action of the representatives of the Canadian Government" before he could appeal against the dismissal of his petition for habeas corpus in extradition proceedings, Canadian authorities returned him at the request of the United States. His appeal was then heard, and the grant of extradition was affirmed. Judge of the Sixth Circuit Court of Appeals (Hamilton), to Secretary of State (Hull), September 6, 1938; same to same, July 13, 1939; D.S.M.S. File No. 211.42 Miller, C.E./10/27. In *People v. Pratt*, 78 Cal. 345 (1889), an attempted plea to the jurisdiction failed where a fugitive was returned from Japan at the request of the governor of California after the Department of State refused to request extradition in the absence of a treaty. The Supreme Court of California noted that the governor's action was probably illegal, but that this did not oust the court's jurisdiction over the fugitive. Illegal action by Mexican authorities in returning a fugitive to the United States did not oust the court's

The causes célèbres cases mentioned in this chapter reveal the extraordinary and extralegal means resorted to by government agents to secure jurisdiction over wanted persons in violation of the domestic laws of the states involved, the internationally protected human rights of individuals, international law, and, when allowed to stand by the judicial authority, the integrity of the judicial process.[13]

Although the causes célèbres discussed in this chapter have attracted the attention of world public opinion, there are other less notorious cases that are nonetheless equally violative of international law and that occurs with greater frequency.[14]

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jurisdiction in *Wentz v. United States*, 244 F.2d 172 (9th Cir.); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 Geo. Wash. L. Rev. 1200 (2007).

13 For an analysis of the legal issues in the *Soblen* case, see Paul O'Higgins, *Disguised Extradition: The Soblen Case*, 27 Mod. L. Rev. 521 (1964). The case aroused considerable interest. *See Id.* at 521 n.1 (comments listed). Dr. Soblen was party to the following cases: Regina v. Secretary of State for Home Affairs, *ex parte* Soblen, [1962] 3 All E.R. 373; Regina v. Governor of Brixton Prison, *ex parte* Soblen, [1962] 3 All E.R. 641; United States v. Soblen, 199 F. Supp. 11 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962). For a brief account of the Israeli phase of the case, see *Soblen Case Summarized*, 5 Isr. Dig. 8 (1962). Deportation in the broadest sense comprehends exclusion and expulsion—now known as removal—among other methods, for the ouster of aliens from a country. These are hardly terms of art, depending as they do for definition upon particular national law and practice. *See* United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958). For a discussion of *Eichmann*, see Attorney General of Israel v. Eichmann, [1968] 36 Int'l. L.R. 5 (Israel) and the Supreme Court opinion, in 36 Int'l. L. R. 277 (1962). For Argentina's protest against Israel for the kidnapping of Eichmann and the Security Council's action, see 15 U.N. SCOR, U.N. Doc. S/4349; William J. Brennan, Jr., *Comment, International Due Process and the Law*, 48 Va. L. Rev. 1258 (1962). *See also* Pierre A. Papadatos, The Eichmann Trial (1964); Michael A. Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 Temp. L.Q. 1 (1961). For a discussion of *Argoud*, see Bart DeSchutter, *Competence of the National Judiciary Power in Case the Accused Has Been Unlawfully Brought within the National Frontiers*, 1 Rev. Belge de Droit Int'le 88 (1965). The decision in *Argoud* was rendered by the *Cour de Sûreté de l'Etat* on December 28, 1963. Argoud was a leader of the military revolt against President DeGaulle during the Algerian controversy. He was kidnapped from Munich in February 1963, and later sentenced to life imprisonment. West Germany Protested the Kidnapping. *See* N.Y. Times, Jan. 1, 1964, at 3; N.Y. Times, Dec. 31, 1963, at 3. Conrad Ahlers, one of the editors of *Der Spiegel*, fled to Spain after police raids on the magazine following his criticism of the state of military preparedness in West Germany. He was summarily deported from Spain to Germany at the request of German authorities. Defense Minister Franz Josef Strauss was subsequently dropped from the government for his part in the affair. In October 1964, Ahlers and two others were indicted for treason on the charge of publishing state secrets in the magazine. N.Y. Times, Oct. 28, 1964, at 3. *See also* N.Y. Times, Nov. 11, 1964, at 15; N.Y. Times, Nov. 9, 1964, at 11; The Observer (London), Oct. 18, 1964, at 6. Charges against Ahlers and the publisher of *Der Spiegel* were dismissed by the Federal Supreme Court in May 1965. N.Y. Times, May 15, 1965, at 5. For a discussion of the *Tshombé* case, see 32 Bull. Int'l Comm'n Jur. 28–29 (1967). For a discussion of the *Alvarez-Machain* case, see *infra* Secs. 3 and 4.

14 Egyptian agents attempted to kidnap Mordechai Luk, an alleged double agent for Egypt and Israel, by shipping him in a trunk to Egypt. Two Egyptian diplomats were expelled from Italy in response. Luk returned to Israel, where he was wanted for military desertion. N.Y. Times, Nov. 19, 1964, at 1; N.Y. Times, Nov. 18, 1964, at 1; N.Y. Times, Nov. 18, 1964, at 6. The disappearance of Professor Jesus de Galindez from New York in March 1956 has never been solved. He was allegedly kidnapped by agents of Trujillo, taken to the Dominican Republic, and killed. N.Y. Times, Mar.–Dec. 1956. *See also* 36 Dep't St. Bull. 1027 (1957). The particularly vigorous campaign for the "repatriation" of defectors, conducted in the late 1950s by the Soviet Union and other Communist-bloc states, can also be classed as a form of "irregular recovery." *See* Alona E. Evans, *Comment, Observations on the Practice of Territorial Asylum in the United States*, 56 Am. J. Int'l L. 148, 151–153 (1962). Following the West German government's offer of a $25,000 reward for the recovery of Martin Bormann, a government official was reported to have pointed out that if Bormann were recovered by kidnapping, "the reward would be paid only if the country of hiding later gave its approval." N.Y. Times, Nov. 24, 1964, at 12. *See also infra* note 54 and the accompanying text (discussing the *Bozano* case).

As stated above, the inducement for the practice of abduction is that national courts recognize *in personam* jurisdiction, notwithstanding the manner in which it was secured. The case of *Ker v. Illinois*[15] in the United States is the most-cited decision in such situations. All too often, however, *Ker* is cited for various forms of unlawful seizure to which it may not apply in terms of the strict application of stare decisis. One inappropriate application of *Ker* was in the trial of Faik Bulut, a Turkish citizen seized by Israeli armed forces in February 1973 in a Palestinian refugee camp located one hundred miles inside Lebanese territory. Bulut was seized with ten other persons who were citizens of various Arab states. The seized persons were charged under an Israeli law purporting to apply to anyone, anywhere, who associates with an organization intending to cause harm to the State of Israel or its citizens. Counsel for defendant Bulut raised, inter alia, the jurisdictional argument that Bulut and the others were seized in violation of international law and that the application of Israeli law was extraterritorial. The military tribunal rejected both arguments, citing *Eichmann* and *Ker* as authority.[16] The court's reliance on these cases was inappropriate. In *Ker*, Illinois had territorial jurisdiction because Ker had committed a crime there, while in *Eichmann*,[17] there was universal jurisdiction because Eichmann had committed international crimes. Serious questions as to the legality of the jurisdictional subject matter and *in personam* bases existed in the *Bulut* case.[18]

In a case before the International Criminal Tribunal for the former Yugoslavia (ICTY), the Tribunal considered whether it could exercise jurisdiction over an individual who was illegally arrested and abducted, in violation of international human rights and due process standards.[19] The ICTY held:

> [T]he exercise of jurisdiction should not be declined in cases of abductions carried out by private individuals, whose actions, unless instigated, acknowledge or condoned by a State, or an international organization, or other entity, do not necessarily in themselves violate State sovereignty.[20]

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15 Ker v. Illinois, 119 U.S. 436 (1886). *See also* Fairman, *supra* note 9.

16 Time, Aug. 20, 1973, at 31; Jerusalem Post Weekly, Aug. 14, 1973; N.Y. Times, July 24, 1973, at 31. *See* also Israel's law of March 21, 1972. The judgment was rendered by the Israeli Military Court (in Hebrew), Judgment of Aug. 7, 1973; Note, *Extraterritorial Jurisdiction and Jurisdiction following Forcible Abduction: A New Israeli Precedent in International Law*, 72 Mich. L. Rev. 1087 (1974).

17 *See* Garcia-Mora, *supra* note 9; Scott, *supra* note 9. *See* also *Ker v. Illinois*, 119 U.S. 436 (1886) (cited by numerous countries as a landmark case for the *mala captus bene detentus* rule); Dickinson, *supra* note 9; Fairman, *supra* note 9; Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, *supra* note 9; Preuss, *Settlement of the Jacob Kidnapping Case*, *supra* note 9.

18 Çavus and Bulut v. Turkey, Court Judgment, App. No. 41580/98 (Oct. 23, 2003).

19 *Prosecutor v. Dragan Nikoli,* Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003). *See also Juvenal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement of May 23, 2005. In this case, the Appellate Chamber of the ICTR noted that:

> [A] shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters. A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee and consular officers. It is, however, not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.

Id. at ¶221 (citations omitted).

20 *Id.* at ¶ 26.

The Tribunal relied on *Alvarez-Machain* as well as cases from other national courts.[21] The court then dismissed the appeal, finding that jurisdiction should be set aside only if egregious human rights violations have occurred.[22]

The United States has been on both sides of abduction cases, but remains fixed to the *Ker* position,[23] provided there is valid subject matter jurisdiction. The decision of the U.S. Supreme Court in *Frisbie v. Collins*,[24] an inter-state rendition case, affirmed this position in 1952. In 1992, the Supreme Court again affirmed this position in *United States v. Alvarez-Machain*,[25] an international abduction case from Mexico, which to the embarrassment of the United States turned out to have resulted in the abduction of the wrong person. The criminal charges were dismissed on the merits, and Dr. Alvarez-Machain was allowed to return to Mexico.[26]

The earlier position of the United Kingdom was the same as that of the United States, and was enunciated in 1829 in *Ex parte Suzannah Scott*.[27] Many other countries have found themselves embroiled in the same application of the maxim *mala captus bene detentus*, as discussed below. But European states that are bound by the European Convention on Human Rights (ECHR) have eschewed this practice in the last two decades.

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21 *Id.* at ¶ 21.

22 *Id.* at ¶¶ 30–34.

23 United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom.*, Unverzagt v. Benn, 5 F.2d 492 (9th Cir. 1952), *cert. denied*, 269 U.S. 566 (1957), *Converse* and *Blatt* case (1911); Lawshe v. State, 121 S.W. 865 (1909); *Meyers* and *Tunstall* case (1862); State v. Brewster, 7 Vt. 118 (1835); Restatement on Foreign Relations of the United States § 606 (1918); Green Hayood Hackworth, Digest of International Law 14–15 (1944) [hereinafter Hackworth Digest]; John B. Moore, Digest of International Law 332 (1901) (discussing the *Adsetts* case). For an excellent survey of U.S. practice, see Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 Brit. Y.B. Int'l L. 77 (1964).

24 Frisbie v. Collins, 342 U.S. 519 (1952).

25 United States v. Alvarez-Machain, 504 U.S. 655 (1992). *See infra* Secs. 3 and 4 (discussing the case in context). *See also United States v. Hill*, 03 C 4196 (95 CR 730–731), 2004 U.S. Dist. LEXIS 18345 (N.D. Ill. 2004) (upholding the validity of jurisdiction even though the relator was abducted from Guinea). In *Hill*, the court also refused to suppress his confession that was obtained while he was forcefully abducted to be brought to the United States to face criminal charges. In relying on *Alvarez-Machain* and the *Ker-Frisbie* rule, the court noted that the Second Circuit exception under *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1972), *reh'g denied* 504 F.2d 1380 (1974), *on remand* 398 F. Supp. 916 (1975), has not been followed in the Seventh Circuit. *Id*. *See also* Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990).

26 *See infra* Secs. 5 and 6.6 for full discussion of the case and its ramifications.

27 109 E.R. 166. *See also Ex parte* Elliott, [1949] 1 All E.R. 373 (K.B.) (Eng.); Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 Brit. Y.B. Int'l L. 265 (1952); O'Higgins, *supra* note 13. For the practice between England and the United States, see the case of *Townsend*, concerning the kidnapping of an American national from the United Kingdom by an American police officer. The Law Officers of the Crown, in the Opinion of 1865, did not challenge the validity of the jurisdiction so acquired. However, they did suggest that "it would be proper and expedient that the attention of the Government of the United States should be called to this case, in order that such instructions may be given to their police authorities as may prevent the possibility of the repetition of similar proceedings." 6 Parry, British Digest of International Law 480–481 (1965). In Blair's case, involving the forcible removal of a British subject from the United States, the Law Officers in 1876 did not challenge the validity of jurisdiction so acquired as a matter of law, but questioned it as a matter of policy. *Id.* at 482–483. The same approach was followed in South Africa in *Abrahams v. Minister of Justice*, 4 S. Afr. L.R. 542 (1963) (S. Afr.), and in Palestine during the British Mandate in *Afounch v. Attorney General*, 10 Ann. Dig. 327 (Sup. Ct. Palestine 1942). For the position of Belgium, see *Geldof v. Meulemester and Stiffen*, 31 I.L.R. 385 (Cass. 1961) (Belg.). For a comparative analysis, *see* Garcia-Mora, *supra* note 9.

For abduction to be unlawful under international law, the abductors must: (1) be public agents or other persons acting under color of law (not bona fide volunteers) of a state other than the one where the individual was present at the time of seizure, and (2) these agents must act without the consent of the state where the seizure takes place.[28] This definition is grounded in the notion that international law is designed to protect the sovereignty and territorial integrity of states by restricting impermissible state conduct. It does not, however, ensure the integrity of the rendition process when violated by individuals acting in their private capacity because private actions are left to national legislation and enforcement.

The "private volunteers" argument was presented at first in the *Eichmann* case, but it was established that those who seized Eichmann were operating as state actors for the Israeli government.[29] By contrast, in the *Vincenti* case, U.S. Department of Justice agents unlawfully seized a U.S. citizen in England. On complaint of Great Britain, Vincenti was released, and the United States apologized to Great Britain for the improper seizure, stating that the agents "acted in their own initiative and without the knowledge or approval of [the] government."[30] If the "private volunteers" argument is accepted, it would mean that states would only have to allow their agents to act as "private volunteers" to avoid the problem of unlawful abduction in the view of international law.

The question of connivance between officials may be classified as a form of abduction, but a distinction is drawn between these two techniques. Abduction only occurs when the state where the individual is present is not a party to the plot. Connivance, on the other hand, occurs when the agents of the two interested states act jointly under color of law. Abduction differs from other informal modes of surrender, particularly those authorized or approved by the respective states, because in those instances there is no violation of the sovereignty or territorial integrity of the state where the individual was present at the time of the seizure. Such a practice would, therefore, not disrupt relations between the respective states nor would it involve infringement of sovereignty. However, issues of human rights violations would remain. The existence of such cooperative undertakings by state agents, even though violative of international due process of law, evidences the cooperation and friendly relations of the respective states, except in cases when the action of agents of such states is based solely on their personal cooperation. There are no cases in legal or diplomatic records available to this writer that illustrate this latter type of practice. There are, however, numerous cases involving agents of neighboring states who seek to circumvent formal rendition processes by acting on their own. In such cases, however, the agents' conduct is known to their superiors and cannot be deemed wholly private. International legal doctrine as expressed in the majority of scholarly writings remains, however, opposed to these practices and to the application of the maxim *mala captus bene detentus*.[31]

In a European cause célèbre in 2003, Turkey sought the extradition of Abdullah Öcalan, a leader of the Kurdistan Workers Party (PKK), a Kurdish separatist group. As leader of the PKK, he was charged with committing several acts of violence that resulted in the death of a number of persons, leading a terrorist group, and trafficking in narcotics to finance the terrorist

28 *See* Cardozo, *supra* note 10. *See* also Dickinson, *supra* note 9; T. Sponsler, *International Kidnappings*, 5 Int'l L. 27 (1971); Note, *The Effect of Illegal Abductions by Law Enforcement Officials on Personal Jurisdiction*, 35 Md. L. Rev. 147 (1975).

29 D. Eisenberg, V. Dan & E. Landau, The Mossad 22–35 (1978).

30 Hackworth Digest, *supra* note 23, at 624. *See also* DeSchutter, *supra* note 13, at 88–124; O'Higgins, *supra* note 13.

31 DeSchutter, *supra* note 13; O'Higgins, *supra* note 13. For a comparative view, see IX Congrès, *Les Problèmes Actuels de L'Extradition*, 39 Rev. Int'le de Droit Pènal 375 (1968); Eleni Sakellar, *Acquisition of Jurisdiction over Criminal Defendants by Forcible Abduction: Strict Adherence to Ker-Frisbie Frustrates United States Foreign Policy & Obligations*, 2 ASILS Int'l L.J. 1 (1978). The authors cited in the notes above and in Secs. 1 and 2 are all critical of the practice.

organization. Because the PKK has adherents in a number of European countries, Öcalan escaped to Italy where he sought refuge. After his flight to Italy, Germany sought his extradition, as did Turkey; however, Germany did not pursue the request for fear that his return to Germany would provoke acts of terrorism and violence by members of the PKK. Italy sought to negotiate a transfer of criminal proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters[32] to another state that had ratified the Convention, but none accepted or qualified under the terms of the convention. In the meantime, Öcalan escaped to Kenya, where he was later kidnapped and transported to Turkey, where he was tried and convicted.[33]

As described below in *Alvarez-Machain*,[34] the U.S Department of Justice paid a bribe of $50,000 to Mexican drug officials to kidnap Dr. Alvarez-Machain and deliver him to U.S. DEA agents who were present at the scene and who subsequently brought him to the United States.[35] The U.S. Supreme Court majority took the preposterous position that because the United States–Mexico extradition treaty did not specifically prohibit such a form of rendition, that it was therefore valid. Later, the Court in *Sosa v. Alvarez-Machain* denied Alvarez-Machain's claim for damages.[36] The two applicable laws are the Alien Tort Claims Act (ATCA)[37] and the Victim Torture Protection Act of 1991 (VTPA).[38] Subsequently, the Supreme Court ruled in *Mohamed v. Palestinian Authority* that the VTPA did not apply to organizations,[39] and in *Kiobel v. Royal Dutch Petroleum* that the ATCA only applied to cases in the United States or on the high seas.[40] All cases involving "extraordinary

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32 European Convention on the Transfer of Proceedings in Criminal Matters, March 30, 1978, CETS No. 073, 1137 U.N.T.S 17825.

33 His case was reviewed by the ECHR, but the conviction was upheld. Öcalan v. Turkey, Chamber Judgment, App. No. 46221/99 (Mar. 12, 2003).

34 *See infra* Sec. 6.

35 Alvarez-Machain v. United States, 504 U.S. 655 (1992).

36 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

37 Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

38 Victim Torture Protection Act of 1991, 28 U.S.C. § 1350 (1991).

39 Mohamed v. Palestinian Auth., 566 U. S. ____ (2012).

40 In *Kiobel v. Royal Dutch Petroleum Co.* et al., 2013 WL 162893, the Supreme Court held that Congress alone may decide whether U.S. legislation is to be applied extraterritorially. Although the case did not address the powers of the president, it would logically follow that the executive branch, acting within the proper scope of its constitutional authority, may also engage in extraterritorial conduct that could be justiciable. The Court in *Kiobel* also distinguished between a cause of action that has extraterritorial effect and the statutory merit basis for the exercise of jurisdiction. The *Kiobel* case addressed the Judiciary Act of 1789 and reviewed its evolution, particularly focusing on *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004). The Court in *Sosa* recognized that the ATS is a jurisdictional statute that provides for U.S. jurisdiction by recognizing private claims under federal common law for violations arising under international law. Sosa, however, emphasized that such violations should be "specific, universal, and obligatory"; *id.* at 732. The Supreme Court in *Kiobel* also addressed the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, and also the Genocide Accountability Act of 2007, 18 U.S.C. § 1090(e), which provides jurisdiction in the United States for the offense of genocide, irrespective of where the offense was committed if the alleged offender is present in the United States. The *Kiobel* judgment, in a very clear manner, reaffirms the principle of territoriality of U.S. laws. In short, the judgment makes clear that territoriality is not only the general rule, but the presumption of U.S. laws. That presumption can of course be rebutted by a showing that Congress intended the law in question to be extraterritorial. This would apply in such cases where statutory language is not clear and unambiguous about the jurisdictional scope and application of the said law. Thus, extraterritorial application of U.S. laws in terms of the merits is not excluded by *Kiobel*. Extraterritorial jurisdiction is also not excluded provided there is a legislative basis for the cause of action.

In *Kiobel*, the Supreme Court emphasized the historic context of the adoption of the Judiciary Act of 1789, more particularly on what would constitute a violation of international law at the time, relying on Blackstone's identification of what international law meant by universal jurisdiction. The Court stated

> We explained in Sosa that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S., at 723, 724; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone—in describing them—did so in terms of conduct occurring within the forum nation. See ibid. (describing the right of safe conducts for those "who are here"); 1 id., at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); id., at 245–248 (recognizing the king's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. De Vattel, Law of Nations 465 (J. Chitty et al. transl. and ed. 1883) ("[O]n his entering the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations . . . ").
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> Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legion—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. Respublica v. De Longschamps, 1 Dall. 111, 1 L.Ed. 59 (O.T. Phila.1784); Sosa, supra, at 716–717, and n. 11. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because "neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors," the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641–642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See Bolchos, 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); Moxon, 17 F. Cas. 942 (wrongful seizure in United States territorial waters).
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> These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.
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> . . .
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> Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. See 4 Blackstone, supra, at 72 ("The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, e.g., Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.
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> Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, supra, at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See Morrison, 561 U.S., at —— (slip op., at 16) ("[W]hen a statute provides for some extraterritorial application, the presumption against extra-territoriality operates to limit that provision to its terms"); see also Microsoft Corp., 550 U.S., at 455–456.

rendition" against the United States and U.S. public officials have been dismissed or denied by U.S. courts.[41]

3. Comparative Jurisdictional Analysis of Unlawful Seizure Cases[42]

Unlawful seizure can be defined as occurring when officials of the state where the individual is present act with the connivance of agents of another state outside the framework of the applicable legal process to effectuate the surrender of the individual to the agents of another state. Cases of governmental connivance or connivance between agents acting in their official capacity are difficult to document, as they presuppose the complicity of those who could bring the matter to the attention of the judiciary.[43] The present view of the position of the

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As stated by Justice Kennedy's concurring opinion, as well as those by Justices Breyer, Ginsburg, Kagan, and Sotomayor, *Kiobel* leaves open a number of significant questions that relate not only to the ATS, but also to the TVPA, as well as the evolving meaning of "international law." As stated by Justice Breyer

> The majority nonetheless tries to find a distinction between piracy at sea and similar cases on land. It writes, "Applying U.S. law to pirates…does not typically impose the sovereign will of the United States onto conduct occurring within the *territorial* jurisdiction of another sovereign and therefore carries less direct foreign policy consequences." *Ante,* at 10 (emphasis added). But, as I have just pointed out, "[a]pplying U.S. law to pirates" *does* typically involve applying our law to acts taking place within the jurisdiction of another sovereign. Nor can the majority's words "territorial jurisdiction" sensibly distinguish land from sea for purposes of isolating adverse foreign policy risks, as the Barbary Pirates, the War of 1812, the sinking of the *Lusitania,* and the Lockerbie bombing make all too clear.
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> The majority also writes, "Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction." *Ibid.* I very much agree that pirates were fair game "wherever found." Indeed, that is the point. That is why we asked, in *Sosa,* who are today's pirates? Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." 1 Restatement § 404 Reporters' Note 1, p. 256 (quoting *In re Demjanjuk*, 612 F.Supp. 544, 556 (N.D.Ohio 1985) (internal quotation marks omitted)). See Sosa, supra, at 732. And just as a nation that harbored pirates provoked the concern of other nations in past centuries, see *infra,* at 8, so harboring "common enemies of all mankind" provokes similar concerns today.
>
> Thus the Court's reasoning, as applied to the narrow class of cases that *Sosa* described, fails to provide significant support for the use of any presumption against extraterritoriality; rather, it suggests the contrary. See also *ante,* at 10 (conceding and citing cases showing that this Court has "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application").

In the opinion of this writer, nothing in this decision should be interpreted as constituting a jurisdictional limitation to a party having a claim arising under international law, particularly when such a claim is also based on treaties ratified by the United States, which provide for extraterritorial jurisdiction, as stated in the concurring opinion.

41 *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). Although the Fourth Circuit denied damages to El-Masri, his case proceeded before the European Court of Human Rights, which resulted in a finding by the Grand Chamber of several violations of the European Convention of Human Rights, including the prohibitions on torture, arbitrary detention, the duty to investigate, the right to the truth, and the right to an effective remedy. El-Masri v. The Former Yugoslav Republic of Macedonia, App. No. 39630/09 Eur. Ct. H.R. (2012). For an overview of the case, see Open Societies Institute, El-Masri v. Macedonia, *available at*: http://www.soros.org/initiatives/justice/litigation/macedonia.

42 *See infra* Sec. 6 for a detailed analysis of U.S. jurisprudence.

43 *See* Evans, *supra* note 14 (citing cases, mostly from diplomatic archives). *See also* Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931); *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); Vaccaro v. Collier, 38 F.2d 862 (D.C. Md. 1930); Hackworth Digest, *supra* note 23, at 624.

individual in international law and in most states remains, however, that he/she cannot raise these issues before international or national courts (except for the right to individual petition before the European Commission on Human Rights, the Inter-American Commission on Human Rights, and the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights).

The plea of unlawful seizure by connivance between officers of the Federal Bureau of Investigation (FBI) and Mexican Security Police was advanced unsuccessfully in *United States v. Sobell*.[44] There the Second Circuit Court of Appeals, sustaining the jurisdiction of the District Court to try Sobell on espionage charges, stated:

> But it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive (in *Ker*). We think the question presented is indistinguishable from that before the Supreme Court in *Ker*, and that our decision here is controlled by that case.[45]

Many cases of unlawful seizure occur between neighboring states, in particular when the individual is a national of the state to whose agents he/she is delivered. Such occurrences have taken place between the United States and Canada, and the United States and Mexico.[46]

In *United States v. Sobell*,[47] U.S. public agents participated with Mexican public officials in the seizure of a U.S. citizen in a foreign country, whereas in *Illinois v. Ker*, it was a U.S. citizen acting under color of U.S. law who acted on his own in Peru. In *Eichmann*, Israeli agents pretending to act on their own seized the accused without the knowledge or connivance of Argentina.

In *Ker*[48] a private detective from the United States, while in Peru, received duly executed extradition papers from the U.S. government, conforming to the requirements of the extradition treaty between the United States and Peru. He failed to use them, however, because the legitimate government of Peru was disorganized as a result of the military occupation of the capital by Chilean forces, and was therefore inaccessible. The occupation forces assisted the U.S. officials in forcing Ker to board a U.S. vessel. At no time did Peru object to the proceedings. If Peru had protested, the question would have arisen whether the occupation by a foreign force had so deprived the Peruvian government of sovereignty over the place where Ker was found that it had no standing to object to police action by foreign authorities.

A similar situation enabled the U.S. government in 1946 to have Douglas Chandler seized in Germany by U.S. military forces and forcibly returned to the United States for trial on charges of treason.[49] The sovereignty of no government was offended by the action of foreign officers on its soil.

In the *Sobell* case the abducting party in Mexico was allegedly made up originally of Mexican officers. Sobell was carried, against his will, to the U.S. border and there turned over to U.S. authorities before being brought into the United States. He was then taken to New York, where he was tried and convicted for conspiracy to commit espionage. Sobell lost in his efforts to obtain release on various grounds, including a charge that the extradition treaty had been

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44 United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873, *reh'g denied*, 355 U.S. 920 (1958). *See also* O'Higgins, *supra* note 13.

45 United States v. Sobell, 244 F.2d 520, 525 (2d Cir. 1957).

46 Evans, *supra* note 14.

47 United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956).

48 Ker v. Illionois, 119 U.S. 436 (1886).

49 Chandler v. United States, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918 (1949), *reh'g denied*, 336 U.S. 947 (1949).

violated. It seems clear that the collaboration of the Mexican police, like that of the French in the *Savarkar* case,[50] deprived Mexico of any basis for complaint, even if it had wanted to raise an objection.

Many years before, however, Mexico had protested vigorously against retention by the United States of Martinez, who was forcibly taken from Mexico to the United States by another Mexican. The latter was extradited to stand trial in Mexico for kidnapping, but the United States refused to release Martinez.[51]

The problems described above are not problems only felt in the United States, but also elsewhere in the world. Suffice it to recall that the case of Franco Freda in which the defendant was convicted in Italy for placing a bomb that killed a number of people in a public place. Pending the appeal, Freda fled to Costa Rica, where he was arrested without cause by the Costa Rican authorities, and put on board a plane where he was delivered into the hands of members of the Italian police authority, who took him back to Italy without any formal legal process.[52]

There is also the 1980 case of Lorenzo Bozano. After the French Court of Appeals of Limoges[53] denied Italy's request for Bozano's extradition, he was one day, by connivance among the Italian, French, and Swiss police, picked up in the streets of Grenoble by French police without any formal process, driven by car eleven kilometers to the Swiss border, and handed over to a Swiss police officer, who took him into custody. Bozano was jailed in Geneva and then surrendered to Italy. This rendition device was made necessary by the fact that France had denied Bozano's extradition on a technical basis, in that the defendant had been acquitted at the trial level but found guilty by the Court of Assizes on appeal, in absentia. As the procedure did not exist in France, there was lack of procedural reciprocity, and the French court found that Bozano was not extraditable. The Italian and the French police authorities agreed to have Bozano returned to Italy, but there was no legal way in to accomplish this. The conspiracy among the

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50 Award of the Permanent Court of Arbitration in the Case of *Savarkar*, between France and Great Britain, 19 Scott, The Hague Court Reports 276 (1916), *reprinted in* 5 Am. J. Int'l L. 520 (1911).

51 1906 U.S. Foreign Relations 1121–1122. *See Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934) *See also* Charles G. Fenwick, Cases on International Law 420 (2d ed. 1951).

52 The seizure took place in August 1979, and he was delivered to Italian authorities on August 24, 1979. For lack of evidence, he was later found not guilty. The seizure was criticized in Rivista Italiana di Diritto e Procedura Penale 693 (1981).

53 Chambre de Mises en Accusation de la Cour D'Appel de Limoges Arret. No. 37, May 15, 1979. After his abduction into Switzerland, an action was brought before the Tribunal du Canton de Genève to challenge the validity of his detention, but was rejected on November 9, 1979. Bozano's counsel appealed the Swiss decision before the Tribunal Federal Suisse, which decided on June 13, 1980 that the extradition was valid. Another action was brought before the Tribunal de Grande Instance de Paris challenging his expulsion, but was rejected in the Ordonnance de Référé of January 14, 1980. However, the Tribunal Administratif de Limoges, in an Arret of December 23, 1981, annulled his expulsion. As Bozano remained incarcerated on the island of Elba, his counsel submitted the case to the European Commission on Human Rights on March 30, 1982. In 1982, the Commission held the complaint admissible (Decision No. 9990/82). The European Court of Human Rights on December 18, 1986, Decision 5/1985/91/138, held against France on grounds of violation of Article 5(1) (right to liberty and security of person) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 9 E.H.R.R. 297 (Eur. Ct. H.R. 1986). In an earlier case, however, France had rejected the validity of jurisdiction by abduction in *Re Jolis*, (1933–34) Ann. Dig. 191 (no. 77) (Fr.). But in 1978, the French authorities delivered Klauss Croissant to Germany after he was ordered extraditable by the trial court before he could appeal. *See* Thomas E. Carbonneau, *Extradition and Transnational Terrorism: A Comment on the Recent Extradition of Klaus Croissant from France to West Germany*, 12 Int'l Law. 813 (1978). *See also* the case of *Amekrane v. United Kingdom*, 16 Y.B. Eur. Conv. on H.R. 356 (1973). In *Amekrane*, British authorities in Gibraltar delivered Colonel Amekrane, who fled from Morocco to Gibraltar, to Moroccan military authorities who took him to Morocco, sentenced him to death, and executed the sentence.

three police authorities resulted in the forcible expulsion of Bozano from France, his delivery to Swiss police authorities, and his subsequent extradition to Italy.

The third example is that of Camillo Caltagirone, who was charged by Italy with the crime of fraudulent bankruptcy. Caltagirone had become a permanent resident of the Dominican Republic and was in the process of applying for Dominican citizenship.[54] The Italian authorities, in collusion with Dominican police authorities, seized him and put him on board a plane destined for Spain. Once in Spain, by connivance with Spanish police authorities, the Italian authorities put him on another plane from Spain to Italy, where members of the Italian police took custody of him.

In a more recent case, a dual United States–Jordanian citizen was taken into custody in Jordan and handed over to U.S. authorities the next day.[55] He was then placed on an airplane and returned to the United States to face a recently filed indictment. The United States did not formally request extradition in this matter, and no Jordanian court was involved.[56] The only basis for his delivery to U.S. custody was the arrest warrant issued by the United States.[57] The individual attempted to challenge this conduct as violative of the 1995 United States–Jordan extradition treaty, but the court rejected this argument, reasoning that only Jordan had standing to raise an objection based on the extradition treaty (which it did not) and that as neither country invoked the treaty none of the treaty rights were available to the individual.[58] The court also relied on the *Ker-Frisbie* doctrine as providing personal jurisdiction over the individual in question.[59]

Interestingly enough, in these four cases, the judicial authorities were never involved, nor were they advised of the cases, nor did they have an opportunity to intervene. Cooperation in all of these cases was between different law enforcement authorities who avoided and evaded judicial and legal processes. These cases may point to a trend in extradition practices where police, in avoidance of the judicial authorities, work out their own arrangements to obtain rendition of individuals, regardless of what the respective legal systems require. This creates serious problems for the integrity of the legal process, even though it may be a manifestation of the frustration of law enforcement authorities with their inability to make the extradition system work with the speed and satisfaction they desire.

In some cases, however, all the organs of government, including the judiciary, may be working either in concert or with the same purpose of preserving jurisdiction over an abducted defendant. This situation appears in the case of Mordechai Vanunu, an Israeli technician who had given information to British newspapers about Israel's military nuclear capabilities. On October 5, 1986, the *Sunday Times* published these accounts, showing that Israel had secretly built up the world's sixth largest nuclear arsenal, a claim that the government of Israel has always denied. Vanunu vanished in London on or about September 30, 1986, and subsequently appeared in custody in Israel.[60] He was tried in Israel on charges of treason and espionage. At a hearing before the Jerusalem District Court on December 21, 1986, Vanunu raised the issue

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54 The two other brothers, Gaetano and Francesco, had been duly requested by the Italian government and their case went before the Southern District of New York. *See* Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980). The cases were dismissed four years later when the Italian Supreme Court reversed the decision of the lower bankruptcy court, which had found the two brothers guilty of the crime of fraudulent bankruptcy.

55 United States v. Amawi, 2008 U.S. Dist. Lexis 27628 (N.D. Ohio 2008).

56 *Id.* at *2.

57 *Id.* at *3.

58 *Id.* at *3–*6.

59 *Id.* at *7–*8.

60 The press reported that Vanunu had been lured from London by a female Mossad agent to Rome "where he was attacked by two men and held down while she injected him with a powerful anesthetic. He was chained and smuggled out of Italy in a cargo ship." Jeff Cohen & Norman Solomon, *Jailed News Source Is Victim of "Free Press,"* Plain Dealer, May 29, 1993, at 6B.

of his kidnapping. The court dismissed this issue, and Vanunu was subsequently convicted of the charges and sentenced to eighteen years in prison.[61] Vanunu was tried and convicted even though it is quite clear that he was kidnapped by Israel's secret service, and the United Kingdom did not file a protest.[62]

It is important to point out here that the efforts of the members of the Council of Europe to develop a convention on European judicial and mutual cooperation in penal matters are ultimately directed toward securing not only easier extradition procedures, but also improved cooperation in penal matters—cooperation at the level of ministries of interior and, therefore, between law enforcement agencies.[63] It is quite likely that if such cooperation develops outside the control of a judicial system, abuses are likely to occur. If such cooperation is subject to judicial control, experience leads one to believe that the temperateness of the legal and judicial process will have a salutary effect on the tendencies of law enforcement agencies to engage in expeditious practices that do not fit the minimum standards of fairness and justice found in a contemporary society.

In *Kasi v. Angelone*, Mir Aimal Kasi killed two CIA employees and injured three others in 1993. He was indicted in Virginia and for over four-and-a-half years was a fugitive. In 1997, he was kidnapped by FBI agents in a hotel in Pakistan. As described by the Fourth Circuit,

> [h]e was hooded, shackled, and transported by vehicle and air to an undisclosed location where he was held in a jail-like facility. Two days later, Kasi was transported by military aircraft from Pakistan to Fairfax County, Virginia, still in the custody of FBI agents, and delivered to the Commonwealth of Virginia for prosecution. The place of Kasi's detention prior to his being returned to the United States, and the identities of any foreign persons involved in his capture and return, have not been disclosed due to security concerns.
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> During the flight to the United States, Kasi signed a written waiver of his rights and gave an oral and written confession to the crimes to Agent Garrett.[64]

On the basis on the confession he made after being kidnapped, Kasi was convicted and sentenced to death. After his conviction, which was affirmed by the Virginia Supreme Court, he applied for certiorari, which was denied.[65] The Fourth Circuit affirmed the *Ker-Frisbie* position as confirmed in *Alvarez-Machain*:

> [u]nder this country's jurisprudence, it has long been held that a criminal defendant who has been abducted to the United States from a foreign nation with which the United States has an

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61 Vanunu served his sentence in an Israeli prison in solitary confinement in a 6 by 10 foot cell. Samuel H. Day, Jr., *Clemency for a Spy, Compassion for a Peacemaker*, S.F. Examiner, Dec. 14, 1993, at A-OP. *See* also Peter Hounam, *Israelis Pressed to Free Vanunu*, Sunday Times, Sept. 26, 1993; *Supreme Court Rejects Nuclear Spy's Petitions,* Agence France Presse, Sept. 6, 1993. He was eventually released in 2004 after eighteen years' imprisonment, but significant restrictions were placed on his liberties. Greg Myre, *Vanunu, Disdaining Israel, Is Freed to Chants vs. Cheers*, N.Y. Times, Apr. 22, 2004, *available at* http://www.nytimes.com/2004/04/22/international/middleeast/22vanu.html.

62 *Man Accused of Leaking Israeli Secrets to Be Jailed during Trial*, United Press International, Dec. 22, 1986.

63 At first, there was the French initiative in the Council of Europe to develop a European judicial space. *See* Estradizione e Spacio Giuridico Europeo (Consiglio Superiore Della Magistratura, 1981); Christine Van den Wijngaert, *L'Espace Judiciare Europén: Vers une Fissure au sein du Conseil de L' Europe*, 6 Revue de Droit Pènal et de Criminologie 511 (1981). But this initiative was dropped. Then, two groups developed: one within the Council of Europe called the Pompidou Group to develop quiet intergovernmental cooperation in the area of drug trafficking; and the other within the European Economic Community enlarged to the United States and Canada called the Trevi Group to deal with terrorism. *See* Ekkehart Müller-Rappard, *The European Response to International Terrorism*, *in* Legal Responses to International Terrorism: U.S. Procedural Aspects 385 (M. Cherif Bassiouni ed., 1988).

64 Kasi v. Angelone, 300 F.3d 487, 491 (4th Cir. 2002).

65 *Id.*

extradition treaty does not thereby acquire a defense to the jurisdiction of the courts within this country. See Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421 (1886) (rejecting defendant's claim that he was illegally subjected to trial in Illinois where a person acting on behalf of the United States government, although armed with a warrant to effectuate the defendant's removal from Peru pursuant to the applicable extradition treaty between the countries, opted instead to forcibly abduct defendant and return him to the United States without Peruvian assistance); cf. Frisbie v. Collins, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952) (relying upon Ker to hold, in the context of a defendant's domestic abduction from the state of Illinois to the state of Michigan for trial, that the power of a court to try a defendant is not impaired by the fact that the defendant was brought within the court's jurisdiction by reason of a "forcible abduction"). As noted in Frisbie, the Supreme Court:

> has never departed from the rule announced in *Ker v. Illinois,* that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will. *Id.* at 522, 72 S.Ct. 509 (citation and footnote omitted); *see also United States v. Porter,* 909 F.2d 789, 791 (4th Cir.1990) (noting this circuit's adherence to the doctrine announced in *Ker* and *Frisbie* to reject criminal defendants' challenge to their involuntary removal from the Philippines and return to the United States for trial); *United States v. Wilson,* 721 F.2d 967, 972 (4th Cir.1983) (rejecting criminal defendant's challenge to district court's jurisdiction on the grounds that he was "tricked" by the lies of an acquaintance working for the government into leaving Libya (where he was safely a fugitive from justice) and traveling to the Dominican Republic, where he was seized by United States agents and returned to the United States for trial).

In *United States v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), however, the Supreme Court interpreted an extradition treaty between Great Britain and the United States, and held that a criminal defendant who had been returned to the United States from a foreign nation by virtue of extradition proceedings under an extradition treaty could only be tried for offenses charged in the extradition request, "until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." *Id.* at 430, 7 S.Ct. 234.

In *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), the Court addressed a similar, but slightly different situation from that presented in *Ker,* and reconciled its holdings in *Ker* and *Rauscher.* Specifically, unlike in *Ker,* agents of the Drug Enforcement Administration ("DEA") were directly involved in the forcible abduction of a physician suspected of aiding the torture and ultimate murder of an undercover DEA agent operating in Mexico, and in effectuating the physician's removal from Mexico and return to the United States for trial on the charges. The Mexican government protested the action as a violation of the extradition treaty in effect between the United States and Mexico. *See id.* at 657, 112 S.Ct. 2188.

On appeal, the United States Supreme Court rejected the defendant's claim that the treaty prohibited the United States government from forcibly abducting a fugitive within the borders of Mexico. Specifically, the Court noted that the express language of the treaty "d[id] not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution," *id.* at 664, 112 S.Ct. 2188," and "d[id] not support the proposition that the Treaty prohibits abductions outside of its terms," *id.* at 666, 112 S.Ct. 2188. The Court also refused to *imply* a term, based upon international practice and precedent, that would "prohibit[] prosecution where the defendant's presence is obtained by means other than those established by the Treaty." *Id.* The Court's willingness to imply a term prohibiting the trial and conviction of an extradited defendant for a crime not specified in the extradition

> request in *Rauscher* was distinguishable, the Court held, because such a term was justified by the express requirement that evidence establishing probable cause of the crime be presented before extradition was required. *See Alvarez-Machain,* 504 U.S. at 669, 112 S.Ct. 2188.
>
> In sum, although the terms of an extradition treaty might limit a court's ability to prosecute a defendant who has been returned to the United States by virtue of the treaty in certain circumstances, the Court has plainly held that an extradition treaty does not divest courts of jurisdiction over a defendant who has been abducted from another country where the terms of the extradition treaty do not prohibit such forcible abduction. *See Alvarez-Machain,* 504 U.S. at 670, 112 S.Ct. 2188; *United States v. Noriega,* 117 F.3d 1206, 1213 (11th Cir.1997) ("Under *Alvarez-Machain,* to prevail on an extradition treaty claim, a defendant must demonstrate by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner.").[66]

The Fourth Circuit followed the Supreme Court's tortured reasoning in *Alvarez-Machain* that because the treaty does not include a prohibition against kidnapping that jurisdiction obtained by kidnapping is valid.[67] The court also took the position that absent a protest by the state from which the kidnapping took place the person does not have standing to challenge the kidnapping, relying on *United States v. Verdugo*.[68] The Fourth Circuit, without giving any reason, rejected the proposition that Kasi should be repatriated to Pakistan and that the United States should seek extradition pursuant to the treaty with that country. In short, the Fourth Circuit's interpretation of *Alvarez-Machain* is that unless an extradition treaty governs forced abductions abroad, nothing in the Constitution or laws of the United States (at present) control that issue. Thus, the Fourth Circuit legalized abductions abroad by U.S. agents of anyone who is not a U.S. citizen. Considering that Kasi had killed two CIA agents and injured three more, it is not surprising that the courts in Virginia did not give much weight to the argument that his coerced confession after abduction was used to convict him. Probably because of the nature of the crime, it was unlikely that the Fourth Circuit would have given greater consideration to other constitutional arguments related to his abduction.

4. Extraordinary Rendition: The United States' New Kidnapping Techniques since September 11, 2001[69]

The very use of the term "extraordinary rendition" implies some legitimacy for a practice that is devoid of any. The United States practiced a form of rendition known as "rendition to justice," which had existed since the late 1980s. The process of "extraordinary rendition" was initiated in 1998 by the Clinton administration, and was dramatically modified after the events of

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66 *Id.* at 493–495 (internal citations omitted).

67 United States v. Torres Garcia, 2007 U.S. Dist Lexis 29922 (D.C. Cir. 2007); United States v. Mejia, 448 F.3d 426, 443 (D.C. Cir. 2006). In these two cases that followed *Alvarez-Machain*, the courts followed the distinction between resort to processes outside extradition even when an extradition treaty exists, provided said treaty did not preclude other forms of rendition.

68 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment protecting against unreasonable searches and seizure does not apply extraterritorially to a nonresident alien and presumably to a non-U.S. citizen). With respect to the issue of standing to protest a violation of the rule of specialty, see Ch. VII, Sec. 6.

69 Bassiouni, The Institutionalization of Torture by the Bush Administration, *supra* note 11; Sadat, *supra* note 12; Jordan Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 Val. U. L. Rev. 1535 (2009); Christopher Hitchens, *Believe Me, It's Torture*, Vanity Fair, Aug. 2008; Steven Miles, Oath Betrayed: Torture Medical Complicity and the War on Terror (2006); George Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 Boston U. L. Rev. 427 (2007); Stuart Grassin, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. Pol'y 325 (2006).

September 11, 2001.[70] Since September 11, 2001, the United States has blatantly engaged in illegal conduct under international law, attempting to use the cover of some legal ambiguity arising out of the practice of abduction, which as discussed above is unlawful.[71] It should be noted that many states, such as those bound by the ECHR and the ACHR, recognize the legality of kidnapping, as practiced by the U.S. practice and jurisprudence.[72]

The rationale for U.S. courts looking the other way in kidnapping cases has usually been either because the conduct was performed by non-U.S. officials or because it has been carried out on foreign territory. With respect to the latter, a number of cases have considered that if the extraterritorial conduct of U.S. officials is "egregious,"[73] then the U.S. courts may not wish to recognize the jurisdictional validity of the kidnapped person.

Recent practice has taken this situation to a new level of illegality or questionable legality by having CIA officials either acting by themselves or with their foreign counterparts, completely outside either U.S. or foreign law. In one reported case in Italy, CIA agents and their Italian counterparts have already been the subject of an indictment.[74] The object in these cases is not only unlawful seizure (kidnapping in domestic laws), but also an intent to commit an international crime, such as torture. This case is due to the personal courage, integrity

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70 Under this practice, CIA or FBI personnel apprehended individuals in states unable to prosecute them due to civil war or other similar circumstances with the intention of transferring them to states interested in and capable of prosecuting them. *See generally* Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 Fla. J. Int'l L. 531, 537 (2007). Under the Clinton administration, the process of extraordinary rendition was similarly designed to transfer individuals to states where they were wanted for trial or detention. There were several limitations on this process, including

> . . . an "outstanding legal process" against the suspect (usually consisting of a conviction connected to terrorist-related offenses in a foreign state); the creation of a CIA profile; the review and approval of the rendition by senior government officials, including the CIA's legal counsel; the existence of states willing to assist in the apprehension and incarceration of the suspect; and diplomatic assurances that the suspect would be treated in accordance with applicable national laws.

*See*Lucien L. Dhooge, *The Political Question Doctrine and Corporate Complicity in Extraordinary Rendition*, 21 Temp. Int'l & Comp. L.J. 311, 314–315 (2007) (approximately seventy terrorism suspects were returned to foreign jurisdictions under this method prior to September 11, 2001). *See also* Bassiouni, The Institutionalization of Torture by the Bush Administration, *supra* note 11; Sadat, *supra* note 12.

71 For a reverse of "extraordinary rendition"—when individuals connected with terrorism are returned from other states to the United States, seeAppendix D: Extraditions and Renditions of Terrorists to the United States, 1993–1999, http://www.state.gov/documents/organization/10306.pdf for the following individuals: Mahmoud Abu Halima (extradited March 1983); Mohammed Ali Rezaq (rendition from Nigeria July 1993); Ramzi Yousef (extradition from Pakistan Feb. 1995); Wali Khan Amin Shah (rendition Dec. 1995); Tsutomu Shirosaki (rendition Sept. 1996); Mir Aimal Kasi (rendition Kenya Aug. 1998); Mohamed Sadeek Odeh (rendition Kenya Aug. 1998); Mamdouh Mahmud Salim (extradition Germany Dec. 1998); Khalfan Khamis Mohamed (rendition S. Africa Oct. 1999). *See also* Report on International Extradition submitted to the Congress Pursuant to Section 211 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (Pub. L. 106-113).

72 United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992.), *cert. granted*, 502 U.S. 1024 (1992); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

73 *See* United States v. Toscanino, 500 F. 2d. 267 (2d. Cir. 1972), *reh'g denied* 504 F.2d 1380 (1974), *on remand* 398 F. Supp. 916 (1975).

74 *See* Bruce Zagaris, *Extradition—Italian Justice Minister Defers Extradition of CIA Operatives*, 22 Int'l Enforcement L. Rep. (2006); John Crewdson, *CIA Targeted "More than 10" in Italy for Kidnap, Agent Says*, Chic. Trib,, July 31, 2006; Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions in Council of Europe Member States,* Information Memorandum II, Jan. 22, 2006.

and determination of a Milano-based investigative judge, Armando Spataro.[75] Judge Spataro's indictment and request for extradition have been buried in the Ministry of Italy, which has not even publicly confirmed that it forwarded the extradition request for the U.S. agents to the United States. The United States has, however, announced, without any legal basis, and without submitting the Italian request to a U.S. court (assuming a request was formally filed by Italy) pursuant to the extradition treaty with Italy,[76] and to U.S. law, Title 18 U.S.C. §§ 3181–3196, that the individuals will not be extradited. The indictment in question was against twenty-six Americans for the kidnapping of Sheikh Abu Omar, an Egyptian cleric who was abducted from Milan and sent to Egypt where he was tortured.[77] Among the indictees were the CIA station chiefs in Milan and Rome, the first and two second secretaries at the U.S. embassy in Rome, and a lieutenant-colonel in charge of security at Aviano Air Base.[78] Italy convicted twenty-three of the twenty-six indicted Americans in absentia,[79] acquitting three on the grounds that they enjoyed diplomatic immunity.[80] The U.S. Department of Defense responded that the Italian judiciary lacked jurisdiction over the matter and insisted that the case against the lieutenant-colonel implicated in the kidnapping be transferred to the United States; the CIA did not respond.[81] These individuals will have to be apprehended by European officials or extradited by the United States upon a formal request from Italy.[82] In September 2012 the Italian Court of Cassation upheld the convictions of the CIA officers.[83]

The *Abu Omar* case was the first prosecution for such unlawful seizures. No government has yet brought an action against another government before the ICJ for a breach of "state responsibility" under international law in the context of extraordinary rendition. In *Ahmad & Aswat v. United States* the United Kingdom considered, in the context of a U.S. extradition request for alleged "terrorists," whether the prospect of a relator being subjected to extraordinary rendition upon his surrender to the United States was sufficient grounds to deny the U.S. extradition request.[84]

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75 Armando Spataro, Ne Valeva la Pena: Storie di Terrorismi e Mafie, di Segreti di Stato e di Giustizia Offesa (2010).

76 Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy, Sept. 24, 1984, 1590 U.N.T.S. 27835.

77 Under Title 18, there is no general extraterritorial criminal provision and the principle of nationality in respect to criminal jurisdiction does not exist except with respect to some limited provisions such as treason, espionage, and tax evasion. This legal stratagem is akin to that of the corporate veil in business law. However, jurisprudence in corporate criminal responsibility has established that the corporate veil cannot be used to conceal conspiracies and crimes. *Id. See also* Zagaris, *supra* note 74, at 135–136 (2007) (noting a "growing European willingness to seek accountability for the aggressive U.S. policy of abducting suspected terrorists on foreign soil, interrogating them at secret locations in a third country, and surrendering them to foreign intelligence agencies with deplorable human rights records.")

78 "FACTBOX: Italy convicts 23 Americans in CIA rendition case," Reuters, Nov. 4, 2009, *available at* http://www.reuters.com/article/2009/11/04/us-italy-renditions-verdict-factbox-idUSTRE5A352H20091104.

79 Erik Sapin, *Italy Convicts 23 Americans for Alleged Rendition of Terrorism Suspect*, 26 Int'l Enforcement L. Rep. 11–14 (2010).

80 Reuters, *supra* note 78.

81 *Id.*

82 *Id.*

83 Ian Shapira, *Italy's High Court Upholds Convictions of 23 Americans in Abu Omar Rendition*, Wash. Post, Sept. 19, 2012; Elisabetta Povoledo, *High Court in Italy Backs Convictions for Rendition*, N.Y. Times, Sept. 19, 2012.

84 *See Ahmad & Aswat v. United States*, [2006] EWHC 2927.

A further extension of extraordinary rendition is the CIA "black sites," or secret prisons, which have been operating in Europe.[85] The CIA may have operated over twenty European sites, at which individuals were unlawfully held and tortured and/or delivered to countries where they were tortured, including Jordan, Egypt, Morocco, and Syria.[86] Through this and other methods, individuals have been transferred for detention in countries that are known for torturing their prisoners.[87] This practice was condemned by the Council of Europe, but no U.S. court has condemned it even in the more benign context of ATCA and VTPA cases, which as stated above have all been dismissed or denied.[88]

Notwithstanding some attempts by U.S. courts, particularly the Second Circuit in the 1970s in *Toscanino v. United States*,[89] to limit the application of *male captus bene detentus*, the Supreme Court validated the doctrine in *Alvarez-Machain*.[90] Even though it could be argued that a court should not look into how a person was brought within its jurisdiction in criminal cases, this is not at all the case in civil matters, where the relevant argument is related to the degree to which a given judicial system adheres to the Rule of Law. Regrettably the international Rule of Law has not received much deference let alone application in the United States in recent years. While the Second Circuit in *Toscanino* sought to limit the *Ker-Frisbie* doctrine discussed above, it adopted language to the effect that if the government agents' conduct "shocks the conscious,"[91] the court should divest itself of jurisdiction as a matter of constitutionality in that such conduct constitutes an "[. . .] unreasonable invasion of the accused's constitutional rights."[92] In contrast, the Fifth Circuit in *Postal* held that a defendant "cannot rely upon a mere violation of international law as a defense to the court's jurisdiction."[93]

The Second and Fifth Circuit may not have anticipated the abhorrent and illegal practice carried out by the George W. Bush administration as of September 11, 2001, including the CIA's kidnapping of non-U.S. citizens abroad and either delivering them to other countries for purposes of torture or detaining them outside the United States for what the administration

85 For an in-depth discussion of the CIA's use of "black sites," see Bassiouni, The Institutionalization of Torture by the Bush Administration, *supra* note 11, at 141–181; Leila N. Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 Case W. Res. J. Int'l L. 309 (2006). *See also* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 Harv. Hum. Rts. J. 123 (Spring 2006); Crewdson, *supra* note 74. *See* M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L 389 (2006).

86 Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, New Yorker, Feb. 14, 2005, *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_fact6#ixzz1uChTS9QS.

87 Human Rights Watch, "The United States' 'Disappeared,' The CIA's Long-Term 'Ghost Detainees'" (October 2004). Poland and Romania are mentioned.

88 *See* Council of Europe, Resolution 1433 (2005), on the *Lawfulness of Detentions by the United States in Guantanamo Bay*. *See also* Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions in Council of Europe Member States,* Information Memorandum II, Jan. 22, 2006; Human Rights Watch, "The United States' 'Disappeared,' The CIA's Long-Term 'Ghost Detainees'" (Oct. 2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/.

89 United States v. Toscanino, 500 F.2d 267 (2d. Cir.), *reh'g denied* 504 F.2d 1280 (1974), *on remand* 398 F. Supp. 916 (1975).

90 United States v. Alvarez-Machain, 504 U.S. 655 (1992).

91 *Toscanino,* 500 F.2d at 273.

92 *Id.* at 275.

93 Postal v. United States, 589 F.2d 862, 884 (5th Cir. 1979).

euphemistically calls "Enhanced Interrogation Techniques"—to quote Shakespeare, "a rose by any other name would smell as sweet."[94]

In addition, a U.S. citizen may be kidnapped by U.S. agents or illegally arrested by U.S. agents and transferred to the authorities of another state, where he or she may be tortured—a practice known as "extraordinary rendition." Kidnapping outside the United States by U.S. agents for "Enhanced Interrogation Techniques" or for extraordinary rendition to another state where there is a likelihood such person will be tortured is in violation of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States has ratified and passed implementing legislation under the Torture Victims Protection Act (TVPA). Such conduct by U.S. agents abroad will still constitute a crime under U.S. law pursuant to Title 18 U.S.C., even if the U.S. agents do not themselves engage in torture, as the agents know or have reasonable grounds to believe that the kidnapped or surrendered individual will or is likely to be tortured. This is specially prohibited by Article 3 of the CAT, which prohibits extradition of a person to a country where there are substantial grounds to believe he or she will be tortured. As stated by this writer:

> CIA personnel have been engaged in interrogations in Guantanamo Bay, Iraq (Abu Ghraib and other detention facilities), and Afghanistan (Bagram, Kandahar, and other free-fire bases). A legalistic interpretation of U.S. law would be that they are not subject to the [Uniform Code of Military Justice], although they accompanied U.S. military forces and operated on U.S. bases. However, under the PATRIOT Act, Federal criminal law applies to U.S. bases abroad and to actions by U.S. citizens abroad. Violations of the CAT also apply to acts committed outside the territorial jurisdiction of the U.S.
>
> Another artful technique employed by the CIA is the resort to euphemistically termed the practice of "extraordinary rendition." This apparently means the kidnapping, sequestration, and transfer of non-U.S. nationals and their physical delivery to governments whose secret services engage in the torture of these individuals in order to obtain information of interest to the CIA. Like the techniques described above, this one is intended to take advantage of the jurisdictional loopholes in Title 18 criminal violations by selecting victims who are not U.S. citizens, kidnapping them outside the territory of the U.S., and delivering them to yet another state. Moreover, by not directly involving any U.S. official in the torture, plausible deniability is advanced by the CIA. If it is possible to establish a connection in terms of knowledge or reasonable foreseeability between the CIA agents who deliver such victims to foreign government agents and the subsequent torture by these governments, then clearly these CIA agents have committed an international crime under the CAT and can be prosecuted under this convention in any country that can exercise jurisdiction over them. They could also be prosecuted under the [Uniform Code of Military Justice]. As early as 1994, Congress, pursuant to the CAT, criminalized torture even when committed outside the territory of the United States. How the government lawyers . . . were able to simply argue that the Guantanamo Bay Naval Station is under Cuban sovereignty and therefore outside the jurisdiction of the U.S. was at best a fantastic argument, particularly when the position of the U.S. for years has been that Cuba does not have sovereignty over that base, so long as the U.S. occupies it.[95]

The George W. Bush administration used the ambiguity in extradition cases as well as jurisdictional cases involving the applicability of Title 18 U.S.C. and Supreme Court and Circuit Court cases limiting the applicability of the U.S. Constitution beyond its territorial boundaries in carrying out its extraordinary rendition scheme. This practice, as well as

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94 *See* Bassiouni, The Institutionalization of Torture by the Bush Administration, *supra* note 11, at 52–73; Bassiouni, *The Institutionalization of Torture under the Bush Administration, supra* note 85. *See also* Sadat, *supra* note 85; Weissbrodt & Bergquist, *supra* note 85.

95 Bassiouni, *The Institutionalization of Torture under the Bush Administration*, *supra* note 85, at 411–412.

how the administration looks at international treaty obligations, the U.S. Constitution, and U.S. laws, is a good measure of how much deference it gave the Rule of Law, both under its U.S. conception and as conceived internationally. A sounder interpretation is that the U.S. Constitution applies to U.S. agents whenever the relevant provisions constitute a limitation on what officials of the U.S. government can do. It would not make sense to say that such a rule stops at the boundaries of the United States. If that were the case, then a U.S. agent on board a vessel or an aircraft, could, the moment the vessel or aircraft is outside the territorial waters or airspace, do what is otherwise prohibited by the Constitution. As stated by Prof. Leila Sadat:

> Sometimes countries, not just the United States, arrest an individual present within their territories and transport him abroad for the purpose of interrogation. In the U.S. case, were the individual a U.S. citizen, such an arrest and transfer would be presumptively illegal, although there is some evidence that it has occurred. Whatever confusion may exist in the jurisprudence of the U.S. Supreme Court as to the extraterritorial application of U.S. Constitutional law, one hopes that we are not yet at the point at which it can seriously be argued that a U.S. citizen present in the United State would not receive the protections of the Fourth and Fifth Amendments of the Constitution to be "secure in their persons" and receive "due process of law" if deprived of his or her liberty through government action. [citations omitted] Even to the extent the government has asserted the power to detain U.S. citizens without charges as part of the [Global War on Terrorism], detention is not tantamount to exile, and the extralegal rendition of a U.S. citizen to a foreign government for interrogation is a power that even the government has not asserted. [citation omitted]."[96]

In the *Verdugo* case the Supreme Court, confirming a Ninth Circuit decision, held that constitutional limitations are applicable only to U.S. citizens, thus excluding U.S. citizens abroad and noncitizens abroad when the unlawful action is performed by U.S. agents, and thus excluding constitutional limitations on U.S. agents acting outside the United States. The constitutional policy upholding the Rule of Law can therefore be suspended by merely crossing U.S. state boundaries, as discussed below in Section 6.[97]

5. Extraterritorial Application of the U.S. Constitution in U.S. Jurisprudence

The abduction and unlawful seizure of persons abroad raises constitutional issues. The basic question in this regard is whether the Constitution has extraterritorial effect. The Supreme Court considered in *Reid v. Covert*[98] which specific provisions of the Constitution apply extraterritorially, and to whom.[99] So far, the Supreme Court has not extended, in the same manner as it did in *Reid*, the guarantees of the Fourth, Fifth, Sixth, and Eighth Amendments extraterritorially. The question is still recurring, however. The Fifth Circuit, in *Escobedo v. United States*,[100] rejected an argument raised by this writer that evidence secured by torture in Mexico

96 Sadat, *supra* note 85; Weissbrodt & Bergquist, *supra* note 85.

97 Bassiouni, *The Institutionalization of Torture under the Bush Administration*, *supra* note 85; Bassiouni, The Institutionalization of Torture under the Bush Administration, *supra* note 11.

98 Reid v. Covert, 354 U.S. 1 (1957).

99 *See* Stephen A. Saltzburg, *The Reach of the Bill of Rights beyond the Terra Firma of the United States*, 20 Va. J. Int'l L. 741 (1980); Paul B. Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 Va. J. Int'l L. 777 (1980). *See also* Johnson v. Eisentrager, 339 U.S. 763 (1950); Bruce Bryan, *Note, The Constitutional Rights of Nonresident Aliens Prosecuted in the United States*, 3 Fordham Int'l L.J. 221 (1980) (discussing the contacts an alien must have with the United States to entitle him to benefit from U.S. constitutional rights).

100 Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980).

should be barred in the United States, but this was before the United States ratified the CAT in 1984.[101]

The Second Circuit, in *Rosado v. Civiletti*,[102] which preceded the U.S. ratification of the CAT, acknowledged that the petitioners, U.S. citizens arrested and convicted in Mexico, "have demonstrated that their convictions, under the laws of the sovereign state of Mexico, manifested a shocking insensitivity to their dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency."[103] Nevertheless, the Second Circuit, for policy reasons, did not follow its factual finding to its logical conclusion, and refused to issue a writ of habeas corpus freeing the petitioners who had elected to be transferred from Mexico to serve their Mexican sentences in the United States under the United States–Mexico Treaty on the Execution of Penal Sentences. In *Rosado* the Second Circuit stated:

> Indeed, because the statutory procedures governing transfers of these prisoners to United States custody are carefully structured to ensure that each of them voluntarily and intelligently agreed to forego his right to challenge the validity of his Mexican conviction, and because we must not ignore the interests of those citizens still imprisoned abroad, we hold that the present petitioners are estopped from receiving the relief they now seek.[104]

The *Escobedo* and *Rosado* cases evidence two different policies. The first reflects the rule of non-inquiry,[105] which though respectful of a foreign sovereign, is not entirely without inquiry.[106] The second reflects a purposeful "no-see" policy in order not to undo the workings of transfer-of-prisoner treaties. But as stated above, both cases were prior to the CAT. Whether U.S. courts will rely on that convention and U.S. implementing legislation,[107] or erode these positions, is as yet unknown. Issues pertaining to the Fourth Amendment are different, and cases have held that its reach extends extraterritorially with respect to the conduct of a U.S. agent against a U.S. citizen.[108] It does not apply to the conduct of a private citizen of the United States or a foreign agent against a citizen of the United States.[109] In addition, the

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101 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], art. 3.

102 Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Jordan Paust, *The Unconstitutional Detention of Prisoners by the United States, Under the Exchange of Prisoners Treaties*, *in* International Aspects of Criminal Law 204 (Richard B. Lillich ed., 1981); Abraham Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 61 Wis. L. Rev. 25 (1980); M. Cherif Bassiouni, *Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada*, 11 Vand. J. Transnat'l L. 249 (1978); 2 International Criminal Law (M. Cherif Bassiouni ed., 3d ed. 2007).

103 *Id.*

104 *Id.*

105 *See* Ch. VII, Sec. 8.

106 *See* Ch. VII. Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960) (which opened the door for a possible humanitarian exception, but that was never pursued by the Second Circuit or any other Circuit).

107 Torture Victims Protection Act 28 U.S.C. § 1350 (2000); 18 U.S.C. § 2340 (2000).

108 The Constitution applies to all actions taken abroad by the U.S. government against its citizens. Reid v. Covert, 354 U.S. 1, 5 (1957). In *Reid*, the Court stated, "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Id.* at 6.

109 Stonehill v. United States, 405 F.2d 738, 743 (9th Cir.), *cert. denied*, 395 U.S. 960 (1969) (holding Fourth Amendment does not apply to conduct by foreign officials). The Fourth Amendment is only directed at the U.S. government, not foreign governments. The exclusion from U.S. courts of evidence obtained by foreign officials through searches that violate the Fourth Amendment would not deter

Fourth Amendment does not extend extraterritorially to the conduct of a U.S. agent against a non-U.S. citizen unless the acts are egregious enough to fall within the exception set out in *United States v. Toscanino*.[110] If an abduction abroad results in the seizure of evidence, the Fourth Amendment applies to conduct against a U.S. citizen by a U.S. agent or to that of a foreign agent acting under the direction of a U.S. agent.[111] Thus, evidence collected in this manner would be inadmissible in U.S. courts.[112]

The Fourth Amendment, unless there is specific legislation,[113] does not apply to conduct by a U.S. agent against an alien, or by a foreign agent against a U.S. citizen, if the conduct does not fall

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such conduct by those officials. Brulay v. United States, 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967). *See generally* Jordan Paust, *Constitutional Limitations on Extraterritorial Federal Power: Persons, Property, Due Process and the Seizure of Evidence Abroad*, *in* International Criminal Law: A Guide to U.S. Practice and Procedure 449 (M. Cherif Bassiouni & Ved P. Nanda eds,, 1987); Saltzburg, *supra* note 99.

110 United States v. Toscanino, 500 F.2d 267. In *Toscanino*, the defendant, an Italian citizen, was convicted of conspiracy to import and distribute narcotics. He appealed, alleging that he had been forcibly abducted from Uruguay, where he resided, by foreign officials who were paid by the U.S. government. In addition, he alleged that after his capture, he had been taken to Brazil, where he was tortured by Brazilian authorities under the direction of U.S. agents, and that he was eventually drugged and put on a commercial flight to the United States. He was arrested on the aircraft when it landed. The district court relied on the *Ker-Frisbie* rule, refusing to conduct any inquiry into the means by which he had been brought to the United States, to convict him. The Second Circuit held that Toscanino was at least entitled to a hearing on his claims, stating "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275.

111 In *United States v. Verdugo-Urquidez*, No. 86-0107-JLI-Crim. Amended Memorandum and Order of Feb. 18, 1987, the court stated:

> In the context of a warrantless search, conducted by United States military personnel, of a United States citizen's apartment in post-war occupied Austria, the First Circuit discussed a relevant hypothetical: For present purposes we assume, and we think it is probably so, that the protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces. [citations omitted] . . . . For example, suppose A, a citizen of the United States, goes to Germany to take employment in a civilian capacity under the High Commissioner. He is suspected of having previously transported stolen goods in interstate commerce, in violation of 18 U.S.C. Section 2314. Agents of the F.B.I. without any search warrant, break into A's dwelling in Germany, ransack the place, find and seize the alleged stolen goods. Upon a subsequent prosecution of A in the United States for that offense, it can hardly be doubted that the evidence so obtained would be excluded as the product of a search and seizure forbidden by the Fourth Amendment. And this would be so, even though no judicial officer had been authorized to act on an application for a warrant. Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made.

See United States v. Verdugo-Urquidez, 939 F.2d 1341, 1360 (9th Cir. 1991). United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). *See also* Best v. United States, 184 F.2d 131, 138 (1st Cir.), *cert. denied*, 340 U.S. 939 (1951). In *Best*, the court ultimately held that the Fourth Amendment permitted the warrantless search, given the drastic circumstances of the immediate postwar military occupation of Austria. *Id.* at 138–141. The initial example discussed by the *Best* court, however, remains relevant to foreign searches conducted in the absence of a state of war, and has been cited with approval by the Second Circuit. United States v. Toscanino, 500 F.2d 267 at 280.

112 *Toscanino*, 500 F.2d at 276.

113 *E.g.*, the Uniform Code of Military Justice, Title 10 U.S.C.

within the *Toscanino* exception.[114] The U.S. Supreme Court made this clear in 1990 in the case of *United States v. Verdugo-Urquidez*.[115] In that matter, the Court held that the Fourth Amendment does not apply to U.S. agents' search and seizure of property owned by an alien and located in a foreign country.[116] Chief Justice William Rehnquist, writing for the Court, stated that the purpose of the Fourth Amendment was to "protect the people of the United States against arbitrary action by their own Government, and not to restrain the Federal Government's actions against aliens outside United States territory. Nor is there any indication that the Amendment was understood by the Framers' contemporaries to apply to United States activities directed against aliens in foreign territory or in international waters."[117] Rehnquist continued that the effect of the Court's extension of protections to noncitizens outside the United States as sought by *Verdugo-Urquidez*, "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[118] All told, the Fourth Amendment's protections of noncitizens only applies to those who "come within the territory of the United States and develop[] significant connections."[119] The issue in *Verdugo-Urquidez* arose out of Mexican Federal Judicial Police and DEA agents' search of Verdugo-Urquidez's homes in Mexico and seizure of certain documents found there.

At the district court, Verdugo-Urquidez moved to suppress evidence seized during the searches of his Mexican homes. The court granted his motion, holding that the Fourth Amendment applied and that the DEA failed to justify the warrantless searches.[120] The Ninth Circuit Court of Appeals affirmed.[121] The appellate court concluded that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad."[122] The dissent, however, argued that the Fourth Amendment does not apply extraterritorially to aliens as it is expressly limited to "the people" of the United States.[123]

The Supreme Court found the reasoning of the dissent persuasive and noted that while the protections of the Fifth and Sixth Amendments extend to "person," some amendments specifically apply

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114 *Id.* at 275. Permitting the use of evidence illegally seized abroad by a foreign agent or a private citizen to obtain a conviction in the United States is similar to the "silver platter" doctrine that developed in the wake of the Supreme Court's decision in *Wolf v. Colorado*, in which the Court held that the exclusionary rule did not apply to the states under the Fourteenth Amendment. As a result, evidence illegally obtained by federal agents, which would be excluded in a federal prosecution, could be passed to state officials "on a silver platter" for use in a state prosecution. 338 U.S. 25 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

115 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). *See also* United States v. Vilches-Navarette, 523 F. 3d 1, at *13 (1st Cir. 2008), *cert denied* (noting that Vilches is a Chilean citizen who is a nonresident of the United States, was apprehended in international waters, and had no substantial connections to the United States, and that accordingly the Fourth Amendment does not apply).

116 *Verdugo-Urquidez*, 494 U.S.at 261. *See* also Abramovsky, *supra* note 9; Gibney, *supra* note 9; Emmanuel Kijo Bentil, *Note, United States v. Verdugo-Urquidez: The U.S. Supreme Court's Effort to Halt the Trade in Illegal Drugs*, 15 N.C. J. Int'l L. & Com. Reg. 511 (1990).

117 *Verdugo-Urquidez*, 494 U.S. at 266–267.

118 *Id.* at 273–274.

119 *Id.* at 271.

120 *Id.* at 259.

121 *Id.* The Ninth Circuit also discussed the need of a foreign state to protest claims of kidnapping of its nationals. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1360 (9th Cir. 1991).

122 *Verdugo-Urquidez*, 494 U.S.at 259 (citations omitted).

123 *Id.* at 264.

to "the people" of the United States.[124] The Court, while recognizing the limits of this argument, nonetheless said that:

> *[w]hile this textual exegis is by no means conclusive*, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, *refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community*.[125]

The Court also noted that there is "no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."[126] Because Verdugo-Urquidez was not of "a class of persons who are part of a national community," but rather "a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico . . . the Fourth Amendment has no application."[127] After *Verdugo-Urquidez*, there is no question as to the inapplicability of the Fourth Amendment protections to aliens abroad.

In these cases, however, the Fifth Amendment guarantee of due process does apply.[128] Due process under the Fourteenth Amendment has been held to require the exclusion of evidence obtained by the government in a manner that "shocks the conscience."[129] In addition, a U.S. court, under its inherent supervisory powers, could exclude evidence as violative of public policy because of the manner in which it was obtained.[130] Such general due process violations are reflected in the egregious conduct standard set out in *Toscanino*.[131]

In the event an indictment has been returned in the United States against an individual, whether a U.S. citizen or not, a given court in the United States would have jurisdiction. In such cases, the Fourth Amendment applies, as do the Federal Rules of Criminal Procedure. Consequently, if a U.S. agent goes abroad to unlawfully seize, or procure the seizure of, a person or evidence, such conduct would violate Rule 41 of the Federal Rules of Criminal Procedure. In such a case, the court should exercise its inherent powers of supervision to suppress evidence illegally obtained.[132]

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124 *Id.* at 265.

125 *Id.* (emphasis added).

126 *Id.* at 267.

127 *Id.* at 274–275.

128 *Id*

129 *Id.*

130 The supervisory power of the courts to exclude evidence in order to maintain civilized standards in the administration of criminal justice was set out in *Weeks v. United States*, 232 U.S. 383 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643.

131 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) For a Second Circuit opinion not finding the kinds of violations in *Toscanino*, *see United States v. Romano*, 706 F.2d 370, 373–375 (2d Cir. 1983).

132 The inherent power theory was used in *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976). The plaintiffs were a group of U.S. citizens living in West Germany, who claimed in their suit that U.S. military personnel had conducted warrantless electronic surveillance of their political meetings and other activities. The defendants argued that the clause was inapplicable overseas because there was no U.S. magistrate authorized to issue an overseas warrant. The court acknowledged that Rule 41(a) of the Federal Rules of Criminal Procedure restricts the power of a magistrate to warrants that authorize the seizure of persons or property within his district, but stated:

> Rule 41(a) cannot limit or restrict the dictates of the Constitution to the United States . . . particularly when the Supreme Court has held those dictates applicable overseas.

Reid v. Covert, 354 U.S. 1 (1957). The court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas. Berlin Democratic

Nevertheless, the suppression of evidence would not invalidate the criminal jurisdiction of the court over the defendant brought before it, though illegally, under the *Ker-Frisbie* rule as affirmed by *Alvarez-Machain*.[133] It is amazing that U.S. courts, which in the 1960s emphasized repeatedly the importance of adhering to the Rule of Law as part of constitutional doctrine and textual doctrine, have so easily jettisoned that foundational American legal value-oriented approach. This has been interpreted as having been caused by the influence of political considerations on judges, a public attitudinal shift away from the previously recognized value-oriented approach to the Rule of Law in the American legal system, a more insular American approach to the international Rule of Law, and American exceptionalism in international matters.

6. Abduction and Other Forms of Unlawful Seizure in the Jurisprudence of the United States[134]

As stated above, the jurisprudence of the United States has traditionally upheld the validity of *in personam* jurisdiction even when secured through extralegal methods, including abduction by government agents. The two landmark U.S. Supreme Court cases that U.S. courts rely on are *Ker v. Illinois*,[135] decided in 1886, and *Frisbie v. Collins*,[136] decided in 1952. These cases established the doctrine that criminal jurisdiction is not impaired by the illegality of the method by which the court acquires *in personam* jurisdiction over the relator. These two landmark cases were confirmed by the Supreme Court in *Alvarez-Machain*.[137] There have been a number of circuit court cases addressing the issues raised by these three cases, as well as related

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Club v. Rumsfeld, 410 F. Supp. at 160. *See also* United States v. Williams, 617 F.2d 1063, 1099 (5th Cir. 1980) (en banc) (concurring opinion).

133 *See supra* Sec. 4 (discussing the *Ker-Frisbie* doctrine). At first glance, the *Ker-Frisbie* rule appears similar to the rule of non-inquiry (*see* Ch. VII, Sec. 8). Under the rule of non-inquiry, a U.S. court may not inquire into (1) the manner in which a requesting state secures evidence sufficient to establish "probable cause" in order to make an extradition request of the United States; (2) the processes by which a foreign criminal conviction is obtained; or (3) the treatment to which the relator may be subject upon extradition to the requesting state. Both doctrines limit the extraterritorial application of the Constitution. However, the rule of non-inquiry is distinguishable on one essential basis: it does not subject an individual to criminal conviction by a U.S. court. Thus, even if unconstitutional acts have occurred prior to a foreign state's extradition request, or even if such acts may occur after the relator has been extradited, the criminal justice processes and standards of the United States have not been perverted by these acts. Failure to exclude evidence seized abroad in violation of the Fourth Amendment, and failure to release a defendant who has been forcibly abducted, allows complete disregard for the basic standards of fairness and decency that underlie the U.S. Constitution. The *Ker-Frisbie* rule has been used in Congress as a justification for the abduction abroad by the United States of suspected terrorists. In introducing the Terrorist Prosecution Act of 1985, S. 1429, Senator Arlen Specter, its sponsor, stated:

> In many cases, the terrorist murderer will be extradited or seized with the cooperation of the government in whose jurisdiction he or she is found. Yet, if the terrorist is hiding in a country like Lebanon, where the government, such as it is, is powerless to aid in his removal, or in Libya [sic], where the Government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial. We have the ability to do that right now, under existing law. Under current constitutional doctrine, both U.S. citizens and foreign nationals can be seized and brought to trial in the United States without violating due process of law.

S. 1429, 99th Cong., 1st Sess., 131 Cong. Rec. S9431 (daily ed. July 11, 1985). For the text of the Terrorist Prosecution Act, see *id.*

134 *See supra* Sec. 4 for non-U.S. cases.

135 Ker v. Illinois, 119 U.S. 436 (1886).

136 Frisbie v. Collins, 342 U.S. 519 (1952).

137 United States v. Alvarez-Machain, 504 U.S. 655 (1992).

issues. The practices of "extraordinary rendition" may be the catalyst for a re-examination of the jurisprudence whose description follows.

In *Ker*, the defendant, while residing in Peru, was indicted by an Illinois grand jury for larceny and embezzlement. At the request of the governor of Illinois, the president, invoking the current treaty of extradition between the United States and Peru, issued a warrant authorizing a Pinkerton agent to take custody of Ker from Peruvian authorities.[138] The agent, however, never served the warrant, probably because by the time he had arrived there the armed forces of Chile, then at war with Peru, were in control of Lima. Instead of using the extradition process, the agent forcibly abducted Ker, placed him aboard an American vessel, and took him to the United States. Ker was subsequently tried and convicted in Illinois. The Supreme Court rejected Ker's argument that he was entitled, by virtue of the treaty with Peru, to a right of asylum there, and held that the abduction of Ker did not violate the Due Process Clause of the Fourteenth Amendment, then less than twenty years old, which the Court construed as requiring merely that the accused be regularly indicted and brought to trial "according to the forms and modes prescribed for such trials."[139] The Court accordingly held that Illinois validly tried Ker, regardless of the method by which it acquired control over him.

In *Frisbie* a Michigan state prisoner, petitioning for habeas corpus, alleged that he had been brought from Illinois to Michigan for trial only after he had been kidnapped, handcuffed, and blackjacked in Chicago by Michigan police officers who had gone there to retrieve him.[140] The prisoner claimed that his conviction in Michigan violated the Due Process Clause of the Fourteenth Amendment, as well as the Federal Kidnapping Act, 18 U.S.C. § 1201, and was, therefore, a nullity.[141] Relying upon *Ker*, the Court rejected the prisoner's due process claim. Thus, under the so-called *Ker-Frisbie* doctrine, due process is limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the relator.

Since *Ker* and *Frisbie*, the first major decision on unlawful seizure was rendered by the Second Circuit in *United States v. Toscanino*.[142] In this 1974 decision, the court held that the *Ker-Frisbie* doctrine is subject to the overriding principle that, where agents of the United States are directly involved in the seizure of a person outside the jurisdiction of the United States by means involving a serious violation of due process standards, no advantage may be taken by such a denial of the individual's constitutional rights. The court in *Toscanino* held that a federal court must "divest itself of jurisdiction over the person of a defendant where it had been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[143]

In the *Toscanino* case the defendant, Francisco Toscanino, and four others were charged with conspiracy to import narcotics into the United States. In his appeal from the narcotics conviction entered against him in the Eastern District of New York, Toscanino contended that the court acquired jurisdiction over him unlawfully through the conduct of U.S. agents, who

138 Pinkerton is a private security company, which at one time had a monopoly in the United States on ferrying currency and gold from various locations.

139 *Ker*, 119 U.S. at 440.

140 *Frisbie*, 342 U.S. 519.

141 *Id.*

142 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). *See* Note, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law*, 47 U. Colo. L. Rev. 489 (1976); Fred C. Pedersen, *Note, International Criminal Law: Due Process Rights of Foreign National Defendants Abducted from Native Country by Federal Agents*, 7 U. Tol. L. Rev. 723 (1976).

143 *Toscanino*, 500 F.2d at 275.

kidnapped him in Uruguay, used electronic surveillance, tortured him, and abducted him to the United States for purposes of prosecuting him.[144]

Toscanino claimed that he was lured from his home in Montevideo, Uruguay, by a phone call made by a member of the Montevideo police, acting as a paid agent of the U.S. government, to a deserted bowling alley. There he was abducted by seven members of the Montevideo police force. He was knocked unconscious, bound, blindfolded, thrown into a car, and driven to the Brazilian border by a circuitous route. With the connivance of the U.S. government, a group of Brazilians met the car and took custody of Toscanino. Toscanino further claimed the he was incessantly tortured and interrogated for seventeen days. Throughout this entire period the U.S. government and the U.S. Attorney for the Eastern District of New York prosecuting the case were aware of Toscanino's interrogation and did, in fact, receive reports of its progress. The defendant was held incommunicado and his requests to consult with his family were denied. Finally, Toscanino was brought to Rio de Janeiro, where he was drugged by Brazilian and U.S. agents and placed on a flight to the United States in the custody of U.S. agents.[145]

In *Toscanino*, the court said in dicta that the *Ker-Frisbie* doctrine cannot be reconciled with subsequent Supreme Court decisions expanding the concept of due process protecting the accused against pretrial illegality, which denies the government the fruits of its exploitation of any deliberate and unlawful activities on its part.[146]

After *Toscanino*, in 1975 the Second Circuit in *United States ex rel. Lujan v. Gengler*[147] limited *Toscanino* by reaffirming the *Ker-Frisbie* doctrine. The court held that for a federal court to divest itself of jurisdiction, the U.S. agent's conduct (outside the United States and which results in the person's presence in the United States) must be "conduct of the most outrageous and reprehensible kind," which results in the denial of due process.[148] The court, however, found that the government's conduct in *Lujan* did not reach the level proscribed by *Toscanino*.

In *Lujan*, the defendant and eight others were indicted by a grand jury of the Eastern District of New York and charged with conspiracy to import and distribute a large quantity of heroin in the United States. An arrest warrant had been issued for the defendant. However, Lujan alleged that the arrest warrant had been enforced in an unconventional manner. Lujan, a licensed pilot, was hired in Argentina by an individual named Duran to fly him to Bolivia. Although Duran represented that he had business to transact there with American interests in Bolivian mines, he in fact had been hired by American agents to lure Lujan to Bolivia. When Lujan landed in Bolivia on October 26, 1973, he was promptly taken into custody by Bolivian police, who were not acting at the direction of their superiors or their government, but as paid agents of the United States. Lujan was not permitted to communicate with the Argentine embassy, an attorney, or any member of his family.

On the following day the Bolivian police, commanded by police major Guido Lopez, took Lujan from Santa Cruz to La Paz, where he was held until November 1, 1973. On that date, Lieutenant Terrazas and other Bolivian police officers, acting together with U.S. agents, brought Lujan to the airport and placed him on a plane bound for New York. Upon his arrival

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144 *Id.* at 268.

145 *Id.* at 270.

146 *Id.* at 275. It is essential to note that most of the cases discussed here deal with mistreatment and forcible abductions perpetrated by or with the acquiescence of representatives of the U.S. government and not by private individuals. In *Toscanino*, for instance, the court stated that upon remand the defendant would be required to establish "that the action was taken by or at the direction of United States officials." *Id.* at 281. *See also* Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition*, 57 Or. L. Rev. 51 (1977).

147 United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975).

148 *Id.* at 65.

at Kennedy Airport in New York, Lujan was formally arrested by U.S. federal agents. At no time prior to arriving in the United States had Lujan been formally charged by the Bolivian police, nor had the United States requested his extradition.[149]

The court in *Lujan* recognized that *Ker* and *Frisbie* no longer provided carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality, and similar outrageous conduct, but it also suggested that not *every* irregularity in the circumstances of the defendant's arrival in the jurisdiction would vitiate the subsequent legal proceedings. The court found that the arrest in *Lujan* may have been unconventional, but not of the kind that would afford sufficient grounds for challenging the jurisdiction of the court.[150] The conduct proscribed by *Toscanino* and *Lujan* is the "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights" at the hands of U.S. agents.

Essentially, *Toscanino* stands for the proposition that although the U.S. Constitution does not protect U.S. citizens from the abuses of process by a foreign government or its agents, it nonetheless may have an extraterritorial effect in that it constitutes a limitation on certain actions of U.S. agents acting abroad under color of legal authority.[151] This means that if a U.S. agent participates in the abduction or use of force against an individual outside the territory of the United States in serious violation of certain aspects of the Fourth, Fifth, Sixth, and Fourteenth Amendments, the protections of due process apply to such violations. Under such an application of due process, the court seeks to uphold the integrity of the judicial system by refusing to take legal cognizance of certain acts committed outside the United States, if those acts are done by U.S. agents in violation of U.S. constitutional protections, which acts are then sought to be given legal effect and cognizance in a U.S. court. However, the court did not extend this rule to cases where U.S. agents are not directly involved in the commission of such violations, even if they were present during their occurrence.

In 1975, in *United States v. Lira*,[152] the Second Circuit held that in the absence of any direct evidence of gross misconduct on the part of U.S. agents, the court's jurisdiction was not impaired by the forcible abduction of a defendant-relator, even following torture by agents of a foreign state. The defendant, Lira, convicted on a narcotics charge in the U.S. District Court for the Southern District of New York, claimed that, after being arrested at the home of his common law wife in Santiago by Chilean police officials, he was blindfolded, beaten, and tortured over a period lasting nearly four weeks by Chilean officials allegedly acting for U.S. agents. Finally, the defendant was placed aboard a plane headed for New York and was arrested on arrival.

In the discussion of the facts, the court stated that the U.S. government's conduct did not reach the level proscribed by *Toscanino*.[153] In the *Lira* case, the court did not discuss the policy question of deterrence against unlawful behavior by U.S. public officials abroad, nor did it reaffirm its earlier position of the need to protect the integrity of the judicial process from conduct that constitutes a serious violation of minimum standards of due process.

Toscanino has also been distinguished by the District of Columbia, as well as the First, Second, Fourth, Sixth, Eighth, and Ninth Circuits, and was rejected by the Fifth, Seventh, and Eleventh Circuits.[154]

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149 *Id.* at 63.

150 *Id.* at 65.

151 *See infra* Sec. 5 (discussing extraterritorial application of the U.S. Constitution).

152 United States v. Lira, 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).

153 *Id.* at 70.

154 United States v. Mitchell, 957 F.2d 465 (7th Cir. 1992); United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992); United States v. Matta, 937 F.2d 567 (11th Cir. 1991); United States v. Pelaez, 930 F.2d 520 (6th Cir. 1991); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Porter, 909 F.2d 789 (4th Cir. 1990); Matta-Ballesteros v. Henman, 896 F.2d 255; United States v. Rosenthal, 793

The United States' position thus remains linked to the *Ker-Frisbie* doctrine, which has been followed rather consistently,[155] albeit with some erosion.

F.2d 1214 (11th Cir.), *cert. denied*, 480 U.S. 919 (1987); United States v. Wilson, 732 F.2d 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1099 (1984); United States v. Darby, 744 F.2d 1508 (11th Cir), *reh'g denied, en banc*, 794 F.2d 733 (11th Cir.), *cert. denied*, 471 U.S. 1100 (1985); United States v. Wilson, 721 F.2d 967 (4th Cir. 1983); David v. Attorney General of the United States, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); Davis v. Muellar, 643 F.2d 521 (8th Cir.), *cert. denied*, 454 U.S. 892 (1981); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Fielding, 645 F.2d 719 (9th Cir. 1981); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir.), *cert. denied*, 451 U.S. 941 (1981); United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980); United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976); United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Marzano, 537 F.2d 257 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1977); United States v. Quesada, 512 F.2d 1043 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); United States v. Winter, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

155 Adhering to the *Ker-Frisbie* rule, federal courts have generally assumed jurisdiction over an abducted defendant. *See* United States v. Cadena, 585 F.2d 1252 (5th Cir.), *overruled in part by* United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983); Mastrian v. McManus, 554 F.2d 813 (8th Cir.), *cert. denied*, 433 U.S. 913 (1977); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States v. Quesada, 512 F.2d 1043 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); United States v. Winter, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Cotten, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); United States v. Vicars, 467 F.2d 452 (5th Cir.), *cert. denied*, 410 U.S. 967 (1973); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); United States v. Sherwood, 435 F.2d 867 (10th Cir.), *cert. denied*, 402 U.S. 909 (1971); United States v. Zammiello, 432 F.2d 72 (9th Cir. 1970); Charron v. United States, 412 F.2d 657 (9th Cir. 1969); United States v. Sobell, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1957), *reh'g denied*, 355 U.S. 920 (1958); Wentz v. United States, 244 F.2d 172 (9th Cir.), *cert. denied*, 355 U.S. 806 (1957); Chandler v. United States, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918 (1949); Robinson v. United States, 144 F.2d 392 (6th Cir.), *aff'd*, 324 U.S. 282 (1945), *reh'g denied*, 325 U.S. 895 (1945), *reh'g denied*, 326 U.S. 807 (1945), *reh'g denied*, 328 U.S. 878 (1946), *reh'g denied*, 356 U.S. 978 (1958); United States *ex rel.* Voight v. Toombs, 67 F.2d 744 (5th Cir.), *cert. dismissed*, 291 U.S. 686 (1934); *Ex parte* Lamar, 274 F. 160 (2d Cir.), *aff'd*, 260 U.S. 711 (1923); *In re* David, 390 F. Supp. 521 (E.D. Ill. 1975); United States v. Marzano, 388 F. Supp. 906 (N.D. Ill.), *aff'd*, 537 F.2d 257 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1977); Snedeker v. United States, 54 F. Supp. 539 (M.D. Pa. 1944). *See generally* Herbert B. Chermside, Jr., *Annotation, Jurisdiction of Federal Court to Try Criminal Defendant Who Alleges That He Was Brought within United States Jurisdiction Illegally or aAs a Result of Fraud or Mistake*, 28 A.L.R. 685 (1976). State courts have almost unanimously followed the *Ker-Frisbie* rule. *See* Glasgow v. State, 469 P.2d 682 (Alaska 1970); People v. Leary, 40 Cal. App. 3d 527, 115 Cal. Rptr. 85 (1974); *In re* Walters, 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975); People v. Bradford, 70 Cal. 2d 333, 450 P.2d 46, 74 Cal. Rptr. 726 (1969), *cert. denied*, 399 U.S. 911 (1970); Brown v. District Court, 571 P.2d 1091 (Colo. 1977); DeBaca v. Trujillo, 167 Colo. 311, 447 P.2d 533 (1968); State v. Segovia, 93 Idaho 594, 468 P.2d 660 (1970); Herman v. Brewer, 193 N.W.2d 540 (Iowa 1972); State v. Smith, 209 Kan. 664, 498 P.2d 78 (1972); Bruffett v. State, 205 Kan. 863, 472 P.2d 206, *cert. denied*, 400 U.S. 1010 (1971); State v. Millican, 84 N.M. 256, 501 P.2d 1076 (N.M. Ct. App. 1972); People v. Walls, 35 N.Y.2d 419, 321 N.E.2d 875, 363 N.Y.S.2d 82, *cert. denied*, 421 U.S. 951 (1975); State v. Fox, 250 Ore. 83, 439 P.2d 1009 (1968); Commonwealth v. Bishop, 425 Pa. 175, 228 A.2d 661, *cert. denied*, 389 U.S. 875 (1967); Berry v. State, 4 Tenn. Crim. App. 592, 474 S.W.2d 668 (Tenn. Crim. App. 1971); *Ex parte* Burge, 409 S.W.2d 403 (Tex. Crim. App. 1966); State v. Blanchey, 75 Wash. 2d 926, 454 P.2d 841, *cert. denied*, 396 U.S. 1045 (1970); Brooks v. Boles, 151 W. Va. 576, 153 S.E.2d 526 (1967). *See generally* Annotation, 165 A.L.R. 947 (1946).

United States v. Cordero[156] involved the seizure of a number of defendants in Panama at the behest of U.S. agents. The defendants were subsequently sent to Venezuela and then to the United States for prosecution. The First Circuit decided the issue of unlawful seizure in that case as follows:

> Appellants' preliminary claim is that the circumstances surrounding their arrest and transport to Puerto Rico deprived the federal district court of jurisdiction to try them. Appellants primarily rely upon what is known as the *Toscanino* exception to the *Ker-Frisbie* doctrine.
>
> As we pointed out when Sorren's case was previously before us, *United States v. Sorren*, 605 F.2d 1211, 1215-16 n.5 (1st Cir. 1979), ("*Sorren I*," seeking mandamus), "under the so-called *Ker-Frisbie* doctrine, the forcible abduction of a criminal defendant into the court's jurisdiction does not impair the court's power to try him." *See Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952). The vitality of this doctrine, which is widely applied throughout the world, has recently been reaffirmed by the Supreme Court. United States v. Crews, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251-52, 63 L.Ed.2d 537 (1980); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975).
>
> The *Toscanino* exception to the *Ker-Frisbie* doctrine requires a court, in the name of due process, to divest itself of jurisdiction of the person of a criminal defendant "where it has been acquired as the result of the [U.S.] government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." United States v. Toscanino, 500 F.2d 267 (2d. Cir. 1974). This exception, however, has been narrowly interpreted to cover only egregious cases. Thus, in *Toscanino* itself, "the 'unreasonable' invasion of . . . rights included beatings, denial of sleep for prolonged periods, fluids injected in his eyes and nose, and electric shocks administered to his ears, toes, and genitals." *Sorren I*, 605 F.2d at 1215–16 n.5. And, where less outrageous treatment was at issue, the courts have tended to apply *Ker-Frisbie*, not the exception. *See, e.g., United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976) (abduction at "instigation" of United States but without direct United States involvement in torture insufficient to divest court of jurisdiction); *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976) (no *Toscanino* violation where defendant failed to show direct United States involvement in torture; forcible abduction without more insufficient); *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847, 96 S. Ct. 87, 46 L.Ed.2d 69 (1975) (no *Toscanino* violation without showing direct United Stated involvement); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S. Ct. 2400, 44 L.Ed.2d 668 (1975) (seizure of defendant not in violation of treaty or against wishes of foreign government and no showing of "shocking" conduct by United States agents made *Toscanino* inapplicable.) *Sorren I*, 605 F.2d at 1216. *See generally* Henkin, International Law 477–78 (2d ed. 1980).
>
> After *Sorren I* and after the subsequent trial, the district court held a hearing outside the presence of the jury to determine the relevant *Toscanino* facts. We have reviewed the record of that hearing with care. It fails to show shocking circumstances or the type of U.S. Government involvement in those circumstances which might together bring the *Toscanino* exception into play. The record indicates that United States Drug Enforcement Administration agent Jimenez identified Sorren to several Panamanian officials at Sorren's hotel on May 8, 1979. Cordero was arrested by Panamanian authorities the next day at the Panama City airport. Cordero states that she saw Jimenez once again after she was arrested. Both appellants saw an American consul who visited them. Aside from this, however, there is no evidence linking American agents to the appellants' treatment. Indeed, when Sorren's counsel asked co-defendant Warren Turner whether he had seen or heard American agents while he was under arrest, Turner replied that he did not.
>
> More importantly, the record does not show the outrageous conduct involved in *Toscanino*. At worst, it shows poor treatment by Panamanian authorities and poor conditions in Panamanian

156 *Cordero*, 668 F.2d 32.

> jails. When Panamanian officials arrested Sorren, they insulted him, pushed him and slapped him. In jail, Sorren was poorly fed, he had to sleep on the floor and had to "huddle up in a corner" to avoid the splashing of urine coming from prisoners in other cells. The Panamanian arresting officers insulted Cordero. They also fed her badly while she was in jail. She had to sleep on the floor or in a chair. These conditions may be poor, unfortunate, hardly decent, but they are a far cry from deliberate torture, and they are beyond the control of American law enforcement authorities and American courts. Were American courts to seek to improve conditions in foreign jails by refusing to try those who are temporarily held there, the result would not be better jails, but the creation of safe havens in foreign lands for those fleeing the reach of American justice. Hence, the *Toscanino* exception does not apply here.
>
> Appellants seek to bolster their "lack of jurisdiction" claim by arguing that their arrests in Panama and subsequent return to Puerto Rico via Venezuela violated extradition treaties between the United States and those countries. *See* Treaty between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, May 25, 1904, 34 Stat. 2851, T.S. No. 445; Extradition Treaty, January 19–21, 1922, United States of America–United States of Venezuela, 43 Stat. 1968, T.S. No. 675. The procedures used to return them to the United States were quite different from the extradition procedures referred to in these treaties. The short and conclusive answer to appellants' claim, however, is that nothing in these treaties suggests that the countries involved must follow the extradition procedures set out in the treaties when they return criminal defendants to the United States. Extradition treaties normally consist of commitments between governments to the effect that each will return those accused of certain crimes at request of the other. *See* H. Kelsen, Principles of International Law 373 (1952). Nothing in the treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so.
>
> Moreover, insofar as relevant here, extradition treaties are made for the benefit of the governments concerned. *See* I. Brownlie, Principles of Public International Law 307 (2d ed. 1973); Kirkemo, An Introduction to International Law 31–32 (1974). *But cf.* Garcia-Mora, International Law and Asylum as a Human Right 30-51, 133–36 (1956). And under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation. *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, at 67–68. The record here provides no basis for any inference that either Panama or Venezuela objected to the appellants' departure from their territories. To the contrary, it was Panamanian and Venezuelan authorities who deported them. *Cf.* 88 Harv. L. Rev. 813, 818–19 (1975)…To hold that extradition treaties *forbid* foreign nations to return criminal defendants except in accordance with the formal procedures they contain, would insofar as we are aware, represent a novel interpretation of those treaties. Under any such interpretation, extradition treaties would hinder, rather than help serve, the return of those accused of crimes within American jurisdiction. We therefore reject appellants' arguments.
>
> There is nothing in the circumstances present here that could make any such showing relevant to the result. *See United States v. Nixon*, 418 U.S. 683, 702, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974); *United States v. Lieberman*, 608 F.2d 889, 904 (1st Cir.), *cert. denied*, 444 U.S. 1019, 100 S.Ct. 673, 62 L.Ed.2d 649 (1980) (absent a showing of arbitrariness or lack of support on the record an appellate court should not disturb the trial court's determination as to the need for enforcing a subpoena *duces tecum*).[157]

This regrettable position of the court can only encourage disregard for extradition procedures, the resort to extrajudicial proceedings, and abuses by law enforcement officials.

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157 *Id.* at 36–38 (internal footnotes omitted). *See also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991), 288 U.S. App. D.C. 129 (D.C. Cir. 1991); United States v. Yunis, 867 F.2d 617, 276 U.S. App. D.C. 1 (D.C.Cir. 1989); United States v. Yunis, 705 F. Supp. 33 (D.D.C. 1989); United States v. Yunis, 859 F.2d 953, 273 U.S. App. D.C. 290 (D.C. Cir. 1988); United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988).

A notable case in which a foreign government vigorously protested unlawful seizure involved the kidnapping of Sidney Jaffe, a U.S. citizen, by two Florida bail-bondsmen for jumping bail in Florida. Canada then sought the extradition of Kear, one of the bondsmen, for the kidnapping of Jaffe. Kear filed a petition for a writ of habeas corpus to prevent his extradition to Canada. The petition for the writ of habeas corpus was denied and Kear was extradited to Canada.[158]

In 1982, the Seventh Circuit in *David v. Attorney General*[159] affirmed the traditional rule, and for all practical purposes distinguished the *Toscanino* case.[160] The court did not wish to apply the doctrine that it has supervisory power over the administration of criminal justice to deny the government the right to exploit its own illegal conduct, as expressed in *Mapp v. Ohio*[161] and *Wong Sun v. United States*.[162] This was recognized in *Toscanino*, even though the Seventh Circuit still considered it an open question in *United States v. Marzano*.[163] There is still some question in the United States as to the applicability of the exclusionary rule in extradition proceedings, although some decisions hold that it is inapplicable.[164]

On September 13, 1987, after luring Fawaz Yunis onto a yacht located in the eastern Mediterranean Sea with promises of a drug deal, FBI agents waited until the yacht sailed into international waters, and then handcuffed, shackled, and arrested Yunis on charges of conspiracy, hostage taking, aircraft damage, and air piracy.[165] Thereafter, Yunis was transferred onto a Navy vessel in which he was reported to have suffered severe sea sickness, and later developed swollen and bruised wrists from the use of handcuffs. Yunis, however, maintained the he was tortured by FBI agents who were on board the naval vessel. But neither the district court nor the court of appeals paid much attention to these facts. The court of appeals in *United States v. Yunis*, citing the *Ker-Frisbie* doctrine, upheld the legality of Yunis's abduction and stated: "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "[166] The court of appeals refused to apply the *Toscanino*[167] exception, stating that "[such] rule has, moreover, been limited to cases of torture, brutality, and similar outrageous conduct."[168] Even though the circumstances surrounding Yunis's arrest were not "a model for law enforcement behavior," the court of appeals refused to extend the *Toscanino* exception to the "discomfort and surprise" experienced by Yunis.[169]

It is important to note that this case differs from other abduction cases in that the seizure occurred on the high seas, and thus it did not violate any state's sovereignty. As the seizure was on the high seas, where no state can claim sovereignty, it can be argued that the seizure was not

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158 Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983). *See also State Territory and Territorial Jurisdiction*, 78 Am. J. Int'l L. 207 (1984) (discussing request by Attorney General and secretary of state for early parole of Sidney Jaffe, whose abduction from Canada had strained U.S.–Canada relations); Buser, *supra* note 9.

159 David v. Attorney General, 699 F.2d 411 (7th Cir. 1983). This case involved the torture and drugging of David, and his illegal detention abroad by U.S. agents.

160 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). *See* also Gary W. Schons, *United States v. Toscanino: An Assault on the Ker-Frisbie Rule*, 12 San Diego L. Rev. 865 (1975).

161 Mapp v. Ohio, 367 U.S. 643 (1961).

162 Wong Sun v. United States, 371 U.S. 471 (1963).

163 United States v. Marzano, 537 F.2d 257.

164 *See* Simmons v. Braun, 627 F.2d 635 (2d Cir. 1980).

165 United States v. Yunis, 924 F.2d 1086 (C.A.D.C. 199)

166 *Id.*

167 *Id.*

168 *Id.* at 1093 (quoting United States *ex. rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975); 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed 2d 668 (1975)).

169 *Yunis*, 924 F.2d at 1093.

in the nature of an abduction because the arrest was lawful. As to luring Yunis out on the high seas, it is hard to argue that the greedy expectation of a drug deal, even though false, can be deemed a sufficient breach to undermine the validity of the arrest. The only serious question that arises in this writer's mind is the allegation of torture of Yunis, or at least of his physical mistreatment. Those who were accused of such acts should have been investigated by the FBI's Office of Professional Standards.

In 1990, the Seventh Circuit declared that "*Toscanino*, at least as far as it creates an exclusionary rule, no longer retains vitality" and became the latest circuit to reject the *Toscanino* exception to the *Ker-Frisbie* doctrine.[170] In the case of *Matta-Ballesteros v. Henman*,[171] the petitioner Juan Ramon Matta-Ballesteros petitioned the Seventh Circuit Court of Appeals for habeas corpus relief. Matta-Ballesteros alleged that U.S. agents kidnapped him from his home in Honduras and tortured him before transporting him to the United States to face trial on criminal charges.[172] Matta-Ballesteros's treatment by and at the direction of the U.S. agents following his seizure was similar to that of Toscanino. Matta-Ballesteros alleged that when on April 5, 1988, he arrived at his home in Honduras, he was surrounded by armed members of the Honduran Special Troops or "Cobras," who were accompanied by at least four U.S. marshals. He was arrested and handcuffed, allegedly at the direction of the U.S. marshals. A black hood was placed over his head and he was pushed onto the floor of a car driven by the U.S. marshals.

> A United States Marshal immediately drove him to a United States Air Force base approximately an hour-and-a-half away. During the ride, Matta claims that he was severely beaten and burned with a "stun gun" at the direction of the United States Marshals. Once he arrived at the airport, Matta was flown to the United States. He claims that during this flight, he was once again beaten and shocked about the body, including on his testicles and feet, again by United States Marshals.
>
> Upon his arrival in the United States, Matta was immediately transferred to Marion Penitentiary. Approximately 24 hours had passed from the time of his apprehension. Matta was subsequently examined by a physician who found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back. According to the examining physician, these injuries were consistent with those which could have been caused by a stun gun.[173]

Matta-Ballesteros asserted that the treatment he received at the hands of the U.S. agents constituted a due process violation, and consequently moved for release due to lack of jurisdiction to prosecute him. The district court denied Matta-Ballesteros's petition without a hearing, on the basis that the alleged facts did not entitle him to relief.[174]

The Seventh Circuit affirmed.[175] The court said:

> The Seventh Circuit has never squarely faced the *Toscanino* exception to the *Ker-Frisbie* doctrine. In *United States v. Marzano*, this Court expressly refrained from deciding whether to follow *Toscanino* and we have not faced the issue since. Several other circuits, however, have considered *Toscanino*. While the Ninth Circuit has adopted this exception, the Fifth and the Eleventh Circuits have rejected it. In addition, no court, including the *Toscanino* court which remanded the case for factual findings, has ever found conduct that rises to the level necessary to require the United States to divest itself of jurisdiction. The decision to follow *Toscanino* is now squarely before this court.

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170 Matta-Ballesteros v. Henman, 896 F.2d 255 (1990).

171 *Id.*

172 *Id.* at 256.

173 *Id.* (citations omitted).

174 *Id.*

175 *Id.*

> We initially note that *Toscanino* is of ambiguous constitutional origins. On its face, *Toscanino* purports to rely on the due process clause (of either the fifth amendment or the fourteenth amendment). Yet the Second Circuit relied for support on *Mapp v. Ohio*, a fourth amendment exclusionary rule case.
>
> . . . While we do not condone government misconduct such as Matta alleges, we cannot create an exclusionary rule for the person of the defendant in light of our analysis and in the face of repeated re-affirmation by the Supreme Court that no such rule exists. The Court has rejected both the deterrence and the judicial integrity rationales for the exclusionary rule applied to this context. We therefore conclude that *Toscanino*, at least as far as it creates an exclusionary rule, no longer retains vitality and therefore decline to adopt it as the law of this circuit.[176]

It is noteworthy that the United States has ratified the CAT.[177] The ratification of this convention means that U.S. courts will have to alter their position and inquire into allegations of torture in extradition cases, with the ensuing effect of denying extradition in cases in which torture was used to secure evidence or a conviction, or when it is likely that the relator may be subjected to torture in the requesting state.[178] The abduction and unlawful seizure of persons abroad, whether citizens or aliens, may also be accompanied by the unlawful seizure of evidence. The availability of remedies under the U.S. Constitution is in question as is the applicability of constitutional rights to aliens.[179]

Another question arises as to whether abduction and unlawful seizure violates formal extradition treaties between the United States and the state in which the individual was seized. In the case of *United States v. Valot*,[180] the defendant argued that his removal from Thailand violated the extradition treaty between the United States and Thailand. In *Valot*, decided by the Ninth Circuit in August 1980, the defendant, Steven Valot, violated his parole in the District of Hawaii by traveling to Asia and Nevada, and a warrant was issued for his arrest. In 1977, he was arrested in Thailand on a marijuana charge and was incarcerated. On May 4, 1979, Thai immigration officials brought Valot to the Bangkok airport and forced him to remain there. Two officials of the U.S. DEA arrived, received Valot from the Thai officials, and over his protests, took him aboard a flight to Honolulu.[181]

In one of his arguments, Valot contended that his removal from Thailand violated the extradition treaty between the United States and Thailand, and that the prosecution was, therefore, barred by the doctrine of *United States v. Rauscher*.[182] However, the Court in *Ker*, decided the same day as *Rauscher*, held that the alleged abduction of the defendant Ker from Peru by an official of the U.S. government, in the face of an extradition treaty in effect between the United States and Peru, would not bar Ker's prosecution in Illinois courts.

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176 *Id.* at 261, 263 (citations omitted).

177 G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 197, 198 U.N. Doc. E/CN.4/1984/72 (1984). The Convention against Torture is implemented in the United States through 18 U.S.C. 113B 2340–2340B. *See also* M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 Rev. Int'le de Droit Pènal 1 (1977).

178 At Article 3(1) the Convention against Torture provides:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Such a development would alter the rule of non-inquiry, discussed in Ch. VII, Sec. 8.

179 *See infra* Sec. 5 (discussing the extraterritorial application of the U.S. Constitution).

180 United States v. Valot, 625 F.2d 308 (9th Cir. 1980).

181 *Id.* at 309.

182 United States v. Rauscher, 119 U.S. 407 (1886). *See also* Ch. II.

The court in *Valot* held that where no demand for extradition is made by the United States, and the defendant is deported by the authorities of the other country that is party to the treaty, "extradition" does not occur, and consequently failure to comply with the extradition treaty does not bar prosecution.[183] Because Thai officials aided Valot's removal to the United States, the court held that the extradition treaty was not violated.[184]

In 1992 the Supreme Court ruled again on the issue of whether abduction and unlawful seizure violate extradition treaties. In *United States v. Alvarez-Machain*,[185] the Court held that if the extradition treaty in question does not prohibit abduction, the *mala captus bene detentus* principle of the *Ker-Frisbie* doctrine applies and U.S. courts may validly exercise jurisdiction over the abducted relator.[186]

Dr. Alvarez-Machain, a citizen of Mexico,, was indicted for participating in the torture and murder of a U.S. DEA agent and a pilot working with him. The DEA believed that Alvarez-Machain had participated in the murder by keeping the DEA agent alive so that he could be tortured and interrogated longer.[187] The DEA wished to proceed against Alvarez-Machain and attempted to secure his presence in the United States through informal negotiations with Mexican officials.[188] A DEA agent offered a Mexican DEA informant $50,000 plus expenses for delivery of Alvarez-Machain to the United States.[189] At trial, the DEA agent testified that the final terms of the abduction had been approved by the DEA in Washington, DC, and that he believed that this was done with the consultation of the U.S. Attorney General's Office.[190] The trial court record described the abduction in the following way:

> On April 2, 1990,. . . [f]ive or six armed men burst into [Dr.Alvarez-Machain's] office. One showed Dr. Machain a badge of the federal police. Another man placed a gun to Dr. Machain's head and told him to cooperate or he would be shot.
>
> Dr. Machain was taken to a house in Guadalajara. One of the men hit him in the stomach as he exited the car at their request. In the house, he was forced to lay on the floor face down for two to three hours. Dr. Machain testified that he was shocked six or seven times through the soles of

183 *Valot*, 625 F.2d at 310.

184 The Second Circuit has followed the results reached in this case. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975). *See also* United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975).

185 United States v. Alvarez-Machain, 504 U.S. 655 (1992). In proceedings at the district cout level, the U.S. District Court for the Central District of California cited to this text. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 607, 609, 614 (C.D. Cal. 1990).

186 *Id.* at 657. The court said:

> The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.

In a recent decision, an Oklahoma federal district court refused to entertain a motion to dismiss an indictment and withdraw a guilty plea where the individual, a Mexican citizen, attempted to rely on his alleged illegal abduction as grounds to dismiss the indictment. The court reasoned that "defendant's claim of illegal abduction is not a basis to dismiss the charges against him, and it would be a waste of judicial resources to allow defendant to withdraw his guilty plea to pursue a meritless defense." United States v. Bonilla, 2010 U.S. Dist. LEXIS 65718 at *5–*7 (N.D. Okla. 2010).

187 *Id.*

188 *Id.*

189 *Id.* at 603.

190 *Id.*

> his shoes with "an electric apparatus." He says that he was injected twice with a substance that made him feel "light-headed and dizzy."
>
> Dr. Machain was then transported by car to Leon where they were joined by a "fair-skinned" man. Dr. Machain asked the fair-skinned man to identify himself and to indicate where they were going. The man said that he was "with the DEA" and they were going to El Paso . . .[191]

The district court found that the DEA was responsible for the kidnapping of Dr. Alvarez-Machain. In this respect the court noted:

> The record reveals that the DEA and its informants were integrally involved in Dr. Machain's abduction. Prior to the kidnapping, the DEA induced the abductors with the offer to pay a $50,000 reward for the successful abduction of Dr. Machain and promised to reimburse these individuals for their expenses. These promises were communicated to the abductors prior to the abduction. The DEA gave the go ahead for the abduction. This command was approved at the highest levels of the DEA. The United States Attorney General's office appears to have been consulted. Upon completion of the abduction, the DEA paid a $20,000 reward to the abductors and their families. In addition, many of the abductors and their families have been relocated to the United States. The United States pays approximately $6,000 per week in living expenses for the relocated abductors.[192]

The Mexican government officially protested the abduction of Alvarez-Machain. The district court summarized the Mexican protests as follows:

> On April 18, 1990, the Embassy of Mexico presented a diplomatic note to the United States Department of State in Washington, D.C., requesting a detailed report on possible U.S. participation in the abduction of Dr. Machain . . . The Mexican government advised the Department of State that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered . . . "
>
> On May 16, 1990, the Embassy of Mexico presented a second diplomatic note to the Department of State. The note stated that "[t]he Government of Mexico considers that the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S government, in violation of the procedure established in the extradition treaty in force between the two countries." In the note, the government of Mexico demanded Machain's return to Mexico.
>
> On July 19, 1990, the Embassy of Mexico presented a third diplomatic note to the Department of State requesting the provisional arrest and extradition of [the DEA informer and the DEA agent who masterminded the abduction] for prosecution in Mexico for crimes relating to the abduction of Dr. Machain.[193]

Alvarez-Machain moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct and that the district court lacked jurisdiction because he had been abducted in violation of the extradition treaty between Mexico and the United States.[194] The district court held that while the U.S. government's conduct was not outrageous, the court lacked jurisdiction to try Alvarez-Machain because his abduction was in violation of the extradition treaty and ordered that he be repatriated to Mexico.[195] The Court of Appeals for the Ninth Circuit affirmed.[196]

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191 *Id.*

192 *Id.* at 609.

193 *Id.* at 604.

194 United States v. Alvarez-Machain, 504 U.S. 655, 658 (1992).

195 *Id.*

196 United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 504 U.S. 1024, *rev'd and remanded*, 504 U.S. 655, 656 (1992).

The Supreme Court reversed, deciding that forcible abduction does not violate the extradition treaty between Mexico and the United States, and that consequently, it did not divest U.S. courts of jurisdiction over Alvarez-Machain.[197]

> Respondent and his *amici* may be correct that respondent's abduction was "shocking," and that it may be in violation of general international law principles . . . We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty . . . and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.[198]

The Supreme Court's *Alvarez-Machain* decision takes the rather curious position that where the abduction or kidnapping is not proscribed by the relevant extradition treaty, the *Ker-Frisbie* rule of *mala captus bene detentus* applies and U.S. courts may exercise jurisdiction over abducted or kidnapped relators.[199] This is apparently so even in a case where a citizen of another state is forcibly abducted from the territory of that state by U.S. agents acting under color of official authority and where the foreign state objects to the removal of its citizen.[200]

Justice Stevens, writing for the dissent in *Alvarez-Machain*, objected strongly to the majority's interpretation of the United States–Mexico Extradition Treaty and to the notion, advanced by the majority opinion, that because the treaty explicitly does not prohibit forcible abductions they are not violative of it.[201] Justice Stevens said:

> It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other Nation. Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty. That, however, is a highly improbable interpretation of a consensual agreement, which on

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197 *Alvarez-Machain*, 504 U.S. at 668.

198 *Id.* at 669–670 (citations omitted).

199 *But see* United States v. Chapa-Garza, 62 F.3d 118 (5th Cir. 1995) (interpreting *Alvarez-Machain* as being inapplicable where extradition proceedings are pending at the time of the fugitive abduction).

200 The majority's position was severely criticized by three dissenters. *See* United States v. Alvarez-Machain, 504 U.S. at 668–685 (Stevens, J., Blackmun, J., and O'Connor, J., dissenting). *See also* United States v. Lazore, 90 F. Supp. 2d 202 (N.D.N.Y. 2000). The court's decision produced significant backlash in the United States and abroad. Then president-elect Clinton said: "The Supreme Court ruled that unless the treaty explicitly forbids it, our country was free to go into Mexico or into any other country that we had a similar treaty with and take someone out. . . . My own opinion is that that is too broad a policy for our country to have." *Clinton, High Court Differ on Abduction*, L.A. Times, Dec. 16, 1992, at A32. The Mexican Attorney General's Office sought the extradition of DEA agents involved in the kidnapping of Dr. Alvarez-Machain. *Mexico Seeks DEA Agents on Charges of Kidnapping*, Wash. Post, Dec. 16, 1992, at A10. The United States was required by the government of Mexico to promise to Mexico that it will not kidnap Mexican citizens and to enter into negotiations with Mexico to ban the practice of cross-border kidnapping. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. Times, June 22, 1993. In the wake of the Court's decision, furthermore, Senator Moynihan has introduced a bill that would prohibit kidnappings and deprive U.S. courts of jurisdiction in cases where the defendants are brought to trial in the United States in violation of international law. *U.S. Must Not Kidnap Suspects Abroad*, Newsday, Dec. 2, 1993, at 114. *See also* 2 Limits to National Jurisdiction: Documents and Judicial Resolutions on the *Alvarez-Machain* Case (Secretaria de Relaciones Exteriores, 1993).

201 *Alvarez-Machain,* 504 U.S. at 674.

> its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.. .
>
> It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.[202]

Justice Stevens also observed that:

> [i]t is ironic that the United States has attempted to justify its unilateral action based on the kidnapping, torture, and murder of a federal agent by authorizing the kidnapping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico.[203]

Subsequent to the discovery that Alvarez-Machain was not the person intended by the United States to be kidnapped from Mexico, in that he had nothing to do with the torture and death of Agent Camarena, Alvarez-Machain filed suit under the Alien Tort Claims Act (ATCA).[204] The Ninth Circuit upheld the claimant's position:

> Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,* 3 Duke J. Comp. & Int'l L. 235, 260–61 (1993). The Universal Declaration, perhaps the most well-recognized explication of international human rights norms, provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile," Universal Declaration, art. 9, and the ICCPR, which the United States has ratified,[16] unequivocally obliges states parties to refrain from "arbitrary arrest or detention." ICCPR, art. 9.[17]
>
> We recently reaffirmed the universal, obligatory, and specific nature of this norm in *Martinez,* 141 F.3d at 1384 (recognizing a "clear international prohibition against arbitrary arrest and detention"); *see also Marcos IV,* 103 F.3d at 795 (recognizing "arbitrary detention . . . as[an] actionable violation[] of international law"). We explained, in defining the norm, that "[d]etention is arbitrary if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person." "*Martinez,* 141 F.3d at 1384 (quoting Restatement on Foreign Relations § 702 cmt. h).[18]
>
> Sosa acknowledges the prohibition against arbitrary arrest and detention, but he contends that for ATCA liability to attach, Alvarez's detention must be "prolonged" in addition to being arbitrary. We can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against "arbitrary" detention and does not include a temporal element. Other authorities reflect this understanding. *See, e.g.,* Bassiouni, *Human Rights in the Context of Criminal Justice, supra,* at 260; Paul Sieghart, *The International Law of Human Rights* 135–59 (1983); *see also* United Nations Study, *supra,* at 5–8 (defining elements of the norm without mention of a temporal component).[19]
>
> Although § 702 of the Restatement on Foreign Relations includes a reference to "prolonged arbitrary detention,"[20] neither the Restatement nor our cases import a separate temporal requirement for purposes of ATCA liability. Section 702 contains a short list of human rights norms that it deems sufficient to qualify as customary law violations. *See* Restatement on Foreign Relations § 702(a)–(g). But the comments to § 702 clarify that the list is non-exhaustive and that

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202 *Id.* at 674–675 (citations omitted).

203 *Id.* at 674, n.12.

204 United States v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), 542 U.S. 692 (2004), *vacated & remanded en banc*, 374 F.3d 1384 (2004).

virtually all of the norms listed, including "prolonged arbitrary detention," belong among the elite set of *jus cogens* norms that are non-derogable. *Id.* cmts. a, n. Section 702 does not state that every arbitrary detention must be "prolonged" to qualify as a violation of the law of nations—which is all that is required under the ATCA—and in fact implies the opposite. *See id.* cmt. ("A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement."). Likewise, our holding in *Martinez,* which cited the Restatement, included the length of detention as but one factor among many in determining whether a violation of the law of nations had occurred. 141 F.3d at 1384.

This is not to say that the length of detention cannot be a factor in evaluating whether there was an actionable violation of international law. Indeed, an extended detention following an improper arrest would necessarily contribute to "arbitrariness." We simply hold, consistent with international law, that there is no freestanding temporal requirement nor any magical time period that triggers the norm.[205]

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16. The ICCPR is one of several international covenants designed to formally codify many of the rights embodied in the Universal Declaration. *See* Brownlie, *supra,* at 576.

17. Each of the regional human rights instruments contains a similar prohibition. *See* American Convention, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 5(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia,* "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . . ."); African Charter on Human and Peoples' Rights ("African Charter"), art. 6, June 27, 1981, 21 I.L.M. 58 (1982) ("[N]o one may be arbitrarily arrested or detained.").

18. Our standard reflects the language of the Restatement as well as other major international sources. *See* Restatement on Foreign Relations § 702 cmt. h; ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."); *id.,* art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, art. 5(1) (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . . ."); African Charter, art. 6 ("No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."); *see also Winterwerp v. Netherlands,* 33 Eur. Ct. H.R. (ser. A.) at para. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as lawful."); United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile* 7 (1964) ("United Nations Study") (adopting the view that "an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with the respect for the right to liberty and security of person").

19. This reading is also supported in the case law. *See, e.g., de Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez v. Wilkinson,* 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Paul v. Avril,* 901 F.Supp. 330, 333–34, 335 (S.D.Fla.1994) (concluding plaintiff suffered arbitrary detention although he was held for less than ten hours); *Forti v. Suarez-Mason,* 672 F.Supp. 1531, 1541

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205 *Id.* at 331 F.3d at 620–622 (internal citations omitted).

(N.D.Cal.1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens." (internal citations omitted)); *see also Litwa v. Poland,* App. No. 26629/95, 33 Eur. H.R. Rep. 53 (2000) (finding detention of six hours and thirty minutes constitutes violation under Article 5 of the European Convention); *Quinn v. France,* App. No. 18580/91, 21 Eur. H.R. Rep. 529 (1995) (finding claim of arbitrary detention under Article 5 of the European Convention where petitioner was detained for a period of eleven hours).

20. The Restatement provides that "[a] state violates international law if…it practices, encourages, or condones…prolonged arbitrary detention." Restatement on Foreign Relations § 702(e).

However, the Supreme Court reversed, holding that neither the ATCA nor the Federal Tort Claims Act provided a remedy for the alien despite the fact that the government controlled the abduction of the alien and had custody of him in the U.S.[206] The Supreme Court relied on the fact concluded that the alleged harm, namely the abduction, occurred in Mexico irrespective of whether the U.S. was the proximate cause of the harm. Subsequently, the U.S. District Court dismissed Dr. Alvarez-Machain's claim for damages under the Federal Tort Claims Act.[207]

The United States increasingly resorts to extraordinary rendition devices, including abduction, thus circumventing traditional extradition processes. As shown in this chapter, there are several municipal and international rights derogated by the increasing use of these devices. In conjunction with such seizures are the related problems of seizing evidence illegally abroad and using it in U.S. courts. In these areas, the question arises as to the appropriate legal remedy.

The remedies for such seizures are not clearly apparent in U.S. law and policy. Courts could divest themselves of jurisdiction in illegal seizure and abduction cases, but as shown above, that is not the practice in the United States. The only available remedy for abduction seems to be damages.[208] These damages are not provided for under law. However, following the U.S.

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206 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), *vacating* 331 F.3d 604 (9th Cir. 2003).

207 Alvarez-Machain v. United States, CV 93-4072 SVW (SHx), 2004 U.S. Dist. LEXIS 28528 (D. Cal. 2004) (on remand).

208 The first damages case was *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). *See also* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979). For damages for unconstitutional rendition, see Arar v. Ashcroft, 585 F.3d 599 (2d Cir. 2009) (refusing to extend *Bivens* actions to the extraordinary rendition context); Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979); McBride v. Soos, 594 F.2d 610 (7th Cir. 1979); Wirth v. Surles, 562 F.2d 319 (4th Cir.), *cert. denied*, 435 U.S. 933 (1978); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975); Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974). As a postscript to the *Alvarez-Machain* case, it should be noted that Dr. Alvarez-Machain was acquitted of the torture and murder charges. "Judge Edward Rafeedie of U.S. District Court said the evidence presented during two weeks of testimony against the doctor…had been based on 'hunches' and the 'wildest speculation' and had failed to support the charges that he had participated in the torture of the drug agent…" Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. Times, Dec. 15, 1992, at A20. The acquittal improved relations between Mexico and the United States. "Mexican Foreign Minister Fernando Solana [called the] verdict a 'very positive step…It will also allow the creation of an atmosphere of respect and better understanding to strengthen anti-drug cooperation between both nations.'" George de Lama, *Abducted Mexican Cleared in Killing*, Chi. Trib., Dec. 15, 1992, at 1. *See* also Gail Diane Cox, *Drug War's Big Showcase Falls Apart*, Nat'l L.J., Feb. 1, 1993, at 8; *Judge Says U.S. Was Told It Held Wrong Doctor in Agent's Killing*, N.Y. Times, Dec. 17, 1992, at A27; Seth Mydans, *Abduction Gone Awry; Mexican Doctor Is Cleared in Killing of U.S. Drug Agent*, N.Y. Times, Dec. 20, 1992, at § 4, p. 2. On July 9, 1993, Alvarez-Machain filed a suit against the DEA and the Justice Department seeking $20 million in damages for his kidnapping. *Doctor Abducted in Camarena Case Sues U.S. Officials*, Chi. Trib., July 9, 1993, at 2. *See also Mexican Doctor Files Claims against U.S. for Abduction*, Liability Wk., July 12, 1993; Jerry Seper, *Justice Sued for $20 Million by Doctor in Camarena Case*, Wash. Times, July 10, 1993, at A5. *See generally infra* Sec.

Supreme Court ruling in *Bivens*, a plaintiff may have standing and seek damages when advocating a fundamental violation under the principle that there is necessarily a remedy for a wrong. This exception, however, has been applied only in limited circumstances, and courts appear wary of expanding the principle greatly. In *Arar* the Second Circuit refused to extend *Bivens* to cases of extraordinary rendition, holding that in determining whether to award damages "we must consider: whether there is an alternative remedial scheme available to the plaintiff; and whether 'special factors counsel[] hesitation' in creating a Bivens remedy."[209] The court concluded that the existence of alternative remedies implied the legislature's wish that such matters not be dealt with by the court. Further, it held that special factors similarly militated to a *Bivens* remedy, namely security and foreign policy considerations,[210] the disclosure of classified information,[211] and the inevitability of trying cases in open court where such classified information would be made public.[212]

In a similar vein, opponents of the justiciability of extraordinary rendition for private actors conclude that the analysis necessary for such a claim would inevitably and inappropriately lead courts to consider political questions squarely reserved for the executive and the legislature.[213] One critic argues that "extraordinary rendition contemplates a close contractual relationship" between the government and the corporate entity, such as an airplane operator and the CIA, thereby necessarily invoking the political doctrine limitation as enunciated in *Baker v. Carr*.[214]

In the event that the unlawful seizure of the person is accompanied by unlawful evidentiary seizure abroad, or if evidence in the United States is obtained illegally, the remedy in the United States could still be application of the exclusionary rule,[215] although the Supreme Court has been limiting that remedy and collateral attacks based on it.[216]

It seems that, for all practical purposes, the judiciary has largely abandoned any concerns for the integrity of the judicial process in the face of practical exigencies that facilitate the work of the U.S. government in its prosecutorial function, as well as that of other governments' law enforcement agencies working together to apprehend wanted or alleged offenders. The reading of court decisions gives the inescapable feeling that courts reach a judgment on the criminality of the accused and then decide how to avoid applying a legal rule that would negate criminal jurisdiction and thus allow the relator to go free. The resulting signals encourage law enforcement officers

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7 (discussing U.S. remedies for abduction abroad). *See* Alien Tort Claims Act, The 1789 Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350 (1994). *See infra* Sec. 7.5 (discussing remedies available to aliens).

209 Arar v. Ashcroft, 585 F.3d 559, 563 (2d. Cir. 2009).

210 *Id.* at 575 ("A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the court ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns.").

211 *Id.* at 576.

212 *Id.* at 577 ("The court's reliance on information that cannot be introduced into the public record is likely to be a common feature of any Bivens actions arising in the context of alleged extraordinary rendition. This should provoke hesitation, given the strong preference in the Anglo-American legal tradition for open court proceedings.").

213 Dhooge, *supra note* 70.

214 *Id.* at 329–330.

215 *See* Steven M. Kaplan, *Note, The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 Colum. J. Transnat'l L. 495 (1977) [hereinafter Note, *Applicability of the Exclusionary Rule*]; Charles E. M. Kolb, *Note, The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 Va. J. Int'l L. 515 (1977).

216 For limits on collateral relief to apply the exclusionary rule, see *Stone v. Powell*, 428 U.S. 465 (1976); Mackey v. United States, 401 U.S. 667 (1971).

to continue the practice of unlawful seizure and abduction.[217] Regrettably, the Reporters of the *Restatement (Third) of the Foreign Relations Law of the United States* uphold the validity of the practice of unlawful seizure without criticism.[218]

Subsequent to the Supreme Court decision in *Alvarez-Machain*, in 2002 the Third Circuit in *United States v. Best* summarized the U.S. jurisprudence as follows:

> At issue in this appeal is whether the District Court has personal jurisdiction over a defendant charged with violating the immigration laws and seized from a foreign vessel on the high seas. It is well established that a court's power to try a defendant is ordinarily not affected by the manner in which the defendant is brought to trial. *See Frisbie v. Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952) (upholding conviction of defendant who had been kidnapped in Chicago by Michigan officers and brought to trial in Michigan); *Ker v. Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421 (1886) (holding that court's power to try defendant for crime was not impaired by forcible abduction of defendant from Peru); *see also United States v. Romero-Galue*, 757 F.2d 1147, 1151 n. 10 (11th Cir. 1985) (noting that "[j]urisdiction over the person of a defendant 'in a federal criminal trial whether citizen or alien, whether arrested within or beyond the territory of the United States,' is not subject to challenge on the ground that the defendant's presence before the court was unlawfully secured") (quoting *United States v. Winter*, 509 F.2d 975, 985–86 (5th Cir. 1975)). This general rule, commonly referred to as the *Ker-Frisbie* doctrine, "rest[s] on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." *Frisbie*, 342 U.S. at 522, 72 S.Ct. 509.
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> The Supreme Court explained in *Frisbie* that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id*. In the years following *Frisbie*, however, it appeared increasingly difficult to reconcile the strict application of its rule with the expanded interpretation of due process expressed by the Court in later cases such as *Mapp v. Ohio*, 367 U.S. 643, 646, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), in which the Court held that due process requires application of the exclusionary rule in state prosecutions. In 1970, nearly two decades after *Frisbie* had been decided, we observed that the doctrine's validity "has been seriously questioned because it condones illegal police conduct." *Gov't of Virgin Islands v. Ortiz*, 427 F.2d 1043, 1045 n. 2 (3d Cir.1970). Four years later, the Second Circuit, citing the "erosion" of the *Ker-Frisbie* doctrine, carved out an exception to the general rule in *United States v. Toscanino*, 500 F.2d 267 (2d Cir.1974).
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> The defendant in *Toscanino* alleged that he had been forcibly abducted from Uruguay and tortured and interrogated over seventeen days at the behest of the United States government. *Id*. at 269–70. Concluding that the government's alleged conduct "shocks the conscience," *id*. at 273, the Second Circuit held that the *Ker-Frisbie* doctrine must yield to the requirements of due process and, accordingly, that a court must "divest itself of jurisdiction over the person of a

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217 *See* Meyer, *You Can Run but You Can't Hide (At Least Not in Tijuana)*, San Diego Reader, Dec. 4, 1986, at 1; Jim Schachter, *Long Arm of Law Bends the Rules*, L.A. Times, July 17, 1986, at 1. *See generally* Sakellar, *supra* note 31. The practice of abduction received U.S. presidential approval in the unlawful seizure of an Egyptian civilian aircraft by U.S. warplanes in connection with the *Achille-Lauro* incident. *See* Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 Tenn. L. Rev. 691 (1985). *See also* M. Cherif Bassiouni, *The Crime of Kidnapping and Hostage Taking*, *in*, 2 International Criminal Law 859 (M. Cherif Bassiouni ed., 2d ed. 1999); Robert A. Friedlander, *The Crime of Hijacking*, *in* 1 International Criminal Law 869 (M. Cherif Bassiouni ed., 2d ed. 1999).

218 The reporters indicated the adherence of the United States to the doctrine *mala captus bene detentus*, even though it has been eroded somewhat by the cases cited in this section, which are also cited in the Restatement. *See* Restatement (Third) on Foreign Relations Law of the United States §§ 431–433 and § 476, Reporters' Note 6 (concerning alternatives to extradition).

defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275

In *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.1975), which the Second Circuit decided shortly after *Toscanino*, the court effectively limited its holding in *Toscanino* to that case's shocking facts. In *Lujan*, a federal prisoner claimed that his due process rights had been violated under *Toscanino* because he had been forcibly abducted in Bolivia and then taken to New York. *Id*. at 63. Despite the fact that Lujan was forcibly abducted, the Second Circuit applied *Ker-Frisbie* and refused to order the district court to divest itself of jurisdiction, observing that "the government conduct of which [Lujan] complains pales by comparison with that alleged by Toscanino." *Id*. at 66. The court explained that "[l]acking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process." *Id*.[219]

Subsequent decisions of the Supreme Court indicate that there is reason to doubt the soundness of the *Toscanino* exception, even as limited to its flagrant facts. A year after *Toscanino* was decided, the Supreme Court generally reaffirmed the validity of the *Ker-Frisbie* doctrine, refusing to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). More recently, in *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), the Court held that the rule of *Ker-Frisbie* was fully applicable to a case in which a Mexican national had been forcibly abducted, even though the abduction may have been "shocking" and in violation of general international law principles. *Id*. at 669–70, 112 S.Ct. 2188. In light of these cases, it appears clear that the *Ker-Frisbie* doctrine has not eroded and that the exception described in *Toscanino* rests on shaky ground. *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995) (observing that, "[i]n the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in [*Toscanino*], have been cut short"). Even more apparent is that the alleged circumstances surrounding the Coast Guard's seizure of the defendant in this case do not come close to resembling the "shocking governmental conduct" that the Second Circuit equated with a violation of due process in *Toscanino*. Accordingly, even if we were to adopt the *Toscanino* exception to *Ker-Frisbie*, it would not apply to the facts of this case.

A second possible exception to the rule of *Ker-Frisbie*, rooted in cases from the Prohibition era, relates to the violation of a treaty. In *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793 (1927), the Supreme Court distinguished *Ker*, explaining that "the *Ker* case does not apply here" on the ground that "a treaty of the United States is directly involved." *Id*. at 605-06, 47 S.Ct. 531. Although the Court ultimately held that the defendants failed to raise timely the jurisdictional issue, the Court's dictum regarding *Ker* clearly indicated that "the rules may be quite different" when a treaty has been violated. *United States v. Postal*, 589 F.2d 862, 874 (5th Cir.1979).

In *Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933), a later Prohibition-era case involving the same treaty discussed in *Ford*, the Supreme Court again acknowledged that the government may limit its own jurisdiction by entering into a treaty. In that case, the government seized the British vessel Mazel Tov outside the territorial seas of the United States and then brought suit against it. *Id*. at 108, 53 S.Ct. 305. Cook, as master and bailee of the Mazel Tov, argued that the trial court lacked jurisdiction to adjudicate rights in connection with the vessel because it was seized outside the territorial limits of the United States and in violation of a treaty with Great Britain. *Id*. The Court agreed, noting that the treaty in question fixed the conditions

219 Specifically, the court noted that, unlike Toscanino, Lujan did not claim that he was knocked unconscious by a gun blow, that drugs were administered to subdue him during the flight to the United States, or that the U.S. Attorney was aware of his abduction or of any subsequent interrogation. *Lujan*, 510 F.2d 62, 66 (2d Cir. 1975). Perhaps most important, Lujan "disclaim[ed] any acts of torture, terror, or custodial interrogation of any kind." *Id*.

> under which a vessel may be seized and taken for adjudication in accordance with the country's applicable laws. *Id*. at 121, 53 S.Ct. 305. Accordingly, it held that "[o]ur government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws." *Id*. In so holding, the Court distinguished prior cases where forfeitures of vessels wrongfully seized by the Navy were upheld, explaining that those cases involved vessels of American registry and that "the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign." *Id*. at 122, 53 S.Ct. 305.
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> This second exception to the Ker-Frisbie doctrine is buttressed by the more recent Alvarez-Machain case, in which the Supreme Court observed that the Ker-Frisbie doctrine is inapplicable to cases where a person is forcibly abducted from a country in violation of an extradition treaty to which the United States is a party. 504 U.S. at 662, 112 S.Ct. 2188. To defeat jurisdiction in such a case, the Eleventh Circuit observed that, under Alvarez-Machain, "a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner." United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir.1997); see also United States v. Rezaq, 134 F.3d 1121, 1130 (D.C.Cir. 1998). However, the Ninth Circuit noted that, if a treaty does not specifically prohibit the abduction of foreign nationals, then it will not cause a court to be divested of jurisdiction over the abducted individual. Matta-Ballesteros, 71 F.3d at 762 (citing Alvarez-Machain, 504 U.S. at 664–66, 112 S.Ct. 2188)
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> …
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> As the Fifth Circuit observed in Postal, a defendant "cannot rely upon a mere violation of international law as a defense to the court's jurisdiction." 589 F.2d at 884." We find substantial support for that position in Supreme Court cases such as Alvarez-Machain and Cook, which both recognize that the rule of Ker-Frisbie is not muted when there is a "violation of general international law principles." Alvarez-Machain, 504 U.S. at 669, 112 S.Ct. 2188; Cook, 288 U.S. at 122, 53 S.Ct. 305. Accordingly, we conclude that, unless the government's seizure of Best was in violation of a treaty between the United States and Brazil, the District Court has jurisdiction over Best in spite of the potential violation of international law.[220]

In *United States v. Arbane*, Arbane was acquitted on drug possession charges brought against him in Ecuador, and was deported from that country to Iran.[221] On the way to Iran, his plane landed for a stopover in Houston, Texas, where he was arrested on a Southern District of Florida indictment. The court relied on *Alvarez-Machain* to hold that there was nothing in the treaty between the United States and Ecuador that required extradition to the exclusion of other means of securing jurisdiction, albeit under *Alvarez-Machain* by means of unlawful abduction. The Eleventh Circuit held the same position in *United States v. Noriega*.[222]

It is important to note in this case that if a person remains on an aircraft the law of the flag of the aircraft applies, and U.S. agents would not have the right to board the aircraft in order to seize a passenger unless the passenger threatened the security of the United States or was committing a crime in violation of U.S. law while on the aircraft.[223] However, if the passenger deplanes and is in the terminal or elsewhere in U.S. territory, he could be apprehended.

It should be noted that if a person is seized in a foreign country in a manner that may violate either that country's laws or the law of the United States, but the seizure in question was not pursuant to the United States' request, either formally through an extradition request, or informally by means of law enforcement or intelligence cooperation, the conduct has no bearing on the validity of a subsequent extradition request made by the United States, except where the

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220 United States v. Best, 304 F.3d 308, 314 (3d Cir. 2002) (internal citations omitted).

221 United States v. Arbane, 19 Fla. L. Weekly Fed. C. 491 (11th Cir. 2006).

222 United States v. Noriega, 117 F.3d 1206 (11th Cir.1997).

223 *See* Ch. VI, Sec. 2.3.8.

previous unlawful conduct was done at the request of the United States. Moreover, the existence of an extradition treaty and a request for extradition does not necessarily obviate other means of transferring custody of a person seized abroad, as argued throughout this chapter, though with some limitations.[224]

The cases described above are not about technical or formal violations of what some may consider the rules of the game. Most of these cases constitute fundamental violations of procedural and substantive due process of law as reflected in the U.S. Constitution, a number of U.S. laws, and several international treaties. More particularly, they involve kidnapping by use of force, which is a crime in every country in the world. This is usually followed by continued use of force during the relator's transit until the person reaches a U.S. destination. More egregious is the recurrence of torture and coercive interrogation during the voyage to the United States, which sometimes lasts days, if not weeks. U.S. courts have been all too lax with these egregious violations, allowing a de facto exception to the application of the Constitution, the laws of the United States, and its international treaty obligations, as if the end justified the means. In no other area of judicial supervisory power over law enforcement practices have U.S. courts been so willing to find some technical rationalization to look the other way. Whether U.S. courts will do the same with respect to "extraordinary rendition" is to be seen, considering the historically unprecedented deference given by U.S. courts to the Bush administration's practices since September 11, 2001. It is not a very likely prospect. However, just as the Supreme Court in *Hamdan v. Rumsfeld* came to the conclusion that presidential powers cannot create a legal black hole in Guantanamo, perhaps U.S. courts will find that kidnapping by force and torture are violations of the Constitution, U.S. laws, and international treaties, no matter how adroitly these violations may be described.

7. Abduction and Unlawful Seizure: State Responsibility in International Law

7.1. Introduction

It is important to note at the outset that the United States takes an entirely different position from what follows as part of its "exceptionalism" to international human rights norms.[225] Chapter II, Section 2.2 discusses the non–self-executing nature of certain international treaties and the non-applicability in U.S. domestic law of ICJ decisions.[226]

7.2. The Questionable Validity of *Mala Captus Bene Detentus* in International Law

The existence and extent of state responsibility in abduction, unlawful seizure, and other forms of irregular rendition vary.[227] Prior to discussing the subject of state responsibility, however, attention should be given to the premise upon which these practices rely, namely the maxim *mala captus bene detentus*. The application of this maxim by national courts over the past one hundred years has been inconsistent, as with other Roman law maxims. In particular this is because two higher principles have been consistently disregarded.

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224 United States v. Herbert, 313 F. Supp. 2d 324 (S.D.N.Y. 2004); Kasi v. Agelone, 300 F.3d 487, 499 (4th Cir. 2002); Saroop v. Garcia, 109 F.3d 165, 168 (3d Cir. 1997); United States v. Noreiga, 117 F. 3d 1206 (11th Cir. 1997); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (holding the issue cannot be raised); United States v. Antonakeas, 255 F.3d 714 (9th Cir. 2001).

225 Michael Ignatieff, American Exceptionalism and Human Rights (2005); Noam Chomsky, Hegemony or Survival: America's Quest for Global Dominance (2003).

226 Medellín v. Texas, 552 U.S. 491 (2008).

227 *See* Ch. IV. For a critical discussion of these practices, referred to by one author as "the law of stolen people," *see* Christopher H. Pyle, Extradition, Politics, and Human Rights 263–281 (2001).

The first of these principles is procedural, namely *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium* (never resort to the extraordinary until the ordinary fails). Thus, *mala captus bene detentus*, in order to be valid as an extraordinary process, must be preceded by the exhaustion of all ordinary procedures available, and cannot be admitted as a surrogate procedure to the existing ordinary channels. This rule of exhaustion of ordinary remedies is well established in international law and was reaffirmed in the 1959 decision of the International Court of Justice in the *Interhandel Case* (Switzerland v. United States).[228] There it was held that where rights claimed by one state have been disregarded by another in violation of international law, all local remedies and means of redress must first be exhausted before recourse to the International Court of Justice is allowed. In other words, the ordinary must be exhausted before resorting to the extraordinary.

The second principle is substantive, namely, the principle *ex injuria ius non oritur*. This principle was the Roman law's counterpart to the exclusionary rule developed in the United States.[229] It requires that certain violations of law not ripen into lawful results. Such a remedy was deemed, under Roman law and under some contemporary laws, an indispensable corollary to certain rights, without which these rights would have no real significance. In Roman law, the protected rights were those interests the violation of which was considered an *injuria* (*injuria* is not to be confused with "injury" as understood in the common law of torts). Every *injuria* had its legal remedy apart from the general principle that no legal validity attached to consequences of an *injuria*. The author of an *injuria* had to redress the wrong committed in a prescribed manner. In addition, there could not be any lawful consequences deriving from the transgression. The principle *ex injuria ius non oritur* was not, therefore, designed to redress the wrong perpetrated against the legally protected interest that had its specific remedy, but was intended to sanction the transgression of the law itself. In this sense, the law is meant *lato senso*, meaning the integrity of the law and the legal process.

A threshold question arises whether the violations stemming from the practices discussed above constitute an *injuria* in international law. The peculiarity of international law compels us to examine this question in light of the existing law of state responsibility.

7.3. The Bases of State Responsibility under International Law

Before considering the applicable international law principles of state responsibility, it is important to take note of the three categories of violations that are at issue in the practices discussed in the preceding sections of this chapter. These categories of violations are:

1. Violations of the sovereignty, territorial integrity, and legal process of the state wherein such acts occurred;[230]
2. Violations of the human rights of the individual involved;[231] and

228 Interhandel Case (Switz. v. U.S.) 1959 I.C.J. 6 (Mar. 21).

229 *See,* e.g., Saltzburg, *supra* note 99; Stephan, *supra* note 99; Note, *Applicability of the Exclusionary Rule*, *supra* note 215.

230 Responsibility of States for internationally wrongful acts, G.A. Res. 56/83, U.N. GAOR, 56th. Sess., U.N. Doc. A/56/83 (Jan. 28, 2002); James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

231 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 24841; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 005; American Convention on Human Rights Nov. 22, 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc 65, Rev. 1, Corr. 1; African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; International Convention

3. Violations of international due process.[232]

The international law of state responsibility has been clearly applied to violations of the first category,[233] and to some extent to violations of the second category,[234] but at best only tenuously to violations of the third category. However, it is apparent that the general principles and policies of state responsibility encompass the three categories of violations stated above.[235]

State responsibility attaches to actions by the state through its agents for specific acts as well as failure to act by a state itself, presumably wherever there is a preexisting legal obligation to do so. Two essential questions are raised in the context of this principle of state responsibility: (1) what degree of connection must be established between the state and its agents, or between the agents of the state and individuals acting in their private capacity, in order for state responsibility to attach?; and (2) is a state obligated merely to refrain from engaging in violative conduct, is there an obligation to prevent such conduct from occurring, or is a state an insurer of lawful conduct?

As to the first question, it is clear that state responsibility attaches to acts committed by agents of a state or by private individuals acting for or on behalf of the state. In the latter instance, the type of connection that must be established between the individual (acting privately) and the state (in order to impute that individual's act to the state) is not very clear, nor does customary international law provide us with reliable criteria. There is, however, no ambiguity in cases where the state, through its agents, incited, encouraged, or induced private individuals to undertake such actions with a view to benefit from the outcome. It is obvious that the less

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for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, C.N.737.2008. TREATIES-12; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, C.E.T.S. No. 126. For case law of the ECHR, see Chahal v. the United Kingdom, Eur. Ct. H. R. App. no. 22414/93 (Nov. 15, 1996); Nachova and Others v. Bulgaria, App. nos. 43577/98 and 43579/98 (Feb. 26, 2004). For case law of the IACHR, see Servellón García et al. Case, Inter-Am. C.H.R. (Ser. C) No. 152 (2006); Moiwana Village Case, Inter-Am. C.H.R. (Ser. C) No. 124 (2005).

232 International Covenant on Civil and Political Rights, Article 14, Dec. 16, 1966, 999 U.N.T.S. 14668; Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, Nov. 4, 1950, C.E.T.S. No. 005; American Convention on Human Rights, Article 8, Nov. 22, 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc 65, Rev. 1, Corr. 1; African [Banjul] Charter on Human and Peoples' Rights, Article 7, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Organization of American States, International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, C.N.737.2008.TREATIES-12; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, C.E.T.S. No. 126. *See also* M. Cherif Bassiouni, Introduction to International Criminal Law, ch. IX (2d ed. 2012).

233 There have been many cases unrelated to abduction such as that of *Nicaragua v. the United States* at the ICJ. Military Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). The *Eichmann* case is one of the most noteworthy causes célèbres. Attorney General of Israel v. Eichmann, [1968] 36 Int'l. L. R. 5 (Israel). *See* U.N. Doc. S/1439 (1960). But it was not submitted to the ICJ. Instead a Security Council Resolution was adopted condemning Israel. S.C. Res. 138, U.N. SCOR, 15th Year. U.N. Doc. S/Res/4349 (June 23, 1960).

234 Chattin Case (United States v. United Mexican States), 1927 IV Rev. Int'l Arb. Awards 282. *See* also William W. Bishop, International Law 753–785 (1962); 3 Hackworth Digest, *supra* note 23 at 279.

235 *See Report of the International Law Commission on the Work of Its Fifty-Third Session, April 23–August 10, 2001*, Responsibility of States for Internationally Wrongful Acts U.N. GAOR, 53rd Sess., U.N. Doc. A/CN.4/L.602/Rev. 1, July 26, 2001; Crawford, *supra* note 230. *See also* Ian Brownlie, System of the Law of Nations: State Responsibility (1983); Clyde Eagleton, The Responsibility of States in International Law (1929); *Harvard Research in International Law, Responsibility of States*, 23 Am. J. Int'l L. 131 (Spec. Supp. 1929).

direct the connection is between the state and the individual acting privately, the more difficult it will be to ascribe state responsibility for individual conduct even when it inures to the benefit of the state.

The second question raises a policy issue in the context of state practice, namely whether responsibility is to be based only on positive conduct, as when a state causes a given act to take place, or whether it also extends to passive conduct, as when a state merely permits conduct to take place. In the latter instance, one may ask whether a state has a duty to prevent unlawful conduct if it has the knowledge or capacity to do so, or if a state is to be held responsible, even though it lacks prior knowledge of the contemplated action or the capacity to prevent it.

The *Eichmann*[236] case is probably the most prominent example of state conduct that raises the question of state responsibility for wrongful conduct against another state. The search for state responsibility criteria in this area suggests that analogies to other aspects of state responsibility should be used. One parallel could be the regulation of armed conflicts and general principles of international criminal responsibility from which are derived applicable rules for state and individual responsibility in cases of violations of international extradition law.[237] Nothing in the writings of scholars, however, suggests this analogy, and to the extent that it is a novel doctrine, it requires refinement.[238] Consider, however, the principles of accountability with respect to command responsibility[239] and the unavailability of the defense of obedience to superior

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236 Attorney General of Israel v. Eichmann, [1968] 36 Int'l. L. R. 5 (Israel). *See* U.N. Doc. S/1439 (1960).

237 Eagleton, *supra* note 235 at 80 (stating "A state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction."). *See also* Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 10; Alwyn V. Freeman, The International Responsibility of States for Denial of Justice (1938); Oliver J. Lissitzyn, *The Meaning of the Term Denial of Justice in International Law*, 30 Am. J. Int'l L. 632 (1936); S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int'l L. 863 (1961).

238 *Id. See also* Fritz Munch, *State Responsibility in International Criminal Law*, *in* A Treatise on International Criminal Law 143 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); Theodor Meron, *International Responsibility of States for Unauthorized Acts of Their Officials*, 33 Brit. Y.B. Int'l L. 85 (1957); Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J. Int'l Crim. Just. 875 (2007); André Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 Int'l & Comp. L.Q. 615 (2003); Marko Milanovic, *State Responsibility for Genocide*, 17 Eur. J. Int'l L 553 (2006); Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 Eur. J. Int'l L 631 (2007); Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. and Mont.), 2007 I.C.J. 43 (Feb. 26); Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1984 I.C.J. 14 (June 27).

239 For the principle of command responsibility, see M. Cherif Bassiouni, Substantive Criminal Law 154 (1978). For the responsibility of states, see 8 Marjorie Whiteman, Digest of International Law 807–815, 825–830 (1963); Meron, *supra* note 238. For case law of the ICTY, see, e.g., *Prosecutor v. Limaj* et al., Case No. IT-03-66-T, Judgement, ¶ 519 (Nov. 30 2005) (holding that "The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law. . . ."); *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgement, ¶ 39 (Nov. 16, 2005) (holding that "the purpose behind the concept of command responsibility is to ensure compliance with the laws and customs of war and international humanitarian law generally. The principle of command responsibility may be seen in part to arise from one of the basic principles of international humanitarian law aiming at ensuring protection for protected categories of persons and objects during armed conflicts. This protection is at the very heart of international humanitarian law. Ensuring this protection requires, in the first place, preventative measures which commanders are in a position to take, by virtue of the effective control which they have over their subordinates, thereby ensuring the enforcement of international humanitarian law in armed conflict. A commander who possesses effective control over the actions of his subordinates is duty bound to

orders.[240] By analogy, perpetrators of abductions would be individually responsible under international criminal law without benefit of the defense of obedience to superior orders, and their superiors would also be held accountable by reason of command responsibility.

State responsibility, as discussed within this section, attaches because an *injuria* has been perpetrated. The only established remedies are reparations and diplomatic apologies; the additional remedy of the return of the person seized unlawfully is not yet recognized, however, some courts have seen fit to apply it.[241] The latter approach is in compliance with the higher principle of *ex injuria ius non oritur*. Indeed, without such a remedy, the integrity of the international legal order would not be preserved.[242]

Section 207, Attribution of Conduct of States of the Restatement (Third), Foreign Relations Law of the United States (1987), states:[243]

> A state is responsible for any violation of its obligations under international law resulting from action or inaction by:
>
> (a) the government of the state,
>
> (b) the government or authorities of any political subdivision of the state, or
>
> (c) any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.

7.4. Internationally Protected Human Rights and State Responsibility

7.4.1. Introduction

State responsibility hinges on the existence of an international right or duty, the transgression of which has certain consequences and requires a remedy to attach. This applies to the second category discussed here, namely practices that violate human rights. The following questions arise in this context: what are these rights, what are their sources, what is their legally binding effect, what sanctions apply, and who applies them?

In judicial terms, state responsibility in this context encompasses:

1. The legally binding effect of internationally protected human rights proscriptions.
2. The self-executing nature of the obligations.

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ensure that they act within the dictates of international humanitarian law and that the laws and customs of war are therefore respected."). For case law of the ICTR, see, e.g.,*Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, Judgement, ¶ 484 (Nov. 28, 2007) (holding that "for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (i.e., he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate."). *See also* M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application (2011).

240 M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (2d ed. 1999). *See also* Yoram Dinstein, The Defense of "Obedience to Superior Orders" in International Law (1965); Theo Vögler, *The Defense of "Superior Orders" in International Criminal Law*, *in* Bassiouni & Nanda, *supra* note 238, at 619.

241 *See infra* Sec. 7.5.

242 *Report of the International Law Commission on the Work of its Forty-Fourth Session, May 4–July 24, 1992*, U.N. GAOR, 47th Sess., Supp. (No. 10), at 34, U.N. Doc. A/47/10 (1992).

243 Restatement (Third), *supra* note 219, at § 207.

3. The penetration of international law into municipal law.

4. The enforcement of human rights proscriptions.

A complete treatment of all these questions is obviously beyond the scope of this analysis, but some general observations must be made.

An initial observation should be made about the attitudes of national courts with respect to internationally protected human rights. Time and time again, court decisions on the subject of unlawful seizures and irregular rendition practices distinguish between violations of international law and violations of national law. National courts accept this dichotomy and do not deem themselves jurisdictionally impaired by violations of international law, and proceed with the case as if the violation of internationally protected human rights did not exist.

The rationale sustaining this dichotomy between violations of international law and violations of national law is predicated on the concept of separate sovereignties. It is also argued that matters of international law are deemed within the prerogatives of the executive (in most national legal systems) and that national courts have no power to enforce internationally protected human rights.[244] Governments also argue that human rights are not enforceable by national courts for a variety of reasons, including:

1. There are no binding international sanctions for violations of human rights, except as provided by treaties;

2. There are no existing binding obligations arising out of internationally enunciated human rights, which are applicable to national courts *qua*, except as provided by treaties; and

3. Self-executing enforcement of internationally enunciated human rights would violate state sovereignty.

The answers to these issues in the present state of international law are by no means as clear-cut as the proponents of human rights or the proponents of state sovereignty claim they are. In fact, no other area of international law is as riddled with confusion between the *lex lata* and *de lege ferenda* as is the literature on international protection of human rights. One may even occasionally find some arguments in the nature of *lex desiderata* that are advanced as *lex lata*.

The observations that follow do not exhaust the arguments advanced on these issues, but are intended to present a cursory view of the present state of the law and its likely immediate development. The central issue is not whether there are human rights, but whether there are rules with enough specific content contained in one of the sources of international law deemed binding upon states and requiring enforcement. Thus, the need is to identify the sources of such rights and then to determine whether these sources contain specific rights with a defined content that applies to unlawful seizures and irregular rendition practices.

7.4.2. The Sources of Internationally Protected Human Rights

The sources of internationally protected human rights are:

1. the United Nations Charter;

2. the Universal Declaration of Human Rights;

3. multilateral treaties;

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244 *See, e.g.,* Richard B. Lillich, International Human Rights (1991); Louis Sohn & Thomas Buergenthal, International Protection of Human Rights (1973). For cases wherein the Universal Declaration of Human Rights was invoked, see *United States v. Steinberg*, 478 F. Supp. 29 (N.D. Ill. 1979) (involving an extradition case); *Fuji v. State*, 38 Cal. 2d. 718, 242 P.2d 617 (1952). For references to other cases involving international human rights instruments, see Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. Sch. L. Rev. 153 (1978).

4. decisions of international courts; and

5. United Nations resolutions.

Classification is based on the degree of applicability and binding nature of specific obligations falling within the meaning of internationally protected human rights.

(1) The United Nations Charter

The Charter refers to respect for human rights in Articles 1(3), 13(1)(b), 55(c), 62(2), and 76(c). The language of Article 55 is quite revealing:

> With a view to the creation of conditions of stability and well being, which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:
>
> …
>
> (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The language quoted above has been considered by some as a statement of principles or a goal, while others read it as stating Charter obligations. Consider, however, that Article 56 states:

> All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

Such a clear statement of obligation places in issue not whether an obligation to achieve the observance of human rights exists, but rather what the specific content of these rights is.

A comprehensive summary of these issues and the arguments of the proponents of various positions has been made by Professor Egon Schwelb.[245] One answer appears in the position of the International Court of Justice in its 1970 Advisory Opinion on "The Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276."[246] The Court unequivocally recognized that the Charter imposes human rights obligations on member states and that these are self-executing obligations. The Court, in paragraph 129 of its opinion, stated that South African apartheid laws and decrees "constitute a violation of the purposes and principles of the Charter of the United Nations."[247]

In paragraph 131 the Court held:

> Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory on international states, human rights and fundamental freedoms for all without distinctions as to race. To establish, indeed to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute *a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter*.[248]

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245 Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 Am. J. Int'l L. 337 (1972). The obligations of international law, though at times couched in moral terms, still have an internationally enforceable content. *See* Myres S. McDougal et al., Law and Public Order in Space 154–155 (1963).

246 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

247 *Id.* at 57.

248 *Id.* (emphasis added).

Thus, according to the Court's view, the Charter, by enunciating its purposes and principles on human rights, established self-executing obligations that acquire their specific content from the Charter as well as other sources of internationally protected human rights.

The issue, it seems, is whether the Charter, having established certain general principles and purposes, can be said to incorporate by reference those specific rights that, by virtue of the evolutionary nature of the subject, have and will continue to develop through various sources of international law. The answer is affirmative, and therefore, these specific rights must be ascertained to determine their applicability. Once ascertained, the specific rights become self-executing obligations by virtue of Article 56. Furthermore, the specific obligations expressed in multilateral treaties are another source of applicable laws and complement the general principles and purposes of the Charter. As an advocate of human rights, this writer maintains that such specific rights should be considered as interpretative of the Charter and become self-executing under Article 56.

(2) The Universal Declaration of Human Rights[249]

The Universal Declaration of Human Rights was adopted in 1948 as a General Assembly resolution. It enunciates specific rights, some of which are affected by the practices of unlawful seizures and irregular renditions, namely:

> Article 3: Everyone has the right to life, liberty and security of person.
>
> Article 9: No one shall be subjected to arbitrary arrest, detention or exile.
>
> Article 10: 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.

These three specific provisions apply to the following instances: (1) unlawful seizures such as abductions, (2) connivance between agents of two states to seize a person without lawful means, and (3) actions by private volunteers acting for or on behalf of a state.

A question exists, however, as to the legally binding effect of the Declaration. One school of thought posits that as a General Assembly resolution, the Declaration has no binding effect on states, while another school claims that the Declaration interprets Charter obligations. The most persuasive argument is contained in the separate opinion of Vice President Ammoun of the International Court of Justice in the *Advisory Opinion on the Continued Presence of South Africa in Namibia (South West Africa)*, wherein he states:

> The Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights. In the case of certain of the Declaration's provisions, attracted by the conduct of South Africa, it would have been an improvement to have dealt in terms with their comminatory nature, which is implied in paragraphs 130 and 131 of the Opinion by the references to their violation.
>
> In its written statement the French Government, alluding to the obligations which South Africa accepted under the Mandate and assumed on becoming a Member of the United Nations, and to the norms laid down in the Universal Declaration of Human Rights, stated that there was no doubt that the Government of South Africa had, in a very real sense, systematically infringed those rules and those obligations. Nevertheless, referring to the mention by resolution 2145 (XXI) of the Universal Declaration of Human Rights, it objected that it was plainly impossible for noncompliance with the norms it enshrined to be sanctioned with the revocation of the Mandate, inasmuch as that Declaration was not in the nature of a treaty binding upon states.
>
> Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind

249 G.A. Res. 217 A (III), Dec. 10, 1948.

> states on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b) of the Statute. One right which must certainly be considered a preexisting binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.
>
> …
>
> It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights."
>
> From this first principle flow most rights and freedoms.
>
> …
>
> …The ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in the San Francisco, Bogota and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations, in particular the above mentioned declarations adopted by the General Assembly in resolutions 1514 (XV), 2625 (XXV) and 2627 (XXV). The Court in its turn has now confirmed it.[250]

Six decades ago the Declaration expressed the consensus of the member states, and since then it has become part of those "general principles of international law recognized by civilized nations." Thus, the provisions of the Declaration can be construed as legally binding because they interpret the principles and purposes of the Charter and are applicable to member states as the embodiment of Article 55, whose execution is required by Article 56. Furthermore, as part of "general principles," transgression of the norms of the Declaration would constitute a violation of international law to which state responsibility would attach.

(3) Multilateral Treaties

In this category of specific human rights norms, the provisions applicable to unlawful seizures and irregular means of rendition are clear and unambiguous. The application of these treaties can be viewed, as in the case of the Universal Declaration, as those specific norms that interpret the principles and purposes of the Charter, and consequently, they could be considered as self-executing under Article 56 of the Charter. In addition, as international treaties, they are part of conventional international law and derive their binding force from that source of international law.

The following provisions would apply to the instances at hand:

(a) The International Covenant on Civil and Political Rights[251]

Article 9

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

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250 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21) at 76.

251 G.A. Res. 2200 A (XXI), Dec. 16, 1966, U.N. GAOR, 21st Sess., Supp. (No. 16), U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967) (*entered into force*, Mar. 23, 1976).

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public)*, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

(b) The Convention Relating to the Status of Stateless Persons[252]

Article 31 Expulsion

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

(c) The Convention Relating to the Status of Refugees[253]

Article 32 Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

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252 Sept. 1954, 360 U.N.T.S. 130.

253 The Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 Prohibition of Expulsion or Return ("Non-Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

(d) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[254]

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

(e) International Convention for the Protection of All Persons from Enforced Disappearance[255]

Article 1

1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

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254 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, art. 3. The Convention against Torture contains an additional protocol establishing the Committee Against Torture. As of May 2012 there are seventy-one signatories and sixty-three state-parties. The United States has not signed the Optional Protocol. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 24841.

255 International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, C.N.737.2008.TREATIES-12. As of September 2012 there are ninety-one signatories and thirty-five state-parties to the Convention. The United States is not a signatory.

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

(f) General Assembly Resolution on Extrajudicial, summary or arbitrary executions

6. *Urges* all States:

(a) To take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life, in particular that of children, during public demonstrations, internal and communal violence, civil unrest, public emergencies or armed conflicts, and to on behalf of or with the consent or acquiescence of the State act with restraint and in conformity with international human rights law and international humanitarian law, including the principles of proportionality and necessity, and in this regard to ensure that police and law enforcement officials are guided by the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;

(b) To ensure the effective protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings, including those targeted at specific groups of persons, such as racially motivated violence leading to the death of the victim, killings of persons belonging to national or ethnic, religious and linguistic minorities, killings of persons affected by terrorism, hostage-taking or foreign occupation, killings of refugees, internally displaced persons, migrants, street children or members of indigenous communities, killings of persons for reasons related to their activities as human rights defenders, lawyers, journalists or demonstrators, killings committed in the name of passion or in the name of honour, all killings committed for any discriminatory reason, including sexual orientation, as well as all other cases where a person's right to life has been violated, and to bring those responsible to justice before a competent, independent and impartial judiciary at the national or, where appropriate, international level, and to ensure that such killings, including those committed by security forces, police and law enforcement agents, paramilitary groups or private forces, are neither condoned nor sanctioned by State officials or personnel;

7. *Affirms* the obligation of States, in order to prevent extrajudicial, summary or arbitrary executions, to protect the lives of all persons deprived of their liberty in all circumstances and to investigate and respond to deaths in custody;

8. *Urges* all States to ensure that persons deprived of their liberty are treated humanely and with full respect for their human rights and to ensure that their treatment, including judicial guarantees, and conditions conform to the Standard Minimum Rules for the Treatment of Prisoners and, where applicable, to the Geneva Conventions of 12 August 19494 and the Additional Protocols thereto, of 8 June 197711 in relation to all persons detained in armed conflict, as well as to other pertinent international instruments;

(g) The European Convention for the Protection of Human Rights and Fundamental Freedoms[256]

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court.

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law.

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent him committing an offense or fleeing after having done so.

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants.

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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256 The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 262, E.T.S. No. 5.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

(h) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[257]

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling that, under Article 3 of the same Convention, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment";

Noting that the machinery provided for in that Convention operates in relation to persons who allege that they are victims of violations of Article 3;

Convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

(i) The Inter-American Convention on Human Rights[258]

Article 7 Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In State parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

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257 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, C.E.T.S. No. 126.

258 Nov. 22, 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

(j) The African Charter on Human and Peoples' Rights[259]

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 12

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

(k) The International Right to the Due Process of Law

In addition to these specific rights, there is the general right that every accused is entitled to the due process of the law.[260] This general right is not stated specifically in human rights documents, but is inferred therefrom. It emanates from the total fabric of human rights treaties and doctrines and from specific protections, and emerges as an overall concept of fairness that is inherent in the international scheme of human rights protections. Even though it is specifically mentioned in Article 32 of the Convention Relating to the Status of Refugees, its absence from other specific provisions underscores its obviousness. Indeed, what can specific rights signify in the absence of the basic framework of a lawful process? There are many rights in international instruments that provide the legal foundation for judicial processes and their fairness. The most important of these rights include:

1. The right to life, liberty, and security of the person;
2. The right to recognition before the law and equal protection of the law;
3. The right to be free from arbitrary arrest and detention;
4. The right to freedom from torture and cruel, inhuman, and degrading treatment or punishment;
5. The right to be presumed innocent;
6. The right to a fair trial;
7. The right to assistance of counsel;
8. The right to a speedy trial;
9. The right to appeal;
10. The right to be protected from double jeopardy; and
11. The right to be protected from *ex post facto* law.[261]

The cumulative effect of these individual rights gives rise to the right to due process.[262]

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259 The African Charter on Human and Peoples' Rights, June 17, 1981, *in* Basic Documents on Human Rights 551 (Ian Brownlie ed., 3d ed., 1992).

260 *See generally* Bassiouni, Introduction to International Criminal Law, *supra* note 232.

261 *Id.* at ch. 9.

262 *See* Brennan, *supra* note 13; Roscoe Pound, *Toward a New Jus Gentium*, *in* Ideological Differences and World Order (Filmer S.C. Northrop ed., 1949). *See also* Luis Kutner, The Human Right to Individual Freedom (1970); Luis Kutner, World Habeus Corpus (1962); Hersch Lauterpacht, International Law and Human Rights (1950). *See generally* Myres S. McDougal et al., Human Rights and World Public Order (1980).

(4) Decisions of International Courts

The International Court of Justice dealt with the issue of human rights in its decisions on Namibia. In its Advisory Opinion, rendered in 1971, the Court made its position on the legally binding effects of human rights unequivocal.[263] The Court affirmed the justiciability of human rights issues and interpreted Charter references to human rights as legally binding obligations that acquire their specific content from other international instruments, such as the Universal Declaration of Human Rights.

The only other international court rendering judgments with respect to human rights as applied to those states subscribing to its jurisdiction is the European Court of Human Rights (ECtHR), which was created by the European Convention on Human Rights (ECHR). The ECtHR has as its sole purpose and function the adjudication of disputes arising out of the ECHR.[264] It should be noted that the ECtHR falls under the rubric of the Council of Europe, which was founded in 1949 to promote human rights, democracy, and the rule of law, and is distinct from the European Union and its judicial organ, the European Court of Justice. The ECtHR has a much larger reach than the European Union, as it extends to forty-seven countries at present.

The experience of the European human rights system is unique in the history of mankind and demonstrates that with respect to the protection of human rights the barriers of state sovereignty can be lowered without having shattering effects on the states involved. The experience of European states in this case ought to allay some of the apprehensions that arise whenever the justiciability of human rights is advanced.

A survey of this sort should not omit a reference to decisions of Arbitral Tribunals and national courts that add their weight to the recognition of state responsibility for violations of human rights. Such cases are plentiful in the annals of international law. One example is the *Chattin* case[265] between the United States and Mexico, wherein violations of the human rights of a U.S. defendant in Mexican criminal proceedings were arbitrated between the two states and resulted in an award of damages to the individual. The protection of minorities in the post-WWI period, arising out of the Minorities Treaty of 1919 and other decisions of the Permanent Court of International Justice, as well as Arbitral Tribunals, offer an equally abundant source of precedents for justiciability of those issues under principles of state responsibility.[266]

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263 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

264 *See* Annual Reports prepared by the Council of Europe, Commission on Human Rights, Stock-Taking on the European Convention on Human Rights. *See also* Dominique Poncet, La Protection de l'Accusé par la Convention Européene des Droits de l'Homme (1977). Several cases were heard by the European Commission on Human Rights and by the European Court on Human Rights concerning cruel, inhuman, or degrading treatment or violation of the European Convention; they are cited and discussed in Arthur H. Robertson, Human Rights in Europe (1978). See the cases against Greece in Requests No. 3321/66, 3323/67, 3344/67. *See also* the cases against the United Kingdom (e.g., Ireland v. United Kingdom, Decision of the Commission of October 1, 1972, Application No. 5310/71; Hilton v. United Kingdom, App. No. 5613/72 (Mar. 5, 1976)).

265 *See* Chattin Case (United States v. United Mexican States), 1927 IV Rev. Int'l Arb. Awards 282. *See* also Bishop, *supra* note 234, at 753–785; 3 Hackworth Digest, *supra* note 23, at § 269.

266 *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

(5) United Nations Resolutions

It is appropriate first to discuss the impact on the United Nations of the 1971 Advisory Opinion of the International Court of Justice on Namibia (South West Africa). The Security Council, in a resolution of October 20, 1971, by a vote of thirteen in favor, none against, and two abstentions, conveyed its appreciation to the Court, stating expressly that it "agrees with the court's opinion expressed in paragraph 133 of the Advisory Opinion," which is quoted above. Shortly thereafter, the General Assembly, in a resolution of December 20, 1971, stated that it "welcomed" the Advisory Opinion "as expressed in paragraph 133." This statement of approval was passed by 111 votes in favor, 2 against, and 10 abstentions.[267] Clearly, as to the applicability of human rights under international law and as to their binding effect, there could be no stronger support than the overwhelming endorsement of the International Court of Justice Advisory Opinion by the Security Council and the General Assembly.

United Nations resolutions emanate from the Security Council and the General Assembly. The significance of such resolutions, particularly those of the General Assembly, which are recommendatory, is that it expresses the views of the world community. Such views, however, acquire legal significance from the recitations of the resolutions[268] and their relationship to further developments of the same subject through other international instruments. Such developments, combined with a record of consistent support by the General Assembly, exhibit and confirm the existence of "general principles" as well as international customs—two sources of international law. There is no greater or more overwhelming record of support for the protection of human rights than those expressed by the General Assembly and various UN specialized agencies. The record reveals that the UN bodies have consistently referred to and upheld the recognition, application, and implementation of the principles and purposes of the Charter and other international instruments dealing with human rights.

The conclusion is that General Assembly resolutions that have been consistently recited or relied upon, and that find tangible expression in other international law developments, rank among those expressions of world community prescriptions that are among the sources of international law having legally binding effects on the world community. In short, they can become customary international law, as is the case with the 1948 Universal Declaration of Human Rights.

(a) The International Right to the Due Process of Law Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[269]

II. Scope of the obligation

> 3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
>
> > (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

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267 G.A. Res. 2871 (XXVI).

268 Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 Am. J. Int'l L. 444 (1969).

269 The International Right to the Due Process of Law Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR 64th Sess., 1465 U.N.T.S. 24841 (Dec. 16, 2005). *See also* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 Hum. Rts. L. Rev 203 (2006).

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

7.4.3. State Responsibility for Violation of Internationally Protected Human Rights: Transfer and Torture

Although the sources of internationally protected human rights, discussed in the previous section, make it clear that states have an obligation to protect individual rights and liberties, the mechanisms of enforcing those rights and holding states accountable for violations of those rights can be elusive in the current international context. The United States' "extraordinary rendition" program has as its goal avoiding giving terrorism suspects due process of law in American courts and obtaining information from suspected terrorists by methods too brutal for American investigators to use.[270] This is evident from the statement of a former covert CIA agent who worked in the Middle East that "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured you send them to Syria. If you want someone to disappear-never to see them again-you send them to Egypt."[271] Although the executive may attempt to deflect state responsibility by claiming that such "extraordinary rendition" was necessary to protect national security, this argument would fail as the protection against torture has arguably risen to a jus cogens norm that is non-derogable under any circumstances.[272] Furthermore, any argument the executive might attempt to raise that a special CIA unit engaged in "extraordinary rendition" ultra vires would fail as attribution principles view ultra vires actions of state organs as irrelevant to the inquiry regarding whether that state organ's actions are attributable to the state.[273]

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270 *See* Button, *supra* note 70, at 535–536.

271 Bob Bear, quoted in Ruth Jamieson & Kierran McEvoy, *State Crime by Proxy & Juridical Othering*, 45 Brit. J. Criminology 504, 516 (2005).

272 *See* Button, *supra* note 70, at 545–569.

273 *Id.* at 544–545 (discussing ILC Articles 4 and 7 that allow actions by state organs to be attributed to the state).

The difficulty of bringing the United States to task for its policy of "extraordinary rendition" and its underlying motivation of torture via transfer to willing countries lies in practical and procedural hurdles.[274] Although the individuals who are the subject of torture would be theoretically able to bring a claim against the United States, it would be unlikely that they would have standing under the CAT and ICCPR to do so as the only forum with jurisdiction to hear individual complaints brought under these instruments is the Inter-American Commission and Court on Human Rights, and the number of such cases proceeding past screening procedures are few and far between.[275] Domestic claims in the United States under the ATCA or TVPA would fail as those claims can only be brought against natural persons or corporations.[276] For various reasons, including the prospect of losing U.S. aid, states largely lack the political will to challenge the United States' "extraordinary rendition" program before an international tribunal.[277] Furthermore, as the "extraordinary rendition" program was secretive in nature, there would likely be a paucity of discoverable evidence in the form of memoranda, directives, and other written evidence that could be obtained; and the United States has revoked general consent to the International Court of Justice's jurisdiction, so that absent voluntary consent to the International Court of Justice's jurisdiction in this matter (an unlikely prospect to say the least), the Court would lack jurisdiction to hear this matter.[278]

It is clear that the U.S. practice of "extraordinary rendition," more specifically with regard to the wars in Iraq and Afghanistan, violates not only the CAT and the ICCPR, but also the provisions of the Geneva Conventions with respect to the rights of POWs and civilians in particular.[279] The Geneva Conventions apply, whether during international armed conflicts between two or more High Contracting Parties or during partial or total occupation of the territory governed by the Geneva Conventions, to any "protected persons" under the Geneva

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274 *See* Button, *supra* note 70, at 566–567 ("The invocation of an international human right is virtually impossible. Unless an individual is 'fortunate' enough to be a victim at the hands of his state of nationality, giving him a right to personally invoke his rights or to be a citizen of a country willing to take up his case, he has no recourse to justice against a state that has rendered him to torture.") For an argument against domestic jurisdiction for crimes stemming from extraordinary rendition, see Dhooge, *supra note* 70, at 344 (2007) ("Even the staunchest supporter of the Bush administration's antiterrorism policies must admit that the U.S. rendition policy, as modified in the wake of September 11th, has resulted in human rights abuses. Rather, the issue in Jeppesen Dataplan, Inc. and similar future suits is whether U.S. courts should proceed with the adjudication of claims alleging violations of international human rights law arising from a domestic program created and implemented in secrecy by the executive branch and bearing significant consequences for U.S. national security and foreign policy. The answer to this issue is clearly in the negative despite the shocking nature of the conduct to which the plaintiffs were allegedly subjected.")

275 The case of *Lopez Brugos v. Uruguay*, Communication No. R12/52, U.N. Doc. Supp. No. 40 (A/36/40), allowed an individual to proceed against a state based on a human rights violation under the ICCPR. *See* Button, *supra* note 70, at 556. For a discussion of individual standing under the CAT and ICCPR, see Button, *supra* note 70, at 557.

276 *Id.* at 558.

277 *Id.* at 558–559.

278 *Id.* at 561–563. The CAT, ICCPR, Refugee Convention, and Geneva Conventions do not specifically provide the ICJ with jurisdiction over matters related to torture as it relates to a program of "extraordinary rendition."

279 *See* the four Geneva Conventions of 1949 and their two Additional Protocols of 1977: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions

Conventions, with different rights attaching to different groups of "protected persons."[280] The third Geneva Convention (regarding POWs) and the fourth Geneva Convention (regarding civilians) generally provide protection to "protected persons" until their release and repatriation.[281] The Bush administration raised arguments against there being a war between High Contracting Parties by stating that the conflict is between the United States and al-Qaeda, a nonstate actor to whom the Geneva Conventions do not apply, but has accepted the applicability of the Geneva Conventions to the war in Iraq.[282] Although there remain questions regarding the nature and extent of the United States' occupation of Afghanistan and Iraq, it is clear that the United States controlled at least portions of Afghanistan and Iraq, which would satisfy the Geneva Conventions' "occupation" requirement.[283] The United States has refused to extend "protected person" status to any al-Qaeda members, whether as POWs or as civilians detained during the wars.[284] This policy was necessary, as the Geneva Conventions protect both civilians and POWs from torture, and contain special protections prohibiting the transfer of civilians.[285] Were members of al-Qaeda protected as POWs or civilians, the United States could not have caused such individuals to be transferred to a third state, wherein they were likely to be tortured, without committing a grave breach of the Geneva Conventions. The concern of the Geneva Conventions against the deportation or transfer of civilians during a war was based in large part on the Nazi practice of stripping German Jews of their citizenship to facilitate a superficially lawful "deportation" of these individuals to either extermination or slave labor camps.[286] Thus, although the Geneva Conventions require an occupying power to respect existing immigration laws of an occupied state, the Geneva Conventions would not allow an occupying power to pressure an occupied state into passing immigration laws allowing for "deportation" of an unwanted class, such as "terrorists."[287] There is nothing in the Geneva Conventions or the Hague Convention that allows an occupying power to expand the rules of deportation in the occupied state, and Article 49 of the fourth Geneva Convention clearly prohibits deportations of civilians.[288] However, in 2003, the Administrator of the Coalition Provisional Authority in Iraq issued a memorandum requiring non-Iraqis in Iraq to obtain a permit to remain in the country, and this permit could be denied for individuals who engaged in "terrorism."[289] These permits were to be renewed every ninety days, and one

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of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. *See also* Convention with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, *reprinted in* 1 Am. J. Int'l L. 129 (Supp. 1907); Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, r*eprinted in* 2 Am. J. Int'l L. 90 (Supp. 1908).

280 *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 Va. J. Int'l L. 295, 297–298 (2007).

281 *Id.* at 301.

282 *Id.* at 300–303.

283 *Id.* at 303–307.

284 For a detailed discussion of the legal reasoning behind this policy, including the Bush administration's failure to consider the possibility that a person not protected as a POW could still be protected as a civilian, see *id.* at 309–318.

285 *Id.* at 318–321.

286 *Id.* at 323–324.

287 *Id.* at 321–332 (discussing the Goldsmith memo and changes to Iraqi immigration policies and practices).

288 *Id.* at 333–334.

289 More particularly, as one author notes, this order provides that:

> A permit may be denied if an officer has reasonable grounds to believe that the permit applicant "will commit offenses, or engage in criminal activity," or: Will engage in or has engaged in an act of terrorism, or is a member of a terrorist organization or an organization that there are reasonable grounds

of the penalties for remaining in the country without such a permit was deportation.[290] It is difficult if not impossible to distinguish the effect of deporting someone on terrorism grounds after modifying local law from Nazi deportation of German Jews during WWII.[291] The same kind of reasoning behind the prohibition on "deportations" applies with equal force to "transfers," despite the arguments in the Bush administration's Goldsmith memorandum to the contrary.[292] However, such transfers and deportations have been ongoing, which has resulted in the torture and other cruel and inhuman treatment of an unknown number of individuals as such transfers are in all likelihood undocumented.

The same kinds of problems regarding holding the U.S. government responsible for violations of the CAT and ICCPR hold true with the Geneva Conventions. Although there is domestic legislation that may provide a ground for a U.S. trial on the matter, namely the War Crimes Act,[293] the lack of prosecutorial will coupled with congressional legislation making it more difficult to hold U.S. personnel accountable under the War Crimes Act makes domestic prosecution a nonstarter.[294] Although the International Criminal Court's (ICC) Rome Statute establishes the Court's jurisdiction over a plan or policy of unlawful deportation or transfer, Afghanistan has signed a non-surrender agreement with the United States and Iraq is not a party to the ICC.[295] As the United States is not a state-party to the Rome Statute, it is difficult to discern a jurisdictional basis for the Court to hear such a case against the United States.[296] Although the Geneva Conventions place an affirmative duty on High Contracting Parties to enact legislation to provide effective penal sanctions for those who commit grave breaches of the conventions, it remains to be seen whether a nation will effectively find jurisdiction to prosecute the United States on these grounds.[297]

The Obama administration issued Executive Order 13,491, which created an interagency task force charged with considering the current U.S. practice of interrogation and transfer of individuals and making recommendations regarding the policy.[298] Regarding interrogations, the task force recommended the creation of a "High-Value Detainee Interrogation Group" with a principal function of intelligence gathering as opposed to law enforcement.[299] The task force concluded that the existing Army Field Manual[300] and Navy Commander's Handbook on the Law of Naval Operations[301] provisions on interrogation were sufficient and no additional or

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to believe will: i) engage in acts which are offensive to the principles of democratic government, institutes or processes, in Iraq; or ii) engage in or instigate the removal by force of any government.

Id. at 330–331.

290 *Id.*

291 *Id.* at 335.

292 For a detailed discussion on this point, see *id.* at 337–343.

293 War Crimes Act, 18 U.S.C. § 2441 (1996).

294 Weissbrodt & Bergquist, *supra* note 280, at 344–345 & n.281–282.

295 *Id.* at 347–348.

296 *Id.*

297 Although a case was brought against Donald Rumsfeld and others on behalf of four Iraqi detainees in 2004 in Germany, where such enacting legislation existed, the German court refused to accept jurisdiction pursuant to the principle of subsidiarity as the United States had primary jurisdiction and had not indicated it was refraining from punishing the behavior described in the complaint. *See id.* at 349–355.

298 *See* John Crook, ed. *Contemporary Practice of the United States Relating to International Law: International Human Right: U.S. Task Force Report on Interrogations and Transfers*, 103 A.J.I.L. 760 (2009).

299 *Id.* at 761–762.

300 U.S. Dept. of the Army, Field Manual, 27–10 (1956).

301 U.S. Dept. of the Navy, Commander's Handbook on the Law of Naval Operations, NWP 1-14M (2007).

different guidance was necessary.[302] Regarding transfers, the task force recommended that the United States rely on assurances that transferees would not be tortured, but that these assurances should be evaluated by the State Department, with the Inspector General of the Departments of State, Defense, and Homeland Security preparing a coordinated annual report on transfers in reliance of assurances.[303] The task force also recommended the inclusion of a monitoring mechanism to ensure that the assurances were being met.[304] However, reliance on such "assurances" cannot be justified as torture is secretive by its nature and would likely escape any monitoring process, and neither state would have an interest in exposing human rights abuses resulting from such a rendition.[305] Thus, there is no indication that the Obama administration will change course regarding the policy of "extraordinary rendition."

7.5. Treaty Interpretation and Internationally Protected Human Rights

The Vienna Convention on the Law of Treaties of 1969[306] states in Article 31:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> …
>
> 3. There shall be taken into account, together with context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

Subsequent agreements and customs, as per subparagraph (b) of Article 31, are sources of interpretation of prior treaty provisions. Moreover, the Universal Declaration of Human Rights should be regarded as a subsequent agreement that interprets Article 55 of the Charter by reason of its intended import as stated in its Preamble, namely:

> *Whereas*, the peoples of the United Nations *have in the Charter reaffirmed their faith in fundamental human rights*, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.[307]

The link between Article 55 of the Charter and the Universal Declaration having been so established, and Article 31 of the Vienna Convention allowing the interpretation of Article 55 to be accomplished through subsequent agreements, the Declaration can be deemed to interpret the Charter's provisions. Consequently, its specific guarantees are incorporated in the general meaning of Charter provisions on human rights and are binding as well as self-executing under

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302 Crook, *supra* note 298, at 761–762.

303 *Id.* at 762.

304 *Id.*

305 *See* Button, *supra* note 70, at 549 (discussing the Human Rights Watch reports regarding diplomatic assurances and torture). *See also* Human Rights Watch, Empty Promises: Diplomatic Assurances No Safeguard against Torture (2004); Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard against Torture (2005).

306 Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679 (1969). *See also* Myres S. McDougal & W. Michael Reisman, International Law in Contemporary Perspective 1119–1270 (1981); Harvard Research in International Law, *Who May Interpret*, 29 Am. J. Int'l L. 973 (Supp. 1935). It should be noted that the Vienna Convention embodies customary international law. The United States did not ratify the convention, but is bound by customary international law. The Restatement (Third) on Foreign Relations Law of the United States contains most of the Vienna Convention provisions. *See* Restatement (Third), *supra* note 219,

307 G.A. Res. 217 A (III), Dec. 10, 1948 (emphasis added).

Article 56 of the Charter. Additionally, other human rights sources should be considered as interpretative of Charter provisions. Violations of such obligations constitute a breach of international law, and therefore, states are estopped from recurring violations of human rights in their processes of unlawful seizures and irregular rendition devices.

The problem arises in the United States in light of recent Supreme Court cases holding that certain international treaties are non–self-executing as discussed in Chapter II, Section 2.2.

7.6. Remedies

From this discussion of the sources of state responsibility, there can be no doubt that violations of certain specific internationally protected human rights constitute internationally enforceable rights in the nature of an *injuria* to which state responsibility attaches, and that, in addition to affording specific remedies, cannot produce legitimate outcomes. The question is first whether arbitrary arrest and detention fall into the category of serious violations of internationally protected human rights so as to be considered *injuria* warranting a legal remedy. The answer seems obvious, as there can be no greater internationally protected human right after the right to life than the right to liberty.

In addition, there is the question relating to the extent of a state's obligation to protect such rights. Clearly, a state cannot infringe upon these rights without due process of law, but is the state obliged to insure against the occurrence of such results when committed by other states? Such an obligation is not yet recognized, because of the relatively recent development of the law of human rights, but if it were recognized, then the state wherein such violations occurred would be aggrieved in two ways. First, the actions of the other state would infringe on the obligation of the state to secure the right of freedom from arbitrary arrest and detention. Second, arising by virtue of the first, the state, as all states, sharing a common duty to insure the safeguarding of internationally protected human rights would be affected by a transgression of such commonly binding obligations.

By arguing for this new obligation, it can be asserted that the rights of an injured state cannot be severed from those of the individual whose internationally protected rights were infringed. The remedy applicable to an international *injuria* should bar the ripening of such violations into lawful outcomes.

A paradigm of such a remedy found its expression in the *Jacob-Salomon* case,[308] where a former German citizen was taken to Germany from Switzerland by force and deceit. Because of a 1921 treaty between Germany and Switzerland concerning unresolved disputes, the matter was submitted to an international court of arbitration.[309] Shortly after the case was initiated, Germany admitted error and returned Jacob to the Swiss authorities.

Five other cases deserve mention in this regard. The first is one in which a Belgian citizen was seized by French agents and brought to trial in France. The Tribunal Correctionel d'Avesnes held in 1933 that the defendant should be returned to Belgium because he was illegally seized, and the French government immediately complied. In a 1965 situation between Italy and Switzerland, the *Affaire Mantovani*,[310] Italy returned an unlawfully seized person to Switzerland, and the Italian authorities extended their apologies to the Swiss government.[311] A 1962

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308 Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, *supra* note 9; Preuss, *Settlement of the Jacob Kidnapping Case*, *supra* note 9.

309 Treaty of Arbitration and Conciliation between the Swiss Confederation and the German Reich, Dec. 3, 1921, 12 L.N.T.S. 281.

310 *See* Charles Rousseau, *Chronique des Faits Internationaux*, 69 Rev. Général de Droit Int'le Public 761 (1965).

311 *But see* the *Bozano* case, *supra* note 54 and accompanying text.

case, known as *The Red Crusader*,[312] between Denmark and the United Kingdom, involved the seizure of a fishing-boat captain by Denmark, which sought to prosecute him for illegally fishing in its territorial waters. On the United Kingdom's complaint of the illegal seizure, the captain was returned to his country. In another case, in September 1974, a U.S. deserter was seized by U.S. agents fifty yards inside Canada after hot pursuit commenced in U.S. territory. On Canada's complaint he was returned to Canada within days.[313] Finally, although in the 1981 *Jaffe* case Canada's protests did not result in his return to that state, his kidnappers were extradited to Canada from the United States to answer the kidnapping charges.[314] In the case of *Kear v. Hilton*,[315] the Fourth Circuit held that a professional bail bondsmen from the United States who kidnapped a bail jumper in Canada and brought him to Florida for trial was extraditable to Canada on kidnapping charges.

These cases upheld and vindicated the principle *ex injuria non oritur.* It must also be noted that world community standards were enunciated to that effect in the unanimous resolution of the Security Council in the complaint of Argentina against Israel in the *Eichmann* case wherein the Council stated:

> [A]cts such as that under consideration, which affect the sovereignty of another state and, therefore, cause international friction, may, if repeated, endanger peace and security. *Requests* the government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of International Law.[316]

The Charter principles of the United Nations and rules of international law include international protection of human rights, which is at issue in unlawful seizure and abduction practices. This analysis leads to the following conclusions:

1. States must abide by specific human rights norms and fulfill the principles and purposes of the Charter and the instruments that interpret it.

2. Unlawful seizures in violation of international law and improper methods executed without benefit of a legal process insuring minimal standards of due process or in violation

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312 The case was not reported in official texts but was discussed in several newspapers and magazines in the United States.

313 An incident involving Japan and South Korea was resolved in November 1973. In August 1973, Kim Dae Jung, spokesman for the opposition of the South Korea's government, was abducted from a hotel room in Tokyo.

> After a week of intensive negotiations, South Korea dispatched Prime Minister Kim Jong Pil to Japan to bow and offer an apology for the kidnapping to Prime Minister Kakuei Tanaka. Under the terms of the compromise, the government of President Chung Hee Park conceded that the chief "suspect" in the kidnapping was Kim Dong Woon, the former first secretary of the Korean Embassy in Tokyo and a suspected agent of the South Korea's Central Intelligence Agency. South Korea, though, insisted that whatever Kim Dong Woon might have done was not in any way an official act, but entirely private. That distinction was essential to the compromise. The government of Prime Minister Tanaka had stated earlier that Japanese sovereignty had been violated only if it turned out that the kidnapping was an "official" act of the Seoul government. As for Kim Dae Jung, South Korea's Foreign Minister said that he had been freed from protective custody in Seoul. South Korea would waive any action against Kim for past activities if he did not repeat his "crimes"—presumably public opposition to the Park regime.
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> Time, Nov. 12, 1973, at 72.

314 *See supra* note 158 and accompanying text (discussing Jaffe's kidnapping by the bail bondsmen and their subsequent extradition).

315 Kear v. Hilton, 699 F.2d 181 (1983).

316 U.N. Doc. S/1439 (1960).

of specific human rights provisions are to be held violative of international law and sanctioned in the following manner:

a. The perpetrators, their aiders and abettors, and responsible superiors are to be held internationally responsible.

b. The person who was subjected to these practices is to be returned to the state from which he was seized and is entitled to damages.

c. The state wherein the act occurred is entitled to reparation and apologies.

3. The International Court of Justice is to exercise compulsory jurisdiction in hearing petitions by states on behalf of individuals who were the object of such treatment and to issue orders equivalent to Writs of *Habeas Corpus and Amparo*.

An alternative remedy, which is certainly not as effective as the exclusion of jurisdiction, is that of financial compensation, or damages. This was held in *Amekrane v. United Kingdom*, which was decided by the European Commission of Human Rights on July 19, 1974.[317] Colonel Amekrane had rebelled against the Kingdom of Morocco, and had fled to Gibraltar to avoid the death penalty imposed on him by Morocco. The colonel had applied for asylum in Gibraltar. The Gibraltar authorities, under UK control, conspired with Moroccan secret police to allow for his abduction back to Morocco. Following his abduction from Gibraltar, the colonel was killed in Morocco. A complaint filed against the United Kingdom was found to be admissible, in that the facts alleged clearly indicated violations of Articles 3, 5, and 8 of the ECHR. The colonel's widow received compensation as part of a settlement solution that was attached to the Commission's report on this matter. Obviously, as Colonel Amekrane was dead, requesting Morocco, the country that had kidnapped him, to return him was not an alternative remedy.[318]

For reasons discussed in Chapter II, Section 2.2, such remedies are not available in U.S. courts because certain international treaties are non–self-executing or because individuals are deemed not to have standing to raise the issue.

In the years since the *Amekrane* case the practice of the European Commission and the ECtHR has developed significantly. As a preliminary matter, it must be remembered that the Commission that made the finding in *Amekrane* has been effectively replaced by the ECtHR, which since 1998 has been the sole organ with jurisdiction over violations of the European Convention.[319] Moreover, under Protocol 11 individuals have direct access to the Court and can file applications without going before the Commission first, as was the case before 1998.

Substantively, a number of important decisions have developed the practice of the European Court with regard to extraditions in violation of the European Convention, particularly with regard to the Article 3 proscription of torture or inhuman or degrading treatment or punishment and the Article 6 protection of fair trial rights. These developments have also allowed applicants to fight their extradition before the actual violation, in effect in order to secure an injunction against the requested state to prevent the extradition of an individual to a place where he/she might be subject to human rights violations.

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317 Amekrane v UK, European Court of Human Rights, Application No. 5961/72 (1973).

318 Note that neither the European Commission nor the European Court has the power to order the return of an abducted or unlawfully seized person.

319 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. 155.

The most important of these developments was the landmark 1989 ruling in *Soering v. United Kingdom*,[320] in which the Court held that:

> extradition may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces *a real risk of being subjected to torture or to inhuman or degrading treatment or punishment* in the requesting country.[321]

In *Vilvarajah and Others v. the United Kingdom* the ECtHR subsequently explained that its investigation of Article 3 violations "must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe."[322] Accordingly, the ruling in *Soering* effectively established a hard protection against extradition in cases of torture, and of inhuman or degrading treatment or punishment (Article 3 of the ECHR), which was later extended to other articles of the European Convention, including the violation of fair trial rights (Article 6), lack of an effective remedy (Article 13), and collective expulsions (Protocol 4 to the ECHR).[323]

Procedurally, in these defensive actions to prevent extradition,

> the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it.[324]

In effect, if the applicant/relator can show that there is a substantial and real risk of a violation of Article 3 or Article 6, extradition is precluded by the ECHR unless the requested state can make a showing to the contrary. Although these articles afford some protections to relators, it is important to note that the applicant before the European Court still bears the initial high burden of establishing the violation, a clear deference on the part of the Court to signatory states and their independent determination of the extraditability of the individual.

The landmark *Soering* case, which laid the foundation for the Court's subsequent jurisprudence, concerned the extradition of a German citizen from the United Kingdom to the United States where he was subject to prosecution for homicide and eventually to the death penalty. The applicant, Jens Soering, was a German citizen who grew up in the United States, where his father was posted as a German diplomat. While studying at the University of Virginia, he murdered the parents of his then girlfriend and fled with her to the United Kingdom, where he was eventually apprehended. Under the terms of the 1972 extradition convention, the United States sought the extradition of Soering and his girlfriend, Elizabeth Haysom, to face capital murder charges.[325] Thereafter the United Kingdom sought assurances that Soering would not face the death penalty, prompting an insubstantial reply from the prosecutor in Virginia; simultaneously West Germany sought Soering's extradition to face trial for the murders in a German court.

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320 Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88 (1989).

321 Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88 (1989), ¶ 91.

322 Vilvarajah and Others v. the United Kingdom, Application nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (1991), ¶ 108.

323 *See also* Ch. VII, Sec. 6.11 and Ch. VIII, Sec. 6.

324 Othman (Abu Qatada v. United Kingdom), Application no. 8139/09 (2012), ¶ 261.

325 Elizabeth Haysom was surrendered to the United States where she pled guilty to accessory to murder charges and received a ninety-year sentence.

In response to the above-mentioned request by the United Kingdom for an assurance that Soering would not be exposed to the death penalty, the Virginia prosecutor trying the case provided an affidavit declaring that "should Jens Soering be convicted of the offence of capital murder as charged in Bedford County, Virginia . . . a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out."[326] During this period Soering was committed to a British mental hospital for psychiatric care due to his "dread of extreme physical violence and homosexual abuse from other inmates in death row in Virginia . . . [which was] having a profound psychological effect on him . . . [and that there was] a mounting desperation in the applicant, together with objective fears that he may seek to take his own life."[327] While fighting his extradition to the United States before the ECtHR, Soering stated that he would consent to his extradition to West Germany to face trial there.[328]

The ECtHR held that it had jurisdiction over the matter even though the alleged Article 3 violation would potentially occur outside of Europe, on the basis that extraditing individuals to places where they may be subject to torture or inhuman or degrading treatment or punishment would violate the spirit animating the ECHR. In effect, the significant importance the European and international communities saw in the proscription against torture or inhuman or degrading treatment demanded special care be given to situations in which individuals were subject to violations after their extradition. Accordingly, the court reasoned that

> It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).[329]

The Court continued,

> What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case . . . Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.
>
> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of

326 Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88 (1989), ¶ 20.

327 *Id.* at ¶ 25.

328 *Id.* at ¶ 26.

329 *Id.* at ¶ 88.

> the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3) … [330]

The actual extradition of Soering turned on the likelihood of his exposure to the death penalty, and hence the "death row syndrome" that would trigger a violation of Article 3 of the European Convention. The Court was, in this regard, not reassured by the Virginia prosecutor's assurance that he would represent the United Kingdom's wishes to the sentencing judge. The Court was of the view that the assurance was insufficient to guarantee the non-imposition of the death penalty,[331] a crucial point in the Court's assessment of whether the "death row syndrome" alleged by Soering, a violation of Article 3 of the Convention, was likely enough to trigger the Court's jurisdiction.

With respect to "death row syndrome," in the view of the Court, the length of time inmates were kept in detention, the conditions on death row, and other factors constituted a violation of the Article 3 proscription on torture, and inhuman or degrading treatment or punishment.[332] The Court did not, notably, rule that the death penalty violated the Convention's protection of the Right to Life (Article 2), as at the time the death penalty was not completely barred under the terms of the Convention,[333] a legal position that likely no longer obtains given the evolution of the customary proscription on capital punishment since 1989, both within Europe and internationally.[334] The Court also did not find a violation of Article 6, concerning the right to a fair trial, given the adequate conditions in the Virginia court system. The ECtHR did, however, entertain the possibility, holding that "The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk."[335] This basis for a denial of extradition was extended in other cases discussed below and is of particular relevance today in the post–September 11 era.

The determination of whether extradition violates Article 3, and by extension any other article of the European Convention, turns on a factual analysis of the situation on the ground in the receiving state. This is not wholly compatible with the doctrine of non-inquiry, especially with regards to Article 6 of the European Convention concerning fair trial rights. Although still the norm, the doctrine of non-inquiry no longer applies with respect to the violation of certain fundamental rights. In certain situations the violation is clear, as with the death penalty in the United States.

However, the Court has imposed certain factual limits on extradition, namely whether "a sufficiently clear causal link between the removal and any ill-treatment which might have occurred."[336] This language was adopted in a case involving the return of Tamil asylum seekers to Sri Lanka who were subsequently physically abused and emotionally distressed. In that case,

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330 *Id*. at ¶¶ 88–89.

331 *Id*. at ¶¶ 97–99.

332 *Id*. at ¶ 111.

333 *Id*. at ¶¶ 101–104.

334 It should be noted that Protocol 6 of the European Convention, which explicitly outlawed the imposition of the death penalty, did not enter into effect until November 1, 1988. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty. Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Apr. 28, 1983, E.T.S. 114.

335 Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88 (1989), ¶ 113.

336 Vilvarajah and Others v. the United Kingdom, Application nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (1991), ¶ 105.

the Court ruled that a violation of Article 3 only obtains where the extradition is "unreasonable or arbitrary" if a causal link had been established.[337] As held by the Court in *Müslim v. Turkey*, the mere presence of instability in a country is not enough to establish a violation of Article 3 of the European Convention. To establish a violation of Article 3, and hence a limit on extradition, specific acts must be shown.[338]

Beyond limits imposed by Article 3, the European Court has also increasingly found violations for Article 6 of the Convention, which provides for the right to a fair trial. Article 6 states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The question of fair trial rights in extradition cases has taken on especial importance in the decade after September 11, 2001, when a significant number of Muslims were sought for prosecution for terrorism offences. Although Article 3 protections remain of prime importance in these cases, Article 6 has taken on new importance as a means of protecting individuals from sham trials.

A leading case with regard to Article 6 is the 2012 ruling in *Othman (Abu Qatada) v. United Kingdom*.[339] The *Othman* case involved the attempted extradition of Omar Othman, a Jordanian also known as Abu Qatada, from the United Kingdom to his country of citizenship to face trial for various charges related to terrorism. Othman had previously received asylum status in the United Kingdom on the basis of previous torture in Jordan. Based on allegations of terrorism, Othman was convicted in absentia in Jordan, which served as the basis of an extradition request to the United Kingdom. In 2002 Othman was taken into custody by the United Kingdom, leading to a six-year process of deportation attempts, leading to the application before the European Court. Othman's application alleged that he would likely be tortured

337 Vilvarajah and Others v. the United Kingdom, Application nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (1991), ¶ 105.

338 Müslim v. Turkey, App no. 53566/99 (2005).

339 Abu Qatada v. United Kingdom, App. no. 8139/09 (2012).

in Jordan in violation of Article 3 and that he would be unable to secure a fair trial, in violation of Article 6.

In the *Othman* case, the ECtHR relied on the language arising out of *Soering* that articulated a ground for denying extradition on the basis of a "flagrant denial of a fair trial in the requesting country."[340] In language resembling the justification offered in the *Soering* case, the court in *Othman* held that "the term 'flagrant denial of justice' has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein."[341] Such flagrant denials of justice include: where trials are conducted in absentia and where there is no provision to rehear the case or introduce new evidence,[342] where there are gross violations of the rights of the defense,[343] where these is extended detention without the right to challenge the validity of the detention,[344] and where there is lack of access to legal counsel.[345]

In the *Othman* case, the ECtHR noted, in particular, the use of evidence adduced under torture[346] would significantly infringe on Othman's Article 5 rights. In particular, the Court found that although torture evidence is not admissible under Jordanian law and the prosecution bears the burden of proving the admissibility of statements of third parties,

> the Court is unconvinced that these legal guarantees have any real practical value. For instance, if a defendant fails to prove that the prosecution was implicated in obtaining an involuntary confession, that confession is admissible under Jordanian law regardless of any prior acts of ill-treatment or other misconduct by the GID. This is a troubling distinction for Jordanian law to make, given the closeness of the Public Prosecutor and the GID. Furthermore, while the State Security Court may have the power to exclude evidence obtained by torture, it has shown little readiness to use that power. Instead, the thoroughness of investigations by the State Security Court into the allegations of torture is at best questionable. The lack of independence of the State Security Court assumes considerable importance in this respect.[347]

Accordingly, the European Court ruled that Othman's extradition to Jordan would amount to a violation of Article 6, without resorting to an analysis of other possible grounds for denying extradition, namely "the absence of a lawyer in interrogation, the prejudicial consequences of his notoriety, the composition of the State Security Court, and the aggravating nature of the length of sentence he would face if convicted."[348]

One final aspect of note is the possible re-extradition of individuals subject to the protections of the ECHR. In a 2012 case the ECtHR found violations for the mass expulsion of Somalis and Eritreans to Libya, as well as its traditional protection of Article 3 on several grounds, some of which are covered above but raised the question of subsequent removal of individuals to third states. In *Hirsi Jamaa and Others v. Italy* the Court ruled that an Italian policy to automatically transfer all refugees found on the high seas to Libya constituted a violation of Articles 3 and 13 of the European Convention (concerning the right to a remedy in Italy), as well as Protocol 4 to the ECHR. More important, the Court extended its protections to groups who can state a prima facie claim of possible violation as the basis of their membership in a

340 *Id*. at ¶ 258.

341 *Id*. at ¶ 259.

342 *See* Sejdovic v. Italy, Application no. 56581/00 (2006); Stoichkov v. Bulgaria, Application no. 9808/02 (2005); Einhorn v. France, Application no. 71555/01 (2001).

343 Bader and Kanbor v. Sweden, Application no. 13284/04 (2005).

344 Al-Moayad v. Germany, Application no. 35865/03 (2007), ¶¶ 82–89.

345 *Id*. at ¶¶ 102–108.

346 Abu Qatada v. United Kingdom, Application no. 8139/09 (2012), ¶ 272.

347 *Id*. at ¶ 278.

348 *Id*. at ¶ 286.

group. In particular, the Court held that "where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of [reports from international organizations such as Amnesty International], that there are substantial grounds for believing in the existence of the practice in question and his or her membership of the group concerned."[349]

Moreover, the ECtHR in *Hirsi Jamaa and Others v. Italy* held that where individuals may be subject to violations of Article 3, the guarantees of the European Convention cannot be evaded on the basis of flimsy assurances. The court held that

> Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States.[350]

This protection applies to further transfer of the individuals to a third country. The Court held that there was a risk of the applicants' repatriation to Eritrea and Somalia from Libya, and accordingly stated that

> the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.[351]

The *Hirsi Jamaa* cases raise some questions over the duty of the United Kingdom toward Julian Assange, a recent cause célèbre, in which the United Kingdom is attempting to extradite Assange to Sweden for investigation and prosecution for sexual assault, despite the real risk that he will be further extradited to the United States for prosecution and potential execution in connection with the release of U.S. government documents on the Wikileaks website. Although the United Kingdom has made representations that Assange could not be executed in the United States, this assurance is notably lacking with respect to other possible violations of Articles 3 and 6 in the United States.

With respect to assurances, the European Court's ruling in *Soering* turned in part on the inadequate nature of the assurance given by the Virginia prosecutor. Subsequent rulings have enunciated further the baseline requirements of the assurance. In a 2010 ruling in *Baysakov and Others v. Ukraine*[352] the Court concluded that, beyond the failure of the Ukraine to receive assurances from the proper organ of the Kazakh government before extraditing Baysakov, "the lack of an effective system of torture prevention, [makes] it…difficult to see whether such assurances would have been respected."[353] Accordingly, the Court has imposed a burden upon requested states not only to receive assurances, but also to ensure that the assurances will be respected.

Finally, following the practice described in Chapter VIII,[354] the case law of the ECtHR provides numerous examples of protections for political acts, membership in political and criminal groups, and the requirement of certain assurances.[355]

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349 Hirsi Jamaa and Others v. Italy, Application no. 27765/09 (2012), ¶ 119.

350 *Id*. at ¶ 129.

351 *Id*. at ¶ 156.

352 Baysakov and Others v. Ukraine, Application no. 54131/08 (2010).

353 *Id*. at ¶ 51.

354 *See also* Ch. VIII, Sec. 2.1.

355 *See, e.g.,* Chahal v. United Kingdom, Application no. 22414/93 (1996); Saadi v. Italy, Application no. 37201/06 (2008); Y.P and L.P. v. France Application No. 32476/06 (2010).

As indicated in the *Amkrane* case, pecuniary remedies can be awarded to applicants. Current practice of the ECtHR provides pecuniary awards for violations that have already been committed, as in the *Amkrane* case, as well as for lawyers' fees and other expenses. In the *Soering* case mentioned above, the Court awarded damages for lawyers' fees and other costs,[356] which is a standard practice of the Court. The Court did not, however, award compensatory damages, or "just satisfaction" to Soering, as his rights had not been violated.

Pecuniary awards for actual violations are provided for in Article 41 of the ECHR, which states, in pertinent part, that:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

In order to make an Article 41 claim, the applicant must obviously succeed in his/her claim of an actual violation for some other provision of the Convention. Further, the ECtHR has adopted language suggesting that pecuniary awards are only given in those situations in which the applicant suffers "non-pecuniary damage which cannot be compensated solely by the finding of violations."[357]

For example, in *Iskandarov v. Russia*, the Court found a violation of Articles 3 and 5 when Iskandarov was extradited from Russia to Tajikistan.[358] Iskandarov was a critic of the Tajik regime and leader of an opposition party. Due to his activism, Iskandarov took refuge in Russia and was subsequently charged by Tajik prosecutors with terrorism and other offenses in his homeland, prompting an extradition request to the Russian government. Iskandarov successfully challenged the extradition request in court, but was subsequently kidnapped by Russian security forces and illegally rendered to Tajik officials, who returned him to Tajikistan to face trial.[359] Upon his return to Tajikistan, Iskandarov was tortured and forced to confess to various crimes on the basis of which he was convicted and sentenced to twenty-three years imprisonment, where he remains despite international condemnation. Iskandarov's representatives filed suit in Russia, which was then pursued before the European Court, which found the violation and awarded just satisfaction for the violation.

> The Court has found violations of Articles 3 and 5 of the Convention on account of the applicant's unlawful extradition to Tajikistan and his unlawful detention by State agents. It accepts that the applicant must have sustained non-pecuniary damage which cannot be compensated for solely by the findings of violations. It finds it appropriate to award him EUR 30,000 in respect of non-pecuniary damage.[360]

It should be noted, however, that Iskandarov is still imprisoned and that his only remedy has been the 30,000 euro award. The award is, in any case, only one-tenth of the 300,000 euros Iskandarov requested.

In other cases, however, the finding of the violation was itself deemed to constitute just satisfaction. This was the case, for instance, in *Shamayev and Others v. Georgia and Russia*,[361] where the Court found a violation of Articles 3, 5, and 13. The case arose out of an incident in which a number of armed individuals crossed into Georgia from Russia and were apprehended there. The

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356 Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88 (1989), ¶ 125.

357 Shamayev and Others v. Georgia and Russia, Application No. 36378/02 (2005), ¶ 525.

358 Iskandarov v. Russia, Application No. 17185/05 (2010).

359 *Id*. at ¶¶ 25–32.

360 *Id*. at ¶¶ 156–157.

361 Shamayev and Others v. Georgia and Russia, Application No. 36378/02 (2005).

individuals were subsequently taken from their cells and surrendered to Russia, where they feared that they would be exposed to the death penalty. As with Iskandarov, the Court awarded damages, but the maximum granted was 8,000 euros in light of the more limited violation of the applicants' rights by the government of Georgia.[362] In one instance, where the applicant was subsequently released, the Court found that although "the applicant must have suffered non-pecuniary damage…the Court's finding affords him sufficient compensation in that respect."[363]

8. United States Remedies for Abduction Abroad

8.1. Remedies Available to U.S. Citizens for Physical Violence Abroad

Physical violence abroad committed against U.S. citizens by a U.S. agent or at the behest of the U.S. government gives rise to remedies in tort and under 28 U.S.C. § 1983.[364] If a private citizen of the United States, such as a bounty hunter or bail bondsman, commits physical violence against another citizen of the United States, the victim may seek redress in tort in any jurisdiction in which the defendant may be located, as torts are transitory and "follow" the defendant.[365]

If the violence is done abroad by a foreign agent and the victim is a U.S. citizen, the TVPA[366] provides a cause of action for victims of torture and the legal representatives of the victims of extrajudicial killing. This liability arises where "an individual, under actual or apparent authority, or color of law, of a foreign nation, subjects an individual to torture or extra-judicial killing," A cause of action under the Act is allowed regardless of the victim's citizenship.[367]

8.2. Remedies Available to Aliens for Physical Violence Abroad

If physical violence is done against an alien abroad by a U.S. agent, a private citizen of the United States, or a foreign agent, the alien may sue in U.S. district court under the ATCA.[368] The Act makes a suit for damages available to any plaintiff who is an alien and has been injured by a tort committed in violation of international law or a treaty of the United States, regardless of where the violence occurred.[369]

In 1980, the Second Circuit found torture to be a violation of international law in *Filartiga v. Pena-Irala*.[370] In that case, Dr. Joel Filartiga and his daughter Dolly, citizens of Paraguay, sued

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362 *Id*. at ¶ 525.

363 *Id*. at ¶ 526.

364 *See also* Elwood Earl Sanders, Jr., *In Search of an Alternative Remedy for Violations of Extradition Treaties*, 34 Sw. U. L. Rev. 1 (2004).

365 *See* Pratt v. Kelly, 585 F.2d 692, 695 (4th Cir. 1978) (stating "[a]ctions for personal injury or death are transitory and may be brought in any court having jurisdiction over the parties and the subject matter of the case").

366 Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73,

367 Torture Victim Protection Act of 1991, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73

368 28 U.S.C. § 1350 (1994). *See, e.g.*, Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. Int'l L. & Pol. 473 (1986).

369 The ATCA provides "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

370 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); *accord* Siderman de Blake v. Republic of Argentina, No. CV 82-1772-RMT (C.D. Cal. 1984).

Americo Peña-Irala, the former police chief of Asuncion, Paraguay, for the torture-murder of Dr. Filartiga's seventeen-year-old son, Joelito, in Paraguay. The plaintiffs and the defendant were all present in the United States when the suit was filed, although Peña-Irala was deported to Paraguay before the court rendered the final decision. The court found that international law prohibited torture[371] by persons acting under color of law and awarded the Filartigas $10 million in damages.

As noted in Chapter IV, the *Filartiga* decision expands the jurisdiction of U.S. courts for the protection of aliens from tortious actions that violate the law of nations.[372] Aliens forcibly abducted abroad may thus seek damages from their abductors under the ATCA.

Subsequent to the discovery that Dr. Alvarez-Machain was not the person intended by the United States to be kidnapped from Mexico, in that he had nothing to do with the torture and death of Agent Camarena, Alvarez-Machain filed suit under the ATCA.[373] The Ninth Circuit upheld the claimant's position, but the Supreme Court reversed, holding that neither the ATCA or the Federal Tort Claims Act provided a remedy for the alien despite the fact that the government controlled the abduction of the alien and had custody of him in the United States. The Supreme Court concluded that the alleged harm, namely the abduction, occurred in Mexico irrespective of whether the United States was the proximate cause of the harm. Subsequently the district court dismissed Alvarez-Machain's claim for damages under the Federal Tort Claims Act.

More recently, in *Mohamed v. Jeppesen Dataplan, Inc.*, claims have been brought against corporations under the ATCA for conspiring or aiding and abetting the U.S. government in the forced disappearance and torture of the named plaintiffs.[374] The plaintiffs, all of Middle Eastern or African origin and some with dual citizenship, were transported to various countries, including Morocco, Egypt, and Afghanistan, where they were tortured or otherwise subjected to brutal treatment. The plaintiffs alleged that Jeppesen provided the U.S. government with "direct and substantial services . . . thereby 'enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities,' " particularly by providing flight planning and logistical support services related to the flights transporting the plaintiffs to their final destinations.[375] The U.S. government intervened before Jeppesen answered the complaint, claiming that the state secrets privilege applied to prevent this suit from proceeding, as it would necessitate an inquiry into covert U.S. military and CIA operations abroad.[376] Although the district court declined to consider the evidentiary questions raised as it determined " 'the very subject matter of this case is a state secret,' " the Court of Appeals reversed the district court's grant of the government's motion to dismiss.[377] The Court of Appeals remanded the case to the district court for the discovery process to begin and the government to subsequently invoke the state secrets privilege once actual discovery is pending to determine whether the complaint

371 The Second Circuit did not provide a precise definition of torture. However, courts faced with similar cases in the future may use the definition in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, Dec. 10, 1984. *See* M. Cherif Bassiouni & Daniel Derby, *The Crime of Torture*, *in* 2 International Criminal Law 705 (M. Cherif Bassiouni, ed., 2d ed.) (1999); Bassiouni, *The Institutionalization of Torture under the Bush Administration*, *supra* note 85.

372 *See* Ch. IV (discussing Alien Tort Claims Act decisions subsequent to *Filartiga*).

373 Sosa v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), 542 U.S. 692 (2004), *vacated & remanded en banc*, 374 F.3d 1384 (2004).

374 *See* Mohamed v. Jeppesen Dataplan Inc., 579 F.3d 943 (9th Cir. 2009), *cert denied,* 131 S. Ct. 2442 (2011).

375 *Id.* at 951.

376 *Id.*

377 *Id.* at 952.

should be dismissed under the state secrets privilege.[378] After considering two bodies of state secrets privilege jurisprudence, one requiring dismissal on the pleadings of a suit where the " 'very subject matter' " of the suit is secret[379] and the other preventing the discovery of secret evidence when disclosure would threaten national security while not requiring dismissal of the entire suit,[380] the court reasoned that the *Totten* bar did not apply to third-party plaintiffs seeking compensation from a party to a clandestine contract involving torture, and that plaintiff's case did not depend on the existence of such clandestine contract.[381] The court reasoned that the better approach in this case was to adopt the *Reynolds* reasoning, which required a balancing of " 'the circumstances of the case' and the plaintiff's 'showing of necessity' for the evidence against the 'danger that compulsion of evidence will expose matters which, in the interest of national security, should not be divulged.' "[382]

This reasoning takes into account the policy concerns regarding separation of powers and national security while preventing the executive's effective immunization of questionable practices through declaring them "state secrets." It remains to be seen how other U.S. district courts and circuit courts of appeals will respond to similar suits. The Second Circuit, which had been at the forefront of allowing plaintiffs to pursue ATCA claims, has rejected the application of domestic concepts of corporate liability in regards to ATCA actions, and has shifted to analyzing corporate liability on the basis of international law principles.[383] This interpretation regarding determining the potential actors who may be held liable under the Alien Tort Claims Act appears to be an attempt by some courts to limit the number of Alien Tort Claims Act cases in the federal courts as part of the "vigilant doorkeeping" suggested by the Supreme Court in *Sosa v. Alvarez-Machain*.[384] However, the Supreme Court in *Sosa* indicated that international law was to govern the determination of the types of torts for which the ATCA can be used as a jurisdictional mechanism, and left open the question of whether international law should similarly apply to the determination of the scope of liability of the actor involved.[385] In *Kiobel*,[386] the Second Circuit continued this shift, holding that corporations are effectively immune from being sued under the ATCA, because hard international law relative to corporate entities remains in development with little legally enforceable regulation of corporate actors, and no international tribunal has yet imposed liability on a corporation.[387] The Second Circuit's decision in *Kiobel* has persuaded other jurisdictions in two cases to dismiss actions brought against corporations under the Act.[388]

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378 *Id.* at 961–962.

379 Totten v. United States, 92 U.S. 105 (1875); *Mohamed*, 579 F.3d at 952–953.

380 United States v. Reynolds, 345 U.S. 1 (1953); *Mohamed,* 579 F.3d at 952–953.

381 *Mohamed,* 579 F.3d at 954–955.

382 *Id.* at 955.

383 Mara Theophila, *"Moral Monsters" under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum Co.*, 79 Fordham L. Rev. 2859, 2862 (2011).

384 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

385 Theophila, *supra* note 382, at 2874 (discussing *Sosa*).

386 The *Kiobel* case was brought by indigenous environmental activists from the Niger Delta who claim that Royal Dutch Shell assisted the Nigerian government in repressing the indigenous people of the Delta.

387 The Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131–145 (2d Cir. 2010) conducted a review of cases, treaties, and submissions of publicists in reaching the conclusion that there is no customary international norm of imposing liability on corporations. *But see* Brief of *Amici Curiae* International Law Scholars in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (S. Ct. Dec. 21, 2011), *available at*: http://harvardhumanrights.files.wordpress.com/2012/01/10-1491-tsac-international-law-scholars.pdf

388 Viera v. Eli Lilly & Co., 2010 WL 3893791 (S.D. Ind. 2010); Flomo v. Firestone Natural Rubber Co., 744 F. Supp. 2d 810 (S.D. Ind. 2010).

It is also important to note that although the court allowed the *Mohamed* suit to go forward, there is no indication yet as to the likelihood of success or the government's ability to exclude evidence on state secrets grounds. It is conceivable that, upon plaintiff's request for discovery in this case, the government will raise a state secrets privilege, which could be granted and defeat the action by excluding essential evidence to prove the case. However, this decision remains significant in that it indicates a willingness on the part of the judiciary to refuse docile acquiescence in the face of potential abuses by the executive. Furthermore, this case has strained relations between the United States and the United Kingdom, as one of the plaintiffs was a UK citizen.[389]

In another case, the Second Circuit Court of Appeals considered extending a *Bivens* action to the context of extraordinary rendition.[390] Arar was the subject of USCIS[391] removal proceedings and was ordered removed to Syria after being found to be a member of a terrorist organization, based on his association with a suspected terrorist and other classified information.[392] The court summarized Arar's treatment in Syria as follows:

> Arar was in Syria for a year, the first ten months in an underground cell six feet by three, and seven feet high. He was interrogated for twelve days on his arrival in Syria, and in that period was beaten on his palms, hips, and lower back with a two-inch thick electric cable and with bare hands. Arar alleges that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and receiving intelligence learned from the interview.[393]

Arar's TVPA claim failed as the court held the conspiracy allegation did not "establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria."[394] The court turned to consider whether Arar could claim damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[395] The plaintiff in *Bivens* was allowed to pursue money damages for an unlawful search in violation of the Fourth Amendment.[396] *Bivens*, in which damages are payable by the offending officers, has the goal of deterring individual federal officers from engaging in constitutional violations, and has been rarely extended beyond the original context.[397] The majority reasoned that extraordinary rendition was a new "context" as "extraordinary rendition" was a potentially recurring scenario with similar legal and factual components.[398] The court then proceeded to

389 Johannes van Aggelan, *The Bush Administration's War on Terror: The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims*, 42 Case W. Res. J. Int'l L. 21, 73–75 (2009). When the UK High Court of Justice considered restoring certain redacted paragraphs in its judgment regarding reports made by the United States to the United Kingdom related to the detention and treatment of the claimant, the United Statea threatened to re-evaluate its intelligence sharing with the United Kingdom. The UK High Court of Justice left those paragraphs unrestored and redacted. *Id.* at 74–75.

390 Arar v. Ashcroft, 585 F.3d 559 (2d. Cir. 2009).

391 In March 2003 the Immigration and Naturalization Service was renamed the United States Customs and Immigration Service and brought under the umbrella of the Department of Homeland Security. For more information, see Ch. III, Sec. 5.

392 *Ashcroft*, 585 F.3d at 565–566. The required CAT finding was made, and a "Final Notice of Inadmissibility" was signed by Deputy Attorney General Larry Thompson, which stated that Arar's removal to Syria would be consistent with the CAT. *Id.* at 566.

393 *Id.* at 566.

394 *Id.* at 568.

395 *Id.* at 571.

396 *Id.* at 571.

397 *Id.*

398 *Id.* at 572.

apply the Supreme Court's two-part inquiry into whether a *Bivens* action should be extended to a new context: whether there is an alternative remedial scheme, and whether "special factors counsel [] hesitation" to create the remedy.[399] The majority noted that it was difficult to establish whether the INA provided an alternative remedial scheme, but there were sufficient "special factors" that counseled against extension of *Bivens* to this context; these special factors included diplomacy, foreign policy, and national security.[400] The majority expressed concern over reviewing and exposing executive policy in the conduct of foreign affairs, and also its concern that reliance on redacted materials, which would result from the confidential nature of the sensitive evidence that would be introduced regarding extraordinary rendition, would defeat the "Anglo-American legal tradition for open court proceedings."[401] Although each of the various dissents eloquently and in depth analyzed the flaws within the majority's opinion, perhaps the most obvious criticism comes in Justice Sack's dissent regarding the alleged "new context," which notes "it should not be forgotten that the full name of the Bivens case itself is Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics."[402]

United States courts have continued to eliminate civil remedies available to the victims of torture. Starting with its finding in *Sosa* and continuing with *Mohamed*, the Supreme Court has radically limited jurisdiction in TVPA suits to natural persons. More recently in *Kiobel* the Second Circuit affirmed the shift in jurisprudence when it held that ATCA suits cannot be brought against corporations.

The U.S. Supreme Court did not address corporations in the *Kiobel* judgement it handed down in Spring 2013, but did address jurisdictional questions, which limits possible civil remedies to individuals—the *Kiobel* judgment does not affect criminal matters. In *Kiobel* the Supreme Court determined that the ATS, also known as the ATCA, only applied to cases in the United States or on the high seas.[403] The Court's judgment makes clear that territoriality is not only the general rule, but the presumption of U.S. laws. That presumption can of course be rebutted by a showing that Congress intended the law in question to have extraterritorial effect. This would apply in such cases where statutory language is not clear and unambiguous about the jurisdictional scope and application of the said law. Thus, extraterritorial application of U.S. laws in terms of the merits is not excluded by *Kiobel*. Extraterritorial jurisdiction is also not excluded provided there is a legislative basis for the cause of action.

In *Kiobel*, the Supreme Court emphasized the historic context of the adoption of the Judiciary Act of 1789, more particularly on what would constitute a violation of international law at the time, relying on Blackstone's identification of what international law meant by universal jurisdiction. The Court stated

> We explained in Sosa that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of

399 *Id.*

400 *Id.* at 573–576.

401 *Id.* at 577.

402 *Id.* at 591.

403 In *Kiobel v. Royal Dutch Petroleum Co.* et al., 2013 WL 162893, the Supreme Court held that Congress alone may decide whether U.S. legislation is to be applied extraterritorially. Although the case did not address the powers of the president, it would logically follow that the executive branch, acting within the proper scope of its constitutional authority, may also engage in extraterritorial conduct that could be justiciable. The Court in *Kiobel* also distinguished between a cause of action that has extraterritorial effect and the statutory merit basis for the exercise of jurisdiction. The *Kiobel* case addressed the Judiciary Act of 1789 and reviewed its evolution, particularly focusing on *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004). The Court in *Sosa* recognized that the ATS is a jurisdictional statute that provides for U.S. jurisdiction by recognizing private claims under federal common law for violations arising under international law. Sosa, however, emphasized that such violations should be "specific,

the rights of ambassadors, and piracy. 542 U.S., at 723, 724; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone—in describing them—did so in terms of conduct occurring within the forum nation. See ibid. (describing the right of safe conducts for those "who are here"); 1 id., at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); id., at 245–248 (recognizing the king's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. De Vattel, Law of Nations 465 (J. Chitty et al. transl. and ed. 1883) ("[O]n his entering the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations . . . ").

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legion—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. Respublica v. De Longschamps, 1 Dall. 111, 1 L.Ed. 59 (O.T. Phila.1784); Sosa, supra, at 716–717, and n. 11. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because " 'neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors,' " the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641–642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See Bolchos, 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); Moxon, 17 F. Cas. 942 (wrongful seizure in United States territorial waters).

These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

. . .

Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. See 4 Blackstone, supra, at 72 ("The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, e.g., Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

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universal, and obligatory"; *id.* at 732. The Supreme Court in *Kiobel* also addressed the Torture Victim Protection Act of 1991, 28 U.S.C. §1350, and also the Genocide Accountability Act of 2007, 18 U.S.C. § 1090(e), which provides jurisdiction in the United States for the offense of genocide, irrespective of where the offense was committed if the alleged offender is present in the United States. The *Kiobel* judgment, in a very clear manner, reaffirms the principle of territoriality of U.S. laws.

> Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, supra, at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See Morrison, 561 U.S., at —— (slip op., at 16) ("[W]hen a statute provides for some extraterritorial application, the presumption against extra-territoriality operates to limit that provision to its terms"); see also Microsoft Corp., 550 U.S., at 455–456.[404]

The *Kiobel* decision, however, leaves open a number of significant questions that relate not only to the Alien Tort Statute (ATS, also known as the ATCA), but also to the TVPA, as well as the evolving meaning of "international law." As stated by Justice Breyer in his concurrence

> The majority nonetheless tries to find a distinction between piracy at sea and similar cases on land. It writes, "Applying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the *territorial* jurisdiction of another sovereign and therefore carries less direct foreign policy consequences." *Ante,* at 10 (emphasis added). But, as I have just pointed out, "[a]pplying U.S. law to pirates" *does* typically involve applying our law to acts taking place within the jurisdiction of another sovereign. Nor can the majority's words "territorial jurisdiction" sensibly distinguish land from sea for purposes of isolating adverse foreign policy risks, as the Barbary Pirates, the War of 1812, the sinking of the *Lusitania,* and the Lockerbie bombing make all too clear.
>
> The majority also writes, "Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction." *Ibid.* I very much agree that pirates were fair game "wherever found." Indeed, that is the point. That is why we asked, in *Sosa,* who are today's pirates? Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." 1 Restatement § 404 Reporters' Note 1, p. 256 (quoting *In re Demjanjuk*, 612 F.Supp. 544, 556 (N.D. Ohio 1985) (internal quotation marks omitted)). See Sosa, supra, at 732. And just as a nation that harbored pirates provoked the concern of other nations in past centuries, see *infra,* at 8, so harboring "common enemies of all mankind" provokes similar concerns today.
>
> Thus the Court's reasoning, as applied to the narrow class of cases that *Sosa* described, fails to provide significant support for the use of any presumption against extraterritoriality; rather, it suggests the contrary. See also *ante,* at 10 (conceding and citing cases showing that this Court has "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application").[405]

In the opinion of this writer, nothing in this decision should be interpreted as constituting a jurisdictional limitation to a party having a claim arising under international law, particularly when such a claim is also based on treaties ratified by the United States, which provide for extraterritorial jurisdiction, as stated in the concurring opinion. That said, all cases involving "extraordinary rendition" against the United States and U.S. public officials have been dismissed or denied by U.S. courts.[406]

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404 *Kiobel*, 2013 WL 162893 at *11–12.

405 *Id.*

406 *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). "The ECtHR, however, found several violations of the European Convention of Human Rights, including the prohibitions on torture, arbitrary detention, the duty to investigate, the right to the truth, and the right to an effective remedy." El-Masri v. The Former Yugoslav Republic of Macedonia,

9. Policy Considerations

There are many unnecessary difficulties in the extradition process that stand in the way of obtaining legitimate results through affirmative and efficient legal techniques. The alternatives to the legitimate extradition process are appealing to state decision-makers entrusted with public safety and security issues because of the failure of states to recognize the binding legal nature of the principle *aut dedere aut judicare* in extradition processes.[407] Thus, they are confronted with a choice between two processes, one, which is *means*-oriented and the other which is *result*-oriented. The choice between these divergent processes depends on the value-oriented goals of the system of justice as administered in the particular state.

The preservation of minimum world order requires making a distinction between irregular situations that result from the cooperative undertakings of interested states and situations where one state resorts to a method that violates the territorial integrity, sovereignty, or legal processes of another state. In both types of instances, the main deterrent to the state's use of such methods would be the recognition of a principle of legality of process that would disallow the application of *mala captus bene detentus*, and establish the primacy of a formal legal process over any irregular processes by declaring any resort thereto as unlawful under international law. Such, however, is still not the case, even though the writings of publicists continue to decry violations of international due process of law. In the case where one state acts without the cooperation or consent of another, threats to a minimum world order include:

1. Violations of the sovereignty, territorial integrity, and domestic legal processes of the state of refuge.

2. Violations of the individual's right to freedom from arbitrary arrest and detention, and to international due process and fairness, and to protection against torture and extrajudicial execution.

3. Violations of the integrity of the international Rule of Law.

Insofar as instances of mutual cooperation and consent between agents of both interested states are concerned, threats to a minimum world order include:

1. Violations of the individual's right to freedom from arbitrary arrest and detention and to international due process and fairness, and protection against torture and extrajudicial execution.

2. Violations of the integrity of the international Rule of Law.

States should weigh the negative consequences of these outcomes in contrast to the benefits of the occasional securing of the custody of a wanted person who may be unreachable though the lawful process of extradition. States should also take into consideration the loss of moral authority by resorting to unlawful means of apprehending persons they seek for investigation, trial, or punishment arising out of a valid legal judgment. Last, states should also take into account the risks of inter-state conflict when their actions, as described above, result in another state's reactions to violations of its sovereignty and dignity. The combination of all of the above weighs in favor of making lawful extradition processes work against unlawful alternatives.

These world order considerations supplement considerations relative to the respect for internationally protected human rights, and to the integrity of national judicial processes.

App. No. 39630/09 Eur. Ct. H.R. (2012) For an overview, *see* Open Societies Institute, El-Masri v. Macedonia, *available at*: http://www.soros.org/initiatives/justice/litigation/macedonia (last visited Aug. 4, 2013).

407 *See* Ch. I, Sec. 3.

The conclusion is that alternative devices to extradition should not be allowed; instead, extradition needs to be made more effective. The practice reveals that this subsystem of alternative extradition devices developed mainly because the practical considerations stated above subverted the formal process. If this is permitted to continue, it may well render the formal extradition process obsolete and useless. The best policy against abduction and other forms of unlawful seizures is the universal recognition of the duty to prosecute or extradite as discussed in Chapter I.

Chapter VI

Theories of Jurisdiction and Their Application

Contents

1. Introduction

Extradition, whether by treaty, reciprocity, comity, or on the basis of national legislation, is premised on the assumption that the interests of a state have been affected by the criminal conduct of a person who is not within that state's jurisdiction, but is within the jurisdiction of another state. The requesting state has subject-matter jurisdiction, while the requested state has *in personam* jurisdiction. Through extradition, the requesting state obtains *in personam* jurisdiction by means of the requested person's surrender from the requested state.

Jurisdictional issues are foundational for active and passive extradition (meaning for the requesting and requested state). Nevertheless, few, if any, treaties refer to applicable jurisdictional bases, or to their ranking in cases of jurisdictional conflicts and for purposes of priority in extradition.

Most treaties use terms such as "within the jurisdiction of the requesting state" without further clarification. United States legislation and bilateral extradition treaties allow for any jurisdictional basis that the requesting state may rely upon under its laws, even if the particular basis is not one that is practiced under U.S. law. This system presupposes that: (1) the interests of the requesting state have been affected in such a manner that it seeks to subject the individual in question to its criminal jurisdiction; and, (2) the state wherein the individual is located does not have a greater interest in the person than the requesting state, and will therefore not deny the request. This balancing of interests theory bears upon the granting or denying of extradition, and also on the outcome of competing jurisdictional claims between the requesting and requested states or between two different requesting states.

The term "jurisdiction" in international law refers to two aspects of the authoritative decision-making process: the first is rule-making, and the second is rule-enforcing. Both of these aspects are present in extradition, because initiating the process presupposes that the requesting state has a legal basis to exercise its authoritative control over the requested individual, because: (1) it has jurisdiction over the subject matter or a given interest that has been or is being affected by the conduct of the person sought (*ratione materiae*); and (2) once surrendered, that state would have *in personam* jurisdiction over that person (*ratione personae*). Consequently, the requesting state seeks from the requested state, which has actual jurisdictional control over the individual, to formally surrender that individual and relinquish jurisdiction over him/her. Prior to this the requesting state must satisfy to the requested state that it has jurisdiction over the subject-matter of the crime for which the individual is sought for prosecution or punishment thereof.

It is universally recognized that every state has the power to regulate conduct within its territory, and beyond it if such conduct affects its legitimate national interests, which includes regulating its own citizens' conduct abroad and protecting them abroad from harm.[1] The power

1 Extraterritorial criminal jurisdiction is a complex question because it implies that one state can exercise its jurisdiction over what may be the territorial jurisdiction of another state. Extraterritorial jurisdiction extension may violate the sovereignty of other states. It also overlaps with the national criminal jurisdiction of other states, and conflicts with those laws and policies. Consequently, it creates potential for conflicts between states. *See* George Lewis, Foreign Jurisdiction and the Extradition of Criminals 30 (1859); Christopher L. Blakesley, *Extraterritorial Jurisdiction, in* 2 International Criminal Law 85 (M. Cherif Bassiouni ed., 3d ed. 2008) [hereinafter Bassiouni, ICL]; Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 4 Utah L. Rev. 685 (1984); William Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 Am. Crim. L. Q. 32, 32–33 (1967); S.Z. Feller, *Concurrent Criminal Jurisdiction in the International Sphere*, 16 Israel L. Rev. 40, 43 n.4 (1981); S.Z. Feller, *Jurisdiction Over Offenses with a Foreign Element*, *in* A Treatise on International Criminal Law (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1973) [hereinafter Bassiouni & Nanda Treatise]; B. James George, Jr., *Federal Anti-Terrorist Legislation, in* International Criminal Law: A Guide to U.S. Practice and Procedure (Ved

of a state to proscribe conduct within its territory or conduct that affects its interests is concomitant to the principle of sovereignty.[2] Thus, the interrelationship between sovereignty and jurisdiction delineates the extent and limits of a state's power to proscribe conduct in relationship to what other states may exercise. However, as conduct performed by individuals (or legal entities in some systems) may be committed within and without the territory of a state and can affect one or more interests of one or more states, the power to proscribe conduct may rest on several theories and, consequently, may result in conflicts of jurisdictional assertion between states. These jurisdictional conflicts necessarily assume an international character. Guidelines are, therefore, needed for the resolution of such conflicting claims.

Five theories of jurisdiction are recognized in international law as giving rise to rule-making and rule-enforcing power by national authoritative decision-making processes.[3] These theories enjoy varying degrees of recognition with respect to rule-making and rule-enforcing power

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P. Nanda & M. Cherif Bassiouni eds., 1987); B. James George, Jr., *Federal Anti-Terrorist Legislation*, *in* Legal Responses to International Terrorism: U.S. Procedural Aspects 25 (M. Cherif Bassiouni ed., 1987); B. James George, Jr., *Jurisdictional Bases for Criminal Legislation and Its Enforcement*, 1983 Mich. Y.B. Int'l Legal Stud. 3; B. James George, Jr., *Extraterritorial Application of Penal Legislation*, 64 Mich. L. Rev. 609, 612 (1965–66); Roland Perkins, *The Territorial Principle in Criminal Law*, 22 Hastings L. J. 1155 (1971); Lotika Sarkar, *The Proper Law of Crime in International Law, in* International Criminal Law 60, 60–76 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

2 One scholar states:

> The most important right—and duty—of a state is jurisdiction. It is solidly established in jurisprudence . . . From the viewpoint of sovereignty, jurisdiction means internal sovereignty, exclusive control over all persons and things within its territory. There are, of course, restrictions, even upon the internal administration of a state, set by international law and they are constantly increasing in number as the needs of the community rise above the claims of the state. "The extent of both the right and the duty of a State to do justice within its own domain, as well as elsewhere, is also fixed by international law." The jurisdiction of a state is simply the amount of control left to that state by the community of nations; or, if the statement be preferred, the powers reserved to the states after they have delegated to the community the exercise of certain powers. In practice, vast powers are left to the states, and the community interferes very little with their internal administration. It should be noted that the state not only administers its own affairs, but acts also as the agent of the community of nations to enforce international law within its territory.

Clyde Eagleton, International Government 87–88 (3d ed. 1957). *See* also Oppenheim's International Law 462–488 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); 1 Lassa Oppenheim, International Law: A Treatise 263 (Hersch Lauterpacht ed., 8th ed. 1955). Another authority concludes:

> [A]ll states have certain sovereign powers which they can exercise without transgressing the rights of other states under international law. If they fail to exercise these powers, it is because either they have voluntarily placed a disability on that exercise, perhaps in the form of a domestic constitutional limitation or they have not considered it necessary, as a practical matter, to exercise their powers.

See George, *Extraterritorial Application*, *supra* note 1.

Article 2 of the Draft Declaration on Rights and Duties of States, prepared in 1949 by the International Law Commission of the United Nations, states:

> Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

Report of the International Law Commission, 1st Sess., June 24, 1949, at 7–8, *reprinted in* 1949 Y.B. Int'l L. Comm'n 287 (1949).

3 The theories of jurisdiction discussed herein are representative of the position of the United States, except maybe for universal jurisdiction, discussed *infra* Sec. 7, about which the United States is ambiguous in law and practice. *See* Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987) [hereinafter Restatement (Third)]. *See* also *Harvard Research in International Law: Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 443 (Supp. 1935) [hereinafter Harvard Research Project] (discussing jurisdiction with respect to crime).

and include: (1) *Territorial* (*infra* Section 2), based on the place of commission of the offense; (2) *Active Personality or Nationality* (*infra* Section 3), based on the nationality of the accused; (3) *Passive Personality* (*infra* Section 4), based on the nationality of the victim; (4) *Protective* (*infra* Section 5), based on the national interest affected (and as such related to the passive personality); and (5) *Universality* (*infra* Section 7), based on the international character of the offense.

It must be noted that whenever the term "jurisdiction" is used, it is inclusive of any one or all of these theories, or jurisdictional bases. However, if a specific term such as "territory" is used in a treaty or national legislation, it refers more narrowly to the territorial theory of jurisdiction,[4] with its potential extensions under the national legislation of the requesting state.[5]

Presumably all parts of the world are either subject to the sovereignty of a given state or are part of special status territories, namely militarily occupied territories and areas over which there is a treaty or agreement that regulates jurisdiction, such as status of forces agreements.[6] In the case of the former, it is both conventional and customary law of armed conflicts that apply. There are also what this writer refers to as "special environments"[7] such as the high seas and Antarctica, space and outer space, which are regulated by international treaties and also by customary international law. What distinguishes these "special environments" is essentially the fact that they are not under the sovereignty of exclusive jurisdiction of any one state. They are environments open to all states, subject to certain limitations as to their use, such as the non-utilization of the ocean's bottom for weapons, as well as the peaceful use of Antarctica, outer space, and celestial bodies. States can exercise limited exclusive jurisdiction on their vessels, submarines, aircraft, spacecrafts, satellites, and exploratory equipment on celestial bodies, as well as the persons therein. By extension of territorial jurisdiction,[8] since 2001 the U.S. government has attempted to artificially create an *in limbo* jurisdictional theory in connection with its detention facility in territories leased from Cuba in Guantanamo Bay. But leased territories are part of the state's territorial jurisdiction; consequently, there is not such thing as *in limbo* jurisdictional territory.[9]

2. Territorial Jurisdiction and Its Extensions

The theory of territorial jurisdiction, often referred to as the *territorial principle* because of its recognition by all states, is the basis on which a state proscribes and enforces rules of conduct within its legal boundaries.[10] The territorial principle, more than any other, is concomitant with sovereignty, and, therefore, all states adhere to it.

Every state exercises jurisdiction over all persons, whether they are nationals, resident or non-resident aliens, legal entities, or objects tangible or intangible within its physical boundaries,

4 *See infra* Sec. 2.

5 *Id.*

6 *See infra* Sec. 2.1.

7 *See infra* Sec. 2.4.

8 *See infra* Sec. 2.

9 This was argued in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), where the Supreme Court held that the treaty obligations of the United States, contained in the Geneva Convention, were applicable. *See generally* M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (2010).

10 For various treaty provisions discussing the effect of whether the offense was committed outside the territory of the requesting state, *see* Extradition Agreement with Malta, art. 2(4), May 18, 2006, S. TREATY DOC. 109–117 ("If the offense has been committed outside the territory of the Requesting State, extradition shall be granted . . . if the laws of the Requested State provide for the punishment of an offense committed outside of its territory in similar circumstances. If the laws of the Requested State do not [so] provide . . . , the executive authority of the Requested State, at its discretion, may grant extradition . . . .");

except where a special jurisdictional immunity exists.[11] The right to proscribe and enforce rules of conduct within a state is not, however, absolute. Certain limitations exist that restrict or compete with the exclusive jurisdiction of states. These limitations may be self-imposed under national law or may be imposed by international law.[12]

Chief Justice Marshall stated the interrelationship between sovereignty and territorial jurisdiction in the case of the *Schooner Exchange v. McFadden*:[13]

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of its restriction, and an investment of the sovereignty, to the same extent, in that power, which could impose such restriction.[14]

This position, adopted by Chief Justice Marshall, has been carried rather consistently throughout U.S. extradition law and practice, even though it is questionable on the basis of its absoluteness. In the twentieth century international law moved away from this absolutist position, especially in the wake of the Nuremberg and Tokyo trials after WWII.

Treaties, as well as the writing of some scholars, use the terms "territory" and "jurisdiction" interchangeably. Territory and jurisdiction, however, do not have the same juridical meaning. Jurisdiction is a legal theory whereby a political entity, namely a state, claims the power to proscribe and

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Hungarian Extradition Treaty, art. 2(4), Dec. 1, 1994, S. TREATY DOC. 104–105; Extradition Treaty with the Bahamas, art. 2(4), Mar. 9, 1990, S. TREATY DOC. 102–117 ("An offense described in this Article shall be an extraditable offense whether or not the offense was committed within the territory of the Requesting State. However, if the offense was committed outside the territory of the Requesting State, extradition shall be granted if the law of the Requested State provides for punishment of an offense committed outside of its territory in similar circumstances"); Italian Extradition Treaty, art. III, Oct. 13, 1983, 35 U.S.T. 3023 ("When an offense has been committed outside the territory of the Requesting Party, the Requested Party shall have the power to grant extradition if its laws provide for the punishment of such an offense or if the person sought is a national of the Requesting Party"); Extradition Treaty with Uruguay, art. 3, ¶2, Apr. 6, 1983, 35 U.S.T. 3197 ("…When the offense for which extradition has been requested has been committed outside the territory of the requesting Party, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances"); French Extradition Treaty, art. 2(4), entered into force Apr. 23, 1996, S. TREATY DOC. 105–113 ("Extradition shall be granted for an extraditable offense committed outside the territory of the Requesting State, when the laws of the requested Party authorize the prosecution or provide the punishment of that offense in similar circumstances").

11 *See infra* Sec. 8.

12 6 Marjorie Whiteman, Digest of International Law 889–890 (1963) [hereinafter Whiteman Digest]. As stated by Whiteman:

> While a state which has an offender against its laws in custody can prosecute him for offenses committed within its jurisdiction, as it defines that jurisdiction, difficulties may arise when it attempts to extradite an offender from a country which does not share its concept of criminal jurisdiction. Many states have, under their laws, jurisdiction to punish their nationals for offenses committed anywhere, whereas common law countries, such as the United States and Great Britain, exercise jurisdiction, generally, only over crimes committed within their territory. Accordingly, these latter countries usually apply their concept of jurisdiction and limit, either specifically or by interpretation of the extradition agreement involved, their obligation to grant extradition to cases where, were the circumstances reversed, they would have jurisdiction over the offense.

Id.

13 Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). *See also* United States v. Rodriguez, 182 F. Supp. 479, 487–488 (S.D. Cal. 1960), *aff'd in part, rev'd in part* Rocha v. United States, 288 F.2d 545 (9th Cir. Cal. 1961).

14 *Schooner Exchange*, 11 U.S. at 116.

enforce its laws, whereas territory is the physical sphere of exercise of that power to prescribe and enforce.

There are numerous cases in which a distinction has been drawn between the two legal concepts in the context of treaty interpretation. In one such instance, the Judicial Committee of the Privy Council refused to surrender one Kossekechatko and others to France, which had exercised its jurisdiction over the relators and had found them guilty. England held that only Article I of the 1878 Extradition Treaty with France applied:

> [T]o crimes committed within the territory of the power . . . seeking extradition . . . In their Lordship's opinion no one of the appellants was liable to be extradited under the treaty, unless the crime of which he was convicted was, in fact, committed within the territory of the French Republic.[15]

A similar view was expressed by the Attorney General of the United States, in the case of *In re Stupp*, when he voiced his recommendation:

> I am quite clear that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liability of the criminal, but to *locality*. The *locus delicti*, the place where the crime is committed, must be within the jurisdiction of the party demanding the fugitive.[16]

In the United States, jurisdiction refers equally to rule-making and rule-enforcing power. In both cases, the same condition exists: namely that the authoritative decision-making body must exercise a certain dominion and control over the territory to which it claims that such power extends. A question arises as to whether the two aspects of jurisdiction, rule-making and rule-enforcing, must exist concurrently within the same territorial sphere over which dominion and control is exercised by a given state.

There is probably no more illustrative case than *In re Lo Dolce.*[17] During WWII, Major William Holohan and Sergeant Carl Lo Dolce of the U.S. Army were assigned to a mission behind enemy lines in German-occupied Italy. Major Holohan was reported killed on the mission. After the war ended, it was alleged that the sergeant had killed him. Lo Dolce, who returned to live in New York, could not be charged under the Uniform Code of Military Justice because he was no longer subject to its jurisdiction.[18] Moreover, he could not be tried in the United States because the alleged crime had not been committed within its territorial jurisdiction. The United States did not at that time rely on the application of any doctrine or theory of jurisdiction except the territorial principle, and hence Lo Dolce could only be tried where the alleged crime took place. The Italian authorities, therefore, requested the extradition of Lo Dolce in 1952, pursuant to the Treaty of 1869

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15 John B. Moore, A Treatise on Extradition and Interstate Rendition 135 (1891) [hereinafter Moore Extradition].

16 *In re Stupp*, 23 F. Cas. 281 (C.C.S.D.N.Y. 1873) (No. 13,562).

17 *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y. 1952). *See also In re* Martin, [1925–1926] Ann. Dig. 303–304 (No. 229) (Royal Hung. Crim. Ct. of Budapest, Hung.). Czechoslovakia requested the extradition from Hungary of one Martin M., who was accused of having committed larceny in January and February 1921, at a location formerly within Hungarian territory, but which was ceded to Czechoslovakia by the Treaty of Trianon, which came into force on July 21, 1921. Extradition was requested as an act of comity, there being no extradition treaty between the two countries. The Hungarian Court held that extradition could not be granted as the crime had been committed in Hungarian territory. *See* United States v. Icardi, 140 F. Supp. 383 (D. D.C. 1956).

The Department of State's position with respect to the United States' jurisdiction to prosecute fugitives on the basis of the victim's U.S. citizenship is that "the United States under its law may prosecute for offenses committed outside the special maritime and territorial jurisdiction of the United States as defined in § 7 of Title 18 of the United States Code." Extradition: Double Criminality, 1975 Digest § 5, at 177.

18 *See* M. Cherif Bassiouni, Criminal Law and Its Processes 573–583 (1969).

then in force between Italy and the United States. The U.S. district court recognized the criminality of the acts charged and that they fell under the treaty provisions. However, the court felt that Italy had no jurisdiction, because the territory wherein the alleged crime took place had been under the control of the German forces that had then occupied it. Accordingly, Italy exercised no dominion and control at that time over the territory, and thus had no jurisdiction over that territory when the alleged crime was committed. Consequently, Italy could not be granted the surrender of Lo Dolce, as he had not been amenable to Italian jurisdiction when he allegedly committed the crime. Accordingly, had Germany attempted to extradite Lo Dolce, it would have probably failed, as it would have been argued, inter alia, that Germany had no present jurisdiction to enforce any laws, which it might have had at the time and place of the alleged crime. It is also doubtful that German laws would have made the killing of an enemy officer a crime. Barring that argument, however, Germany could have prosecuted Lo Dolce. The question of dominion and control as a basis for territorial jurisdiction was also in part relied upon in the earlier denial of the surrender of Andriju Artukovic to Yugoslavia for alleged crimes committed in that country during WWII.[19]

A unique factual situation illustrating the interplay of territorial jurisdiction and extradition arose in the case of *Munaf v. Geren*.[20] In the context of the 2003 war in Iraq, a multinational coalition force, the Multinational Force-Iraq (MNF-I) was established in accordance with UN Security Council Resolutions with the purpose of detaining pending investigation and prosecution by Iraqi courts under Iraqi law individuals alleged to have committed hostile or warlike acts in Iraq.[21] The MNF-I, at the request of the Iraqi government, operated under the unified command of U.S. military officers.[22] During its operations, the MNF-I detained two individuals with dual citizenship (Iraqi and United States). One individual, Shawqi Omar, was accused of providing assistance to Musab al-Zarqawi and of planning the kidnappings of foreigners.[23] He was labeled an "enemy combatant" in the "war on terror" and taken into the custody of the MNF-I in 2004 as he was considered a security threat to Iraq.[24] The other, Mohammad Munaf, was detained on the belief that he had been responsible for orchestrating the kidnapping of a group of Romanian journalists with whom he had traveled to Iraq as a translator and guide.[25] Although Munaf had initially confessed to facilitating the kidnapping, he later withdrew his confession, which, in part, caused the Iraqi Court of Cassation to vacate his conviction and remand his case to the Central Criminal Court in Iraq for further proceedings.[26] Both Omar

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19 United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). Subsequently, when the political climate changed, Artukovic's extradition to Yugoslavia to answer charges of murder was decided. *In re Extradition of* Artukovic, 628 F. Supp. 1370 (C.D. Cal. 1986); Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986), *subsequently overruled by,* Lopez-Smithy v. Hood, 121 F. 3d 1322 (9th Cir. 1997).

20 Munaf v. Geren, 553 U.S. 674 (2008). This was a complex decision discussing the availability of a habeas corpus action to obtain judicial review of a decision to transfer an American citizen to a foreign state (Ch. XI, Sec. 1.2), the proper review of claims that an individual may be subjected to torture for compliance with Article 3 of the U.N. Convention against Torture (Ch. VII, Sec. 7.3), and whether extradition proceedings were even applicable under the circumstances (Ch. II, Sec. 4.8). These issues are discussed in the respective chapters.

21 *Munaf*, 553 U.S. at 679. U.N. Doc. S/Res/1546, ¶ 10 (June 8, 2004); U.N. Doc. S/Res/1637 (Nov. 11, 2005); U.N. Doc. S/Res/1723 (Nov. 28, 2006).

22 *Munaf*, 553 U.S. at 679.

23 *Id.* at 681.

24 *Id.* at 681–682.

25 *Id.* at 683.

26 *Id.* at 684.

and Munaf, through next-friend petitions, challenged their continued detentions in habeas corpus proceedings in Washington, DC.[27] In both cases, the federal district court and court of appeals refused to issue injunctions effectively preventing the petitioners' release to Iraq, reasoning along different channels that the Iraqi government had the right to try individuals captured in Iraqi territory.[28]

In *Munaf v. Geren*, there was no issue as to whether the relators were within the government's custody, as the MNF-I, under whose control the relators were, was itself under the control of the president of the United States, bringing the jurisdictional inquiry before the Court to an end.[29] It is significant that even though the habeas petitioners in *Munaf* were physically in Iraq, nowhere near the physical custody of the District of Columbia, both the D.C. Circuit Court and the Supreme Court found jurisdiction to review the habeas petition, and the U.S. Supreme Court even went to the merits of the petition before it.

Regarding the merits, the Supreme Court framed the question in terms of a state's sovereignty within its own territory, namely "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."[30] The petitioners sought release without transfer to Iraqi custody, a result that would have interfered with Iraq's sovereign right to punish offenses against its law committed within its borders.[31] The Supreme Court relied heavily on the theory that a nation enjoys "exclusive and absolute" jurisdiction within its own territory, which includes the right of foreign nations to try American citizens for crimes against that nation's laws committed within that nation's territory.[32] This principle of territorial jurisdiction carried such weight with the Supreme Court that it rejected the argument that extradition prevailed over the simple handing over of these two dual-nationals to Iraq without going through the extradition process, even though an extradition treaty was in effect between the two countries.[33] The court held:

> this is not an extradition case, but one involving the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory. In the extradition context, when a " 'fugitive criminal' " is found within the United States, " 'there is no authority vested in any department of the government to seize [him] and surrender him to a foreign power,' " in the absence of a pertinent constitutional or legislative provision. *Ibid.* But Omar and Munaf voluntarily traveled to Iraq and are being held there. They are therefore subject to the territorial jurisdiction of that sovereign, not of the United States. Moreover, as we have explained, petitioners are being held by the United States, acting as part of the MNF-I, at the request of and on behalf of the Iraqi Government. It would be more than odd if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained.[34]

It is surprising that the Supreme Court failed to appreciate the significance of the fact that petitioners were held by U.S. forces on U.S. military bases in Iraq, and that U.S. forces applied the Uniform Code of Military Justice (UCMJ) to U.S. personnel on its bases to the exclusion

27 *Id.* at 682, 684–685.

28 *Id.* at 682–685.

29 *Id.* at 685–686.

30 *Id.* at 689.

31 *Id.* at 692.

32 *Id.* at 694–695.

33 Extradition Treaty Between the Kingdom of Iraq and the Republic of the United States, U.S.–Iraq, June 7, 1934, 49 Stat. 3380.

34 *Munaf*, 553 U.S. at 704.

of Iraqi law. At the time the United States and Iraq had not entered into an agreement on jurisdiction over U.S. bases and U.S. personnel.[35] Extradition applies to situations where an individual is detained by one state pending transfer to another state for continued detention. The requirement of legal justification for executive action in surrendering an individual to a foreign government is expressed in *Valentine v. United States ex. rel. Neidecker*,[36] and as argued by this writer and other scholars, is wholly applicable to a situation where U.S. citizens are in the custody of the United States from whom another state seeks their surrender.[37] The *Valentine* decision also concerns separation-of-powers principles and the need for a check by the judiciary on eExecutive discretion in actions deemed arbitrary or in violation of the Constitution and laws of the United States, as discussed in Chapter II.[38]

As Amici for Omar and Munaf argued:

> This is perhaps best illustrated by posing this question: If Romania gave credence to the allegations against Mr. Munaf—to wit, that he participated in the kidnapping of three Romanian journalists with whom he traveled from Romania to Iraq—how would Romania go about securing his extradition to Romania? The State of Iraq lacks effective control and custody of Mr. Munaf, and thus could not extradite him to Romania. If Romania wanted to seek the extradition of Mr. Munaf, it could only do so by making an extradition request to the U.S., under the Extradition Treaty between Romania and the U.S., 44 Stat. 2020 (made July 23, 1924, entered into force April 7, 1925), supplemented by 50 Stat. 1349 (made Nov. 10, 1936, entered into force July 27, 1937). That is because only the U.S. would have the ability to grant extradition, and, in fact, transfer custody of Mr. Munaf to Romania (assuming all applicable treaty and statutory standards were met).[39]

Thus, although Iraq may have had a jurisdictional basis upon which to base its extradition request for Omar and Munaf, it would still have had to request such extradition. One cannot help but wonder why the Department of Defense, Department of State, and Department of Justice did not ask the government of Iraq to file an extradition request pursuant to the existing treaty[40] and pursuant thereto grant extradition. It surely would have been less cumbersome than having to go through judicial proceedings and then have the Supreme Court perform mental contortions to reach a legally questionable result when the alternative would have been a valid, legal result.

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35 Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.–Iraq, Nov. 17, 2008. *See also* M. Cherif Bassiouni, *Legal Status of U.S. Forces in Iraq from 2003–2008*, 11 Chi. J. Int'l L. 1 (2010).

36 Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936).

37 Brief of Amici Curiae M. Cherif Bassiouni and Other International Law Professors Listed Herein in Support of Omar et al. and Munaf et al. as Amici Curiae supporting Respondents, Munaf v. Geren, 553 U.S. 674 (2008) (Nos. 07-394, 06-1666), 2008 WL 543036 [hereinafter "Munaf Amicus"].

38 Munaf Amicus at *9.

39 Munaf Amicus at *19–20 (footnotes omitted). Romania is currently seeking the extradition of Munaf to serve a ten-year prison sentence entered against him in Romania. *See* Nine O'Clock, *Munaf Acquitted of Kidnapping Charges in Iraq: The Iraqi-American Is Still Sought by Interpol to Serve a 10-Year Prison Term in Romania, for His Involvement in the Abduction of Three Journalists in 2005,* Mar. 18, 2011, *available at* http://www.nineoclock.ro/munaf-acquitted-of-kidnapping-charges-in-iraq/ (last visited Oct. 1, 2011). Munaf filed a communication with the U.N. Human Rights Committee against Romania, for alleged violations of the ICCPR by Romania with regard to Munaf's detention and trial in Iraq. *See* Human Rights Committee, Special Rapporteur's Rule 92/97 Decision regarding Communication No. 1539/2006, U.N. Doc. CCPR/C/96/D/1539/2006 UNCHR (Aug. 21, 2006) (finding no violation of the ICCPR by Romania under the circumstances).

40 Extradition Treaty Between the Kingdom of Iraq and the Republic of the United States, U.S.–Iraq, June 7, 1934, 49 Stat. 3380.

The territorial theory has several extensions and applications, which are discussed below.

2.1. Special Status Territories

The term "territory" is often a dependable variable of the notion of jurisdiction; that is, the power to exercise dominion and control over a determined physical area. Consequently, the power to exercise jurisdiction may extend to certain territories whose legal status may vary. Such is the case of certain territories that, by reason of exceptional circumstances or special conditions, are called "Special Status Territories." A factor common to all cases of "Special Status Territories" is that the area over which the jurisdictional control of one state extends is usually excepted from that of another state's control, either in whole or in part for a certain period of time, usually determined by treaty. This usually occurs from the existence of peculiar circumstances, such as military occupation, treaties, or other arrangements. The term "Special Status Territories," therefore, does not include "Special Environments."[41]

Section 3185 of Title 18 of the United States Code provides for the return from the United States to "any foreign country or territory or any part thereof"[42] occupied by or under the control of the United States of any person found in the United States who is charged with committing any of certain enumerated offenses in violation of the criminal laws in force in such foreign country or territory. Such return is made upon the written requisition of "the military governor or other chief executive officer in control of such foreign country or territory."[43] Provisions are made for proceedings "before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged,"[44] and that the person so held shall be returned "on the order of the Secretary of State of the United States."[45]

The application of this authority extends to military occupied zones. In the case of *In re Kraussman*,[46] dealing with the United States' occupied zone of Germany, the district court stated:

> The question which presents itself here is whether or not this right of the courts to continue to function in the heart of a foreign nation whose sovereignty has been restored, is occupation or control of part of that country by the United States within the intent and purpose of the extradition statute, Section 3185. I do not think so. The occupation and control mentioned in the statute refers to full governmental authority based upon a dominating police or military force which makes the authority effective. . . . The United States High Commissioner is not now in the words of the statute the "chief executive officer in control of such foreign country."
>
> Although the treaty excludes Berlin and Germany as a whole, the fair implication to be drawn from this exclusion is that the retention of powers by the signatories is principally for the purpose of dealing with the Soviet Republics relative to the reunification of Germany and a peace treaty, and that, in so far as it is practically possible, local governmental authority will be turned over to the Federal Republic of Germany as soon as and to the extent that it is feasible. The Government has offered no proof that the situation in the American Sector of Berlin is factually different from this. Therefore, in the face of a retention of joint overall power de jure and a policy de facto to turn over to the Federal Republic of Germany as much of the administration of local government as possible, it cannot be said that the situation is one which comes within Section 3185.[47]

Whenever there is jurisdiction over a military base or territory in a host country, the guest state having such legal authority can prosecute the violator within that physical area under its control or send him to the guest country for trial, or seek his extradition if he escapes to another

41 *See infra* Sec. 2.4 (discussing Special Environments).

42 18 U.S.C. § 3185 (2000).

43 *Id.*

44 *Id.*

45 *Id.*

46 *In re Kraussman*, 130 F. Supp. 926 (D. Conn. 1955).

47 *Id.* at 928–929.

state.[48] In addition to military occupation, territories may be leased by agreement, whether for military or nonmilitary purposes, and such an agreement may have an extraterritorial clause or a special jurisdictional clause permitting the lessee-state to exercise jurisdiction over the leased territory, completely, partially, concurrently, or with respect to its nationals only. An example of a leased territory is the U.S. Naval Base in Guantanamo, Cuba. Article IV of the Lease Agreement, signed on July 2, 1903, by the United States and Cuba, under which the United States was granted the right to establish and maintain a naval station at Guantanamo, provides:

> Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.
>
> On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.[49]

The same basis for jurisdiction, established by a treaty, existed between the United States and the Philippines in the Military Bases Agreement of 1947. This treaty contained provisions regarding jurisdiction over offenses and the delivery of fugitives to the authorities having jurisdiction over the particular offenses. Article XIII, paragraph 7 of the Military Bases Agreement of 1947 between the United States and the Philippines provides that:

> The United States agrees that it will not grant asylum in any of the bases to any person fleeing from the lawful jurisdiction of the Philippines. Should any such person be found in any base, he will be surrendered on demand to the competent authorities of the Philippines.[50]

Even though a state enjoying special status rights over a given territory can exercise its jurisdiction within the framework of the agreement between respective states, it does not have to exercise it. Conversely, in the case of *Wilson v. Girard*,[51] the Supreme Court recognized the right of the United States acting through its agents to waive jurisdiction over an American citizen and to relinquish him to Japan, even though the territory wherein the crime was committed was a U.S. military installation, which by treaty was exempted from Japan's territorial jurisdiction. The district court had held that because Girard's act was committed in the performance of his official duty, he was, under U.S. law, "accountable only to United States Federal jurisdiction,"[52] and his delivery to the Japanese authorities would be "illegal and in violation of the Constitution and laws of the United States."[53] The district court decision was reversed by the Supreme Court, which held that "[a] sovereign nation has exclusive jurisdiction to punish

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48 6 Whiteman Digest, *supra* note 12 at 740–748.

49 Lease of Certain Areas for Naval and Coaling Stations, July 2, 1903, art. IV, T.S. No. 426; 6 Bevans 1120, 1121; S. Doc. No. 357, 61st Cong., 2d Sess. 360, 361 (1910). Another example is the Panama Canal Zone under the United States–Panama Canal Treaty, 193 Stat. 4521, 33 U.S.T. 39, T.I.A.S. No. 10,030 (entered into force Oct. 1, 1979).

50 61 Stat. 2019, 4026, 43 U.N.T.S. 271, 288. In *Williams v. Rogers*, 449 F.2d 513 (8th Cir. 1971), the court of appeals held that article XIII of the 1947 Agreement, amended in 1965, provides the specific jurisdictional and procedural basis for arrest, trial, and custody of U.S. military personnel accused of committing offenses in the Philippines. Relying on *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), the court held that this treaty also provides the basis for transferring military personnel to the Philippines for prosecution by Philippines judicial authority without the need for an extradition treaty or the need to pursue extradition procedures. The court, in fact, held that the agreement could serve as a substitute for an extradition treaty. Also, military transfers of personnel from the United States to the Philippines for prosecution under the terms of the agreement were found not to require compliance with the extradition procedures that would be applicable to nonmilitary personnel in the United States. This is a novel approach that appears to be unprecedented in the annals of U.S. extradition practice.

51 Wilson v. Girard, 354 U.S. 524 (1957).

52 Girard v. Wilson, 152 F. Supp. 21, 26 (D. D.C. 1957).

53 *Id.* at 27.

offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."[54] The Court also held that:

> The issue of our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.[55]

The *Girard* case arose under a special agreement with Japan, namely the Security Treaty of 1952.[56] However, the problems raised in that case are no different from those of Status of Forces Agreements (SOFA), the North Atlantic Treaty Organization (NATO), or other bilateral agreements.

As to NATO, the North Atlantic Treaty of April 4, 1949, specifically states "that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party."[57] The parties agreed in Article VII of the SOFA of June 19, 1951, inter alia, that:

> 5. (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.[58]

Under the George W. Bush administration, the United States departed from its established practice of negotiating SOFAs with countries where it has stationed troops. Such practice is consonant with international custom. This has been the case since 2001 in Afghanistan and since 2003 in Iraq. In both of these countries, the United States stationed a significant number of troops, in the former estimated at peak at 100,000 and in the latter at 140,000, in addition to an undetermined number of civilian contractors working parallel to the military, for military purposes, or for civilian reconstruction projects. United States military personnel are subject to the UCMJ, which applies to all military personnel wherever they may be, but not to civilian contractors. As there is no SOFA between the United States and either Iraq or Afghanistan, the criminal conduct of any U.S. national there is subject to these countries' respective territorial jurisdiction.

2.2. Subjective–Objective Territorial Theory

United States law and practice is strongly based on the theory of territorial jurisdiction[59] with respect to both nationals and aliens who have violated federal or state law, even when part of

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54 *Wilson,* 354 U.S. at 529.

55 *Id.* at 530.

56 Security Treaty between the United States and Japan, Sept. 8, 1951, 3 U.S.T. 3329, T.I.A.S. No. 2491.

57 North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964. *See also* Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971), *cert. denied,* 405 U.S. 926 (1972); Holmes v. Laird, 459 F.2d 1211 (D. D.C.), *cert. denied,* 409 U.S. 869 (1972).

58 North Atlantic Treaty Organization, Status of Forces, June 19, 1951, 4 U.S.T. 1792, 1800, T.I.A.S. No. 2846. *See also* Richard R. Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, 7 Int'l & Comp. L.Q. 72 (1958). Most states claim jurisdiction over members of their armed forces, both nationals and non-nationals, regardless of their current location. *See* Restatement (Third), *supra* note 3, at § 422, Reporters' Note 5. Because conflicts of jurisdiction can result from the presence in one state of members of the military of another state, SOFAs are usually concluded between the two countries. *See also* James R. Coker, *The Status of Visiting Military Forces in Europe: NATO and SOFA, A Comparison*, *in* Bassiouni & Nanda Treatise, *supra* note 1, at 115.

59 *See* Restatement (Third), *supra* note 3, at §§ 402, 415, 431.

the acts constituting the crime were committed outside its territory,[60] provided, however, that its effects were within the territory.

The fact that a crime was not entirely committed within the state's territory, or that the preparation for the crime occurred in another state, does not prevent the states in which some of the acts or results occurred from asserting their respective jurisdiction.[61] These extensions of the territorial principle have been such that it is often difficult to distinguish between cases relying on this theory and other theories, such as the protective or nationality theories. Indeed, U.S. courts in many cases have freely extended the territorial theory to situations where it would have appeared that another theory would have been more appropriate. Among such cases are those in which U.S. citizens have committed violations of U.S. law outside of U.S. territory, but that had some effect within the United States. These cases involved acts detrimental to U.S. national security[62] or economic interests,[63] as well as other categories of violative conduct.[64] The fact remains that in these cases the more appropriate theories are nationality[65] or protected interest, and not territoriality by extension.

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60 Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); *cf.* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *See also* United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955), wherein the court distinguished the earlier case of United States *ex rel.* Majka v. Palmer, 67 F.2d 146 (7th Cir. 1933), and ordered an alien deported for having made false statements under oath to an American consul abroad while applying for a passport. The court noted that deporting an alien for perjury is far different from indicting and trying him for a crime committed abroad." *Baker*, 136 F. Supp. at 548. In 1968, on the same issue, the Second Circuit Court of Appeals held in *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968), that a perjured statement before a U.S. consul abroad subjected such a person to prosecution in the United States. For acts of aliens committed wholly abroad, but with effect in the United States, see *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), and for a conspiracy in Canada having effect in the United States, see *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967). In *Rivard*, the defendants were extradited from Canada to the United States for conspiring in Canada to smuggle heroin into the United States. *See also* United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986), in which the Third Circuit upheld the jurisdiction of the United States to try persons arrested on the high seas for conspiracy to import narcotics. The court, noting that the United States traditionally could assert jurisdiction over crimes having an effect within the territory of the United States, recognized a growing extension of that doctrine by scholars of international law to include jurisdiction over conduct intended to have an effect in the territory of the United States. *But see* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1055 (3d Cir. 1993) (holding that the effects requirement of *Wright-Barker* has been superseded by 46 U.S.C. app. § 1903(d)).

61 *See* art. 3, *in* Harvard Research Project,*supra* note 3; Restatement (Third), *supra* note 3, at § 402; Blakesley, *Conceptual Framework for Extradition, supra* note 1, at 694.

62 *See, e.g.,* Kawakita v. United States, 343 U.S. 717 (1952), *reh'g denied*, 344 U.S. 850 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

63 In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), a federal court enjoined the defendant American corporations from conducting various activities in Yucatan designed to control the exportation of sisal to the United States from Mexico and to monopolize the market both inside and outside the United States in violation of provisions of the Sherman Anti-Trust Act. In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), a federal district court in Texas was held to have jurisdiction over a suit by an American watch company to enjoin a U.S. citizen from using the company's trademark, registered under U.S. law, in Mexico on watches made in Mexico. *See* Stewart E. Rauner, Note,*Antitrust Law: Extraterritoriality*—Mannington Mills, Inc. v. Congoleum Corp., *595 F.2d 1287 (3d Cir. 1979)*, 20 Harv. Int'l L. J. 667 (1979).

64 In *Blackmer v. United States*, 284 U.S. 421 (1932), a U.S. citizen was convicted upon his return to the United States for contempt of court for failure to obey a subpoena directing him to return home from France to act as a witness for the U.S. government in a criminal trial. In *Sachs v. Government of the Canal Zone*, 176 F.2d 292 (5th Cir. 1949), a U.S. citizen was tried and convicted for criminal libel that he had composed in the Republic of Panama, a sovereign state, for publication and circulation in the Canal Zone.

65 See Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 Yale J. Int'l L. 41 (1992).

Where aliens have been involved, U.S. courts have expanded the traditional application of the territoriality theory, generally through the use of what may be referred to as the subjective–objective territorial theory. This theory is better described as an extension of the territorial theory rather than as a separate one. Under it, aliens acting outside territorial boundaries are considered as having committed crimes within the state if the offense has a certain impact within the territory of the state. When considering the application of the subjective–objective territorial theory, the important factor is that the effect of the crime occurred within the territory of the rule-enforcing state. The state where the consequences or impact of the crime occurred has objective territorial jurisdiction. The state in which or from which certain acts were committed has subjective territorial jurisdiction.

This theory has been recognized, although not under this particular nomenclature, by the *Restatement (Third) of the Foreign Relations Law of the United States*,[66] and has been relied upon in early cases, such as those involving violations of prohibition laws.[67] English and other Commonwealth courts have extended its application to cases involving national security[68] and other matters.[69]

Whenever states are faced with the problem of acts committed outside their territory but having effects within it, courts deem the perpetrator constructively present in the state where

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66 See Restatement (Third), *supra* note 3, at § 402. Section 402 reads, in part, as follows:

> A state has jurisdiction to prescribe law with respect to
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> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

67 *See, e.g.*, Ford v. United States, 273 U.S. 593 (1927). The defendants, British subjects who had been on a British ship on the high seas about twenty-five miles west of San Francisco at the time it was seized by U.S. authorities, were convicted of conspiracy to violate U.S. liquor laws, pursuant to a treaty between the United States and England authorizing the United States to seize any British vessels and persons on such vessels suspected of such offenses.

68 In *Joyce v. Director of Public Prosecution*, [1946] 1 All E.R. 186 (Eng. H.L.), the defendant, who had acted as a propagandist radio announcer for Nazi Germany (known also as "Lord Haw-Haw"), was convicted of treason and hanged, even though he was a U.S. national and therefore an alien to English courts. Joyce had obtained a British passport fraudulently in July 1933, and held it until it expired on July 1, 1940, after he had begun to broadcast for Germany. The court found that the possession of even this illegally obtained passport gave Joyce certain rights under British law and imposed upon him a corresponding duty of allegiance, which he violated. In a South African case, *Rex v. Neuman*, 8 S. Afr. L.R. 1248 (1949) (S. Afr.), the defendant was a German national domiciled in the Union of South Africa who had applied for naturalization there, but who had also retained his German nationality. While in Germany, he had committed acts against the national security of South Africa and was subsequently captured. At the time of his trial, he was not a national of South Africa. The court found, however, that because he had resided in South Africa and had enjoyed its protection, he "owed allegiance to that State, breach whereof renders him liable to the penalties of high treason." *Id.* at 1256.

69 *See Rex v. Godfrey*, [1923] 1 K.B. 24 (Eng.) (ordering a man in England to be extradited to Switzerland to stand trial for having procured his confederate, who was in Switzerland, to obtain goods by false pretenses, even though the first man had never been in Switzerland).

the effects of the conduct took place and which requests that actor's delivery. The case that appears to be relied upon most frequently in the United States is *Strassheim v. Daily*,[70] wherein the Supreme Court held that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it justified a State in punishing the offender if the State should succeed in getting him within its power."[71]

As early as 1798, the Attorney General indicated that a person charged with piracy on the high seas should be tried in the United States and not extradited to England.[72] A different rationale was relied upon in *Sternaman v. Peck*,[73] which involved the extradition of a woman who had poisoned her husband in New York. The ensuing death occurred in Canada. On rehearing, the argument was raised that if a crime had been committed, it was not within the territory of Canada, but the court rejected it by citing cases where the jurisdiction had been upheld although the crime had been commenced in another district.[74] No attempt was made to determine whether the crime had been perpetrated solely within the territory of Canada. In fact, the court seems to have relied upon the existence of concurrent jurisdiction in the United States and Canada.[75]

Two other cases from the Ninth Circuit, *Ex parte Davis*[76] and *In re Hammond*,[77] permitted extradition on a non-territorial jurisdiction theory. In the first case, the requesting state had jurisdiction based on the subjective territorial principle, while the requested state had objective territorial jurisdiction. The court rested its decision in both instances on the grounds that the necessary elements to complete the offense were consummated in the requesting state. The first of these cases, *Ex parte Davis,* was for the murder of an individual who had been fatally wounded in Mexico but died in California. The argument was made that the offense was not complete until the death of the victim occurred, which was in California. The reasoning of the court in dismissing this contention centered on the language of the treaty requiring that the crime be committed within the jurisdiction of Mexico. As the petitioner had done all the acts necessary for the commission of the offense within Mexico, the treaty requirement was satisfied and extradition could be granted.[78] This factual situation and the jurisdictional theory of the requesting state is the opposite of that found in *Sternaman*: the United States had "subjective" territorial jurisdiction in *Sternaman* and "objective" territorial jurisdiction in *Davis*. Despite the difference in jurisdictional bases, the *Davis* court failed to distinguish between the cases and employed reasoning in support of its decision that conceivably would require an opposite result in *Sternaman.* In *Sternaman*, the jurisdiction of Canada was determined by reference to

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70 Strassheim v. Daily, 21 U.S. 280 (1911). *See* Melia v. United States, 667 F.2d 300 (2d Cir. 1981) (citing *Strassheim v. Daily*, for the proposition that a single telephone call from the United States to Canada constituted an act within Canada sufficient for jurisdictional basis under U.S. law).

71 *Strassheim*, 21 U.S. at 289.

72 1 Op. Att'y Gen. 88 (1852). A similar position was expressed in *In re Stupp*, 23 F. Cas. 281 (C.C.S.D.N.Y. 1873) (*dictum*). In an unreported case, extradition was refused where the victim was shot on a U.S. vessel in Canadian waters, but later died in the United States. Edward Clarke, A Treatise on International Criminal Law 71–72 (4th ed. 1903) [hereinafter Clarke Treatise]; *cf.* Terlinden v. Ames, 184 U.S. 270, 289 (1902) (defining extradition).

73 Sternaman v. Peck, 83 F. 690 (2d Cir. 1897).

74 *Id.* at 691.

75 The same conclusion was reached in *Commonwealth v. Macloon,* 101 Mass. 1 (1869), and *Tyler v. People,* 8 Mich. 320 (1860). The *Tyler* analysis, however, could lead to the conclusion that the place where a victim died would have sole jurisdiction over the prosecution for murder.

76 *Ex parte* Davis, 54 F.2d 723 (9th Cir. 1931).

77 *In re* Hammond, 59 F.2d 683 (9th Cir.), *cert. denied*, 287 U.S. 640 (1932).

78 *Davis*, 54 F.2d at 727.

U.S. and Canadian principles of jurisdiction,[79] whereas in *Davis*, the court looked exclusively to the language of the treaty.[80]

In the second of these cases, *In re Hammond*,[81] the accused forged a check drawn on a Canadian bank, which was deposited in his account in California. The court determined jurisdiction by looking to where the crime was completed and concluded that Canada had exclusive jurisdiction, despite the fact that the opinion relied to some extent on authorities enunciating the broad application of the "objective" principle.

The court of appeals in that case relied on a decision of the Supreme Court to the effect that one outside of a state who willfully puts in motion factors to take effect in that state is answerable at the place where the harm is done, and that this principle is recognized in the criminal jurisprudence of all countries. The court of appeals stated:

> [T]he Supreme Court in the decision from which we have quoted (*Ford v. United States*, 273 U.S. 593) shows the desirability of surrendering a person for trial who puts in motion forces which operate to consummate a crime within the territory of the demanding nation . . . and there is no reason to suppose that the treaty was intended to exclude such a class of offenders . . .[82]

These difficulties arise whenever a given conduct deemed criminal produces its effects at a place other than where the original conduct took place, and also whenever the offense is deemed by its nature or effect to be continuous. The various decisions considered in this area seem to be searching for some definitive criteria of application for the maxim *lex loci delicti.*[83] Unlike cases involving civil responsibility, which may depend upon public policy considerations, conflicts of jurisdiction in criminal cases are less susceptible to flexible rules based on alternative policy considerations. Nonetheless, it seems clear that judicial decisions are guided by the interest displayed by prosecuting authorities, and the courts reject the claims of defendants whenever the state having concurrent or alternative jurisdiction does not challenge the jurisdiction of the requesting state.

In *United States ex rel. Eatessami v. Marasco*,[84] an Israeli citizen obtained a loan in New York from a bank in Switzerland on the basis of forged securities given as collateral. The court, in holding that a crime had been committed within the territorial jurisdiction of Switzerland, interpreted the relevant treaty to allow extradition "whenever the extraditee is shown *prima facie* to have intended the harm and caused the harm to the demanding state substantially as claimed by the latter."[85] This rule focuses entirely on the competence of the requesting nation and allows extradition whenever those jurisdictional requirements have been met. The court

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79 Sternaman v. Peck, 83 F. 690 (2d Cir. 1897).

80 *Davis*, 54 F.2d 723.

81 *Hammond*, 59 F.2d 683. *See also* United States *ex rel.* Hatfield v. Guay, 11 F. Supp. 806 (D. N.H. 1935).

82 *Hammond*, 59 F.2d 683 at 686. However, in 1940, the same court rejected the contention of Alexander Strakosch that he should not be extradited to Great Britain on charges of fraudulent conversion and obtaining money by false pretenses on the grounds that even if the evidence could be said to show his presence in London and his participation there in the activities of certain other accused individuals, there was no evidence to show that he was there at the time of the actual commission of the acts constituting the offenses, or any evidence of his direct participation in those acts. The court stated:

> Moreover from the facts stated in the depositions, it is reasonably inferable—and, we think, obvious—that Spiro and his associates, including appellee [Strakosch], were engaged in a conspiracy, and that the crimes in question were committed in furtherance thereof. It therefore makes no difference whether appellee was present or absent at the commission of the acts constituting the crimes, or whether he did or did not directly participate in their commission.

Cleugh v. Strakosch, 109 F.2d 330, 335 (9th Cir. 1940).

83 The law of the place where the crime took place. Black's Law Dictionary 820 (5th ed. 1979).

84 United States *ex rel.* Eatessami v. Marasco, 275 F. Supp. 492 (S.D.N.Y. 1967).

85 *Id.* at 496.

examined the qualifying words of the treaty with Switzerland, which requires that the offense be "committed in the territory of one of the contracting States [and that the offender] be found in the territory of the other State . . . ."[86] The limitation that the crime take place within the territory of the requesting state is found in a few U.S. treaties.[87] Usually the words used are "jurisdiction" or, as in recent conventions, "territorial jurisdiction."[88]

The Italian Supreme Court held in a 1934 case entitled *In re Amper* that

> In view of the principles of international cooperation for the suppression of crime, the sole duty of the Court of the requested State is to determine the subjective and objective existence of the crime charged and to see whether it is extraditable according to the principles which rule the relations between the two States in the matter of extradition. It cannot raise questions of territorial jurisdiction if its own jurisdiction is not involved.[89]

In *Rex v. Godfrey*,[90] an individual was held to be a fugitive in England when Switzerland sought to have him extradited, although he had not been in Switzerland when the offense was committed. The same result applied to fugitives who had escaped to England but were sought by Germany for fraud committed by them in Holland against persons defrauded in Germany.[91]

In 1954, the French Cour de Cassation held that a certain stateless person residing in France should be extradited to Belgium to face prosecution for participation in a fraudulent scheme attempted to be carried out in Belgium by an accomplice with the aid of forged documents, even though the person remained in France. The court took the view that although his acts were committed in France, they were part of an ensemble of acts over which Belgian courts had jurisdiction.[92]

Decisions in the United States and in other countries do not attempt to ascertain jurisdiction under any particular theory, but rather limit their analyses to the location of the primary effect of the alleged criminal acts.

The theory of subjective–objective territoriality contains an inherent conflict in that it recognizes jurisdiction in more than one state without ranking priorities, an issue dealt with in Section 11 below. The attitude of the judiciary, particularly in the United States, has been to ignore the issue of conflicting concurrent jurisdictions and to pursue a pragmatic course. Under this approach, the state that has physical custody has de facto priority.

One of the more recent causes célèbres is the case against General Manuel Noriega, the former president of Panama.[93] United States military forces seized General Noriega in Panama in the

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86 Treaty with Switzerland for the Extradition of Criminals, May 14, 1900, art. I, 31 Stat. 1928 (1901), T.S. No. 354. A new treaty has been in force since 1977. *See* Treaty Between the Swiss Confederation and the United States of America on Mutual Assistance in Criminal Matters, Jan. 23, 1977, 27 U.S.T. 2019, T.I.A.S. No. 8302.

87 Other treaties allowing extradition for crimes committed within the demanded state's territory are with: Uruguay, Mar. 11, 1905, art. I, 35 Stat. 2028 (1909), T.S. No. 501; Supplemental Treaty with Uruguay, Apr. 11, 1984, art. I, T.I.A.S. No. 10,850; Argentina, Sept. 26, 1896, art. I, 31 Stat. 1883 (1901), T.S. No. 6; Supplemental Treaty with Argentina, Jan. 21, 1972, art. I, 23 U.S.T. 3501; and, Colombia, May 7, 1888, art. I, 26 Stat. 1534 (1891), T.S. No. 53; Supplemental Treaty with Colombia, Mar. 4, 1982, T.I.A.S. Kavass 334.

88 *See* Treaty of Extradition with South Africa, Dec. 18, 1947, 2 U.S.T. 884, T.I.A.S. No. 2243.

89 F. Ann. Dig. 353 (Italy Cass. 1934).

90 [1923] 1 K.B. 24 (Eng.).

91 Rex v. Jacobi and Hiller, 46 L.T.R. 595 (1881) (Eng.).

92 *Malinowski,* 1954 Bull. Crim. No. 165 (Fr.).

93 *See generally* Douglas Kesh, Note, *The Capture of Manuel Antonio Noriega: A Legal Analysis*, 4 Touro J. Transnat'l L. 251 (1993).

course of an armed conflict and brought him to the United States to answer charges of criminal conspiracy to import illegal drugs into the United States. In seizing and prosecuting Noriega, the United States expansively exercised extraterritorial jurisdiction premised upon the objective–subjective extraterritorial theory.[94] The court said that:

> [I]nternational law principles have expanded to permit jurisdiction upon a mere showing in *intent* to produce effects in this country, without requiring proof of an overt act or effect within the United States.. .
>
> In the drug smuggling context, the "intent doctrine" has resulted in jurisdiction over persons who attempted to import narcotics into the United States but never actually succeeded in entering the United States or delivering drugs within its borders. The fact that no act was committed and no repercussions were felt within the United States did not preclude jurisdiction over conduct that was clearly directed at the United States.
>
> These principles unequivocally support jurisdiction in this case.[95]

There is very little support, if any, in international law for the proposition that criminal jurisdiction can be exercised extraterritorially on the sole factor of "intent," as claimed by the court. If a person, however, sets up a drug trafficking operation whose base is one state, with distribution aimed at other states, and in fact the drugs in question are smuggled into other states, each state in which the drugs are smuggled has jurisdiction under the objective territorial theory. The state from which the operation is conducted or directed therefore has territorial jurisdiction.

Theories of jurisdiction should be ranked in order to provide the basis for resolving conflicts of competing jurisdictional claims and priorities in extradition requests. But the jurisprudence of almost all states has recognized the territorial theory as ranking over all other theories, and is thus given priority in extradition requests. Within the territorial theory, the state that has custody of the accused has priority, but this does not bar the state having subjective territoriality from prosecuting the accused at a later time. The only restriction would be that of *ne bis in idem* or double jeopardy, where recognized.[96]

2.3. Floating and Aerial Territoriality: The Law of the Flag

2.3.1. Historical Basis

The high seas have historically been considered outside the exercise of states' national sovereignty and jurisdiction.[97] Indeed, for approximately 200 years now, freedom of the seas has been the dominant rule of the international law of the sea,[98] with all that it comports as consequences on jurisdiction. The origin of the concept of the freedom of the high seas in Western legal literature is attributed to Hugo Grotius's publication *Mare Liberum*.[99] Grotius, however,

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94 United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); United States v. Noriega, 683 F. Supp. 1373 (S.D. Fla. 1988).

95 *Noriega*, 746 F. Supp. at 1513 (citations omitted).

96 The principle that a person cannot be twice judged for the same crime has yet to be fully recognized in international law. *See* Ch. VIII, Sec. 4.3.

97 *See* Barry E. Carter & Phillip R. Trimble, International Law 924 (1991) (noting that Grotius regarded the notion of *mare clausum* (closed sea) as an impermissible extension of a state's sovereignty).

98 R P. Anand, Origin and Development of the Law of the Sea 225 (1983). *See also* Robin Rolf Churchill & Alan Vaughan Lowe, The Law of the Sea 165 (1983) (noting that the principle of the freedom of high seas "is a cornerstone of international law").

99 Hugo Grotius, Mare Liberum (R. Magoffin trans., 1916); Hugo Grotius, Mare Liberum Sive de Jure, Quod Batabis Competittit ad Indicana Commercia (1609). But one scholar posits that "there

was the jurist for the Dutch West India Company, which had an interest in freedom of the high seas for its commerce. But England did not entirely share the Dutch view. For many years Selden's *Mare Clausum*,[100] written for the British Crown and serving British interests, was the authoritative English work on maritime law.[101] But once the concept of the closed sea became detrimental to England and Europe's commercial interests, *Mare Clausum*[102] was rejected in favor of Grotius's *Mare Liberum*, or free sea.[103]

The principle of the freedom of the high seas is now well established. It is part of conventional and customary international law. As an expression of international custom, freedom of the seas is included in the *Restatement (Third) of the Foreign Relations Law of the United States*.[104] Similarly, the concept of *Mare Liberum* is codified in Article 2 of the 1958 Convention on the High Seas[105] and article 87 of the 1982 Law of the Sea Convention. Article 87(1) specifically provides:

> The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;
>
> (b) freedom of overflight;
>
> (c) freedom to lay submarine cables and pipelines . . . ;
>
> (d) freedom to construct artificial islands . . . ;

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is no doubt that the freedom of the seas in the form of unobstructed freedom of navigation and commercial shipping was accepted by all the countries in the Indian Ocean and other Asian seas for centuries before history was ever recorded." Anand, *supra* note 98, at 226.

100 J.Selden, Mare Clausum (M. Nedham trans., 1972); J. Selden, Mare Clausum Seu de Domino Maris (London, 1635).

101 Professor Anand observed that *mare clausum* for some time superseded *mare liberum*, not necessarily due to its academic superiority, but thanks to "the 'louder voice' of the British Navy." Anand, *supra* note 98, at 229.

102 Professor Anand observed that the genius of Grotius's work "lies in observing and presenting the maritime customs of Asian countries in the form of a doctrine, supported by logical arguments, Christian theology and the authority of venerable Roman law. . . ." Anand, *supra* note 98, at 228.

103 *Id.*

104 Section 521 of the Restatement (Third), *supra* note 3, provides:

> (1) The high seas are open and free to all states, whether coastal or land-locked.
>
> (2) Freedom of the high seas comprises, inter alia:
>
> (a) freedom of navigation;
>
> (b) freedom of overflight;
>
> (c) freedom of fishing;
>
> (d) freedom to lay submarine cables and pipelines;
>
> (e) freedom to construct artificial islands, installations, and structures; and
>
> (f) freedom of scientific research.
>
> (3) These freedoms must be exercises by all states with reasonable regard to the interests of other states in their exercise of freedom of the high seas.

105 Convention on the High Seas, done at Geneva, Apr. 29, 1958, 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter High Seas Convention]. Article 2 of the 1958 Convention recognizes non-exhaustively the following freedoms on the high seas: (1) freedom of navigation, (2) freedom of fishing, (3) freedom to lay submarine cables and pipelines, and (4) freedom of overflight. Also, for the jurisdictional provision of the High Seas Convention, see Article 97.

(e) freedom of fishing… ;

(f) freedom of scientific research…[106]

The principle of the free seas is supported by the absence of territorial sovereignty on the high seas.[107] In recognition of this corollary, Article 89 of the 1982 Law of the Sea Convention, entitled "Invalidity of Claims of Sovereignty," prohibits any state from subjecting any part of the high seas to its sovereignty.[108] In short, the freedom of the high seas is based on the recognition that no state may exercise territorial sovereignty on the high seas.

A consequence of the principle of the freedom of the high seas, and the prohibition on the exercise of territorial jurisdiction on the high seas, is that ships on the high seas are, as a general rule, subject only to the jurisdiction of the state under whose flag they sail.[109] The Permanent Court of International Justice in the *Lotus* case in 1927 recognized this principle, and stated that "vessels on the high seas are subject to no authority except that of the State whose flag they fly."[110] The court added: "In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."[111]

The U.S. Supreme Court recognizes the customary "law of the flag," as the principle is termed. In 1952, in *Lauritzen v. Larsen*, the Court called the law of the flag "perhaps the most venerable and universal rule of maritime law…"[112] In *Lauritzen*, the Court recalled an earlier decision where it said "that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction…"[113] The 1982 Law of the Sea Convention, which became effective on November 16, 1994, has yet to be ratified by the United States.[114] The Convention provides at article 92(1) that "[s]hips shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties…, shall be subject to its exclusive jurisdiction on the high seas…."[115] These provisions of the 1982 Law of the Sea Convention have become part of customary international law, and thus binding on the United States despite the fact that the United States has only signed, but not ratified, the treaty.

Conventional international law, however, permits, in certain limited situations, warships of one state to approach and search vessels sailing under the flag of another state on the high seas. Under the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention, warships may proceed to verify a vessel's right to fly its flag. This represents a codification of the customary right of reconnaissance: the right of a public ship of a state to approach a vessel on the high seas and ascertain her identity and nationality.[116] Both conventions, however, provide

106 United Nations Convention on the Law of the Sea, Dec. 10, 1982, U. N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982) art.87(1) [hereinafter LOS Convention].

107 Momtaz Djamchid, *The High Seas, in* 1 Handbook on the New Law of the Sea 385 (René-Jean Dupuy & Daniel Vignes eds., 1991) [hereinafter Dupuy & Vignes Handbook].

108 Article 89 specifically provides: "No States may validly purport to subject any part of the high seas to its sovereignty." LOS Convention, *supra* note 106.

109 Robert C. F. Reuland, Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 Vand. J. Transnat'l L. 1161, 1164 (1989).

110 *Case of the S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 9, at 25.

111 *Id.*

112 Lauritzen v. Larsen, 345 U.S. 571 (1952).

113 *Id.* (*citing* United States v. Flores, 289 U.S. 137 (1933)).

114 Although the United States is not a party to the Convention, it endorses all portions of the Convention except those regarding seabeds. Christina E. Sorensen, Comment, *Drug Trafficking on the High Seas: A Move toward Universal Jurisdiction under International Law*, 4 Emory Int'l L. Rev. 207, 207 n.1 (1990) (citing 83 U.S. Dep't of State 13. No. 2075 at 70 (1983)).

115 LOS Convention, *supra* note 106.

116 Reuland, *supra* note 109, at 1169.

that the warship is not justified in approaching another vessel to verify its right to fly its flag unless certain grounds exist.[117] Article 22 of the 1958 Convention on the High Seas proscribes such verification unless there are reasonable grounds for suspecting:

> (a) that the ship is engaged in piracy; or
>
> (b) that the ship is engaged in slave trade; or
>
> (c) that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.[118]

The 1982 Law of the Seas Convention, at article 110, contains the same list of special circumstances allowing verification of a vessel's right to fly and adds to it circumstances of unauthorized broadcasting and ships without nationality.[119] The *Restatement (Third) of the Foreign Relations Law of the United States* recognizes the principle of noninterference with vessels within the jurisdiction of another state and provides that, in general, ships

> are not subject to interference on the high seas [except] if [such interference is] authorized by the flag state, or if there is reason to suspect that the ship (a) engaged in piracy, slave trade, or unauthorized broadcasting; (b) is without nationality; or (c) though flying a foreign flag . . . , is in fact of the same nationality as the . . . law enforcement ship.[120]

It is thus quite clear in conventional and customary international law that, on the high seas, a state may lawfully exercise jurisdiction over vessels of another generally,[121] only where an international crime (e.g., piracy or slave trade) is involved. A vessel involved in an international crime is, therefore, under no state's protection, and is subject to any state's stop, search, and seizure.[122] Presumably, the state disregarding the law of the flag and exercising its jurisdiction over a vessel involved in an international crime does so under the universal jurisdiction theory.[123]

The universal theory of jurisdiction grants any state jurisdiction over crimes deemed to be of concern to the entire community of nations.[124] Some scholars argue that where the crime involved is not recognized as an international crime, "an exhibition of the States's criminal authority extraterritorially, that is, on the high seas, can only be justified in international law on theories of personal jurisdiction over nationals or of protective jurisdiction."[125] The protective theory of jurisdiction, discussed below, allows a state to prosecute certain offenses committed extraterritorially, provided such offenses threaten national security.[126] Offenses subject to jurisdiction under the protective theory include espionage, drug trafficking, and conspiracy to violate immigration or customs laws.[127] The nationality theory of jurisdiction gives a state jurisdiction over its nationals whether inside or outside of its territory.[128]

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117 *See* Article 22 of the 1958 High Seas Convention, *supra* note 105; Article 110 of the 1982 LOS Convention, *supra* note 106.

118 High Seas Convention, *supra* note 105.

119 LOS Convention, *supra* note 106 at art. 110(1)(c), (d).

120 Restatement (Third), *supra* note 3, at § 522.

121 Note that consent of the flag state may give jurisdiction over one of its vessels to another state for the purposes consented to. For a more detailed discussion, see text below.

122 Reuland, *supra* note 109, at 1179.

123 *See generally* Feller, *Jurisdiction Over Offenses, supra* note 1, at 32–34.

124 Restatement (Third), *supra* note 3, at § 404. *See* also Blakesley, *Traditional Bases of Jurisdiction, supra* note 1, at 31–33. *See also infra* Sec. 7.

125 Daniel Patrick O'Connell, The International Law of the Sea 935 (Ivan A. Shearer ed., 1984).

126 Restatement (Third), *supra* note 3, at § 402 cmt. f. *See also* Blakesley, *Traditional Bases of Jurisdiction, supra* note 1, at 19–22 (discussing the protection theory of jurisdiction).

127 Restatement (Third), *supra* note 3, at § 402 cmt. f.

128 *Id.* § 402(2). *See also* Blakesley, *Traditional Bases of Jurisdiction, supra* note 1, at 22–27 (discussing the nationality principle of jurisdiction).

Because the exercise of jurisdiction on the high seas is generally limited by the law of the flag, stateless vessels sailing under no flag are in a peculiar position. Stateless vessels are customarily subject to jurisdiction of any state wishing to exercise its jurisdiction over them.[129] United States courts recognize that stateless vessels do not enjoy the protection of the flag of any state and are thus not afforded the right of undisturbed navigation on the high seas.[130]

One other situation that presents a deviation from the exclusiveness of flag-state jurisdiction arises when the flag state consents to another state's exercise of jurisdiction, however limited, over one of the vessels sailing under its flag. Because a state enjoys jurisdiction over vessels that sail under its flag in its exercise of sovereignty, a state may consent to jurisdiction of another state over one of the vessels flying its flag. Consequently, a ship on the high seas may come under the legitimate jurisdiction of a state other than its flag state. For example, in 1981, the United States entered into a bilateral agreement with the United Kingdom[131] that allows U.S. authorities to board private British-flagged vessels suspected of trafficking in drugs on the high seas in the Gulf of Mexico, the Caribbean Sea, and on the Eastern seaboard. In addition to formal agreements, a state may get jurisdiction to search and seize a foreign-flagged vessel on the high seas by obtaining an individual consent from the flag state.[132]

2.3.2. The Law of the Flag as a Jurisdictional Basis

It is well established that vessels, aircraft, and spacecrafts bearing the flag of a given state are an extension of the state's territory, particularly on the high seas, in international air space, and in outer space. Therefore, the territoriality theory applies to them by extension. This approach can be argued, if for no other reason than the fact that the object of the extension, whether a vessel, aircraft, or spacecraft, owes its existence to technology that permitted such objects to utilize special environments other than land. To that extent, the theory is predicated on a fiction.

Although there are obvious technological differences among ships, aircraft, and spacecrafts, there are, subject to the limitations discussed below, four factors that are common to all of them and thus permit their joint treatment in the context of theories of jurisdiction and extradition. These similarities are: (1) ships, aircraft, and spacecrafts operate in spaces that, with the exception of territorial airspace, territorial sea, and internal waters, are legally beyond the territorial claims of any single state; (2) ships, aircraft, and spacecrafts enable humans to travel with great mobility and speed through these spaces; (3) ships, aircraft, and spacecrafts are sources of power for states; and (4) ships, aircraft, and spacecrafts are potential arenas for criminal activities.

The high seas, although available for use by all states, are not subject to the sovereign claims of any state.[133] The airspace above the high seas is similarly for use by all states and is not subject

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129 Restatement (Third), *supra* note 3, at § 522. *See* Reuland, *supra* note 109, at 1196–1206 (discussing the stateless vessel exception to the prohibition against exercise of sovereignty on the high seas over vessels other than those sailing under the sovereign's flag).

130 E.g., United States v. Rubies, 612 F.2d 397, 402 (9th Cir. 1979) (stating that "[u]nder international law, foreign flag vessels are generally accorded the right of undisturbed navigation on the high seas.... An unregistered or 'stateless' vessel, however, does not have these rights and protections.").

131 Agreement to Facilitate the Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking in Drugs, Nov. 13, 1981, U.K.-U.S., T.I.A.S. No. 10,296.

132 *See* Sorensen, *supra* note 114, at 223. *See generally* George K. Walker, *The Interface of Criminal Jurisdiction and Actions under the United Nations Charter with Admiralty Law*, 20 Tulane Mar. L. J. 217 (1996).

133 Convention on the Territorial Sea and Contiguous Zone, art. 1, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter the Territorial Sea Convention]; LOS Convention, *supra* note 106, at arts. 87–110. Article 89 prohibits any state from subjecting any part of the high seas to its sovereignty. It specifically provides: "No State may validly purport to subject any part of the high seas to its sovereignty." Although the Territorial Sea Treaty does not specify how wide the territorial sea may be, it is generally believed that it may be no wider than twelve miles. *See* James Brierly, The Law of

to national appropriation or claims of sovereignty.[134] In addition to claiming sovereignty over its internal waters (which all states may do), a coastal state may claim a territorial sea, extending no more than twelve miles (with some exceptions) from its coastline, over which it may claim complete sovereignty, subject only to the right of innocent passage of the ships of other states.[135]

The airspace above the territorial sea is also subject to the sovereign claims of the coastal state,[136] but there is no corresponding right of innocent passage for aircraft. This difference in legal status is rooted in the technological fact that aircraft, usually being smaller, faster, and more maneuverable than ships, are a greater potential threat to the security of states.[137] The airspace superjacent to a state's land territory and internal waters, of course, is also subject to

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Nations: An Introduction to the International Law of Peace 202–211 (1955). If a state claims a territorial sea of less than twelve miles from the baseline from which the breadth of the territorial sea is measured, it may exercise jurisdiction over this area in order to prevent and punish infringement of fiscal, customs, immigration, and sanitary regulations. Territorial Sea Convention, art. 24, *supra. See also* United States v. Peña-Jessie, 763 F.2d 618 (4th Cir. 1985); United States v. Williams, 617 F.2d 1063 (5th Cir. 1980); United States v. Monroy, 614 F.2d 61 (5th Cir 1980); United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979); Dupuy & Vignes Handbook, *supra* note 107; Elizabeth P. DeVine, Note, *The Long Arm of Federal Courts: Domestic Jurisdiction on the High Seas*, 37 Wash. & Lee L. Rev. 269 (1980). *See generally* Anand, *supra* note 98, at 225 ("For nearly 200 years, freedom of the seas has been the dominating rule of international law of the sea and has expressed its essence."); Churchill & Lowe, *supra* note 98, at 165 (noting that the principle of the freedom of high seas "is a cornerstone of international law.").

134 *But see* United States v. Georgescu, 723 F. Supp. 912 (E.D.N.Y. 1989) (holding that the United States may constitutionally assert jurisdiction over crimes occurring on aircraft flying over the Atlantic Ocean).

135 *See* Territorial Sea Convention, *supra* note 133, arts. 14–23; LOS Convention, *supra* note 106. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), the Supreme Court held that a warship of a foreign state, at peace with the United States, is exempt from U.S. jurisdiction while in U.S. territorial waters. The rationale was sovereign immunity and jurisdictional exemption of consent from the host state. Such consent is implied unless there is an express statement to the contrary. Consequently, the territorial state will not exercise jurisdiction even in criminal matters over such vessels, or the persons and property on board it. In *The Wildenhus's Case*, 120 U.S. 1 (1887), the Supreme Court held that when a private vessel—a merchant ship as opposed to a warship—enters a port, it is subject to domestic law unless exempted by treaty. The territorial state will exercise its jurisdiction for crimes committed on board the vessel, even when the victim and aggressor are both foreigners. The positions expressed in these two cases are still valid in the United States. *See* United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982), involving the jurisdiction of the United States beyond territorial seas of any foreign nation under 21 U.S.C. §§ 955a, 955b(d), wherein the court found that U.S. jurisdiction can be exercised over a foreign vessel on the high seas that is part of a conspiracy to be consummated in the United States when the vessel is "stateless," and also under the protective principle theory and the passive personality theory. *See also* Haitian Refugee Center, Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (holding president has authority to order interdiction on high seas of vessels carrying illegal aliens bound for the United States).

136 *See* the Territorial Sea Convention, *supra* note 133; LOS Convention, *supra* note 106; the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 5191, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

137 Chicago Convention, *supra* note 136, art. 1. The concept of innocent passage for aircraft in a foreign state's territorial airspace was discussed at the meeting of the Institute of International Law held in Brussels in 1902, but it was never adopted as a rule of law. The effectiveness of aircraft as weapons of war, demonstrated over the fields of Europe from 1914 to 1918, no doubt contributed greatly to the early scuttling of the concept. *See* 4 Green Haywood Hackworth, Digest of International Law 357–358 (1944). *See also* United States v. Louisiana, 394 U.S. 11 (1969); United States v. Baker, 609 F.2d 134 (5th Cir. 1980). The court in *Baker* relied on Chief Justice Marshall's opinion in *Church v. Hubbard*, 6 U.S. 187 (1804), which states that a nation's power to secure itself from injury may certainly be exercised beyond the limits of its territory. *Id.*

the complete and exclusive sovereignty of the subjacent state.[138] As with airspace over the territorial sea, there is no right of innocent passage. Any such right of passage must be acquired by agreement between states. These are the basic rules of international law governing the legal status of the high seas and atmosphere of the planet Earth.

The legal status of outer space is not subject to any claims of sovereignty. This rule, first developed out of UN resolutions, is a part of conventional and customary international law.[139] As of yet, there has been no agreement or decision on the separation of national airspace from outer space, although there are some indications as to where such a dividing line should be delineated.[140]

The use of the term "floating territory" to describe ships, aircraft and spacecrafts is, of course, an unnecessary fiction,[141] as many difficulties arise when the territorial principle is extended to justify jurisdiction over anything other than land. The four factors listed above are preferable to the floating territory concept for use in analysis because they expressly recognize, without the use of fictions, the uniqueness of these power bases and consequently their importance to the states. Another term employed to describe this theory is the "law of the flag," which considers ships, aircraft, and spacecrafts as territory proper because of their capability of acquiring nationality, which is manifested by appropriately identifying colors, insignia, or flag.

As a result of the carrier's nationality, states have competence to proscribe and enforce rules of conduct governing all persons aboard ships and aircraft of their nationalities, even when the ships or aircraft are within areas subject to other territorial states.[142] This competence, however, is not exclusive, except when a ship is on the high seas.[143] In *Skiriotes v. Florida*,[144] the U.S. Supreme Court said that:

> [T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.[145]

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138 Chicago Convention, *supra* note 136, arts. 3(c), 6. Although Article 5 gives to states that are parties to the Chicago Convention a right of passage for nonscheduled flights into and across the territory of another state, the right is very limited and cannot be compared with the right of innocent passage for ships in the territorial sea, as the territorial state may legally require the aircraft to land.

139 *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, articles I & II, Jan. 27, 1967, 3 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter 1967 Space Treaty]; G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. 15, at 15, U.N. Doc. A/5515 (1963); G.A. Res. 1721, U.N. GAOR, 16th Sess., Supp. 17, at 6, U.N. Doc. A/5100 (1961). *See* also Brierly, *supra* note 133, at 220; Myres McDougal et al., Law and Public Order in Space 217 (1963); Stephen Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 Fordham L. Rev. 349, 351 (1969).

140 *See* John A. Vosburgh, *Where Does Outer Space Begin?*, 56 A.B.A. J. 134 (1970).

141 *See* William E. Hall, A Treatise on International Law 244–249 (8th ed. 1924).

142 *See* Restatement (Third), *supra* note 3, at §§ 402, 502.

143 Restatement (Third), *supra* note 3, recognizes the principle of noninterference with vessels within the jurisdiction of another state and provides that, in general, ships "are not subject to interference on the high seas [except] if [such interference is] authorized by the flag state, or if there is reason to suspect that the ship is (a) engaged in piracy, slave trade, or unauthorized broadcasting; (b) is without nationality; or (c) though flying a flag . . . , is in fact of the same nationality as the . . . law enforcement ship." Restatement (Third), *supra* note 3, at § 522.

144 Skiriotes v. Florida, 313 U.S. 69 (1941).

145 *Id.* at 73. *See also* Blackmer v. United States, 284 U.S. 421 (1932); United States v. Bowman, 260 U.S. 94 (1922).

An example of such exercise of jurisdiction is the case of *United States v. Flores*,[146] where a U.S. citizen was indicted for the murder of another U.S. citizen aboard an American vessel. At the time of the offense, the vessel was anchored in the Port of Matadi in the Belgian Congo, which was then subject to the sovereignty of the Kingdom of Belgium, about 250 miles inland from the mouth of the Congo River. The U.S. Supreme Court overruled the lower court's decision that the place where the offense was committed was not within the admiralty and maritime jurisdiction of the United States, stating:

> It is true that the criminal jurisdiction of the United States is in general based upon the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect. *United States v. Bowman*, 260 U.S. 94, 98; compare, *Blackmer v. United States*, 284 U.S. 421. But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. . . . Subject to the right of the territorial sovereignty to assert jurisdiction over offenses disturbing the peace of the port, it has been supported by writers on international law, and had been recognized by France, Belgium, and other continental countries as well as by England and the United States.[147]

The United States has jurisdiction over its flag vessels anywhere on the high seas, and can board and search "manifests and other documents" and public areas of such vessels without any "probable cause" or limitations under the Fourth Amendment.[148] United States agents may search "for safety, documentation, and obvious customs and narcotics violations."[149] The First Circuit Court of Appeals spoke representatively in *United States v. Hilton* when it said "[w]e believe the limited intrusion represented by a document and safety inspection on the high seas, even in the absence of a search warrant or suspicion of wrongdoing, is reasonable under the Fourth Amendment."[150] There is extensive case law showing that authorized U.S. agents need no probable cause or even reasonable suspicion to board U.S. vessels on the high seas.[151]

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146 United States v. Flores, 289 U.S. 137 (1933).

147 *Id.* at 155–157. *See* United States v. Del Sol, 679 F.2d 216 (11th Cir. 1982). In passing § 995a of 21 U.S.C., Congress intended to reach extraterritorial acts of possession on board American ships under "law of the flag" theory of jurisdiction. For a discussion of implied extraterritoriality of a statute, and a review of all circuits discussing *United States v. Bowman*, *see* Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 Geo. Wash. Int'l L. Rev. 1 (2007).

148 United States v. Villamontes-Marques, 462 U.S. 579 (1983).

149 United States v. Thompson, 710 F.2d 1500, 1504 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984); United States v. Watson, 678 F.2d 765 (9th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1983).

150 United States v. Hilton, 619 F.2d 127, 131 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980).

151 The following cases are still controlling as there have been no newer cases on the same points of law. E.g., United States v. Thompson, 928 F.2d 1060 (11th Cir.), *cert. denied*, 112 S. Ct. 270 (1991); United States v. Peterson, 812 F.2d 486 (9th Cir. 1987); United States v. Troise, 796 F.2d 310 (9th Cir. 1986); United States v. Humphrey, 759 F.2d 743 (9th Cir.), *cert. denied,* 480 U.S. 917 (1985); United States v. Ciley, 785 F.2d 651 (9th Cir. 1985); United States v. Burke, 716 F.2d 935 (1st Cir. 1983); United States v. Dillon, 701 F.2d 6 (1st Cir. 1983); United States v. Luis-Gonzales, 719 F.2d 1539 (11th Cir. 1983); United States v. Bent, 707 F.2d 1190 (11th Cir. 1983); United States v. Ceballos, 706 F.2d 1198 (11th Cir. 1983); United States v. Green, 671 F.2d 46 (1st Cir.), *cert. denied,* 457 U.S. 1135 (1982); United States v. Watson, 678 F.2d 765 (9th Cir.), *cert. denied,* 103 S. Ct. 451 (1982); United States v. Hayes, 653 F.2d 8 (1st Cir. 1981); United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981), *cert. denied,* 459 U.S. 823 (1982); United States v. Clark, 664 F.2d 1174 (11th Cir. 1981); United States v. Hilton, 619 F.2d 127 (1st Cir.), *cert. denied,* 449 U.S. 887 (1980); United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Mazyak, 650 F.2d 788 (5th Cir. 1980), *cert. denied,* 455 U.S. 922

Although constrained by the law of the flag, the United States has been extending its jurisdiction over foreign vessels on the high seas. Recent case law suggests that U.S. agents have the authority to act against foreign vessels on the high seas under domestic statutes, namely 14 U.S.C. § 89(a) and 19 U.S.C. § 1581(a).[152]

Excluding international custom,[153] the 1958 Convention on the High Seas[154] states the basic right of states, both coastal and noncoastal, to operate ships under their respective flags on the high seas.[155] The Convention provides that:

> [S]hips have the nationality of the State whose flag they are entitled to fly. [But] [t]here must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.[156]

Article 6 of the Convention states that ships can be under the flag of only one state and may not change flags during a voyage or while in a port of call, unless there is a real transfer of ownership or change of registry. Except as expressly provided for in the High Seas Convention or other international treaties, the flag state has exclusive jurisdiction over the ship.[157] The flag state, however, may consent to another state's exercise of jurisdiction over one of its vessels. Recent cases show that even when the United States does not secure the consent of the flag state to exercise jurisdiction over one of its vessels and exercises jurisdiction nonetheless, U.S. courts reject individual defendants' objections to lack of jurisdiction. The First Circuit Court of Appeals on this point said: "[t]he purposes of international law's 'consent' requirement is to protect nations, not individuals; and if the nation does not care, the individual cannot raise 'lack of consent' as a ground for suppression."[158] Warships and ships used only in governmental noncommercial service have "complete immunity from the jurisdiction of any State other than the flag State."[159]

When a ship is within a foreign state's territorial sea or inland waters, the competence of the flag state to proscribe and enforce rules of conduct on board is less complete than when the

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(1982); United States v. De Weese, 632 F.2d 1267 (5th Cir. 1980), *cert. denied,* 454 U.S. 878 (1981); United States v. Williams, 617 F.2d 1063 (5th Cir. 1980); United States v. Zurovsky, 614 F.2d 779 (1st Cir. 1979), *cert. denied,* 446 U.S. 967 (1980); United States v. Erwin, 602 F.2d 1183 (5th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978), *cert. denied,* 446 U.S. 956 (1980); United States v. One (1), 43 Foot Sailing Vessel, 538 F.2d 694 (5th Cir. 1976).

152 *E.g.,* United States v. Pearson, 791 F.2d 867 (11th Cir.), *cert. denied,* 479 U.S. 991 (1986); United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986); United States v. Marsh, 747 F.2d 7 (1st Cir. 1984); United States v. Williams, 617 F.2d 1063 (5th Cir.), *cert. denied,* 446 U.S. 956 (1980).

153 *See* Brierly, *supra* note 133, at 304–307.

154 High Seas Convention, *supra* note 105.

155 *Id.* at art. 4.

156 *Id.* at art. 5. The Convention does not define what a "genuine link" is or what happens if such a link did not exist between a state and a ship ostensibly sailing under its flag. *See* Restatement (Third), *supra* note 3, at § 501 cmt. b; § 501, Reporters' Note 2.

157 High Seas Convention, *supra* note 105, art. 6; LOS Convention, *supra* note 106, art. 94. Examples of situations in which the rule of exclusive flag state jurisdiction is modified are piracy and slave trading, discussed later under the universality principle, and hot pursuit. In the latter, a ship or aircraft of the coastal state may undertake uninterrupted pursuit on the high seas of a foreign vessel that is suspected of having violated the laws and regulations of the coastal state, if the pursuit begins while the foreign vessel or one of its boats is still within the internal waters or territorial sea of the pursuing state. *Id.* art. 23. *See also* Ford v. United States, 273 U.S. 593 (1927); Brierly, *supra* note 133 at 307, 311.

158 United States v. Hensel, 699 F.2d 18, 29 (1st Cir. 1983), *cert. denied,* 461 U.S. 958 (1983); *accord,* United States v. Pringle, 751 F.2d 419 (1st Cir. 1984); United States v. Kincaid, 712 F.2d 1 (1st Cir. 1983); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).

159 High Seas Convention, *supra* note 105, arts. 8(1), 9; LOS Convention, *supra* note 106, art. 96.

ship is on the high seas. The flag state, instead of having exclusive jurisdiction, usually has concurrent jurisdiction with the coastal (territorial) state.

Regarding merchant ships and governmental ships operated for commercial purposes, the Territorial Sea Convention provides that:

> [T]he criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.[160]

It has not been established, however, whether international law prohibits a coastal state from exercising its jurisdiction over situations not provided for in Article 19(1)(a)–(d) of the Territorial Sea Convention, as this provision dictates only that a coastal state should not exercise its jurisdiction over merchant ships and governmental ships operated for commercial purposes.

Generally, however, the coastal state may exercise criminal jurisdiction in matters that affect the "peace of the port,"[161] an imprecise term that should be adequately provided for by Article 19(1)(a)–(d), but which may be extended further.

An example of the type of situation that may fall under the "peace of the port" doctrine is the *Wildenhus's* Case,[162] where a Belgian national killed another Belgian national below the deck of a Belgian vessel on which they were both crew members. At the time of the offense, the ship was moored to a dock in Jersey City. Wildenhus was arrested by local police authorities and appropriately charged. The Belgian consul applied for a writ of habeas corpus based upon a treaty between Belgium and the United States, which provided in particular regard to disorders aboard merchant vessels:

> [T]he local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.[163]

After discussing cases that had been heard before French tribunals under a previous treaty between the United States and France, the Supreme Court held that the local court properly exercised jurisdiction over the case:

> Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereign of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction and that

160 Territorial Sea Convention, *supra* note 133, arts. 19(1), 21.

161 *Id.*

162 Wildenhus's Case, 120 U.S. 1 (1886).

163 *Id.* at 5. *See also* United States v. Perez-Herrera, 221 U.S. 280 (1911); United States v. Mann, 615 F.2d 668 (5th Cir. 1980), *cert. denied,* 450 U.S. 994 (1981); United States v. Rubies, 612 F.2d 397 (9th Cir. 1979), *cert. denied,* 446 U.S. 940 (1980); *In re* Chan Kam-Shu, 477 F.2d 333 (5th Cir. 1973) (regarding seizure of a person on board a vessel).

> if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it.[164]

In determining whether a crime committed on board a ship disturbs the "peace of the port" of the coastal state, *Wildenhus's* case[165] quotes from a French case, which established its jurisdiction:

> Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquility of the port or the intervention of the local authority is invoked or the act constitutes a crime by common law [*droit commun,* the law common to all civilized nations] the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because the crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory.[166]

The above provisions do not affect the right of a coastal state "to take any steps authorized by its laws" for the purpose of conducting an arrest or an investigation on board a foreign ship passing through the coastal state's territorial sea after leaving its internal waters.[167] In this way, the coastal state retains complete jurisdiction, not subject to the suggested general rule of Article 19(1), to proscribe and enforce rules governing events taking place either on board the foreign ship or on land while the ship was in the coastal state's internal waters. If the alleged crime or offense took place on board the foreign ship before it entered the coastal state's territorial sea, however, the coastal state is prohibited from taking any steps on board the ship to arrest any person or conduct any investigation if the ship is only passing through the territorial sea without entering internal waters.[168] This distinction between the interest of a state with regard to its territorial sea on the one hand, and its internal waters on the other, is no doubt a realization of the fact that when a foreign ship is in the internal waters of a coastal state, it will probably dock at some time during the duration of the visit. Upon docking, the crew, and perhaps the passengers of the ship, may go ashore and come in contact with the nationals of that state. If any of these interactions are criminal or tortious in nature, the coastal state may exercise jurisdiction, even though the ship has left the port and is passing through the territorial sea on its way to the high seas.

Courts in extradition matters rely on the convenient fiction that a vessel is an extension of the physical territory of a state and, therefore, within the scope of all national legal provisions applicable to its territory. Nonetheless, the relationship between territory and jurisdiction is often at issue in extradition cases involving vessels because of the conflicts that arise between coastal states and flag states.

In *R. v. Governor of H. M. Prison, Brixton, ex parte Minervini*,[169] Norway requested the extradition from Great Britain of Onafrio Minervini, an Italian citizen charged with the murder of a fellow seaman on board a Norwegian flag vessel. No specific evidence as to the geographic

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164 Wildenhus's Case, 120 U.S. at 18.

165 *Id.*

166 *Id.*

167 Territorial Sea Convention, *supra* note 133, art. 19(2). Indeed, U.S. courts have held that U.S. agents may board foreign vessels in U.S. territorial waters without reasonable suspicion of criminal activity for the purposes of document and safety inspections. United States' jurisdiction attaches to foreign vessels in U.S. territorial waters by virtue of their presence. Cunard Steamship Co. v. Mellon, 262 U.S. 100, 124 (1923). The principal case addressing the authority of U.S. agents to stop and search foreign vessels in U.S. waters is *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

168 Territorial Sea Convention, *supra* note 133, art. 19(5); LOS Convention, *supra* note 106, art. 27.

169 *R. v. Governor of H. M. Prison, Brixton,* ex parte *Minervini*, [1958] 3 All E.R. 318 (Eng.).

position of the vessel at the time of the alleged murder was submitted to the court, although it appeared that the vessel had been located some six days steaming distance from the port. After his commitment for surrender by the British extradition magistrate, Minervini applied for a writ of habeas corpus alleging, inter alia, that the case did not come within the provisions of the Extradition Treaty of 1873 between Great Britain and Norway,as the offense was not, in the words of Article I of the Treaty, "committed in the territory" of the requesting state. The Queen's Bench Division rejected this contention and held that the petition should be denied, stating:

> This treaty is not treating "territory" in its strict sense but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the treaty. Indeed, it is to be observed, though it may be said to be an argument the other way, that in many of these treaties reference is made not to territory but to jurisdiction, [sic] but in my view in this treaty territory is equivalent to jurisdiction. . . .
>
> The second way in which he [the applicant] puts the case is this: Assuming that he is wrong and that "territory" must be given more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third Power because he says that would be a gross breach of international comity; it would not only be legislating in respect of foreign territory, but also would be assuming something which was within that territory to be the territory of another foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship, whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that Power; because if I am right in saying that "territory" in Art. 1 of the treaty is equivalent to "jurisdiction," then assuming that the ship was at the time of the alleged murder within the territory of a foreign Power, it would be only a matter of competing jurisdiction and no one suggests that it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it seems to me that it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway, in the territorial waters of this country or in the territorial waters of any other Power; the Norwegian government had jurisdiction and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position of the vessel and he had jurisdiction to make the order which he did . . . .[170]

The Lord Chief Justice in the *Minervini* case dismissed the application and held that the word "territory" in the Extradition Treaty was synonymous with "jurisdiction." The treaty was held not to be connected with territory in its strict sense, but in a sense that was equivalent to jurisdiction, as the list of crimes in the treaty included "assaults on board a ship on the high seas" and other offenses occurring on the high seas.[171]

The same question was at issue in *Wilheim Wolthusen v. Starl*,[172] brought before the Supreme Court of Argentina in 1926. The United States requested the extradition from Argentina of an individual charged with having committed larceny on board an American merchant vessel while the vessel was moored in the harbor of Rio de Janeiro.

The Extradition Convention of 1896 between the United States and Argentina provides for the extradition of persons accused of crimes "committed in the territory of one of the high contracting parties."[173] The accused contended that the United States had no jurisdiction, the act having been committed in the territorial waters of Brazil. The Supreme Court of Argentina

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170 *Id.* at 320–321.

171 *Id.*

172 *Wolthusen v. Starl*, 3 Ann. Dig. 305 (Sup. Ct. 1926) (Arg.).

173 Convention on Extradition, U.S.–Arg., Sept. 26, 1896, 31 Stat. 1883, T.S. No. 6. The current U.S.–Artg. Extradition Treaty, S. Doc 105–118, June 15, 2000, states extradition shall be granted for offenses committed in whole or in part within the Requesting State's territory, which, for the purposes of this Article, includes all places subject to that State's criminal jurisdiction.

held that extradition should be granted. The Court noted that although the crime took place in the jurisdictional waters of Brazil, the crime injured only the rights and interests secured by the laws of the United States. The Court found that according to the principles of international law, "territory" meant not only the area within the limits of a state but also all other places subject to the sovereignty and jurisdiction of that state. With reference to the Treaty of 1896, "territory" was also found to include merchant or war vessels under the flag of the state as well as the house of a diplomatic agent of that state. The Supreme Court of Argentina held:

> [T]hat the term territory in the clause of the treaty in question includes, for the purpose of extradition, crimes committed on the high seas on board merchant or war vessels carrying the Argentina or United States flag; crimes committed on war vessels of both nations and in the house of a diplomatic agent of either of the countries.[174]

2.3.3. United States Vessels on the High Seas

United States courts consider that with respect to U.S. vessels on the high seas, the United States can exercise jurisdiction under the "objective territorial principle" of extraterritorial jurisdiction, discussed *supra* Sec. 2.2. This theory requires that the act over which a state asserts jurisdiction has an actual or intended effect within the territory of that state.[175] United States courts have followed this position in cases involving vessels on the high seas that have been involved in drug smuggling, presumably into the United States.[176]

The Third Circuit Court of Appeals has specifically stated that "Congress may assert *extraterritorial* jurisdiction over violations of United States law occurring on the high seas, so long as such jurisdiction does not abridge constitutional provisions or this nation's international agreements."[177] Note that in addition to 14 U.S.C. § 89(a), which explicitly provides the U.S. Coast Guard with the authority to make inspections, searches, and seizures of any vessel over which the United States has jurisdiction, including those on the high seas,[178] 19 U.S.C. § 1581(a) authorizes U.S. Customs officers to board, inspect, and search any vessel present inter alia "at any . . . authorized place."[179] An "authorized place" under § 1581(a) may extend beyond the territorial waters of the United States to the high seas.[180]

Courts have found broad authority of the Coast Guard under § 89(a) on the high seas when U.S. vessels are involved.[181] For example, the First Circuit Court of Appeals has said that under the provisions of § 89(a), "the Coast Guard may stop and board any American flag vessels on the high seas without a warrant and without any particularized suspicion of wrongdoing."[182] Furthermore, courts do not require any showing of probable cause or reasonable suspicion to justify Coast Guard action on the high seas under § 89(a). The First Circuit Court of Appeals in *United States v. Hilton* held: "We believe the limited intrusion represented by a document and safety inspection on the high seas, even in the absence of a warrant or suspicion

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174 *Wolthusen*, 3 Ann. Dig. 305.

175 *See* Blakesley, *Extraterritorial Jurisdiction, supra* note 1 at 14–19 (discussing the objective principle of extraterritorial jurisdiction).

176 United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986).

177 *Id.* at 166 (emphasis added).

178 14 U.S.C. § 89(a) (2000).

179 19 U.S.C. § 1581(a) (2000).

180 *See* United States v. Cariballo-Tamayo, 865 F.2d 1179 (11th Cir. 1989) (regarding 19 U.S.C. § 1587(a) authorizing boarding of "hovering vessels" on the high seas).

181 United States v. Purvis, 768 F.2d 1237, 1238 (11th Cir. 1985) (stating Coast Guard officers may "stop and board an American flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity").

182 United States v. Hilton, 619 F.2d 127, 131 (1st Cir.), *cert. denied,* 449 U.S. 887 (1980).

of wrongdoing is reasonable under the Fourth Amendment."[183] There is extensive case law showing that authorized U.S. agents need no probable cause or even reasonable suspicion to board U.S. vessels on the high seas.[184]

2.3.4. Non–United States' Vessels on the High Seas

United States jurisdiction over foreign vessels on the high seas is, as stated above in Section 2.3.3, constrained by the law of the flag and the requirement of international law that, on the high seas a state can exercise jurisdiction only over vessels sailing under its flag except for cases in which vessels engage in or are the scene of international crimes permitting the exercise of universal jurisdiction, discussed below in Section 7. A state whose flag vessel is involved may, however, waive its protection and consent to another state's jurisdiction over the vessel.

Whenever the United States secures the consent of another state to exercise jurisdiction over its vessel, U.S. agents may exercise their authority under relevant statutes[185] that apply to U.S. vessels on the high seas, namely 14 U.S.C. § 89(a) and 19 U.S.C. § 1581 (a).

It is important to note, however, that even when the United States does not secure the consent of the flag state to exercise jurisdiction over one of its vessels, and exercises jurisdiction nonetheless, U.S. courts have rejected an individual defendant's objections to the lack of jurisdiction. The First Circuit Court of Appeals presents a very questionable position on this point by stating that "[t]he purpose of international law's 'consent' requirement is to protect nations, not individuals; and if the nation does not care, the individual cannot raise 'lack of consent' as a ground for suppression."[186] However, it is clear from this holding that if there is a protest from the flag state, then the issue of unlawful search and seizure can be raised. For a parallel position on standing to raise the issue of violation of the rule of specialty, see Chapter VII, Sec. 6.6.

The U.S. case law addressing search and seizure of foreign vessels on the high seas began with *The Antelope* case decided by the Supreme Court.[187] *The Antelope* grew out of a seizure of a

183 *Id.* at 131.

184 *See supra* note 151.

185 United States v. Davis, 905 F.2d 245, 250 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 753 (1991) (holding verbal consent by flag state sufficient to bring vessel within U.S. jurisdiction); United States v. Quemener, 789 F.2d 145, 153–154 (2d Cir.) (regarding agreement with Great Britain allowing U.S. agents to board a British ship within 150 miles of United States' coast), *cert. denied,* 479 U.S. 829 (1986); United States v. Wright-Barker, 784 F.2d 161, 176 (3d Cir. 1986) (concerning consent of Panamanian government allowing Coast Guard to seize drugs from a Panamanian freighter on the high seas); United States v. Peña-Jessie, 763 F.2d 618, 621 (4th Cir. 1985) (regarding consent of Panamanian government allowing U.S. agents to board); United States v. Marsh, 747 F.2d 7, 9 (1st Cir. 1984) (concerning agreement with Denmark allowing customs officials to board and seize Danish vessel on high seas).

186 United States v. Hensel, 699 F.2d 18, 29 (1st Cir.), *cert. denied,* 103 S. Ct. 2431 (1983). *See also* United States v. Kincaid, 712 F.2d 1 (1st Cir. 1983) (holding consent of flag state not required for a valid search under the Fourth Amendment); *accord* United States v. Pringle, 751 F.2d 419, 425 (1st Cir. 1984) (stating individual defendants have "no standing to invoke the protections on international law"); United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978) (holding that of the possible remedies, nothing requires "the granting of immunity from criminal prosecution"); United States v. Bellaizac-Hurtado, 2011 U.S. Dist. LEXIS 22271 at *7–*8 (S.D. Fla. 2011) (stating "standing to claim noncompliance with international law is thus denied to individuals, like Defendants here, absent state intervention. It does *not* necessarily follow that the MDLEA was enacted without regard to principles of international law. Instead, this statutory limitation on standing is fully consistent with a traditional understanding of the 'Law of Nations.' "). *See* Ch. VII, Sec. 6 on standing in connection with speciality.

187 *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

Spanish slave vessel on the high seas by the Revenue Cutter Service, the predecessor of the Coast Guard.[188] The Court held that the stop and seizure of the slave ship was illegal.[189] The Court said: "If it be neither repugnant to the law of nations, or privacy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist."[190] The case law that has developed since *The Antelope* clearly suggests that U.S. agents have authority to act under domestic statute against foreign vessels on the high seas, provided the agents have at least a reasonable suspicion that the vessel is subject to U.S. jurisdiction by virtue of its violation of U.S. criminal law.[191]

2.3.5. Stateless Vessels

Stateless vessels are, in international law, subject to the jurisdiction of any state wishing to exercise jurisdiction over them.[192] United States courts are in agreement with this position,[193] and have consistently held that U.S. agents are authorized to approach and board any apparently stateless vessel[194] to determine its nationality[195] and whether it is engaging in illicit activities.

188 *Id.* at 68.

189 *Id.* at 122.

190 *Id.*

191 United States v. Vilches-Navarrete, 523 F.3d 1, 14 (1st Cir. 2008) (noting that "the USCG's 'authority under 14 U.S.C. § 89(a) to stop and board a vessel on the high seas is quite broad.' ") (citations omitted); United States v. Aguilar, 286 Fed. Appx. 716 (11th Cir. 2008) (unpublished opinion); United States v. Williams, 617 F.2d 1063, 1076 (5th Cir.), *cert. denied,* 446 U.S. 956 (1980). *See also* United States v. Wright-Barker, 784 F.2d 161, 176 (3d Cir. 1986) (adopting a reasonable suspicion standard for high seas boardings); United States v. Pearson, 791 F.2d 867, 870 (11th Cir.) (applying reasonable suspicion standard), *cert. denied,* 479 U.S. 991 (1986); United States v. Marsh, 747 F.2d 7, 10 (1st Cir. 1984) (requiring reasonable suspicion where vessel's appearance and movements unusual).

192 *See supra* note 129. *See also* Reuland, *supra* note 109, at 1196–1206, and accompanying text (discussing the status of stateless vessels in international law).

193 *E.g.,* United States v. Rubies, 612 F.2d 397 (9th Cir. 1979) (stating that stateless vessels do not enjoy the protection of the law of the flag and thus are not accorded the right to undisturbed navigation).

194 United States v. Matos-Luchi, 627 F.3d 1, 6 (1st Cir. 2010) (stating "vessel may be deemed 'stateless,' and subject to the enforcement jurisdiction of any nation on the scene, if it fails to display or carry insignia of nationality and seeks to avoid national identification"); United States v. Tinoco, 304 F.3d 1088 (11th Cir. 2002). This decision was superseded by statute regarding the requirement that a court consider the secretary of state's certification as conclusive proof of statelessness, as noted in *United States v. Brant-Epigmelio,* 2009 U.S. Dist. LEXIS 124918 (M.D. Fla. 2009); Moreno v. United States, 510 F. Supp. 2d 780, 782 (M.D. Fla. 2007) (stating vessel was without nationality and subject to U.S. jurisdiction where none of the crew members claimed or admitted to being the captain or master of the vessel when U.S. Coast Guard boarded the vessel); United States v. Piedrahita-Santiago, 931 F.2d 127, 129–130 (1st Cir. 1991) (stating vessel considered stateless when not flying a flag); United States v. Passos-Paternina, 918 F.2d 979, 980–983 (1st Cir. 1990) (holding vessel considered stateless when captain made conflicting claims of nationality and had flags of two states present on board); United States v. Fuentes, 877 F.2d 895, 900 (11th Cir. 1989) (stating vessel considered stateless when flying no flag, had no home port markings on the hull, had no registration documents, and captain made conflicting claims of nationality).

195 United States v. Cuevas-Esquivel, 905 F.2d 510, 513 (1st Cir.) (boarding apparently stateless vessel valid because as such it is subject to U.S. jurisdiction, at least for purposes of determining nationality), *cert. denied,* 111 S. Ct. 208 (1990); United States v. Cortes, 588 F.2d 106, 110–111 (5th Cir. 1979) (boarding an apparently stateless vessel valid to ascertain her nationality); United States v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979) (boarding an apparently stateless vessel valid as such is subject to U.S. jurisdiction, at least for the purposes of establishing her nationality), *cert. denied,* 446 U.S. 940 (1980).

Where there are claims to multiple nationality of a vessel, a U.S. court has held that such a vessel is properly considered stateless and thus subject to U.S. jurisdiction.[196]

2.3.6. Searches and Seizures on the High Seas

The traditional notion that international crimes on the high seas, like piracy, are subject to universal jurisdiction[197] was extended first to the control of the slave trade,[198] and then to drug trafficking. The 1958 Convention on the High Seas and the 1982 Law of the Sea Convention both provide for broad rights of inspection, boarding, and seizure for these crimes. This provides the conventional basis for a state's exercise of national jurisdiction. The evolution of these concepts, which with respect to piracy go as far back as the mid-1600s, also provide a jurisdictional basis under customary international law. The United States has also relied on its national jurisdiction to seize persons suspected of engaging in acts of terrorism.[199] The consequences of such searches and seizures include the right of the boarding state to prosecute and eventually to extradite such persons it may have legally seized. The flag state of the vessel has priority in jurisdiction, unless the boarding state can show that the vessel was engaged in the violation as opposed to some of its crew members and passengers. The flag state can protest the boarding and the seizure, and insist on the return of persons seized for trial under the law of the flag state. This is still an area fraught with legal uncertainties because of the absence of clearly enunciated international law norms. For further discussion on this question, see *infra* Sections 2.3.7 and 7.

Another problem arises with respect to seizure on the high seas of someone sought by the United States in connection with an indictment or a conviction in the United States. This problem arose in connection with the seizure of Fawaz Yunis. On September 13, 1987, after luring Fawaz Yunis onto a yacht in the eastern Mediterranean Sea with promises of a drug deal, FBI agents waited until the yacht sailed into international waters, and then handcuffed, shackled, and arrested him on charges of conspiracy, hostage taking, aircraft damage, and air piracy.[200] Thereafter, Yunis was transferred onto a Navy vessel in which he was reported to have suffered severe sea sickness, and later developed swollen and bruised wrists from the use of handcuffs. Yunis, however, maintained that he was tortured by FBI agents who were on board the naval vessel. However, neither the district court nor the court of appeals paid much attention to these facts. The court of appeals in *United States v. Yunis*, citing the *Ker-Frisbie* doctrine, upheld the legality of Yunis's abduction and stated: "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "[201] The Court of Appeals refused to apply the *Toscanino*[202] exception, stating that "[such a] rule has, moreover, been limited to cases of torture, brutality, and similar outrageous conduct."[203] Even though the circumstances surrounding Yunis's arrest

196 *See* United States v. Tam Fuk Yuk, 2009 U.S. Dist. LEXIS 7941 at *5–*6 (M.D. Fla. 2009) *motion for new trial denied*, United States v. Chun Hei Lam, 2011 U.S. App. LEXIS 12185 (11th Cir. 2011).

197 *See infra* Sec. 7.

198 *See, e.g.,* M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. Int'l L. & Pol. 445 (1991).

199 *See* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); United States v. Yunis, 705 F. Supp. 33 (D. D.C. 1989); United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988); United States v. Yunis, 681 F. Supp. 909 (D. D.C. 1988); United States v. Yunis, 681 F. Supp. 896 (D. D.C. 1988).

200 United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988)

201 United States v. Yunis, 924 F.2d 1086, 1092–1093 (D.C. Cir. 1991).

202 *See* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

203 *Yunis,* 924 F.2d at 1093 (quoting United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied,* 421 U.S. 1001, 95 S. Ct. 2400, 44 L. Ed. 2d 668 (1975)).

were not "a model for law enforcement behavior," the Court of Appeals refused to extend the *Toscanino* exception to the "discomfort and surprise" experienced by Yunis.[204]

It is important to note that because this case differs from other abduction cases in that the seizure occurred on the high seas, and thus did not violate any state's sovereignty, it can be argued that the seizure was not in the nature of an abduction because the arrest was lawful. As to luring Yunis out on the high seas, it is hard to argue that the greedy expectation of a drug deal, even though false, can be deemed a sufficient breach to undermine the validity of the arrest. The only serious question that arises, in this writer's mind, is the allegation of torture of Yunis, or at least of his physical mistreatment. Those who are accused of having committed such acts should have been investigated by the FBI's Office of Professional Standards.

In *United States v. Best*,[205] the Third Circuit found that the United States could exercise jurisdiction in connection with alien smuggling in a situation involving the seizure of a vessel, as well as the persons on board it, outside the territorial waters of the United States, but in the contiguous zone as defined under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.[206] However, the court in this case adopted the position of *male captus bene detentus*, first expressed in *Ker v. Illinois*[207] and *Frisbie v. Collins*,[208] and confirmed in *Alvarez-Machain*.[209]

2.3.7. The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

On October 7, 1985, the Italian-flagged vessel *Achille Lauro* was seized on the high seas off the Egyptian Coast by a group of persons believed to belong to the Palestine Liberation Front (PLO).[210] The *Achille Lauro* subsequently entered the territorial waters of Egypt and was seized by Egyptian authorities. One of the perpetrators killed a U.S. citizen, Leon Klinghoffer, who was disabled and in a wheelchair, and threw him overboard after the group held control of the vessel and seized all of its passengers and crew. The act was not piracy under U.S. law,[211] or under the 1958 Geneva Convention[212] or the Law of the Sea Convention.[213]

The case was novel in that it had elements of what was covered under the 1970 Hague Convention[214] and the 1971 Montreal Convention[215] for the prohibition of crimes aboard aircraft. These conventions were inspired from the customary and conventional international law crime of piracy, but the provisions on piracy, slavery, and slave-trafficking and drug-trafficking on the

204 *Yunis,* 924 F.2d at 1093.

205 United States v. Best, 304 F.3d 308 (3d Cir. 2002).

206 Territorial Sea Convention, *supra* note 133.

207 *Kerr*, 119 U.S. 436 (1886).

208 Frisbie v. Collins, 342 U.S. 519 (1952).

209 United States v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), 542 U.S. 692 (2004), *vacated & remanded en banc*, 374 F.3d 1384. *See also* Ch. V.

210 *See, e.g.,* Gerald P. McGinley, *The* Achille Lauro *Case: A Case Study in Crisis Law, Policy and Management, in* Legal Responses to International Terrorism: U.S. Procedural Aspects 323 (M. Cherif Bassiouni ed., 1988).

211 *See The Cutting Case, in* 2 John B. Moore, Digest of International Law 228–242 (1901) [hereinafter Moore Digest].

212 High Seas Convention, *supra* note 105, art. 15.

213 *See* LOS Convention, *supra* note 106.

214 Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7162 [hereinafter the Hague Convention].

215 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter the Montreal Convention].

high seas contained in the 1958 High Seas Convention and the 1982 Law of the Seas Convention had not been extended to cover other crimes committed on the high seas. Thus, jurisdiction would vest in the state where the vessel was flagged, as an extension of the territoriality principle. But the vessel was seized in Egyptian territorial waters, and the victims were from a number of different countries, chief among them the U.S. victim, who was the only casualty.[216] All of these facts raised different jurisdictional claims and potential claims that could not be answered on the basis of clear-cut established international law. It became evident that a need existed for a new convention on the subject of such claims arising from act committed on board ships on the high seas.

The International Maritime Organization developed a convention entitled the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.[217] The textual language, which is the product of negotiations, is not the best that could have been obtained, but it provides some guidance as to priority, which will help national courts in deciding such conflict questions.

2.3.8. The Law of the Flag for Aircraft

Conventional and customary international law recognize the jurisdiction of a state to proscribe and enforce rules of conduct for all persons aboard aircraft having its nationality, whether the aircraft is over the high seas or within the airspace of another state. This principle is found in almost all national laws.[218]

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216 *See* Klinghoffer v. S.N.C. *Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990) (concerning admiralty jurisdiction in 28 U.S.C. § 1333), *vacated*, 937 F.2d 44 (2d Cir. 1991). *See also* United States v. Palestine Liberation Org., 695 F. Supp. 1456 (S.D.N.Y. 1988) (concerning Anti-Terrorism Act of 22 U.S.C. §§ 5201–5203, Agreement between United Nations and United States, § 1 *et seq.,* 22 U.S.C. § 287).

217 Mar. 10, 1988, 27 I.L.M. 668 (1988), which provided the following jurisdictional provision, article 6:

> 1. Each State party shall take such measure as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed:
>
> (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
>
> (b) in the territory of that State, including its territorial sea; or
>
> (c) by a national of that State.
>
> 2. A State Party may also establish its jurisdiction over any such offence when:
>
> (a) it is committed by a stateless person whose habitual residence is in that State; or
>
> (b) during its commission a national of that State is seized, threatened, injured or killed; or
>
> (c) it is committed in an attempt to compel that State to do or abstain from doing any act.
>
> 3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.
>
> 4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the State Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.
>
> 5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

See also Melvina Halberstam, *Terrorism on the High Seas: The* Achille Lauro *Piracy and the I.M.O. Convention on Maritime Safety*, 82 Am. J. Int'l L. 262 (1988).

218 For the United States, see Restatement (Third), *supra* note 3, at § 402 cmt. h; *id.* at § 402, Reporters' Note 4; Harvard Research Project,*supra* note 3. But there exists specific legislation in various titles of the United States Code pertaining to the regulation of aircraft and more particularly to jurisdiction on board aircrafts with respect to criminal conduct. *See infra* Sec. 7.

Unlike ships that have the right of innocent passage through territorial waters, there is no right of innocent passage for aircraft through the airspace above a state's territory, internal waters, or territorial sea. The actual practices of states with respect to crimes and other offenses committed on board aircraft of their own nationalities outside their territorial borders indicate, at least insofar as states dedicated to a strict interpretation of the territorial principle are concerned, a reluctance to exercise jurisdiction in the absence of express and specific legislative authorization.

In *United States v. Cordova*,[219] the defendant, Cordova, a Puerto Rican passenger on an American aircraft that at the time was over the high seas somewhere between San Juan, Puerto Rico and New York, assaulted another passenger and members of the crew. Cordova was arrested when the plane arrived at New York, and brought to trial. The court found him guilty, but refused to convict him, due to the absence of federal jurisdiction, holding that the statutes under which jurisdiction was claimed were applicable only to vessels within the admiralty and maritime jurisdiction of the United States or to certain crimes committed on the high seas. The court did not consider an airplane a vessel within the meaning of the statute or the airspace over the high seas as a part of the high seas.

In response to this decision Congress passed the Crimes in Flight Over the High Seas Act[220] in 1952, to include within the "special maritime and territorial jurisdiction of the United States" the following:

> Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.[221]

The English position is well expressed in *Regina v. Martin*,[222] wherein the defendants were British nationals charged in 1966 with unlawful possession of raw opium while aboard a British aircraft en route to Singapore from Bahrain. No violation of the law of either state was alleged. Jurisdiction was claimed under the British Civil Aviation Act, which provided, in part, that:

> [A]ny offense whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.[223]

The court stated that it did not have jurisdiction over the defendants because they were not in the United Kingdom at the time the offense was committed, and the law under which they were indicted did not apply to acts done on British aircraft outside of the United Kingdom. Section 62 did not create any offenses, but only provided the place where an act that was already an offense, if committed on a British aircraft outside of the United Kingdom (which was not the case here), might be tried.

It should be noted, however, that the court did draw a distinction between "universal" offenses, such as murder and theft, which "are not thought of as having territorial limits," and offenses defined as such "only in relation to a particular place." An example of the latter category would

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219 United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950).

220 Act of July 12, 1952, Pub. L. No. 514, ch. 695, 66 Stat. 695 (codified at 18 U.S.C. § 7(5) (1988)).

221 *Id.* The term "State" has been defined to mean a state of the United States, and not a foreign country. Wynne v. United States, 217 U.S. 234 (1910). For a detailed discussion of United States' practice regarding aircraft crimes, *see* Elizabeth G. Brown, *Jurisdiction of United States Courts over Crimes in Aircraft*, 15 Stan. L. Rev. 45 (1962).

222 [1956] 2 Q.B. 272 (Eng.).

223 British Civil Aviation Act, 12, 13 & 14 Geo. 6, Ch. 67, at 62 (1949).

be the British law in question prohibiting the possession of certain drugs, which was applicable only in the United Kingdom. In construing the British statute, the court said:

> It is most unsatisfactory if there is to be complete lawlessness on British aircraft, but on the other hand, it can hardly be satisfactory if a foreigner traveling from one place to another, thousands of miles from England, is to be held liable for infringing regulations about which he cannot possibly have any knowledge at all.[224]

The possibility of concurrent jurisdictional claims, including but not limited to the conflicting principles discussed above,[225] caused in part the search for an effective and appropriate convention to clarify the subject.

In 1963, the Convention on Offenses and Certain Other Acts Committed on Board Aircraft,[226] also known at the Tokyo Convention, was adopted. The Convention applies to:

> [O]ffenses against penal law [and other] acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.[227]

In general, the Convention applies to offenses or other acts done by a person on board any aircraft registered in a state party to the treaty "while the aircraft is in flight or on the surface of the high seas or of any area outside the territory of any State."[228] For purposes of the Convention, "an aircraft is considered to be in flight from the moment when the landing run ends."[229] The Convention does not apply to aircrafts used in military, customs, or police services.[230]

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224 *Regina v. Martin*, [1956] 2 Q.B. 272, 284 (Eng.).

225 The 1958 Draft Convention on Aviation Crimes, prepared by the Air Law Committee of the International Law Association, provided in Article 3 a list of preferences as to what law should apply in the case of a crime committed aboard an aircraft:

> 3.01 The criminal law to be applied to the case shall, in the discretion of the court acquiring jurisdiction according to Article 2, be selected from the following laws in the order of preference stated:
>
> 3.01(1) First preference: the law of the State of the flag of the aircraft, if such State has an appropriate law;
>
> 3.01(2) Second preference: the law of the State of the place where the accused person first touches earth after the commission of the crime;
>
> 3.01(3) Third preference: the law of the State and of the place where the aircraft first touches down after the commission of the crime. (This may be an emergency landing place or a scheduled landing place).
>
> 3.01(4) Fourth preference: the law of the State and of the place where the aircraft was first scheduled to touch down or where a first landing had been planned when the flight commenced as the normal end of the flight during which the crime was committed. (This will not be an emergency landing place.).. .
>
> 3.01(5) Fifth preference: the law of the place where the aircraft has ascended into flight prior to commission of the crime.

International Law Association, *Air Law, Crimes in Aircraft* 301, 303 (New York University Conference 1958).

226 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 120 U.S.T. 2942, T.I.A.S. No. 6768 [hereinafter the Tokyo Convention].

227 *Id.* at art. 1(1).

228 *Id.* at art. 1(2). *But see* Ch. III of the Tokyo Convention, *supra* note 226, which makes special provision for the powers of the aircraft commander.

229 *Id.* at art. 1(3).

230 *Id.* at art. 1(4).

The jurisdiction of states that are parties to the Convention is set out in Articles 3 and 4. Article 3 reaffirms the law-of-the-flag principle but does not make it exclusive. It provides:

> 1. The State of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board.
>
> 2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offenses committed on board aircraft registered in such State.
>
> 3. This convention does not exclude any criminal jurisdiction exercised in accordance with national law.[231]

Article 4 provides certain limitations upon the exercise of concurrent jurisdiction based on other principles, at least insofar as aircraft in flight are concerned. It reads:

> A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board except in the following cases:
>
> (a) the offense has effect on the territory of such State;
>
> (b) the offense has been committed by or against a national or permanent resident of such State;
>
> (c) the offense is against the security of such State;
>
> (d) the offense consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such State;
>
> (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.[232]

The Tokyo Convention, therefore, allows states considerable latitude for asserting jurisdiction. Other provisions deal with powers of the aircraft commander, unlawful seizure of aircraft and various powers and duties of states under the Convention.[233] Conspicuous by their absence from the Convention are any provisions dealing with (1) the development of a system of priorities governing the order in which the several possible principles of criminal jurisdiction, including the law of the flag, can be exercised; (2) the prevention of double jeopardy; and (3) the question of which state has jurisdiction over an in-flight crime that occurs aboard an aircraft chartered under a "barehull" charter to one who is a national of a state other than the state of registry.[234]

On December 16, 1970, the Convention for the Suppression of Unlawful Seizure of Aircraft was signed at The Hague.[235] The Hague Convention is mainly addressed to the crime of air piracy, rather than to other common crimes, which need not be acts of air piracy though committed on board aircraft.[236]

Notwithstanding the numerous instances of aircraft hijacking, there has been no case known to this writer where extradition under the terms of the 1963 Tokyo or 1970 Hague

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231 *Id.* at art. 3.

232 *Id.* at art. 4.

233 *Id.* at art. 3. For an analysis and appraisal of the Tokyo Convention, see Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air L. & Com. 305, 328–354 (1964).

234 *Id.* at 329–330. *See also* Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980).

235 *See* Hague Convention, *supra* note 214, at §§ 5, 6.

236 For jurisdiction relating to unlawful acts on aircrafts and at airports, see the Montreal Convention, *supra* note 215. Article 5 states:

Convention was the basis upon which such an offender was surrendered to the United States for prosecution.[237] In all cases, the hijacker either was returned or surrendered through one of the alternative devices of rendition or returned to the United States voluntarily. In several hijacking cases not involving the United States, the offenders were tried by the territorial state, and extradition was denied.[238] Even though the universality theory applies,[239] no state other than the flag state or the landing state has ever sought or prosecuted a hijacker under this theory. The greater concern of the drafters of the 1970 Hague Convention was that the *political offense exception* should not be a bar to the extradition of hijackers. However, this concern did not materialize. The United States, for example, did not request extradition of hijackers from Cuba until 1973, although, despite the absence of diplomatic relations, a valid treaty existed.[240] In other cases, the offender or offenders have either (1) been prosecuted by the state wherein they landed; (2) left the landing state voluntarily and returned to the flag state; or (3) been immediately granted asylum formally or welcomed in such a manner that the flag state did not bother to make any extradition request. The 1970 Hague Convention was followed by two other international instruments, the 1971 Montreal Convention[241] and the 1988 Montreal Protocol.[242]

Article 5.

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

a) when the offence is committed in the territory of that State;

b) when the offence is committed against or on board an aircraft registered in that State;

c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction in accordance with national law.

Id.

See also the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation [Montreal Protocol], Feb. 24, 1988, 27 I.L.M. 627 (1988). Article 3 states:

In Article 5 of the Convention, the following shall be added as paragraph 2 bis:

2 bis. Each Contracting state shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 bis and in Article 1, paragraph 2, in so far as that paragraph relates and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article.

237 Arthur I. Hirsch & David O. Fuller, *Aircraft Piracy and Extradition*, 16 N.Y.L.F. 392, 406–415 (1970).

238 Three such cases are reported in M. Cherif Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DePaul L. Rev. 217, 219 n.5 (1970).

239 *See infra* Sec. 7 (discussing the universality theory of jurisdiction).

240 *See* Alona E. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 Am. J. Int'l L. 695 (1969).

241 For the jurisdictional provision for the 1971 Montreal Convention, see *supra* note 215.

242 For the jurisdictional provision of the 1988 Montreal Protocol, see *supra* note 236.

Pursuant to the 1971 Montreal Convention,[243] the Security Council ordered Libya, in Resolution 731 (1992), to surrender two accused Libyans who were charged in the United States and in Scotland (United Kingdom) for sabotage of Pan Am Flight 103, which exploded in air over Lockerbie, Scotland. Scotland found that it had jurisdiction because the aircraft exploded over its territory, and that the crime had been committed in its air space. The United States held that it had jurisdiction because the offense was against a United States–flagged aircraft, and the crime was directed against U.S. citizens.[244] Special antiterrorist legislation enables the United States to extend extraterritorial jurisdiction to protect its citizens abroad.[245] Libya brought an action against the United States and the United Kingdom before the International Court of Justice (ICJ)[246] to have the Security Council Resolution ordering it to extradite the two accused nationals invalidated. One of the grounds is that the 1971 Montreal Convention gives precedence to prosecution over extradition as evidenced in the sequence of words used, namely "prosecute" and then "extradite." Libya suggested that its duty to prosecute under the 1971 treaty could not be overridden by the Security Council's order to extradite (surrender) the individuals. But the Court held that the Security Council determined its own competence. The issue of jurisdiction and treaty obligations has not, however, been substantively decided as of yet.

2.4. Special Environments

This section encompasses the Arctic, the Antarctic, and outer space. Although there are many different and contrasting environments on Earth, only the Arctic and the Antarctic are unique in terms of their use by people, so that they require special jurisdictional treatment. Outer space is sui generis as well, as it is the most challenging of all environments known to mankind.

2.4.1. The Arctic

Analysis of the legal status of the Arctic depends upon an understanding of the basic physical characteristics of the area. The ice covering the Arctic Ocean is not an unbroken extension of the surrounding continents, nor is it attached to any continent. Rather, it exists independently in permanent form. It could conceivably be regarded as falling under the territorial principle if a state could legally claim sovereignty over it under international law. Some early legal publicists who wrote about the Arctic expressed the opinion that it could be territorially claimed.[247] Scientific explorations, however, have proved that most of the ice is neither permanent nor uniform, and that it is actually mobile.[248] Therefore, the Arctic is primarily of a marine character. The Arctic Ocean has been opened to underwater navigation by the advent of the nuclear submarine, which,

243 *See supra* note 215.

244 For Passive Personality, *see infra* Sec. 4.

245 *See infra* Sec. 6.

246 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Lib. v. U.S.), 1992 I.C.J. 234 (Feb. 27); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Lib. v. U.K.), 1992 I.C.J. 231 (Feb. 27).

247 Donat Pharand, *Freedom of the Seas in the Arctic Ocean*, 19 U. Toronto L.J. 210, 212 (1969).

248 *Id.* at 218–219. There are many floating ice islands in the Arctic Ocean capable of human habitation, if only to a limited degree. An example is Fletcher's Ice Island, occupied as a research station by the United States Air Force between 1952 and 1978. It drifted for some time after, except for a year and a half when it was grounded north of Alaska but later drifted south and melted. First spotted in 1947, it was inhabited by some forty scientists and technicians by 1967. Another such research station, Arlis II, was operated continuously by the Air Force for four years, but had to be abandoned when it drifted into the Greenland Sea after covering more than 4,300 nautical miles during its drift across the Arctic Ocean. *Id.* at 221.

unlike its predecessors, does not have to surface periodically to recharge its batteries. In addition, icebreakers and other ships have demonstrated that the Arctic Ocean is capable of being navigated. Due to ever quickening climate change sea traffic in the Arctic is increasingly rapidly, and commercial vehicles are now able to traverse it even in the deepest winter, something that was unimaginable previously.[249]

The riparian Arctic states have indicated that they consider the Arctic Ocean free for use by all states and not subject to the sovereign claims of any state.[250] This is evidenced by the navigation by both Arctic and other states on and below the surface of the Arctic Ocean, by aircraft flying over the area, and by the establishment of research stations on drifting ice islands. Thus, international freedom of use of the Arctic Ocean has attained the status of international custom as evidenced by a general practice.[251] However, as the Arctic ice caps are melting rapidly due to climate change, as indicated above, the natural resources of energy and fish will become more accessible and likely lead to competing claims among the riparian Arctic states regarding their right to exploit these resources. To this end, in 2001 Russia submitted a claim to the UN Commission on the Limits of the Continental Shelf requesting an extension beyond the existing 200-mile outer limit, but the Commission has not, as yet, ruled on the request,[252] and in 2007 Russia "planted" a flag on the Arctic sea bed, arguing that it was an extension of its continental shelf, ostensibly to claim control over half of the Arctic Ocean and the natural resources found therein.[253] Although the 2011 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic[254] divided up the Artic for purposes of conducting search and rescue operations, there has been no formal division of the Arctic, and to the knowledge of this writer, the matter has not come up before the Artic Council or any other body.[255] Whether a new treaty will be concluded to deal with these claims, similar to the Antarctic Treaty discussed below, remains to be seen.[256]

At present, as the Arctic is considered part of the high seas, the territorial principle does not apply, except as it might relate to certain parts of the ice cap that are permanent and are attached to land areas, or to those areas of the Arctic Ocean claimed by Arctic states as part of their territorial sea. Other principles of international criminal jurisdiction would have to be relied upon in order to assert jurisdiction over a particular criminal act performed or having effects thereon.[257] Due to the

249 Matt McGrath, *Gas Tanker Ob River Attempts First Winter Arctic Crossing*, BBC, Nov.26, 2012, *available at* http://www.bbc.co.uk/news/science-environment-20454757.

250 *Id.* at 227–231. The Arctic states include the United States, Russia, Canada, Norway, and Denmark. The U.S. government has long held the view that the Arctic is not subject to a sovereign claim. In 1909, it refused to accept Admiral Perry's "annexation" of the region. 2 Whiteman Digest, *supra* note 12, at 1266.

251 U.N. Charter art. 38(1)(b).

252 For more information, *see* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm.

253 C.J. Chivers, *Russians Plant Flag on the Arctic Seabed*, N.Y. Times, Aug. 3, 2007, *available at* http://www.nytimes.com/2007/08/03/world/europe/03arctic.html?_r=0.

254 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011.

255 *See* Nuuk Declaration, May 12, 2011; Tromsø Declaration, Apr. 29, 2009; Salekhard Declaration, Oct. 26, 2006; Reykjavik Declaration, Nov. 24, 2004; Inari Declaration, Oct. 10, 2002; Barrow Declaration, Oct. 13, 2000; Iqaluit Declaration, Sept. 17–18, 1998.

256 *See generally,* Molly Watson, Comment, *An Arctic Treaty: A Solution to the International Dispute Over the Polar Region*, 14 Ocean & Coastal L. J. 307 (2009); Mary Beth West, *Mounting Tension and Melting Ice: Exploring the Legal and Political Future of the Arctic: Arctic Warming: Environmental, Human, and Security Implications*, 42 Vand. J. Transnat'l L. 1081 (2009).

257 In 1970 an American technician working on Fletcher's Ice Island was indicted in the United States (Federal District Court, E.D. Va.) for the killing of another technician on the ice island. Under international law, the island, floating 300 miles from the North Pole, was considered part of the Arctic Ocean. The

fact that most human activities taking place in the Arctic environment are likely to occur aboard a submarine, surface ship, or aircraft, the jurisdictional principle most likely to be relied upon is the law of the flag. Activities of a criminal or even tortious nature taking place outside of these power bases can be handled by other principles.[258] As discussed above, the United States is assertive when exercising jurisdiction using other forms of jurisdiction, namely territorial, active personality, passive personality, and the protective principle.[259]

2.4.2. The Antarctic

The Antarctic mainland was discovered by Captain Nathaniel Palmer in 1829, but its existence as a continent was only established later. Although systematic and extensive scientific exploration of the Antarctic did not begin until the 1930s, the main thrust of activities in the area began with the International Geophysical Year from July 1957 to December 1958.[260]

Because the Antarctic is a continent, the territorial principle could apply as a basis for international criminal jurisdiction, subject to states making proper legal claims of territorial sovereignty under international law. The 1959 Antarctic Treaty[261] and the 1991 Additional Protocol on Environmental Protection of the Antarctic[262] are the basic legal documents governing the activities of states in Antarctica. The Antarctic Treaty provides that:

> [N]o acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.[263]

Department of Justice, rather than prosecute the alleged offender under active personality or protected interest theories, considered the island as a "vessel on the high seas." *See* M. Cherif Bassiouni, *Extraterritorial Criminal Jurisdiction*, The Globe (Illinois State Bar Assoc. Newsletter), Vol. 6.1, at 1 (1970).

258 An example of a special jurisdictional situation is Canada's recent claim of competence to enforce pollution regulations up to one hundred miles from its coastline. *See* Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 Mich. L. Rev. 1 (1970).

259 *See also* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81 (2002).

260 *See* Richard B. Bilder, *Control of Criminal Conduct in Antarctica*, 52 Va. L. Rev. 231, 233–237 (1966) (citing sources on the history and physical characteristics of Antarctica).

261 The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [*hereinafter* the Antarctic Treaty]. The United Nations Treaty Series lists nineteen state-parties as of September 28, 2012: Argentina, Australia, Belgium, Brazil, Chile, Czechoslovakia, Denmark, France, German Democratic Republic, Japan, Netherlands, New Zealand, Norway, Poland, Romania, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America. The Secretariat of the Antarctic Treaty has a more expansive list of state-parties, identifying as of September 2012, 2012 the following states: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Italy, Japan, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Monaco, Netherlands, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Poland, Portugal, Romania, Russian Federation, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States of America, Uruguay, and Venezuela. *See, e.g.,* W.M. Bush, Antarctica and International Law: A Collection of Inter-State and National Documents (1988); Steven J. Burton, *New Stresses on the Antarctica Treaty: Toward International Legal Institutions Governing Antarctica Resources*, 65 Va. L. Rev. 421 (1979).

262 Additional Protocol on Environmental Protection to the Antarctic, Apr. 20, 1991, 30 I.L.M. 1455, Sen. Treaty Doc. 102–122.

263 Antarctic Treaty, *supra* note 261, at art. IV (2).

Article IV (1) of the treaty provides that:

> [N]othing contained in the present treaty shall be interpreted as:
>
> (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica.
>
> (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica or otherwise;
>
> (c) prejudicing the position of any Contracting Party as regards its recognition or nonrecognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.[264]

Thus, although states may retain any claims acquired prior to the treaty, they may not make any new claims while the treaty is in force.[265] Therefore, the territorial principle would not be applicable to the unclaimed parts of the Antarctic continent. Other principles of jurisdiction would have to be utilized for the control of criminal conduct.

As the high seas within the area south of sixty degrees south latitude are not affected by the provisions of the Antarctic Treaty,[266] criminal jurisdiction for acts committed on board ships or aircraft on or over the high seas would be within the ambit of the law of the flag theory.[267] Jurisdiction over criminal acts committed on the continent of the permanent ice shelves attached to it is still problematic, because the treaty deliberately omits discussion of this aspect. However, observers who are carrying on inspections under the treaty as designated by Article VII (1) and scientific personnel exchanged under Article III (1)(b), as well as staff members accompanying such persons, are:

> [S]ubject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their function.[268]

Thus, the active personality principle is given exclusive application in specified cases.

With regard to other foreign nationals, the Treaty only provides that the Contracting Parties concerned in any dispute over the exercise of jurisdiction in Antarctica shall immediately consult each other with a view to reaching a mutually acceptable solution.[269] In addition, the twelve states who are the original Contracting Parties shall meet periodically to discuss and formulate measures regarding "questions relating to the exercise of jurisdiction in Antarctica."[270]

It can be assumed, therefore, in the absence of any further guidelines drawn up pursuant to the Antarctic Treaty, that states are free to utilize any of the various principles of criminal jurisdiction, with the exception of the territorial principle, unless the act is committed in a previously claimed area.[271] States whose international criminal jurisdiction, as defined by their own municipal law, is based primarily on the territorial principle may have difficulty in

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264 *Id.* at art. IV (1).

265 The Treaty is in force for at least thirty years after its date of entry into force. *See* Antarctic Treaty, *supra* note 261, at art. XII (2)(a).

266 *Id.* at art. VI.

267 Aircraft flying over the continent of Antarctica would no doubt also be under the exclusive competence of the flag state, as no state could claim sovereignty over any Antarctic airspace as long as claims of sovereignty are prohibited over the continent itself, and the 1959 Treaty is in force.

268 *See* Antarctic Treaty, *supra* note 261, at art. VIII (1).

269 *Id.* at art. VIII (2).

270 *Id.* at art. IX (1)(e).

271 Seven states claim territory in Antarctica. *See* Bilder, *Control of Criminal Conduct in Antarctica, supra* note 258, at 260.

finding jurisdiction in some cases.[272] The most applicable principle is probably that of active personality, although it certainly is not to be considered exclusive in application, except where the Treaty so provides.[273]

2.4.3. Outer Space

The examination of jurisdictional problems of outer space has been placed under the category of special environments because outer space, like the Earth's polar regions, is alien and hostile to human existence. The analogy, however, should not be carried too far, for although an examination of jurisdictional problems in the Arctic and the Antarctic may be helpful to an understanding of those problems in outer space, the vast differences among these environments make any extrapolation of the analogy detrimental to the development of the law of outer space.

Outer space is similar to the polar regions in that there can be human activity outside of the power bases, such as on spacecraft or ships. However, this applies more so in outer space than in the area outside of ships on the high seas or aircraft flying through the atmosphere. People can function in spacesuits outside of their space vehicles and, eventually, will be able to do so upon the surfaces of other celestial bodies, just as they can function outside of shelters in the Arctic and the Antarctic if properly clothed.

As outer space, like the high seas or the airspace over the high seas, is not subject to claim of sovereignty, no state should be able to claim jurisdiction under the territorial principle.[274] Also, because the very nature of outer space confines most human activities to the interior of spacecraft, it can be expected that the dominant jurisdictional principle in outer space, at least for the near future, will be the law of the flag.

Article VIII of the 1967 Space Treaty provides that:

> A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. . . .[275]

This provision gives states of registry, otherwise considered as the flag states, authority to prescribe and enforce rules of conduct governing both criminal and non-criminal matters on board spacecrafts of all types while in outer space, whether a spacecraft is traveling through outer space, orbiting a celestial body, or resting upon a celestial body. The same competence

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272 *See id.* at 244–259 (discussing the application of U.S. law in Antarctica).

273 *See id.* at 260–265 (reviewing relevant foreign law applicable to Antarctica).

274 Probably the greatest difference between Earth's polar regions and outer space is that the former are finite in size, whereas the latter, to the extent of human knowledge, is infinite. Therefore, the use of "territory" in relation to outer space is not appropriate. Also, on Earth, both territorial seas and territorial airspace are as much a part of a state's sovereign "territory" as are its actual land areas. Also, in the absence of the "no sovereignty" rule currently in force in both customary and conventional international law, the surfaces of some planets would be capable of appropriation as sovereign territory, just as islands in the high seas can be so appropriated. It should also be noted at this point that although the United States prescribes rules of law for islands over which it claims sovereignty, it also prescribes rules of law for certain Trust Territories over which it does not claim sovereignty, but does exercise jurisdiction. *See* S. Houston Lay, The Law Relating to Activities of Man in Space 201–202 (1970).

275 1967 Space Treaty, *supra* note 139, at art. VIII. The remainder of art. VIII states that:

> Such objects of component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

Id.

appears to extend to activities outside a spacecraft, whether in outer space or on or under the surface of a celestial body, as the article states that jurisdiction and control applies to the object and "any personnel thereof"[276] without requiring that the personnel actually be inside the spacecraft.[277] Activities inside research stations or other dwellings of a permanent or semipermanent nature, which rest on or beneath the surfaces of celestial bodies and are not capable of either landing or taking off themselves, and which may be constructed with components brought to the celestial body by spacecraft, would also be included within Article VIII, because the ownership of objects "landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body . . . "[278]

Although there is no recorded case or instance of extradition for a crime committed in any one of these special environments, crimes have been committed as between nationals, and prosecution of such offenses has invariably been on one of the several other theories discussed in this chapter. The United States, in its dogged insistence on the territoriality theory when it suits its interest, applied the flag or floating territoriality theory to the only case reported, which took place near the Arctic Circle.[279]

The international law of outer space is growing very rapidly with the use of space stations, communication satellites, and other ventures in the exploration and exploitation of space and celestial bodies. There are already a number of conventions regulating these acts, but with the presence of more persons in this new medium, jurisdictional questions are bound to arise. Where there are people, there are likely to be actions that may cause harm and injury to others as well as to property. Thus, what law will apply is one question. The answer is likely to be the law of the flag by analogy to maritime and air law. However, if an individual outside a spacecraft or object carrying the flag commits a harmful act upon another person or object, then clearly the law of the flag cannot apply. In these cases countries will apply either the law of the nationality of the alleged perpetrator or the law of the nationality of the victim. As of yet, there is no international convention that addresses these issues.

The rights and duties of states with regard to the rescue and return of astronauts and the return of objects that are launched into outer space but come down unexpectedly in a foreign state, on the high seas, or in a place not subject to the jurisdiction of any state, have been clarified and elaborated by the Agreement of the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, done at Washington, London, and Moscow, April 22, 1968. 19 U.S.T. 7570, T.I.A.S. No. 6599. *See also* J.E.S. Fawcett, Outer Space: New Challenges to Law and Policy (1984); Stephen Gorove, Studies in Space Law: Its Challenges and Prospects (1977); Stephen Gorove, *International Protection of Astronauts and Space Objects*, 20 DePaul L. Rev. 597 (1970); Lawrence D. Roberts, *Addressing the Problem of Orbital Space Debris: Combining International Regulatory and Liability Regimes*, 15 B.C. Int'l & Comp. L. Rev. 51 (1992); George P. Sloup, *Peaceful Resolution of Outer Space Conflicts through the International Court of Justice: "The Line of Least Resistance,"* 20 DePaul L. Rev. 618 (1970); Krystyna Wiewiorowska, *Some Problems of State Responsibility in Outer Space Law*, 7 J. Space L. 23 (1979); James R. Wilson, Note, *Regulation of the Outer Space Environment through International Accord: The 1979 Moon Treaty*, 2 Fordham Envtl. L. J. 173 (1991); Major Ronald L. Spencer, Jr., *State Supervision of Space Activity*, 63 A.F. L. Rev. 75 (2009).

276 1967 Space Treaty, *supra* note 139.

277 This is apparently a greater competence than was provided by U.N. General Assembly Resolution 1962 (XVIII) of Dec. 13, 1963, G.A. Res. 1962, 18 U.N. GAOR, Supp. 15, at 15, U.N. Doc. A/5515 (1963), which provided, in part, the following statement of jurisdiction: "The State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and any personnel thereon, while in outer space . . . "

278 *See* 1967 Space Treaty, *supra* note 139, at art. VIII.

279 *See supra* notes 248 and 251.

3. The Active Personality or Nationality Theory

The active personality theory, like the territorial theory, is based upon state sovereignty and provides, in part, that nationals of a state are entitled to the state's protection even when they are outside its territorial boundaries. This is the premise for the passive personality theory discussed in Section 4.[280] Along with a right to state protection, a national has a corresponding duty to obey those municipal laws that are recognized as having an extraterritorial effect.[281] Such laws usually pertain to the duty of allegiance.[282]

The active personality theory is rarely relied on by U.S. courts.[283] The Harvard Research Project reviewed the various legislative enactments of states implementing this principle and classified them into five basic types according to the offenses proscribed, namely:

1. those statutes which made all offenses punishable;

2. those statutes which made only those offenses punishable which were also punishable by the *lex loci delicti*;

3. those statutes which made all offenses of a certain degree punishable;

4. those statutes which made only those offenses committed against co-nationals punishable; and

5. those statutes which made only certain enumerated offenses punishable.[284]

Some states have given the theory even more extensive application, such as to prosecute those individuals who were not nationals at the time the offense was committed, but who later became nationals.[285] In this manner, these penal laws are retroactive and, in the opinion of this writer, in violation of the principles of legality embodied in the prohibition against ex post facto prosecution.[286] Such an application of the active personality theory can result in an injustice to the defendant, particularly with regard to double jeopardy. International law, however, does not clearly prohibit such an exercise of jurisdictional authority, as there is no principle of international law forbidding a state the right to the reasonable exercise of jurisdiction over its nationals even when abroad.[287] Thus, a state may enforce its penal laws against its nationals even when the conduct charged as criminal was committed in a foreign jurisdiction. There appears to be no human rights protection against this other than the rule of *ne bis in idem*, which has yet to be sufficiently evidenced in the customary practice of states.

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280 Oppenheim's International Law, *supra* note 2, at 457; 1 Oppenheim, *supra* note 2, at 686–689. *See also* Lauritzen v. Larson, 345 U.S. 571 (1953) (stating U.S. citizen or U.S. legal entity entitled to protection of U.S. law). The U.S. Supreme Court recognized the nationality theory in *Skiriotes v. United States,* 313 U.S. 70 (1941). *See also* United States v. Reeh, 780 F.2d 1541 (11th Cir. 1986); United States v. Danizewski, 380 F. Supp. 113 (E.D.N.Y. 1974); United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960). *See* g*enerally* Blakesley, *Conceptual Framework for Extradition, supra* note 1, at 706–713; Watson, *supra* note 65 (both discussing the nationality theory of jurisdiction).

281 Restatement (Third), *supra* note 3, at § 402, Reporters' Note 1.

282 *See Joyce v. Director of Public Prosecution*, [1946] 1 All E.R. 196 (Eng. H.L.) (involving treason).

283 *See* Restatement (Third), *supra* note 3, at § 402(2) and Reporters' Note 1 (noting wide acceptance of nationality jurisdiction but its rare application in the United States); Watson, *supra* note 65, at 42 (stating "the United States is one of the least aggressive proponents of one of the most widely accepted forms of extraterritorial jurisdiction, or criminal jurisdiction based on the nationality of the offender.").

284 *See* Harvard Research Project, *supra* note 3, at 523.

285 *See, e.g.,* Strafgesetzbuch [StGB] § 4 (C.H. Beck 1963) (F.R.G.).

286 Nonetheless, the Harvard Research Project would allow such an extension of jurisdiction.

287 For an opinion that the active personality principle "is without any justification," see Patrick J. Fitzgerald, *The Territorial Principle in Penal Law: An Attempted Justification*, 1 Ga. J. Int'l & Comp. L. 29, 43 (1970).

The question of whether such a theory will be given recognition by a state other than the state of nationality that is seeking to enforce its penal laws extraterritorially arises when an extradition request is presented. The requested state then has to decide whether the requesting state has subject matter jurisdiction over a crime allegedly committed in a foreign state. That foreign state could well be the requested state, in which case it will have to decide whether it wishes to waive its *in personam* jurisdiction over the relator. If it does not waive its jurisdiction, then the requested state will have precedence for asserting its own jurisdiction. In the event the alleged offense was committed in a state other than the requested state, an issue would arise whenever that state would also request the extradition of that same person. In this case, priority is likely to be given to the state claiming territorial jurisdiction. The problems of enforcing penal laws extraterritorially on the basis of the nationality of the offender are essentially conflicts-of- law problems. This theory places a burden on every national of a state having such legislation who when abroad falls under the sway of two penal legislations.

Most penal laws that extend extraterritorially fall into three categories: (1) laws pertaining to allegiance, national duties, and obligations arising out of the bond of nationality (such as treason);[288] (2) common crimes that even if committed abroad have an effect upon internal public order (such as fraudulent schemes);[289] and (3) common crimes committed abroad that have a bearing upon the nationality state's outlook upon the individual (such as violation of probation or parole).[290] A different situation exists in states that prohibit extradition of their nationals. Then, the prosecution of individuals from such states for crimes committed abroad and that violate the penal laws of both states proceeds in the courts of the nationality state.[291]

The first category has received recognition in extradition law as a valid basis for a request, but its application is limited by reason of the political offense exception.[292] The second category can also fall in the subjective territorial theory, and as such presents no difficulties other than in cases of multiple requests and the need to establish priority in granting extradition. The third category is applied without difficulty, because the extradition request is based on a penal judgment concerning another factual situation, but wherein the offender was conditionally released. The offense committed abroad, which the nationality state is taking cognizance of, is only relied upon by that state to revoke the conditional release. Considerations of such revocation are not within the examining prerogative of the requested state, and, therefore, this instance would present no conflict-of-laws problems. The final situation described above is the appropriate measure to be taken by a state that prohibits extradition of its nationals. It is the proper application of the maxim *aut dedere aut judicare*.[293] Such a measure avoids the problems of non-prosecution of offenders because of their nationality, and thus, promotes the preservation of a minimum world order.[294] In this category, the state of nationality, which becomes the prosecuting state, may require that the offense be prosecutable not only under the laws of the state wherein it was committed, but also under its own laws.[295] This requirement of *double*

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288 *See Joyce v. Director of Public Prosecution*, [1946] 1 All E.R. 196 (Eng. H.L.).

289 *In re* Roquain, 26 I.L.R. 209 (Cass. 1958) (Belg.). This case involved the commission of the crime of adultery in France. Such an offense affected the family status in Belgium and was committed between Belgian nationals. *See also Public Prosecutor v. Van H.*, 19 I.L.R. 227 (Sup. Ct. 1952) (Neth.).

290 *Schneeberger v. Public Prosecutor of the Canton of Lucerne*, 21 I.L.R. 125 (Cass. 1954) (Switz.).

291 *In re Gutierrez,* 24 I.L.R. 265 (Sup. Ct. 1957) (Mex.).

292 *See* Ch. VIII, Sec. 2.1.

293 This term is utilized to convey the duty that a state must either prosecute or extradite. *See* M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Prosecute or Extradite in International Law (1995) [hereinafter Bassiouni & Wise, *Aut Dedere Aut Judicare*].

294 *See* Ch. VIII and Ch. X.

295 *X v. Public Prosecutor*, 19 I.L.R. 226 (Ct. App. 1957) (Neth.).

criminality[296] is one of the conditions for granting extradition, and it is, therefore, important that it be applied to a procedure that is intended to be a substitute for extradition.

Other than cases where a national has violated abroad a duty of citizenship, such as treason, the active personality theory is embodied in the laws of a growing number of countries from Brazil to Sweden. Under these laws, the state of nationality can prosecute its nationals for a common crime committed abroad without any connection with the state of nationality, exclusively on the basis of the perpetrator's nationality.[297]

4. The Passive Personality Theory

The passive personality theory complements the active personality theory. Whereas the exercise of the active personality theory ensures that the nationals of a given state who have committed offenses abroad will be brought to justice, the passive personality theory ensures that a state's interest in the well-being of its nationals abroad will also be protected. Because the ultimate well-being of the state itself depends upon the welfare of its nationals, it can be argued that a state has a legitimate interest in the prosecution of those who commit crimes against its nationals abroad.

As indicated above, the passive personality theory is the counterpart of the active personality theory. Both indeed rely on nationality as a criterion. In passive personality, it is that of the victim that is relevant, while in the active personality, it is that of the offender. Under both theories, the state seeking to exert its jurisdiction claims the power to regulate conduct outside its territory by imposing certain limitations on individuals.

The passive personality theory can also be viewed as part of the protected interest theory discussed in the following section. It is distinguishable, however, in that the object of its protection is the person who is a national of the state, regardless of where he/she may be, whereas the protected interest theory refers to the protection of the state's interests from harmful acts committed outside the state's jurisdiction that have an effect within the state.

The most famous application of the passive personality theory is undoubtedly the case of the S.S. Lotus,[298] although the decision of the Permanent Court of International Justice (PCIJ) was based

296 *See* Ch. VII, Sec. 2.

297 *See In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980) (where Sweden sought the extradition of a Swedish national who was a permanent resident of the United States for a crime committed in Denmark by someone acting on his behalf), *cert. denied,* 451 U.S. 938 (1980). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); United States v. Hill, 279 F.3d 731, 740 (9th Cir. 2002); United States v. Walczak, 783 F.2d 852, 854 (9th Cir. 1986) (holding that jurisdiction over a U.S. citizen who violated a federal statute while in Canada was proper under nationality principle); McKell v. Islamic Rep. of Iran¸ 722 F.2d 582, 588 (9th Cir. 1983); United States v. King, 552 F.2d 833, 851 (9th Cir. 1976); Abraham Abramovsky & Jonathan I. Edelstein, *The Post-Sheinbeign Israeli Extradition Law: Has It Solved the Extradition Problems between Israel and the United States or Has It Merely Shifted the Battleground?*, 35 Vand. J. Transnat'l L. 1 (Jan. 2002).

298 S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 9; 2 Manley O. Hudson, World Court Reports 20 (1935); Manley O. Hudson, *The Sixth Year of the Permanent Court of International Justice*, 22 Am. J. Int'l L. 1, 10 (1929). The case involved a collision on the high seas between a French ship, the *Lotus*, and a Turkish vessel, the *Boz-Kourt*, near Turkish territorial waters. When the French ship put into port at Constantinople, the French watch officer who was in charge of the *Lotus* at the time of the collision was arrested on shore. France claimed that Turkey had no jurisdiction to try the French officer, while Turkey claimed that it was not prohibited from doing so by international law. Both states agreed to submit the case to the Permanent Court. Turkey claimed jurisdiction under Article 6 of the Turkish Penal Code, which provided that any foreigner who committed an offense abroad to the prejudice of Turkey or of a Turkish subject would be punished in accordance with the Turkish Penal Code. *See also* United States v. Felix-Gutierrez, 940 F.2d 1200 (9th Cir. 1991) (holding that passive personality and other

on other grounds.[299] There has been much confusion over the years about the significance of the *S.S. Lotus* (France v. Turkey) case, which was decided by the PCIJ in 1927,[300] and its application to the passive personality theory. In that case, a collision between a French and Turkish vessel resulted in the death and injury of several Turkish nationals, and as a result, a French officer was prosecuted in Turkey for causing the accident. The PCIJ held that Turkey could prosecute the French officer under its penal laws because the injury had occurred on the Turkish vessel (floating territoriality), and the victims were Turkish nationals (passive personality). The court indicated that the combination of these two jurisdictional theories created an adequate basis under prevailing international law. Some states, such as Germany, have enacted statutes based upon this theory.[301] The theory, however, has been criticized by scholars.[302]

In addition, the Brussels Convention,[303] the Geneva High Seas Convention of 1958,[304] and the Law of the Sea Convention[305] have prohibited states that are parties thereto from relying on this theory to assert their jurisdictional authority. The Harvard Research Project, although listing the passive personality theory as one of the five general theories of penal jurisdiction recognized in international law, does not include it in the text of the Draft Convention.[306]

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jurisdictional principles "cumulatively" justified prosecution of a foreign national for a crime against a DEA agent); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (arguing protective and passive personality principles supported prosecution of a foreign national for a crime against a DEA agent); Blakesley, *Conceptual Framework for Extradition, supra* note 1, at 713–716; Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1 (1993).

299 Although the wording of Article 6 of the Turkish Penal Code would support both the passive personality and protected interest principles, the majority of the Permanent Court based its decision upon the fact that the Turkish vessel was assimilated to Turkish territory, and that because the effects of the crime were felt on the Turkish vessel, they were felt in Turkey itself. *See* Hudson, *The Sixth Year of the Permanent Court of International Justice, supra* note 298, at 11. This is, in effect, a recognition of the subjective–objective territorial principle. Brierly, *supra* note 133, at 308.

300 *S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 9.

301 *See, e.g.,* Strafgesetzbuch [StGB] art. 4(2) (C. H. Beck) (F.R.G.). *See* also Whiteman Digest, *supra* note 12, at 104 (discussing the *Cutting* case).

302 *See, e.g.,* Richard R. Baxter, *Extraterritorial Application of Domestic Law*, 1 U.B.C. L. Rev. 333 (1960); Brierly, *supra* note 133, at 302; Watson, *supra* note 298, at 3 (arguing that states should be allowed to exercise passive personality jurisdiction, but only in cases when "the defendant is not prosecuted either by the state in which the crime was committed or by the defendant's home state"). A case applying the passive personality doctrine without reference to it occurred in 1866, when Mr. Hale, U.S. consul at Alexandria, arrested and sent to the United States on an American man-of-war, with the assent of the Egyptian authorities, John H. Suratt, an American citizen who was charged with complicity in the assassination of President Lincoln. Moore Digest, *supra* note 211. *See also* Moore Extradition, *supra* note 15, at 104.

303 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions and Other Incidents of Navigation, signed at Brussels, May 10, 1952, 1960 Gr. Brit. T.S. No. 47 (Cmnd. 1128), at 14 (effective Nov. 20, 1955).

304 High Seas Convention, *supra* note 105, art. 11. Article 11(1) of the Treaty provides that:

> In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or other disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

Id.

305 LOS Convention, *supra* note 106.

306 According to the Harvard Research Project: "The [passive personality principle] is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles." Harvard Research Project,*supra* note 3, at 589. The Harvard Research Project also

As with the active personality theory, the passive personality theory may lead to situations where the accused is exposed to double jeopardy. Nevertheless, the theory is relied upon by a number of states and must continue to be considered applicable in any situation in which its use is not prohibited by international law. The three following conditions must be met for the passive personality theory to be invoked:

1. the victim must be a national of the forum state (the state which either has the defendant in custody or is demanding that the state which does have custody extradite the defendant to stand trial);

2. the defendant may not be a national of the forum state; and

3. the offense must not have been committed within the territorial jurisdiction of the forum state (except when explicitly waived).

Israel relied on this theory in part in the prosecution of Adolf Eichmann under Israeli law,[307] even though there was also sufficient reliance on the universality theory to avoid any legal challenges to Israeli subject matter jurisdiction in that case. In Eichmann's case, however, extradition was not the mode of securing custody over the accused, as Israeli agents kidnapped Eichmann from Argentina.[308]

An example of legislation incorporating the passive personality theory is an Israeli law of March 21, 1972, amending Israeli penal law with respect to jurisdiction. Under this law, conduct that affects the state (protected interest theory) and its economic interests (extended protected interest theory), and is designed to harm its nationals (passive personality theory), subjects any such actor to the jurisdiction of Israeli courts.[309]

In recent years, a number of new legislative enactments in the United States have invoked the passive personality theory. For example, upon signing the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents[310] in 1973, the United States promulgated laws penalizing crimes against U.S. officials and diplomats abroad.[311] Subsequently, the United States signed the International Convention Against the Taking of Hostages[312] and passed the Hostage Taking Act authorizing prosecution of terrorist crimes by or against U.S. nationals abroad.[313]

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concluded that the principle has been opposed by writers in both common and civil law countries and that "[o]f all principles of jurisdiction having some substantial support in contemporary national legislation, it is the most difficult to justify in theory." *Id.* at 579. While excluding the general or unrestricted use of the passive personality principle, however, the Harvard Draft reserves its limited use for situations where no other principle will apply, although the principle is used in the context of the universality theory. *Id.* at art. 10(c) at 589.

307 *See* Pierre A. Papadatos, The Eichmann Trial (1964); M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 Vand. J. Transnat'l L. 25, 28–33 (1973) (discussing the extradition effects of the trial). *See also* Ch. V.

308 *See* Ch. V.

309 The Jerusalem Post Weekly, Aug. 14, 1973, at 4 (discussing the first application of this law to a Turkish national unlawfully seized in Lebanon by Israeli commandos, who was prosecuted, convicted, and sentenced to seven years' imprisonment by a military court relying on this statute.). *See also* Time, Aug. 20, 1973, at 31.

310 Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. *See also* George, *Federal Anti-Terrorist Legislation*, *supra* note 1.

311 *See* 18 U.S.C. §§ 1114, 1117 (2000).

312 Dec. 17, 1979, 18 I.L.M. 1456 (1979).

313 18 U.S.C. § 1203 (2000).

The *Restatement (Third)* notes wide acceptance of passive personality-based jurisdiction in prosecuting terrorists.[314] Professor Watson notes, however, that "[o]utside of terrorism . . . the United States still seems reluctant to embrace passive personality jurisdiction."[315] Consequently, the few judicial decisions that utilize the passive personality theory of jurisdiction are in cases involving crimes against governmental agents.[316] For a discussion of the expansion of this theory in U.S. law, see *infra* Section 8. The passive personality doctrine is less relied upon than the active personality doctrine. This explains why Article 5 of the CAT[317] contains a limiting provision for passive personality jurisdiction, allowing it "if that State considers it appropriate," which does not appear in connection with the other jurisdictional provisions of Article 5:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) *When the victim is a national of that State if that State considers it appropriate.*
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.[318]

Since then, however, a number of states have enacted laws permitting states in "terrorism" cases to base their criminal jurisdiction on passive personality.[319]

5. The Protected Interest or Protective Theory

This is a much broader theory than the passive personality theory, because it extends the sphere of protection afforded to state interests. It is, in effect, a "long arm" jurisdictional theory that allows a state to reach beyond its physical boundaries to protect its national interests from harmful effects

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314 *See* Restatement (Third), *supra* note 3, at § 402 cmt. g. Watson argues that:

> [T]he Constitution permits the Congress to establish jurisdiction over terrorist and serious non-terrorist crimes by foreigners against Americans abroad. Although regulation of terrorism against Americans may be more clearly related to the foreign affairs power than regulation of common crimes against Americans, both serve to protect United States nationals from harm abroad—a central mission of foreign policy, and therefore an acceptable application of the congressional power to define and punish offenses against the law of nations may provide an additional justification for establishing jurisdiction over terrorists.

Watson, *supra* note 298, at 34.

315 *Id.* at 11.

316 *See, e.g.,* United States v. Felix-Gutierrez, 940 F.2d 1200 (9th Cir. 1991); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (holding that passive personality together with other jurisdictional theories justified prosecution of a foreign national for a crime against a DEA agent); Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989) (noting that in an extradition case the requesting state based its jurisdiction on protective and passive personality theories). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3d Cir. 1997).

317 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, draft *reprinted in* 23 I.L.M. 1027 (1985) [hereinafter Torture Convention] (emphasis added).

318 Torture Convention, *supra* note 317, at art. 5 (emphasis added).

319 18 U.S.C. § 2331 *et seq*.

arising from conduct abroad. The protected interest theory allows a state to assert jurisdiction over a citizen or an alien, whether an individual or a legal entity, acting outside the state's territorial boundaries in a manner that threatens interests of the state.

Both the Harvard Research Project[320] and the *Restatement (Third)*[321] recognize the protective theory. Both emphasize the potential application of this theory to cases involving counterfeiting of state documents by expressly stating in separate provisions that it applies to such cases,[322] and to cases involving national security. Each includes, however, a limiting provision: (1) The Harvard Research Project requires that the alien's act "not [be] committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed,"[323] and (2) the *Restatement (Third)* requires that it be "generally recognized as [a crime] by reasonably developed legal systems."[324]

The Harvard Research Project and the *Restatement (Third)* are reflections of the customary practice of the United States, even though the actual practice differs at times. The protected interest principle is likely to be applied by states to any act committed by an alien that poses either an actual or potential harm to any vital interest of that state. The United States has not been reluctant to rely on the protected interest theory, although it usually does so under the guise of an exception to the territorial principle, rather than considering it a separate theory.[325] The exceptions to the territorial theory, as discussed above, may produce the same outcome as the protected interest theory. The latter, however, has a much broader potential application, as it allows a state wider latitude in the exercise of extraterritorial criminal jurisdiction. The courts of the United States have relied on the protected interest theory in antitrust cases,[326] and also in the

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320 Harvard Research Project, *supra* note 3, at arts. 7, 8.

321 Restatement (Third), *supra* note 3, at § 402 (3) and cmt. f.

322 Harvard Research Project, *supra* note 3, at art. 8; Restatement (Third), *supra* note 3, at § 402 cmt. f. *See, e.g.*, United States v. Rodriguez, 182 F. Supp. 479, 489–490 (S.D. Cal. 1960).

323 Harvard Research Project, *supra* note 3, at art. 7.

324 Restatement (Third), *supra* note 3, at § 402 cmt. f.

325 *See, e.g.*, United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943). In *Archer*, an alien who had sworn falsely before a vice consul of the United States of an American Consulate in Mexico was prosecuted under a U.S. statute making such false swearing a crime. The court stated that "any person who takes false oath before a consul commits an offense, not against the country where the consul is, but against the sovereignty of the United States." *Id.* at 711. *See also* United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960). In *Rodriguez*, the defendants, who had made false statements to U.S. officials outside of U.S. territory in order to obtain status as non-quota immigrants, were prosecuted. The court stated that "Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by . . . [its] legislation." *Id.* at 491; *accord* Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961). The *Rocha* case involved aliens who had conspired to enter the United States illegally as preferred status immigrants. The court, citing the *Rodriguez* case, stated that "the powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters." *Id.* at 549. *See also* United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985); United States v. Hensel, 711 F.2d 1000 (11th Cir. 1983) (upholding conviction under constitutional statute that required no showing that criminal activity would have effect within United States territory); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); United States v. Egan, 501 F. Supp. 1252 (S.D.N.Y. 1980); United States v. Keller, 451 F. Supp. 631 (D. P.R. 1978).

326 *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (otherwise known as the "Alcoa" case, in which the defendant Canadian corporation was charged with certain violations of the Sherman Anti-Trust Act relating to attempts to restrain and monopolize interstate and foreign commerce of the United States). *See also* United States v. Imperial Chem, Indus., 100 F. Supp. 504 (S.D.N.Y. 1951). *But see* Timberlane Lumber Co. v. Bank of Am, Nat'l Trust & Savings Ass'n, 749 F.2d 1378 (9th Cir. 1984) (dismissing plaintiff's claim for lack of subject matter jurisdiction after court weighed potential conflict with Honduran law that might result from enforcement of U.S. antitrust laws), *cert. denied*, 472 U.S. 1032 (1985). *See* 6 Whiteman Digest, *supra* note 12, at 126–127 (explaining *Timberlane*

enforcement of certain provisions of the Securities Exchange Act that relate to regulated securities transactions taking place outside the United States.[327] However, such extensions have met with criticism, particularly when the jurisdictional extension is represented as an extrapolation of the territoriality principle.[328]

There is, however, no general rule of international law that prohibits the use of this theory on a limited basis.[329] The potential for using this theory in extradition is vast. Indeed, if the authoritative decision-making process of a given participant is without restriction as to what constitutes conduct performed outside its boundaries, but having an internal effect on its interest that it deems itself competent to protect, then almost every act by any person that affects the political and economic interest of a state could subject such person to the jurisdiction of that state. This is exemplified by the case of the Israeli law of March 21, 1972, which purports to grant jurisdiction to its courts to enforce Israeli law over acts, wherever committed, that affect or are destined to affect the security of the state or its interests. The requested state in such a situation would be confronted with a value judgment made by the requesting state, and there would be no basis to challenge the request or to question its merits without challenging that very judgment. Therefore, to avoid creating conflict situations, a "long arm" jurisdictional theory must take into account its potential threat to world public order, and it must have well-defined limitations. This explains why the United States has historically relied on an extrapolation of the territorial principle, even though this was at times strained. This position has changed as the United States has relied more and more on the protective theory to obtain extraterritorial jurisdiction in economic matters.[330] An example of this is *United States*

Lumber); 6 Whiteman Digest,*supra* note 12, at 118–160 (discussing in general the United States' practices with respect to jurisdiction over antitrust cases).

327 It must be shown that the transaction had an effect upon U.S. interests, and that the stock in question was registered and listed on a U.S. stock exchange. Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); SEC v. Briggs, 234 F. Supp. 618 (N.D. Ohio 1964).

328 *See, e.g.,* Eric Stein & Peter Hay, Law and Institutions in the Atlantic Area 684 (1968); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 1957 Brit. Y.B. Int'l L. 146, 175. As the American federal system is based upon the theoretical premise that the federal government, and Congress in particular, can act only when the power to do so is specifically delegated to it in the Constitution, and that the non-delegated sovereign powers remain with the states and the people as required by the Tenth Amendment, a special problem is raised within the context of American constitutional law, which is outside the scope of this discussion. *See* George, *Extraterritorial Application*, *supra* note 1, at 614–617. *See also* Sarkar, *The Proper Law of Crime*, *supra* note 1, at 463–464.

329 The Permanent Court of International Justice in the *Lotus* case affirmed the territorial principle, but did not exclude other theories, including universality, which is discussed below in Sec. 7. As stated by the Court:

> No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offense happens to be at the time of the offense.

S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 9, at 23.

Article 11 of the High Seas Convention, however, would prohibit use of the protective principle in the situations specified therein. High Seas Convention, *supra* note 105, art. 11. The protective principle was recently used by France to obtain the extradition of a Haitian gang leader charged with murdering France's honorary consul. Although this drew criticism from the Haitian media, such serious charges involve clear national interests. *See* Bruce Zagaris, *Dominican Government Extradites Haitian Gang Leader for Murder of Consul*, 26 Int'l Enforcement L. Rep. 87–88 (Mar. 2010). It was also invoked by Spain in requesting the extradition of Rwandan president Paul Kagame and forty officers based on information that the individuals were involved in the murder of nine Spanish citizens. *See* Bruce Zagaris, *Rwanda Urges Governments and Interpol to Ignore Spanish Arrest Warrants*, 24 Int'l Enforcement L. Rep. 133–134 (Apr. 2008).

330 *See infra* Sec. 9.

v. Hijazi, where the United States sought to prosecute a Kuwaiti citizen for inflating the price of a subcontract to Kellogg, Brown and Root. At the time of the alleged fraud, Hijazi was neither in the United States, nor a citizen or resident, thus negating the traditional bases for jurisdiction. Rather, the government sought his prosecution for violating a protected interest of the United States. In denying Hijazi's motion to dismiss, the district court held that a government has a right to "protect itself." The court reasoned that:

> The character of the activity to be regulated is of profound importance. The United States has a strong interest in protecting itself from fraud. This is not a case in which the United States is attempting to prosecute a foreign national for an act taken against a U.S. citizen, or even a U.S. corporation, it is attempting to prosecute Hijazi for actions that were taken against the United States itself. Thus, the concepts of international law that a national has the right to protect itself from crimes against it surely support jurisdiction here.[331]

6. Expanded Extraterritorial Criminal Jurisdiction

In the last two decades, the United States, as well as many states, has expanded its extraterritorial criminal jurisdiction in reliance upon an expanded view of the traditional theories discussed above, namely territoriality, active personality, passive personality, and protected interest.[332] This extension is due to new manifestations of transnational criminality such as terrorism, sex tourism, and cybercrime,[333] to name only those that have attracted the most attention, as well as to international crimes such as genocide, crimes against humanity, and war crimes. International treaties, as well as national legislation in different countries, have expanded their extraterritorial criminal jurisdiction for these crimes.

At the outset, it is important to note that there exists a legal presumption in U.S. statutory interpretation that, absent a clear indication, Congress ordinarily intends federal statutes to only have domestic application.[334] It is equally well-established in the United States that in interpreting a statute that applies extraterritorially, it is presumed that Congress does not intend to violate international law.[335]

The United States has adopted several legislative provisions for the extraterritorial application of its criminal law with respect to terrorism.[336] Antiterrorism legislation having extraterritorial

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331 United States v. Ali Hijazi, 2011 U.S. Dist LEXIS 7734, at *22–*23 (C.D. Ill. 2011) (internal citations omitted) (emphasis added).

332 For examples of treaties providing for jurisdiction regardless of where the offense was committed, *see* Peruvian Extradition Treaty, art. II(3)(c), *entered into force* Mar. 25, 2003, S. TREATY DOC. 107–106 ("For the purposes of this Article, an offense shall be an extraditable offense, regardless of . . . (c) where the offense was committed"); Bolivian Extradition Treaty, art. II(3)(b), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104–122 ("To determine . . . whether an offense is punishable under the laws in the Requested State, it shall be irrelevant . . . where the act or acts constituting the offense were committed"); Jordanian Extradition Treaty, art. 2(4), *entered into force* July 29, 1995, S. TREATY DOC. 104–103 ("An offense described in this Article shall be an extraditable offense regardless of where the act or acts constituting the offense were committed"); Austrian Extradition Treaty, art. 2(6), *entered into force* Jan. 1, 2002, S. TREATY DOC. 105–150, TIAS 12916; Indian Extradition Treaty, art. 2(4), *entered into force* July 21, 1999, S. TREATY DOC. 105–130, TIAS 12873; Extradition Treaty with Luxembourg, art. 2(4), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105–110, TIAS 12804.

333 *See generally* United States v. Clark, 435 F.3d 1100 (9th Cir. 2006).

334 *See* Small v. United States. 544 U.S. 385 (2005).

335 McColluch v. Scoiedad Nacional de Marioneros de Honduras, 327 U.S. 10, 21–22 (1963). *See also* United States. v. Neil, 312 F.3d 419, 421 (9th Cir. 2002).

336 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; USA PATRIOT ACT, 18 U.S.C. § 2331, Pub. Law No. 107-56 (2001) (amended 2006); Exec. Order No. 13,224, 3 C.F.R. 13,224 (Sept. 23, 2001); U.S. Anti-Terrorism & Effective Death Penalty Act (AEDPA), 8 U.S.C.

effect does pose a problem as these laws conflict with territorial criminal legislation as well as with the legislation of other states, which are predicated on the same theories.[337] Thus, it would not be uncommon, in a case involving terror violence, that the victims have different nationalities, that the perpetrators have different nationalities, and that the crime is committed on the territory of a state other than that of the victims or the perpetrators. In these complex cases with jurisdictional conflicts, the courts of the requested state will be confronted with the difficult issue of which of the multiple requesting states will be given priority. Regrettably, there is very little international law to resolve such jurisdictional conflicts, and that basically leads states interested in prosecuting such perpetrators to seek to obtain *in personam* jurisdiction by other means, such as kidnapping.[338]

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§1189 (2000); Airport and Transportation Security Act of 2001, S. 1447 (Nov. 19, 2001); Authorization for the Use of Military Force (Congressional Joint Resolution, September 14, 2001); Legal Aspects of the Use of Military Force; Congressional Research Service, September 13, 2001; 49 U.S.C. §§ 44901–44910 (Air Commerce & Safety); 18 U.S.C. §§32–37 (Aircraft & Motor Vehicle Crimes); 18 U.S.C. §§ 175–178 (Biological Weapons); 18 U.S.C. §§ 229 (Chemical Weapons); 18 U.S.C. §231–233 (Civil Disorders); 50 U.S.C. §§2302–2353 (Defense Against Weapons of Mass Destruction); 42 U.S.C. §§5122–5196 (Disaster Relief); 50 U.S.C. §§1801–1862 (Foreign Intelligence Surveillance); 50 U.S.C. §§1701–1707 (International Emergency Economic Powers); 50 U.S.C. §§1601–1651(National Emergencies); 42 U.S.C. §§64-271 (Quarantine and Inspection); 18 U.S.C. §§3071–3077 (Rewards for Information Concerning Terrorist Acts and Espionage); 18 U.S.C. §§2151–2156 (Sabotage); 18 U.S.C. §§2701–2711 (Stored Wire & Electronic Communications & Transactional Records Access); 18 U.S.C. §2331–2339 (Terrorism); 50 U.S.C. (War and National Defense); 50 U.S.C. §§1341–1548 (War Powers Resolution); 18 U.S.C. §§2510–2522 (Wire & Electronic Communications Interception & interception of Oral Communications); Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (George W. Bush, Nov. 13, 2001); Executive Order on Citizen Preparedness in War on Terrorism (George W. Bush, Nov. 9, 2001); Homeland Security Presidential Directive 2: Combating Terrorism through Immigration Policies (George W. Bush, Oct. 29, 2001); Homeland Security Presidential Directive 1: Organization and Operation of the Homeland Security Council (George W. Bush, Oct. 29, 2001); Executive Order Establishing Office of Homeland Security (George W. Bush, October 8, 2001); Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism (George W. Bush, Sept. 23, 2001); Executive Order Calling Reserves of Armed Forces to Active Duty (George W. Bush, Sept. 14, 2001); Declaration of National Emergency (George W. Bush, Sept. 14, 2001); National Emergency Powers (Congressional Research Service background paper, Sept. 18, 2001); National Security Presidential Directive 1—Organization of the National Security Council (George W. Bush, Feb. 13, 2001); Continued Detention of Aliens Subject to Final Orders of Removal [Immigration and Naturalization Service; interim rule, Nov. 14, 2001—adds new provisions to govern determinations by the Immigration and Naturalization Service as to whether there is a significant likelihood that an alien will be removed from the United States in the reasonably foreseeable future, and whether there are special circumstances—including terrorist activity—justifying the continued detention of certain aliens]; National Security; Prevention of Acts of Violence and Terrorism [Department of Justice, Bureau of Prisons; interim rule, Oct. 31, 2001—permits monitoring of communications with attorneys to deter acts of terrorism]; Aircraft Security under General Operating and Flight Rules [Department of Transportation, Federal Aviation Administration; final rule, Oct. 4, 2001—requires certain aircraft operators to search prior to departure aircraft and screen passengers, crew members, and other persons, and their accessible property].

337 Customary international law needs to be evidenced by *opinio juris* and the consistent practice of states, both of which are very weak, except in demonstrating a historic preference for the theory of territorial jurisdiction, as discussed in Sec. 1 of this chapter. The writings of scholars are also very limited on this subject. For an identification of general principles of law as a means of deriving guidelines for jurisdictional conflict resolution, see M. Cherif Bassiouni, *General Principles of International Law*, 11 Mich. J. Int'l L. 768 (1990).

338 *See* Ch. V.

7. Universal Jurisdiction[339]

7.1. Introduction

Universal jurisdiction has become the preferred legal technique of those seeking to prevent impunity for international crimes.[340] Although there is no doubt that it is a useful and, at times, necessary technique, it has negative aspects. The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as genocide, crimes against humanity, war crimes, and torture.[341] There may be other international crimes for which an applicable treaty provides for such a jurisdictional basis, as in the case of terrorism.[342]

The foremost issue in the legal analysis of universal jurisdiction is its rationale. In the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis.* The exercising state acts on behalf of the international community because it has an interest in the preservation of world order as a member of that community. Although the state may also have its own interest in exercising universal jurisdiction, if those interests are jurisdictionally based the state would be exercising its own criminal jurisdiction on the basis of a theory of jurisdiction other than universality, viz., extended territoriality, active personality, passive personality, or a protected economic interest.

As an *actio popularis,* universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing state. The basis is, therefore, exclusively the nature of the crime, and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes. Precisely because a state exercising universal jurisdiction

339 Based in part on an article in the *Virginia Journal of International Law* from M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices*, 42 Va. J. Int'l L. 81 (2001); reprinted with permission. *See* Marc Henzelin, Le Principe de L'Universalité en Droit Pénal International (2000).

340 *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad,* Human Rights Watch Update (Human Rights Watch), Sept. 2000 [hereinafter Human Rights Watch]; *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction* (Amnesty International) [hereinafter *Universal Jurisdiction: 14 Principles*]; *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (Redress), June 1999 [hereinafter *Universal Jurisdiction in Europe*].

341 For a comprehensive review, see M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application 279–294 (2011). *See also* M. Cherif Bassiouni, Introduction to International Criminal Law 78–89 (2d. ed. 2012). For a review of national prosecutions for international crimes, see Bassiouni, Introduction to International Criminal Law, *supra* note 341, at ch. IX. *See also* William Schabas, Genocide in International Law: The Crime of Crimes (2009).

342 1 M. Cherif Bassiouni, International Terrorism: Multilateral Conventions (1937–2001) (2001); 1–2 M. Cherif Bassiouni, International Terrorism: A Compilation of U.N. Documents 1972–2001 (2002); M. Cherif Bassiouni, *Extraterritorial Jurisdiction: Applications to "Terrorism," in* Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Mirjan Damaška 201 (Jon Jackson, Maximo Langer & Peter Tillers eds., 2008); M. Cherif Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations, in* Values & Violence: Intangible Aspects of Terrorism 216 (Wayne McCormack ed., 2008); M. Cherif Bassiouni, *An Assessment of International Legal Modalities to Control International Terrorism*, 31 Arab J. Legal & Judicial Scis. 17 (2005); M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 Case W. Res. J. Int'l L. 299 (2004); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Perspective*, 43 Harv. Int'l L.J. 83 (2002).

does so on behalf of the international community, it must place the overall interests of the international community above its own.

Universal jurisdiction is not without its difficulties, however. Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently to create unnecessary frictions between states, to abuse legal processes, and to harass individuals.

Given these problems, universal jurisdiction must be used cautiously in order to both prevent certain negative consequences and achieve its useful purpose. There is some evidence, however, to suggest that the exercise of universal jurisdiction by domestic jurisdictions is dominated by realpolitik considerations of executives across the globe, and that these political considerations, as a practical matter, limit the excessive claims of both the supporters and detractors of the theory.[343]

Ultimately, universal jurisdiction must be harmonized with other jurisdictional theories. In this context, it should be noted that private international law has yet to develop rules or criteria of sufficient clarity to consider priorities in the exercise of criminal jurisdiction whenever more than one state claims jurisdiction.

The theories of jurisdiction contained in treaties and evidenced in the customary practice of states are essentially territorial or based on the nationality of the perpetrator or the victim. Consequently, jurisdictional conflicts between states have been few. Nevertheless, as evidenced by the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom/United States) [hereinafter *Lockerbie*] and *Questions Relating To The Obligation To Prosecute Or Extradite* (Belgium V. Senegal) [hereinafter *Habré*] decisions of the ICJ,[344] lack of clarity in treaty obligations concerning the precedence of the duty to prosecute over the duty to extradite have led to tensions between interested states. In the *Lockerbie* case this tension led to a jurisdictional stalemate that lasted for almost ten years until a negotiated solution was reached in which the accused were tried in the Netherlands under Scottish law.[345] In the *Habré* case, Belgium and Senegal wrangled for a decade over jurisdiction over the former Chadian president Hissene Habré, eventually involving the African Union, before the ICJ ruled that Senegal had judicial precedence despite ongoing concerns over its ability to adequately prosecute Habré.[346]

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343 Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Role of Political Branches in the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 4–5 (2011).

344 *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.) (Feb. 27, 1998); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Feb. 27, 1998), 37 I.L.M. 587 (1998); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14); Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J. (July 20). For a discussion of these cases, *see* Ch. I, Sec. 3.4. *See also* Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 81–87.

345 *See* Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. Int'l & Comp. L. 355 (2000); Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 Int'l Law 289 (2000).

346 The ICJ in the *Habré* case also did not taken up the question of the unwillingness or inability of a state to effectively and sincerely prosecute an individual, as Senegal's record in the case was not altogether reassuring. This question also arose in the *Lockerbie* case, where the ICJ ruled on a textual analysis of the Montreal Convention without considering whether Libya's unwillingness to launch a good faith

It should also be noted that universal jurisdiction is not as well-established in conventional and customary international law as its ardent proponents profess it to be.[347] These proponents and their organizations have listed countries[348] as relying on universal jurisdiction when, in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented. As it stands today, only eighteen countries have universal jurisdiction provisions for crimes under international law.[349] A 2011 study by Professor Máximo Langer determined that there have been thirty-two trials before national courts under the universal jurisdiction principle, which targeted overwhelmingly individuals accused of crimes in the former Yugoslavia or Rwanda, and those by Nazis.[350] In the eight trials for crimes allegedly committed in other locations, five proceeded with the support of the accused's state of nationality, and the remaining three were tried in absentia.[351] While more than one thousand proceedings have been initiated on universal jurisdiction grounds—again largely against individuals accused of crimes in the former Yugoslavia or Rwanda, or those by Nazis—the majority never reached trial.[352]

The study also concluded that the subjects of universal jurisdiction proceedings are overwhelmingly lower-level individuals whose prosecution does not alter the political hierarchy of states that have undergone internal conflicts. It also does not disrupt the operations of the international system, which is traditionally less concerned with low-level perpetrators. They are, in fact, the ones frequently offered in place of more senior executives and decision-makers. Where there is potential disruption, as with the attempted prosecution of Habré or Abdoulaye Yerodia Ndombasi—*Case Concerning the Arrest Warrant of April 11, 2000* (Congo v. Belgium) [hereinafter the *Arrest Warrant* case]—the former acting Minister of Foreign Affairs of the Congo, the ICJ has ruled against universal jurisdiction. This suggests that neither the benefits nor the drawbacks of universal jurisdiction have been realized, and that as with many other facets of international law its use will be dictated by realpolitik first and foremost.[353]

Because universal jurisdiction has been infrequently relied upon in national judicial decisions, its relationship with other theories of jurisdiction has yet to be clarified. With respect to certain international crimes, the substantive defense of immunity has been eliminated since the Nuremberg Charter and the IMT's judgments,[354] and reinforced by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and Article 27 of the Rome Statute of the International Criminal Court (ICC). The removal of substantive immunity means that a defendant cannot rely

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investigation and possible prosecution had any bearing on the venue for the trial. As this writer suggested in Chapter I, the question of capacity and willingness is absolutely relevant to the question of jurisdictional priorities in universal jurisdiction cases.

347 *See supra* note 340.

348 *Id.*

349 Michael Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 Harv. Int'l L.J. 357, 359 (2010).

350 Langer, *supra* note 343, at 9.

351 *Id.*

352 *Id.* at 8.

353 M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and Realpolitik*, 22 Ga. St. U. L. Rev. 541 (2006); M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 Case W. Res. J. Int'l L. 191 (2003); M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 Pace Int'l L. Rev. 213 (2000); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. Colo. L. Rev. 409 (2000). *See also* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Role of Political Branches in the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1, 4–5 (2011).

354 The International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) removed substantive immunity for crimes against peace, war crimes, and crimes against humanity. Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 8 U.N.T.S. 279, 59 Stat. 1544 [hereinafter IMT Charter]; Charter of the International Military Tribunal for the Far East,

on his/her status as a head of state, senior government official, or diplomat to interpose that position as a substantive defense negating criminal responsibility for these crimes, but only before these judicial institutions established by treaty. Otherwise, as decided by the ICJ in the *Arrest Warrant* case, temporal immunity has been recognized as alive and well under customary international law.

The use of the theory of universal jurisdiction by national jurisdictions has not, as yet, been directed against foreign heads of state and foreign senior officials, save for a few cases, most notably for Belgium's charges in the *Habré* case.[355] It must be noted that the Belgium charge is primarily based on the CAT, which provides a conventional basis for universal jurisdiction.[356] The *Habré* case is a complex one that took more than a decade to resolve after legal proceedings in Senegal, Belgium, and at the ICJ. After his ouster in 1990, Habré moved to Senegal, where he lived quietly for nearly a decade until January 2000 when a group of victims filed a formal complaint in Dakar. In February a Senegalese judge formally indicted Habré for torture and crimes against humanity,[357] but the indictment was dismissed by the Cour de Cassation in July 2000 on jurisdictional grounds.[358] This decision led to the filing of a complaint in Belgium that resulted in a four-year investigation and the issuing of an indictment in 2005 for torture, crimes against humanity, and war crimes. Belgium sought his extradition, which Senegal refused. After more than three years of delays, which included consultations with the African Union (AU) and the Economic Community of West African States (ECOWAS) over the creation of a special tribunal and other jurisdictional matters, Belgium applied to the ICJ in order to force Senegal to either prosecute or extradite Habré.[359] In July 2012 the ICJ issued its judgment, declaring that Senegal had a duty under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to prosecute Habré or, failing to do so, extradite him to Belgium to face trial there.[360] As of April 2013 Senegal is in the process of creating a special "Extraordinary African Chambers" composed of Senegalese and other African judges and staff to try the case.[361]

Jan. 19, 1946, T.I.A.S. No. 1589 at 3, 4 Bevans 20, amended Apr. 26, 1946, art. 6., T.I.A.S. No. 1589 at 11, 4 Bevans 27 [hereinafter IMTFE Amended Charter]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) removed substantive immunity for genocide, crimes against humanity, and war crimes. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993), *annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808*, U.N. Doc. S/2-5704 & Add. 1 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

355 *See* Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 79–89 (2d ed. 2012) for a detailed review of the Habré case in Senegal and before the ICJ.

356 Convention against Torture, *supra* note 317, at art. 5.

357 *Plainte avec Constitution de Partie Civile* (Feb. 3, 2000), http://www.hrw.org/legacy/french/themes/habre-plainte.html. *See also* Frederic L. Kirgis, *The Indictment in Senegal of the Former Chad Head of State*, ASIL Insights (Feb. 2000), http://www.asil.org/insigh41.cfm.

358 *Aff. Habré, Decision Number 14 of 20.03.2001*, Cour du Cassation, *available at* http://www.asser.nl/upload/documents/20121105T123352-Habre,%20Cassation%20Court,%20Senegal,%2020%20March%202001.pdf.

359 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Application, p. 15, *available at* http://www.icj-cij.org/docket/files/144/15054.pdf.

360 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J. (July 20).

361 Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (Sept. 12, 2012), http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal.

7.2. The Theoretical Foundation of Universal Jurisdiction

The theory of universal jurisdiction[362] is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty. In addition, the exercise of universal jurisdiction displaces the right of the accused to be tried by the "natural judge," a hallmark of the traditional exercise of territorial jurisdiction.[363] The rationale behind the exercise of such jurisdiction is that:

1. No other state can exercise jurisdiction on the basis of the traditional doctrines;
2. No other state has a direct interest; and
3. There is an interest of the international community requiring enforcement.

Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community. In other words, a state exercising universal jurisdiction carries out an *actio popularis* against persons who are *hostis humani generis*.[364]

Two positions can be identified as the basis for transcending the concept of sovereignty. The first is the universalist position that stems from an idealistic Weltanschauung. This idealistic universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community, and thus transcending the singularity of national interests. The second position is a pragmatic policy-oriented one that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.

These two positions share common elements, namely: (1) the existence of commonly shared values and/or interests by the international community; (2) the need to expand enforcement mechanisms to counter more serious transgressions of these values/interests; and (3) the assumption that an expanded jurisdictional enforcement network will produce deterrence, prevention, and retribution that ultimately will enhance world order, justice, and peace. Under both positions, the result is to give each and all sovereignties, as well as international organs, the power to individually or collectively enforce certain international proscriptions. This theory applies when the proscription originates in international criminal law and not in the national

362 *See* Hays Butler, Universal Jurisdiction: A Compilation of Documents (3 vols. 2000). *See also*, *e.g.*, Jordan J. Paust, M. Cherif Bassiouni & Michael Scharf et al., International Criminal Law: Cases and Materials (2d ed. 2000); Steven Ratner & Jason Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (2d ed. 2001); *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* (Committee on International Human Rights Law and Practice, International Law Association), 20–21 (2000) [hereinafter Universal Jurisdiction in Respect of Gross Human Rights Offenses] (concluding that states are entitled to exercise universal jurisdiction with respect to genocide, crimes against humanity, war crimes, and torture, but recommending that "[g]ross human rights offenders should be brought to justice in the state in which they committed their offences"); Human Rights Watch, *supra* note 340. Surveys and listings of national legislation purporting to authorize the use of universal jurisdiction can be found in *Universal Jurisdiction in Europe, supra* note 340, at 16–47; *Universal Jurisdiction: 14 Principles, supra* note 340, at 5; http://www.icrc.org/ihl-nat.nsf.

363 *See, e.g.,* European Convention on Human Rights, Nov. 4, 1950, art. 13, Europ. T.S. No. 5, 213 U.N.T.S. 221; American Convention on Human Rights, November 22, 1969, art. 25, O.A.S.T.S. No. 36; 1144 U.N.T.S. 123.

364 For a discussion of the circumstances under which a state may proceed *actio popularis* as a result of a breach of *obligatio erga omnes,* see Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 Cornell Int'l L.J. 297, 299–301 (2000). *See also* Maurizio Ragazzi, The Concept of International Obligations *Erga Omnes* (1997); Andre de Hoogh, Obligations *Erga Omnes* and International Crimes (1996); *cf.* Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

law of a given state. In other words, crimes exclusively under national law cannot give rise to universal jurisdiction.

The universalist and the policy-oriented positions differ as to: (1) the nature and sources of the values/interests that give rise to an international or supranational prescription; (2) the composition of the international community and its membership; and (3) the nature and extent of the legal rights and obligations incumbent upon states.[365]

The universalist position can be traced to metaphysical and philosophical conceptions arising in different cultures and at different times, but converging in some aspects. For example, in the three monotheistic faiths of Judaism, Christianity, and Islam, full sovereignty rests with the Creator, and transgressions of the Creator's norms confer on the religious community the power to enforce them, irrespective of any limitations in space or time.[366]

Starting in the fifteenth century Western jurists and philosophers, in part based on Christian concepts of natural law, developed an idealist universalist position. But contrary to some contemporary authors who refer to them, these early jurists and philosophers did not extend their universalist views of certain universal wrongs to universal criminal jurisdiction to be exercised by any and all states.[367] Cesare Beccaria in his 1764 pamphlet *Dei Delitti e Delle Pene*[368] expressed an idealist universalist view that there exists a community of nations sharing common values that all members of the international community are commonly bound to enforce, collectively and singularly. But he did not extend it to universal jurisdiction. He expressed his views as follows:

> There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris for this abstract reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men.[369]

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365 These issues are discussed in Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 293, at 3–69. The case for an international *civitas maxima* supporting the duty to prosecute or extradite is valid; it is doubtful, however, that it includes universal jurisdiction other than as a subsidiary jurisdictional basis to enforce the attainment of these goals. In fact, *aut dedere aut judicare* may well be argued as the substitute for a theory of universal jurisdiction. In this writer's opinion, universal jurisdiction complements *aut dedere aut judicare* in that whenever a state does not extradite and proceeds to prosecute, it may need to rely on universality.

366 This is why the Ayatollah Khomeni in 1989 issued an edict of death for blasphemy against author Salman Rushdie for his book *The Satanic Verses* (1988). The majority of the world's states reacted negatively to the extraterritorial reach, as did many scholars. *See* M. Cherif Bassiouni, *Speech, Religious Discrimination, and Blasphemy, in* Proceedings of the American Society of International Law 432–435 (1989); Hurst Hannum, *Speech, Religious Discrimination, and Blasphemy, in* Proceedings of the American Society of International Law 427–428 (1989); Virginia Leary, *Speech, Religious Discrimination, and Blasphemy, in* Proceedings of the American Society of International Law 428–430 (1989); Ved Nanda, *Speech, Religious Discrimination, and Blasphemy, in* Proceedings of the American Society of International Law 430–431 (1989). This is an example of why universal jurisdiction should be carefully circumscribed. There have nevertheless been many contrary positions expressed by Muslim writers in the West, as well as in the Muslim world, which have taken a position in support of the Ayatollah's fatwa, thus in fact advocating universal jurisdiction.

367 For a synopsis of the views on this point, including those of Grotius, Heineccius Burlamaqi, de Vattel, Rutherford, Kent, and others, see Henry Wheaton, Elements of International Law 181 (R.M. Dana ed., 8th ed. Boston, Little-Brown 1866).

368 Cesare Beccaria-Bonesana, An Essay on Crimes and Punishment (Academic Reprints ed. 1953) (1819).

369 *Id.* at 135. *See also* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 293, at 27.

Later Hugo Grotius, in his two volumes *De Jure Belli Ac Pacis* (first published in 1625), argued from the same philosophical premise but relied on a pragmatic policy-oriented approach of pursuing *hostis humani generis* on the high seas. Grotius's premise was the notion of *mare liberum*, which was not necessarily a new doctrine, but under which he posited the right of freedom of navigation on the high seas. Because the right of freedom of navigation on the high seas was applicable universally, it followed that an infringement upon that right by pirates would be universally punished. It is that doctrine that became the foundation of the modern theory of universal jurisdiction for certain international crimes.

For the naturalist, a concept of universal wrongs can be identified with reference to natural law,[370] while for the legal positivist they cannot.[371] Thus, the evolution of legal concepts such as *nullum crimen sine lege, nulla poena sine lege*[372] flew in the face of the abstract notion of universal wrongs identified by reference to natural law.[373] These concepts originated in the writings of Montesquieu,[374] but they were later reflected in the positivism of criminal law of the 1800s European criminal codifications.[375] These codifications embodied the principles of legality in criminal law and made it difficult for the continued recognition of the universalist position expressed by a few earlier jurists and philosophers.

Many legal scholars since the nineteenth century have advocated the theory of universal jurisdiction without necessarily clarifying the philosophical foundation of that theory or its legal elements. Instead they argue, much like the early universalists, that certain international crimes imply that all states, irrespective of any existing national legislation, and even contrary to national legislation, have the power to prosecute, irrespective of any territorial connection to the crime, or any connection to the nationality of the perpetrator or the victim. Perhaps the most articulate expression of the question was made in 1922 by Donnedieu de Vabres, who stated:

> Dans sa notion élémentaire et son expression absolue, le système de *la répression universelle*, ou del'*universalité du droit de punir* est celui qui attribue vocation aux tribunaux répressifs de tous les Etats pour connaître d'un crime commis par un individu quelconque, en quelque pays que ce soit.
>
> L'Etat qui, se prévalant de cette doctrine, exerce sa compétence unverselle, ne revendique nullement un droit de souveraineté qui lui serait propre, soit à l'égard de lacte qu'il réprime, soit vis-à-vis de son auteur. Il n'agit pas pour la défense de ses intérêts. Il intervient, a défaut de tout autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse. Il suit de là que son intervention a un caractère très subsidiaire. Elle ne se manifeste que si l'Etat qui juge a le délinquant en sa possession.

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370 For different expressions of natural law, see The Natural Law Reader (Brendan F. Brown ed., 1960) (expressing natural law on the basis of Catholicism); Lloyd L. Weinreb, Natural Law and Justice (1987). *See also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 551 (Advisory Op.) (July 8) (Weeramantry, J., dissenting); Saul Mendlovitz & Merav Datan, *Judge Weeramantry's Grotian Quest*, 7 Transnat'l L. & Contemp. Probs. 401 (1997).

371 For these different philosophies of law, *see* Bassiouni, Crimes against Humanity, *supra* note 341, at 89–122.

372 *Id.* at 123–167.

373 *Id.*

374 2 Charles de Secondat Montesquieu, De L'Esprit des Lois, Oeuvres Complétes (Roger Caillois ed., 1951). The maxim derives from Roman law.

375 Bassiouni, Crimes against Humanity, *supra* note 341, at 123–167. The modern European origin for the "principles of legality" is attributed to Paul Anselm von Feuerbach, who first explicated them in his Lehrbuch des Gemeinen in Deutschland Gültigen Peinlichen Rechts (1801). *See also* Giuliano Vassalli, *Nullum Crimen Sine Lege,* Appendice del Nuouisomo Digesto Italiano 292 (1984).

> Tel qu'on vient de le définir, le système de l'universalité du droit de punir a sa modeste origine dans un texte du Code de Justinien, C. III, 15, *Ubi de criminibus agi oportet*, 1, qui, déterminant le ressort, en matière pénale, des gouverneurs de l'Empire, donne à la fois compétence au tribunal du lieu de commission du délit, et à celui du lieu d'arrestation du coupable (*judex deprehensionis*). L'interprétation tendancieuse des glossateurs substitua au *judex deprehensionis le judex domicilli*.
>
> Néanmoins, il fut admis pendant tout le moyen âge, dans la doctrine italienne, et dans le droit qui gouvernait les rapport des villes lombardes, qu'à l'égard de certaines catégories de malfaiteurs dangereux-*banniti, vagabundi, assassini*,-la simple présence, sur le territoire, du criminel impuni, étant une cause de trouble, donnait vocation à la cité pour connaître de son crime. Au XVI siècle, *Doneau* rétablit la véritable signification du texte fondamental, C. III. 15. 1, favorable au *forum deprehensionis*. Ayrault écrit, à la même époque: "Il semble que, franchement et volontairement, nous nous rendions sujets aux lois de la patrie dont nous corrompons le repos." Au XVII siècle, cette idée se fait jour dans les écrits du Hollandais Paul Voët, au XVIII siècle, dans ceux de l'Allemand Henricus de Cocceji. Elle pénètre jusqu'à notre époque, où elle est fréquemment reproduite. Il en résulte que la commission de certains crimes, d'une exceptionnelle gravité, est une source de compétence universelle.
>
> Il appartint à Grotius qui fut, à l'aube du XVII siècle, le grand vulgarisateur, sinon le fondateur du droit international, d'attacher à la théorie de la compétence universelle toute sa valeur philosophique. A l'heure où les grandes unités politiques, de constitution récente, se dressaient les unes contre les autres, il formula, comme un précurseur, la loi de la solidarité humaine. Il existe, dit-il, une société universelle des hommes, *societas generis humani*. Le crime, envisagé comme une violation du *droit naturel* qui la régit, droit non écrit, mais gravé dans la conscience individuelle, est une offense à l'humanité tout entière. L'obligation de punir qu'il engendre est universelle. Elle se traduit, pour l'Etat dans le pouvoir duquel le criminel est tombé, par l'alternative fameuse d'extrader ou de punir: *aut dedere, aut punier*. L'influence de Grotius peut s'observer dans la doctrine de ses successeurs hollandais, scandinaves ou allemands. On la rencontre au XVIII siècle, et dans la période revolutionnaire, où la pure tendance individualiste et humanitaire résiste au socialisme, à l'étatisme issus du *Contrat social*. On la retrouve, au cours du XIX siècle, dans les écrits de nombreux théoriciens, et dans quelques législations positives.[376]

This doctrinal view, which is essentially a policy-oriented one despite being grounded in natural law philosophy, has received increasing support among legal scholars in the twentieth century,[377] but it has not been supported by the practice of states. In fact, there are only a few reported cases known to scholars in which such an unfettered universal jurisdiction doctrine has been applied without the existence of a link to the sovereignty or territoriality of the enforcing state.[378]

A 1990 Report of the Council of Europe aptly summarized the contemporary situation of the law and practice of states:[379]

> There are considerable differences of opinion among member states concerning the purpose of the principle of universality, according to which criminal jurisdiction is exercised over offences

376 Henri Donnedieu de Vabres, Introduction a l'Etude du Droit Pénal International 135–136 (1922) (footnotes omitted). *See also* Henri Donnedieu de Vabres, Les Principles Modernes du Droit Pénal International (1928).

377 *See* Butler, *supra* note 362.

378 Most of them relating to piracy. *See* Alfred Rubin, The Law of Piracy (2d ed. 1998). Some cases reported by scholars refer to post-WWII prosecutions, but could not be found by this writer. *See* Schabas, *supra* note 341, at 360–368. For a discussion of contemporary state practice, see Secs. 7.4 and 7.5.

379 Report of the European Committee on Crime Prevention, Council of Europe (1990). The report was prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set on by the European Committee on Crime Problems (CDPC) in 1984.

committed abroad, without the requirements underlying the previously mentioned principles of jurisdiction necessarily being present.

Some states are only prepared to apply the principles to certain offences if they are authorised or obliged to do so under international law. Some conventions authorise the assertion of universal jurisdiction, others require such jurisdictional action so as not to leave certain offences unpunished. The majority of states have felt at liberty to introduce the principle in their national legislation without any such authorisation or obligation. Nevertheless, many of the latter group have evidently tried to keep in line with existing international agreements when establishing universal jurisdiction. However, there are also a number of states that have reserved a considerable degree of universal jurisdiction over offences not covered by any agreement. They assume that any conflict of competence with other states, which may arise from their extensive claims, can be avoided in practice by a broad application of the principle of discretionary jurisdiction, or by imposing conditions for prosecution, such as the requirement to authorisation from a central body or for the presence of the suspect. The latter requirement is, for that matter, imposed by all states on the exercise of jurisdiction based on this principle, at least in practice.

Some conventions would seem to permit the assertion of universal jurisdiction in relation to offences covered therein. The Red Cross Conventions of 1949 would be examples, though not all states party to these conventions have asserted universal jurisdiction under these instruments. The 1961 Single Convention on Narcotic Drugs and the amending Protocol of 1972, and the 1971 Convention of Psychotropic Substances are also examples. Some states have established jurisdiction based on universality in respect of offences covered by these treaties.

Other conventions clearly envisage or require the taking of universal jurisdiction: treaties on counterfeiting, piracy, hijacking and actions endangering the safety of civil aviation afford examples. Virtually all states have established universal jurisdiction over such offences. Comparable conventions envisaging the taking of universal jurisdiction are those relating to the combat against terrorism, the prevention of torture, the protection of diplomatic staff, the physical protection of nuclear material and the taking of hostages.

The maxim *aut dedere aut judicare* is reflected in an increasing number of conventions, although the way it is translated into national legislation and its effect differ from state to state and even from category to category of offence within a single country.

There is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based, such as the "representation" principle or the principle of protection. There are often differences of opinion as to which principle should form the basis of a particular term of extraterritorial jurisdiction. It has also been shown that, under special circumstances, forms of jurisdiction have been established which cannot be classified under any of the traditional principles of jurisdiction described above. These can be found, for example, in military law, in certain emergency laws and in legislation regarding taxes and customs duties.

The difficulty of categorising these different forms of extraterritorial legislative criminal jurisdiction can perhaps be explained by the fact that they do not always have a sound theoretical basis. The committee considered it its task to study the theoretical basis for such jurisdiction and, where possible, to describe it or develop it further.[380]

Universal jurisdiction has indeed been frequently confused with other theories of extraterritorial criminal jurisdiction. But, as discussed below, with few exceptions, the legislation and practice of states overwhelmingly evidences a connection between the crime and the enforcing state based on the crime's territorial impact or because of the nationality of the perpetrator or the nationality of the victim. As discussed below, explicit or implicit recognition of the theory of universal jurisdiction in conventional international law has been limited to certain

380 *Id.* at 14–16.

international crimes. Nevertheless, the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction. Instead, universal jurisdiction for certain international crimes is a theory of jurisdiction that is predicated on the policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations, and also in pursuit of its own national interest. But that does not mean that this enforcing exercise supplants the enforcing interests of other states, or for that matter, of international organs such as the ICTY, ICTR, and ICC. That is why a balancing test must be applied in the exercise of universal jurisdiction.

Scholars, including this writer, support the proposition that an independent theory of universal jurisdiction exists with respect to jus cogens international crimes. The premises for such a theory are both the historic idealistic universalist position and the pragmatic policy position mentioned above.[381] In order to support such a theory, however, it is necessary to have an understanding of the historical evolution of that theory and its contemporary content and application. Furthermore, it is indispensable to have guidelines for the application of this theory in order to avoid jurisdictional conflicts, disruptions of world order, and abuse and denial of justice, and to enhance predictability of jurisdictional priorities and consistency in jurisdictional disputes and outcomes.

7.3. Universal Jurisdiction in International Criminal Law

The primary sources of substantive international criminal law are conventions and customs that resort to general principles of law and the writings of scholars essentially as a means to interpret conventions and customs.[382] Conventional international law is the better source of substantive international criminal law insofar as it is more apt to satisfy the principle of legality, *nullum crimen sine lege, nulla poena sine lege*.[383] But that does not exclude customary international law or general principles of law as sources of substantive international criminal law, provided they meet the standard of specificity equivalent to that of conventional international law. The inquiry into universal criminal jurisdiction and its application[384] must be made by reference to: (1) national legislation to determine whether it exists in most national legal systems representing the families of the world's major criminal justice systems,[385] and (2) in conventional international criminal law to determine the existence of international legal norms that provide for the application of universal jurisdiction by national criminal justice systems and by internationally established adjudicating bodies.[386]

The research of scholars as to national legislation evidences that very few states have provisions allowing their legal systems to exercise universal jurisdiction over anyone who has committed

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381 *See supra* note 364 and accompanying text.

382 M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework, in* 1 International Criminal Law 3 (M. Cherif Bassiouni, ed., 1999) [hereinafter Bassiouni, *Sources*].

383 For a discussion of the process of establishing customary international law, see Sec. 7.5.1.

384 "In its classic statement, however, the universality theory encompasses acts committed beyond any country's territorial jurisdiction, the paradigm offense being piracy on the high seas." Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 Cornell Int'l L.J. 281, 303 (1987). *See id.* at 303 n.161 ("The justification for the universality principle lies in the fact that without such jurisdiction, no country could prosecute the offender.").

385 Bassiouni, *General Principles of International Law*, *supra* note 337. *See also* Révé David, Les Grands Systèmes de Droit Contemporaries 22–32 (5th ed. 1973).

386 M. Cherif Bassiouni, International Criminal Law Conventions and Their Penal Provisions (1997) [hereinafter Bassiouni, ICL Conventions]. For a discussion of contemporary state practice with respect to universal jurisdiction, see Sec. 7.5.1.

a jus cogens international crime, irrespective of the time and place of the crime's occurrence, its impact upon the territory of the enforcing state, its commission by one of the state's nationals, or its commission against one of the state's nationals. The judicial practice of states is also limited. To the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.

The collective practice of states in establishing international judicial organs since the end of WWI, which includes five international investigating commissions and four international ad hoc criminal tribunals, evidences that none of them has been based on the theory of universal jurisdiction.[387] The Statute of the International Criminal Court (ICC) also does not establish universal jurisdiction for "situations" referred to it by states, but only a universal scope as to the crimes within the jurisdiction of the Court.[388] These crimes are: genocide, crimes against humanity, and war crimes, which are jus cogens international crimes.[389] As "referrals"[390] to the ICC are made by a state party[391] or by a nonstate party,[392] it is difficult to argue that the ICC's jurisdiction flows from the theory of universal jurisdiction. However, "referrals" by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction, because they can transcend the territoriality of a state-party.[393] That provision could be interpreted as allowing the Security Council to refer a "situation" to the ICC, even when it applies to crimes occurring outside the territory of a state-party and involving the responsibility of nationals from nonparties.

International criminal law evidences the existence of 27 categories of crimes.[394] These 27 categories are evidenced by 281 conventions concluded since 1815.[395] Some of these conventions include penal provisions that distinguish them from other conventional international law. These international categories are: aggression; genocide; crimes against humanity; war crimes; unlawful possession, use, emplacement, stockpiling and trade of weapons, including nuclear weapons; nuclear terrorism; apartheid; slavery, slave-related practices, and trafficking in human beings; torture and other forms of cruel, inhuman, or degrading treatment; unlawful human experimentation; enforced disappearances and extrajudicial executions; mercenarism; piracy and unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; aircraft hijacking and unlawful acts against international air safety; threat and use of

387 M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11 (1997).

388 *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 14, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], *reprinted in* 37 I.L.M. 999 (1998). *See also* M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History (1998).

389 ICC Statute, *supra* note 388, at arts. 6, 7 & 8. Following the first review conference held in Kampala, Uganda in 2010, the ICC Statute was amended to include the Crime of Aggression. For a detailed discussion of this key event, see Claus Kreb & Leonie von Holtzendorf, *The Kampala Compromise on the Crime of Aggression*, 8 J. Int'l Crim. Justice 1179 (2010); Astrid Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression—at Last… in Reach… Over Some*, 2 Goettingen J. Int'l L. 745 (2010); Hans-Peter Kaul, Speech, *From Nuremberg to Kampala—Reflections on the Crime of Aggression* (Aug. 30, 2010), http://www.icc-cpi.int/NR/rdonlyres/6A8372F3-B7DE-42D2-949F-28B6AEC2A4F2/282450/03092010_IHLDialogs_Chautauqua_Speech1.pdf.

390 ICC Statute, *supra* note 388, at art. 14.

391 *Id.* Germany, New Zealand, and Canada are examples of countries that have recently passed national implementing legislation.

392 *Id.* at art. 12(3).

393 *Id.* at art. 13(b).

394 *See* M. Cherif Bassiouni, Introduction to International Criminal Law, ch. III, sec. 4.

395 *Id.*

force against internationally protected persons and United Nations personnel; taking of civilian hostages; use of explosives; unlawful use of the mail; financing of terrorism; unlawful traffic in drugs and related drug offenses; organized crime and related specific crimes; destruction and/or theft of national treasures; unlawful acts against certain internationally protected elements of the environment; international traffic in obscene materials; falsification and counterfeiting; unlawful interference with international submarine cables; and corruption and bribery of foreign public officials.[396] Among the penal provisions contained in these 281 conventions there are provisions on criminal jurisdiction. Of these, 101 contain a reference to a jurisdictional theory,[397] and among them only a few, discussed below, can be construed explicitly or implicitly as reflecting universal jurisdiction. Conversely, 74 provisions reflect the obligation to prosecute or extradite, evidencing the legislative choice of this enforcement technique over that of conferring universal jurisdiction to any and all states.[398]

Because conventional and customary international criminal law overlap with respect to certain crimes, it is useful to examine whether universal jurisdiction vis-à-vis jus cogens international crimes arises under any of the sources of international criminal law. What follows is an assessment of the evolution of universal jurisdiction with respect to jus cogens international crimes based on conventional and customary international law sources. These jus cogens international crimes are: piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, apartheid, and torture.[399]

It is noteworthy that several international criminal law conventions that apply to crimes that have not risen to jus cogens contain a provision on universal jurisdiction. This evidences the recognition and application given to this theory.

7.3.1. Piracy

Piracy is deemed the basis of universal criminal jurisdiction for jus cogens international crimes, but that was not always the case. The term "piracy" has its origins in Greek literature as *peiretes* and is reported in Homer's *Iliad*[400] and *The Odyssey*,[401] as well as in Thucydides' *History of the Peloponnesian War*.[402] It then appeared in Roman literature, notably in the writings of Cicero, who referred to pirates as *pirata* and *praedones*, or land-based predators who were later referred to as brigands and bandits.[403] Cicero is also credited with the notion that *pirata* and *praedones* are *hostis humani generis*.[404] Grotius, relying on Aristotle and Cicero, elaborated on the theory of *hostis humani generis* and its application in time of war, which was the context in which piracy was viewed at that time.[405]

396 *Id.* at 144–145

397 *Id at 145*.

398 *Id*. Although *aut dedere aut judicare* is advocated as a *civitas maxima,* it should be noted that the formula is more prevalent in conventions dealing with drugs and terrorism.

399 M. Cherif Bassiouni, *International Crimes: Jus Cogens and* Obligatio Erga Omnes, 59 Law & Contemp. Probs. 9 (1996).

400 Homer, The Iliad (A.T. Murray trans., 1971).

401 Homer, The Odyssey (A.T. Murray trans., 1960).

402 Thucydides, The Peleponnesian War (C.M. Smith trans., 1969).

403 Cicero, Contra Verres II (L.H.G. Greenwood trans., 1953). *See also* Cicero, De Officii (L.H.G. Greenwood trans., 1953); Cicero, De Re Publica (C.W. Keyes trans., 1928).

404 Coleman Philippson retraces that historical evolution, both as to its substantive meaning and as to exercise of jurisdiction in Greece and Rome. 2 Coleman Philippson, The International Law and Custom of Ancient Greece & Rome (1911).

405 Hugo Grotius, De Jure Belli ac Pacis (Francis W. Kelsey trans., 1925) (1625). Grotius also relied on the Old and New Testaments and on Aristotle and Cicero for a universal perspective. *See* Cicero, De Re Publica, *supra* note 403, at 211 (bk. III, XII):

The early history of defining piracy was not, however, linked to universal jurisdiction as it was in the nineteenth and twentieth centuries. Professor Alfred Rubin has documented this history up to contemporary times in his authoritative review of the subject.[406] Alberigo Gentili[407] and Balthasar de Ayala[408] adopted the universalist view of piracy and its universal punishment by all states because it was dictated by *ius gentium.* But their application of piracy was essentially in the context of war as the phenomenon was then seen. Grotius, however, whose approach was more pragmatic, saw the problem of dealing with pirates as part of his view of a certain order on the high seas. From a jurisdictional perspective, Grotius, an advocate of the openness of the high seas or *mare liberum*, posited the principle that ships on the high seas were an extension of the flag state's territoriality. Thus, the flag state could exercise its jurisdiction over non-national ships and persons for acts of piracy. It was not, therefore, an application of universal jurisdiction whereby any and all states could exercise their jurisdiction over any and all pirates. Instead, it could be said that it was the recognition of the universal application of the flag state's jurisdiction in its right to defend against pirates and eventually to pursue them as both a preventive and punitive measure.

The early law of piracy and its jurisdictional applications developed in the national laws and practices of the major seafaring nations between the 1600s and 1800s. Though they developed along separate legal concepts and legal techniques, they were parallel as to their outcomes. The reason is probably their commonality of interests in securing themselves from the perils of piracy. These developments were based on the recognition of the flag state's power to seize and punish pirates who committed that crime as it was defined by national law. This was particularly the case with England and in the early years of the United States of America.[409] As Rubin posits the evolution of the jurisprudence, statutory enactments and the writings of scholars were based on a misunderstanding of the term "piracy."[410] Nevertheless, universal jurisdiction

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> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

Id. See also Bassiouni, Crimes against Humanity, *supra* note 341, at 108 n.71.

406 Rubin, *supra* note 378.

407 Gentili, De Ivre Bellicis Libri Tres (J.C. Rolfe trans., 1933) (1612). *See, e.g.,* Gentili's work De Jure Belli (1612), *reprinted in* Classics of International Law (1933); Grotius, De Jure Belli ac Pacis, *supra* note 405. For a brief assessment of these works, see Peter Haggenmacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture, in* Hugo Grotius and International Relations ch. 4 (1992) [hereinafter Grotius and International Relations]; G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas about War, in* Grotius and International Relations.

408 Balthazar Ayala, De Ivre et Officiis Bellicis et Disciplina Militari (J.P. Bote trans., 1912) (1581). *See* Balthazar Ayala, Three Books, on the Law of War, and on the Duties Connected with War, and on Military Discipline 88 (John Pawley Bate trans., 1912) (1597).

409 *See* Rubin, *supra* note 378.

410 *Id.* at 124. He includes in that category Sir William Blackstone, whose Commentaries on the Laws of England (vol. 4, 1769) influenced American law and jurisprudence. The Constitution in Article 1, Section 8, Clause 10 refers to "Piracies," and the Judicature Act of September 24, 1789, *An Act to Establish the Judicial Courts of the United States*, ch. 20, § 9, 1 Stat. 73, 76–77, gives each of the thirteen original

to prevent and suppress piracy has been widely recognized in customary international law as the international crime par excellence to which universality applies.

Positive international law in the twentieth century has clearly established universal jurisdiction for piracy.[411] The 1958 Geneva Convention on the Law of the High Seas[412] includes two provisions on jurisdiction over piracy. Article 18 states:

> A ship or aircraft may retain its nationality, although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.

"district courts" exclusive jurisdiction for such crimes. The first time, however, that piracy was deemed a crime of universal jurisdiction arose under Jay's Treaty of 1794, signed at London November 19, 1794, art. 21, 8 Stat. 116, 12 Bevans 13, 27. Joseph Story, however, did not embrace the universalist view of piracy and slavery in his seminal work, Commentaries on the Conflict of Laws (1834); instead, he argued for the same result from a positivistic perspective. Chief Justice John Marshall, also a positivist, recognized the universal reach of U.S. law whenever the acts of piracy were against a U.S. vessel and U.S. nationals. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818). In *United States v. Klintock,* 18 U.S. (5 Wheat.) 144 (1820), Chief Justice Marshall wrote:

> [T]he Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the eighth section [of the act of 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatsoever, is within the meaning of this act, and is punishable in the Courts of the United States. *Persons of this description are proper objects for the penal code of all nations*; and we think that the general words of the Act of Congress applying to all persons whatsoever, though they ought to not be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; *but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.*

Id. at 152 (emphasis added). The certificate issued by the Supreme Court concludes: "That the act of the 30th of April, 1790, does extend *to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels." Id.* at 153 (emphasis added). The Congress, however, rejected Chief Justice Marshall's interpretation of the Act of 1790 requiring a nexus to the United States, and in 1819 passed a new act explicitly extending jurisdiction to all international acts, irrespective of their link to the United States. *See* United States v. Hasan, 2010 LEXIS 115746, at *39 (E.D. Va. 2010), *cited in* Anthony Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1063 n 201 (2011). In 1820 the Supreme Court affirmed that the definition of piracy in the Act of 1819 was based on "the law of nations," and effectively removed the requirement of a nexus to the United States. In *Smith* the court declared that "piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law) as an offence against the universal law of society, a pirate being deemed an enemy of the human race." United States v. Smith, 18 U.S. 153, 161 (1820). For an overview of the early piracy cases, see Colangelo, *supra*. In practice, however, all other U.S. cases involving piracy had a "contact" with U.S. law, either because the acts of piracy were committed against a U.S. vessel or against U.S. nationals.

411 This may be due to the fact that piracy has for all practical purposes disappeared as of the nineteenth century, and during the twentieth century there is only one instance that occurred in the Western world. Thus, the international community found it more readily acceptable to recognize universal jurisdiction for piracy. *See* Thomas Franck, *To Define and Punish Piracies; The Lessons of the Santa Maria: A Comment*, 36 N.Y.U. L. Rev. 839 (1961). Conversely, there have been many manifestations of piracy in Southeast Asia. *See* Gerhard O.W. Mueller & Freida Adler, Outlaws of the Ocean (1985).

412 April 25, 1958, 450 U.N.T.S. 82, 1 U.S.T. 2312, T.I.A.S. No. 5200.

Article 19 states:

> On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith.

This Article clearly establishes universal jurisdiction.

The 1982 Montego Bay Convention on the Law of the Sea[413] reiterated Article 19 of the 1958 Geneva Convention, providing the same text in Article 150, namely:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Thus, universal jurisdiction for the crime of piracy is firmly established in positive international law.[414]

The question of piracy has increasingly entered discussions at the United Nations and in particular the Security Council. Most notably, in November 2012 the Security Council invoked its Chapter VII powers—which allows it to make a finding of a threat to international peace and security, and therefore impose certain remedies[415]—and adopted a Resolution that, inter alia, "*Calls upon* all States to criminalize piracy under their domestic law and to favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, and their facilitators and financiers ashore, consistent with applicable international law including international human rights law."[416] The Security Council also

> *Reiterates* its decision to continue its consideration, as a matter of urgency, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support, as set forth in resolution 2015 (2011), and the importance of such courts having jurisdiction over not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks, and emphasizes the need for strengthened cooperation of States, regional, and international organizations in holding such individuals accountable, and encourages the CGPCS to continue its discussions in this regard."[417]

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413 United Nations Convention on the Law of the Sea ("Montego Bay Convention"), October 7, 1982, U.N. Doc. A/CONF.62/122.

414 *See also* Jacob W.F. Sunderberg, *The Crime of Piracy*, *in* 1 International Criminal Law 799 (M. Cherif Bassiouni ed., 3d ed. 2008).

415 Article 39 of the U.N. Charter provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 42 of the Charter provides:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

416 S.C. Res 2077, ¶18, U.N. Doc. S/RES/2077 (2012).

417 *Id.* at 19.

Finally, the Council "*Urges* States and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecution of suspected, and imprisonment of convicted, pirates."[418]

Universal jurisdiction for piracy has also been increasingly recognized in domestic Court rulings, especially since the significant growth in piracy off the Horn of Africa.[419] A good example is the 2012 decision in *Attorney General v. Mohamud Mohammed Hashi & 8 Others* before the Court of Appeal for Kenya, in which the court held that

> the offence of piracy on the coast of Somalia, which we are dealing with in this appeal, is of great concern to the international community as it has affected the economic activities and thus the economic well being of many countries including Kenya. All States, not necessarily those affected by it, have therefore a right to exercise universal jurisdiction to punish the offence.[420]

The norm, however, has been for states to avoid prosecutions under the principle of universal jurisdiction. One study found that between 1998 and 2009 there were "1158 cases of pirate attacks cognizable under universal jurisdiction,"[421] with the overall numbers of incidents rising from 210 in 1998 to 406 in 2009.[422] During that span, only China, India, Kenya, and Yemen exercised universal jurisdiction to prosecute individuals accused of piracy,[423] which resulted in seventeen prosecutions, or less than 1.5 percent of the total number of incidents.[424] Even where other states (including France, Germany, Italy, Russia, Spain, Sweden, the United Kingdom, and the United States) apprehended individuals suspected of piracy they were transferred to the custody Kenya and Yemen for prosecution,[425] despite the presumptive applicability of universal jurisdiction.

There have been three notable convictions for Somali piracy in U.S. courts, all of which involved attacks on ships flying the U.S. flag.[426] Accordingly, although extraterritorial jurisdiction was exerted over the individuals in these cases, the fact that there was a nexus to the United States eliminates their basis in universal jurisdiction. Nonetheless, the United States has historically shown a willingness to prosecute aggressively for crimes committed against U.S. citizens and U.S. interests abroad.

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418 *Id.* at 25.

419 Piracy off the Horn of Africa, especially by Somalis, was prompted by the destruction of fishery stocks by "factory fishing" or "fishing piracy" that forced subsistence fishers into piratical acts, and the effects of the disintegration of the Somali state. *See* Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 Eur. J. Int. Law 399 (2009); J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 Am. J. Int'l L. 397 (2010); Leticia Diaz & Barry Dubner, *Foreign Fishing Piracy vs. Somalia Piracy—Does Wrong Equal Wrong?*, 14 Barry L. Rev. 73 (2010); Leticia Diaz & Barry Dubner, *On the Evolution of the Law of Sea Piracy: How Property Trumped Human Rights, The Environment and the Sovereign Right of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 Barry L. Rev. 175 (2009).

420 *Attorney General v. Mohamud Mohammed Hashi & 8 Others*, (2012) E.K.L.R. ¶ 38, H.C. Miscellaneous Appl. No. 434 Of 2009.

421 Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 Am. J. Int'l L. 436, 437 (2010).

422 *Id*. at 439.

423 *Id*. at 437.

424 *Id*. at 444.

425 *Id*. at 445.

426 *See* United States v. Said, 680 F.3d 374 (4th Cir. 2012); United States v. Salad, 2012 WL 6097444 (E.D.Va. 2012) (involving an attack on a sailboat flying the U.S. flag); United States v. Hasan, 47 F.Supp.2d 599 (E.D. Va. 2010) (involving an attack on a U.S. naval ship mistaken for a civilian vessel).

The first modern U.S. piracy case based on universal jurisdiction is *United States v. Ali Mohamed Ali*, which involves several Somalis who are accused of capturing a Bahamian ship and holding it and its Estonian, Georgian, and Russian crew ransom.[427] In that case, which is ongoing, the U.S. District Court for the District of Columbia relied upon the language of 18 U.S.C. § 1651, which provides that "Whoever, on the high seas, commits the crime of piracy *as defined by the law of nations*, and is afterwards brought into or found in the United States, shall be imprisoned for life."[428] Accordingly, the Court concluded that

> Because there is no nexus between the United States and the conduct charged in the indictment, only the universality theory of extraterritorial jurisdiction is applicable here. And universal jurisdiction prosecutions accord with international law only if the charged conduct falls within the international law definition of the universal jurisdiction crime. Dire, 680 F.3d at 454–55. Therefore, the Court must decide how the law of nations defines piracy.[429]

On that basis, the court held that under international law there was no universal jurisdiction for conspiracy, but that there was for aiding and abetting, thus dismissing the former count while allowing the second to proceed. With regard to the third count, hostage taking, the court determined that it had jurisdiction based not on the alleged act's status as an international crime to which universal jurisdiction applies, but because 18 U.S.C. § 1203 specifically provides for it. In the end, the district court concluded that

> the task of adapting eighteenth-century laws to combat the contemporary practice of piracy belongs neither to the Judiciary nor to the Executive. Congress has clearly, and constitutionally, authorized prosecutions for "piracy as defined by the law of nations," 18 U.S.C. § 1651 (emphasis added), and hostage taking, *id.* § 1203, even when there is no nexus to the United States. *Congress has not, however, authorized prosecutions for piracy on the basis of universal jurisdiction that depart from the international law definition of the crime*.[430]

The *Ali* ruling thus confirms the limited applicability of universal jurisdiction for privacy outside of a unique set of charges and facts, although under the ruling the dispositive question is the international law definition of the crime, which may well change especially in light of ongoing definitional changes, including by the Security Council, which has called for the criminalization of the "illicitly plan[ning], organiz[ing], facilitat[ing], or financ[ing] and profit[ing] from such attacks."

7.3.2. Slavery

Slavery has been associated with piracy since 1815, when the Declaration of the Congress of Vienna equated traffic in slavery to piracy. Since then, there has been a gradual development in the positive international law of slavery and slave-related practices based on the same type of universal condemnation that existed with respect to piracy. Nevertheless, universal condemnation, which is evident in twenty-seven conventions on the subject of slavery and slave-related practices from 1815 to 1982, did not, as discussed below, always produce the resulting universality of jurisdiction.[431] There are also forty-seven other conventions elaborated between 1874 and 1996 applicable to this category of crime,[432] which, like piracy, is deemed part of jus cogens.[433]

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427 United States v. Ali, 2012 WL 2870263 (D.D.C.2012).

428 18 U.S.C. § 1651

429 *Id*. at *13–14.

430 *Ali*, 2012 WL 2870263 at *41 (emphasis added).

431 Bassiouni, ICL Conventions, *supra* note 386, at 637–734.

432 *Id.*

433 Bassiouni, *Enslavement as an International Crime, supra* note 198.

An analysis of the treaty provisions contained in these conventions reveals that only a few establish universal jurisdiction or allow a state to exercise it.[434] Conventions concerning the suppression of the traffic in women and children, and "white slave traffic"[435] and other slave-related practices do not contain specific provisions on universal jurisdiction, nor does the Forced Labor Convention.[436]

It may be significant that with respect to traffic in slavery on the high seas, universal jurisdiction is more evident in treaty provisions insofar as that traffic has been equated to piracy. In this situation, universal jurisdiction is necessitated by the medium used by traffickers, namely, the high seas, as it is the most effective way to combat such traffic. However, with respect to sexual exploitation of persons, it seems that the conventions have left it to the states to decide what jurisdictional theories they would rely upon. This may be explained in part by the fact that these practices are conducted by means of transiting through the territory of states and that the ultimate stage of such trafficking is exploitation on the territory of a state. As a result, a state could exercise territorial criminal jurisdiction to combat this international crime without the need for universal jurisdiction. This neutral position on universal jurisdiction is expressed in the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,[437] which in Article 11 states "nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law."

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434 *See* Treaty for the Suppression of the African Slave Trade, signed at London December 20, 1841, arts. VI, VII, X, and Annex B, pt. 5, 2 Martens Nouveau Recueil (ser. 1) 392. The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (General Act of Brussels), July 2, 1890, art. 5, 27 Stat. 886, 17 Martens Nouveau Recueil (ser. 2) 345, states in Article V:

> The contracting powers pledge themselves, unless this has already been provided for by laws in accordance with the spirit of the present article, to enact or propose to their respective legislative bodies, in the course of one year at the latest from the date of the signing of the present general act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offenses against the person, to the organizers and abettors of slave-hunting, to those guilty of mutilating male adults and children, and to all persons taking part in the capture of slaves by violence; and, on the other hand, the provisions relating to offenses against individual liberty, to carriers and transporters of, and to dealers in, slaves.
>
> Guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offenses have been committed shall be arrested either on communication of the incriminating evidence by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the power in whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them.

Id. art. 5. *See* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York, March 21, 1950, art. 11, 96 U.N.T.S. 271 ("Nothing in this Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law.").

435 International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 1 L.N.T.S. 83, 35 Stat. 1979; International Convention for the Suppression of the White Slave Traffic, May 4, 1910; International Convention for the Suppression of the Traffic in Women and Children, September 30, 1921, 9 L.N.T.S. 415.

436 Convention Concerning Forced or Compulsory Labour (Forced Labour Convention, 1930) June 28, 1930, 39 L.N.T.S. 55; Convention (No. 105) Concerning the Abolition of Forced Labour, June 5, 1957, 320 U.N.T.S. 291.

437 96 U.N.T.S. 271.

Whenever slavery and slave-related practices are committed within the context of an armed conflict, they are subject to international humanitarian law and become a war crime. But in such cases, even though the crime is international and is part of jus cogens, the jurisdictional theory relied upon is usually territoriality.[438]

The provisions contained in all the treaties relevant to slavery and slave-related practices characteristically require the signatory states to take effective measures to prevent and suppress slavery, and also provide specific obligations as to criminalization and punishment, extradition, and mutual legal assistance. All of these provisions can best be characterized as reflecting the concept of *aut dedere aut judicare*. This is even true with respect to the more recent treaty provisions that link slavery to piracy. For example, the 1958 Geneva Convention on the Law of the High Seas[439] provides in Article 13 that:

> [E]very state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free.

The 1982 Montego Bay Convention on the Law of the Sea adopted the identical provision in Article 99.[440]

With respect to slavery as a jus cogens international crime, it is essentially the writings of scholars that have driven the notion that universal criminal jurisdiction extends to all manifestations of this category of international crime.[441]

It should be noted, however, that slavery has not disappeared in the twenty-first century, at least not in the common chattel slavery embodied in the trans-Atlantic slave trade, even though they have been universally condemned for centuries. Modern day slavery or "human trafficking," as it is often referred to, is increasingly common as population flows from the global South to Europe and North America increase, mainly in the forms of refugees seeking sanctuary, economic migrants, and abducted individuals.[442]

The primary characteristics of modern day slavery has been the trafficking of domestic, agricultural, and day laborers from the global South to Europe and North America, as well as the increase in the traffic of women and children for sexual exploitation. As defined by Article 3 of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[443]

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438 *See supra* Sec. 7.3.

439 High Seas Convention, *supra* note 105.

440 Montego Bay Convention, *supra* note 413.

441 *See also* M. Cherif Bassiouni, *Enslavement: Slavery, Slave-Related Practices, and Trafficking in Persons for Sexual Exploitation*, *in* 1 International Criminal Law 535 (M. Cherif Bassiouni ed., 3d. ed. 2008); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. Int'l L & Pol. 445 (1991).

442 *See* Kevin Bales, Modern Slavery: The Secret World of 27 Million People (2009); Trafficking in Humans: Social, Cultural and Political Dimensions (Sally Cameron & Edward Newman eds., 2008); E. Benjamin Skinner, A Crime so Monstrous: Face-to-Face with Modern-Day Slavery (2008); Anthony M. DeStefano, The War on Human Trafficking: U.S. Policy Assessed (2007); Enslaved: True Stories of Modern Day Slavery (Jesse Sage & Liora Kasten eds. 2006). *See also* Niklas Jakobsson & Andreas Kotsadam, *The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation*, 35 Europ. J.L & Econ. 87 (2013); Donna Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. St. Thomas L.J. 28 (2008–2009); Mark Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow against Modern Day Slavery*, 6 U. St. Thomas L.J. 9 (2008–2009); Melanie Wallace, *Voiceless Victims: Sex Slavery and Trafficking of African Women in Western Europe*, 30 Ga. J. Int'l & Comp. L. 569 (2001–2002).

443 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15. 2000, 2273 U.N.T.S. 319, U.N. Doc. A/55/383. *See* Jakobsson & Kotsadam, *supra* note 442; Hughes, *supra* note 442; Wallace, *supra* note 442.

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The problem of human trafficking and modern-day slavery is vast. According to the International Labour Organization (ILO)

> 20.9 million people are victims of forced labour globally, trapped in jobs into which they were coerced or deceived and which they cannot leave. Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation, or what some call "modern-day slavery." The data from which the estimate derives cover the study reference period of 2002–2011. The estimate therefore means that some 20.9 million people, or around three out of every 1,000 persons worldwide, were in forced labour at any given point in time over this ten-year period.[444]

The ILO's estimate of 20.9 million victims of forced labor is a conservative one. Of these 20.9 million victims of forced labor

> 18.7 million (90%) are exploited in the private economy, by individuals or enterprises. Out of these, 4.5 million (22% total) are victims of forced sexual exploitation, and 14.2 million (68%) are victims of forced labour exploitation, in economic activities such as agriculture, construction, domestic work and manufacturing. The remaining 2.2 million (10%) are in state-imposed forms of forced labour, for example in prison under conditions which contravene ILO standards on the subject, or in work imposed by the state military or by rebel armed forces.[445]

Although customary international law and the writings of scholars recognize slavery and slave-related practices as a jus cogens international crime, the practice of states has not evidenced the fact that universal criminal jurisdiction has been applied to all forms and manifestations of slavery and slave-related practices.[446] The 2000 Convention on Organized Crime and its two Protocols on human trafficking and human smuggling, as described below, allows for

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444 International Labour Organization, ILO Global Estimate of Forced Labour 13 (2012) (internal citations omitted).

445 *Id*.

446 International Convention for the Suppression of the Traffic in Women of Full Age, October 11, 1933, 150 L.N.T.S. 431; Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on September 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva on October 11, 1933, 53 U.N.T.S. 13; Annex to the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on September 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva on October 11, 1933; International Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on September 30, 1921, amended by the Protocol Signed at Lake Success, New York, on November 12, 1947, 53 U.N.T.S. 39; International Convention for the Suppression of the Traffic in Women of Full Age concluded at Geneva on October 11, 1933, amended by the Protocol, signed at Lake Success, New York, on November 12, 1947, 53 U.N.T.S. 49; Annex to the Protocol Amending the Agreement for the Suppression of the White Slave Traffic signed at Paris on May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on May 4, 1910; International Agreement for the Suppression of the White Slave Traffic, signed at Paris on May 18, 1904, amended by the Protocol, signed at Lake Success, New York, on May 4, 1949, 92 U.N.T.S. 19, 2 U.S.T. 1997; International Convention for the Suppression of White Slave Traffic, signed at Paris on May 4, 1910, and amended by the Protocol, signed at Lake Success, New York, May 4, 1949, 98 U.N.T.S. 101; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, March 21, 1950, 96 U.N.T.S. 271; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices

the application of universal jurisdiction, but essentially provides for the continuation of existing modes of jurisdiction to combat the practice.

A 2009 report by the United Nations Office on Drugs and Crime (UNODC) concludes that 79 percent of human trafficking is for sexual purposes, while 18 percent is for forced labor.[447] In that study, the UNODC studied the human trafficking legislation and enforcement in 155 states, and concluded that, as of 2008, 63 percent had passed anti-trafficking laws "addressing the main forms of trafficking"; 16 percent had passed laws covering some aspects of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and 54 percent had specialized police units on trafficking. According to the UNODC study, of the 155 countries sampled, 91 had prosecuted an individual for human trafficking, 73 had secured a conviction, 47 reported at least 10 convictions a year, with 15 of those countries securing at least 50 convictions a year.[448]

In 2000 two Protocols to the Convention against Transnational Organized Crime were adopted that specifically address human trafficking.[449] The first is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[450] which specifically addresses the above-mentioned issues, and the second is the Protocol against the Smuggling of Migrants by Land, Sea and Air,[451] which deals specifically with the transport of individuals.

Article 2 of the former Protocol on trafficking describes its purpose as being

> (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
>
> (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
>
> (c) To promote cooperation among States Parties in order to meet those objectives.

The second is intended to "to prevent and combat the smuggling of migrants," although in many cases smuggled migrants and trafficked persons overlap in practice.

It should be noted, however, that the two Protocols do not explicitly require the implementation of universal jurisdiction provisions in the domestic criminal codes of the state-parties. For instance, the Protocol on trafficking provides that:

Similar to Slavery, September 7, 1956, 266 U.N.T.S. 3, 18 U.S.T. 3201. *See* Bassiouni, ICL Conventions, *supra* note 386.

447 United Nations Office on Drugs and Crime, Global Reports on Trafficking in Persons (2009).

448 *Id.*

449 United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, U.N. Doc. A/55/383.

450 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15. 2000, 2273 U.N.T.S. 319, U.N. Doc. A/55/383. *See* Jakobsson & Kotsadam, *supra* note 442; Hughes, *supra* note 442; Wallace, *supra* note 442.

451 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507, U.N. Doc. A/55/383. *See* Trafficking in Humans, *supra* note 442; DeStefano, *supra* note 442. *See also* Kappelhoff, *supra* note 442.

Article 6

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing, or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

Therefore, the Protocol effectively leaves it to states to implement laws based on their existing jurisdictional framework. As is the case with most states, this entails forms of jurisdiction other than universal jurisdiction.

7.3.3. War Crimes

Of all international crimes, the war crimes category has the largest number of instruments that include a wide range of prohibitions and regulations.[452] Many of these instruments specifically embody, codify, or evidence customary international law. The four Geneva Conventions

452 Bassiouni, ICL Conventions, *supra* note 386, at 285. *See also* Yoram Dinstein, *The Universality Principle and War Crimes, in* The Law of Armed Conflict: Into the Next Millennium 17–37 (Michael N. Schmitt & Leslie C. Green eds., 1998); Willard B. Cowles, *Universal Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177 (1945).

of 1949[453] and their two Additional Protocols[454] are the most comprehensive codifications of prohibitions and regulations, and their provisions include the most specific and wide-ranging penal norms.[455] The so-called "Law of Geneva" overlaps with the so-called "Law of the Hague,"[456] much of the latter having been incorporated into the former. The "Law of Geneva" has become part of the customary law of armed conflicts.[457] The violations of the Geneva Conventions and the so-called "Laws and Customs of War" constitute war crimes and are jus cogens international crimes.

With respect to the four Geneva Conventions of 1949, the "grave breaches" are contained in Articles 50, 51, 130, and 147, respectively.[458] With respect to Protocol I, "grave breaches" are contained in Article 85.[459]

There are, however, no provisions in these Conventions that specifically refer to universal jurisdiction. One can assume that the penal duty to enforce includes implicitly the right of the state-parties to exercise universal jurisdiction under their national laws. This arises out of the obligation to prevent and repress "grave breaches" and also out of the provisions of Articles 1 and 2, which are common to the four Geneva Conventions, to wit:

> *Article 1:* The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.
>
> *Article 2:* In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall

453 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva August 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. 3362 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed at Geneva August 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. 3363 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, signed at Geneva August 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva August 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter Fourth Geneva Convention].

454 Protocol I Additional to the Geneva Conventions of August 12, 1949, opened for signature at Berne December 12, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of August 12, 1949, opened for signature at Berne December 12, 1977, U.N. Doc. A/32/144, Annex II.

455 Bassiouni, ICL Conventions, *supra* note 386, at 416–445, 457–494.

456 Convention with Respect to the Laws and Customs of War on Land (First Hague, II), signed at The Hague July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949. *See* A Manual on International Humanitarian Law and Arms Control Agreements (M. Cherif Bassiouni ed., 2000) [hereinafter Bassiouni, Manual on International Humanitarian Law].

457 Bassiouni, ICL Conventions, *supra* note 386, at 286.

458 First Geneva Convention, *supra* note 453, art. 50; Second Geneva Convention, *supra* note 453, art. 51; Third Geneva Convention, *supra* note 453, art. 130; Fourth Geneva Convention, *supra* note 453, art. 147. *See in particular* Bassiouni, Manual on International Humanitarian Law, *supra* note 456.

459 Protocol I, *supra* note 454, art. 85. *See* also Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of August 12, 1949 (Yves Sandoz et al. eds., 1987).

> furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[460]

Although no convention dealing with the law of armed conflict contains a specific provision on universal jurisdiction, it is nevertheless valid to assume that the 1949 Geneva Conventions and Protocol I provide a sufficient basis for states to apply universality of jurisdiction to prevent and repress the "grave breaches" of the Conventions. But none of the other conventions dealing with the law of armed conflict contain a provision on universal jurisdiction.

Customary international law as reflected in the practice of states does not, so far, in the judgment of this writer, warrant the conclusion that universal jurisdiction has been applied in national prosecutions.[461]

There are a few cases in the practice of states that are relied upon by some scholars to assert the opposite, but such cases are so few and far between that it would be incorrect to conclude that they constitute practice. Nevertheless, it can be argued that customary international law can exist irrespective of state practice if there is strong evidence of *opinio juris*, which is the case with respect to war crimes.

The recognition of universal jurisdiction for war crimes is essentially driven by academics' and experts' writings, which extend the *universal reach* of war crimes to the universality of jurisdiction over such crimes. The 1949 Geneva Conventions require state-parties to "respect and ensure respect," while the "grave breaches" provisions of the Conventions and Protocol 1 require enforcement. This has been interpreted by some not only as giving parties the right to adopt national legislation with universal jurisdiction, but also as creating an obligation to do so. Nonetheless, there is some confusion arising out of collective enforcement mechanisms, such as the IMT, IMTFE, ICTY, and ICTR. The IMT and the IMTFE were collective actions based on the inherent powers of the involved states as participants in the respective armed conflicts, and also on the basis of territoriality. The ICTY and the ICTR are forms of collective enforcement derived from the power of the Security Council under Chapter VII of the United Nations Charter, but these tribunals' jurisdiction is territorial. In all of these situations criminal jurisdiction is based on territoriality, and with respect to the IMT and IMTFE, it could be said to have also relied on "passive personality." As stated above, the ICC does not have universal jurisdiction though its reach is universal, except insofar as "referrals" from the Security Council to the ICC are based on the theory of universality.[462]

Notwithstanding the above, there is nothing in the Law of Armed Conflict that prohibits national criminal jurisdiction from applying the theory of universality with respect to war crimes. It can even be argued that the general obligations to enforce, which include the specific

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460 For particular provisions regarding the enacting of legislation by contracting parties for the repression of grave breaches, *see* First Geneva Convention, *supra* note 453, art. 49; Second Geneva Convention, *supra* note 453, art. 50; Third Geneva Convention, *supra* note 453, art. 129; Fourth Geneva Convention, *supra* note 453, art. 146.

461 For a discussion of contemporary state practice with respect to war crimes, see *infra* notes 498–505 and accompanying text.

462 Following WWII, Allied military tribunals referred to the exercise of universality with respect to war crimes and crimes against humanity. *See* Boed, *supra* note 364, at 307–308 n.51 (citing Kenneth Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 807–810 (1988) (discussing *In re* List, 11 Trials War Crim. 757) (U.S. Mil. Trib., Nuremberg 1948); Almelo Trial 1 L. Rep. Trials War Crim. 35 (Brit. Mil. Ct., Almelo 1945); Zyklon B Case, 1 L. Rep. Trials War Crim. 93 (Brit. Mil. Ct., Hamburg 1946); Hadamar Trial, 1 L. Rep. Trials War Crim. 46 (U.S. Mil. Comm'n, Wiesbaden 1945); *In re* Eisentrager, 14 L. Rep. Trials War Crim. 8 (U.S. Mil. Comm'n, Shanghai 1947)). *See also* Willard B. Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 Am. J. Int'l L. 299, 309–313 (1948). But these cases were prosecuted pursuant to Control Council Law No. 10, which gave the four major Allies "sovereignty" over their respective zones of occupation. Thus, the tribunals exercised national jurisdiction.

obligations to prevent and repress "grave breaches" of the 1949 Geneva Conventions and Protocol I, allow states to expand their jurisdiction to include the theory of universality.

7.3.4. Crimes against Humanity

The origin of crimes against humanity can be drawn back to the First Hague Convention of 1899 on the Laws and Customs of War and the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land, which make reference to the "laws of humanity" and evidence a nascent concern for human values.[463] Crimes against humanity were first defined in positive international criminal law in Article 6(c) of the Nuremberg Charter as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.[464]

Similarly, Article 5(c) of the IMTFE Charter[465] and Article 2(c) of Control Council Law No. 10[466] provided for the prosecution of crimes against humanity. In prosecutions under all three instruments, however, jurisdiction was territorial in nature, though it can also be argued that it extended to passive personality. Jurisdiction over crimes against humanity as provided for in Article 5 of the ICTY,[467] Article 3 of the ICTR,[468] and Article 7 of the ICC is likewise territorial except with respect to "referrals" to the ICC by the Security Council, in which case the jurisdiction is universal.[469] It should be noted that, as of August 2013, 122 states have ratified the Rome Statute of the ICC, which gives the court territorial jurisdiction over nearly two-thirds of the states of the world for crimes against humanity.

It is also important to note that there is no specialized convention for crimes against humanity.[470] As a result, one cannot say that there is conventional law providing for universal jurisdiction for crimes against humanity.[471] The writing of scholars essentially drives that proposition. To date, fifty-five states have adopted national legislation allowing domestic prosecution of crimes against humanity and, in some cases even when committed outside the state's territory and even when committed by or against non-nationals.[472] But these states have also added some additional jurisdictional links as prerequisites for the exercise of such jurisdiction, as discussed below. As a jus cogens international

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463 For a historical overview, see Bassiouni, Crimes against Humanity, *supra* note 341, at ch. 3. *See also* Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity (August 2010), http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf (last visited Sept. 28, 2012); Forging a Convention for Crimes against Humanity (Leila Nadya Sadat ed., 2011); M. Cherif Bassiouni, *"Crimes against Humanity:" The Need for a Specialized Convention*, 31 Colum. J. Transnat'l L. 457 (1994).

464 IMT Charter, *supra* note 354, art. 6(c).

465 IMTFE Amended Charter, *supra* note 354, art. 5(c).

466 Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, December 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, art. 2(c), *reprinted in* Benjamin B. Ferencz, An International Criminal Court: A Step toward World Peace 488 (1980).

467 ICTY Statute, *supra* note 354, art. 5.

468 *Id.*, art. 3.

469 *See supra* notes 436 and 443 and accompanying text.

470 *See* Bassiouni, "Crimes against Humanity," *supra* note 437.

471 For a discussion of contemporary state practice with respect to crimes against humanity, see *infra* notes 498–503 and accompanying text.

472 Bassiouni, Crimes against Humanity: Historical Application and Contemporary Application, *supra* note 341, at 660–664.

crime, crimes against humanity are presumed to carry the obligation to prosecute or extradite, and to allow states to rely on universality for prosecution, punishment, and extradition.

7.3.5. Genocide

The jus cogens crime of genocide did not exist before the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[473] In fact, genocide was assumed to be the successor of crimes against humanity, but its scope is in effect narrower. Article VI of the Convention states:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of *the State in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[474]

It is clear from the plain meaning and language of this provision that jurisdiction is territorial, and that only if an "international penal tribunal" is established and only if state parties to the Genocide Convention are also state-parties to the convention establishing an "international penal tribunal" can the latter court have universal jurisdiction.[475] However, such universal jurisdiction will be dependent upon the statute of that "international penal tribunal," if or when established.

Since the adoption of the Genocide Convention, two international ad hoc criminal tribunals were established, namely the ICTY[476] and the ICTR,[477] in 1993 and 1994, respectively. In 1998, the Rome Statute for the ICC was opened for signature.[478] All three statutes contain a provision making genocide a crime within the jurisdiction of the court. But that, in itself, does not give these tribunals universal jurisdiction.

Article IV of the ICTY,[479] and Article II of the ICTR define genocide in much the same way as Articles II and III of the Genocide Convention.[480] The jurisdiction of both tribunals is territorial. Their competence extends only to crimes committed within the territory of the former Republic of Yugoslavia and Rwanda, respectively. As for the ICC, Article 6 defines "genocide" in almost the same terms as Article II of the Genocide Convention.[481] The jurisdiction of the ICC, as stated above, is essentially territorial as to the parties, though the parties can refer cases to the ICC for crimes that did not occur on their territory, and are obligated to surrender persons within their territory, whether nationals or non-nationals. Thus, while the reach of the ICC is universal as to "referral" by state-parties under Article 14 and non–state-parties under Article 12(3), "referrals" by the Security Council have a universal scope and also represent a theory of universal jurisdiction.

Notwithstanding the fact that Article VI of the Genocide Convention hardly justifies the contention that it reflects the theory of the universality of jurisdiction,[482] commentators argue

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473 Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added).

474 *Id.* at art. 6 (emphasis added).

475 *Cf.* John F. Murphy, *International Crimes*, *in* 2 United Nations Legal Order 993, 1010 (Oscar Schachter & Christopher C. Joyner eds., 1995) ("[T]he Convention does not create a system of universal jurisdiction.").

476 *See* ICTY Statute, *supra* note 354.

477 *See id.*

478 *See* ICC Statute, *supra* note 388. The Statute of the Extraordinary Chambers in the Courts of Cambodia also contains a provision for the prosecution of Genocide.

479 *See* ICTY Statute, *supra* note 354, at art. 4.

480 *Id.* at art. 2.

481 ICC Statute, *supra* note 388, at art 6.

482 *See* Schabas, *supra* note 341, at 353–378. *See also* Matthew Lippman, *Genocide, in* Bassiouni, 1 ICL 403, *supra* note 1.

consistently that customary international law has recognized universality of jurisdiction for genocide even though there is no state practice to support that argument. As Professor Meron states, "[I]t is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state."[483]

Notwithstanding the absence of support in conventional international law and in the practice of states[484] for the unqualified assertion that genocide ipso facto allows universal jurisdiction, the ICTY's Appeals Chamber in the *Tadić* case, in connection with genocide, stated that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."[485] Similarly, the ICTR held in the case of *Prosecutor v. Ntuyahaga* that universal jurisdiction exists for the crime of genocide.[486]

7.3.6. Apartheid

The crime of apartheid did not come into existence until 1973 when the United Nations adopted the Convention on the Suppression and Punishment of the Crime of Apartheid.[487] The Convention provides in Article IV, in pertinent part, as follows:

The States Parties to the present Convention undertake:

> (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.[488]

Article V of the Convention states:

> Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.[489]

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483 Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 570 (1995). *But see* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 Law & Contemp. Probs. 153, 159–160 (1996); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away with It*, 11 Mich. J. Int'l L. 90, 91–92 (1989); Randall, *supra* note 462, at 837. These and other authors, including this writer, have consistently asserted that universal jurisdiction applies to genocide as a jus cogens international crime. *See* Bassiouni, *International Crimes: Jus Cogens and* Obligatio Erga *Omnes*, supra note 399. It is because of scholars' influence that the *Restatement of the Foreign Relations Law of the United States* explains: "Universal jurisdiction to punish genocide is widely accepted as a principle of customary law." Restatement (Third), *supra* note 3, at § 403, Reporters' Note 1.

484 For a discussion of contemporary state practice with respect to genocide, see Sec. 7.3.5.

485 *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 62 (Oct. 2, 1995).

486 *Prosecutor v. Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999).

487 G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention]. *See* Roger S. Clark, *Apartheid, in* Bassiouni, 1 ICL 599,*supra* note 1. A draft statute was prepared by this author in 1979.

488 Apartheid Convention, *supra* note 487, at art. 4.

489 *Id.* art. 5.

There is clearly a departure in the text of these two articles from the jurisdictional provision contained in the Genocide Convention,[490] as Articles IV and V of the Apartheid Convention provide unambiguously for universal jurisdiction.[491] However, it seems that after the demise of the apartheid regime in South Africa, and the lack of prosecutions for apartheid under this convention by the new regime, the Convention may have fallen into desuetude. For the Convention to have any future validity, it should be amended to apply to apartheid-like practices.

7.3.7. Torture

Torture was established as an offense in conventional international law in 1984 in the CAT.[492] Article 5 of the Convention provides:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.[493]

The premise of the enforcement scheme in this Convention is the concept *aut dedere aut judicare*.[494] Throughout the Convention there are several references to the jurisdiction of the enforcing state, and Article 7.1 of the Convention states:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[495]

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490 *See supra* note 464 and accompanying text.

491 It should also be noted that 108 states have ratified the Apartheid Convention, which is significantly less than the 193 member states of the United Nations. *See Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention,* U.N. Doc. E/CN.4/1426 (1981); M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 Hofstra L. Rev. 523 (1981).

492 Convention against Torture, *supra* note 317. *See* Daniel H. Derby, *The International Prohibition of Torture*, *in* Bassiouni, 1 ICL 621, *supra* note 1; J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).

493 Convention against Torture, *supra* note 317, at art. 5.

494 *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 286.

495 Convention against Torture, *supra* note 317, at art. 7.1.

But Article 7.1 is more a reflection of *aut dedere aut judicare* than it is of universal jurisdiction.[496] It establishes the duty to extradite, and only in the event that a person is not extradited is a state obligated to prosecute, by implication, in reliance on universal jurisdiction.

In the cause célèbre case *In re Pinochet*, which reached the House of Lords, there was indeed reference to genocide and other international crimes. In the rehearing there was also a reference to universal jurisdiction as a concomitant to international crimes:

> That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the Courts of other states is another. It is significant that in respect of serious breaches of "intransgressible principles of international customary law" when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide convention provides only for jurisdiction before an international tribunal of the Courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its jurisdiction to future acts.[497]

Notwithstanding this dicta, the issue was whether the courts of the United Kingdom were competent to decide on the extradition request of Spain for the criminal charge of torture, and whether extradition should be granted in accordance with the treaty obligation of the United Kingdom toward Spain and in accordance with U.K. law. The United Kingdom is bound by the CAT and is obligated thereunder to prosecute or extradite. Spain, also a state party to the CAT, sought extradition for torture, relying on its passive personality jurisdiction because its nationals were the victims of the alleged crimes of torture. Thus the *Pinochet* case, in the opinion of this writer, does not stand for the proposition of universal jurisdiction, nor for that matter is the extradition request from Spain for torture based on universal jurisdiction. The Torture Convention, however, does implicitly allow for universal jurisdiction.

In 2002 the General Assembly approved the text of an Optional Protocol to the CAT to establish a mechanism for "regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty." The Optional Protocol is monitored by a Sub-Committee on Prevention. In addition, state-parties are required to establish domestic mechanisms to ensure the prevention of torture of those held in detention.[498]

7.3.8. Other International Crimes to Which Universal Jurisdiction Applies

There are several international crimes that have not yet risen to the level of jus cogens but whose founding instruments explicitly or implicitly provide for universal jurisdiction. The 1963 Hijacking Convention provides in Article III(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."[499] It therefore implicitly allows

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496 *See* Rosalyn Higgins, Problems and Process: International Law and How We Use It 64–65 (1994).

497 *R. v. Bow Street Stipendiary Magistrate and others,* ex parte *Pinochet Ugarte,* [1998] 4 All ER 897, [1998] 3 W.L.R. 1456 (H.L.). *See* Reed Brody & Michael Ratner, The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain; Human Rights Watch, *supra* note 340; *When Tyrants Tremble: The Pinochet Case* (Human Rights Watch). *See also The Prosecution of Hissène Habré-An "African Pinochet," in* Human Rights Watch, *supra* note 340, at 11–12.

498 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, *adopted* Dec. 18, 2002.

499 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Hijacking Convention), signed at Tokyo September 14, 1963, art. 3(3), 704 U.N.T.S. 219, 20 U.S.T. 2941.

national legislation to provide for universal jurisdiction. Similarly, the 1970 Hague Hijacking Convention states in Article IV(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."[500] Article VII further provides:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[501]

The 1971 Montreal Hijacking Convention states in Article V(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."[502] In addition, the 1988 Montreal Convention on Hijacking provides in Article III:

In Article 5 of the Convention, the following shall be added as paragraph 2 *bis*:

> 2 *bis*. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 *bis*, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article.[503]

All the treaty provisions mentioned above implicitly allow for universal jurisdiction if national legislation provides for it. The following treaty provisions make it more explicit.

The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation states in Article 7(4, 5):

> 4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.
>
> 5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.[504]

Article X(1) of this Convention further provides as follows:

> 1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings

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500 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), signed at The Hague December 16, 1970, art. 4(3), 860 U.N.T.S. 105, 22 U.S.T. 1641.

501 *Id.* at art. 7.

502 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention), signed at Montreal September 23, 1971, art. 5(3), 974 U.N.T.S. 177, 24 U.S.T. 564.

503 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal, adopted by the International Civil Aviation Organization, February 24, 1988, art. 3, 27 I.L.M. 627.

504 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome March 10, 1988, art. 7(4, 5), 27 I.L.M. 668.

in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.[505]

The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf provides in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when the offence is committed:

(a) against or on board a fixed platform while it is located on the continental shelf of that State; or

(b) by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) it is committed by a stateless person whose habitual residence is in that State;

(b) during its commission a national of that State is seized, threatened, injured or killed; or

(c) it is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Protocol does not exclude any criminal jurisdiction exercised in accordance with national law.[506]

The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents states in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:

(a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;

(c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the states mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.[507]

505 *Id.* at art. 10(1).

506 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome March 10, 1988, art. 3, 27 I.L.M. 685.

507 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), opened for signature at New York December 14, 1973, art. 3, 1035 U.N.T.S. 167, 28 U.S.T. 1975.

The 1979 Convention Against the Taking of Hostages states in Article V:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:
>
> (a) in its territory or on board a ship or aircraft registered in that State;
>
> (b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
>
> (c) in order to compel that State to do or abstain from doing any act; or
>
> (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.[508]

The 1994 Convention on the Safety of United Nations and Associated Personnel takes the same jurisdictional approach of the Convention on Internationally Protected Persons. Article X of the United Nations Personnel Convention states:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:
>
> (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State.
>
> 2. A State Party may also establish its jurisdiction over any such crime when it is committed:
>
> (a) By a stateless person whose habitual residence is in that State;
>
> (b) With respect to a national of that State; or
>
> (c) In an attempt to compel that State to do or abstain from doing any act.
>
> 3. Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.
>
> 4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.
>
> 5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.[509]

The 1961 Single Convention on Narcotic Drugs provides in Article 36(4) that "[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party."[510] Article

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508 International Convention Against the Taking of Hostages, concluded at New York December 17, 1979, art. 5, 18 I.L.M. 1456.

509 Convention on the Safety of United Nations and Associated Personnel, opened for signature at New York December 15, 1994, art. 10, U.N. Doc. A/49/742 (1994).

510 Single Convention on Narcotic Drugs (Single Convention), signed at New York March 30, 1961, art. 36(4), 18 U.S.T. 1407, *referenced in* 14 I.L.M. 302. For an amendment to Article 36, see Article 14 of

22(5) of the 1971 Convention on Psychotropic Substances employs identical language to the 1961 Single Convention.[511] The 1954 Hague Convention for the Protection of Cultural Property explicitly provides for universality in Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."[512] The 1970 UNESCO Cultural Convention states in Article 12: "The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories."[513]

The 1923 Convention on Obscene Materials provides in Article II:

> Persons who have committed an offence falling under Article 1 shall be amenable to the Courts of the Contracting Party in whose territories the offence, or any of the constitutive elements of the offence, was committed. They shall also be amenable, when the laws of the country shall permit it, to the Courts of the Contracting Party whose nationals they are, if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories.
>
> Each Contracting Party shall, however, have the right to apply the maxim *non bis in idem* in accordance with the rules laid down in its legislation.[514]

The 1929 Convention on the Suppression of Counterfeiting states in Article 17: "The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law."[515]

The 1884 Submarine Cables Convention provides in Articles 1, 8, and 9 as follows:

> *Article 1*: The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties.
>
> *Article 8*: The court competent to take cognizance of infractions of this Convention shall be those of the country to which the vessel on board of which the infraction has been committed belongs. It is, moreover, understood that, in cases in which the provision contained in the foregoing paragraph cannot be carried out, the repression of violations of this Convention shall take place, in each of the contracting States, in the case of its subjects or citizens, in accordance

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the Protocol Amending the Single Convention on Narcotics Drugs, 1961, signed at Geneva March 25, 1972, 976 U.N.T.S. 3, 26 U.S.T. 1430.

511 Convention on Psychotropic Substances (Psychotropic Convention), signed at Vienna February 21, 1971, art. 22(5), 1019 U.N.T.S. 175, T.I.A.S. No. 9725. *See also id.* at art. 27 (regarding territorial application).

512 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at the Hague May 14, 1954, art. 28, 249 U.N.T.S. 240.

513 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Cultural Convention), signed at Paris November 14, 1970, art. 12, 823 U.N.T.S. 231.

514 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, opened for signature at Geneva September 12, 1923, art. 2, 27 L.N.T.S. 213, 7 Martens Nouveau Recueil (ser. 3) 266. *See also* International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, signed at Geneva September 12, 1923, amended by the Protocol, signed at Lake Success, New York November 12, 1947, art. 2, 46 U.N.T.S. 169.

515 International Convention for the Suppression of Counterfeiting Currency, signed at Geneva April 20, 1929, art. 17, 112 L.N.T.S. 371.

with the general rules of penal competence established by the special laws of those States, or by international treaties.

Article 9: Prosecutions on account of the infractions contemplated in articles 2, 5 and 6 of this Convention, shall be instituted by the State or in its name.[516]

The Mercenaries Convention states in Article 9(2, 3):

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3, and 4 of the present Convention in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law.[517]

The Inter-American Convention of Forced Disappearance of Persons sets forth the doctrine of *aut dedere aut judicare* in Article 4, while Article 6 provides for qualified universal jurisdiction by implication:

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.[518]

Article 6.1 of the Draft International Convention on the Protection of All Persons from Forced Disappearance states:

1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances: (a) When the offence of forced disappearance was committed within any territory under its jurisdiction; (b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.[519]

The International Convention for the Suppression of the Financing of Terrorism states in Article 7:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State;

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

(c) The offence is committed by a national of that State.

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516 Convention for the Protection of Submarine Cables, signed at Paris March 14, 1884, arts. 1, 8, 9, 24 Stat. 989, 11 Martens Nouveau Recueil (ser. 2) 281.

517 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted at New York December 4, 1989, art. 9(2, 3), 29 I.L.M. 89.

518 Inter-American Convention of Forced Disappearance of Persons, adopted at Belem Do Para, Brazil June 9, 1994, art. 6, *available* at http://oas.org/juridico/english/Sigs/a-60.html.

519 Draft International Convention on the Protection of All Persons from Forced Disappearance, August 19, 1998, art. 6.1, E/CN.4/Sub.2/1998/19, Annex.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.[520]

The International Convention for the Suppression of Acts of Nuclear Terrorism similarly states in Article 9 that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State; or

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State; or

(b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or

(c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or

(d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or

(e) The offence is committed on board an aircraft which is operated by the Government of that State.[521]

The Convention on the Physical Protection of Nuclear Material provides in Article 8 that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 7 in the following cases;

a. when the offence is committed in the territory of that State or on board a ship or aircraft registered in that State;

b. when the alleged offender is a national of that State.

520 International Convention for the Suppression of the Financing of Terrorism, art. 7, Dec. 9, 1999, U.N. Doc A/54/49.

521 International Convention for the Suppression of Acts of Nuclear Terrorism, art 9, April 13, 2005, 2445 U.N.T.S. 89.

> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offences in cases where the alleged offender is presented in its territory and it does not extradite him pursuant to article 11 to any of the States mentioned in paragraph 1.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.
>
> 4. In addition to the States Parties mentioned in paragraphs 1 and 2, each State Party may, consistent with international law, establish its jurisdiction over the offences set forth in article 7 when it is involved in international nuclear transport as the exporting or importing State.[522]

The European Convention on the Suppression of Terrorism provides in Article 6 that:

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.
>
> 2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.[523]

The International Convention for the Suppression of Terrorist Bombings states in Article 6 that:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 when:
>
> (a) The offence is committed in the territory of that State; or
>
> (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
>
> (c) The offence is committed by a national of that State.
>
> 2. A State Party may also establish its jurisdiction over any such offence when:
>
> (a) The offence is committed against a national of that State; or
>
> (b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or
>
> (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
>
> (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or
>
> (e) The offence is committed on board an aircraft which is operated by the Government of that State.[524]

The Inter-American Convention Against Terrorism provides in Article 10 for the transfer of persons in custody, stating that:

> 1. A person who is being detained or is serving a sentence in the territory of one state party and whose presence in another state party is requested for purposes of identification, testimony, or otherwise providing assistance in obtaining evidence for the investigation or prosecution of

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522 Convention on the Physical Protection of Nuclear Material, March 3, 1980, Art. 8, 1456 UNTS 24631.

523 European Convention on the Suppression of Terrorism, Jan. 27, 1977, Art. 6, 1137 U.N.T.S. 17828.

524 International Convention for the Suppression of Terrorist Bombings, Art. 6, Dec. 15, 1997, 2149 U.N.T.S 256.

offenses established in the international instruments listed in Article 2 may be transferred if the following conditions are met:

a. The person freely gives his or her informed consent; and

b. Both states agree, subject to such conditions as those states may deem appropriate.[525]

The Convention on the High Seas provides in Article 19 that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[526]

The Regional Convention on Suppression of Terrorism (Inter-Asian) provides in Articles 4 and 5:

Article IV

A contracting State in whose territory a person suspected of having committed an offence referred to in Article I or agreed to in terms of Article II is found and which has received a request for extradition from another Contracting State, shall, if it does not extradite that person, submit the case without exception and without delay, to its competent authorities shall take their decisions in the same manner as in the case of any offence of a serious nature under the law of the State.

Article V

For the purpose of Article IV, each Contracting State may take such measures as it deems appropriate, consistent with its national laws, subject to reciprocity, to exercise its jurisdiction in the case of an offence under Article I or agreed to in terms of Article II.[527]

Most of the conventions cited above relate to what is commonly termed "terrorism" and international drug trafficking, which are usually crimes committed by individuals and small groups, and are not usually state-sponsored. Consequently, it is easier for states to recognize and apply the theory of universality and other enforcement modalities to these types of actors than to do so with respect to those who carry out state policy. This explains why, notwithstanding the extensive harm caused by genocide and crimes against humanity, states have been reluctant to have the same enforcement obligations apply as they have provided, for example, with respect to "terrorism" and international drug trafficking. It is this writer's contention that for obvious, self-serving political reasons, international criminal law conventions whose subjects are those persons engaging in state action or carrying out state policy contain less effective enforcement mechanisms than other similar international conventions.[528]

7.4. Contemporary Practice before International Criminal Tribunals

International criminal tribunals do not necessarily exercise universal jurisdiction despite their international character. In most cases their jurisdiction is limited to more conventional jurisdictional theories, primarily based on the territoriality and nationality principles. For instance, the ICTY and ICTR have jurisdiction only over crimes committed in the former Yugoslavia and Rwanda, respectively, although the authority conferred by the Security Council grants

525 Inter-American Convention Against Terrorism, Art. 10, June 3, 2002, OAS Treaty A-66, 42 I.L.M. 19.

526 Convention on the High Seas, Art. 19, April 29, 1958, 450 U.N.T.S. 11.

527 Regional Convention on Suppression of Terrorism, arts. 4 and 5, Nov. 4, 1987.

528 *See* Bassiouni, *Sources*, *supra* note 382, at 27–31.

certain universal characteristics to their practice, for instance concerning the issuing of arrest warrants.[529] The Mixed-Model tribunals, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon are domestic tribunals exercising territorial jurisdiction but with an internationalized subject matter, and do not exercise universal jurisdiction.

The ICC, which after the expected closure of the ICTY and ICTR in December 2014 will be the only international tribunal, exercises universal jurisdiction in particular situations, namely when the Security Council refers a matter to the Court on the basis of Article 13(b). The Court does not exercise universal jurisdiction when acting pursuant to Articles 14 and 15, concerning state referrals and the prosecutor's *propio mutu* jurisdiction, respectively.[530] This issue was described by this writer in *The Legislative History of the International Criminal Court* as follows:

> Jurisdiction of the ICC is based on the principles of territoriality and nationality with respect to states parties and non-states parties, and on the theory of universality with respect to the SC. The reach of the Court's jurisdiction is universal, because it extends to states parties and to non-states parties, irrespective of where the crimes was committed.
>
> Before the Court can exercise jurisdiction in connection with a crime, the alleged crime must have been committed on the territory of state party, or by one of its nationals on any other territory [Article 12(2)]. In addition, the ICC may exercise its jurisdiction when a non-state party consents to the Court's jurisdiction, and the crimes has been committed on that state's territory, or the accused is one of its nationals [Article 12(3)]. The Court can also exercise its jurisdiction over a national of a non-state party if the latter committed a crime on the territory of a state party, or against ne of its citizens provided it is on the territory of a state party, and the state party refers the condition to the ICC.
>
> It is clearly established in international criminal law that whenever a crimes is committed on the territory of a given state, that state can prosecute or extradite the perpetrator, even when that person is a non-national. Because of that principle, a state may extradite a non-national to another state for prosecution. Thus, every state has the right, in accordance with its constitutional and other legal norms, to transfer jurisdiction to another state that has jurisdiction over an accused, or to international adjudicating body. Such international transfer is an entirely valid exercise of national sovereignty, but it must be done in accordance with international human rights norms. Thus, the ICC does not provide for anything more than already exists in customary practice of states with respect to the prosecution of a non-state party national who commits a crime on the territory of a state party.
>
> Since the ICC is complementary to national criminal jurisdiction, a state party's surrender of an individual to the ICC's jurisdiction pursuant to the Treaty does not detract from its national sovereignty or infringe upon the national sovereignty of another state, such as the state of nationality of the perpetrator or the victim. It also does not violate the rights of the individual whose

529 *See* Ch. I.

530 Therefore, the cases against al-Bashir and Qadhafi qualify as universal jurisdiction cases, whereas the case against Laurent Gbagbo, the former president of Côte d'Ivoire, does not as the successor government of Alassane Ouattara referred the matter to the Court, triggering jurisdiction under Article 14.

Other high profile cases the Mixed-Model tribunals have prosecuted involve former heads of state, namely Khieu Samphan, the nominal head of state of Democratic Kampuchea, who now stands trial before the Extraordinary Chambers in the Courts of Cambodia, and Charles Taylor, the former Liberian president who was convicted by the Special Court for Sierra Leone in 2012. These Mixed-Model Tribunals do not formally apply universal jurisdiction, as they are legally national courts that have a formal arrangement with the United Nations. As such, they are employing territorial jurisdiction for the crimes, even though the United Nations in involved.

> prosecution is transferred to a competent criminal jurisdiction in accordance with international human rights law norms. The same rationale applies to non-state parties who refer a situation to the Court pursuant to Article 12(3).[531]

In addition to the concept of territoriality, the ICC can also exercise its jurisdiction on a universal basis whenever the Security Council refers a situation to it. However, Article 98 of the Statute raises another jurisdictional issue pertaining to priority based on obligations arising out of other treaty obligations by the state-parties. The provision raises the question as to whether a state-party can or should defer jurisdiction to another state instead of the ICC.

Article 98, which is mentioned in the excerpt above, provides that

> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[532]

Presumably, this language applies to Status of Forces Agreements and to diplomats covered by the Vienna Conventions on Diplomatic Relations and Consular Relations.[533]

Thus, pursuant to Article 98, a head of state, diplomat, or other official covered by immunity under a treaty or pursuant to customary international law could invoke procedural immunity and prevent his/her surrender to the ICC.[534] Article 98, although not intended as such, has become a mechanism for states to avoid their responsibilities by effectively creating an international obligation that triggers the provisions of Article 98. The United States, for instance, has concluded numerous "Article 98 agreements" *since* the signing of the Rome Statute with the express purpose of preventing the surrender of U.S. forces to the court. These bilateral agreements require the consent of the signatories before any citizen of that state may be extradited to the ICC, or in some cases to any international criminal tribunal.[535] Given the hostility of the United States toward the ICC it seems certain that it would not consent to any such surrender. These Article 98 agreements thus manipulate the jurisdiction of the Court by creating loopholes that were not intended by the statute itself.

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531 M. Cherif Bassiouni, 1 The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence (2005) (internal citations omitted).

532 ICC Statute, *supra* note 388, art. 98.

533 For an overview of the nature of Status of Forces Agreements, *see* M. Cherif Bassiouni, *Law and Practice of the United States, in* Bassiouni, 2 ICL 269, *supra* note 1.

534 It is noteworthy that the ICTY did indict Slobodan Milosevic while a head of state in office and sought his extradition, which the Republic of Serbia conceded on June 28, 2001. *See Prosecutor v. Milosevic* (Indictment) (May 24, 1999), *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm. *See* also *Prosecutor v. Milosevic* (Decision on Review of Indictment and Application for Consequential Orders) (May 24, 1999), *available* at http://www.un.org/icty/milosevic/decision-e/052499rev.htm. The first trial of a head of state for genocide and crimes against humanity was *Prosecutor v. Kambanda,* case no. ICTR-97-23-S, September 4, 1998; *Prosecutor v. Kambanda,* case no. ICTR-97-23-I, October 19, 2000. Jean Kambanda was former prime minister of Rwanda, and acting president at the time of the Hutu slaughter of the Tutsis.

535 *See* Ch. II, Sec. 4.4, and Appendix V.

7.4.1. Jurisdictional Immunities before International Criminal Tribunals

Universal jurisdiction can be relied upon by a state in its power to proscribe. But when it relies upon it for its power to enforce, a state is necessarily subject to certain international legal obligations that may limit its authority. Historically these limitations included the absolute immunity of heads of state, senior officials, and accredited diplomats in their posts. Today, customary international law no longer recognizes an absolute immunity for these officials. It does, however provide temporal immunity for sitting heads of state and senior government officials, as well as absolute immunity for accredited diplomats in their posts, subject to the duty of the sending state to prosecute under its laws.[536] These developments are based both in treaty and customary law.

The absolute immunity of heads of state and senior government officials was first removed after WWII.[537] Historically the most significant development in international criminal law with regards to immunities was Article 7 of the IMT Charter, which provided that

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Under the provisions of the IMT Charter several high-ranking Nazi officials were tried, including Karl Dönitz, the second president of the Third Reich after Hitler's death, and Herman Göring, the president of the Reichstag.

Article 6 of the IMTFE Charter similarly provided that

> the official position, at any time, of an accused . . . shall [not], of itself, be sufficient to free such accused from responsibility for any crime with which he is charged.. .

The IMTFE prosecuted four Japanese prime ministers, three foreign ministers, and numerous other senior government ministers and ambassadors.[538]

The Genocide Convention, which was adopted in December 1948, provided that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." The International Law Commission's Nuremberg Principles, which sought to codify the Nuremberg trials, concluded that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[539]

Forty years later, when international criminal law re-emerged to deal with the conflicts in the former Yugoslavia and Rwanda, the tribunals responsible for the conflicts were given

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536 *See* Arrest Warrant of April 11, 2000 (Congo v. Belg.) (Dec. 8, 2000). *See* Ch. I, Sec. 3.4. *See also* Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 81–87. *See also* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Art. 31, 500 UNTS 95; Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 43, 596 UNTS 261. *See* Eileen Denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations (2d ed. 1998); Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999).

537 Article 227 of the Versailles Treaty did provide for the prosecution of Kaiser Willhelm, although he had gone into exile in the Netherlands and prosecution was avoided by all sides through the clever creation of a clearly non-extraditable offense. *See* Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 542–547.

538 For political reasons the Japanese emperor Hirohito was not indicted by the IMTFE. *See* Bassiouni, *From Versailles to Rwanda in Seventy-Five Years*, *supra* note 387.

539 International Law Commission, 2 Yearbook of the International Law Commission 374 (1950)

jurisdiction over heads of state and senior ministers. Article 7(2) of the Statute of the ICTY statute[540] and Article 6(2) of the ICTR Statute[541] remove head of state immunity. The two statutes, using the same language, provide that:

> The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

It was under this provision that the ICTR indicted former Rwandan prime minister Jean Kambanda in October 1997; thus he became the first former head of state to be indicted by an international tribunal since Dönitz. A year and a half later, in May 1999, Slobodan Milošević was indicted by the ICTY, becoming the first sitting head of state to be indicted by an international tribunal, although he was no longer in office when he appeared before the Tribunal.[542] Beyond Kambanda and Milošević, the ICTY has indicted and tried several high-ranking officials from the former Yugoslavia, including Radovan Karadžić and Biljana Plavšić, the former presidents of the Republika Srpska, and Momčilo Krajišnik, the former co-president of Bosnia and Herzegovina. The ICTR also indicted and tried Pauline Nyiramasuhuko, the former Minister for Family and Women's Affairs.

Article 27 of the Rome Statute of the ICC,[543] similarly removes head of state immunity, providing:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

As mentioned above, the ICC has indicted a number of heads of state and senior government officials, including al-Bashir of the Sudan and al-Qadhafi of Libya on the basis of universal jurisdiction through the SC referral.[544]

From the above it is clear that absolute immunity for heads of state and senior government officials has been abolished under customary international law. Temporal immunity persists,

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540 ICTY Statute, *supra* note 354, at art. 7(2).

541 ICTR Statute, *supra* note 354, at art. 6(2).

542 *Prosecutor v. Milosevic*, Case No. IT-02-54, Indictment (May 24, 1999).

543 The Rome Statute of the International Criminal Court (ICC) removed substantive immunity for genocide, crimes against humanity, war crimes, and, eventually, aggression, when defined and adopted by the assembly of state parties. ICC Statute, *supra* note 388, at art. 27. It should be noted that Article 27 is in Part III, which has the heading "General Principles of Law"; however, although Part IX contains no reference to immunity, Article 98 seems to allow for immunities. *See id.* art. 98. For a discussion of this issue, see Sec. 7.5.1. Thus, one can conclude that substantive immunity has been removed for some crimes and by certain legal instruments. A progressive development position can justifiably be that the removal of such immunity for genocide, crimes against humanity, and war crimes is part of customary international law. Opponents of the progressive view will argue that its removal is connected to certain legal instruments and legal processes that do not reflect the customary practice of states.

544 In addition, the ICC has exercised territorial jurisdiction over Laurent Gbagbo, the former president of Côte d'Ivoire, as well as over a number of high level Kenyan government officials for their involvement in electoral violence in 2007, including Uhuru Kenyatta, the Deputy Prime Minister, Henry Kosgey, the Minister of Industrialisation, Francis Muthaura, the former Cabinet Secretary, and William Ruto, the Minister for Higher Education. However, Gbagbo and the Kenyan ministers were subject to ICC jurisdiction after a state referral in the case of the former, and Kenya's ratification of the Rome Statute in the case of the latter. Neither was therefore, properly speaking, an exercise in universal jurisdiction based on a Security Council referral.

however, meaning that sitting heads of state, senior government officials, and accredited diplomats in their posts are still immune from suit under customary international law. The applicability of this long-standing principle was emphatically underscored by the ICJ in the *Arrest Warrant* case, where the court ruled that a Belgian attempt to prosecute the sitting Congolese foreign minister violated the customary international law prohibition on prosecuting sitting heads of state or senior government officials.[545]

The *Arrest Warrant* case arose out of Belgium's April 2000 indictment of Abdoulaye Yerodia Ndombasi, the Democratic Republic of Congo's acting Minister of Foreign Affairs, for incitement to genocide in the Congo.[546] The indictment was issued under Belgium's universal jurisdiction provisions: at no point was the accused a citizen or resident of Belgium, and the indictment was issued while he was in the Congo.[547] On October 17, 2000, Congo filed an Application with the ICJ requesting that the Court annul Belgium's arrest warrant. Congo challenged Belgium's assertion of extraterritorial jurisdiction, as well as the propriety of Article 5 of the Belgian law, which negates an official immunity. The ICJ eventually issued a ruling based on customary international law and the Vienna Convention on Diplomatic Relations,[548] concluding that Yerodia enjoyed temporal immunity and reaffirming the principle that the prosecution of a sitting government minister would infringe upon that person's ability to effectively carry out his/her duties, thus harming the diplomatic and political activities of a state.[549]

It should be noted, however, that the *Arrest Warrant* and the subsequent *Habré* rulings do not apply to indictments issued by the ICC because the ICJ applied customary and conventional international law on immunities, whereas the ICC applies the law of its statute to its state parties. But its statute, namely Article 27, also applies to non–state-parties under Article 12(3) with the consent of the non–state-parties, and also to non-state parties in situations referred to the ICC by the Security Council pursuant to Article 13(b). In these instances the ICC statutory provisions override customary international law. Article 27(2) of the Rome Statute of the ICC provides that

> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[550]

As of April 2013, 122 states have ratified the Rome Statute.[551]

The question of immunities also came up in a domestic court when Spain sought the extradition of the former Chilean dictator Augusto Pinochet. Although the issue was decided in a

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545 *See* Ch. I, Sec. 3.4. *See also* M. Cherif Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 81–87.

546 *See* Arrest Warrant of April 11, 2000 (Congo v. Belg.) (Order) (Dec. 8, 2000).

547 As there were no links to Belgium, the case was distinguishable from that of four Rwandans who were charged under the same law and convicted for crimes committed in Rwanda, as the group of four were all domiciled in Belgium and physically present on Belgian territory at the time of their arrest. *See infra* Sec. 7.5.

548 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95. Article 29 of the Vienna Convention provides that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

549 *Case Concerning the Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 121 (Feb. 14, 2002).

550 *Id.* at art. 27.

551 The States Parties to the Rome Statute, *available at* http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 7, 2013).

domestic court, the Law Lords considered international law as the basis for Pinochet's extradition to another country, and thus the case is considered here and not in Section 7.5

In *Pinochet I*,[552] an Appellate Committee of the House of Lords held by a margin of three to two that Pinochet was not immune with respect to crimes under international law.[553] In *Pinochet III*,[554] an expanded panel of the House of Lords, in construing the scope of § 134 of the Criminal Justice Act of 1988, ruled that a head of state cannot claim immunity for torture, as torture by its very nature cannot constitute an official act.[555] The Law Lords, however, held that Senator Pinochet was protected by immunity for the charges of murder and conspiracy to murder.[556] Despite the Law Lords' ruling, Home Secretary Jack Straw determined that he was unfit to stand trial and Pinochet was not extradited to Spain.[557]

Another impediment to the exercise of universal jurisdiction is the application of national statutes of limitations, even though such limitations have been removed with respect to war crimes and crimes against humanity.[558] Unfortunately, the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity has only been ratified by fifty-four states.[559] The more recent European Convention on Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European) has just seven ratifications and one additional signature.[560] Under the circumstances, it is valid to ask whether the existence of these two conventions (and other manifestations of international *opinio juris*) constitutes an expression of customary international law, or whether the limited number of ratifications reveals the insufficiency of national support.

7.5. Contemporary Practice before National Courts

National courts have in recent years exercised universal jurisdiction over certain crimes, namely genocide, crimes against humanity, war crimes, and torture. Unlike the ICC, however, there are no conventions regulating the application of universal jurisdiction in a domestic context, especially with regards to jurisdictional conflicts and immunities. Universal jurisdiction is therefore guided by customary law on the domestic level with only limited guidance from the ICJ, as in the *Habré* and *Lockerbie* cases.[561]

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552 R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 1), [1998] 3 WLR 1456.

553 Christine M. Chinkin, International Decision, Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 93 Am. J. Int'l L. 703, 704 (1999).

554 R. v. Bow St. Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [1999] 2 WLR 827 (*citing* International Extradition in U.S. Law and Practice (3d rev. ed. 1996)).

555 Chinkin, *supra* note 553, at 708.

556 *Id.*

557 In doing so, Shaw exercised executive discretion, which is recognized in international law. *See* Ch. XI for a detailed discussion of executive discretion in extradition matters.

558 Bassiouni, Crimes against Humanity, *supra* note 341.

559 Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter U.N. Convention on the Non-Applicability of Statutes of Limitations]. As of October 2012 there are fifty-four state-parties to the Convention, namely: Afghanistan, Albania, Argentina, Armenia, Azerbaijan, Belarus, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Costa Rica, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Estonia, Gambia, Georgia, Ghana, Guinea, Honduras, Hungary, India, Kenya, Kuwait, Laos, Latvia, Liberia, Libya, Lithuania, Mexico, Mongolia, Montenegro, Nicaragua, Nigeria, Panama, Paraguay, Peru, Philippines, Poland, Moldova, Romania, Russian Federation, Rwanda, Serbia, Slovakia, Slovenia, St. Vincent and the Grenadines, the Former Yugoslav Republic of Macedonia, Tunisia, Ukraine, Uruguay, Viet Nam, and Yemen.

560 Europ. T.S. No. 82 [hereinafter European Convention on Non-Applicability of Statutory Limitations]. Belgium Bosnia and Herzegovina, Montenegro, Netherlands, Romania, Serbia, and Ukraine have ratified the European Convention. France has signed but not ratified the European Convention.

561 *See* Sec. 7.5.1.

A number of states have adopted national legislation criminalizing genocide, crimes against humanity, war crimes, and torture, pursuant to either conventional or customary international law proscribing these international crimes.[562] Pursuant to their national jurisdictional laws, they can exercise jurisdiction over persons charged with the commission of these crimes even when the crime in question was committed outside the territory of the enforcing state. However, most of these jurisdictional laws require a nexus with the enforcing state, such as the nationality of the perpetrator or the victim. Thus, these types of laws are not properly in the category of universal jurisdiction, but rather in that of extraterritorial jurisdiction.

One study concludes that eighteen countries have enacted criminal legislation with a universal jurisdiction provision.[563] The application of national legislation has been primarily with respect to situations in which the accused was in the custody of the enforcing state. Thus, state law and judicial practice have usually required at least the presence of the accused in the territory of the enforcing state, or whenever the victim or perpetrator is a national of the enforcing state, although this was not true in the *Arrest Warrant* case. Several states have enacted national legislation in connection with "grave breaches" of the Geneva Conventions, while others have provided for universal jurisdiction in connection with other international conventions, mostly dealing with genocide and terrorism. Some states have expanded upon the "grave breaches" of the Geneva Conventions by including other violations of the laws and customs of war. Some states have also provided for universal jurisdiction in the case of crimes against humanity, based on their national legislation.[564]

Professor Máximo Langer has conducted the most extensive study of domestic prosecutions based on universal jurisdiction known to this writer. His study found that there have been only thirty-two domestic trials under the theory of universal jurisdiction, primarily for Nazi crimes and for crimes committed in the former Yugoslavia and Rwanda.[565] In particular, he found that Australia has tried one Nazi; Austria has tried one former Yugoslav; Belgium has tried eight Rwandans; Canada has tried one Nazi and one Rwandan; Denmark has tried one former Yugoslav; France has tried one Tunisian and one Mauritanian; Germany has tried four former Yugoslavs; Israel has tried two Nazis; the Netherlands has tried three Afghans, one Congolese, and one Rwandan; Norway has tried one former Yugoslav; Spain has tried one Argentinian; Switzerland has tried one former Yugoslav and one Rwandan; and the United Kingdom has tried one Afghan and one Nazi.[566]

As indicated above, eighteen countries have adopted universal jurisdiction legislation for certain crimes. Some of these are described below.

The French Penal Code is an example of national legislation that provides for universal jurisdiction if required by treaty and if domestic implementing legislation is in place, but none has been adopted except for the ICC treaty whose statute, as discussed above, allows for universal jurisdiction when a situation is referred to it by the Security Council. France's Criminal Code

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562 *See* Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application, *supra* note 341, at 279–294 (2011). Some states have enacted modified versions of universals for war crimes, including Australia, Belgium, Canada, France, and the United Kingdom. *Id*. at 287. Belgium extended its universal jurisdiction provision more broadly to incorporate a broader range of crimes. *Id.* at 289.

563 *See* Scharf, *supra* note 345. Note, however, that in some cases a nexus requirement does exist for these provisions to take effect. *See also* Langer, *The Diplomacy of Universal Jurisdiction*, *supra* note 343 for a review of specific national legislation.

564 *See* Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application, *supra* note 341, at 279–294.

565 Langer, *The Diplomacy of Universal Jurisdiction*, *supra* note 343.

566 *Id.* at 42.

defines genocide and crimes against humanity, but does not specifically provide for universal jurisdiction, though by implication it is possible for French law to provide for it.[567] France's criminal jurisdiction has extraterritorial reach based on territorial impact, national security, protection of currency against counterfeiting, and nationality of victim or perpetrator. For "active personality," the condition of "double criminality" is required. Article 113-8 of the French Penal Code[568] prohibits the exercise of jurisdiction in cases of prior conviction or acquittal. The public prosecutor acting pursuant to a victim's complaint must commence all criminal actions.[569] Article 113-11 (20) extends jurisdiction for crimes on board of, or against, aircraft, whenever the aircraft lands in French territory. Thus, other than the presence of the aircraft in its territory, its jurisdiction is universal. Article 113-12 extends jurisdiction on the high seas, without any connection to territory or nationality link or protected interest impact, whenever international conventions and French law provide for it. That, too, can be viewed as a form of universality of jurisdiction. No specific provision in the jurisdiction article refers to jus cogens international crimes whose definitions are contained in Book II of the Code Pénal.

Book II of the Code Pénal deals with crimes against persons. It starts with Article 211-1, *Du Genocide*, and includes Article 212-1, *Des Autres Crimes Contre l'Humanité*. These articles define the two crimes respectively, but do not include any reference to jurisdiction. In the Code's structure, jurisdiction is covered in Article 113, as referred to above. But there is no legislative provision that established universal jurisdiction for these crimes. Frédéric Desportes and Francis Le Gunehec state

> 194.-Les insuffisances du dispositif législatif. Les crimes contre l'humanité relevant des règles ordinaires de compétence et de procédure. Si, effectivement, le particularisme ne se justifie pas en la matière, il est possible en revanche de regretter en d'autres domaines quelques insuffisances dans le dispositif législatif.
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> Ainsi, il n'a été prévu aucune disposition particulière concernant l'application de la loi française et la compétence des juridictions françaises pour le jugement des crimes commis à l'étranger. En pareil cas, la répression n'est possible, selon les règles générales, que si les crimes ont été commis par un français ou sur la personne d'un français. Cette limitation s'accorde assez mal avec la nature des crimes contre l'humanité. Il aurait été convenable et conforme au droit international

567 Code Pénal art. 212-1 (Dalloz ed. 2000). For a discussion of France's three major prosecutions of Barbie, Touvier, and Papon, see Leila Sadat Wexler, *The French Experience, in* Bassiouni, 3 ICL 329, *supra* note 1. *See also* Brigitte Stern, International Decision, *Universal Jurisdiction over Crimes against Humanity under French Law*, 93 Am. J. Int'l L. 525 (1999); Leila Sadat Wexler, *Prosecutions for Crimes against Humanity in French Municipal Law: International Implications, in* Proceedings of the American Society of International Law 270–276 (1997); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France*, 20 J.L. & Soc. Inquiry 191 (1995); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L. 289 (1994). The French Cour de Cassation, in a 1998 judgment (Cass. crim., Jan. 6, 1998, *Bull. crim.,* no. 2, Rép pén. Dalloz 2000), considered that universal jurisdiction was applicable in the case of genocide in accordance with Article 689-2 of the French Code of Criminal Procedure. The question was also raised as to whether torture should be subject to universal jurisdiction. Commentators also take the position that there would be universal jurisdiction as part of France's obligations to implement Security Council Resolution 827, which established the ICTY, and Resolution 955, which established the ICTR. Based on this reasoning, it could also be assumed that France's implementation of the ICC Statute would justify its exercise of universal jurisdiction.

568 Yves Mayaud, Code Pènal: Nouveau Code Pénal, Ancien Code Pénal (87th ed. Dalloz 2000).

569 *See* Art. 113-12.

> de conférer en la matière, comme en bien d'autres, une compétence universelle aux juridictions françaises;
>
> On peut se demander toutefois si les dispositions des Conventions de Genève du 12 août 1949 ne leur ont pas donné directement une telle compétence pour un certain nombre "*d'actes graves."* En effet, ces conventions comportent une disposition ainsi rédigée "chaque partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis, ou d'avoir ordonné de commettre, l'une ou l'autre de ces infractions graves et elle devra les déférer à ses propres tribunaux, quelle que soit leur nationalité. Elle pourra aussi, si elle le préfère (…) les remettre pour jugement à une autre Partie contractante." La chambre d'accusation de Paris, saisie par des ressortissants bosniaques rescapés des camps de détention serbes, n'a pas consacré cette interprétation, estimant que les Conventions de Genève étaient dépourvues d'effet en droit interne et qu'elles ne pouvaient des lors recevoir application en l'absence de texte portant adaptation de la législation française à leurs dispositions (Ch. Acc. Paris, 24nov. 1994, Javar et autres, inédit). Il serait cependant possible, pour retenir la compétence des juridicitons françaises, de se fonder sur la Convention contre la torture de New York du 10 décembre 1984, à condition toutefois que l'auteur soit "truvé en France" (et sur l'ensemble, Cl. Lombois, *De la compètence territoriale*, R.S.C., 1995, p. 399.[570]

Thus, France does not provide for universal jurisdiction for genocide and crimes against humanity, which also appears to be the case under French Military Law for War Crimes.[571]

Legislation that provides for universal jurisdiction only if there is a territorial connection can be seen in the domestic enactments of Canada and Germany. For instance, Canada's 1985 law[572] allows for retrospective jurisdiction over the crimes of genocide, crimes against humanity, and war crimes, providing that at the time of the crime the conduct constituted a crime under international law as well as under Canadian law, the defendant was within the territorial jurisdiction of Canada, Canada was at war with the country when the crime occurred, and the crime occurred in the territory of that country or was committed by one of its citizens. All of this points to a territorial or a sovereignty connection that does not exactly make Canada's jurisdiction truly universal. As the Canadian Supreme Court noted in *Regina v. Finta*:

> Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil *only when the conditions specified in s. 7(3.71) are satisfied.* The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute individuals such as Imre Finta is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity. As Cherif Bassiouni has very properly observed, a war crime or a crime against humanity is not the same as a domestic offence.[573]

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570 Frédéric Desportes & Francis Le Gunehec, Le Nouveau Droit Pénal: Droit Pénal General (4th ed. 1997).

571 *See however* Gilbert Azibert, Code de Procèdure Pénal 2000, 459 *et seq.* (12th ed. LITEC 2000), where he comments on extraterritorial jurisdiction, but does not refer to universal jurisdiction. Nevertheless, the Code permits universal jurisdiction if it is included in an international convention that France has ratified, provided that the crime in question is also a crime under French law. This is provided for in Articles 689-2 to 689-7 of the Code de Procèdure Pénal. Azibert, *supra* at 313–314. *See also* R. Koering-Joulin, "Jurisclasseur de Procèdure Pénale" fasc. 20, No. 91. *See, e.g.,* Claude Lombois, Le Droit Pénal International (1979); André Huet & Renée Koering-Joulin, Le Droit Pénal International (1994).

572 Criminal Code § 7(3.71) (Can.).

573 *Regina v. Finta*, [1994] 1 S.C.R. 701, 811 (Cory, J.) (emphasis added) (citation omitted).

Section 6 of the German Criminal Code has frequently been cited as providing for universal jurisdiction.[574] It states that

> German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad: (1) genocide . . . ."[575]

In 1999, however, the German Federal Supreme Court required a "legitimizing connection" before jurisdiction in Germany would attach.[576] This connection could take the form of a familial link or former domicile. The German judiciary introduced this requirement based upon concerns that the exercise of such jurisdiction would interfere with the sovereignty of other states. In addition, Section 6(9) of the German Criminal Code allows for the application of German criminal jurisdiction for acts covered by "an international agreement binding on the Federal Republic of Germany . . . if they are committed abroad."[577]

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574 Section 6, which is entitled "Acts Abroad Against Internationally Protected Legal Interests," provides as follows:

> German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:
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> genocide (Section 220a);
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> serious criminal offenses involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310;
>
> assaults against air and sea traffic (Section 316c);
>
> trafficking in human beings (Section 180b) and serious trafficking in human beings (Section 181);
>
> unauthorized distribution of narcotics;
>
> dissemination of pornographic writings in cases under Section 184 subsection (3) and (4);
>
> counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152a subsections (1) to (4)), as well as their preparation (Sections 149, 151, 152 and 152a subsection (5));
>
> subsidy fraud (section 264);
>
> acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

Strafgesetzbuch (StGB) § 6.

575 *Id.* at § 6 (1).

576 German *Bundesgerichtshof,* Urteil vom. 30, Apr. 1999, 3StR 215/98. See Article 211 for genocide and Article 212 for crimes against humanity. France's 1996 criminal code has a similar provision. *See also* M. Cherif Bassiouni, *Crimes against Humanity*, *in* Bassiouni, 1 ICL 437, *supra* note 1.

577 *StGB*, § 6(9). *See also* StGB § 7. Section 7, which is entitled "Applicability to Acts Abroad in Other Cases," states:

> German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement. German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:
>
> was a German at the time of the act or became one after the act; or
>
> was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.

StGB § 7. On February 12, 2001, the Constitutional Court of Germany affirmed a judgment convicting a Bosnian Serb for genocide in Bosnia in accordance with § 200a StGB, the German Penal Code.

Italy's criminal code, Article 7, also provides for extraterritorial criminal jurisdiction, but requires a nationality or territorial connection.[578]

Switzerland adopted legislation extending universal jurisdiction over the three crimes of genocide, crimes against humanity, and war crimes.[579] Switzerland's *Code Pénal Militaire*, enacted by the Federal law of June 13, 1927 and amended up to February 29, 2000, contains a jurisdictional basis for universal jurisdiction in Article 9, which states in paragraph 1: "Le présent code est applicable aux infractions commises en Suisse et à celles qui ont été commises à l'étranger." Chapter 6, Articles 108-109 are also a basis for universal jurisdiction for "infractions commises contre le droit des gens en cas de conflit armé." But more conclusive is Article 6 *bis* of the *Code Pénal*, which states:

> 1. Le présent code est applicable à quiconque aura commis à l'étranger un crime ou un délit que la Confédération, en vertu d'un traité international, s'est engagée à poursuivere, si l'acte est réprimé aussi dans l'Etat où il a été commis et si l'auteur se trouve en Suisse et n'est pas extradé à l'étranger. La loi étrangère sera toutefois applicable si ell est plus favorable à l'inculpé.
>
> 2. L'auteur ne pourra plus être puni en Suisse: s'il a été acquitté dans l'Etat où l'acte a été commis, pour le même acte par un jugement passé en force; s'il a subi la peine prononcée contre lui à l'étranger, si cette peine lui a été remise ou si elle est prescrite.

On the basis of that law, Switzerland prosecuted and convicted a former Rwandan mayor for war crimes.[580]

Australia has two statutes, the Geneva Conventions Act (1957), whose sections 6 and 7 provide for universal jurisdiction for "grave breaches," and the War Crimes Act (1945) (Cth), No. 48, which also permits universal jurisdiction, and resulted in the case of *Polyukhovich v. Commonwealth of Australia and Another* (1991).

Austria's Penal Code, Article 64 (as well as 65.1.2) provides for universal jurisdiction for *aut dedere aut judicare*. In *Republic of Austria v. Cvjetkovic* (1994) it applied its jurisdiction in the case of a crime committed in the conflict in the former Yugoslavia, where the accused was present in Austria. Denmark's Penal Code Art. 8(5) is similar to that of Austria's, and has been applied in a similar case, *Prosecution v. Saric* (1994).

Belgium had the most far-reaching universal jurisdiction legislation.[581] Human Rights Watch described the country's provision as follows:

> Belgium probably provides for the most extensive exercise of universal jurisdiction over human rights crimes of any country. Belgian courts can try cases of war crimes (internal or international), crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium. As a practical matter, however, courts are not likely to pursue an investigation unless Belgium has a real connection to the case.[582]

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578 *See* 3 Codice Penale: Annotato con la Giurisprudenza 103–114, arts. 7, 8, 9 (and commentary) (S. Beltrani, F. Caringella & R. Marino eds., Oct. 1996).

579 *See* Christian Favre, Marc Pellet & Patrick Stoudmann, Code Penal Annote (1997). *Cf.* Didier Pfirter, *The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes*, 32 Cornell Int'l L.J. 499 (1999).

580 *See Coupable de crimes de guerre et d'assassinat, le maire rwandais est condamné à la perpétuit*, Le Temps, May 1, 1999.

581 Act Concerning the Punishment of Serious Violations of International Humanitarian Law § 7 (Belgium). For an overview, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes, supra* note 259; Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics*, 25 Cardozo L. Rev. 247 (2003–2004); Steven R. Ratner, *The American Journal of International Law*, 97 Am. J. Int'l L. 888 (2003).

582 Human Rights Watch, *supra* note 341, at 8.

The first application of this new law came before the Court of Assises in 2001. The accused in the landmark case were two Benedictine sisters, a former professor at the National University of Rwanda (since then at the Catholic University of Louvain), and a former businessman and Minister (husband of the daughter of the personal doctor of President Juvénal Habyarimana) of crimes committed during the Rwandan genocide in 1994. The four were convicted in June 2001 on the basis of Belgium's universal jurisdiction provisions, but all four were physically present in Belgium at the time they were charged with these crimes.[583]

The two most well-known examples of the application of universal jurisdiction in Belgium were against the acting Congolese Foreign Minister, Abdoulaye Yerodia Ndombasi, and against the former Chadian dictator Hissène Habré, who was in exile in Senegal at the time of the issuing of the indictment. As discussed above, both cases were appealed to the ICJ, and in the *Arrest Warrant* case concerning Yerodia, the ICJ ruled that Belgium universal jurisdiction law violated the customary international law protections of heads of state and senior government officials, even for jus cogens crimes, and accordingly the indictment was dismissed. In the *Habré* case the ICJ ruled that Senegal had jurisdictional priority over Belgium. It is should be noted that it is unclear from the ICJ's ruling in the *Habré* case whether the jurisdictional preference applies under customary law to jus cogens crimes as the ruling was based on the text of the CAT.

In summary, no other country has before or since allowed for the exercise of such an expansive version of universal jurisdiction as did Belgium.[584] The far-reaching nature of its universal jurisdiction provisions was criticized in many circles, however, and under mounting pressure the law was amended in 2003 to limit its application. New cases initiated after 2003 require a nexus to Belgium, either on account of the perpetrator's presence in Belgium or on of it being the country of his/her primary residence, or if the victim is a Belgian citizen or lived in Belgium

583 Marlise Simons, *Belgian Jury Convicts 4 of 1994 War Crimes in Rwanda*, N.Y. Times, June 9, 2001, *available at*: http://www.nytimes.com/2001/06/09/world/09RWAN.html

584 *Cf.* Human Rights Watch, *supra* note 341, at 9–10.

> Following the genocides in the former Yugoslavia and Rwanda, a number of European countries brought perpetrators to trial on the basis of universal jurisdiction. In *Belgium*, a Rwandan, Vincent Ntezimana, was arrested and charged with genocide. In *Germany*, the Bavarian High Court sentenced a Bosnian Serb, Novislav Djajic, to five years imprisonment in 1997 under the Geneva Conventions for aiding and abetting the killing of fourteen Muslim men in Bosnia in 1992. A former leader of a paramilitary Serb group, Nikola Jorgic, was convicted on eleven counts of genocide and thirty counts of murder, and sentenced to life imprisonment by the Düsseldorf High Court. A third case is pending against a Bosnian Serb charged with genocide before the Düsseldorf High Court. In *Denmark*, Bosnian Muslim Refik Saric is currently serving an eight-year sentence for war crimes, charged under the Geneva Conventions with torturing detainees in a Croat-run prison in *Bosnia* in 1993. In April 1999, a *Swiss* military court convicted a Rwandan national of war crimes[,] but held it had no jurisdiction over genocide and crimes against humanity. A Bosnian Serb was indicted but acquitted of war crimes. The *Netherlands* is prosecuting a Bosnian Serb for war crimes before a military court. *France* is currently prosecuting a Rwandan priest, Wenceslas Munyeshyaka, for genocide, crimes against humanity, and torture. In addition, in July 1999, French police arrested a Mauritanian colonel, Ely Ould Dah, who was studying at a French military school, on the basis of the U.N. Convention against Torture, when two Mauritanian exiles came forward and identified him as their torturer. Ould Dah, free on bail, slipped out of France in March 2000, however. In February 2000, a *Senegalese* court indicted the exiled dictator of Chad, Hissène Habré, on torture charges. In 1997, the *United Kingdom* arrested a Sudanese doctor residing in Scotland for alleged torture in Sudan, but later dropped the charges, apparently for lack of evidence. In August 2000, *Mexico* arrested Ricardo Miguel Cavallo, a former Argentine military official. Judge Garzón of Spain has filed an extradition request for Cavallo based on the torture and "disappearance" of over 400 people.
>
> *Id. See Universal Jurisdiction in Respect of Gross Human Rights Offenses, supra* note 362, at 22–29; *Universal Jurisdiction in Europe, supra* note 340, at 16–47.

for three years prior to the commission of the crimes. The amended law also allows for universal jurisdiction in cases where Belgium is obligated to exert jurisdiction on the basis of a treaty.[585]

7.5.1. The Customary International Law Status of Universal Jurisdiction

Bearing in mind that there are 193 member states of the United Nations and a number more states that are not members, it is necessary to assess whether the relatively recent enactments of a few states are sufficient to establish a rule of customary international law of universal jurisdiction over genocide, crimes against humanity, war crimes, and torture. There is consensus among advocates of universal jurisdiction that it obtains for the four crimes listed above on the basis of their jus cogens and *erga omnes* qualities. This writer suggests that, in addition to those four, the following be included as subject to universal jurisdiction: piracy, slavery and slave-related practices, human trafficking, apartheid, and contemporary practices such as violent attacks upon civilians and civilian installations covered by international conventions.[586]

Two criteria are necessary to establish customary international law, viz., the existence of a sufficient state practice and *opinio juris sive necessitates*.[587] As stated by the ICJ: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[588]

Sufficient state practice is established when the principle at issue has duration, uniformity, consistency, and generality.[589] State practice consists of: (1) specific legislation enacting the provisions for universal jurisdiction; (2) legislative enactments that authorize the application of universal jurisdiction; and (3) state judicial practice, whether based on national legislation or international conventions. In the *Military and Paramilitary Activities* case, the International Court of Justice noted that:

> [T]he mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom "as evidence of a general practice accepted as law," the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[590]

Opinio juris is the external acceptance by states that a practice is recognized as being obligatory.[591] To establish *opinio juris*, states must behave in such a manner that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in

585 *Belgium: Universal Jurisdiction Law Repealed*, Human Rights Watch (Aug. 2, 2003), http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed.

586 Bassiouni, Introduction to International Criminal Law, *supra* note 341, at ch. III.

587 Ian Brownlie, Principles of Public International Law 4–9 (5th ed. 1998); 1 George Schwarzenberger, International Law 41 (3d ed. 1957); 1 Lassa Oppenheim, *supra* note 2 at 25–27.

588 Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, 29–30 (June 3).

589 David H. Ott, Public International Law in the Modern World 13–16 (1987).

590 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97–98 (June 27).

591 Ott, *supra* note 589, at 15.

the very notion of the *opinio juris sive necessitatis*."[592] The conduct of states, however, need not be "in absolutely rigorous conformity" with the rule:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[593]

This writer is doubtful that the few national enactments and prosecutions that exist as of 2013 are sufficient to satisfy the elements of consistent state practice necessary to constitute customary international law.[594] Professor Langer likewise concludes that

> universal jurisdiction will not establish a minimum international rule of law in the sense of either holding a substantial share of the perpetrators of international crimes accountable, or being applied equally across defendants. Since the political branches' expected costs quickly surpass the expected benefits in this type of case, the analysis herein suggests that it is not a coincidence or the result of too premature a judgment that, in the last twenty-five years, only twenty-six people around the world have been criminally convicted on the basis of universal jurisdiction despite the end of the Cold War, the unprecedented position of human rights on the agenda of many societies, and the passing of universal jurisdiction statutes by many states. Rather, a limited potential to convict international criminals seems to be a structural feature of the universal jurisdiction enforcement regime. In addition, given that high- and most mid-cost defendants can impose more costs than any potential prosecuting state is willing to pay, those defendants are in effect beyond the reach of this enforcement regime.[595]

However, although national legislation and national judicial practice is presently insufficient to establish an international customary practice with respect to universal jurisdiction, that limited practice, combined with the large number of states that have extraterritorial criminal jurisdiction that also reaches persons accused of international crimes, may constitute a sufficient legal basis to conclude that at least there exists a duty to prosecute or extradite, and where appropriate to punish persons accused, charged, or convicted of international crimes. If that proposition is accepted, then it follows that when available jurisdictional means are ineffective, universal jurisdiction should apply.

It must be remembered that a number of conventions provide, implicitly or explicitly, for universal jurisdiction with respect to certain international crimes, some of which are deemed part of jus cogens. With respect to the latter category, there exists a legal obligation embodied in the maxim *aut dedere aut judicare* to prosecute or extradite, and where appropriate to punish those accused, charged, or convicted of jus cogens crimes. This is a non-derogable obligation incumbent upon all states as a consequence of the jus cogens character of these crimes. Thus, it is an obligation *erga omnes* that is binding even upon states who refuse to recognize such an obligation. It may appear tautological to add that such an obligation exists because it also arises under customary international law, but it is not, because it is customary international law that

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592 North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

593 *Military and Paramilitary Activities*, 1986 I.C.J. at 98.

594 Some states have universal jurisdiction for specific crimes such as genocide. Others may have near universal jurisdiction for crimes against humanity and war crimes. Still other states, such as Germany, have universal jurisdiction plus a linking connection. No country has universal jurisdiction for all these crimes. It is therefore difficult to say anything more than universal jurisdiction exists sparsely in the practice of states and is prosecuted in only a limited way.

595 Langer, *The Diplomacy of Universal Jurisdiction*, *supra* note 343, at 45 (internal citations omitted).

provides the basis for the elevation of certain international crimes to the level of jus cogens. In addition, "general principles of law" also provide the basis for the elevation of certain international crimes to the level of jus cogens. Furthermore, the "writings of the most distinguished publicists" also support the proposition that jus cogens crimes require the application of universal jurisdiction when other means of carrying out the obligations deriving from *aut dedere aut judicare* have proven ineffective. In fact, it could be argued that the establishment of international investigative and judicial organs since WWII, such as the IMT, IMTFE, ICTY, ICTR, and ICC embody the very essence of *aut dedere aut judicare* with respect to jus cogens crimes.

There is no doubt that each one of these sources of international law is by itself insufficient to establish the proposition that universal jurisdiction applies to jus cogens crimes, but it is the cumulative effect of these sources that does. This proposition may run contrary to a purist theory of international law that requires each one of the sources of law referred to rise to a certain level of legal sufficiency in order to achieve the status of binding international law. But if the proposed theory of cumulating sources of international law that have not, each in their own right, achieved the level of legal sufficiency is accepted, then it can be concluded that universal jurisdiction is at the least recognized with respect to jus cogens crimes, if not required.

The other category that needs to be assessed is that of national law, and it includes national legislation and judicial practice. Both of these, however, reveal that only a few states have universal jurisdiction, and among them only two ever provided for this theory of jurisdiction without a territorial nexus, but even then without a mechanism to enforce the provision. Beyond that only judicial decisions have been rendered that support universal jurisdiction, whether with or without means to the enforcing state. On the other hand, many states have extraterritorial criminal jurisdiction that reaches those who commit international crimes, whether jus cogens or not, and this represents in practice the maxim *aut dedere aut judicare*. Here again, the international law purist can challenge this proposition by arguing that the existence of extraterritorial criminal jurisdiction does not necessarily evidence the *opino juris* of states in respect of the maxim. The answer to that may be reminiscent of a sophist's argument, namely: if not that, then what? But a more prosaic argument is this: if states extend their national criminal jurisdiction extraterritorially to prosecute more persons charged with international crimes, is that not in itself evidence of their intentions to enforce international criminal law? Granted, most of these national laws are aimed at prosecuting nationals who commit crimes abroad, or non-nationals who commit crimes abroad against the nationals of the state having such legislation, or at nationals and non-nationals who while abroad commit acts that have a national impact or effect deemed to be criminal under national legislation. But does that change the impact of extraterritorial national legislation that also reaches these very same persons when they also commit international crimes?

Last, it would be a valid argument to propose that the cumulative weight of international law sources, national legislation, and judicial practices can be deemed sufficient to find the existence of universal jurisdiction for jus cogens and even other international crimes.

If there is such a thing as a sophisticated argument that is not sophistry, I propose what international law's progressive thinkers would call a policy argument. Simply put, the argument is that in the era of globalization, international compensation is necessary to combat crime, whether international or domestic, and the only way by which this is achievable is through the obligation to prosecute or extradite, and where appropriate, to punish persons accused, charged, or convicted of a criminal offense, whether it be international or domestic. To implement such a policy requires the closing of certain jurisdictional gaps consistent with the preservation of the international legal order, and respect for and observance of international human rights law. The closing of such gaps is through universal jurisdiction. Thus, one way of reaching the recognition of universal jurisdiction is through the obligation of *aut dedere aut judicare*. This does not, however, diminish the recognition of universal jurisdiction as *actio popularis* or on any other legal or policy bases.

7.6. Misconceptions about National State Law and Practice

A number of states have enacted laws with extraterritorial jurisdictional reach. Most of these laws however extend national legislative reach to situations involving their nationals, or whenever their nationals are the victims of certain crimes. Some extend their extraterritorial reach to crimes committed abroad but whose impact affects the interests of the enforcing state. Among these national laws are those that provide universal jurisdiction based on national law whenever it is permissible or required by an international treaty. In all of these cases, except for a brief period in Belgium and Spain,[596] which is discussed below, national legislation as applied requires that the accused be present on the territory of the enforcing state. Scholars, however, do not give sufficient weight to these distinctions and surmise that the possible application of universal jurisdiction without regard to the need for a nexus to the enforcing state is sufficient to conclude that there is sufficient state practice to warrant the conclusion that universal jurisdiction is part of customary international law. There is no doubt that the existence of such national legislation evidences some recognition of the existence of universal jurisdiction. But whether it is sufficient in and of itself to rise to the level of customary international law is questionable. In addition, there are various national judicial decisions that apply universal jurisdiction or refer to it in dicta. Here again, scholars tend to construe these cases as evidencing the application of universal jurisdiction in national judicial decisions. But, as discussed below, there have only been two cases known to this writer, namely Belgium and Spain, in which universal jurisdiction was applied without any nexus to the enforcing state, and even those extensive provisions were eventually scaled back to require a nexus to the country, in 2003 and 2009, respectively.

Two cases are illustrative of this misconception.

In *Attorney General of Israel v. Eichmann*,[597] the Israeli district court referred to universal jurisdiction in dictum, but relied on Israel's national legislation conferring upon its courts jurisdiction over "crimes against the Jewish people," based on a law it passed in 1950 that includes genocide and crimes against humanity whenever committed against the "Jewish people" wherever they may be.[598] Israel's jurisdictional reach is, under its law, universal,[599] but it is based on a nationality connection to the victim that properly places this jurisdictional basis under the "passive personality" theory. Admittedly, that law purports to apply to acts that took place before the establishment of the sovereign state of Israel in 1948, but that does not alter the basis of the theory relied upon. Furthermore, there is no historical legal precedent for such a retroactive application of criminal jurisdiction based on nationality, but that goes to the issue

596 *Ley Del Poder Judicial*, Article 65 (1985), and *Ley Organica*, Article 23 (1985), which was applied in connection with Spain's extradition request to England for Augusto Pinochet. Naomi Roht-Arriza *The Pinochet Precedent and Universal Jurisdiction*, 35 New England L. Rev., 311 (2001). This was also applied in connection with Spain's request to Mexico for the extradition of Ricardo Miguel Cavallo, an Argentine citizen, sought for prosecution in Spain for crimes committed in Argentina during the "dirty war" of the 1970s. See *Juan E. Mendez and Salvador Tinajero-Esquivel, the Cavalo Case: A New Test for Universal Jurisdiction* in 8(3) Human Rights Brief 8 (American University, Washington College of Law, Spring 2001).

597 36 I.L.R. 5, 5–57 (Israel D.C., Jerusalem, December 12, 1961).

598 *See* Nazi and Nazi Collaborators (Punishment) Law, August 1, 1950, 4 L.S.I. No. 64, at 154. For a discussion of the unique characteristics of this law, see *Honigman v. Attorney General*, 18 I.L.R. 542, 543 (Isr. S. Ct. 1953).

599 *Cf.* D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 Brit. Y.B. Int'l L. 1, 12 (opining that "the exercise of jurisdiction by Israel in the *Eichmann* case stands out as highly unusual, and probably unfounded").

of the law's international validity and the jurisdictional theory relied upon rather than its jurisdictional basis.[600] In its judgment, the district court stated:

> All this applies to the crime of genocide (including the "crime against the Jewish people") which, although committed by the killing of individuals, was intended to exterminate the national as a group . . . The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations.[601]

In affirming the district court's judgment, the Supreme Court of Israel, while noting full agreement on the protective principle of jurisdiction, insisted upon the universal jurisdiction argument, as this applied not only to Jews in whose name Israel claimed to exercise protective jurisdiction, but also to Poles, Slovenes, Czechs, and gypsies.[602] The Supreme Court further stated: "The State of Israel . . . was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."[603]

In *Demjanjuk v. Petrovsky*,[604] the United States Court of Appeals for the Sixth Circuit referred to universal jurisdiction over crimes of genocide and crimes against humanity, but relied on the same Israeli law that was based on the theory of passive personality. The Sixth Circuit noted that "Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial."[605]

7.7. Conclusion

The historical evolution of jus cogens international crimes, from their recognition as being offensive to certain values to their universal condemnation and finally to their universal proscription, developed in different ways. But the distinctive historical evolution of each of these jus cogen*s* international crimes is no different than that of other international crimes.[606] The emergence, growth, and inclusion in positive international criminal law of international crimes went through different stages and gestational periods.[607] Piracy, slavery, and war crimes evolved over centuries through declarative prescriptions and later in enforcement proscriptions,[608] while some crimes such as genocide, apartheid, and torture did not. They became international crimes by virtue of their separate embodiment, each in a single convention adopted in 1948, 1973, and 1984, respectively, without prior gestation in other stages of evolution. Crimes

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600 *See* Robert K. Woetzel, *The Eichmann Case in International Law, in* International Criminal Law 354 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965); Telford Taylor, *Large Questions in the Eichmann Case*, N.Y. Times, Jan. 22, 1961, § 6 (Magazine), at 11.

601 *Eichmann*, 36 I.L.R. at 57 (para. 38).

602 *Attorney Gen. of Israel v. Eichmann*, 36 I.L.R. 277, 304 (para. 12) (Israel S. Ct., May 29, 1962).

603 *Id.*

604 776 F.2d 571 (6th Cir. 1985).

605 *Id.* at 582. *See* Yoram Sheftel, Defending Ivan the Terrible: The Conspiracy to Convict John Demjanjuk (1996).

606 *See* Bassiouni, *Sources, supra* note 382, at 46–100.

607 M. Cherif Bassiouni, *Enforcing Human Rights through International Criminal Law and through an International Criminal Tribunal, in* Human Rights: An Agenda for the Next Century 347 (Louis Henkin & Lawrence Hargrove eds., 1994).

608 The category of war crimes continues to be augmented to reflect different practices and more detailed regulations; slave-related practices have not, as mentioned above, been included.

against humanity, however, had a short gestational period between 1919, when the crime was first proposed and almost accepted, and 1945, when it was embodied in positive international criminal law in the Nuremberg Charter.[609] Since then it has been included in the statutes of the ICTY, ICTR, and ICC, but there is still no specialized convention on that category of crimes as there is with war crimes, genocide, apartheid, and torture.[610] But the conventions relative to those crimes do not all have clear provisions, and in some cases, no provisions at all on universal jurisdiction. It is their status as jus cogens crimes that implies that universal jurisdiction exists.

Universal jurisdiction, as discussed above, resembles a checkerboard. Some conventions recognize it, and some national practices of states demonstrate its existence, but the practice is uneven and inconsistent. Most of all, the practice of states does not evidence a widespread application.

The confusion about universality is that it has at least five meanings:

1. The universality of condemnation for certain crimes;

2. The *universal reach* of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others;

3. The extraterritorial reach of national jurisdiction, which may also merge with universal reach of national legislation;

4. The *universal reach* of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and

5. The universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.

The diverse meanings attributed to universal jurisdiction have probably been among the reasons confusion has surrounded its legal significance. Similarly, the diverse theories of extraterritorial jurisdiction that were applied by international and national judicial bodies have also contributed to this confusion. But the writings of scholars added to the confusion when they expressed in *lex lata* terms what may have been *de lege ferenda* or only expected *desiderata*.

What truly advanced the recognition and application of universal jurisdiction has been the acceptance of the maxim *aut dedere aut judicare* as an international *civitas maxima*. The duty to prosecute or extradite and, where appropriate, to punish persons accused of or convicted of international crimes, particularly jus cogens crimes because of their heinous nature and disruptive impact on peace and security, necessarily leads to the recognition of universal jurisdiction as a means of achieving the goals of *aut dedere aut judicare*.

The writings of scholars have driven the recognition of the theory of universal jurisdiction, particularly for jus cogens international crimes. These writings reflect idealistic universalistic views, as well as pragmatic policy perspectives. The combination of international and national sources of law has produced a cumulative effect sufficient to warrant the recognition of universal jurisdiction for jus cogens crimes. Universal jurisdiction is the most effective method of deterring and preventing international crimes, by increasing the likelihood of prosecution and punishment of its perpetrators. This approach to international criminal accountability is also believed to be a factor in reducing impunity for the perpetrators of these crimes.[611]

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609 For that historical evolution, see Bassiouni, Crimes against Humanity, *supra* note 341.

610 The only logical method of dealing with the problems of uneven development of international criminal law is to codify it, but it regrettably appears that governments do not support this proposition; consequently international criminal law will continue to suffer from a number of legislative and other deficiencies. *See, e.g.,* M. Cherif Bassiouni, A Draft International Criminal Code and a Draft Statute for an International Criminal Tribunal (1987).

611 *See* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law & Contemp. Probs. 9 (1996); Madeline H. Morris, *International Guidelines against Impunity: Facilitating*

A dynamic interaction exists between: (1) international and national norms of international criminal law, (2) international and national processes for the enforcement of international criminal law, and (3) state and nonstate actors' cooperation in the development of norms and processes and in their implementation. This dynamic interaction is breaking down traditional compartmentalization between international and national law.[612] As a result, hybrid norms and processes have developed that include both international and national characteristics and incorporate the combined supportive roles of state and nonstate actors in the development of norms and processes, as well as in their implementation. This dialectical relationship, which some call "complementarity," is, however, even more complex. It is an amorphous and changing process that is difficult to define, predict, or assess, other than to recognize that it is both growing and evolving. The fact that it is, in part, the product of contingent circumstantial and occasional factors does not diminish its continued growth.

The policy-based assumptions and goals of universal jurisdiction are that such a jurisdictional mechanism, when relied upon by a large number of states, can prevent, deter, punish, provide accountability, and reduce impunity for some international crimes, and that it can enhance the prospects of justice and peace. Irrespective of the checkered nature of the recognition and application of universal jurisdiction in international and national law and practice, the policy arguments advanced in its favor, particularly in light of the historic record of impunity that has benefited so many of the perpetrators of these crimes for so long, support its application. But universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of international legal processes.[613] If that were the case, it would produce conflicts of jurisdiction between states, which have the potential to threaten world order, subject individuals to abuses of judicial processes, prompt human rights violations, cause politically motivated harassment, and result in the denial of justice. In addition, there is the danger that

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Accountability, 59 Law & Contemp. Probs. 29 (1996); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law & Contemp. Probs. 41 (1996); Bassiouni, *International Crimes: Jus Cogens and* Obligatio Erga Omnes, *supra* note 399; W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 Law & Contemp. Probs. 75 (1996); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 Law & Contemp. Probs. 81 (1996); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 Law & Contemp. Probs. 93 (1996); Jennifer L. Balint, *The Place of Law in Addressing International Regime Conflicts*, 59 Law & Contemp. Probs. 103 (1996); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 Law & Contemp. Probs. 127 (1996); Joyner, *supra* note 475; Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 Law & Contemp. Probs. 173 (1996); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 Law & Contemp. Probs. 181 (1996); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 Law & Contemp. Probs. 197 (1996). *See also* Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, September 17–21, 1998, *in* 14 Nouvelles Études Pénales (1998); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L. J. 2537 (1991).

612 *See* Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705, 707 (1988).

> The international system of states is fundamentally different from any national community of persons and of corporate entities. It is not helpful to ignore those differences or to cling to the reifying notion that states are "persons" analogous to the citizens of a nation. Some of the differences are of great potential interest. In a nation, Machiavelli noted, "there cannot be good laws where there are not good arms." In the international community, however, there are ample signs that rules unenforced by good arms are yet capable of obligating states and quite often even achieve habitual compliance.

Id. (footnote omitted).

613 This highlights a significant reason universal jurisdiction should not be exercised over all international crimes.

universal jurisdiction may be perceived as hegemonic jurisdiction exercised mainly by some Western powers against persons from developing nations. The actual practice of universal jurisdiction is far more prosaic, however. Universal jurisdiction by states has focused overwhelmingly on low-level offenders whose prosecution, if the arguments of the theory's advocates are to be believed, will have little deterrent value, and similarly avoids the concerns of the theory's opponents because low-level prosecutions are unlikely to disrupt the global order.

To avoid these and other negative outcomes, while enhancing the positive outcomes of an orderly and effective application of universal jurisdiction, it is indispensable to arrive at norms regulating the resort by states and international adjudicating bodies to the application of this theory.[614] At first, guidelines should be developed that in time may garner consensus among scholars and, ultimately, among governments. At that stage, an international convention should be elaborated so that these guidelines can become positive international law.

The history of contemporary international law is replete with examples of scholarly and NGO initiatives that have set in motion a process that ripened into conventional international law. The Princeton Project on Universal Jurisdiction will hopefully result in an international convention on universal jurisdiction for jus cogens and other international crimes that includes jurisdictional priorities; provides rules for resolving conflicts of jurisdiction; and minimizes the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice.[615]

As the French philosopher Pascal once said, "Every custom has its origin in a single act," and in this case, there is ample evidence of many such acts. However, it is their cumulative effect that gives weight to the proposition that universal jurisdiction is part of customary international law. Nevertheless, the fact that there is a customary international law recognition of universal

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614 The series of Restatements of certain aspects of U.S. law is an interesting model. However, as there is no Restatement on criminal law, the closest analogy is the Restatement (Second) of Conflict of Laws, which, in Section 6, includes a policy-oriented approach to choice of law. It states:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws, § 6, at 10 (1971). Although such a choice-of-law approach can work in a federal system linked by a Constitution that contains a "full-faith and credit" clause, U.S. Const. art. IV, § 1, it may not work effectively at the international law level. Consequently, a more hard-fast normative approach may be more appropriate in the international context.

615 Although this writer strongly supports this outcome, it must be noted that a similar effort undertaken in 1967 by the International Association of Penal Law resulted in the adoption of the 1968 U.N. Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity. *See* U.N. Convention on the Non-Applicability of Statutes of Limitations, *supra* note 559. Fifty-four states ratified it. *See also* 37 Revue Internationale de Droit Pénal (1966). It can thus be assumed that at most the same number of states would support a Convention on universal jurisdiction. The more recent European Convention on Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European) has only a disappointing two ratifications. *See* European Convention on Non-Applicability of Statutory Limitations, *supra* note 560.

jurisdiction does not imply that it can be exercised with respect to all international crimes or that it can be exercised by all states without limitations. What the crimes are for which universal jurisdiction applies is still an unsettled question, though there is a more generalized agreement that they include piracy, slavery and slave-related practices, war crimes, crimes against humanity, and genocide, and by convention, torture and some international terrorism crimes. In addition, customary international law does not so far settle the issue of whether there needs to be a nexus to the enforcing state, such as the presence of the accused on its territory. There are also other issues that remain unresolved, such as the temporal immunity of heads of states and diplomats, and a number of issues pertaining to the rights of the individual to prevent vexatious and multiple prosecutions, as well as how to ensure due process and fairness in the course of proceedings based on universal jurisdiction. Consequently, it can be said that the recognition of universal jurisdiction in customary international law is in its first stage of evolution, and that it has to be followed by other stages needed to clarify the rights and obligations of states in the exercise of this form of extraterritorial jurisdiction in order to maximize the benefits of universal jurisdiction and eliminate its potential for abuses.

8. International Immunities

International immunities apply through conventional and customary international law to three categories of persons: heads of state and family members,[616] diplomats on mission or accredited high-level government personnel on mission (officials representing the state),[617] and personnel of international organizations such as the United Nations and other intergovernmental organizations benefiting from existing "treaties and immunities agreements" between them and their member states or a particular host country. These types of immunities are called personal immunities.[618] They are to be distinguished from substantive immunities under the doctrine of *jure imperii*, or "acts of state," under customary international law.[619] This doctrine is reflected in U.S. legislation.[620]

With respect to personal immunities, there is a distinction applicable both in international law, as well as domestic law, with respect to temporal immunity and substantive, or subject matter, immunity. The former merely limits the period of the immunity to that of the officeholder's tenure, while the latter provides blanket immunity for the person by reason of that person's status. Since the IMT and the IMTFE after WWII, there has been a gradual development in international law limiting immunities with respect to certain international crimes. In some cases, these limitations have been construed to also apply to temporal immunity.

Article 27 of the ICC statute eliminates all forms of international immunities, including for heads of state.[621]

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or

616 Bassiouni, Introduction to International Criminal Law, *supra* note 341, at ch. II, sec. 4.

617 Vienna Convention on the Law of Diplomatic Immunity, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. *See also* U.N. Convention on Special mission, Dec. 16, 1969, 1035 U.N.T.S., arts. 21, 29, 31, 34, and 42 (*entered into force* June 21, 1985).

618 *See* Bassiouni, Introduction to International Criminal Law, *supra* note 341, at ch. II, sec. 4.

619 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

620 *See* 1976 Foreign Sovereign Immunities Act, as amended in 1988, 28 U.S.C. §§ 1602–1611; Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 72.

621 M.Cherif Bassiouni, 2 The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text 208–210 (2005); ICC Statute, *supra* note 388.

parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[622]

But it should be recalled that customary international law still recognizes temporal immunity.[623]

8.1. Head of State Immunity

Traditionally heads of state have been immune from the national criminal jurisdiction of another state other than their own, arising out of the Westphalian notion of international relations, which is based on the absolute sovereignty of states.[624] After WWI, the absolute immunity that had been given to heads of state gave way to a qualified immunity, removing the substantive immunities for certain crimes, but retaining the temporal immunity.[625] The first attempt to prosecute a head of state came after the conclusion of WWI when the victorious allies charged Kaiser Wilhelm of Germany.[626] Wilhelm sought refuge in the Netherlands, which refused to extradite him because the crime with which he was charged, "the supreme offense against the sanctity of international treaties," was deemed by the Netherlands to be a political crime.[627] However, since the establishment of the IMT at Nuremberg in 1945[628] there is no immunity for heads of state for international crimes such as the crime against peace, war crimes, crimes against humanity, and since 1948, genocide.[629] In a 1946 resolution, the UN General Assembly affirmed the non-applicability of substantive immunity of heads of state with respect to international crimes.[630] Several treaties have subsequently codified in positive law the G.A. Resolution, including the 1948 Genocide Convention in Article 4, the 1973 Apartheid Convention in Article 3, and the 1984 Convention against Torture, which in Articles 4 and 12 removed head of state and other substantive immunities from criminal prosecution.[631]

There is frequently a question as to the immunity of foreign heads of state, particularly as to acts they claim were pursuant to their prerogatives in acting on behalf of their state. But their claims have been rejected where the acts were deemed outside the legitimate scope of a head of

622 Bassiouni, 2 The Legislative History of the International Criminal Court, *Id.]*

623 *See infra* Sec. 8.2.

624 Bassiouni, Introduction to International Criminal Law, *supra* note 341.

625 *Id.* at 72–73.

626 *Id.* at 72.

627 Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, art. 227. *See also* M. Cherif Bassiouni, *World War I: The War to End All Wars, and the Birth of a Handicapped International Criminal Justice System*, 33 Denv. J. Int'l L. & Pol'y 255 (2002).

628 IMT Charter, *supra* note 354. Article 7 specifically states that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." *Id. See also* Annex to Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472, *reprinted in* 3 Bevans 1239.

629 Convention on the Prevention and Punishment of the Crime of Genocide, adopted at New York, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951). Article IV states: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

630 Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 74.

631 *Id.*

state's lawful conduct.[632] Foreign heads of state have occasionally fared better when the criminal charge or civil efforts against them were to seize assets that could not have been derived but from the position they occupied.

Among the beneficiaries of this leniency are Haiti's former dictator Jean-Claude "Baby Doc" Duvalier and the Philippines' now deceased President Ferdinand Marcos. Both had substantial assets in Switzerland that they were able to keep. But they surely are not the only ones. The late Shah of Iran was also able to keep his fortune abroad.

The customary practice of states has shown the willingness to prosecute former heads of state for international crimes. The U.K. House of Lords found Augusto Pinochet, the former head of Chile, extraditable under the 1984 Convention against Torture, even though it recognized head of state immunity, on the grounds that torture is never a lawful act.[633] Recently, heads of state have been unable to escape prosecution because of the existence of the Statutes of the ICTY and ICTR.[634] The Statutes for both Tribunals, as well as the ICC, proscribe the granting of immunity to heads of state. Article 7(2) of the Statute of the ICTY states: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[635] Article 6(2) of the Statute for the ICTR mirrors the language used in Article 7(2) of the ICTY Statute.[636]

As a result of the aforementioned proscriptions, Jean Kambanda, a former prime minister of Rwanda, was indicted and pleaded guilty to all counts of the indictment, which included: (1) genocide, (2) conspiracy to commit genocide, (3) direct and public incitement to commit genocide, (4) complicity in genocide, (5) crimes against humanity (murder), and (6) crimes against humanity (extermination). Similarly, Slobodan Milosevic, as a head of state of the Federal Republic of Yugoslavia, was indicted for war crimes and human rights violations against Kosovo's ethnic Albanian population.[637] At the ICC, Sudanese president Omar al-Bashir was indicted for genocide, crimes against humanity and war crimes in the Darfur; Muammar al-Qadhafi for war crimes committed during the Libyan civil war; and Laurent Gbagbo for crimes against humanity committed during the Ivorian civil war.

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632 *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 2960 (1993); Jimenez v. Aristiguieta, 311 F.2d 547 (5th Cir.); *cert. denied,* 373 U.S. 914, *reh'g denied*, 374 U.S. 858 (1963); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); United States v. Noriega, 683 F. Supp. 1373 (S.D. Fla. 1988); New York Land Co. v. Republic of Philippines, 634 F. Supp. 279 (S.D.N.Y. 1986) (also in reference to Ferdinand Marcos).

633 Bassiouni, Introduction to International Criminal Law, *supra* note 341, at 76.

634 *See generally* Marc Henzelin, *L'Immunité pénale des chefs d'Etat en Matiére Financiére: Vers Une Exception pour les actes de pillage de resources et de corruption?*, *in* 12 Revue Suisse De Droit international et de Droit Européen 179 (2002); Mary Margaret Penrose, *It's Good to Be the King!: Prosecuting Heads of States and Former Heads of States under International Law*, 39 Colum. J. Transnat'l L. 193–200 (2000); Jill M. Sears, *Confronting the "Culture of Impunity:" Immunity of Heads of State from Nuremberg to* Ex Parte *Pinochet*, 32 German Ybk. Int'l L. 125 (1999); A. Biannchi, *Immunity versus Human Rights: The Pinochet Case*, 10 Eur. J. Int'l L. 249 (1999); Ved P. Nanda, *Human Rights and Sovereign and Individual Immunity (Sovereign Immunity, Act of State Immunity and Diplomatic Immunity): Some Reflections*, ILSA J. Int'l & Comp. L. 467 (1999); Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers*, 247 Receuil de Courts de l'Académie de la Haye 9 (1994).

635 Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993).

636 Statute of the International Criminal Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

637 *See Prosecutor v. Milosevic* (Indictment) (May 24, 1999), *available* at http://www.un.org/icty/indictment/english/mil-ii990524e.htm.

Additionally, Spain has arrested Isabel Peron on an Argentine extradition warrant for crimes against humanity regarding her alleged role in the abduction and murder of left-wing activists opposing her rule in Argentina, although a court in Spain ultimately rejected the extradition request, reasoning that the charges did not constitute crimes against humanity and that the statute of limitations had expired.[638] Peru sought the extradition from Japan of its former head of state, Alberto Fujimori, whose trial began December 2007 in Peru, and who was convicted and sentenced in 2009 to a twenty-five–year prison term, which he is currently serving.[639]

One of the most prominent examples of the prosecution of a head of state is the attempted prosecution of Hissène Habré, the former head of Chad. Since 1999 Belgium has attempted to prosecute Habré in what has become a cause célèbre of head of state prosecution and universal jurisdiction.[640] The criminal complaint was initially filed by Chadians living in Belgium accusing Habré of, inter alia, murder and torture in Chad during his brutal rule.[641] Eventually a Belgian *Juge d'Instruction* issued an indictment in Belgium pursuant to Belgium's national law of 1993, as amended in 1999,[642] which gives it universal jurisdiction over certain international crimes, namely, genocide, crimes against humanity, and war crimes.[643] The matter was complicated by Habré's ouster, which saw him seek refuge in Senegal, where he remains to this day and which is the requested state for Habré's extradition to Belgium. Senegal, as a state party to the CAT, is faced with its obligation to prosecute or extradite[644] but has refused to extradite

638 *See* Bruce Zagaris, *Spain Arrests Isabel Perón on Argentine Extradition Warrant for Crimes against Humanity*, 23 Int'l Enforcement L. Rep. 87–88 (Mar. 2007); BBC News, *Spain Rejects Peron Extradition*, April 28, 2008, *available at* http://news.bbc.co.uk/2/hi/7372056.stm (last visited Sept. 15, 2011).

639 On May 29, 2002 the Supreme Court of Japan approved Peru's extradition request. The Ministries of Justice and Foreign Affairs had been expected to approve the request, but did not. *See Court Advances Extradition of Fujimori*, Chi. Trib., May 31, 2002, at sec. 1, p. 6. In 2005, Fujimori left Japan for Chile where he was arrested. The Supreme Court of Chile approved Peru's extradition request on September 21, 2007. *See* Simone Romero, *Chileans Order Peru's Ex-Chief Home for Trial*, N.Y. Times, Sept. 22, 2007, at A1. Fujimori arrived in Peru on September 22, 2007 and his trial began December 10, 2007. There have been many other cases in which states have indicted and/or prosecuted their former heads of states. They include: Ethiopia and Iran's indictments of, respectively, Emperor Haile Selassie in 1974 and King Reza Pahlevi in 1979; Romania's indictment of its former president Ceausescu in 1987; and Pakistan's indictment of its former Prime Minister Benazir Bhutto in 1990. *Fujimori 25 Year Sentence Upheld by Peru Supreme Court*, BBC, Jan. 3, 2010, *available at* http://news.bbc.co.uk/2/hi/8438237.stm.

640 Documents on the Habré case can be found at http://www.hrw.org/justice/habre.

641 *Id*.

642 Act Concerning the Punishment of Serious Violations of International Humanitarian Law § 7 (Belgium). Belgian Law of June 16, 1993, as amended by the Law of February 10, 1999. As a consequence of the ICJ's decision in *Congo v. Belgium* the Cour de Cassation held that international immunities apply on a temporal basis. Consequently, the Belgian courts must suspend proceedings against such persons. As a result, an amendment to the 1993 law was introduced before the Belgium Senate, and the Conseil d'Etat expressed its position on the proposed law, which provides that in cases where there is no "link" to Belgium, the investigatory authority must defer the case to the ICJ or to a state seeking to exercise its jurisdiction. Belgium thus remains the jurisdiction of last resort, but subject to certain limitations. See amendments to the law of June 16, 1993, April 5, 2003, Sénat de Belgique, 2-1256/14. *See also* A. Andries, C. Van den Wyngaert, E. David, & J. Verhaegen, *Commentaire de la loi du 16 juin 1993 relative à la repression des violations graves de droit international humanitaire*, Revue de Droit Pénal et de Criminologie 1133 (1994); Damien Vandermeersch, *Compètence universelle et immunités en droit international humanitaire la situation belge*, *in* Le Droit Pènal a l'epreuve de l'internationalisation 227 (Marc Henzelin & Robert Roth eds.,2002).

643 Vandermeersch, *supra* note 642.

644 Convention against Torture, *supra* note 317, arts. 5(2), 7(1) (establishing the duty to prosecute or extradite).

Habré and has attempted to prosecute him domestically. After an initial finding by the Senegalese Judge of Instruction that the former head of state was subject to the criminal jurisdiction of Senegal, the decision was reversed by the Senegalese *Cour de Cassation*. Nevertheless, in 2002, that decision was reconsidered.[645] Since then, Senegalese courts have wrestled with the means by which to try Habré, and the African Union became involved in the matter as well in order to establish an African tribunal for his prosecution. Senegal abruptly withdrew from these talks in mid-2011, drawing criticism from the African Union.[646] After long delays, Belgium brought the issue of Senegal's duty to extradite or prosecute before the ICJ in 2009. The matter was heard by the ICJ, which ruled that Senegal has jurisdictional priority under the *aut dedere aut judicare* provision of the CAT.[647]

Senegal has also suspended Habré's repatriation to Chad, where he was sentenced to death in absentia in 2008 for "financial, material and moral support to the rebels" attempting to overthrow the current government.[648] Human rights groups have consistently opposed Habré's extradition to Chad and prefer to see him tried in Senegal,[649] including the United Nations High Commissioner for Human Rights, Navi Pillay.[650] However, Pillay stressed that although Habré cannot be returned to Chad, he must be prosecuted or extradited to face charges against him in Belgium.[651]

More recently, the "Arab Spring" uprisings led to the domestic prosecution of former heads of state in Egypt and Tunisia. In Tunisia, former president Zine El Abidine Ben Ali was convicted in absentia in 2011 for financial crimes and in 2012 for the killing of protestors.[652] In June 2012 former Egyptian president Hosni Mubarak was convicted for failing to prevent the killing of protestors in Tahrir Square by police in early 2011, resulting in a life sentence.

As mentioned above, the ICC, under Article 27 of the Rome Statute, has issued indictments against a number of heads of state, including Laurent Gbagbo of Côte d'Ivoire, Omar al-Bashir of the Sudan, and Muammar al-Qadhafi of Libya. As of April 2013, al-Bashir remains in office in the Sudan, but Gbagbo is in The Hague awaiting trial, and Qadhafi was killed after having been taken into the custody of National Transitional Council forces in October 2011.

From January 1990 to May 2008, sixty-seven heads of state or government, spanning Latin America, Africa, Europe, Asia, and the Middle East, were formally charged or indicted with serious criminal offenses involving human rights and corruption for the most part.[653] Only half of the cases went to trial: half of the trials resulted in convictions, and half of the convictions resulted in some form of sentence.[654] This weak and ambivalent prosecution pattern is tied to

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645 *Id.*

646 *African Union: Press Senegal to Extradite Habré*, Human Rights Watch, *available at*: http://www.hrw.org/en/news/2011/06/28/african-union-press-senegal-extradite-habr.

647 International Court of Justice Unofficial Press Release, No. 2009/26, July 17, 2009, *available at* http://www.icj-cij.org/docket/files/144/15343.pdf; *African Union: Press Senegal to Extradite Habré*, Human Rights Watch.

648 *Chad Confirms Former President Habre's Conviction*, Agence France Presse, Aug. 19, 2008, *available at* http://afp.google.com/article/ALeqM5jRB8NAgF4CYAzlVwngJZzPdkgKFw.

649 Moumine Ngarmbassa, *Habre Death Sentence Won't Alter Senegal Case—Chad*, Reuters Africa, Aug. 19, 2008, *available at* http://africa.reuters.com/wire/news/usnLJ487890.html.

650 *Id.*

651 AFP, *Former Chad Dictator Habre "Must Face Prosecution,"* July 12, 2011, *available at* http://www.google.com/hostednews/afp/article/ALeqM5iQjSs_ZIiY5fv8P8Ls-i-GvHvIVA?docId=CNG.b2ceadbac94f53ed52774bcb398e39c0.4b1.

652 *Former Tunisian President Ben Ali on Trial*, United Press International, Jan. 3, 2012.

653 Prosecuting Heads of State, 12 (Ellen L. Lutz & Catilin Reiger eds., 2009). For a categorical separation and discussion of these prosecutions by region with disposition, see *id.* at 295–304.

654 *Id.* at 14.

the political climate surrounding the prosecutions.[655] Thus, increased political resolve among states in the international community to bring human rights violators to justice is necessary if heads of state are to be deterred from further commission of atrocities, as otherwise they will assume that there is insufficient political will to bring them to account.

8.2. Diplomatic Immunity

The Vienna Convention on the law of diplomatic immunity and the Vienna Convention on the law of consular immunity both provide for complete immunity of accredited diplomats, their spouses, and members of their families and household personnel.[656] Under the provision of the two conventions, a host country to which a diplomat is formally accredited can neither prosecute nor extradite that person, irrespective of how minor or how serious a crime he/she may have committed. The only option for a host country is to consider that diplomat a persona non grata and request the diplomat to leave the country within a specified period of time. There is an implied obligation for the sending country to prosecute the diplomat, but that depends on whether its national law permits it to do so if the act is committed outside its territorial jurisdiction, or if the act is committed pursuant to an order from a superior of the diplomat in question.

If a diplomat commits a crime in a given country to which he/she was accredited and was either expelled or left voluntarily, and then returned to that country without being diplomatically accredited, he/she may then be subject to prosecution, because diplomatic immunity attaches to the function and not the person. Therefore, if that person is in a country other than one in which he/she committed the act deemed to be a crime and he/she is not an accredited diplomat to that country, he/she may be prosecuted or sought for extradition from that country and prosecuted.

United Nations personnel and personnel of international organizations are also covered by similar immunity from prosecution if the international organization has an agreement to that effect with the host country.[657]

Embassies and consular offices are also immune from the exercise of national jurisdiction by the host country under both the Vienna Convention of Diplomatic Immunity and the Vienna Convention on Consular Immunity.[658] The law of the state of the embassy applies within it.

On April 11, 2000, the diplomatic immunity of the Democratic Republic of Congo's (DRC) acting minister of foreign affairs, Yerodia Abdoulaye Ndombasi, was challenged when a

655 *Id.* at 19, 37. One example of political pressure influencing the pursuit of justice is how Belgium's expansive legislation permitting its exercise of universal jurisdiction was repealed in 2003 after the United States, facing criminal complaints filed by Iraqi families arising from U.S. actions during the first Gulf War, threatened to pull NATO headquarters out of Brussels unless the law was changed.

656 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. *See* M. Cherif Bassiouni, *Protection of Diplomats under Islamic Law*, 74 Am. J. Int'l L. 609 (1980); B.J. George, Jr., *Diplomatic and Consular Immunity*, *in* International Criminal Law: A Guide to U.S. Practice and Procedure 395 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987) [hereinafter Nanda & Bassiouni U.S. Guide].

657 *See generally*, Geert-Jan Alexander Knoops, Prosecution and Defense of Peacekeepers under International Criminal Law (2004).

658 Vienna Convention on Consular Relations, *supra* note 536.

Belgium judge issued an international arrest warrant against him for "crimes against humanity" and genocide. Following the issuance of the arrest warrant, the DRC filed proceedings with the ICJ on October 17, 2000, against Belgium, for, in pertinent part, the "violation of the diplomatic immunity of the Minister of Foreign Affairs of a sovereign state, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations."[659] The DRC also submitted a request for the indication of a provisional measure,[660] which specifically asked for the immediate cancellation of the Belgium arrest warrant.

In order for the ICJ to grant the Democratic Republic of Congo's request for provisional measures, the DRC had to prove: (1) the preservation of its rights was urgent, and (2) the existence of irreparable prejudice.[661] The DRC argued that the need for provisional measures was urgent because the arrest warrant made it impossible for the minister of foreign affairs to perform his duties; for example, he was prohibited from traveling to other states because he was in fear that an arrest warrant would be served upon him.[662] In fact, at the proceedings on November 20, 2000, counsel for the DRC stated: "A State whose Minister for Foreign Affairs is obliged to remain on the territory of that State is, as it were, decapitated."[663] He further argued that because the Minister for Foreign Affairs was unable to travel outside of his state, the DRC was excluded from the international arena, thereby causing irreparable harm.[664] In response, Belgium argued that because, at the time of the proceedings, Yerodia was no longer the acting minister of foreign affairs of the DRC, but instead the minister of education, a provisional measure was not warranted.[665]

The ICJ, assuming compulsory jurisdiction over the case, determined that because Yerodia had assumed a new position as minister of education, which required less travel, and that because the DRC had failed to prove that the preservation of DRC's rights were urgent and might cause irreparable harm in the future, the indication of provisional measures was unnecessary. The

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659 Case Concerning the Arrest Warrant of April 11, 2000 (DRC v. Belgium), 2000 I.C.J. 121 (Request for the Indication of Provisional Measures Order of Dec. 8). *See also* Article 41, paragraph 2, of the Vienna Convention of April 18, 1961, which codified diplomatic relations by stating:

> All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry of Foreign Affairs of the receiving State or such other Ministry as may be agreed.

Vienna Convention on Diplomatic Relations, *supra* note 536, at art. 41.

660 The issuance of provisional measures is largely intended to "preserve the respective rights of the parties pending the decision of the Court." Case Concerning the Arrest Warrant of April 11, 2000 (DRC v. Belgium), 2000 I.C.J. 121 (Request for the Indication of Provisional Measures Order of Dec. 8). *See* M. Cherif Bassiouni, *Universal Jurisdiction Unrevisited: The International Court of Justice Decision in Case Concerning the Arrest Warrant of April 11, 2000 (Democratic Republic of the Congo v. Belgium)*, 12 Palestine Yearbook of In'tl Law 27–48 (2002–2003); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes, supra* note 259.

661 *See* citations, *supra* note 660.

662 *Id.*

663 Case Concerning the Arrest Warrant of April 11, 2000 (DRC v. Belgium), 2000 I.C.J. 121 (Proceedings on November 20, 2000); Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 27–48; Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 259, at 81.

664 *Case Concerning the Arrest Warrant of April 11, 2000* (DRC v. Belgium), 2000 I.C.J. 121 (Request for the Indication of Provisional Measures Order of Dec. 8); Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 27–48; Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 259, at 81.

665 *See* citations, *supra* note 664.

merits essentially hinged upon whether a state can exercise universal jurisdiction irrespective of any links to its territory, such as the presence of the accused.[666]

The ICJ drew several conclusions regarding international immunities.[667] First, international immunities are binding on states, which must give recognition to temporal diplomatic and head of state immunity. However, international law does not recognize substantive immunity with respect to international crimes.[668] International tribunals, such as the ICTY, ICTR, and ICC, can derogate temporal immunity, and therefore customary international law can be changed by the Security Council, as well as states through the use of treaties.[669]

Although it ordered Belgium to cancel the international effect of its arrest warrant, the ICJ avoided making a decision on the issue of universal jurisdiction, as the ICC statute does not provide for it, unless referred to by the Security Council.[670] The case implies that an unregulated application of universal jurisdiction would negatively impact world order.[671] The Court did not make a decision on the conflict between international law, which requires prosecution for international crimes, and other international immunities.[672] But, the Court left a future possibility of allowing Belgium, or another state, to exercise universal jurisdiction for serious international crimes, once the temporal immunity has expired.[673]

The ICJ in its opinion also did not address which individuals are entitled to temporal immunity, although the Vienna Convention on Diplomatic Relations applied to Yerodia, the incumbent minister of foreign affairs, in this case.[674] Thus, international uncertainty remains as to whether a head of state or cabinet officer on diplomatic missions, who do not fall under the Vienna Convention on Diplomatic Relations, are entitled to temporal immunity. The Court concluded in its final judgment, which is binding on Congo and Belgium, that

> the issue against Mr. Abdulaye Yerodia Ndombasi or the arrest warrant of 11 April 2000, and its international circulation, constituted violations of legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister of Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.[675]

After rejecting all of Belgium's jurisdictional and admissibility objections, the Court held that it had to address the question of immunity from criminal jurisdiction of an incumbent minister of foreign affairs under customary international law.[676] The Court reasoned that an

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666 The Princeton Principles on Universal Jurisdiction, *in* Bassiouni, Universal Jurisdiction (2001); Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law (Steve Macedo ed., 2003); Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 27–48; Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 259, at 81. This case remains under consideration on the merits by the ICJ.

667 Case Concerning the Arrest Warrant of April 11, 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14, 2002), *reprinted in* 41 I.L.M. 536; Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 35–44.

668 *Id.*

669 *Id. See also supra* Sec. 7.4.1.

670 *Id.*

671 *Id.*

672 *Id.*

673 *Id.*

674 *Id.*

675 *Id. See also* ICJ Press Release 2002/04, *available at* http://www.icj-cij.org/docket/index.php?pr=552&code=cobe&p1=3&p2=3&p3=6&...

676 Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 37–38.

incumbent minister has full immunity from criminal jurisdiction through the duration of his position; thus, any acts that he performs, whether in an official or private capacity, cannot be distinguished, because he has immunity from prosecution for either type of acts, as that would prevent him from exercising his role as minister.[677] Additionally, the Court found that there is a distinction between the jurisdictional rules of national courts and those of international immunities and that temporal immunity existed in international law.[678] The Court stressed though, that temporal immunity does not equate to impunity with respect to crimes committed. The Court concluded that the mere issuance of the warrant violated Belgium's obligation toward the DRC, because it violated Yerodia's immunity from criminal jurisdiction and the inviolability that he enjoyed under international law.[679]

8.3. State Immunity: A Bar to Civil Remedies for Jus Cogens International Crimes

The question of state immunities arises in the international context when individuals sue states for civil remedies for violations of international norms. The issue arose recently when various civil parties sought damages from Germany in Italian courts for violations arising out of WWII, and the matter was subsequently brought before the ICJ on the grounds that the suits violated Germany's immunity in the courts of another state. The following analysis of the case is taken from the second edition of *Introduction to International Criminal Law*.[680]

> The doctrine of state immunity was upheld by the ICJ in *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening) with respect to individual remedies sought by Italian POW who were the victims of slave labor in Nazi Germany, and Greek victims of a massacre in Distomo, Greece.[681] The case arose out of several successful tort actions by Italian and Greek victims of Nazi atrocities before domestic Italian courts.[682] The underlying acts were not in dispute, as Germany accepted responsibility for the atrocities, in particular the use of slave labor. However, Germany challenged the Italian rulings before the ICJ, arguing that sovereign immunity shielded it from civil actions before the courts of other states.
>
> After the conclusion of the war, in 1947, Italy signed a peace treaty with the victorious allies which included a provision that "Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945."[683] Subsequent bilateral agreements were reached between the two countries in which Italy indemnified Germany for all suits arising out of the Second World War in exchange for a lump sum payment to the Italian government.[684] In 1953, Germany adopted the *Bundesentschädigungsgesetz*, a national

677 *Id.* at 38.

678 *Id.* at 38. *See also* Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 259, at 84. Such immunity is not available under Article 27 of the ICC Statute; however, the ICC Statute is formed by a treaty, and states can thereby alter customary international law.

679 Bassiouni, *Universal Jurisdiction Unrevisited, supra* note 660, at 39.

680 Bassiouni, Introduction to International Criminal Law, *supra* note 341.

681 Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. 1 (Feb. 3, 2012).

682 The Greek claims arose out of a separate incident in Greece that was successfully litigated before that country's courts. However, the Minister of Justice refused to enforce the damages awarded and the Greek plaintiffs brought the matter before Italian courts, seeking enforcement of the judgment there, resulting in the transfer of German property in Italy to the Greek plaintiffs.

683 Treaty of Peace with Italy. Signed at Paris, on February 10, 1947, art. 77(4), Feb. 10, 1947, 49 UNTS 3.

684 Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. 1, ¶24 (Feb. 3, 2012).

law establishing a compensation system for victims of crimes committed by the Nazi regime.[685] An additional law was adopted in 2000 to provide compensation specifically for the victims of slave labor.[686]

The 1953 and 2000 German laws applied to civilian victims only; neither provided a remedy for POWs who had been used as slave labor, and POWs were explicitly excluded from the reparations scheme under a separate 2000 law,[687] which was upheld by the German Constitutional Court despite its disparate effect.[688] Furthermore, compensation for Italian POWs was not included in the 1947 Peace Treaty and was excluded from the subsequent agreements which terminated all Italian claims against Germany. The Italian POWs who had been forced into slave labor were not, however, considered "civilians" for the purposes of compensation despite the fact that they had been deprived of POW protections arising under IHL by the Nazis. Despite this Germany argued, and the ICJ accepted, that the Italian soldiers never lost their POW status and could therefore lawfully be put to some form of work even though the Nazi government had denied them the full protections that this status required.[689] Thus, Italian POWs became a category of victims without a remedy under German Law.

Unable to file a claim in German courts due to the 2000 law excluding POWs from restitution claims, the Italian plaintiffs brought a domestic action in Italy.[690] Germany brought the matter before the ICJ on the grounds of state immunity, arguing that state and judicial practice, as well as practical concerns militated against the right of national courts to hear international tort claims against a foreign state. In response, Italy argued that the victims had been excluded from all compensation schemes and had no other recourse to remedy their denial of justice for a *jus cogens* violation of international law. In effect, Italy argued that by necessity and by reason of the fact that the claimants (whether Italian or Greek) were present in Italy, Italian courts could exercise their national jurisdiction over these claims.

The ICJ ruled in favor of Germany,[691] holding that the doctrine of state immunity prevailed over other considerations, even barring compensation for *jus cogens* crimes such as slave labor.[692] Under the Court's ruling the Italian POWs were also deprived of a remedy under international law since state immunity barred any civil action against Germany in the courts of another state. The ICJ's judgment reinforced the principle that state immunity is a state right deriving from the co-equal nature of state sovereignty,[693] and as such a firm and well-entrenched doctrine of customary international law.[694] The ICJ held that no exception existed to state immunity, and thus in an elegant way it said *too bad* for the victims. In doing so, the Court disregarded the obligation of Germany to provide for a remedy under the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[695] which it did

685 Bundesentschädigungsgesetz (BGBl. I S. 1387) (Ger.).

686 Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. 1, ¶26 (Feb. 3, 2012).

687 2000 Federal Law (14/3206) (Ger.), art. 11.

688 Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. 1, ¶26 (Feb. 3, 2012).

689 *Id*. at ¶¶ 26 and 29.

690 *Id*. at ¶¶ 28–29.

691 *Id*. at ¶¶ 101–103.

692 *Id*. at ¶¶ 92–101.

693 *Id*. at ¶ 56 (Feb. 3, 2012).

694 *Id*. at ¶¶ 57–60, 65, 69, 89–91.

695 G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (March 21, 2006).

not even address or cite in its decision.[696] This omission raises questions about the position of the ICJ on the progressive development of international law in connection with ICL, IHL and IHRL.

9. Expansionist Approach to Extradition Jurisdiction in the United States

The proposed Federal Criminal Code of 1977, in the first version presented in the Senate[697] and the second version presented in Senate Bill 1437, § 204, as well as other sections, such as 1734 and 1751, clearly expanded the concept of extraterritorial criminal jurisdiction from what it had traditionally been in the United States.[698] At least in a federal criminal code it would all be in the same place, but no such code has been adopted. Presently, there are numerous federal statutes with many variations on the theme of jurisdiction, which make this area even more confused and confusing than other aspects of federal law. For unknown reasons no federal criminal code has been enacted in the United States, thus leaving the diverse criminal statutes in the first twenty-one titles and other criminal provisions attached to other laws not even compiled in a single section, let alone harmonized.

What is of greater concern, however, in the area of extradition is overlapping and concurrent[699] jurisdiction, which makes it difficult for courts to distinguish between crimes arising out of what may be substantially the same conduct, but which are deemed criminally punishable in more than one state. One such example is the case of *Sindona v. Grant*,[700] where the acts committed by the relator in Italy and the United States, for which he was prosecuted in the United States and for which he was requested by Italy, were substantially the same. The problems of business criminality will render it more difficult for the extradition magistrate to make the appropriate distinctions.

Federal legislation has expanded extraterritorial jurisdiction. In the more traditional criminal areas it includes: the general conspiracy statute of 18 U.S.C. § 371; RICO, 18 U.S.C. § 1961; CCE (continuing criminal enterprises) 21 U.S.C. § 848; money laundering, 18 U.S.C. §§ 1956, 1957; and cybercrime, PROTECT Act, 18 U.S.C. § 2702,[701] Cyber-Security Enhancement Act of the Homeland Security Act of 2002, 18 U.S.C. § 225,[702] Computer Crimes & Intellectual Property Section of the PATRIOT Act, 18 U.S.C. § 202–220, §814, §1030(c), (e).[703]

The expansion of extraterritorial criminal jurisdiction can be witnessed in recent years, most notably in the area of business criminality. That can be seen readily in the extension of

696 M. Cherif Bassiouni, *International Recognition of Victims' Rights*, *in* 6 Human Rights L. Rev. 203 (2006).

697 The Criminal Code Reform Acts of 1977, 95th Cong., 1st. Sess., May 2, 1977.

698 *See* Feinberg, *Extraterritorial Jurisdiction and Proposed Federal Criminal Code*, 72 J. Crim. L. 385 (1981); David L. Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern amongst Friends of America*, 1 N.W. J. Int'l L. & Bus. 1 (1979).

699 *See* Feller, *Concurrent Criminal Jurisdiction, supra* note 1; C. Shachor-Landau, *Extra-Territorial Penal Jurisdiction and Extradition*, 29 Int'l & Comp. L. Q. 274 (1980).

700 619 F.2d 167 (2d Cir. 1980).

701 Prosecutorial Remedies and Tools against the Exploitation of Children Today, Pub. L. No. 108-21, 117 Stat. 650 (2003).

702 H.R. 5710 (2002); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

703 USA PATRIOT ACT, 18 U.S.C. §2331, Pub. Law No. 107-56 (2001) (amended 2006), (amended and extended in 2011). For a detailed historical analysis of the more controversial provisions of the USA PATRIOT Act, *see* the USA PATRIOT Sunset Extension Act of 2011, S. Rep. 112–113 (Apr. 5, 2011).

Securities and Exchange Regulations;[704] the Sarbanes-Oxley Act;[705] the Foreign Corrupt Practices Act;[706] the Export Administration Act (as amended in 1979 with particular reference to the anti-boycott provisions contained therein);[707] and the expansion of antitrust legislation[708] and tax.[709]

More significantly international terrorism also prompted legislation that has extraterritorial aspects. This includes: the Homeland Security Act of 2002,[710] USA PATRIOT ACT,[711] Exec. Order No. 13,224,[712] U.S. Anti-Terrorism & Effective Death Penalty Act (AEDPA),[713] Airport and Transportation Security Act of 2001, S. 1447 (Nov. 19, 2001); Authorization for the Use

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704 *See* Glenn C. Guritzky, Note, *Securities—Transnational Application of the Anti-Fraud Provisions of the Federal Securities Laws Expanded*—SEC v. Kasser, *548 F.2d 109 (3d Cir.),* cert. denied., *431 U.S. 938 (1977)*, 8 Seton Hall L. Rev. 795 (1978); Joseph A. Marovitch, Note, Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.: *An Unjustifiable Expansion of Subject Matter Jurisdiction in a Transnational Securities Fraud Case*, 2 N.W. J. Int'l L. & Bus. 264 (1980); Jay Richardson, Note, *A Policy Approach to Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, 17 Willamette L. Rev. 263 (1980); George M. Taylor, III, Note, *Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts*, 11 Vand. J. Transnat'l L. 711 (1978). *See also* Donald H.J. Hermann, *Extraterritorial Criminal Jurisdiction in Securities Laws Regulation*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 79.

705 Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). For a detailed discussion of the regulations under the Sarbanes-Oxley Act of 2002, see Robert J. Jossen, *Dealing with the Lawyer's Responsibilities under the Sarbanes-Oxley Act of 2002: Ethical Dilemmas and Practical Considerations*, ALI-ABA Course Study Materials (2008).

706 *See* Robert J. Gareis & Paul McCarthy, *Foreign Corrupt Practices Act and Related Statutes*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 193; Mary F. Lyle, Note, *The Foreign Corrupt Practices Act of 1977: Problems of Extraterritorial Application*, 12 Vand. J. Transnat'l L. 689 (1979). *See also* S.B. 1722, 95 Cong., 1st Sess., Sept. 7, 1979.

707 *See* David Babinski, Note, *Trade—The Export Administration Act of 1979*, 4 Suffolk Transnat'l L. J. 361 (1980); Reed R. Kathrein, *Criminal Enforcement of the Export Administration Act*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 141. For recent extraterritorial applications of U.S. export control laws, see Bruce Zagaris, *The Expanding Extraterritorial Application of United States Export Law: Regulation of Foreign Translations and Criminal Prosecution of Foreign Nationals,* in the April 4, 1994 publication by the District of Columbia Bar Association.

708 *See* United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (wherein a federal court enjoined the defendant American corporations from conducting various activities in Yucatan designed to control the exportation of sisal to the United States from Mexico and to monopolize the market both inside and outside the United States, in violation of provisions of the Sherman Anti-Trust Act). *See also* Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (holding a federal court in Texas had jurisdiction over a suit by an American watch company to enjoin a U.S. citizen from using the company's trademark, registered under U.S. law, in Mexico on watches made in Mexico); Joseph P. Giffin, Perspectives on the Extraterritorial Application of U.S. Anti-Trust and Other Laws (1979); Theodore L. Banks, *International Activities and Crime Considerations under United States Antitrust Laws*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 51; Catherine V. Mannick, Note, *Antitrust: British Restrictions on Enforcement of Foreign Judgments*, 21 Harv. Int'l L. J. 727 (1980); Pierre Vogelenzang, Note, *Foreign Sovereign Compulsion in American Anti-Trust Law*, 33 Stan. L. Rev. 131 (1980).

709 *See* David Passius, *Tax Crime and Extraterritorial Discovery*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 105.

710 Pub. L. No. 107-296, 116 Stat. 2135.

711 18 U.S.C. § 2331, Pub. Law No. 107-56 (2001) (amended 2006) (amended and extended in 2011). For a detailed historical analysis of the more controversial provisions of the USA PATRIOT Act, *see* the USA PATRIOT Sunset Extension Act of 2011, S. Rep. 112–113 (Apr. 5, 2011).

712 3 C.F.R. 13,224 (Sept. 23, 2001).

713 8 U.S.C. § 1189 (2000).

of Military Force (Congressional Joint Resolution, September 14, 2001); Legal Aspects of the Use of Military Force; and Congressional Research Service, September 13, 2001. Further, provisions of the U.S. Code that deal with international terrorism include the following subjects: Air Commerce and Safety,[714] Aircraft & Motor Vehicle Crimes,[715] Biological Weapons,[716] Chemical Weapons,[717] Civil Disorders,[718] Defense Against Weapons of Mass Destruction,[719] Disaster Relief,[720] Foreign Intelligence Surveillance,[721] International Emergency Economic Powers,[722] National Emergencies,[723] Quarantine and Inspection,[724] Rewards for Information Concerning Terrorist Acts and Espionage,[725] Sabotage,[726] Stored Wire & Electronic Communications & Transactional Records Access,[727] Terrorism,[728] War and National Defense,[729] War Powers Resolution,[730] and Wire & Electronic Communications Interception & Interception of Oral Communications.[731] The Omnibus Diplomatic Security and Antiterrorism Act of 1986[732] prohibits violent terrorist acts against U.S. nationals abroad.[733] The subjects covered include:[734] foreign intelligence surveillance;[735] killing and assaulting federal officials;[736] killing and assaulting family members;[737] terrorist violence against U.S. nationals;[738] consumer

714 49 U.S.C. §§ 44901–44910 (2000).

715 18 U.S.C. §§ 32–37 (2000).

716 18 U.S.C. §§ 175–178 (2000).

717 18 U.S.C. §§ 229–229F (2000).

718 18 U.S.C. §231–233 (2000).

719 50 U.S.C. §§ 2302–2371 (2000).

720 42 U.S.C. §§ 5122–5208 (2000).

721 50 U.S.C. §§ 1801–1862 (2000).

722 50 U.S.C. §§ 1701–1707 (2000).

723 50 U.S.C. §§ 1601–1651(2000).

724 42 U.S.C. §§ 264–272 (2000) (amended, in part, by the Public Health Security and Bioterrorism Prevention Act of 2002, 107 P.L. 188; 116 Stat. 594 in 2002).

725 18 U.S.C. §§ 3071–3077 (2000).

726 18 U.S.C. §§ 2151–2156 (2000).

727 18 U.S.C. §§2701–2712 (2000) (as amended, in part, in 2001 by the USA PATRIOT Act, 107 P.L. 56, as further amended, in part, in 2006 by the USA PATRIOT Improvement and Reauthorization Act of 2005).

728 18 U.S.C. §2331–2339D (2000) (as amended, in part, in 2006 by the USA PATRIOT Improvement and Reauthorization Act of 2005) (as further amended 2009).

729 50 U.S.C. (2000).

730 50 U.S.C. §§ 1541–1548 (2000).

731 18 U.S.C. §§ 2510–2522 (2000).

732 Pub. L. No. 99-399, 100 Stat. 896, § 1201 (1986), and amended Pub.L. 102-572, Title X, §1003(a)(1), Oct. 29, 1992, 106 Stat. 4521; renumbered § 2332 and amended Pub.L. 102-572, Title X, § 1003(a)(2), Oct. 29,1992, 106 Stat. 4521; Pub.L. 103-322, Title VI, § 60022, Sept. 13, 1994, 108 Stat. 1980; Pub.L. 104-132, Title VII, § 705(a)(6), Apr. 24, 1996, 110 Stat. 1295.

733 *See generally* George, *Federal Anti-terrorist Legislation*, *supra* note 1, at 31–34 (noting that the legislation was the first clear adoption of the passive personality by Congress); George, *Federal Anti-Terrorist Legislation*, *in* Nanda & Bassiouni U.S. Guide, *supra* note 1, at 15.

734 *See* George, *Federal Anti-Terrorist Legislation*, *supra* note 1.

735 50 U.S.C. §§ 1801–1811 (2000).

736 18 U.S.C. §§ 351, 1111, 1112, 1113, 1114, 1751(a)(c)(e)(f)(k) (2000); 3 U.S.C. §§ 105 (a)(2)(A), 106(a)(1)(A) (2000 & Supp. 2004); 28 U.S.C. § 451 (2000).

737 18 U.S.C. § 879 (2000).

738 18 U.S.C.A. § 2331 (2000) (as amended in 2000).

product tampering;[739] violence against foreign officials;[740] aircraft hijacking;[741] kidnapping of federal officials;[742] protection of U.S. property abroad;[743] protection of foreign diplomatic premises within the United States;[744] destruction of, trespass on, or occupation of other public premises;[745] illegal trafficking in nuclear materials;[746] destruction of energy facilities;[747] smuggling of firearms and their unlawful possession in the United States;[748] and unlawful use of the mails for explosives.[749] Of significant interest is the expansion of U.S. jurisdiction in the area of international crimes, particularly because the United States has been somewhat reluctant to recognize the theory of universality.[750] The United States has recently enacted or proposed legislation to grant jurisdiction over offenses violating human rights laws.[751] Nevertheless, without referring to the theory of universality—except in the proposed Senate Bill 1437, where reference is made to the crimes of hijacking under the Tokyo,[752] Hague,[753] and Montreal[754] Conventions; the protection of diplomats;[755] and grave breaches of the four Geneva Conventions of 1949[756]—it was never quite clear why the United States has been reluctant to recognize the theory of universality, or at least to recognize the possibility that its courts may exercise jurisdiction over international crimes. Such recognition was stated rather clearly in *Ex parte Quirin*[757] in 1948, in which Chief Justice Stone stated, "From the very beginning of its history, this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy

739 18 U.S.C.A. § 1365 (2000) (as amended in 2002).

740 18 U.S.C.A. § 1116(b)(3) (2000).

741 18 U.S.C.A. §§ 31, 32 (2000).

742 18 U.S.C.A. § 1201(a)(5)(2000) (as amended in 2003).

743 18 U.S.C. § 1363 (2000) (as amended in 2001).

744 Vienna Convention on Diplomatic Relations, arts. 22(2), 30(1), 30(2), Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, U.N.T.S. 95 (*entered into force* with respect to the United States Dec. 13, 1972).

745 18 U.S.C. §§ 793(a)–(g) (2000); 18 U.S.C. §§ 2152–2155 (2000); 18 U.S.C. §§ 1361–1363 (2000); 18 U.S.C. § 970 (2000).

746 42 U.S.C. §§ 2077, 2095, 2122, 2131, 2201 (i) or (o), 2272, 2273, 2274, 2275, 2276, 2277, 2278a, 2278b (2000); 42 U.S.C. §§ 2283(a)(b), 2284 (2000).

747 18 U.S.C. § 1365 (2000).

748 18 U.S.C. §§ 545, 546 (2000).

749 18 U.S.C. § 1715 (2000).

750 *But see* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985) (holding Israel could assert universal jurisdiction as grounds for extradition of a U.S. citizen charged with war crimes and crimes against humanity), *cert. denied,* 475 U.S. 1016 (1986). *See In re Extradition of* Rafael Eduardo Pineda Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 17, 1998); *In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).

751 Human Rights Enforcement Act of 2009, Public Law 111-122, 123 Stat. 3480 (Dec. 22, 2009) (providing jurisdiction over genocide and for the creation of a criminal division in the Department of Justice to enforce human rights law); Child Soldiers Accountability Act of 2008 Pub. L. No. 110-340, 122 Stat. 3735 (2008) (amending INA §§ 212(a)(3), 237(a)(4), 8 U.S.C. § 1182(a)(3), 1227(a)(4)).

752 Tokyo Convention, *supra* note 226.

753 Hague Convention, *supra* note 214.

754 Montreal Convention, *supra* note 215.

755 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, G.A. Res. A/3166 (XXVII), T.I.A.S. No. 8532.

756 *See supra* note 453.

757 *Ex parte* Quirin, 317 U.S. 1 (1948). *See* Coleman v. Tennessee, 97 U.S. 509 (1878) (concerning jurisdiction over war crimes).

nations as well as of enemy individuals."[758] The United States further accepted this principle in the cases of *Hirota v. MacArthur*,[759] *In re Yamashita*,[760] and *Demjanjuk v. Petrovsky*.[761] In *Calley v. Callaway*,[762] the court did not refer to the violations of the Uniform Code of Military Justice as international crimes. Interestingly, however, U.S. legislation permits jurisdiction for a tort claim resulting from a violation of international human rights (torture).[763]

In *United States v. Hollinshead*,[764] the Ninth Circuit, relying on 18 U.S.C. § 2314 concerning interstate transportation of stolen property, applied that law in a situation concerning pre-Columbian art that was illegally exported from Guatemala. The act also constituted a violation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[765] The court discussed whether Guatemalan or U.S. law should apply, as if it were a matter of choice of law, and although the court ultimately applied U.S. law, it was interesting that the court took cognizance of the possibility of applying the law of Guatemala. The issue with respect to extradition is not as much which law to apply,[766] but whether the United States will take cognizance of a criminal act committed outside of its territory and pass judgment upon it.[767]

The United States has long held the position that it feels no compunction in exercising its extraterritorial jurisdiction for matters that may, in its legislative judgment, be deemed as affecting the interests of the United States.[768] The problem, however, arises with respect to an extradition request made to the United States. Clearly, if the United States recognizes theories of extraterritorial jurisdiction, it would be difficult to deny the same to a requesting state. The critical issue will arise whenever there is concurrent jurisdiction or a clear conflict in the jurisdictional theories of the requesting and requested states. The position of the United States is

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758 *Quirin*, 317 U.S. at 27.

759 Hirota v. MacArthur, 338 U.S. 197 (1948).

760 *Ex parte* Quirin, 327 U.S. 1 (1946).

761 Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1986), *cert. denied*, 475 U.S. 1016 (1986). *See In re Extradition of* Rafael Eduardo Pineda Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 17, 1998); *In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).

762 Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976). *See also* Gary Komarow, *Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 Int'l & Comp. L. Q. 21 (1980).

763 *See* United States v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), 542 U.S. 692 (2004), *vacated & remanded en banc*, 374 F.3d 1384; Rasul v. Bush, 542 U.S. 466 (2004); Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l L. J. 53 (1981). *But see* Sale v. Haitian Centers Council, 113 S. Ct. 2549, 2567 (1993) ("Acts of Congress normally do not have an extraterritorial application unless such an intent is clearly manifest").

764 United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

765 Nov. 14, 1970, 16th General UNESCO Conference, *reprinted in* 10 I.L.M. 289 (1971).

766 Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case W. Res. L. Rev. 44 (1974).

767 *See* Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974).

768 *See, e.g.,* Ford v. United States, 273 U.S. 593 (1927); *Strassheim,* 221 U.S. 280; United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988) (holding non-objection of foreign states to extradition of relator precluded his objection to the extradition); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977); United States *ex rel.* Eatessami v. Marasco, 275 F. Supp. 492 (S.D.N.Y. 1967). *But see* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) (holding that kidnapping of a foreign national by U.S. government agents may violate international law protecting state sovereignty). United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (holding that the extradition with Mexico did not specifically exclude kidnapping—a questionable conclusion). *See* Ch. V.

essentially embodied in *Valentine v. United States ex rel. Neidecker*,[769] which is that the language of the treaty will control. In that respect, contemporary treaties merely state that extradition will be granted whenever the requesting state will have jurisdiction.[770] That type of language causes a U.S. court to defer to the jurisdictional theory of the requesting state, irrespective of the theory itself and of whether the United States recognizes the theory. Such was the case in *In re Assarsson*,[771] where Sweden relied on its active personality or nationality theory of jurisdiction in seeking the relator for a crime committed in Denmark.

Contemporary expansion in extraterritorial jurisdiction in recent "antiterrorist" legislation in the United States[772] as well as the expanded interpretation given to the notion of criminal conspiracy, has raised questions with respect to the recognition of these theories in other legal systems, particularly those that are not common law–based. It could be argued that such theories raise a question as to the existence of reciprocity.[773] Furthermore, foreign courts, in interpreting treaties with the United States, may not necessarily give recognition to an extradition request based on a crime charged or committed under a U.S. law that relies on one of the expanded theories of jurisdiction. The problems in this context are twofold. The first problem concerns the interpretation of the relevant treaty[774] and whether the term "jurisdiction" or "territory" will mean the same thing[775] and will be interpreted in light of the jurisprudence existing at the time of the treaty or at the time of the request for extradition. The second problem would be whether the foreign court will look at the jurisprudence of the United States or at its own jurisprudence to determine the meaning and scope of the terms "jurisdiction" or "territory," which terms are found and used interchangeably in all treaties.[776]

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769 Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

770 *See,* e.g., Convention on Extradition, Oct. 24, 1961, U.S.–Swed., art. III, 14 U.S.T. 1845, T.I.A.S. No. 5496.

771 *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980), *cert. denied,* 451 U.S. 938 (1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999). *But see* Emami v. United States, Dist. Ct. N.D. Cal., 834 F.2d 1444 (9th Cir. 1987). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir., Dec. 10, 1997); *In re Extradition of* Lehming, 951 F. Supp. 505 (D. Del. 1996); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

772 In *United States v. Yunis*, 681 F. Supp. 896 (D. D.C. 1988), the defendant was charged under these Acts, which embody the obligation of the United States under the 1969 Hague and 1971 Montreal Conventions on Hijacking and Sabotaging of aircraft. The defendant was seized in international waters outside Cyprus and abducted, and brought to the United States against his will. Yunis was also charged under the Hostage Taking Act 18 U.S.C. § 1203 (1984), which also authorizes extraterritorial criminal jurisdiction. This legislation gives effect to the 1979 International Convention Against the Taking of Hostages. The Circuit Court in *United States v. Yunis*, 942 F.2d 1086 (D.C. Cir. 1991), held that the district court had proper *in personam* jurisdiction and subject-matter jurisdiction. Yunis was convicted of conspiracy, 18 U.S.C. § 371 (1984); hostage taking, 18 U.S.C. § 1203 (1984); and hijacking, 49 U.S.C. App. § 1472 (1974). The court's reasoning was unclear as to the jurisdictional basis it relied upon.

773 *See* Ch. II, Sec. 4.5 and Ch. V.]

774 *See* Ch. II, Sec. 4.3.

775 *See supra* Sec. 1.

776 This position was argued but rejected in the extradition (requested by the United States of Switzerland) of Roberto Suarez, Jr., which was decided by the Swiss Federal Court for the Canton of Ticino on August 3, 1982, in which extradition was granted to the United States on the basis of an alleged conspiracy committed in Colombia, where all the acts took place, but whose intended effect was to be in the United States.

The trend in the expansion of the United States' extraterritorial jurisdiction conflicts with those of European legal systems, which have traditionally opposed jurisdictional expansions. The modern European trend is, however, toward eliminating territorial boundaries.[777]

At the international level, there is also a trend to enhance the duty to prosecute or extradite and to give greater recognition to the principle of universality for certain international crimes. Obviously, as more international criminal law conventions provide for a duty to prosecute or extradite, problems will arise with respect to states that will not carry out their obligations in this respect. By expanding criminal jurisdiction, certain states, such as the United States, will be in a position to preempt these problems by asserting jurisdiction on an alternative basis. This, of course, does not solve the issue of securing *in personam* jurisdiction over the relator and may induce states to resort to unlawful seizures of the persons sought. The United States has, since the 1960s, embarked on a course of ever-expanding extraterritorial jurisdiction in almost all areas of the law.[778] However, since the 1980s it has been restricting the extraterritorial application of constitutional guarantees to U.S. citizens abroad and constitutional limitations on U.S. agents acting abroad.[779]

This dual track of expanded criminal jurisdictions and limitations on constitutional rights and restrictions are seen in the United States as a proper response to certain forms of criminality, particularly drug trafficking and terrorism. The result is a reduction in the standards of integrity of the U.S. criminal justice system.

Such a policy also leads to potential conflicts with other states.[780] In the absence of an international court with jurisdiction to handle all such matters, or other means to resolve jurisdictional conflicts, states will have no alternative but to compete with one another, and that may even lead to situations that threaten the peace and security of humankind. One such example is the conflicts among the United States, the United Kingdom, and the Libyan Arab Jamahiriya over the extradition of two persons charged with the sabotage of Pan Am Flight 103 out of London, which blew up over Lockerbie, Scotland, killing 259 persons.[781] The United States

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777 *See* Ch. I. For text of the Schengen Agreement, see H. Meijers et al., Schengen (1991). For the trend to establish a Europe-wide criminal jurisdiction area, see Régis de Gouttes, *Vers un Espace Judiciaire Pénal Pan Européen?*, *in* Recueil Dalloz Sirey (1991); Régis de Gouttes, *Variations sur L'espace Judiciaire Pénal Européen, in* Recuil Dalloz Sirey (1990).

778 As described by Professor Blakesley:

> United States courts have recently expanded the traditional bases of jurisdiction over extraterritorial crimes. The major impetus behind that expansion is the burgeoning problem of extraterritorial conspiracies to import narcotics into the United States. The courts have sought to discourage prophylactically narcotics importation by asserting jurisdiction over even thwarted conspiracies. Although that judicial approach might have great practical merit, it also creates a conceptual crisis: thwarted extraterritorial narcotics conspiracies come close to fitting within several of the traditional bases of extraterritorial jurisdiction, but they actually fit none. As a result, the courts have tugged and stretched the traditional bases of jurisdiction in order to obtain jurisdiction over the anomalous case of the thwarted extraterritorial narcotics conspiracy. In so doing, however, the courts have muddled the language of international law and created the risk that extradition in such cases will be denied.

Blakesley, *Conceptual Framework for Extradition, supra* note 1, at 685–686.

> Various bodies of law limit a state's authority to apply domestic law to events occurring in a foreign state. They include public international law; jurisdictional limitations in domestic law; and the law of the foreign state itself, which may preclude enforcement of the judgment rendered by the state assuming jurisdiction, or more importantly for the purposes of this article, may serve as a basis for denying extradition.

Id. at 686–687 (citations omitted).

779 *See* Ch. V (regarding the discussion of unlawful seizures and abductions).

780 *See* David M. Kennedy et al., *The Extradition of Mohammed Hamadei*, 31 Harv. Int'l L. J. 5 (1990).

781 *See In re* Pan Am. Corp., 950 F.2d 839 (2d Cir. 1991).

and the United Kingdom sought the extradition of the two persons indicted in the United States and Scotland. But Libya contended that it had the right, even the duty, to first prosecute them in Libya, in accordance with the 1971 Montreal Convention.[782] The United States and the United Kingdom sought and obtained an unprecedented Security Council Resolution 748,[783] which ordered Libya to surrender these individuals or risk sanctions under Chapter VII of the Charter. Prescinding from the unprecedented nature of the resolution's contents, Libya brought an action against the United States and the United Kingdom before the ICJ. The ICJ decided that the Security Council had the power to decide on its own competence under Chapter VII of the UN Charter.[784]

10. Recommendations for a Policy-Oriented Inquiry into the Problems of Jurisdiction and Jurisdictional Priorities in Extradition and World Public Order

When a state requests another state to surrender a fugitive to its jurisdictional control, it asserts that: (1) it has jurisdiction over the subject matter of the conduct allegedly performed by the actor; (2) it is a competent forum to prosecute the offender; and (3) when the actor is surrendered, he/she will be properly submitted to its judicial authorities for the exercise of their competent jurisdictional authority.[785]

These representations by the requesting state presuppose that the requested state: (1) is competent to exercise *in personam* jurisdiction over the relator; (2) has legislative authority to regulate the type of conduct allegedly committed by the relator, and such conduct is deemed in violation of that state's laws; and (3) is the competent forum to prosecute the offender. Concerning proper legislative authority, the requesting state may rely on any one of the theories discussed

782 *See supra* note 215. For an earlier position, see Christopher Schreuerer, *Concurrent Jurisdiction of National and International Tribunals*, 13 Houston L. Rev. 508 (1976).

783 *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 293, at 169–190.

784 A decision on the merits of the case brought by Libya against the United Kingdom and the United States is still pending before the International Court of Justice. Provisional measures were denied on April 14, 1992. In denying provisional measures, the court issued two sets of opinions: one in the proceedings against the United Kingdom, the other in the proceedings against the United States. *See* Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of April 14, 1991, [1992] I.C.J. Reports 3; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of April 14, 1992, [1992] I.C.J. Reports 114. The two sets of opinions are substantially identical. Other relevant documents in the case are reprinted in 31 I.L.M. 717–758 (1992). Commenting on the case generally, see Fiona Beveridge, *The Lockerbie Affair*, 41 Int'l & Comp. L.Q. 907 (1992); Vera Gowland Debbas, *The Relationship between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 Am. J. Int'l L. 643 (1994); Thomas M. Franck, *Editorial Comment, The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 Am. J. Int'l L. 519 (1992); Bernhard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case*, 4 European J. Int'l L. 184 (1993); Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 Mich. J. Int'l L. 222 (1993); Robert F. Kennedy, Note, *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 Va. J. Int'l L. 899 (1993); Vaughn Lowe, *Lockerbie—Changing the Rules during the Game*, Cambridge L.J. 408 (1992); Gerald P. McGinley, *The I.C.J.'s Decision in the Lockerbie Cases*, 22 Ga. J. Int'l & Comp. L. 577 (1992); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 Am. J. Int'l L. 83 (1993); Alfred P. Rubin, *Libya, Lockerbie and the Law*, 4 Diplomacy & Statecraft 1 (1993); *cf.* Alfred P. Rubin, *Viewpoints: UN Sanctions on Libya*, 54 Int'l Practitioner's Notebook 18 (Aug. 1992); Christian Tomuschat, *The Lockerbie Case before the International Court of Justice*, 48 Int'l Comm'n Jurists Rev. 38 (1992).

785 *See* Ch. V (concerning unlawful seizures and irregular rendition).

above, and its national jurisdiction will be recognized, unless it conflicts with an international law norm, in which case the latter prevails. In the event that the laws of the requesting state conflict with the laws or public policy of the requested state, the question becomes whether the laws or policy of either state conflict with international law. If neither state's laws conflict with international law, but only conflict with each other, the requested state will prevail. In any event, an offender should not benefit from a conflict of laws to evade criminal responsibility. Thus, conflict-of-laws questions must be resolved on the basis of the policy of *aut dedere aut judicare.*[786]

As to the requirement regarding the competent forum for prosecution, international criminal law recognizes three theories that can be relied upon. They are *forum domicilius*,[787] *forum delicti commissis*,[788] and *forum deprehensious*.[789] The determination of a proper prosecution forum is a policy-oriented inquiry within the framework of conflict-of-laws resolution.

The first formal contact between the requesting and requested state is receipt of the extradition request by the requested state, which first considers whether the requesting state: (1) has jurisdiction over the subject matter; (2) is the proper prosecution forum; and (3) would have *in personam* jurisdiction once the relator is delivered. If a similar request is made by a second state claiming jurisdiction over the same subject matter arising either out of the same conduct allegedly performed by that relator, which the first requesting state equally claims, or by reason of another conduct allegedly committed by the same relator against the second requesting state, then the requested state has to decide the priority among these competing requests. Furthermore, the requested state may also have an interest in prosecuting the relator, either by reason of the same conduct alleged in one or both requests, or by reason of other alleged criminal conduct. In this case, it must weigh its interests and those of the requesting state or states.

In the case where there is only one extradition request and the requested state has no concurrent interest or claim to the same relator, six policy-oriented questions are proposed:

1. Does the requesting state properly assert jurisdiction over the subject matter and the relator?

2. Does such jurisdiction exist in law and in fact?

3. Is such a jurisdictional claim contemplated by the treaty or the practice of reciprocity or comity upon which the request is made?

4. Does the jurisdictional claim arise under (a) international law; (b) international law as applied by the requesting state; or (c) the national law of the requested state?

5. Does the jurisdictional basis claimed conflict with the public policy of the requested state or is it so repugnant to its system as to deny it recognition?

6. Is the jurisdictional claim asserted by the requesting state violative on its face of the very basis on which it allegedly rests, whether it be international law, municipal law, or the application of international law in the municipal law of either the requesting or requested state?

If there is more than one extradition request for the same relator, the requested state must first satisfy itself concerning the set of policy-oriented questions stated above. Thereafter, the state of refuge must rank such requests. Four policy considerations for ranking are suggested:

1. The first received will be the first granted.

2. The more serious offense receives priority.

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786 This maxim means that a state must either prosecute or extradite. *See* Bassiouni & Wise, *Aut Dedere Aut Judicare*, *supra* note 293.

787 This term refers to the forum wherein the defendant is domiciled.

788 This term refers to the forum wherein the crime was committed.

789 This term refers to the forum wherein the defendant was arrested.

3. The most significant state interest affected by the alleged crime receives priority.

4. Rank depends upon subject matter jurisdiction. That is, a sub-ranking based on jurisdictional theory could be applied as follows: (a) the territorial theory has precedence over all others, (b) second in rank is the combination of two or more theories asserted by one requesting state (such as universality and passive personality or passive and active personality); then should follow in order (c) the universality theory, (d) the protective theory, (e) the nationality theory, and (f) the passive personality theory.

There are no clear guidelines in extradition law and practice as to the applicable international law rule in concurrent jurisdiction claims. The outcome is uncertainty of prosecution[790] and potential conflict between the interested states.

International law recognizes the equal sovereignty of all nation-states in the world community and does not grant any of them a hierarchical authority over the other. Nonetheless, the requested state must make a policy decision as to the applicability and propriety of the requesting state's three jurisdictional requirements. Furthermore, in the event of multiple requests, the requested state is in a position to give priority to the request of one authoritative decision-maker over the other, and thus it exercises a hierarchical authority over coequal participants in the world community system. The requested state is, therefore, in a vertical relationship vis-à-vis the requesting state and pursues that role with respect to conflict-of-laws issues arising out of the application of multiple theories of jurisdiction.[791] The significance of this decision-making function is manifest whenever the requested and requesting states have different interpretations and policies as to the theories of jurisdiction in question and their application.

International criminal law has come to recognize, in varying degrees and with different applications, several theories of jurisdiction. In extradition practice, jurisdictional issues are determined by the requested state. That fact may not be as disconcerting in practice as it appears in theory, because there is an anticipation that requested states will apply their domestic theories and policies. This realization ignores the broader theories with respect to the international nature of the process. Such implications require that national theories of jurisdiction and their application should be subordinated to international law rules. Thus, no participant in the world constitutive process will be in a hierarchical position with respect to another coequal participant.[792]

The recognition of the coequal sovereignty of all states precludes harmony among the conflicting national laws of different states, and conflicts of interpretation are difficult to resolve. Because, however, there is no such harmony in national approaches to jurisdiction, there is no alternative to the establishment of a hierarchical norm in theories of jurisdiction to avoid conflict between coequal authoritative decision-making processes. Such a hierarchical norm would be applied by each state, and it would not, therefore, detract from the sovereignty of any other state. Among the several problems raised by this subject is, of course, the inability of states, in the presently constituted world social order, to develop this type of alternative policy solution. The consequences arising from these problems are reflected in clashes between these horizontally related decision-making processes. The potential effect of such clashes is the creation of conflict situations leading to threats and disruptions of minimum world order.

These problems of conflict of criminal jurisdiction are largely due to the narrow and jealously guarded concept of sovereignty. The battles over where to prosecute an accused criminal

790 *See* David A. Clanton, Comment, *Extradition: Concurrent Jurisdiction and the Uncertainty of Prosecution in the Requested Nation*, 14 Wayne L. Rev. 1181 (1968).

791 Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 Temp. L.Q. 295 (1959).

792 Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 (1956).

overshadow the real substance of the issue: prosecuting or punishing offenders. The alternative to the present situation is to seek the proper applicable substantive law rather than to dispute which forum should prosecute an accused criminal.

The multiplicity of jurisdictional theories results not only in conflict-of-laws problems, but also creates two other sets of problems: (1) an impediment to just and effective criminal law enforcement, whether nationally or internationally; and (2) the subjection of accused offenders to the risk of multiple prosecutions and other violations of their human rights. Indeed, under the passive personality doctrine or the nationality doctrine, more than one state can prosecute and punish a person for the same offense and subject that person to multiple jeopardy.

The interest in preserving world public order does not conflict with concern for preserving national public order, nor will either one of these interests be impaired by preserving basic human rights. None of these, however, can be served without curtailing national sovereignty concepts in matters of extradition.[793]

11. Overlapping Jurisdictional Claims and Extradition Priorities

There are two issues that present themselves in connection with extradition priority. The first is when more than one state seeks the extradition of the same person from a requested state. The multiple requests from different requesting states can be for the same set of facts, and this situation arises whenever a particular crime falls with the jurisdiction of more than one state. The second arises when the two requests are made for separate facts that are unrelated. In addition, a separate issue arises when a request is made by a state and the requested state also claims jurisdiction with respect to the same set of facts, which constitute a crime in the requested state as well as in the requesting state. With respect to the latter, it is common for the requested state having jurisdiction over crimes arising out of a certain set of facts that are also claimed to constitute a crime or crimes in another jurisdiction, namely that of the requesting state, to claim priority in prosecution based either on territoriality, nationality, passive personality, or protected interest, as these theories of jurisdiction are discussed in this chapter.

In these situations the requested state conventionally exercises jurisdictional priority, having custody of the accused. But that does not exclude the possibility of extraditing such a person to a requesting state for purposes of prosecuting the same person for a crime or crimes claimed by the requesting state. Usually this means that the requested state, which seeks to exercise its jurisdictional priority, would prosecute the person and then extradite him/her conditionally upon that person being tried in the requesting state subject to returning that person after the end of the trial for that person to execute his/her sentence in the requesting state exercising its jurisdictional priority. Such a person will then execute his/her sentence in the original requested state, and then upon completion of the execution of the sentence be transferred to the original requesting state for the execution of the second sentence. This situation arose in connection with the former head of state of Panama, Manuel Noriega, who was first prosecuted and sentenced in the United States and then upon completion of his sentence was extradited to France.[794] After execution of his sentence in France, he was sought for extradition by Panama, and the French court of appeals extradited him to Panama after a conditional release was granted.[795]

As to situations involving competing jurisdictional claims between a requesting state and the requested state, as stated above, national jurisdiction will usually be deemed a priority over the

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793 *See* M. Cherif Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, *in* Aktuelle Probleme des Internationalen Strafrechts (D. Oehler & P.G. Potz eds., 1970); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 Vand. J. Transnat'l L. 151 (1992).

794 United States v. Noriega, 694 F. Supp. 2d 1268 (S.D. Fla. 2007).

795 Cour d'appel [CA] Paris, 5ème ch., Sept. 21, 2011, ____ JCP____, (n. 2011/06023).

request by a requesting state, particularly if the facts upon which the person has been requested are the same in both the requested and requesting states without further justification. In *United States v. Cotroni*, the Canadian Supreme Court held that two Canadian citizens could be extradited to the United States to face heroin trafficking charges.[796] The court held that although the requested state may have an interest in prosecuting an individual, "It is often better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside."[797] In that case, the court held that, on the balance of interests, extradition was warranted. However, in *Ferguson v. Attorney General of Trinidad & Tobago*, the Supreme Court of Trinidad and Tobago ruled that that country had priority over the United States, the requesting state, as the crime was committed in Trinidad and Tobago and the effects were greatest there. Although the United States could have prosecuted the individuals for laundering the money in the United States, the balance test borrowed from *Cotroni* militated against extradition.[798]

796 [1989] 1 S.C.R. 1469.

797 *Id.*

798 *Ferguson v. Atty. General of Trinidad and Tobago*, H.C.A. No. 4144 (High Court of Justice, Nov. 7, 2011).

Chapter VII

Substantive Requirements: Dual Criminality, Extraditable Offenses, Specialty, and Non-Inquiry

Contents

1. Reciprocity: The Underpinning of Substantive Requirements

The practice of extradition, as discussed in Chapter I, developed before treaties superseded custom as its most important source. As the practice evolved over the centuries it settled on a number of similar substantive requirements, exclusions, exceptions, defenses, and procedures.[1] These similarities were later reflected in treaties, national legislation, jurisprudence, and doctrine. The cumulative effect of these different sources make up what is regarded as the customary international law of extradition.

The two most important features of modern extradition are its legal nature and its observance of the Rule of Law. Although the obligation to extradite in the absence of a treaty was supported by Jean Bodin,[2] Hugo Grotius,[3] and other publicists discussed in Chapter I, and is expressed in the maxim *aut dedere aut judicare*,[4] the duty to extradite in the absence of a treaty is still not sufficiently recognized as being part of customary international law (CIL). The practice of states reflects the position that no clear international legal obligation or duty to surrender a fugitive from justice exists in the absence of a treaty or reciprocity, except with respect to international crimes.[5]

Extradition is essentially a process of inter-governmental legal assistance for the prosecution and punishment of persons accused of a crime or convicted of a crime in another state. It is also the process by which a person is surrendered by a state to an international criminal tribunal. It should be noted that with respect to international criminal tribunals the process is referred to as "surrender."[6]

The increased concerns for human rights protection expressed through international conventions, national constitutions, and national laws, as well as in multilateral and bilateral

1 *See* Ch. VIII.

2 Jean Bodin, Les Six Livres de la République (Paris 1577).

3 Hugo Grotius, De Jure Belli ac Pacis, Libri Tres (Paris 1625) ("ut non stricte populus aut rex ad dedendum teneatur, sed ut diximus, ad dedendum aut puniendum . . . est enim disjunctiva obligatio.").

4 M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Prosecute or Extradite (1995).

5 *See* Ch. I.

6 *See* Ch. I, Sec. 7.

extradition treaties, have modified the contractual concept of extradition that prevailed in the nineteenth century.[7] Nevertheless, the substantive requirements of extradition discussed in this chapter derive essentially from the traditional conceptual basis for the practice, namely that extradition is a contractual relationship between governments that recognizes the observance of individual rights required by international law. These rights inure to the benefit of the relator, who can claim their application in the national legal systems of the requested and requesting states. Standing to claim a legal right arising under international law, or by virtue of a treaty, is subject to national law, however. Abridgement of such rights gives rise to legal remedies under international law.[8]

The basic requirements applicable to extradition are alternatively referred to as "principles" or "rules" without regard to the legal implications that such a choice of words may have in a given national legal system. These requirements are usually embodied in bilateral extradition treaties, but they are also found in multilateral treaties and in national legislation. More important, they are a part of CIL.[9]

The relationship between treaties and national legislation depends on national constitutional and other national legal provisions applicable to extradition in accordance with the hierarchy of sources of law in a given legal system. The U.S. Constitution provides for the supremacy of treaties, which rank with the Constitution as the supreme law of the land.[10]

The substantive requirements for extradition are: dual criminality, extraditable offenses, specialty, and non-inquiry. These substantive requirements do not share the same characteristics, but are predicated on reciprocity in the sense of equivalent mutual treatment deriving from the mutuality of legal obligations. As a result, these substantive requirements are, in many respects, interrelated. Thus, dual criminality and extraditable offenses, which require that the underlying act be recognized as a crime in both states, reflect the premise of reciprocity upon which these substantive requirements are based. The same applies to specialty, which requires the requesting state to observe the limitations provided by the requested state in connection with the charges and penalties for which the relator can be prosecuted or the type of punishment he/she can receive. The "rule of non-inquiry,"[11] as it is frequently referred to in U.S. jurisprudence, is also based on the premise of reciprocity, in that states shall not sit in judgment of each other's legal systems.[12]

Reciprocity does not require complete parallelism between the obligations of states, but rather the balanced equivalence of reciprocal obligations. Thus, whether a treaty mentions certain jurisdictional theories or not, a requesting state may rely on a jurisdictional theory that is not recognized by the requested state, and vice versa. For example, states recognize or differently rely on extraterritorial jurisdiction principles, namely active personality, passive personality, protected interest, and universality.[13] The requested state may rely on reciprocity to deny the

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7 *See* Ch. I.

8 *See infra* Sec. 6 (Specialty).

9 For the question of the applicability of customary international law to U.S. courts, *see* Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999); *contra* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 816 (1997).

10 U.S. Const. art. VI, § 1, cl. 2. *See* Reid v. Covert, 354 U.S. 1 (1957); Restatement (Third) of the Foreign Relations Law of the United States § 117 (1987) [hereinafter Restatement (Third)]. *See also* M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DePaul L. Rev. 1169 (1993).

11 *See infra* Sec. 8.

12 It should be noted (as discussed below in Sec. 4) that this rule is not an absolute bar to a U.S. court's inquiry into certain practices that constitute a violation of international law or a violation of U.S. law and public policy.

13 *See* Ch. VI.

request on the notion that because it could not prosecute on such a jurisdictional theory, it cannot grant extradition for prosecution on the said theory. To avoid such problems, newer U.S. extradition treaties make specific mention of the fact that the requested state shall grant extradition when the offense in question is within the jurisdiction of the requesting state. This avoids making jurisdiction a substantive requirement for extradition, as is the case with dual criminality.

Another issue of reciprocity is what triggers the request, namely an arrest warrant, a charging instrument (such as an indictment or its counterpart), or a conviction. A treaty, however, may use the term "charge," which could either mean an arrest warrant or a formal charging instrument. Whether the term "charge" is one or the other is essentially a question of treaty interpretation, as is the question of whether it could be considered as falling in the area of dual criminality depending upon the determination of the first question. In that context, however, the issue of reciprocity also arises, as has been argued by this writer and co-counsels in *In re Assarsson*.[14] Nonetheless, in *Assarsson* the court did not interpret the treaty provisions as requiring an absolute symmetry. Thus, it was possible for Sweden to rely on the nationality principle of jurisdiction, which the United States could not have invoked in its extradition request to Sweden because it is not applicable in U.S. law.[15]

A requested state may consider that a certain aspect of the requesting state's criminal process is so alien to its system so as to lack any basis of reciprocity. That could also include any particular procedure that is so patently contrary to the fundamental principles of the requested state's legal system as to cause it to refuse the use of its legal processes in furtherance of the goal of the requesting state.[16] In such a case, the requirement of reciprocity could be relied upon, and it would even be advisable to do so in order to avoid a judicial opinion containing language offensive to the requesting state. For example, a court considering a denial of extradition to a requesting state where a conviction was obtained by means of torture, or where it appears on the face of the record of the conviction that the relator had no opportunity to defend him-/herself, the court could simply conclude that the procedure in question lacked any basis of reciprocity within the U.S. legal system, rather than refusing to concede extradition by reason that the procedure in the requesting state is fundamentally violative of minimum due process standards generally accepted by civilized nations, a ruling that would be offensive to the requesting state and embarrassing to the U.S. government in its diplomatic relations with that state. The Court of Appeals of Limoges, France, took this position for different reasons in the *Bozano* case,[17] wherein Italy had requested the extradition of Bozano for the crime of murder. The relator had been acquitted in Italy by the trial court due to insufficient evidence, but subsequently was retried on appeal *in absentia* for the same crime and found guilty. The *Chambre des Mises*

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14 *In re Assarsson*, 635 F.2d 1237 (7th Cir.), *cert. denied*, 451 U.S. 938 (1980). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999).

15 *See, however, with respect to terrorism*, 18 U.S.C. § 1202(a), §§ 2331–2339 (2000), as amended by the 2001 USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 376 (2001) (amending the definition of domestic terrorism and adding the "Harboring and Concealing of Terrorists"). *See also* B.J. George, Jr., *Federal Anti-Terrorist Legislation*, *in* Legal Responses to International Terrorism: U.S. Procedural Aspects 25 (M. Cherif Bassiouni ed., 1988); M. Cherif Bassiouni, 1 International Terrorism: A Compilation of U.N. Documents (1972–2001) (2001).

16 *See* Ch. I.

17 Judgment of May 15, 1979, Cour d'Appel de Limoges, No. 37 (Fr.); 9 Eur. H.R. Rep. 297 (1987). *See also* opinion of Tribunal de Grande Instance de Paris, Ordonnance de Réfer, Jan. 14, 1980 (Fr.). Bozano was subsequently illegally seized in France and delivered to Switzerland, which extradited him to Italy. But the European Court of Human Rights condemned this practice and held for Bozano against France. *See* Ch. V, Secs. 1 (discussing the *Bozano* case).

en Accusation held that this procedure did not exist in France, and that the lack of reciprocity was a valid reason for denying extradition.[18]

Treaties that do not specifically exclude or include reciprocal extradition of nationals usually couch such provisions in optional terms. Thus, each state is given discretion in extraditing its respective nationals. In this context, a state that has agreed to such a discretionary right may also have a specific constitutional prohibition against extradition of its nationals, such as in the case of Mexico. Though the 1979 extradition treaty between Mexico and the United States contains a discretionary provision,[19] this in reality means that only the United States will extradite its nationals. This is the case because, even though the discretionary provision is reciprocal, it is known a priori, meaning that it can only be exercised by one of the parties. The argument was presented by this writer before the Fifth Circuit in *Escobedo v. United States*[20] to the effect that such a provision in the 1899 treaty between the United States and Mexico violated the principle of reciprocity because Mexico never extradited any of its citizens to the United States, while the United States extradited its citizens to Mexico. The same provision is contained in the 1979 extradition treaty between these countries. The court, however, rejected the argument, holding that it could not go behind the treaty, and that the use of discretion was a matter to be left to the executive branch.

In 1990 the United States added § 3196:

> If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition had been requested by that country if the other requirements of that treaty or convention are met.[21]

The language is quite clear that the United States does not have to extradite its nationals to a foreign country unless a treaty requires it to do so. However, § 3196 gives discretion to the secretary of state to surrender a U.S. citizen even if a treaty does not require it.[22]

Mutuality of obligation has two approaches in the context of treaties. The first is that the same treaty binds the same two countries, irrespective of whether the treaty is bilateral or multilateral. This is the approach of identical mutuality, where the obligation to extradite arises out of the same legal source and, therefore, all states concerned have symmetrical obligations arising out of the same treaty. The second is where two countries in a bilateral relationship are bound, but not by the same legal instrument or on the same legal basis. This approach of non-identical mutuality occurs when there are obligations arising from different legal sources, each binding on one of the two states, but having different sources. For example, if one country agrees to extradite on the basis of its national legislation, while another agrees to do so on the basis of reciprocity, in substance, these two countries are respectively bound to extradite but on the

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18 *Id.*

19 U.S.–Mex. Extradition Treaty (1979), 31 U.S.T. 5059, Protocol (not yet ratified), Sen. Doc. No. 106-46.

20 Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980), *cert. denied sub nom.*, Castillo v. Forsht, 450 U.S. 922 (1981), *reh'g denied*, 451 U.S. 934 (1981). Even though Mexico does not extradite its nationals to the United States, the reverse is not true. The United States could insist on reciprocity and not extradite its nationals, even though after so many years of practice it might be difficult to reverse the course. *See* Peroff v. Hylton, 563 F.2d 1099, 1101–1102 (4th Cir. 1977).

21 18 U.S.C. § 3196 (2000).

22 The constitutionality of such a power was raised in the context of the doctrine of separation of powers, but it was found that apportioning different responsibilities to separate branches of government does not conflict with the Constitution. Mistretta v. United States, 488 U.S. 361, 380, 109 S. Ct. 647, 659 (1989), Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995), *vacated and remanded by* 82 F. 3d. 1081 (1996).

basis of separate legal sources of obligation. Another example is where two states are bound to extradite, but on the basis of different treaties.[23]

2. Dual Criminality[24]

Dual criminality (also referred to as double criminality and double incrimination) refers to the characterization of the relator's conduct as criminal under the laws of both the requesting and requested states. It is a reciprocal characterization of criminality that is considered a substantive requirement for granting extradition. But it should not be confused with reciprocity as one of the legal bases for the practice of extradition, namely: bilateral or multilateral treaties, reciprocity, comity, or national legislation.[25] Dual criminality embodies a reciprocal characterization of those offenses deemed extraditable. Treaties list or otherwise designate extraditable offenses and also require dual criminality. Both of these requirements characteristically contain an implicit element of mutuality.[26]

Dual criminality and extraditable offenses are closely linked. The first is conceptual. It means that the crime charged in the requesting state is also a crime in the requested state. The second, extraditable offenses, means those offenses that are deemed subject to extradition. In treaty practice, extraditable offenses are listed in the treaty or designated in some way, usually by a formula. Whenever the practice is not based on a treaty, extraditable offenses will be those that the respective states agree to and for which they are willing to reciprocate. Thus, if a formula is established for dual criminality, extraditable offenses are those that are contained in the criminal laws of both legal systems.

As early as 1880, the Institute for International Law, meeting at Oxford, declared in its Resolutions, "La condition de reciprocité, en cette matière, peut-être commandé par la politique; elle n'est pas exigée par la justice" ("The condition of reciprocity in this matter can be based on a political consideration; it is not required by justice").[27] Earlier publicists such as Billot, Grotius, and Vattel expressed a similar view.[28]

Some states require dual criminality independently of what they deem extraditable offenses, while others deem the dual criminality formula sufficient without needing to add a list of extraditable offenses. It would be desirable if states practiced extradition on the basis of dual criminality predicated on a formula and driven by the facts, in other words, that the facts are sufficient to warrant a criminal charge of the same nature in both states.

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23 This is the case at present between the United States and the United Kingdom, where the United Kingdom is bound by the 2003 extradition treaty, which it ratified and incorporated into its national legislation, but which the United States only ratified in 2006. *See* Ch. I, Sec. 5.

24 This discussion has been referenced in a case before the Federal Court of Australia. *See Dutton v. O'Shane,* 2003 132 F.C.R. 352. *See also* United States v. De La Pava, 1993 U.S. Dist. LEXIS 1912 (N.D. Ill. 1993); *In re Extradition of* Guillen, 1991 U.S. Dist. Lexis 21839 (N.D. Ill. 1991).

25 *See* Ch. II, Sec. 4.

26 The proposition that extradition as practiced on the basis of reciprocity also requires dual criminality was upheld by several decisions in those countries that engage in nontreaty reciprocally based practice. *See In re Nikoloff*, 7 Ann. Dig. 351, 352 (Upper Ct. Dresden 1933) (F.R.G.) (stating "Extradition would be granted upon the principle of reciprocity and upon that of identity of extradition and prosecution, which by the way is a universally recognized principle of international law."). *See also Re Bachofner*, 28 I.L.R. 322 (Sup. Ct. Just. 1959) (Colom.); *In re Zahabian*, 32 I.L.R. 290 (Fed. Tribunal 1963) (Switz.); *Re Kozil*, 40 I.L.R. 211 (CFed. 1964) (Arg.) (denying an extradition request on the basis of reciprocity on the grounds that the two states involved (Brazil and Argentina) had not specifically agreed to engage in this practice, as required by Argentine law).

27 1 Annuaire de l'Institut de Droit International (1874–1883) 733 (1928).

28 *See* Bodin, *supra* note 2; Grotius, *supra* note 3. *See also* authors cited in 4 Maurice Travers, Le Droit Pénal International 389 (1921).

Dual criminality is intended to ensure to each of the respective states that it (and the relator) can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct that it does not characterize as criminal. The requirement of dual criminality does, of course, benefit the relator insofar as he/she can avoid the processes of justice of the state in which the conduct was allegedly committed, if (depending upon the interpretative formula) the same conduct is not also deemed criminal in the requested state.

There are three approaches to determine whether the offense charged, even though criminal in both states, falls within the meaning of dual criminality:

1. whether the act is chargeable in both states as a criminal offense regardless of its prosecutability;

2. whether the act is chargeable and also prosecutable in both states; and

3. whether the act is chargeable and prosecutable, and could also result in a conviction in both states.

Cases show some divergence in the interpretation of this requirement, as discussed below, but most states adhere to the first approach. Furthermore, as is discussed in Chapter VIII, several defenses arise that reveal that occasionally a request will be denied on grounds that prosecution is barred by a statute of limitations or a conviction cannot be returned because of legally exonerating conditions.[29] This indicates also that the requirement of dual criminality may be contingent upon other factors. The choice of any of the above theories by which to define dual criminality, and the validity of any one of the defenses that can be raised, are invariably a reflection of the *ratione materiae* of extradition, as discussed in Chapter I.

The Tenth International Congress of Penal Law of the Association Internationale de Droit Pénal held in Rome in 1969 recommended that the requested state set aside the requirement of dual criminality *in concreto*, unless special circumstances exist in the requesting state, such as the question of public order. In such cases, the requested state would examine *in abstracto* whether the conduct of the relator constitutes an offense under its law, or if it deems that type of conduct punishable.[30] According to these recommendations, however, extradition can be denied if it is manifest that the request is in the nature of a subterfuge for achieving non-penological purposes. In this case, the requested state will not be bound to adhere to the proposed formulation.[31]

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29 *See* Ch. VIII, Sec. 4.7.

30 Congrès International de Droit Pénal, *Les Problèmes Actuels de l'Extradition*, 41 Rev. Int'le de Droit Pénal 12 (1970) [hereinafter Congrès]; Hans Schultz, *Rapport General* 39 Rev. Int'le de Droit Pénal 785, 792 (1968). *See Extradition of S. Case*, 45 I.L.R. 376, 377 (BGH 1965) (F.R.G.) (holding that the crime of fraudulent acquisition of export grants or tax rebates under Austrian law constituted ordinary fraud in West Germany and was therefore extraditable); *In re Seidnitzer,* 49 I.L.R. 507, 508–509 (Cass. 1962) (Italy) (granting extradition request of Austria on the grounds that the alleged offense constituted, *in abstracto*, a crime under the laws of both states); *Athanassiadis v. Government of Greece and Others*, 51 I.L.R. 248 (H.L. 1967) (Eng.) (holding that the crime of fraud under Greek law constituted the crime of obtaining money by false pretenses under British law). *See also* United States v. Sensi, 879 F.2d 888, 893–894 (D.C. Cir. 1989) (holding that the U.S. crime of mail fraud, which does not necessarily require the individual to successfully steal anything, and the United Kingdom crime of theft, which requires a successful taking of something from someone, was sufficiently congruent and therefore extraditable). *See also* United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal., Apr. 24, 1998); Spatola v. United States, 741 F. Supp. 362 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2d Cir. 1991) (holding that the U.S. law of conspiracy to commit an offense constituted the crimes of association under Italian law regardless of whether the crime under Italian law is far broader than the conspiracy law of the United States). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition* of Orellana, 2000 WL 1036074 (S.D.N.Y. Jul. 26, 2000).

31 *See* Congrès, *supra* note 30; Schultz, *supra* note 30.

Extradition is still regarded primarily as an instrument of interstate cooperation designed to inure to the benefit of the interested states. This assertion remains true even though the criminality of the relator must be demonstrated in accordance with certain rules and procedures. Because states are coequal sovereigns, emphasis on this characteristic has pervaded the practice of extradition and consequently imposed certain exigencies (i.e., substantive requirements). This form of reciprocity is referred to by some authors as a rule of CIL.[32]

The requirement of dual criminality is found in treaties and is stated either specifically or implicitly. It is also found in the national laws and judicial practice of most states and is therefore deemed part of CIL. Even though the United States will only grant extradition pursuant to the existence of a treaty, as is required in 18 U.S.C.§§ 3180, 3181, and 3184, it can request extradition without a treaty.[33] In both situations, however, CIL is relevant to interpreting the legal basis and conditions of extradition. In this context, it is noteworthy that states may consider the requirement of dual criminality satisfied if the facts giving rise to the crime in the requesting state also give rise to a crime in the requested state. But a question remains whether the laws of the requested state criminalized the conduct in question at the time the criminal conduct occurred in the requesting state. Some states, such as the United States, hold that such symmetry in timing is not necessary. Thus, what they rely upon is that the conduct is criminal in both legal systems at the time of the request.[34] This position is tantamount to allowing extradition for conduct that at the time of its occurrence was not criminal in the requested state, but was criminal at the time the request was ultimately made. For example, Switzerland criminalized money laundering in Article 305 of its *Code Pénal* on August 1, 1990, but the United States can obtain extradition for money laundering under its relevant statute for conduct occurring before August 1, 1990, because that is the way Switzerland interprets its dual criminality requirement. Presumably, the United States would also act accordingly if it were a requested state in a case involving acts deemed criminal under its laws, but committed in the requesting state prior to the entry into effect of the relevant statute in the laws of the United States or any state of the Union. In one case, however, a federal district court in California adopted the relator's claim that the relevant time for determining whether dual criminality was satisfied was the time of the alleged commission of the offense rather than the time of the indictment.[35]

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32 Satya D. Bedi, Extradition in International Law and Practice 69–84 (1966); Ivan A. Shearer, Extradition in International Law 132–149 (1971). *See, e.g.,* Joseph v. Hoover, 254 F. Supp. 2d 595 (D. Virgin Islands 2003). Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988); *cert. denied*, 490 U.S. 1106, *reh'g denied*, 492 U.S. 927 (1989). *See also In re Extradition of Powell*, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); *In re Extradition* of Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); Cucuzzella v. Keliikoa, 638 F.2d 105 (9th Cir. 1981); Heilbronn v. Kendall, 775 F. Supp. 1020 (W.D. Mich. 1991); Cheng Na-Yuet v. Hueston, 690 F. Supp. 1008 (S.D. Fla. 1988), *appeal after remand*, 734 F. Supp. 988 (1990), *aff'd*, 932 F.2d 977 (11th Cir. 1991). *Compare* Brauch v. Raiche, 618 F.2d 843, 847–851 (1st Cir. 1980) *with* Shapiro v. Ferrandina, 478 F.2d 894, 905–909 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973). *See also* Melia v. United States, 667 F.2d 300, 304 (2d Cir. 1981), in which the relator was charged with "procuring" a murder. Although the term "procuring" was not listed in the treaty, the court held "nevertheless, that the Treaty does cover the offense." The assumption was made that procuring "fell within the meaning of being a 'party' to a crime." This broad interpretation expands the meaning of extraditable offenses. *See also* United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. Nov. 18, 1997).

33 *See* Ch. II.

34 In considering the dual criminality issue, some courts inquire into whether the laws of both states are "substantially analogous." *See* Bruce Zagaris, *Court of Appeal Affirms and Overturns Extradition Request to Korea on Bribery Charges*, 24 Int'l Enforcement L. Rep. 269–270 (July 2008).

35 *See* Linda Friedman Ramirez, *District Court Finds Violation of Dual Criminality in Case of Extradition from India*, 24 Int'l Enforcement L. Rep. 435–436 (Nov. 2008).

The doctrine of dual criminality is the object of several definitional approaches, as discussed above, and depending upon the choice, will be more or less identified with extraditable offenses. Similarly, because of the various approaches to defining extraditable offenses, the likelihood for confusion between these two requirements exists. Because of the nexus between dual criminality and extraditable offenses, they are discussed contextually in Section 3.

In the United States, a relator may be surrendered for a crime under federal criminal law or under the criminal laws of the state wherein the relator is found. This approach was expanded on in *Factor v. Laubenheimer*[36] by relying on what could be said to be tantamount to generally recognized crimes in most states. This approach has been followed by the circuits to date, among them, the First Circuit in *Brauch v. Raiche*,[37] in which the court upheld the magistrate's application of the law of the asylum state, stating:

> Although it is clear that *Factor* held criminality in the asylum state was not a necessary precondition to extraditability, it is not clear whether the Court also meant that a finding of criminality under that state's law was always sufficient to justify extradition. Part of the rationale offered by the Court for its decision in *Factor* was a desire to avoid construing that treaty so that "the right to extradition from the United States may vary with the state or territory where the fugitive is found." The Court was concerned that the treaty be construed so as to secure the intended equality and reciprocity between the parties. In light of the importance the Court placed on preserving reciprocity, we do not believe the Court's disapproval of extraditability varying with state law would extend to the situation in which one state's law might confer extraditability, while that of the preponderance of the states would not. A prerequisite under the Treaty for an extradition request by Great Britain is that the offense be one for which Britain would be willing to extradite. Thus, even if the asylum state from which Britain requests extradition is the only state criminalizing the conduct in question, the policy of reciprocity would be served since that state could presumably obtain extradition for the same acts from Britain.[38]

In *Clarey v. Gregg*,[39] the Ninth Circuit revisited the question of dual criminality, holding:

> Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations. *United States v. Saccoccia*, 18 F.3d 795, 800 n.6 (9th Cir. 1994). The doctrine is incorporated into the Extradition Treaty Between the United States and Mexico at Article II, §§ 1, 3.
>
> Both the magistrate judge and district court found that the requirement of dual criminality is met in this case because Clarey's acts, which constitute simple homicide in Mexico, would constitute felony murder in the United States. Felony murder is "murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery." 18 U.S.C. § 1111.
>
> Clarey argues that dual criminality has not been established because the statute under which he has been charged in Mexico criminalizes a much broader range of conduct than does the United States felony murder statute. Mexico charged Clarey with simple homicide, which Article 201 of the Guanajuato Penal Code defines as occurring "when one takes another person's life." [E.R.305] Clarey argues that the United States and Mexican statutes are not "substantially

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36 Factor v. Laubenheimer, 290 U.S. 276 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Joseph v. Hoover, 254 F. Supp. 2d 595 (D. Virgin Islands 2003). The alleged conduct must be unlawful under federal criminal law, the criminal law of the state where the relator is found, or as stated in *Factor*, the law of the preponderance of states. *See* Peters v. Agnor, 888 F.2d 713 (10th Cir. 1989); DeSilva v. DiLeonardi, 181 F.3d 865 (7th Cir. 1999).

37 Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980).

38 *Id.* at 848–849 (citations omitted).

39 Clarey v. Gregg, 138 F. 3d. 764 (9th Cir. 1998). *See also* United States v. Sai-Wah, 270 F Supp. 2d 748 (W.D.N.Y. 2003) (not finding dual criminality and denying certification of extraditability).

analogous," see *Theron v. United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), because the United States statute requires that the homicide be perpetrated during the commission of a violent felony, while Mexican law requires only that a homicide occur.

Clarey's challenge overstates the degree to which the applicable criminal laws of the two countries must be "substantially analogous." Although some analogy is required, see *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993) (Pakistani law of conspiracy not sufficiently analogous to United States' separate crime of using a telephone to facilitate a drug offense), differences between statutes aimed at the same category of conduct do not defeat dual criminality. That is apparent from an examination of Theron, upon which Clarey relies. Theron held that a South African statute, which criminalized the failure of an adjudicated insolvent to disclose his insolvency when obtaining credit, was sufficiently analogous to 18 U.S.C. § 1014, which criminalized false statements to a bank. The opinion stated:

> Admittedly, South Africa's law is broader than section 1014, but both laws can be used to punish the failure to disclose a loan applicant's liabilities to a bank when obtaining credit. Theron's argument ignores that for purposes of dual criminality, it is immaterial that South Africa's law is broader than the analogous law in this country.

Theron, 832 F.2d at 497. Here, too, Mexico's homicide statute and the United States statute can both be used to punish the acts with which Clarey is charged—causing the death of Bishop by beating him during a robbery. The two laws are analogous because they both punish acts of the same general character—the taking of another's life; no more is required. *See Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404-05 & n.2 (9th Cir. 1988). The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical. When "the laws of both the requesting and the requested party appear to be directed to the same basic evil," *Shapiro v. Ferrandina*, 478 F.2d 894, 908 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S. Ct. 204, 38 L. Ed. 2d 133 (1973), the statutes are substantially analogous, and

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40 Wright v. Henkel, 190 U.S. 40, 23 S. Ct. 781 (1903); Collins v. Loisel, 259 U.S. 309, 42 S. Ct. 469 (1922). United States' courts have conducted surveys of the law of all fifty states where there was no clear federal law or law within the state where the court was located on point regarding the criminal conduct at issue. *See In re Extradition of* Exoo, 522 F. Supp. 2d 766, 770, 776, 778–785 (S.D. W.Va. 2007) (conducting a fifty-state survey regarding the dual criminality of assisted suicide in U.S.–Ireland extradition). *See also* Linda Friedman Ramirez & Nicole Mariani, *U.S. Magistrate Denies Extradition to Ireland for Role in Assisted Suicide*, 24 Int'l Enforcement L. Rep. 88–89 (Mar. 2008); *In re Extradition of* Sanchez Rea, 2008 U.S. Dist. Lexis 11366, at *6 (E.D. Cal. 2008), stating:

> In determining whether a similar criminal proscription exists under American law, the Court looks first to federal law; if no similar offense is found, the Court then looks to the law of the State in which the extradite is found; if no similar offense is found, the Court then looks to the law of the preponderance of the States.

Various U.S. federal courts have applied the "substantially analogous" standard. *See* Manta v. Chertoff, 518 F.3d 1134, 1141–1143 (9th Cir. 2008) (discussing intent to defraud and dual criminality, and stating "Dual criminality exists if the 'essential character' of the acts criminalized by the laws of each country are the same and the laws are 'substantially analogous.' "); United States v. Hoholko, 2010 U.S. Dist. Lexis 19880, at *4–*7 (D. Mont. 2010) (discussing extortion and conspiracy, stating "the laws of the countries need only be 'substantially analogous,' such that dual criminality exists if the 'essential character' of the criminal acts are the same."); *In re Extradition of* Brandao, 2009 U.S. Dist. Lexis 122677, at *9, *11–*13, *16 (S.D. Ohio 2009) defining "substantially analogous" as " 'punish[ing] conduct falling within the broad scope' of the same 'generally recognized crime . . . ' " and holding that the United States failed to establish dual criminality regarding a criminal enterprise); *In re: Extradition of* Lam, 2009 U.S. Dist. Lexis 43075, at *13–*14 (E.D. Cal. 2009) ("dual criminality is deemed to be satisfied when the two contries' laws are substantially analogous."); *In re Extradition of* Exoo, 522 F.Supp. 2d 766, 770, 776 (S.D. W.Va. 2007) ("in considering whether there is dual criminality . . . the Court must determine whether, '[t]he two statutes are substantially analogous . . . . Absolute identity is not required.' ").

41 United States v. Riviere, 924 F.2d 1289, 1302 (3d Cir. 1991).

> can form the basis of dual criminality. *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989); *see also In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986) (upholding extradition for conspiracy even though overt act was not required in requesting nation because request alleged several overt acts); *cf. Collins v. Loisel*, 259 U.S. 309, 312, 66 L. Ed. 956, 42 S. Ct. 469 (1922) (The law does not require that the . . . scope of [criminal] liability be coextensive, or in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.)

Dual criminality does not require that absolute identity is present between the crime charged and the counterpart U.S. crime, be it a federal or a state crime, so long as the crimes are "substantially analogous."[40] Nor does it require that the punishment be identical.[41]

United States practice, as well as that of most European states, has been more liberal toward dual criminality. It is now well-established that the determination of whether dual criminality has been satisfied is not driven by the crime charged, but rather by the underlying facts and whether they constitute a crime in both legal systems, irrespective of how they are labeled.[42] For instance, in *Molnar*, the district court held that dual criminality is fact-driven:

> This language essentially codifies the doctrine of dual, or double criminality. Under the doctrine of dual criminality, an accused can be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations. *DeSilva,* 125 F.3d at 1113; *Murphy v. U.S.,* 199 F.3d 599, 602 (2nd cir.1999); *Clarey v. Gregg,* 138 F.3d 764, 765 (9th Cir.1998), *cert. denied,* 525 U.S. 853, 119 S.Ct. 131, 142 L.Ed.2d 106 (1998). Alleged conduct is considered criminal in this country if it would be unlawful under federal statutes, the law of the state where the accused is found, or the law of the preponderance of states. *DeSilva,* 125 F.3d at 1114. "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel,* 259 U.S. 309, 312, 42 S.Ct. 469, 470–471, 66 L.Ed. 956 (1922).[43]

Interestingly, however, the U.S. government in extradition proceedings is frequently inconsistent when applying the concept that the underlying facts should be dispositive and not the label given an offense. This is evidenced with respect to *ne bis in idem*[44] and specialty issues.[45]

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42 *See* United States v. Thomas, 322 Fed. Appx. 177, 180–181 (3d Cir. 2009) (unpublished opinion) (discussing continuing criminal enterprise and U.S.–U.K. extradition); Hurtado-Hurtado v. U.S. Attorney General, 2009 U.S. Dist. Lexis 125460, at *6–*9 (S.D. Fla. 2009); Choe v. Torres, 525 F.3d 733, 737 (9th Cir. 2008) (discussing bribery under the U.S.–S. Korea extradition treaty); United States v. Ramnath, 533 F. Supp. 2d 662, 673–675 (E.D. Tex. 2008); *In re Extradition of* Necolaiciuc, 2011 U.S. Dist. Lexis 25911, at *39–*45 (M.D. Fla. 2011) (discussing embezzlement and abuse of office in U.S.–Romania extradition); *In re Extradition of* Paberalius, 2011 U.S. Dist. Lexis 57907, at *22–40 (discussing traffic violations and disturbing the peace in U.S.–Lithuania extradition); McCabe v. United States, 2011 U.S. Dist. Lexis 39910, at *11–*14 (N.D. Cal. 2011) (discussing sexual assault on minors in U.S.–Ireland extradition); Markey v. U.S. Marshall Serv., 2010 U.S. Dist. Lexis 38082, at *6–*9 (N.D. Ind. 2010) (discussing sexual assault on minors in U.S.–Ireland extradition); *In re Extradition of* Markey, 2010 U.S. Dist. Lexis 14390, at *4–*8 (N.D. Ind. 2010) (discussing sexual assault on minors in U.S.–Ireland extradition); *In re Extradition of* Ritzo, 2010 U.S. Dist. Lexis 37543, at *7–*15 (discussing sexual assault on minors and other sexual crimes involving minors in U.S. –Canada extradition); *In re Extradition of* Pelletier, 2010 U.S. Dist. LEXIS 44979 (S.D. Fla. Apr. 12, 2010) (discussing drug trafficking in U.S.–Portugal extradition); *In re Extradition of* Exoo, 522 F.Supp. 2d 766, 770, 776, 778–785 (S.D. W.Va. 2007) (discussing assisted suicide in U.S.–Ireland extradition); Batchelder v. Gonzalez, 2007 U.S. Dist. Lexis 96736 (N.D. Fla. 2007) (discussing invitation to sexual touching in U.S.–Canada extradition).

43 *In re Extradition of* Molnar, 202 F.Supp. 2d 782, 785–786 (N.D. Ill. 2002).

44 *See* Ch. VIII, 4.3.

45 *See* Sec. 6.

In connection with both of these issues, the government at times argues against a facts-driven approach, while it argues in favor of such an approach for dual criminality.

The position in the United States is that dual criminality is a substantive requirement of extradition, which can be summarized as follows:

1. It does not require that the crime charged be the same exact crime contained in federal or state law; it is sufficient that it be the same type of crime. Thus, theft, larceny, embezzlement, and fraud are the same type of crimes and it is not important that the crime charged have the same label, or have the same legal elements as those contained in the crime contained in the criminal law of the requested state.

2. What matters is whether the facts giving rise to the criminal charges would also give rise to a similar criminal charge in the requested state. Whether the same facts give rise to the same crime is not at issue, but whether the same facts give rise to a criminal charge under the criminal law of the requested state.

3. The same facts can give rise to multiple criminal charges in one or both systems, but that is not a dual criminality issue; rather it may be an issue of *ne bis in idem* (or double jeopardy in the United States).[46]

Over the last three decades, federal and state criminal laws have significantly increased in number, adding not only new forms of criminality, but placing new labels on preexisting crimes to enhance penalties. Furthermore, many infractions of federal laws have become criminalized.[47] This literally exponential growth of U.S. criminal legislation has not been accompanied by a rational policy to deal with related crimes with respect to charging and sentencing purposes. As a result, a single criminal transaction, with a single purpose and a single victim, can give rise to multiple criminal charges, and result in multiple convictions and multiple sentences running consecutively. Thus, when the United States seeks the extradition of a person for a complex crime such as one under the Racketeer Influenced and Corrupt Organizations Act (RICO), which requires predicate offenses, the government can, after the person has been surrendered, issue a superseding indictment adding new charges deemed part of the alleged criminal transaction and subsumed within the meaning of the crime originally charged in the initial extradition request. Although this raises issues pertaining to specialty,[48] it also raises issues of dual criminality. The United States can charge a person with RICO whose predicate crimes are violations of the International Revenue Service's Cash Transaction Requirement (CTR). The latter may be deemed non-extraditable in the requested state, yet extradition may be granted for RICO because the requested state does not know that without the predicate crime (which is not extraditable because it lacks dual criminality), RICO cannot stand. To get around that difficulty, the United States will agree not to prosecute for the CTR violations but only for RICO, and then introduce evidence of CTR violations at the trial, not for purposes of a conviction, but for evidentiary purposes only. Thus, the government can avoid, in form though not in substance, violating the principle of specialty.[49]

In order to overcome some of the dual criminality implications of these complex crimes, modern extradition treaties include special provisions to address jurisdictional elements, attempt/conspiracy offenses, and even tax and customs offenses.[50] However, some U.S. extradition

46 *See* Ch. VIII, Sec. 4.3.

47 *See,* e.g.,International Criminal Law: A Guide to U.S. Practice and Procedure (Ved P. Nanda & M. Cherif Basisouni eds., 1987).

48 *See infra* Sec. 6.

49 *Id.*

50 *See* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties* at 9–10 and accompanying footnotes, Congressional Research Service report for

requests involving complex crimes have been denied by the requested state on dual criminality grounds.[51]

3. Extraditable Offenses

3.1. The Meaning of Extraditable Offenses

Irrespective of the legal basis for extradition, the alleged offense for which extradition is requested must be either enumerated among the extraditable offenses in a treaty or found according to the formula for ascertaining extraditability in the applicable treaty or in the national legislation. In the absence of a treaty, if extradition is based on reciprocity, the offense must be mutually recognized as extraditable by both states. Where extradition is based on comity, it will depend exclusively on the applicable national law.

Extradition treaties either list the offenses for which extradition shall be granted or designate a formula by which to determine extraditable offenses. In addition to defining or designating extraditable offenses, the criminality of the relator's alleged conduct must satisfy the requirement of dual criminality[52] (i.e., the offense charged must constitute a crime in the two legal systems).[53] The extent to which a given type of conduct shall be considered criminal in the two respective legal systems varies, depending on the legal systems involved. The interpretation and application of the requirement as to what constitutes an extraditable offense will also vary according to the legal system in question.

The substantive requirements of extradition are that a person accused of or found guilty of an offense in the requesting state be surrendered to that state, provided the following criteria are met:

1. If a treaty exists, the offense must be listed or designated;
2. If no treaty exists, the respective states will reciprocate for the same type of offense;
3. If no treaty or reciprocity exists, but the request is based on comity, the requested state will rely on its customary practice; and
4. The offense charged must also constitute an offense in the requested state, that is, dual criminality, either in the objective sense, *in concreto*, or in the subjective sense, *in abstracto*.

The practice of listing offenses in a treaty to which participants are bound is a manifestation of a reciprocal obligation.[54] Similarly, when dual criminality is required by a treaty or by custom,

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Congress 98-958, Mar. 17, 2010, *available at*: http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

51 *See* Bruce Zagaris, *Thailand Denies U.S. Request to Extradite Russian Alleged Arms Smuggler*, 25 Int'l Enforcement L. Rep. 406–407 (Oct. 2009) (U.S. charge of conspiracy to furnish weapons to the Colombian Revolutionary Armed Forces of Colombia); Bruce Zagaris, *U.K. National Wins Partial Victory in Resisting U.S. Extradition Request*, 24 Int'l Enforcement L. Rep. 175–176 (May 2008) (U.S. charge of conspiracy to price-fix denied on dual criminality grounds for absence of a requirement of dishonesty, which was required for purposes of U.K. extradition).

52 *See supra* Sec. 2.

53 Bedi, *supra* note 332, at 69–84; Shearer, *supra* note 32, at 132–149.

54 Extradition was denied where a person was requested by the Czech Republic for a crime that did not involve fraud or breach of trust, which is what the treaty provides for as an extraditable offense. The extradition judge in the case found that on its face the Czech penal code did not include fraud or breach of any fiduciary responsibility by the perpetrator. Therefore, the provision of the Czech criminal code relied on in the extradition request did not correspond to the extraditable offense listed in the treaty. Moreover, the applicable provision of the Czech criminal code failed to satisfy dual criminality in that it fails to show any statute in the United States that criminalizes the act of harming a creditor without the existence of an element of fraud or deceit. The court also rejected the government's argument that under

it is applicable to the practice regardless of whether the legal basis of the practice is a treaty or reciprocity. Such a requirement, in effect, imposes a mutuality of obligations on the parties.

A corollary to the requirements of extraditable offense and dual criminality is the doctrine of specialty.[55] That doctrine is premised on the assumption that whenever a state uses its formal processes to surrender a person to another state for a specific charge, the requesting state shall carry out its intended purpose of prosecuting or punishing the offender only for the offense for which the requested state conceded extradition.[56]

3.2. Extraditable Offenses and Their Relationship to Dual Criminality

The term "extraditable offenses" applies to treaty practice whereby offenses are listed or designated by a formula in the applicable treaty. If the practice of the respective states is based on reciprocity, then extraditable offenses are those that constitute an offense in both systems. Extradition granted on comity is an exceptional method resorted to in special instances whenever the respective states do not rely on a treaty or reciprocity. In these cases, the requesting state does not rely on any definition or method of designating extraditable offenses, and the requested state can grant or deny the request irrespective of the offense charged or its designation. However, the requested state may, depending upon its national legislation, request that dual criminality be satisfied. In most cases involving extradition on the basis of comity, the conduct of the relator constituted an offense in the requested state. It appears, therefore, that CIL requires the condition of dual criminality as to all bases of extradition.

Extraditable offenses are interpreted in one of two ways: (1) requiring that the offense charged be identical to an offense in the treaty list; or (2) not requiring that the offense charged be identical to the offense listed in the treaty, but requiring that the acts underlying the criminal charge sustain a charge similar in nature under the laws of the requested state.[57]

The second of these interpretative approaches focuses on the question of whether the acts performed in the requesting state, and constituting an offense under its laws, could also constitute an offense under the laws of the requested state and made extraditable under the treaty, regardless of the actual offense charged by the requested state. In effect, this approach produces the same result as when the subjective interpretation of the requirement of dual criminality is applied. Under this approach to interpreting extraditable offenses, the requested state examines the category and type of offense charged to determine the counterpart under its own laws. From a practical point of view, acts that are part of the common crimes variety are likely to constitute an offense in all legal systems. Hence, if this type of conduct is charged by the requesting state and the identical charge does not exist in the requested state, the likelihood is great that the same category or type of offense exists in the requested state. Therefore, this type of broad interpretation of extraditable offenses corresponds to a subjective interpretation of dual criminality.

Factor v. Laubenheimer, 290 U.S. 276 (1933) (not requiring dual criminality), the treaty applicable to the Czech Republic requires dual criminality. *See In Re Extradition of* Platko, 213 F. Supp. 2d 1229 (S.D. Cal. 2002); *In re Extradition of* Pena Lara, 1998 U.S. Dist. LEXIS 17777. For cases involving financial crimes, see inter alia United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Havoco of America Ltd. v. Hill, 255 F.3d 1321 (11th Cir. 2001).

55 *See infra* Sec. 6.

56 *See infra* Sec. 7.

57 *See generally*, *In re Extradition of* Ye Gon, 2011 U.S. Dist. Lexis 12559, at *24–*39 (D.D.C. Feb. 9, 2011); *In re Extradition of* Bilanovic, 2008 U.S. Dist. Lexis 97893, at *22–*23 (W.D. Mich. Dec. 3, 2008); United States v. Gecas, 120 F.3d 1419, 1479 (11th Cir. 1997); United States v. Medina, 985 F. Supp. 397, 399 (S.D.N.Y. 1998).

When extradition is practiced between states that do not require the listing of extraditable offenses, but designate them in another manner, the requested state will have to determine whether the offense and its counterpart fall within the treaty formula and also satisfy the dual criminality requirement. As the common crimes variety are invariably listed or designated in treaties, the two requirements of extraditable offense and dual criminality, whenever broadly interpreted, are satisfied by a single test (i.e., whether the conduct is criminal in the jurisprudence of both states, even though not defined identically).[58] The same outcome is produced even if a given state is not to apply dual criminality, but adheres to strict compliance with the treaty list, or if that state interprets the extraditable offense listed in the treaty as referring to acts that would have constituted the offense charged had they been committed in the requested state. Under this interpretation of extraditable offenses, the requirement of dual criminality is also satisfied. This indicates the close relationship of the two conditions when they are interpreted and applied in their broadest sense, or under the subjective approach of dual criminality *in abstracto*.

As an indication of the interrelationship and even possible confusion between these two elements, Marjorie Whiteman states the following:

> A common requirement for extradition is that the acts which form the basis for the extradition request constitute a crime under the law of both the requesting and the requested States. This requirement exists whether the request is made under a treaty or apart from a treaty and whether a list of offenses or a minimum-penalty provision is involved. In the case of a treaty or a law providing for extradition for offenses punishable by at least a certain minimum penalty, specific provision is usually made that the offense must be a crime in both States. Where a list of offenses is involved in the treaty or the law, a specific provision on the point is less common. However, even in the absence of a specific provision, the requirement is generally imposed. The question whether the requirement has been met generally arises with regard to the law of the requested State and where the requirement is covered by a specific provision in the law or treaty it is often cast only in terms of the law of the requested State, since, if a State requests extradition, it must base its request on an alleged violation of its law. It might be supposed that if two States agree, in a treaty, to a list of offenses for which extradition shall take place, they would include only those acts which are crimes in both States. However, questions nevertheless may arise. Certain acts may, under the law of the requesting State, constitute a listed treaty offense while, under the law of the requested State, the same acts may constitute no crime or, more frequently, one not listed in the treaty.[59]

3.3. Methods of Determining Extraditable Offenses

Designation of extraditable offenses in treaties may be achieved by one of two methods, *enumerative* or *eliminative*.[60]

The *enumerative* method for naming and defining offences has a limiting effect, confining the application of the treaty to stated offenses. United States legislation authorizes extradition whenever there is a treaty or convention for extradition between the United States and any foreign government, against persons charged with having committed, within the jurisdiction of any such foreign government, any of the crimes provided for by such treaty or convention. The bilateral extradition treaties and conventions to which the United States is a party will usually contain a list of offenses for which extradition shall be granted. The Montevideo

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58 *See* Hurtado-Hurtado v. U.S. Attorney General,2009 U.S. Dist. Lexis 125460, at *6–*9 (S.D. Fla. 2009); *In re Extradition of* Sainez, 2008 U.S. Dist. Lexis 9573, at *8–*12 (S.D. Cal. 2008).

59 6 Marjorie Whiteman, Digest of International Law 773–774 (1963), [hereinafter Whiteman Digest].

60 A New Zealand court discussed this point. *See* Government of the United States of America v. Cullinane, (2002) NZCA 330.

Convention of 1933, which was concluded among American states, provides for extradition of persons charged with "a crime . . . [which] is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year."[61] However, this agreement is not operative if there is a bilateral treaty in force between the parties concerned (Article 21).

An example of a bilateral treaty with an extensive use of the enumerative method is the 1974 treaty between the United States and Denmark, which lists the following as extraditable offenses:

> 1. murder; voluntary manslaughter; assault with intent to commit murder. 2. Aggravated injury or assault; injuring with intent to cause grievous bodily harm. 3. Unlawful throwing or application of any corrosive or injurious substances upon the person of another. withschemes intended to deceive or defraud, or by any other fraudulent means. 4. Rape; indecent assault; sodomy accompanied by use of force or threat; sexual intercourse and other unlawful sexual relations with or upon children under the age specified by the laws of both the requesting and the requested States. 5. Unlawful abortion. 6. Procuration; inciting or assisting a person under 21 years of age or at the time ignorant of the purpose in order that such person shall carry on sexual immorality as a profession abroad or shall be used for such immoral purpose; promoting of sexual immorality by acting as an intermediary repeatedly or for the purpose of gain; profiting from the activities of any person carrying on sexual immorality as a profession. 7. Kidnaping; child stealing; abduction; false imprisonment. 8. Robbery; assault with intent to rob. 9. Burglary. 10. Larceny. 11. Embezzlement. 12. Obtaining property, money or valuable securities: by false pretenses or by threat or force, by defrauding any governmental body, the public or any person by deceit, falsehood, use of the mails or other means of communication in connection. 13. Bribery, including soliciting, offering and accepting. 14. Extortion. 15. Receiving or transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained. 16. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or officer of any company. 17. An offense against the laws relating to counterfeiting or forgery. 18. False statements made before a court or to a government agency or official, including under United States law perjury and subornation of perjury. 19. Arson. 20. An offense against any law relating to the protection of the life or health of persons from: a shortage of drinking water; poisoned, contaminated, unsafe or unwholesome drinking water, substance or products. 21. Any act done with intent to endanger the safety of any person traveling upon a railway, or in any aircraft or vessel or bus or other means of transportation, or any act which impairs the safe operation of such means of transportation. 22. Piracy; mutiny or revolt on board an aircraft against the authority of the commander of such aircraft; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft. 23. An offense against the laws relating to damage to property. 24. a. Offenses against the laws relating to importation, exportation or transit of goods, articles, or merchandise. b. Offenses relating to willful evasion of taxes and duties. c. Offenses against the laws relating to international transfers of funds. 25. An offense relating to the: a. spreading of false intelligence likely to affect the price of commodities, valuable securities or any other similar interests; or b. making of incorrect or misleading statements concerning the economic conditions of such commercial undertakings as joint-stock companies, corporations, cooperativesocieties or similar undertakings through channels of public communications, in reports, in statements of accounts or in declarations to the general meeting or any proper official of a company, in notifications to, or registration with, any commission, agency or officer having supervisory or regulatory authority over corporations, joint-stock companies, other forms of commercial undertakings or in any invitation to the establishment of those commercial undertakings or to the subscription of shares. 28. Unlawful abuse of official authority which results in grievous bodily injury or deprivation of the life, liberty or property of any

61 Convention on Extradition, signed at Montevideo, Dec. 26, 1933, art. 1(b), T.S. No. 882, 165 L.N.T.S. 45.

> person, [or] attempts to commit, conspiracy to commit, or participation in, any of the offenses mentioned in this Article.[62]

The *eliminative* method, which is indicative rather than limitative, specifies as extraditable those offenses that under the laws of both states are punishable by an agreed degree of severity, usually a minimum penalty. This method is more convenient in that it avoids unnecessary detail in the treaty and obviates problems arising out of the omission of certain crimes. It also eliminates problems with the characterization of offenses that arise out of definitional differences between the laws of the requested and requesting states. However, there are difficulties in determining what actually constitutes the prescribed penalty, namely the actual sentence, the possible sentence, or the range of the sentence.[63] It is also problematic with respect to indeterminate sentences. The use of this method has been found to be impractical by countries such as the United States, where minimum sentences are not a uniform feature of federal laws and the laws of the various states. Illustrating this difficulty, Whiteman reported with respect to the issue arising between Colombia and the United States:

> [T]he Colombian Foreign Office . . . [proposes] that instead of including in the convention a list of the extraditable crimes it be provided that crimes should be regarded as extraditable when they are punishable by the penal laws of both countries with a minimum penalty of deprivation of liberty for six months. [The United States responded that] . . . all of the bilateral extradition agreements of the United States contain lists of extraditable crimes and the Department [did] not desire to make any exception to this practice.
>
> The foregoing view of the matter in question is largely based upon the fact that in general recent Federal penal enactments in the United States do not prescribe a minimum sentence which may be imposed but provide merely for imprisonment for "not more" than a certain term. It is believed that similar provisions are contained in recent enactments throughout various states of the Union. Moreover, the states have penal codes which differ in many respects the one from the other and this would constitute a further obstacle to an agreement along the lines suggested by the Colombian Government.[64]

The main defects of the *enumerative* method arise from the fact that the list can omit certain offenses, and their subsequent inclusion by supplementary treaty may prove too cumbersome.[65]

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62 U.S.–Denmark Extradition treaty, Art. 3, *entered into force* July 21, 1974, 25 U.S.T. 1293.

63 This situation arose in *United States v. Clark*, 664 F.2d 1174 (11th Cir. 1981). The relator was sought in Canada for a crime of which he had been convicted and sentenced to a term of less than one year, although the offense was punishable by terms longer than one year. The relator argued that because the Treaty on Extradition between the United States and Canada required that an offense be "punishable" by a term of more than one year, his offense did not fall under the Treaty. The court disagreed, stating, "[l]eniency in sentencing does not raise a bar to extradition." *See also* Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir. 1981) in which the court held that even though the British subject was sixteen at the time he allegedly participated in a robbery in Hong Kong and could be considered eligible as a "youthful offender" allowing leniency in sentencing, he could have been charged with, convicted of, and sentenced for a felony under New York law, and thus could be extraditable under the treaty. *See also* Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999).

64 6 Whiteman Digest, *supra* note 59, at 772–773 (quoting Secretary of State (Hull) to the American Ambassador at Bogota (Braden), instruction No. 37, June 9, 1939, MS. Department of State, file 221.11/7).

65 *But see* United States v. Stegeman, 43 I.L.R. 234 (Sup. Ct. B.C. 1966) (Can.), where the Court held that bankruptcy offenses, which were not listed in the United States–Canada extradition treaty, were nevertheless encompassed thereunder because of a treaty provision that subsequent extradition arrangements could list specific offenses, which would be incorporated into the treaty. The bankruptcy offenses were so cited and therefore became part of the treaty as extraditable offenses. *See also* Markham v. Pitchess, 605 F.2d 436 (9th Cir. 1979), *cert. denied*, 447 U.S. 904 (1980) (stating that drug-related offenses were included in the Treaty of Extradition of 1971 with Canada); *cf.* United States v. Layton, 855 F.2d 1388

As this method excludes an ad hoc determination of extraditable offenses, it is inflexible. These defects have prompted the development in some treaties of resorting to the *eliminative* method and thus defining extraditable offenses by their punishment. This method has flaws in that it is impractical for use by legal systems that have a notable disparity in penalties. Furthermore, it is not always clear whether this method applies to minimum, maximum, or possible penalties. The use of such a method may also tend to eliminate the need to comply with the requirement of dual criminality, which has some meritorious applications, particularly insofar as it concerns minor offenses in the requested state but which are aggravated in the requesting state because of a more punitive or retributive approach.

The *eliminative* method, by its very nature, reflects and appeals to a retributive theory of punishment by, inter alia, ignoring enlightened theories of rehabilitation and resocialization, particularly in cases where the deviant behavior is considered an illness rather than a crime. This would be the case, for example, with respect to drug addiction violations. Among many other examples are cases involving what some states deem to be mental health problems and, in particular, juvenile delinquency violations. In addition, problems of alcoholism and drug addiction are perceived so differently that what would be a crime in some states would be considered a disease in another. The penal philosophies of states range in diversity from one extreme to another, and the only commonality on which the eliminative approach could rest is the basic punitive orientation, whenever manifested in the respective laws of the states in question.

Even though modern concepts of criminology and penology discredit a straight penalty approach to characterize offenders, the contemporary trend in extradition treaties is to designate extraditable offenses by such a method.[66]

Another significant problem raised by this method is the element of knowledge of the law attributed by legal presumption to an offender, whether that person is a native or an alien. Ignorance of the law is no defense, but the presumption of knowledge of the law in an age of fast and easy travel among states with a wide divergence of penal laws strains the presumption to its utmost. It must be noted, however, that although ignorance of the law is no defense, one

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(9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989) (considering that the statutes at issue in each case were "enacted to serve important interests of government," the court applied the statute to extraterritorial conduct).

66 Shearer, *supra* note 32, at 134–135. Shearer states that out of 163 treaties published in the League of Nations Treaty Series, 80 have no lists, but follow the eliminative method. Among the 50 treaties published between Volumes 1 and 550 of the United Nations Treaty Series, 33 have adopted the same method. The European Extradition Convention of 1957, Europ. T.S. No. 24, also adopted this formula in Article 2. *See also* Extradition Agreement with the European Union, art. 4(1), *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (which provides that "An offense shall be an extraditable offense if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty," thereby removing an earlier list of offenses); Argentine Extradition Treaty, art.2(1), *entered into force* Jun. 15, 2000, S. TREATY DOC. 105-18, TIAS 12866;Paraguyan Extradition Treaty, art. II(1), *entered into force* Mar. 9, 2001, S. TREATY DOC. 106-4, TIAS 12995; Bolivian Extradition Treaty, art. II(1), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; French Extradition Treaty, art.2(1), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-13; Hungarian Extradition Treaty, art.2(1), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Jordanian Extradition Treaty, art.2(1), *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Italian Extradition Treaty, art. II(1), *entered into force* Sept. 24, 1984, 35 U.S.T. 3023; Extradition Treaty with Belize, art. 2(1), *entered into force* Mar. 27, 2001, S. TREATY DOC. 106-38; Extradition Treaty with Uruguay, art. 2, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197 (with respect to enumerated offenses); Extradition Treaty with the Bahamas, art. 2(1), *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Extradition Treaty with Thailand, art. 2(1), *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Costa Rican Extradition Treaty, art. 2(1), *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17. *See also* Garcia & Doyle, *supra* note 50. *See also* United States v. Balsys, 119 F.3d 122, n. 10, (2d Cir. 1997).

of the premises on which this presumption is based is the existence of notice of the proscribed conduct affording all persons the opportunity to refrain from engaging in it.[67] Dual criminality provides an implicit element of notice by analogy, in that the individual is held to the same proscribed conduct known to the individual in his or her own legal system. However, allowing extradition whenever the charge contains a penalty equal to that of the other state, regardless of the corresponding nature of the offense in both laws, subjects individuals to criminal jeopardy without adequate notice.

3.4. Rationale for Defining Extraditable Offenses

Two reasons are traditionally advanced for the proposition that extraditable offenses should be defined: (1) to avoid using a cumbersome and costly procedure such as extradition for minor offenses; and (2) to avoid having the requested state decline surrender on public policy grounds (because the conduct is not criminalized in that state), thus causing embarrassment to the respective states. Both arguments, though valid, are nonetheless open to challenge, if for no other reason than because they are predicated essentially on the interest of only the requested state. If, for example, the requesting state believes it has a sufficient interest in prosecuting a relator, to what extent should the requested state be concerned with whether it is for a serious or a minor offense, and whether the identical offense is deemed criminal in the requested state? This is a policy question that should not be left to the determination of individual states, because its conflict-creating potential is sufficient to make it a question of international concern. In any event, whenever the offense charged by the requesting state is deemed contrary to the public policy of the requested state, it is likely due to the fact that the offense is of a political character or is charged in order to effectuate a political rather than a criminological end. In this case, however, the state of refuge can deny the request on grounds of the "political offense exception."[68]

The requirement of dual criminality makes the listing of offenses in a treaty a technicality, which only renders the procedure more cumbersome. As a substantive matter, dual criminality provides more protection to the individual and gives the requested state more flexibility than the rigid approach of listing offenses in a treaty. The latter approach allows for technical flaws in the process and requires constant revision of treaties without adding anything more substantive to the requirement than that the offense constitute a crime in both legal systems.

To avoid the difficulties stated above, a proposed technique of designating extraditable offenses in treaties is as follows: to list nonextraditable offenses and to designate extraditable offenses by type, category, and dispositional method. This technique eliminates by implication certain offenses that should not by their nature or significance be the subject of extradition. The justification is, to some extent, akin to the earlier rationale advanced to support the practice of listing offenses. The difference between the earlier traditional justification and the one advanced here is that the list of extraditable offenses should contain those offenses that are excepted from the practice, rather than list those that would support it. Furthermore, extraditable offenses should not be labeled or referred to by name, but classified in a manner indicating type, category, and disposition. This method would avoid most of the shortcomings discussed above and would incorporate the benefits deriving from the application of the requirement of dual criminality without the need to duplicate the same substantive requirement.

Another argument in support of a modified method of designating extraditable offenses arises in those cases in which the relator is not a national of the requesting state, but a national of the requested state that permits extradition of its nationals. In such cases, it could be assumed that listing or defining extraditable offenses is a protection for such persons insofar as offenses listed or defined constitute the same crime in the person's own state. Therefore, that person will not

67 M. Cherif Bassiouni, Substantive Criminal Law 449 (1978).

68 *See* Ch. VIII, Sec. 2.1.

be subjected to the application of a foreign law (that of the requesting state of which he/she is not a national) without adequate notice and knowledge. Essentially, it is an argument that extends the doctrine *nullen crimen sine lege*,[69] even though the requirement of dual criminality is theoretically sufficient to satisfy this requirement of the principle of legality. Apart from these arguments applicable to extraditable offenses in treaties, the requirements of dual criminality provide the substantive basis needed to ensure that the process will not be arbitrary.

3.5. Contemporary Approaches to Extraditable Offenses

Earlier U.S. treaties contained a list of extraditable offenses in the text or in an appendix. In addition, these treaties state that the offense must be punishable under the laws of both contracting parties. Treaties concluded during the last three decades contain a formula for dual criminality coupled with the requirement that the offense be punishable by at least one year of imprisonment. This avoids the old archaic form of listing offenses that gave rise to so much unnecessary litigation. Nevertheless, each treaty must be examined to determine the approach followed.

A representative formula approach is found in Article 2 of the 1978 Treaty between the United States and the Federal Republic of Germany:[70]

> Article 2
>
> Extraditable Offenses
>
> (1) Extraditable offenses under this Treaty are:
>
> (a) Offenses described in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties;
>
> (b) Offenses, whether listed in the Appendix to this Treaty or not, provided they are punishable under the Federal laws of the United States and the laws of the Federal Republic of Germany. In this connection it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offenses or denominate an offense by the same terminology.
>
> (2) Extradition shall be granted in respect of an extraditable offense:
>
> (a) For prosecution, if the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year; or
>
> (b) For the enforcement of a penalty or a detention order, if the duration of the penalty or detention order still to be served, or when, in the aggregate, several such penalties or detention orders still to be served, amount to at least six months.
>
> (3) Subject to the conditions set out in paragraphs (1) and (2), extradition shall also be granted:
>
> (a) For attempts to commit conspiracy, to commit, or participate in, an extraditable offense;
>
> (b) For any extraditable offense when, only for the purpose of granting jurisdiction to the United States Government, transportation, transmission of persons or property, the use of the mails or other means of communication or use of other means of carrying out interstate or foreign commerce is also an element of the specific offense.
>
> (4) When extradition has been granted in respect of an extraditable offense, it shall also be granted in respect of any other extraditable offense only by reason of the operation of paragraph (2).[71]

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69 Bassiouni, *supra* note 67, at 25–37, 50–58.

70 Treaty of Extradition, June 20, 1978, U.S.–F.R.G., 32 U.S.T. 1485, Supplementary Treaty of 1986, KAV 705.

71 *Id.*

On October 21, 1986, a Supplementary Extradition Treaty with the Federal Republic of Germany was signed.[72] The Supplementary Treaty, Article 1, amends Article 2 of the 1978 Treaty as follows:

> Article 1
>
> (a) Article 2, paragraph (1) of the Extradition Treaty is amended to read as follows:
>
> (1) Extraditable offenses under the Treaty are offenses which are punishable under the laws of both Contracting Parties. In determining what is an extraditable offense it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offense or denominate an offense by the same terminology, or whether dual criminality follows from Federal, State or Laender laws. In particular, dual criminality may include offenses based upon participation in an association whose aims and activities include the commission of extraditable offenses, such as a criminal society under the laws of the Federal Republic of Germany or an association involved in racketeering or criminal enterprise under the laws of the United States.[73]

This new formulation is intended to eliminate some of the problems connected with new complex crimes such as continuing criminal enterprise (CCE) and RICO.[74] Other treaties have special provisions to deal with problems associated with jurisdictional elements of extraditable offenses, and certain treaties include provisions dealing with tax and customs offenses.[75]

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72 Supplementary Extradition Treaty with the Federal Republic of Germany, Oct. 21, 1986, Treaty Doc. 100-6, 100th Congress, 1st Sess. 1987.

73 *Id.*

74 RICO, 18 U.S.C. § 1961 (2000 and Supp. 2004); CCE (continuing criminal enterprises) 21 U.S.C. § 848 (2000 and Supp. 2004). For an example of the application of the extraditable offense inquiry into conspiracy relative to allegations of terrorist activity, see Bruce Zagaris, *Trinidad Magistrate Orders Extradition of Three Suspects to U.S. in JFK Airport Terrorism Plot*, 23 Int'l Enforcement L. Rep. 375–376 (Oct. 2007). For examples of treaties making extraditable an attempt or conspiracy to commit an extraditable offense, though not necessarily addressing RICO or CCE as such, see Extradition Agreement with the European Union, art. 4(1), entered into force Feb. 1, 2010, S. TREATY DOC. 109-14 (superceding certain types of extradition agreements between the United States and EU member states so that, in extradition requests made between those countries, extraditable offenses shall be understood to include "an attempt or conspiracy to commit, or participation in the commission of, an extraditable offense"); Extradition Treaty with the Bahamas, art. 2(2), *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17 ("An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling, causing or procuring the commission of, or being an accessory before or after the fact to, an [extraditable] offense…"); Extradition Treaty with Trinidad and Tobago, art. 2(2), *entered into force* Nov. 29, 1999, S. TREATY DOC. 105-21; Jordanian Extradition Treaty, art. 2(2), *entered into force* July 29, 1995, S. TREATY DOC. 104-3 ("An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, or participation in the commission of, an [extraditable] offense…"); Extradition Treaty with Luxembourg, art. 2(1), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-10, TIAS 12804; Extradition Treaty with the United Kingdom, art. 2(2), *entered into force* April 26, 2007, S. TREATY DOC. 108-23 ("An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact."). *See also* Garcia & Doyle, *supra* note 50.

75 For provisions regarding jurisdictional elements, *see* Extradition Agreement with the European Union, art. 4(2), *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (superceding certain types of extradition agreements between the United States and EU member states so that, in extradition requests made between those countries, an offense shall be considered extraditable "regardless of whether the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court");

4. Jurisprudential Applications of Dual Criminality and Extraditable Offenses

Extradition from the United States will not be granted unless the relator is alleged to have committed one of the offenses enumerated or described in the applicable extradition treaty. Treaties do not usually define extraditable offenses but either name them or establish a formula for identifying them, as described above. Therefore, the extradition magistrate or judge must apply some body of substantive criminal law to determine whether the act committed constitutes an extraditable offense. That body of law is the jurisprudence of the state where the relator was arrested. It will be compared, however, with the meaning of the crime under the laws of the requesting state.

In *Collins v. Loisel*,[76] Justice Louis Brandeis stated:

> Collins contends that the affidavit of the British Consul General does not charge an extraditable offense. The argument is that the affidavit charges cheating merely; that cheating is not among the offenses enumerated in the extradition treaties; that cheating is a different offense from obtaining property under false pretenses which is expressly named in the Treaty of December 13, 1900, 32 Stat. 1864; that to convict of cheating it is sufficient to prove a promise of future performance which the promisor does not intend to perform, while to convict of obtaining property by false pretense it is essential that there be a false representation of a state of things past or present. *See State v. Colly*, 39 La. Ann. 841 (1887). It is true that an offense *is extraditable only if the acts charged are criminal by the laws of both countries*. It is also true that the charge made in the Court of India rests upon Section 420 of its Penal Code, which declares: "Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person . . . shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine," whereas Section 813 of the Revised Statutes of Louisiana declares: "Whoever, by any false pretense, shall obtain, or aid and assist another in obtaining, from any person, money or any property, with intent to defraud him or the same, on conviction, be punished by imprisonment at hard labor or otherwise, not exceeding twelve months." But the

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Protocol Amending U.S.–Israel Extradition Treaty, art. 1, *entered into force* Jan. 10, 2007, S. TREATY DOC.109-3 (replacing art. II of earlier treaty); Lithuanian Extradition Treaty, art. 2(3), *entered into force* Mar. 31, 2003, S. TREATY DOC. 107-4; Austrian Extradition Treaty, art. 2(4)(c), *entered into force* Jan. 1, 2000, S. TREATY DOC. 105-50, TIAS 12916; Extradition Treaty with Belize, art. 2(3)(b), *entered into force* Mar. 27, 2001, S. TREATY DOC. 106-38; Korean Extradition Treaty, art. 2(3)(c), *entered into force* Dec. 20, 1999, S. TREATY DOC. 106-2, TIAS 12962. For provisions regarding tax and customs, see South African Extradition Treaty, art. 2(6), *entered into force* June 25, 2001, S. TREATY DOC. 106-24 ("Where extradition of a person is sought for an offense against a law relating to taxation, customs duties, exchange control, or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty, or exchange regulation of the same kinds as the law of the Requesting State"); Extradition Agreement with the European Union, art. 4(3)(c), *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (applying in place of provisions contained in any earlier extradition treaty between the United States and an EU member state that allowed for extradition only for a specified list of offenses); Austrian Extradition Treaty, art. 2(4)(B), *entered into force* Jan. 1, 2002, S. TREATY DOC. 105-50, TIAS 12916; Korean Extradition Treaty, art. 2(6), *entered into force* Dec. 20, 1999, S. TREATY DOC. 106-2, TIAS 12962; Polish Extradition Treaty, art. 3, *entered into force* Sept. 17, 1999, S. TREATY DOC. 105-14. *But see* Extradition Treaty with Luxembourg, art. 5(1), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-10, TIAS 12804 ("The executive authority of the Requested State shall have discretion to deny extradition when the offense for which extradition is requested is a fiscal offense [i.e., purely a tax, customs, or currency offense]."). *See also* Garcia & Doyle, *supra* note 50, at 11.

76 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. Jul. 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D.Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D.Cal. 1998).

> affidavit of the British Consul General recites that Collins stands charged in the Chief Presidency Magistrate's Court with having feloniously obtained the pearl button by false pretenses; and the certificate of the Secretary to the Government of India, which accompanies the papers on which Collins' surrender is sought, describes the offense with which he is there charged as "the crime of obtaining valuable property by false pretenses." The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. *It is enough if the particular act charged is criminal in both jurisdictions*. This was held with reference to different crimes involving false statements in *Wright v. Henkel*, 190 U.S. 40, 58; *Kelly v. Griffin*, 241 U.S. 6, 14; *Benson v. McMahon*, 127 U.S. 457, 465; and *Greene v. United States*, 154 Fed. 401. Compare *ex parte* Piot, 15 Cox C. C. 208. The offense charged was, therefore, clearly extraditable.[77]

The Brandeis opinion conformed with that of Chief Justice Melville Fuller in *Wright v. Henkel*,[78] wherein he stated, "it is enough if the particular variety was criminal in both jurisdictions."[79]

In *Glucksman v. Henkel*,[80] Justice Oliver Wendel Holmes, relying on Chief Justice Fuller's position, went even further. With respect to the relationship between the complaint and the evidence represented, he stated:

> Neither *Wright v. Henkel*, 190 U.S. 40, nor *Pettit v. Walshe*, 194 U.S. 205, indicates that because the law of New York in this case may determine whether the prisoner is charged with an extraditable crime, it is to determine the effects of such a variance between evidence and complaint. *That is a matter to be decided on general principles, irrespective of the law of the state*.[81]

The majority position expressed by Justices Holmes and Brandeis remained firm in U.S. jurisprudence until it was expanded in a controversial manner in *Factor v. Laubenheimer*.[82] In that case, the United Kingdom requested extradition from the United States of John Jacob Factor for the crime of knowingly receiving fraudulently obtained money. The Supreme Court upheld the decision of the extradition magistrate in favor of extradition, despite the fact that the criminal law of Illinois, where Factor was found and where the extradition hearing was held, did not specifically cover this offense. The Court found the conduct with which Factor was charged to be a crime in the United Kingdom and within the provisions of the Treaty of 1889 between the two countries, and that it was a crime under the law of many states, although not Illinois (which, however, criminalized similar conduct).

The *Factor* case reaffirmed the position of the United States to engage in extradition relations only by treaty and limited the practice to a strict interpretation of the applicable treaty (the treaty in question, namely the Webster-Ashburton Treaty of 1842 and its supplementary agreements of 1889, 1900, and 1905). Each supplementary agreement, inter alia, added to the list of

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77 *Colins,* 259 U.S. at 311–312 (citations omitted). For a recent case following this analysis, see *In re Extradition of* Szepietowski, 2009 U.S. Dist. Lexis 4658, at *20–*24 (E.D.N.Y. Jan. 23, 2009).

78 Wright v. Henkel, 190 U.S. 40 (1903). *See Scott v. State of Israel*, 48 I.L.R. 188, 189 (Sup. Ct. as Ct. Crim. App. 1970) (Isr.) (holding, citing *Wright v. Henkel*, that the relator was extraditable to the United States for an offense under the laws of a particular state rather than a federal offense). *See also* Theron v. U.S. Marshal, 832 F.2d 492, 496 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988); Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980); Heilbronn v. Kendall, 775 F. Supp. 1020, 1024 (W.D. Mich. 1991) (stating that the court must look to proscription by similar criminal provisions of federal law or, if none, the law of the place where the petitioner is found or, if none, the law of the preponderance of the states).

79 *Wright*, 190 U.S. at 60–61.

80 Glucksman v. Henkel, 221 U.S. 508 (1911).

81 *Glucksman,* 221 U.S. at 513–514 (emphasis added).

82 Factor v. Laubenheimer, 290 U.S. 276 (1933). For a critical view of this decision, see Manley O. Hudson, *The* Factor *Case and Double Criminality in Extradition*, 28 Am. J. Int'l L. 274 (1934). For a supporting view, see Edwin M. Borchard, *The* Factor *Extradition Case*, 28 Am. J. Int'l L. 742 (1934).

extraditable offenses. The offense charged in this case was not a crime in Illinois where the accused was sought, and traditional application of dual criminality would have precluded his extradition. The Court reached its conclusion by finding the requirement of dual criminality, which was stated in the treaty as applicable to some of the offenses, was not applicable to the offense for which the relator was sought because the offense was listed in one of the supplementary agreements that failed to mention that requirement explicitly. The Court in interpreting the treaty found, under the maxim *expressio unius est exclusio alterius*, that dual criminality as stated in the original treaty had been excluded from the supplementary part that was applicable to the case at bar. The Court rejected the argument that dual criminality was a requirement of CIL, because U.S. extradition practice was based solely on the existence of a treaty. For all practical purposes, had the Court recognized the applicability of the dual criminality requirement in reliance on many precedents, including *Collins v. Loisel*,[83] which it distinguished, it could have been satisfied. The requirement would have been interpreted as subjectively meaning that the acts charged constituted an extraditable offense if charged in the requested state, even though it is not the same charge proffered by the requesting state. The Court concluded that when the particular offense charged is not among those specifically required to be criminal in both states, the acts complained of need not constitute the same crime in the state where the accused is found. It was sufficient, the Court found, that the offense was specified in the treaty and considered a crime by the jurisprudence of both states.

The Supreme Court, in effect, set aside the argument that there was a general treaty requirement of dual criminality by declaring:

> The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships…should be construed more liberally than a criminal statute or the technical requirements of criminal procedure.…It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory. But that policy when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offenses charged according to the laws of the particular place of asylum.[84]

The *Factor* decision was precedent to the question of treaty interpretation, and only in dicta addressed the substance of the application and interpretation of the dual criminality requirement.

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83 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. Jul. 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

84 *Factor*, 290 U.S. at 298–300. *See* McElvy v. Civiletti, 523 F. Supp. 42 (S.D. Fla. 1981), in which the defendants argued that the requirement of dual criminality, meaning that the offense for which extradition was sought be a serious crime punishable under the laws of both countries, was not satisfied because the offense with which they were charged did not constitute a felony under the law of the United States. Dismissing the defendant's complaint, the court stated that extradition challenges must be approached with a view toward finding the offenses within the treaty. In this case, dual criminality was satisfied because the offenses alleged were substantially analogous to each other. *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); *In re* Abarca, 40 I.L.R. 208, 209 (Cass. 1964) (Belg.), in which the court rejected the relator's contention that the concept of "attempted" crime was different under Belgian and Swiss law. The failure by the Swiss court to specify whether the alleged offense constituted an "attempted crime" or an "unsuccessful crime" was found by the court to be irrelevant, as both concepts were embraced within Belgian law. *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Demjanjuk, 612 F. Supp. 544, 569 (N.D. Ohio 1985), *aff'd sub nom.*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (holding that the common law rule of

Justices Butler, Brandeis, and Roberts, who dissented from the majority, pointed out that even if the Court applied a broad interpretation of the requirement of dual criminality, the outcome still would have been the same. This illustrates the observation made earlier that a broad subjective interpretation of dual criminality leads to the same result as its non-applicability when it is coupled with a broad interpretation of what constitutes the requirement of extraditable offenses.

The position of the United States has remained consistent in all the major decisions of the twentieth century, namely: *Wright v. Henkel*,[85] *Pettit v. Walshe*,[86] *Glucksman v. Henkel*,[87] *Kelly v. Griffin*,[88] *Collins v. Loisel*,[89] and even to some extent *Factor v. Laubenheimer* (subject to the reservations stated in the discussion of this case).[90] Moreover, in 1952, the Second Circuit Court of Appeals in *United States ex rel. Rauch v. Stockinger*[91] denied the application for a writ of habeas corpus brought by Sol and Harold Rauch, whose extradition from the United States was requested by Canada for the crimes of theft and fraud. The extradition agreement between

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"dual criminality" was inapplicable because the U.S.–Israel extradition treaty governed. Citing *Factor*, the court stated that U.S. extradition, which was governed by treaty, did not necessarily bar prosecution for an offense not prosecutable as a crime in the United States.).

85 Wright v. Henkel, 190 U.S. 40 (1903). See also Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); *In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

86 Pettit v. Walshe, 194 U.S. 205 (1904).

87 Glucksman v. Henkel, 221 U.S. 508 (1911). *See* also Bedi, *supra* note 32, at 69–84; Shearer, *supra* note 32, at 132–149. *See also In re Extradition of* Manzi, 888 F.2d 204 (1st Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *In re Extradition of* Russell, 789 F.2d 801 (9th Cir. 1986); Melia v. United States, 667 F.2d 300 (2d Cir. 1981); United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); Cucuzzella v. Keliikoa, 638 F.2d 105 (9th Cir. 1981); United States *ex rel.* DiStefano v. Moore, 46 F.2d 310 (2d Cir. 1930), *cert. denied*, 283 U.S. 830 (1930); Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990). *Compare* Brauch v. Raiche, 618 F.2d 843, 847–851 (1st Cir. 1980) *with* Shapiro *v.* Ferrandina, 478 F.2d 894, 905–909 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973).

88 Kelly v. Griffin, 241 U.S. 6 (1916). *See also* Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989), *reh'g denied*, 492 U.S. 927 (1989). *See also In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

89 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y., July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y., Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997); United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989). *See also* United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal. 1998); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986); Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986); *In re Extradition of* Rafael Eduardo Pineda Lara, 1998 WL 67656 (S.D.N.Y. Feb. 17, 1998); *In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); *In re* Sindona, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

90 *See supra* note 82 and accompanying text. For other liberal interpretations of what constitutes an extraditable offense citing *Factor v. Laubenheimer*, see *Villareal v. Hammond*, 74 F.2d 503 (5th Cir. 1934); Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931). The opposite view is represented in *Hatfield v. Guay*, 87 F.2d 358 (1st Cir. 1937), *cert. denied*, 300 U.S. 678 (1937), *reh'g denied*, 301 U.S. 713 (1937), which seemed to apply an objective criteria of interpretation to dual criminality, even though it restricted itself to the interpretation of extraditable offenses and did so narrowly. As to acts which preceded a treaty, it was held that the treaty list was applicable. *See* United States *ex rel.* Oppenheim v. Hecht, 16 F.2d 955 (2d Cir. 1927), *cert. denied*, 273 U.S. 769 (1927).

91 United States *ex rel.* Rauch v. Stockinger, 269 F.2d 681 (2d Cir. 1959), *cert. denied*, 361 U.S. 913 (1959), *reh'g denied*, 361 U.S. 973 (1960). *See* Spatola v. United States, 925 F.2d 615 (2d Cir. 1990); *In*

the United States and Canada included larceny as an extraditable offense. The question arose as to whether the offense charged was the same one stated in the treaty constituting an extraditable offense. The court stated:

> After an examination of the applicable portions of the Criminal Code of Canada dealing with theft and fraud we are convinced that the facts set out in the depositions provided a reasonable ground for the Commissioner to believe that relators committed acts criminal under the laws of Canada. It likewise seems clear to us that the contents of the depositions provided a reasonable ground for him to believe that relators committed acts which would be criminal under the laws of New York. New York Penal Law, McKinney's Consol. Laws, c. 40, Sections 1290, 1294, and 1295. It is immaterial that the acts in question constitute the crime of theft and fraud in Canada and the crime of larceny in New York State. *It is enough if the particular acts charged are criminal in both jurisdictions*. *Collins v. Loisel*, 1922, 259 U.S. 309, 42 S. Ct. 469, 66 L. Ed. 956.[92]

Thus the court did not limit its inquiry to the label of the charge, but inquired into the criminal conduct and the type of crime to which it gave rise.

In *Gallina v. Fraser*[93] the district court and circuit court clarified the inquiry of courts into the alleged criminal conduct, its relationship to the offense charged, and its corresponding offense in the law of the requested state. Considering the application for a writ of habeas corpus filed by Vincenzo Gallina, who was being held for extradition to Italy for the crime of robbery, the district court stated in 1959 that:

> There is ample evidence in the record that the acts participated in by the relator were within that definition. It is true that the Italian record employs terms which translate into English as "continuous," "reiterated," and "aggravated" in connection with the offense of robbery, but an examination of the record establishes that these words describe circumstances surrounding a robbery or series of robberies, which circumstances, under Italian law, indicate the nature and type and extent of the penalty to be inflicted, rather than the nature of the crime itself. It is also clear that the reference in the Italian record to a charge of "attempted" robbery against relator indicates nothing more than that it was to be considered just another circumstance of the crime of aggravated robbery, of which relator was ultimately convicted. The offense of aggravated robbery as encompassed in the Italian Penal Code, translated sections of which are in the record, is extraditable under the treaty.[94]

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re Extradition of Orellana, 2000 WL 1036074 (S.D.N.Y. July 26, 2000); Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re* Edmondson, 352 F. Supp. 22 (D. Minn. 1972).

92 *Stockinger*, 269 F.2d at 685–687 (emphasis added).

93 Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960), *reh'g denied*, 364 U.S. 906 (1960). *See also* Messina v. United States, 728 F.2d 77 (2d Cir. 1984). In *Prushinowski v. Samples*, 734 F.2d 1016 (4th Cir. 1984), the court examined the alleged criminal conduct and its relationship to the offense charged by the requesting rather than the requested state. The relator was sought by Great Britain for violations of the British Theft Act of 1968, which were extraditable offenses, but contended that the offenses with which he was charged were actually violations of the English Finance Act of 1972, which were not extraditable offenses. The court held that the relator was extraditable because probable cause had been established that he had violated the British Theft Act of 1968, and that a British court was the appropriate tribunal to determine which statute was most appropriate.

94 *Gallina*, 177 F. Supp. at 866–867. *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, 99 Cal. Daily Op. Serv. 200, (9th Cir. 1990). *But see* Ahmad v. Wigen, 726 F. Supp. 389, *aff'd* 910 F.2d. 1063 (2d Cir. 1990); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3d Cir. 1997).

By comparison, another decision took a more restrictive view. In 1957, Mexico requested the extradition of Abe Wise from the United States for fraud arising from the writing of a check by Wise "by reason of the settlement relative to a profit sharing association contract which was not honored because of insufficient funds."[95] As fraud was not one of the crimes enumerated in the Extradition Treaty of 1899 between the United States and Mexico,[96] the extradition complaint referred to section 19 of Article II of the Treaty, which provided for extradition for the offense of "obtaining by threats of injury, or by false devices, money, valuable or other personal property. . . ." The extradition magistrate held that a proper case for extradition had not been made out, stating:

> I find no crime denominated as fraud listed in the Treaty or Supplemental Conventions. That term seems to have crept into the complaint by reason of the use of the term in some of the documents and records of the Mexican Government accompanying the complaint. The offense sought to be charged here, and which the complaint *should* charge, if extradition is to be had, is that of *obtaining money, valuable or other personal property by false devices*. Mexico seems to have such a law, and Texas has such a law—swindling, punishable by imprisonment as for theft. But the complaint does not charge Wise with obtaining *money, valuables or other personal property* by false devices; it charges commission of the crime of fraud more particularly referred to in Section [subd.] 19 of the Treaty. But it does not charge *what* Wise obtained—whether money, or *what* valuable or *what* personal property.. .
>
> An examination of these exhibits discloses they do not by any stretch of the imagination charge Wise with *obtaining money, valuables or other personal property* by threats of injury or by false devices, the offense for which extradition is authorized by subd. 19 of Article II of the treaty. On the contrary, taking as admitted all of the fact allegations and conclusions set out in the Mexican proceedings, the record shows that Wise committed, and is charged with committing, in Mexico, the crime of "drawing a check without funds," *in settlement of a profit sharing contract between himself and an association of collective farmers*.
>
> *This is an offense for which the treaty does not authorize extradition.* While the laws of Mexico, and now the laws of Texas, provide punishment for the giving of a hot check, in the amount involved here ($23,241.38), with intent to defraud, even in payment of a pre-existing debt, that crime is not a *treaty offense*. It is *not* charged that Wise obtained *money, valuables, or other personal property* by the false device of giving a hot check. It *is* charged that he made a *settlement of matters with the association* by giving the worthless check. . . . If Wise had obtained vegetables or cantaloupes by the false device of a worthless check, the offense would be extraditable; but "settlement" of a debt or controversy by worthless check does not come within the treaty. . . .[97]

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95 *In re* Wise, 168 F. Supp. 366 (S.D. Tex. 1957). The Canadian position was the same in *In re Dornberger*, 8 Ann. Dig. 381 (Sup. Ct. 1935) (Mex.). *But see* Koskotas v. Roche, 740 F. Supp. 904 (D. Mass.), *aff'd*, 931 F.2d 169 (1990) (holding that the focus should be on whether the crime charged and the treaty offense share the same essential elements. The extradition court must inquire whether the extraditing country is obliged to prove each essential element of the offense covered by treaty in order to prove the charged offense).

96 Treaty for the Extradition of Criminals, Feb. 22, 1899, U.S.–Mex., 31 Stat. 1818.

97 168 F. Supp. at 368–369, 370–371, 372. *See* Hu Yau-Leung v. Soscia, 649 F.2d 914, 918–919 (2d Cir. 1981), *cert. denied*, 454 U.S. 971 (1981). In that case, the district court had denied extradition of the relator to Hong Kong, because the Treaty on Extradition between the United States and the United Kingdom required the offense be a "felony." The relator, who was sixteen at the time the crimes were allegedly committed, could be prosecuted in the United States only as a juvenile delinquent, so the "felony" requirement was not met. The Second Circuit reversed, holding that the district court had erred in considering only federal law to determine whether the offense constituted a felony. Instead, the Second Circuit held that federal law determines a felony only when a violation of a federal statute is alleged, and as the offense in question was a felony under the laws of the state of New York, not federal law, then New York law determined whether the offense was a "felony." The court concluded that because the offense was a felony under New York law, it was a felony within the meaning of the treaty. *See also In re Extradition of* Tang Yee-Chun, 674 F. Supp. 1058 (S.D.N.Y. 1987); Freedman v. United States,

This last paragraph of the court's opinion reveals how narrowly it construed the treaty provision and how restrictively it was applied.

In a case having political ramifications, the Court of Appeals for the Fifth Circuit in 1962 in *Jimenez v. Aristeguieta* adhered to the same position.[98] The relator, Carlos Perez Jimenez, the president of the Republic of Venezuela, who had been deposed in a coup d'état, sought asylum in the United States. Among the crimes charged against him were causing improvements to be made on his private property and work to be done in connection with his private ventures at public expense, as well as receiving, through intermediaries, "kickbacks" and commissions in connection with the negotiation and award of contracts for the purchase, with public funds, of guns, airplanes, and other articles or property supplied or to be supplied to the government of Venezuela. Jimenez's extradition was requested on the basis, inter alia, of paragraph 14 of Article II of the Extradition Treaty of 1922 between the United States and Venezuela, which listed as an extraditable offense:

> Embezzlement or criminal malversation committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela.[99]

As to this aspect of the case, the extradition magistrate found sufficient evidence that President Jimenez committed the acts charged and that these acts were within the meaning of paragraph 14 of Article II of the Treaty. On appeal from denial of a habeas corpus petition challenging the finding of the extradition magistrate, the Court of Appeals for the Fifth Circuit concluded that:

> Criminal malversation includes a broad category of corrupt official practices. Webster's New International Dictionary defines the word "malversation" thus: "Evil conduct; fraudulent practices; misbehaviour, corruption, or extortion in office." p. 1490 (2d ed. 1957). The Oxford English Dictionary lists two current meanings: :corrupt behaviour in an office, commission, employment, or position of trust," and "corrupt administration *of something*"—and gives a number of instances of the use of the word in such broad senses, beginning in 1549 and continuing through the nineteenth century.
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> Black's Law Dictionary sets out the accepted definition: "In French law, this word is applied to all grave and punishable faults committed in the exercise of a charge or commission, (office), such as corruption, exaction, concussion, larceny." p. 1112 (4th ed. 1951).
>
> There is evidence showing that appellant, as chief executive of Venezuela, used his position of power and authority to divert funds and services belonging to Venezuela to his own use and benefit. The offenses as to which probable cause has been certified constituted "embezzlement or criminal malversation." [100]

This position was followed in *In re Extradition of Rabelbauer*,[101] where the Austrian government also sought the extradition of the relator on the basis of the treaty offense of malversation. That crime, in the 1900s, referred to the equivalent crime of embezzlement by a public official and abuse of trust and confidence through which the accused deprived someone else of something of value. A strict interpretation of malversation could exclude such property crimes as theft, burglary, or robbery as they do not involve the abuse of trust and confidence of the victim. The

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437 F. Supp. 1252 (N.D. Ga. 1977) (finding the relator not extraditable for the offense of "commercial bribery," which was not a crime under the laws of Georgia or the United States. However, the relator was extradited to Canada on the charge of fraud.).

98 Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, *reh'g denied*, 374 U.S. 858 (1963).

99 Extradition Treaty with Venezuela, Jan. 19, 1922, U.S.–Venez., Art. II (14), 43 Stat. 1698.

100 Jimenez v. Aristeguieta, 311 F.2d 547, 562–563 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

101 *In re Extradition of* Rabelbauer, 638 F. Supp. 1085 (S.D.N.Y. 1986).

relator argued that as the accompanying Austrian text of Article II, paragraph 14 contained the word "unterschlagung," the meaning of the English text was limited. "Unterschlagung," Rabelbauer argued, meant only embezzlement or misappropriation of funds, and could not be official corruption. The government argued that "unterschlagung" was intended to encompass the same broad range of misdeeds as malversation. The court concluded it would take a broad view of the meaning of the term, not in the context of the time the treaty was entered, but in contemporary terms. The court stated:

> A liberal construction of paragraph 14 brings official misconduct and corruption within the crime of criminal malversation. The fact that malversation's Austrian counterpart unterschlagung may have acquired a narrower meaning since 1930 is irrelevant. There is little doubt that the word has undergone some evolution in Austria because even [Rabelbauer's Austrian criminal attorney] testified that it only entered the Austrian Penal Code in 1975. The broad meaning originally attached to the word is evidenced by the fact that unterschlagung is also contained in the Treaty as the translation in Article II, paragraph 20 for "breach of trust." As the Austrian Federal Ministry of Justice has indicated, the word had a meaning in 1930 broad enough to be the equivalent of malversation and was used for that purpose. The intention of the contracting parties would be served by no other construction.[102]

That, in the opinion of this writer, who was counsel in the case, was an erroneous interpretation as treaties are to be interpreted in accordance with the plain meaning of the words and their import at the time of the conclusion of the treaty. Courts are not the appropriate mechanism for updating older treaties to comport with contemporary requirements.

In a parallel construction, Canadian courts have adopted the same position vis-à-vis the United States. In 1963, the United States, on behalf of the State of New York, sought the extradition from Canada of James Pendergast, who had been indicted in New York for larceny. It was charged that Pendergast had issued several large checks against insufficient funds. After Pendergast had been found extraditable, he applied for discharge by way of habeas corpus. In dismissing the application, the High Court of Justice of Ontario considered the offense, in terms of Canadian law, as follows:

> Pendergast was indicted in the State of New York in respect to two charges on what is called grand larceny in the first degree. It is apparent that this charge is the equivalent of what is known in Canada as obtaining money by false pretenses.[103]

While the other courts showed more reticence to expand the notion of kindred offenses, the Canadian Court found it easier to pursue a course of interpretation of dual criminality *in abstracto*. The reciprocal experience of Canada and the United States as neighboring states has done much to ensure the satisfactory reliance on this interpretative approach to dual criminality. The relations between the United States and Mexico have demonstrated the same consistency, which is characteristic of neighboring states concerned with the mutual preservation of their internal order and cooperation in the suppression of criminality.

Some cases reveal, however, that overreliance on the spirit of cooperation between neighboring states may cause a requesting state not to comply fully with all treaty and statutory requirements. The requesting state must show that the offense charged also constitutes a crime in its own jurisdiction; otherwise extradition cannot be granted. This situation arose before the Superior Court of Quebec in *United States v. Link and Green*,[104] in which the United States had asked for the extradition of Link and Green from Canada on the basis of indictments returned by the State of Michigan. The indictments charged the relators with obtaining money by false pretenses and forgery, inducing persons residing in Michigan to buy shares in certain

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102 *Id.* at 1088.

103 *Ex parte Pendergast*, 6 Crim. L.Q. 393, 394 (Can. 1963).

104 21 I.L.R. 234 (Super. Ct. Que. 1954) (Can.).

companies. The accused conducted their scheme from Montreal by means of postal and telephone services, and at no time were they in Michigan or elsewhere in the United States. After carefully considering the facts and the evidence presented, the Superior Court of Quebec stated:

> For an extradition application to be granted to surrender a fugitive for trial in a foreign jurisdiction, the conduct charged as an offense must be punishable criminally both by the laws of that foreign jurisdiction and of Canada, and must also come within the provisions of the relevant Extradition Treaty or Convention.... [However] [i]t now becomes necessary to state that the applicant did not attempt to make any proof that forgery, false pretenses, defrauding the public or appropriating money or property for the benefit of the accused were offenses under the law of the State of Michigan, although they are criminal offenses under the Canadian Criminal Code.[105]

The unusual feature of this case was not the question of whether the offense charged constituted an extraditable offense or whether it constituted an offense in the requested state, but whether it was an offense under the laws of the requesting state.

A similar decision was reached in *In re Lamar*[106] by the Supreme Court of Alberta, when the Court, rejecting the application for extradition, stated:

> The evidence does not disclose that the use of the mails constituted any part of the unlawful obtaining, as the money so unlawfully obtained was taken before the confirmation of purchase letter was written or mailed. Therefore no *prima facie* case has been made out to make the above proven law applicable. The imputed crime has not shown to be a crime within the law of the United States of America.[107]

These cases, however, do not bear directly on the type of interpretation the Canadian courts have given dual criminality in practice with the United States. The interpretation remained a subjective, *in abstracto*, interpretation.[108]

This practice dates back to 1860 to the notorious case of *In re Anderson*.[109] The relator, John Anderson, was a black slave who was sought for extradition from upper Canada to Missouri to answer a charge of murder under the laws of that state. The alleged crime had been committed when the victim, a planter named Diggs, attempted to prevent the fugitive from escaping. Under the laws of the requesting state, the victim was not only authorized, but under legal duty to attempt to prevent the escape of slaves. In Canada, the institution of slavery was not recognized and, of course, no law required citizens to apprehend escaping slaves. Had the incident occurred in Canada, the relator would not have been culpable for killing the victim in order to retain his liberty. The case was nevertheless decided in favor of surrender by the Court of the Queen's Bench of Upper Canada, on the grounds that the victim had been acting with legal authority. Furthermore, under the law of Canada, if a person kills another who is attempting to apprehend him/her under legal authority, such a person commits murder.[110]

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105 *Id.* at 234–235.

106 9 Ann. Dig. 405 (Sup. Ct. Alta. 1940) (Can.).

107 *Id.* at 406.

108 *See, e.g.,* Gary Botting, Extradition between Canada and the United States (2005); Gerard V. LaForest, Extradition to and from Canada (2d ed. 1977).

109 Ann. Reg. (1861), 520, Parliamentary Papers (1860), *discussed in* Edward Clarke, A Treatise upon the Law of Extradition 103 (London, Stevens and Haynes 1867).

110 An opposing view was taken by Great Britain in an opinion of the law officer of Her Majesty's government in an application made to the president administering the government of the Virgin Islands by the lieutenant governor of the Danish Island of Saint Thomas for the arrest and restitution of two slaves charged with burglary and felony who had fled to Tortola. The law officer said: "[W]e are of the opinion that according to the Law of Nations and the Laws of this Country, the Danish Government is not entitled to demand these Refugees; and it makes no difference in our view of the case that they are Slaves

A contrasting position was taken in the case of *United States v. Eisler*, in which Eisler was sought for extradition from the United Kingdom on charges of perjury. The English court stated:

> It seems to me the facts are abundantly clear. Eisler filled in a form as required by the law and he made therein certain statements. He was arraigned and indicted on various matters, including making a false statement. He was tried before the District Court of Columbia in due course and he was sentenced, and he is therefore a convicted person. The point is, is he a fugitive criminal?—a person whose return to his country may be required by the United States. What is an indictable [extraditable] crime? Those matters are regulated by a Treaty between this country and the United States of America, and are set out in the Order in Council of 6th July, 1945, amongst other places. Those persons who have been accused or convicted of certain crimes or offences shall be returned, if found within the territory of either party, and in Article 3 (14) the crime of perjury is set out. It is therefore necessary to see whether by the law both of the United States and this country this man was found guilty of a crime which means perjury. Perjury is a somewhat technical matter. It is thought by certain people that if you merely tell a lie on oath, you have committed perjury. You have committed an offence which is something akin to perjury, but not necessarily perjury. The definition of perjury is contained in Section 1 of the Perjury Act. "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in the proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . . ." Then by Section 2, "The expression `judicial proceeding' includes a proceeding before any court, tribunal, or person having by law power to hear, receive and examine evidence on oath." And Section 3—relied on by Sir Valentine Holmes—"Where a statement made for the purpose of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorized by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for purposes of this section, be treated as having been made in a judicial proceeding." That was the occasion on which Eisler made his false statement. It seems to me there were then contemplated no judicial proceedings whatever. It was purely an administrative action performed by the officer in question. He was taking and recording statements of Mr. Eisler. Mr. Eisler for making the statements in the form which were false, was convicted by the District Court of Columbia on the third indictment, and that sets out that in the said application the defendant made statements as set out in A, B, and C of count (1) which were false in respect of that count. The point is, is what he was convicted of in America, both in America and here, an extraditable crime. In my opinion, it is abundantly clear that in no circumstances whatever could that offence of which Mr. Eisler was convicted in America be brought under the technical head of perjury in this country.
>
> In those circumstances, the United States requisitioning power[s] have failed to show that Mr. Eisler has been guilty of an extraditable crime, and this application fails.[111]

Commenting on this decision, the Department of State noted that the offense Eisler had been convicted of in the United States was apparently also an offense in the United Kingdom, as it appeared in the British Perjury Act of 1911 under a section entitled "Kindred offenses," one of which was false swearing under oath made otherwise than in a judicial proceeding. The Department stated:

> The Department of State and the Department of Justice were aware at the time that the request for the extradition of Eisler was made that it would be necessary to establish the fact that the crime for which the fugitive had been convicted was a crime covered by the treaty according to British law. The applicable provision in Article 9 of the treaty is typical of the provision

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by the Law of Denmark or that in the event of their being acquitted of the Felony they would continue to be held in Slavery in that Country." *See* Sir Arnold McNair, *Extradition and Extraterritorial Asylum*, 1951 Brit. Y.B. Int'l L. 172, 180.

111 *See* United States v. Eisler, 75 F. Supp. 640 (D.D.C. 1948), *aff'd*, 176 F.2d 21 (D.C. Cir. 1948), *cert. denied*, 337 U.S. 958 (1949); 6 Whiteman Digest, *supra* note 59, at 797–798.

> contained in each of our treaties. It was thought, however, that the British court would follow the practice of the courts of the United States in interpreting extradition treaties liberally and that it would hold that the crime came within the term "perjury" as used in the treaty in as much as the British Perjury Act of 1911 defines in Section 2 the crime as a kindred offense.
>
> It is believed that the term "perjury" was used in the treaty generically rather than technically, as the definition of the crime both by the United States and British statute was fixed many years before the treaty was negotiated and it is hardly to be assumed that the two Governments intended to apply different meanings to it. It does not appear from the transcript of the hearings that this view was argued before the court or that it passed upon it but rather that the court limited its decision to the one point, namely, that the offense was not perjury within the meaning of Section 1 of the British Perjury Act.[112]

The British position has remained consistent since 1865. In *Ex parte Windsor*,[113] the court discharged the relator, who was wanted for forgery by the United States, because the acts alleged by the requesting state did not constitute the crime of forgery under UK law. The same rationale was followed in *King v. Dix*[114] in 1902, in which extradition was denied because the charge of larceny alleged by the United States did not conform to the required elements of that crime under UK law. A second charge of embezzlement was found to be extraditable, because it corresponded to the crime of larceny by fraud under UK law and was covered by the treaty.

Finally, in *R. v. Governor of H.M. Prison, Brixton, Ex parte Gardner*, an extradition request from New Zealand to the United Kingdom was denied for the alleged offense of obtaining money with intent to defraud by means of false pretenses.[115] The court noted the relator had falsely represented that he would supply a distributor with cosmetics for a sum of money and made such representations as to a future event, which although criminal under the law of New Zealand, were not encompassed in UK law. Accordingly, the offenses charged did not constitute crimes under the law of England and Wales.[116]

France, in its extradition relations with the United States, adheres to a more rigid position than does the United Kingdom. In the *Blackmer* case,[117] France refused extradition to the United States because the offense charged did not constitute a prosecutable offense *in concreto* under French law. The Paris court found that the statute of limitations for similar offenses had lapsed under French law, and thereby extinguished the prosecutability of the offender. Thus, the acts

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112 6 Whiteman Digest, *supra* note 59, at 798–799 (quoting the American Embassy, London, to the Department of State, dispatch No. 980, June 9, 1949, encl. 1, MS. Department of State, file 241.11 Eisler, Gerhart/6-949; Assistant to the Legal Adviser (Vallance) to Gilbert F. Kennedy, Counselor at Law, London, letter, July 22, 1949, *id.* at 7–1349). For a discussion of the case, see Philip E. Jacob, *International Extradition: Implications of the Eisler Case*, 59 Yale L. J. 622 (1950).

113 12 L.T.R. 307 (Q.B. 1865) (Eng.).

114 18 T.L.R. 231 (K.B. 1902) (Eng.).

115 41 I.L.R. 397 (Q.B. Div'l Ct. 1967) (Eng.). *See also* Alun Jones, Jones on Extradition (1995); V. Hartley Booth, British Extradition Law and Procedure 47, 111, 167 (1980). The first English extradition book was Charles Egan, The Law of Extradition Comprising the Treaties Now in Force between England and France and England and America (1846). For subsequent writings, see Henry C. Biron & Kenneth E. Chalmers, The Law and Practice of Extradition (1903); Frederick Waymouth Gibbs, Extradition Treaties (1868); Sir George Cornewall Lewis, On Foreign Jurisdiction and the Extradition of Criminals (London 1859); Aloysius de Mello, A Manual of the Law of Extradition and Fugitive Offenders Applicable to the Eastern Dependencies of the British Empire (2d ed. 1933); Sir Francis Taylor Piggott, Extradition (1910).

116 41 I.L.R. *supra* note 115, at 399, 404.

117 Case of Blackmer, Court of Appeals of Paris, Chambre des Mises en Accusation (1928). *See also* Blackmer v. United States, 284 U.S. 421 (1932).

charged could not constitute an offense under French law. Therefore, the French position focuses on the prosecutability of the offense, or *l'incrimination*, as does that of the United States, but the difference lies in considering the statute of limitations a substantive defense to be raised at trial.

In a 2008 case, the relators argued that the dual criminality requirement was not satisfied because the U.S. statute of limitations on fraud had lapsed.[118] The court reasoned that under the analogous statute, different from the one the relators relied on, the applicable statute of limitations had not run.[119]

Another case involving the United States as a requesting state was *In re Insull*.[120] In that matter, a Greek Court of Appeals in 1933 found that an extraditable offense was to be found *in concreto,* and dual criminality required that all the elements of prosecution in the requested state be satisfied. The court asserted its right to examine the substance of the charge and to determine the existence of the mental element of the offense charged. In effect, the court examined whether the relator could have been found guilty under Greek law, which was tantamount to a finding of potential conviction rather than mere prosecutability. The United States was critical of that approach and rejected it.

The question of the type and quantum of evidence required in an extradition request is often confused with the issue of extraditability, which requires substantively that the offense be extraditable and that the offense charged satisfy dual criminality, meaning prosecutability rather than punishability.[121] It is noteworthy that, under common law, the examining magistrate or judge considers the existence of probable cause as a reasonable belief that the offense charged has been committed. In civil law systems, the examining magistrate or judge does not inquire into the probable cause or the evidence and takes the charging document or the arrest warrant (both of which are issued by a judge) at face value as constituting probable cause.

As discussed above, the U.S. Supreme Court in *Collins v. Loisel*[122] in 1922 stated: "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in two countries."[123] It is, therefore, enough if the particular action charged is criminal in the two legal systems. This position embodies the notion of *in abstracto* dual criminality and is, therefore, contrary to the *in concreto* approach followed in some countries.[124] The *in abstracto*

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118 The relators argued that the applicable statute of limitations was five years under 18 U.S.C. § 3282 because the charged offense in Pakistan was analogous to wire or mail fraud. *In re Extradition of* Tawakkal, 2008 U.S. Dist. Lexis 65059, at *20–*21 (E.D. Va. Aug. 22, 2008).

119 The court reasoned that the applicable statute was the bank fraud statute, which carried a ten-year statute of limitations that had not run. As such, the court did not consider arguments regarding fugitive disentitlement tolling the statute of limitations under 18 U.S.C. § 3290. *Id.* at *33–*35.

120 7 Ann. Dig. 344 (Ct. App. Athens 1933) (Greece).

121 The distinction between these approaches will be discussed in Ch. VIII with respect to substantive defenses to extradition; the requirement of proof is discussed in Ch. IX.

122 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. Jul. 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); Gouveia v. Vokes, 800 F. Supp. 241, 246 (E.D. Pa. 1992).

123 *Collins*, 259 U.S. at 312. *See also Ex parte* Bryant, 167 U.S. 104 (1897).

124 Congrès, *supra* note 30, at 792–795; Jean Claude Lombois, Droit Pénal International 495–496 (2d ed. 1979). The essence of the rule or principle of dual criminality is reciprocity, but that does not mean that the procedures in both states must be alike. For a position that is not followed in other legal systems, particularly France, see United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. Jul. 14, 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). For example, in *In re Extradition of*

approach requires merely that the act charged constitute a crime in the jurisprudence *lato sensu* of the two countries. This position was clearly stated in *Collins*[125] and further developed in *Factor v. Laubenheimer*.[126] The thrust of U.S. decisions has always been in this direction, which rejects the *in concreto* approach of demanding that all requirements of guilt and punishment exist in the two countries. The *in abstracto* approach has also been the one consistently followed by the UK courts,[127] as evidenced by a 1979 case involving an extradition request from the United States for members of the Church of Scientology, wherein the Queen's Bench stated: "[D]ouble criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognized as substantially similar in both countries; (2) that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law."[128] Going even beyond the traditional approach, a U.S. court in *In re Edmondson*[129] noted that "minor variances in technical definition of crime are not fatal."[130]

The development of a liberal *in abstracto* approach coupled with a tradition of listing extraditable offenses in a treaty, which would appear to be a rigid requirement, makes for a more flexible application. It is probably in response to the rigidity of the practice of listing extraditable offenses in treaties that U.S. courts react in a more liberal fashion in interpreting and applying the meaning of those offenses under U.S. law. This is certainly not a better solution to the problems created by the traditional U.S. practice of listing extraditable offenses in a treaty, rather than merely stating a general form defining the *in abstracto* doctrine of dual criminality, with the added proviso that the offenses be punishable by more than one year of imprisonment, so as to limit the otherwise cumbersome and lengthy practice to crimes of some seriousness. The rather liberal interpretation given the principle of dual criminality in more recent cases[131] has resulted,

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Bozano before the Chambre des Mises en Accusation of Limoges, the court held that Bozano's conviction in absentia on appeal after acquittal at trial violated the principle of reciprocity. *See supra* note 17 and accompanying text. *See also* S.Z. Feller, *The Scope of Reciprocity in Extradition*, 10 Isr. L. Rev. 427 (1975). *See* Ch. V, Sec. 4.

125 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998).

126 Factor v. Laubenheimer, 290 U.S. 276 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Glucksman v. Henkel, 221 U.S. 508 (1911). *See also* United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir.), *cert. denied sub nom.*, Reed v. United States, 506 U.S. 924, 113 S. Ct. 347, 121 L. Ed. 2d 262 (1992); United States *ex rel.* Rauch v. Stockinger, 269 F.2d 681 (2d Cir. 1959), *cert. denied*, 361 U.S. 913 (1959), *reh'g denied*, 361 U.S. 973 (1960).

127 *In re Budlong and Kember*, [1980] 1 All E.R. 701, *reprinted in* United Kingdom Case Note, *Extradition-Double Criminality-Definition of Political Offense-Specialty*, 74 Am. J. Int'l L. 447 (1980).

128 *Id.* at 448.

129 *In re Edmondson*, 352 F. Supp. 22 (D. Minn. 1972).

130 *Id.* at 25.

131 Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1405 (9th Cir. 1988) (stating that Hong Kong crimes of false accounting and publishing a false statement are substantially analogous to the federal crime of making a false entry in a bank statement), *cert. denied*, 490 U.S. 1106 (1989), *reh'g denied*, 492 U.S. 927 (1989). *See also In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); Emami v. U.S. Dist. Ct. of N. Dist. of California, 834 F.2d 1444 (9th Cir. 1987) (stating that the substantive conduct of the German crime of fraud and the American crime of mail fraud were functionally identical). *See also In re Extradition* of Chen, 1998 U.S. App. LEXIS 22125 (9th Cir.), Dec. 10, 1997; *In re Extradition of* Lehming, 951 F. Supp. 505 (D. Del. 1996); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D.

for example, in *Jhirad v. Ferrandina*,[132] where the U.S. District Court for the Southern District of New York found that a breach of confidence under Indian criminal law is equivalent to embezzlement. Similarly, the court found in the *Sindona* case[133] that the Italian crime of *concorso in peculato* is equivalent to embezzlement. Clearly the latter, which under Italian criminal law is the participation in embezzlement by a public official of public funds, is far from the traditional meaning of embezzlement under the common law of crimes, or for that matter, under its meaning within the definition of "theft" of the Model Penal Code now followed in most states.[134]

These developments occurred because courts, rather than looking at the doctrine of dual criminality per se, considered first the question of treaty interpretation. Thus courts, starting from that perspective, and only thereafter finding an existing or corresponding crime in the United States, undertook a broader interpretation of dual criminality. In time, a liberal trend developed in applying the doctrine. The United States traditionally interprets extradition treaty provisions in a liberal manner.[135] Consequently, the liberality of the interpretation of the treaty provision and the doctrine of dual criminality has resulted in a less technical approach. This trend favors extradition and strays from the traditional principle *favor reo*. More recent decisions have even interpreted extraditable offenses within a treaty as having a retroactive effect.[136] Thus, in the case of a new treaty (for example between the United States and Italy, which entered into a treaty in 1975 to replace the treaty of 1856), a person sought under the later treaty for a crime committed under the earlier treaty was deemed extraditable.[137] This means that courts consider the doctrine of dual criminality to be more for the benefit of the requesting state than for the protection of the relator.

Cal. 19998); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973); Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), *aff'd on other grounds*, 319 F.2d 661 (2d Cir. 1963), *cert. denied*, 375 U.S. 981 (1964); Spatola v. United States, 741 F. Supp. 362 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615, 618 (2d Cir. 1991) (holding that the U.S. law of conspiracy to commit an offense constituted the crime of association under Italian law); *In re Extradition of* Tang Yee-Chun, 674 F. Supp. 1058 (S.D.N.Y. 1987); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977).

132 Jhirad v. Ferrandina, 355 F. Supp. 1155 (S.D.N.Y. 1973), *rev'd*, 486 F.2d 442 2d Cir. (1973), *on remand*, 377 F. Supp. 34 (S.D.N.Y. 1974), *on remand*, 401 F. Supp. 1215 (S.D.N.Y. 1975), *aff'd*, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976), *reh'g denied*, 429 U.S. 988 (1976).

133 *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd sub nom.*, Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

134 *See* Model Penal Code (Official Text 1962); Bassiouni, *supra* note 67, at 303–333.

135 *See* Ch. II, Sec. 4.3.

136 *See* Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977). *See also* United States *ex rel.* Oppenheim v. Hecht, 16 F.2d 955 (2d Cir. 1927), *cert. denied*, 273 U.S. 769 (1927); Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960), *reh'g denied*, 364 U.S. 906 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, (9th Cir. 1990). *But see* Gouveia v. Vokes, 800 F. Supp. 241 (E.D. Pa. 1992) (holding that a statutory amendment to an extradition treaty authorizing the federal government to extradite a U.S. citizen, if appropriate, was not applicable to a naturalized American citizen whose conduct had been adjudged criminal in Portugal prior to the amendment).

137 For a more recent case, see *United States v. Ryan*, 360 F. Supp. 265 (E.D.N.Y. 1973), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

The traditional position of the United States has always been that the U.S. crime corresponding to an extraditable offense listed in the treaty is made in accordance with the law of the state where the arrest occurs (irrespective of where the arrest warrant was issued). Confusion arises, however, as to whether state or federal law or both apply.[138] This also means that elements of the crime and proof thereof are determined in accordance with the same law. In the 1904 *Pettit v. Walshe*[139] decision, the U.S. Supreme Court found that state law applies, though in *Wright v. Henkel*[140] federal law was not excluded. Subsequently, several federal appellate court decisions deviated from the *Pettit* position. In *Greci v. Birknes*,[141] the court questioned *Pettit* in that its rationale at the time was that most extraditable offenses were defined by state law, but this was no longer the case and federal law may have been more relevant.

Proof of the elements of the crime, as well as all evidentiary questions relating thereto, is determined by federal law.[142] To date, courts still adhere to the position that state law controls as to the crime, but sometimes apply federal standards to "probable cause" and federal law with respect to "evidentiary questions" pertaining to its proof.[143] This, in effect, injects a strong dose of federal criminal law in what was traditionally conceived of as an area of state substantive law.

The case of *Pettit v. Walshe*[144] generated confusion, which has continued since the ruling in 1904, with respect to shifting between the application of state law and federal law. Regrettably, there is no legislative history to clarify when state standards apply. Thus, questions such as the nature of the crime charged for purposes of dual criminality or probable cause and proof

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138 For a more recent case, see *O'Brien v. Rozman*, 554 F.2d 780 (6th Cir. 1977).

139 Pettit v. Walshe, 194 U.S. 205 (1904).

140 Wright v. Henkel, 190 U.S. 40 (1903). *See* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974) (indicating that state law must be looked to at all times; however, if interstate or foreign commerce is involved, reference may be made to foreign law, particularly in an area where state law may be precluded or preempted by a valid exercise of congressional power). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *Cf. Scott v. State of Israel*, 48 I.L.R. 188, 189 (Sup. Ct. as Ct. Crim. App. 1970) (Isr.) (citing *Wright v. Henkel* and holding that the relator was extraditable to the United States for an offense under the laws of a particular state rather than for a federal offense). There is still some uncertainty about whether state law or federal law applies. This is due to two trends. The first is the government's desire to use whatever law is more convenient. The second is the growth of federal criminal law. As a general rule it can be said that state law applies, and in its absence, federal law. *See also* Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); *In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); *In re Extradition of* Marzook, 924 F.Supp. 565 (S.D.N.Y. 1996).

141 Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976). *See also* Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir. 1981) (holding that both state and federal law are relevant absent evidence to the contrary), *cert. denied*, 454 U.S. 971 (1981). In *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), *In re Locatelli*, 468 F. Supp. 568 (S.D.N.Y. 1979), and *Jhirad v. Ferrandina*, 355 F. Supp. 1155, 1161 (S.D.N.Y. 1973), *rev'd on other grounds,* 486 F.2d 442 (2d Cir. 1974) the court held that federal bankruptcy law applied instead of state law, while *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973) held the opposite. *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000). *Compare* Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) *with* Wright v. Henkel, 190 U.S. 40 (1903) (holding that state common law and statutory law could apply).

142 *See* Ch. IX (discussing probable cause and evidentiary questions).

143 For recent cases, see *Theron v. U.S. Marshal*, 832 F.2d 492 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1987); Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980) (stating that the acts upon which the English charges were based were proscribed by similar criminal provisions of federal law, New Hampshire law, or the law of the preponderance of the states); United States *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726 (9th Cir. 1975); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973); Heilbronn v. Kendall, 775 F. Supp. 1020 (W.D. Mich. 1991).

144 Pettit v. Walshe, 194 U.S. 205 (1904).

thereof will, depending on the case and the issue, alternate between reliance on federal law and state law.

It is noteworthy that almost every U.S. decision refers to dual criminality as a "principle," but none has ever defined the meaning of "principle." Presumably, it means a substantive condition of such significance that it is a firm, even irreversible, requirement in U.S. practice. The full impact of that term and its significance would arise if, by treaty or by some other means, the United States would do away with it. This could occur if, for example, U.S. legislation authorized extradition on the basis of comity or by executive agreement, which may not embody the requirement of dual criminality. Courts would then have to decide if it is truly a principle, and thus consider it as an implicit condition for extradition, or if the decisions heretofore rendered meant it only to be a requirement conditioned upon its explicit embodiment in a treaty.

Although the principle seems to have been adhered to consistently in the jurisprudence of the United States, as it has been embodied in each of the treaties the United States has entered into (under a provision listing extraditable offenses), an exception may be found with respect to revocation of parole.[145] The district court in *McGann v. United States Board of Parole*,[146] citing *In re Extradition of Edmondson and Fisher*,[147] held that "although escape was not an extraditable offense under the treaty, extradition was proper where the underlying offense, the crime pursuant to which the escapee was serving time, was extraditable under the treaty."[148]

All of the cases discussed in this section, as well as those cited in the footnotes,[149] indicate that extraditable offenses refer to those offenses that are listed or designated in the relevant extradition treaty, subject to different applications, and in the absence of a treaty to those offenses that are based on reciprocal recognition. All cases indicate that the requirement of dual criminality applies (whether by treaty or not), and is subject to one of the two methods of interpretation discussed earlier (i.e.,*in concreto* or *in abstracto*). The weight of jurisprudential authority, however, reveals that in the United States the subjective method, *in abstracto*, prevails. Certainly, this is the trend in its treaty practice.

In *Brauch v. Raiche*,[150] the decision of the First Circuit in 1980 portended an even broader application of the rule. It is noteworthy that the United States in *Fiocconi v. Attorney*

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145 McGann v. U.S. Bd, of Parole, 356 F. Supp. 1060 (M.D. Pa. 1973), *aff'd*, 488 F.2d 39 (3d Cir. 1973), *cert. denied*, 416 U.S. 958 (1974), *reh'g denied*, 417 U.S. 927 (1974).

146 *Id.*

147 *In re Extradition of* Edmondson & Fisher, 352 F. Supp. 22 (D. Minn. 1972).

148 *In re Extradition of* Edmondson & Fisher, 352 F. Supp. 22 (D. Minn. 1972) (It is cited in the McGann case at page 1062.).

149 *See supra* Secs. 3 and 4. *See also Re* Peron et al., 40 I.L.R. 210 (Sup. Ct. 1965) (Arg.) (concerning an extradition request by Argentina, which was denied by Spain because the request was not made in accordance with strict observance of treaty terms); *United States v. Novick*, 32 I.L.R. 275 (Super. Ct. Que. 1960) (Can.); *Re* Gerber, 24 I.L.R. 493 (BGH 1957) (F.R.G.).

150 Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980). In *United States v. Van Cauwenberghe*, 814 F.2d 1329 (9th Cir. 1987), amended by, 827 F.2d 424 (1987), *cert. denied*, 484 U.S. 1042 (1987), involving an extradition from Switzerland of a Belgian citizen, the Court found that mail and wire fraud can be subsumed within the meaning of "obtaining money under false pretenses." Whether such an offense is established and satisfies the requirement of dual criminality is a matter for the requested state to determine. The court also considered dual criminality as that which is criminally coextensive in the two respective legal systems, and relied on *Collins v. Loisel*, 259 U.S. 309 (1922). *See also In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. Jul. 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. Jul. 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998). *In re Extradition of* Manzi, 888 F.2d 204 (1st Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *In re Extradition of* Russell, 789 F.2d 801 (9th Cir. 1986); and Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). *See also In re Extradition of* Chen, 161 F.3d 11 (9th Cir. 1998); Crudo

General[151] requested and received extradition of the relator from Italy for an offense not listed in the treaty on the basis of comity. The United States, however, will not provide reciprocity in the absence of a treaty-listed offense included in the meaning of dual criminality.[152]

5. Dual Criminality and Complex Crimes

During the last twenty years, the United States has enacted criminal legislation that does not have a counterpart in any foreign legal system, such as RICO[153] and CCE.[154] Because these statutes have no foreign counterpart, when the United States is the requesting state the issue arises as to whether dual criminality exists. A consequence of this problem may spill over into the principle of specialty,[155] where extradition may have been granted on the basis of the requested state's understanding of the charge, which may in fact differ from the actual offense for which the relator is prosecuted or convicted in the United States. The traditional rule of looking at the underlying facts and the general nature of the charge as the basis of dual criminality may not prove helpful in cases involving RICO, CCE, or Securities and Exchange Commission[156] violations. A foreign court may therefore have the option of granting extradition for an offense known to its system and that it would deem to be included within the meaning of such offenses as RICO or CCE. In that case, the United States could only prosecute the relator for the particular offense for which the extradition request was made and granted, which will be determined on the basis of the extradition order if it contains such specificity. Otherwise, a U.S. court would have to compare the extradition request and the extradition order to determine the exact nature of the charges for which the relator was extradited and for which he/she can be prosecuted.

Another option for the requested state seeking to determine dual criminality for complex crimes is to identify the multiple elements of the offense, and determine whether some elements correspond to the same or a similar offense under the laws of that state, even though the complex offense does not exist in the requested state's legal system. The issue that remains, however, is whether the extradition would be granted exclusively for the lesser included offense or for the complex offense.

RICO and CCE are, for all practical purposes, the aggregation of more traditional crimes and are intended to increase the penalties, as well as to facilitate prosecution and conviction. Other crimes arising out of administrative regulations, such as CTR,[157] are frequently a predicate for RICO and may complement CCE, as well as deal with the problem of money laundering. However, most countries do not have similar crimes. The problem thus arises as to whether

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v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); Clarey v. Gregg, 183 F.3d 764 (9th Cir. 1998).

151 Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972). *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998); Spatola v. United States, 741 F. Supp. 362 (E.D.N.Y 1990), *aff'd,* 925 F.2d 615 (2d Cir. 1991); Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); Bozilov v. Seifert, 983 F.2d 140 (9th Cir. 1993), *amending,* 967 F.2d 353 (9th Cir. 1992); United States v. Levy, 25 F.3d 146 (2d Cir. 1994); *In re Extradition of* Orellana, 2000 WL 1036074 (S.D.N.Y. July 26, 2000).

152 United States v. Orsini, 424 F. Supp. 229 (D.C.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir. 1977), *cert. denied*, 434 U.S. 997 (1977). *See* 6 Whiteman Digest, *supra* note 59, at 443–446.

153 Racketeer-Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961–1968 (2000).

154 Continuing Criminal Enterprise, 21 U.S.C. § 848(b) (2000).

155 *See infra* Sec. 6.

156 Securities Exchange Act of 1934, 15 U.S.C. §§ 78 *et seq.* (2000).

157 Reports on Domestic Coins and Currency Transaction, 31 U.S.C. § 5313 *et seq.* (2000). *See particularly* §§ 5324(1), 5324(2) (filing false CTR's), and 5324(3) (structuring transactions to evade reporting requirements). For money laundering, see 18 U.S.C. §§ 1952, 1956, 1957 (2000).

these complex crimes and other administrative-like crimes designed to complement other complex crimes can be deemed extraditable offenses in other countries if these specific offenses do not exist in the requested state. Where extradition had been granted for these offenses, the approach has essentially been to consider the components of such crimes as RICO and CCE as the equivalent of those offenses contained in the criminal laws of the requested states. In other words, if the entire loaf has no counterpart, the slicing of the loaf produces pieces that may have a counterpart. But in some cases, the problem also arises when the entire loaf, such as in RICO, involves predicate acts that are not extraditable. For example, some countries such as Austria, Switzerland, and Hungary do not have the equivalent crime of failure to report transportation of cash in excess of $10,000, which the United States requires by CTRs. Thus, a request by the United States based on a RICO charge whose predicate act is money laundering operations, but where the money laundering facts can only be established by CTR violations, presents a serious problem. These countries would not extradite for CTR violations, but would extradite for money laundering and eventually for RICO when the predicate acts include money laundering. But if money laundering can only be established through CTR, for which there is no dual criminality, then extradition may be denied. Alternatively, the extradition order can be granted subject to the preclusion of prosecution for CTR violations. In these cases, the prosecution may attempt to circumvent this hurdle by seeking to introduce evidence of CTR violations while excluding the charge from going to the jury, thus admitting through the back door evidence of a crime that is specifically prohibited from admission through the front door. Thus far, this issue has not been fully resolved in the United States.[158]

Some of these issues arose in *Sudar v. United States*,[159] in which Canada granted the extradition of the relator on RICO charges. Sudar was charged with racketeering and conspiracy to racketeer involving interstate and foreign commerce based on predicate acts of murder, threats of murder, arson, and extortion. He argued dual criminality was lacking because the crimes of racketeering and conspiracy to racketeer are unknown in Canadian law.

The Ontario Supreme Court, affirming the judgment of the county court, held that the relator was extraditable. The court found the indictment in the United States charged an enterprise and a pattern of racketeering, the pattern being based on the predicate acts of murder, threats of murder, arson, and extortion. The court erroneously found that the U.S. Supreme Court equated "enterprise" with "conspiracy," though it did not identify the Supreme Court case in which this conclusion is reached.[160] In addition, the Court did not accept the argument that the substance of the charges against Sudar was the federal offense of racketeering, rather than the state offenses of murder, threats of murder, arson, and extortion. The court stated:

> [T]he only real substantive components of the indictment against Sudar for the purposes of extradition are the conspiracy (very loosely defined in United States law) and the activities of murder, threats to murder, etc. There is no doubt as to the criminality of these activities and of any conspiracy in relation thereto. They are recognized as such the world over.[161]

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158 On evidentiary questions as being outside the scope of the rule of specialty, see *United States v. Lehder-Rivas*, 955 F.2d 1510 (11th Cir.), *cert. denied sub nom.*, Reed v. United States, 506 U.S. 924 (1992); *United States v. Alvarez-Moreno*, 874 F.2d 1402 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990); *United States v. Cuevas*, 847 F.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *United States v. Thirion*, 813 F.2d 146 (8th Cir. 1987).

159 25 S.C.R.3d 183 (Can. 1981). For a criticism of the court's reasoning and conclusions in this case, see Steven A. Bernholz et al., *International Extradition in Drug Cases*, 10 Int'l L. & Comm'l Reg. 353, 361–364 (1985). *See also* Jonathan O. Hafen, Comment, *International Extradition: Issues Arising under the Dual Criminality Requirement*, 1992 B.Y.U. L. Rev. 191 (1992); Sharon A. Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 Nova L. Rev. 581 (1991).

160 25 S.C.R.3d at 186.

161 *Id.* at 187.

Thus, because conspiracy and the crimes of murder, threats of murder, arson and extortion are crimes under Canadian law, and because the extradition treaty required a liberal interpretation, the court held that the requirement of dual criminality had been met.[162]

The question raised by this decision is whether the extradition of Sudar was granted for the offenses of racketeering and conspiracy to racketeer, as indicated in the U.S. indictment and extradition request, or whether it was granted based on the crimes of conspiracy, murder, threats of murder, arson, and extortion, as the court's decision seems to indicate. If the answer is the latter, then prosecution of the relator under RICO would violate the principle of specialty.[163]

A similar issue arose in *Riley and Butler v. Commonwealth*,[164] in which the relators appealed a decision finding them extraditable for the offense of Continuing Criminal Enterprise under 21 U.S.C. § 848. The court noted that CCE contains five elements:

> 1. That the defendant violated certain provisions of the law, including those which make it an offense to knowingly, intentionally or unlawfully to possess marijuana or hashish with intent to distribute it, or knowingly, intentionally and unlawfully to cause marijuana or hashish to be imported into the United States;
>
> 2. That such violation was part of a continuing series of violations by the defendant of the federal narcotics laws of the United States;
>
> 3. That such series of violations was undertaken by the defendant in concert with five or more persons;
>
> 4. That the defendant occupied the position of organizer or any other position of management with respect to such five or more persons in the said undertaking; and
>
> 5. That the defendant obtained substantial income or resources from the continuing series of violations.[165]

The court first considered whether CCE was an extraditable offense under the Treaty on Extradition between Australia and the United States of 1976. In doing so, it concluded that the offense consists of two or more acts. In the case before it, one act of the relators was knowingly, intentionally, and unlawfully possessing marijuana or hashish with the intention to distribute it. The other was knowingly, intentionally, and unlawfully causing marijuana or hashish to be imported into the United States. The Extradition (Foreign States) Act of 1966 of Australia defined an extraditable offense in Section 4(1A) as:

> An offense against the law of, or a part of, a foreign state is an extradition crime for the purposes of this Act if, and only if, the act or omission constituting the offense or the equivalent act or omission, or, where the offense is constituted by two or more acts or omissions, any of those acts or omissions or any equivalent act or omission, would, if it took place in, or within the jurisdiction of, the part of Australia where the person accused or convicted of the offense is found, constitute an offense against the law in force in that part of Australia that—
>
> (a) is described in Schedule 1.[166]
>
> Schedule 1 contains a list of thirty-five offenses, including offenses relating to narcotics and dangerous drugs. The court found that importation of narcotics and possession of such substances

162 *Id.*

163 *See infra* Sec. 6.

164 260 A.L.R. 106 (1985) (Austl.); superseded by the Extradition Act of 1988 (amended by Act. No. 66 in 2002).

165 *Id.*

166 *Id.* at 107.

with intent to distribute were criminal acts in New South Wales, the state in which the relators were found. The court determined that the relevant inquiry was whether:

> [T]here had been produced before [the magistrate] such evidence as would in his opinion, according to the law in force in New South Wales, justify the trial of an accused person if the acts or omissions constituting the crime of continuing criminal enterprise had taken place in or within the jurisdiction of New South Wales and . . . that those acts or omissions would constitute a crime according to the law of New South Wales, whether or not in truth they would constitute a crime in New South Wales.[167]

The court concluded that CCE was an extraditable offense, even though the same offense did not exist under Australian law.[168]

The relators argued that interpreting the treaty in such a manner as to find CCE an extraditable offense violated the principle of dual criminality. The section at issue stated:

> Extradition shall also be granted for any other offenses that are made extraditable under the extradition laws of Australia and which are felonies under the laws of the United States of America.[169]

The argument raised by the relators was that the offense of continuing criminal enterprise was not an offense "made extraditable under the extradition laws of Australia." The court disagreed, stating:

> [B]ecause at least one act which formed an element of the offense of continuing criminal enterprise, or an equivalent act, would have constituted an offense against a law . . . if it had occurred in New South Wales, the offense itself is an extradition crime.[170]

The court interpreted both Section 4(1A) of the Extradition (Foreign States) Act 1966 and the relevant paragraph of the treaty (quoted above) to exclude the principle of dual criminality. The court concluded that the right and duty of extradition was created by the treaty, and not the principles of international law, and that therefore the lack of dual criminality was not a bar to extradition.[171]

In a 2009 narcotics CCE extradition case before the Third Circuit, the relator challenged his extradition, in part, by arguing that the offense of CCE did not exist in the United Kingdom.[172] In *United States v. Thomas*, the relator was extradited from the United Kingdom and subsequently tried and convicted for operating a CCE related to drug trafficking and money laundering in the United States.[173] After finding that the relator had standing to challenge his extradition on dual criminality and specialty grounds, the court analyzed the United States–United Kingdom Extradition Treaty and the Extradition Act of 2003.[174] The court presented the relevant extradition documents as follows:

> Under the rule of dual criminality, an extraditable offense must be punishable under the criminal laws of both the surrendering and the requesting state. *See United States v. Saccoccia,* 58 F.3d 754, 766 (1st Cir. 1995). This principle is embodied in the U.S.–U.K [sic] Extradition Treaty as follows:

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167 *Id.*

168 *Id.* at 108.

169 *Id.*

170 *Id.* at 109.

171 *Id.*

172 United States v. Thomas, 322 Fed. Appx. 177, 179 (3d Cir. 2009) (unpublished opinion).

173 *Id.* at 178–179.

174 *Id.* at 180–181.

> Extradition shall be granted for *an act or omission the facts of which disclose an offense* within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty, or any other offense, if: (a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty; (b) the offense is extraditable under . . . the law of the United Kingdom . . . ; and (c) the offense constitutes a felony under the law of the United States of America.

U.S.–U.K. Extradition Treaty, art. III(1) (emphasis added).

The Schedule includes "[a]n offense against the law relating to narcotic drugs" including marijuana. *Id.* Further, in the United Kingdom conduct constitutes an "extradition offense" if

> (a) the conduct occurs in [the United States]; (b) *the conduct would constitute an offence under the law of the relevant part of the United Kingdom* punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom; (c) the conduct is so punishable under the law of the [the [sic] United States] (*however it is described in that law*).

Extradition Act, 2003, c. 41, § 137 (U.K.) (emphasis added).[175]

The court reasoned that this language only required that the conduct be subject to serious criminal sanctions in both countries, without any further requirement as to how or why the particular conduct is sanctioned.[176] The court further reasoned that the CCE charge involved illicit funds derived from the direction of a large marijuana distributing organization over five years, which was an offense in the United Kingdom punishable with imprisonment for more than twelve months, making any inquiry into other U.S. offenses irrelevant.[177] Thus, the court held that the relator's prosecution for operating a CCE did not violate dual criminality.[178]

A similar issue arose in the United Kingdom in *Government of Denmark v. Nielsen*.[179] In *Nielsen*, the relator was charged in Denmark with fraudulently abusing his position as a controlling shareholder of a company of which he was also a director, for which offense Denmark sought his extradition from the United Kingdom. The magistrate who initially heard the case discharged the relator because, after hearing expert evidence regarding the Danish law in question, found the Danish offense to be narrower than the English offenses specified in the Secretary of State's order to proceed. The Divisional Court quashed the discharge, and the relator appealed to the House of Lords.

In a lengthy opinion, Lord Diplock considered the language of the relevant extradition treaty to be determinative:

> Whether in an accusation case the police magistrate has any jurisdiction to make findings as to the substantive criminal law of the foreign state by which the requisition for surrender of a fugitive criminal is made will depend on the terms of the arrangement made in the extradition treaty with that state. Some treaties may contain provisions that limit surrender to persons accused of conduct that constitutes a crime of a particular kind (for example, one that attracts specified minimum penalties) in both England and the foreign state. Accusation cases arising under extradition treaties that contain this kind of limitation I shall call "exceptional accusation cases." In an

175 *Id.*

176 *Id.* at 181.

177 *Id.*

178 *Id.*

179 [1984] 2 All E.R. 81 (Eng.).

> exceptional accusation case it will be necessary for the police magistrate to hear expert evidence of the substantive criminal law of that foreign state and make his own findings of fact about it.[180]

The magistrate's error had been to consider evidence of the substantive law of Denmark in determining whether the principle of dual criminality had been satisfied. Lord Diplock concluded that the magistrate's inquiry should be much narrower:

> At the hearing . . . the magistrate must first be satisfied that a foreign warrant . . . has been issued for the accused person's arrest and is duly authenticated . . . . Except where there is a claim that the arrest was for a political offence or the case is an exceptional accusation case, the magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered by the foreign state.
>
> The magistrate must then hear such evidence . . . as may be produced on behalf of the requisitioning foreign government, and by the accused if he wishes to do so; and at the conclusion of the evidence the magistrate must decide whether such evidence would, *according to the law of England*, justify the committal for trial of the accused for an offence . . . In making this decision it is English law alone that is relevant. The requirement that he shall make it does not give him any jurisdiction to inquire into or receive evidence of the substantive criminal law of the foreign state in which the conduct was in fact committed.[181]

In *U.S. Government v. McCaffery*,[182] in which the United States sought the extradition of the relator for federal offenses consisting of wire fraud and interstate transportation of stolen securities, the House of Lords overturned the discharge of the relator, holding that the decision in *Nielsen* was determinative in this case.

In complex litigation involving economic crimes, the United States may rely on a variety of statutes that regulate economic matters, which may not be deemed extraditable under some treaties. This occurred in the *Marc Rich* extradition case,[183] in which the United States sought the extradition of Marc Rich from Switzerland for violations of regulations concerning oil and gas pricing as well as mail and wire fraud. Switzerland denied extradition. Although mail fraud could have the characteristics of common law fraud, whose counterpart exists in almost every legal system in the world, the use of the mails in connection with a scheme designed to violate economic regulations may not necessarily be viewed as equivalent to the common crime of fraud, which in many legal systems is directed against private interests, or involves the taking of something belonging to a public entity. Such economic crimes as were involved here would, however, constitute criminal fraud in most legal systems of the world. As a result, as the treaty between the United States and Switzerland does not include violations of economic regulations, and Switzerland in general does not extradite for such offenses (or for currency, tax, or customs violations, except in very narrow circumstances), the principle charge against Marc Rich was deemed non-extraditable, and the use of the mail was deemed derivative of the economic regulation, rather than a criminal fraud in its common meaning under Swiss criminal law.

Complex crimes also raise significant questions with respect to the principle of specialty, which is discussed below.

As stated above in Section 2, there exists an intricate relationship between dual criminality, extraditable offenses, and specialty—particularly with respect to complex economic (financial)

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180 *Id.* at 89.

181 *Id.* at 91.

182 [1984] 2 All E.R. 570 (Eng.).

183 The unpublished administrative decision in this case is on file at the Federal Ministry of Justice and Police, Berne, Switzerland. This writer served as counsel in the Swiss extradition proceedings.

crimes. One reason is that the United States has made criminal many manifestations of what would logically be the same crime, and created new criminal labels for the same criminal transaction in order to enhance penalties. Thus, a fraudulent scheme can give rise to multiple crimes other than the underlying fraud. This could include mail fraud, tax violations of many types, and others. What does the foreign requested state look at? The overall criminal transaction, or each separate charge? In what way does the foreign requested state look at the ultimate penalty that artificially aggravates the penalty of the original criminal fraud by adding these different crimes that are really components of the fraud? Most foreign requested states are not familiar with these intricate aspects of U.S. criminal prosecutions, and more particularly the sentencing implications of such multiple charges, even when they are excluded from the indictment for purposes of a conviction but retained for other purposes.

6. The Principle of Specialty (also referred to as the Rule of Specialty)

6.1. Nature of the Principle

This principle, which is also alternatively referred to as a rule or doctrine, stands for the proposition that the requesting state, after securing the surrender of a person, can only prosecute and punish that person for the offense or offenses for which he/she was surrendered by the requested state, and must conform its penalties to any limitations established by the surrendering state.[184] If the requesting state wishes to depart from these limitations, it must obtain the consent of the surrendering state before proceeding on other charges, and before imposing or carrying out a sentence that varies from any limitations set by the surrendering state.[185] In all cases, the requesting state must abide by the assurances it has given to the surrendering state as part of the extradition. Otherwise, the requesting state must return the individual to the surrendering state.[186]

The origin of the term "specialty" is in the French word *specialité*, which means particularity, but the general usage of *specialité* throughout Europe and other countries of the world gave rise to its transposition in the United States to the term "specialty" or "speciality." The French term is clear and unambiguous; in fact, it partakes of both the English words "particularity" and "specialty" to connote specificity. Specialty is frequently referred to as a principle because it is so broadly recognized in international law and practice that it has become a rule of CIL. As such, it is binding upon the United States. The United States, however, also recognizes and applies this principle, through its national legislation, treaty practice, and jurisprudence. Indeed, most extradition treaties contain a provision on specialty. Title 18 U.S.C. § 3186 states:

> The Secretary of State may order the person committed under Sections 3184 [Fugitives from foreign country to United States] and 3185 [Fugitives from country under control of United

184 For cases citing this summation of the rule of specialty, see *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1305–1306 (11th Cir. 2000); United States v. Gallo-Chamorro, 48 F.3d 502, 507 (11th Cir. 1995); United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988); R. v. Truong, 2002 V.S.C.A. 27. For a case referencing this as the primary recent treatise in the area, see *United States v. De La Pava*, 1993 U.S. Dist. Lexis 1912 (N.D. Ill. 1993).

185 For a case discussing this point, *see Benitez v. Garcia*, 419 F. Supp. 2d 1234 (D. Cal. 2004).

186 The question of where a relator is allowed to leave at will is not well-established. As a general rule, he/she is entitled to return to the state from which he/she was originally extradited or to his/her country of origin. But the question arises as to whether he/she is entitled to choose to go to any other country, or whether the prosecuting state can force him/her to depart to a country which is not of his/her choice. Frequently, a state will use its immigration laws to achieve such a result, which is inimical to the relator's interest. *See* Ch. IV (Disguised Extradition).

> States into the United States] of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.
>
> Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.
>
> A person so accused who escapes may be retaken in the same manner as any person accused of any offense.[187]

Some examples of treaty language follow.

The United States-Italy Extradition Treaty states:

> 1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting Party except for:
>
> (a) the offense for which extradition has been granted or when the same facts for which extradition was granted constitute a differently denominated offense which is extraditable;
>
> (b) an offense committed after the surrender of the person; or
>
> (c) an offense for which the Executive Authority of the United States or the competent authorities of Italy consent to the person's detention, trial or punishment. For the purpose of this subparagraph, the Requested Party may require the submission of the documents called for in Article X.
>
> 2. A person extradited under this Treaty may not be extradited to a third State unless the surrendering Party consents.
>
> 3. Paragraphs 1 and 2 of this article shall not prevent the detention, trial or punishment of an extradited person in accordance with the laws of the Requesting Party, or the extradition of that person to a third State, if:
>
> (a) that person leaves the territory of the Requesting Party after extradition and voluntarily returns to it; or
>
> (b) that person does not leave the territory of the Requesting Party within 30 days of the day on which that person is free to leave.[188]

The United States–Germany Extradition Treaty states:

> (1) A person who has been extradited under this Treaty shall not be proceeded against, sentenced or detained with a view to carrying out a sentence or detention order for any offense committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
>
> (a) When the State which extradited him consents thereto. A request for consent shall be submitted, accompanied by the documents mentioned in Article 14 and a record established by a judge or competent officer of the statement made by the extradited person in respect of the request for consent. If under the law of the Requesting State the issuance of a warrant of arrest for the offense for which extradition is sought is not possible, the request may instead be accompanied by a statement issued by a judge or competent officer establishing that the person sought is strongly suspected of having committed the offense.
>
> (b) When such person, having had the opportunity to leave the territory of the State to which he has been surrendered, has not done so within 45 days of his final discharge or has returned to that territory after leaving it. A discharge under parole or probation without an order restricting the freedom of movement of the extradited person shall be deemed equivalent to a final discharge.

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187 18 U.S.C. § 3186 (2000).

188 U.S.–Italy Oct. 13, 1983, art. XVI; T.I.A.S. No. 10837 (*entered into force* Sept. 24, 1984).

(2) The State to which the person has been extradited may, however, take any legal measures necessary under its law, in order to proceed *in absentia*, to interrupt any lapse of time or to record a statement under paragraph (1)(a).

(3) If the offense for which the person sought was extradited is legally altered in the course of proceedings, he shall be prosecuted or sentenced provided the offense under its new legal description is:

(a) Based on the same set of facts contained in the extradition request and its supporting documents; and,

(b) Punishable by the same maximum penalty as, or a lesser maximum penalty then, the offense for which he was extradited.[189]

The United States–Mexico Extradition Treaty states:

1. A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition had been granted nor be extradited by that Party to a third State unless:

(a) he has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

(b) he has not left the territory of the requesting Party within 60 days after being free to do so; or

(c) the requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

2. If, in the course of the procedure, the classification or the offense is changed for which the person requested was extradited, he shall be tried and sentenced on the condition that the offense, in its new legal form:

(a) is based on the same group of facts established in the documents presented in its support; and

(b) is punishable with the same maximum sentence as the crime for which he was extradited or with a lesser sentence.[190]

Another representative treaty is the United States–Jamaica Extradition Treaty, which states in Article XIV:

(1) A person extradited under this Treaty may only be detained, tried or punished in the Requesting State for the offence for which extradition is granted, or (a) for a lesser offence proved by the facts before the court of committal . . . (b) for an offence committed after the extradition; or (c) for an offence in respect to which the executive authority of the Requested State . . . consents to the person's detention, trial or punishment . . . or (d) if the person (i) having left the territory of the Requesting State after his extradition, voluntarily returns to it; or (ii) being free to leave the territory of the Requesting State after his extradition, does not so leave within forty-five (45) days . . . . (2) A person extradited under this Treaty may not be extradited to a third State unless (a) the Requested State consents; or (b) the circumstances are such that he could have been dealt with in the Requesting State pursuant to sub-paragraph (d) of paragraph (1).[191]

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189 June 20, 1978, U.S.–F.R.G., art. 22; 32 U.S.T. 1485 (*entered into force* Aug. 29, 1980), Supplementary Treaty, KAV 705 (Mar. 11, 1993).

190 May 4, 1978, U.S.–Mex., art. 17, 31 U.S.T. 5059 (*entered into force* Jan. 25, 1980), Protocol (*entered into force* May 21, 2001) TIAS 12897, Sen. Doc. No. 105-46. For a case discussing the requirements under Article 17, see *In re Extradition of Sainez*, 2008 U.S. Dist. Lexis 9573, at *28–*30 (S.D. Cal. 2008).

191 U.S.–Jamaican Extradition treaty, *entered into force* July 7, 1991, S. Treaty Doc. 98-18, KAV 1026. *See also* Extradition Treaty with Belize, art. 14, *entered into force* Mar. 27, 2001, S. TREATY DOC. 106-38; Polish Extradition Treaty, art. 19, *entered into force* Sept. 17, 1999, S. TREATY DOC. 105-14;

The rationale for the principle of specialty rests on the following factors, which bear on the requesting and requested states:

1. the requested state could have refused extradition if it had known that the relator would be prosecuted or punished for an offense other than the one for which extradition was granted;

2. the requesting state would not have had *in personam* jurisdiction over the relator if not for the requested state's surrender of that person;[192]

3. the requesting state would be abusing the formal processes of the requested state in securing the surrender of the person for reasons other than those disclosed in the extradition request;

4. the requested state used its processes in reliance upon the representations made by the requesting state, and accordingly is entitled to the observance of these representations; and

5. the relator is entitled to be tried for the crime or crimes for which he was extradited, and thus to be free from prosecutorial abuse once he is within the jurisdictional control of a requested state.

The principle of specialty is designed to ensure against a requesting state's breach of trust to a requested state and to avoid prosecutorial abuse against the relator after the requested state obtained *in personam* jurisdiction over the relator.[193] It is a principle essentially designed to insure the integrity of the requesting and requested state processes. Thus, the surrendering state can waive specialty or allow prosecution for offenses other than those for which the relator was extradited, subject to any limitation that the surrendering state may include in the waiver (e.g., a limitation on the charge or sentence).[194] In addition, whether by treaty, national legislation, or international custom, specialty is a right that also inures to the benefit of the relator. For this reason, the relator can waive the right and consent to his/her prosecution for crimes other than those for which he/she was extradited. Consequently, the relator is entitled to raise the issue irrespective of whether the requested state protests the violation of the principle to the

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Extradition Treaty with Uruguay, art. 13, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197; Hungarian Extradition Treaty, art. 17, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Extradition Treaty with Thailand, art. 14, *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Bolivian Extradition Treaty, art. XII, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Extradition Treaty with the Bahamas, art. 14, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Jordanian Extradition Treaty, art. 16, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Costa Rican Extradition Treaty, art. 16, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Italian Extradition Treaty, art. XVI, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023.

192 For a case citing to this factor, see *United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006).

193 In *Kuhn v. Staatsanwaltschaft des Kantons Zurich*, 34 I.L.R. 132, 133 (Fed. Tribunal 1961) (Switz.), it was held that:

> The principle is designed to safeguard the rights of the extraditing State. This requires the restriction of the rights of the requesting State to the extent to which they would be restricted if extradition had not taken place.

See also Re Albrand, 51 I.L.R. 269 (Cass. 1969) (Fr.) (holding that the specialty principle does not apply to an offense committed after extradition); *cf. Re* Trillard, 48 I.L.R. 187 (Trib. gr. inst. de Nevers 1967) (Fr.) (holding that the specialty principle applied only insofar as restricting the case before the court of the requesting state to the facts on which the decision of the requested state was made, and did not preclude the judicial authorities of the requesting state from giving these facts the legal characterization called for under the law of the requesting state); *Dutch-German Extradition Case*, 44 I.L.R. 174 (BGH 1965) (F.R.G.).

194 *See* Ch. VIII, Sec. 4.3 (*ne bis in idem).*

requesting state.[195] It is, however, essentially the requested state's right, and it can therefore waive it even if the relator does not agree.

The seminal case on the principle of specialty is *United States v. Rauscher*, where the U.S. Supreme Court held that a defendant has standing to challenge treaty violations.[196] Notwithstanding *Rauscher*,[197] some circuits (as discussed below in Section 6.4), have expressed different understandings of the principle with respect to the relator's standing to raise the issue without some form of protest by the surrendering state.

In *Rauscher*, the Supreme Court held that a defendant in the United States who was extradited from a foreign country could only be tried for the offense for which he had been extradited. The Supreme Court stated that the extradited defendant "shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country…"[198] *Rauscher* expressly rejected the proposition that a defendant within the jurisdiction of the United States, "*no matter by what contrivance of fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally*."[199]

The Supreme Court unequivocally stated the positive aspect of the principle that a person can only be tried for the offense for which he was delivered and after the completion of the sentence, if convicted, "he shall have a reasonable time to leave the country."[200] The Court also went on to posit what cannot be done, namely that such a person brought to the United States pursuant to an extradition treaty cannot be deemed within the jurisdiction of the United States

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195 See *infra* Sec. 7.4.

196 United States v. Rauscher, 119 U.S. 407 (18986). For circuit decisions, see inter alia, *United States v. Puentes*, 50 F.3d 1567, 1571–1576 (11th Cir. 1995), *United States v. Lehder-Rivas*, 955 F.2d 1510, 1520 (11th Cir. 1992), *cert. denied subnom.*, *Reed v. United States*, 113 S. Ct. 347 (1992); *United States v. Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027 (1989); *United States v. Kaufman*, 858 F.2d 994, 1006–1009 (5th Cir. 1988), *reh'g den'd*, 874 F.2d 242 (1989); *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *Gallanis v. Pollanck*, 568 F.2d 234, 238 (2d Cir. 1977); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Chen, 161 F.3d 11 (9th Cir. 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); United States v. Cuevos, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1122 (1989); United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986). The Supreme Court reaffirmed its position in a rarely cited case, *Johnson v. Browne*, 205 U.S. 310 (1907). The relator, who was extradited from Canada, objected to being prosecuted for charges other than those for which he was extradited. The Supreme Court agreed with the defendant's position. No protest was required. *See also* United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997); United States v. Bakhtiar, 964 F. Supp. 112 (S.D.N.Y. 1997). All other relevant cases are cited below in this section.

197 *Rauscher*, 119 U.S. at 407.

198 *Id.* at 424 (emphasis added).

199 *Id.* at 422 (emphasis added). *See* Brauch v. Raiche, 618 F.2d 843, 851 (1st Cir. 1980) ("provides that a fugitive may not be tried by the requesting county for any offenses other than those for which extradition was granted"). *See also* United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979). The Second Circuit in *United States v. Levy* held that specialty "is a jurisdictional limitation restricting a court's power to enter judgment against the defendant." 947 F.2d 1032, 1034 (2d Cir. 1991). The court in this case went on to say what is the flip side of most specialty arguments: that "the doctrine of specialty *does not guarantee a right not to be tried*, but rather a right to be protected from a court's authority." *Id.* at 1034 (emphasis added).

200 *Rauscher*, 119 U.S. at 424.

without any limitations with respect to the basis upon which he was surrendered.[201] This position has been consistently upheld.[202]

The position of the United States since *Rauscher* is best expressed in *Fiocconi v. Attorney General of the United States*.[203] The Second Circuit saw the strict observance of the principle of specialty as part of the foreign relations rules of the United States, which embody CIL.[204] The principle of specialty is not left to the whim of states, but is subject to customary rules of international law, which also embody the international protection of certain human rights.[205] But unlike *Rauscher*, *Fiocconi* did not recognize the relator's standing to raise the issue of specialty if it had been waived by the surrendering state.[206]

Not all circuits have followed *Rauscher* and *Fiocconi*, however. There is some division among U.S. federal circuits regarding whether the principle of specialty can be considered a rule of CIL. The current split in authority among circuit courts when applying the principle of specialty makes it difficult to conclude outright that the principle of specialty is a part of CIL. Cases before the Ninth and Eleventh Circuits attempt to bind the principle of specialty to the existence of an extradition treaty, as discussed below. But these holdings do not foreclose arguments for treating the principle of specialty as CIL. Rather, the Ninth Circuit's decision to give deference to the expectations of the extraditing country in the absence of an explicit assurance, and the Eleventh Circuit's decision to impose a bright-line rule and thus become an outlier in rule-of-specialty jurisprudence, illustrate that the debate over whether to treat the principle of specialty as CIL continues.

The Second Circuit, in *Fiocconi v. Attorney General*,[207] and the Fifth Circuit, in *United States v. Kaufman*,[208] both treated the principle of specialty as a part of international law. Conversely, two court cases in 2007 and 2009 emphasized the connection between the principle of specialty and treaties. In *Benitez v. Garcia*, the Ninth Circuit stressed that it "was wary . . . of

201 *Id.* at 427, except with respect to unlawful seizures after *Alvarez-Machain*. *See also* Ch. V.

202 Bingham v. Bradley, 241 U.S. 511 (1916); Collins v. O'Neil, 214 U.S. 113 (1909); Johnson v. Browne, 205 U.S. 309 (1907); United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997); United States v. Bakhtiar, 964 F. Supp. 112 (S.D.N.Y. 1997); Cosgrove v. Whinney, 174 U.S. 64 (1899). *See also* Cook v. United States, 288 U.S. 102 (1933); United States v. Verdugo-Urquidz, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 505 U.S.1201 (1992); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973); Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972). *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998). Both *Shapiro* and *Fiocconi* were cases involving extradition on the basis of a treaty, but for prosecutions of an offense not contained in the treaty, and for which prosecution was conceded by the requested state on the basis of comity.

203 Fiocconi v. Attorney. General of the United States, 462 F.2d 475 (2d Cir. 1972). *See also* United States *ex. rel.* Saroop v. Garcia, 109 F.3d 165, 168 (3d Cir. 1997).

204 Fiocconi, 462 F.2d at 479. *See also* Kenneth E. Levitt, *International Extradition, The Principle of Specialty and Effective Treaty Enforcement*, 76 Minn. Law Rev. 1017 (1992); Jonathon George, *Toward a More Principled Approach to the Principle of Specialty*, 12 Cornell Int'l Law J. 309 (1979).

205 *See* United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994); United States v. Khan, 993 F.2d 1368 (9th Cir. 1993); *but see Welsh & Thrasher v. Sec. of State for the Home Dept.*, 2006 E.W.H.C. 156 (Admin) Feb. 21, 2006 (U.K.) The Queen's Bench held that (1) the application of specialty in the United States was affected by the known view of the sending state, (2) there were no UK authorities suggesting that specialty was breached when the U.S. courts permitted extradition to be proved by evidence relating to offenses on which extradition had been refused, and (3) the effect of the specialty section of the 2003 Extradition Act (UK) was to prohibit extradition when the conditions were not met.

206 *See infra* Sec. 7.5. *See also* United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987); United States v. Van Cauwenberghe, 814 F.2d 1329, 1334 (9th Cir. 1987).

207 462 F.2d 475, 479–480 (2d Cir. 1972).

208 858 F.2d 994, 1007 (5th Cir. 1988).

enforcing extradition conditions that are neither expressly agreed to by both countries nor contemplated by the relevant extradition treaty," and instead looked to treaties and assurances to apply the principle of specialty.[209] But the *Benitez* court did reverse the denial of the defendant's habeas corpus petition, giving deference to a condition in the extradition decree that the defendant not receive a life sentence. Additionally, the Eleventh Circuit in *United States v. Valencia-Trujillo* held that "the rule of specialty is treaty-based."[210] The Eleventh Circuit focused on *Rauscher's* emphasis on the importance of treaties as laws of the land and noted that the principle of specialty is but a provision of the treaty.[211]

To qualify as CIL, the principle of specialty "must be shown to result from (1) 'a general and consistent practice of states' that is (2) 'followed by them from a sense of legal obligation.' "[212] The *Benitez* and *Valencia-Trujillo* decisions highlight the split among circuit courts and the debate over whether the principle of specialty is considered a part of CIL in accordance with U.S. jurisprudence. An analysis of these two cases illustrates that the courts' reasoning in the cases does not foreclose the argument that the principle of specialty has its roots independent of a treaty or an assurance.

As noted above, the Ninth Circuit court in *Benitez* expressed reluctance to enforce extradition conditions not expressly agreed to or contemplated by contracting parties to an extradition agreement. In *Benitez*, the Venezuelan extradition decree specified that the defendant not be sentenced to life in prison or incarcerated for more than thirty years, but the defendant was sentenced to fifteen years to life.[213] Moreover, in accordance with the extradition decree, the U.S. State Department sent a letter to the district attorney's office recommending that a life sentence not be imposed.[214] Additionally, the United States–Venezuela extradition treaty provides that assurances may be made that punishments will not involve the death penalty or imprisonment for life. Venezuela, however, did not obtain an assurance from the United States that a life sentence would not be imposed.[215] The Ninth Circuit did not enforce the thirty-year incarceration limit requested in the decree because United States and Venezuela did not agree to this limitation, but the court did enforce the life imprisonment restriction specified in the decree. In finding that the defendant's sentence violated the extradition order, the court looked at the extradition treaty, the extradition decree, the expectations of Venezuela, and the role of the executive branch.[216]

With regards to the limitation on life imprisonment, the *Benitez* court treated both the treaty and decree as established federal law, and emphasized the request in the extradition decree that the defendant not receive a life sentence.[217] The Ninth Circuit stressed, largely on the basis of the holding in *Rauscher*, that courts should give deference to the expectations of the extraditing country. As the court noted, "the purpose of the treaty, and the respect due our longstanding extradition relationship with Venezuela call for such an interpretation."[218]

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209 476 F.3d 676, 682 (9th Cir. 2007).

210 573 F.3d 1171, 1179–1180 (11th Cir. 2009).

211 *Id.*

212 *Recent Case, Eleventh Circuit Holds That "Rule of Specialty" Applies Only When Provided by Treaty:* United States v. Valencia-Trujillo, 123 Harv. L. Rev. 572, 578 (2009) [hereinafter *Recent Case*].

213 Benitez v. Garcia, 476 F.3d 676, 679 (9th Cir. 2007) (opinion withdrawn by the court).

214 *Id.*

215 *Id.* at 679, 682.

216 *See* Barbara Merry Boudreaux, Benitez v. Garcia: *An Extradition Arrangement Lost in Translation*, 15 Tul. J. Int'l & Comp. L. 661, 673 (2007).

217 *Benitez,* 476 F.3d at 682.

218 *Id.*

Therefore, the issue is whether the Ninth Circuit's deference to Venezuela's expectations, as expressed in the extradition decree, reflects an implicit acknowledgment of a legal obligation such that the case's holding can be read as applying a form of CIL. Despite the lack of assurances about limitations on the life sentence, the Ninth Circuit stretched its reasoning to accommodate Venezuela's expectations by giving equal footing to the extradition treaty and the extraction decree—even though the status of decrees as federal law is unknown.[219] In its original opinion, prior to being revised, the circuit court noted that it did not need to consider whether to extend the principle of specialty because there was a treaty and the defendant was charged with a crime for which Venezuela agreed to extradite him.[220] Thus, the court likely felt safe in giving strong deference to the extradition decree because of the existence of the treaty. But the court's reasoning raises questions about whether the court acted out of a deeper sense of "obligation" in order to enforce Venezuela's expectations.

The holding of the Eleventh Circuit in *Valencia-Trujillo* that a defendant who is not extradited pursuant to a treaty lacks standing to assert a rule-of-specialty claim was applauded by scholars who argue that the principle of specialty is not a part of CIL.[221] Arguments posited for not treating the principle of specialty as CIL focus on the limited application of *Rauscher* to cases where there is an extradition treaty and the lack of legal duty or right to extradition.[222] The *Valencia-Trujillo* court also looked to the U.S. Supreme Court case *Medellin v. Texas*, in finding that treaties generally do not create private rights of actions.[223]

The *Valencia-Trujillo* court enunciated several bright-line rules, namely that "[b]ecause extradition agreements are not treaties, they do not become part of the law of this country," and that "[t]he rule of specialty applies only to extraditions pursuant to treaty."[224] But it is these bright-line rules that set the *Valencia-Trujillo* case apart from other extradition cases. Notably, "[i]n holding that the rule of specialty only applies to extraditions pursuant to a treaty, the Eleventh Circuit was the first circuit court to create such a bright-line rule."[225] Interestingly, in an earlier case, the Eleventh Circuit held that the principle of specialty is based on international comity and applied the principle despite the absence of a valid treaty with the extraditing country.[226]

There are concerns arising out of the *Valencia-Trujillo* court's decision to limit standing absent reference to an extradition treaty in an extradition order. Courts may interfere with the authority of the executive branch in conducting foreign relations. The holding potentially allows courts "to disregard the intentions of the respective executive bodies and themselves choose which rights extradited individuals can assert."[227]

Thus, despite its efforts to create a bright-line rule and not treat the principle of specialty as CIL, the restrictive position taken by the *Valencia-Trujillo* court may not be well received by other circuits, which have typically applied a case-by-case approach.[228] Therefore, the holding may actually promote the argument that the principle of specialty has a greater place in

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219 *See* Boudreaux, *supra* note 216, at 673–674.

220 Benitez v. Garcia, 449 F.3d 971, 976 (9th Cir. 2006).

221 *United States v. Valencia-Trujillo*, 573 F.3d 1171, 1181 (11th Cir. 2009). *See Recent Case*, *supra* note 212, at 577–578; Mark A. Summers, *Rereading* Rauscher: *Is It Time for the United States to Abandon the Rule of Specialty?* 48 Duq. L. Rev. 1, 25 (2010).

222 *See Recent Case*, *supra* note 212, at 578–579; *Summers*, *supra* note 221, at 27–28.

223 *Valencia-Trujillo,* 573 F.3d at 1181, *citing* Medellin v. Texas, 552 U.S. 491 (2008)

224 *Id.* at 1179–1180.

225 Amie Cafarelli, Case Comment: *Extradition Law*, 33 Suffolk Transnat'l L. Rev. 377, 387 (2010).

226 *See* Gallo-Chamorro v. United States, 233 F.3d 1298, 1302, 1305 (11th Cir. 2000).

227 Cafarelli, *supra* note 225, at 387.

228 *Id.* at 383.

international law, and cannot be so easily dismissed by courts to the detriment of other government branches.

Although the holdings of *Benitez* and *Valencia-Trujillo* stress a connection between the principle of specialty and the existence of an extradition treaty, these decisions are unlikely to be the final word on whether the principle of specialty is a part of CIL. The reasoning of the *Benitez* court is far from a straightforward application of the principle of specialty as merely a provision of a treaty. Rather, the *Benitez* court primarily focused on the extraditing country's expectations, and thus it can be argued that the court was acting out of a sense of legal obligation to enforce the extradition decree. Likewise, the *Valencia-Trujillo* court crafted a bright-line rule that attempted to discard the idea of the principle of specialty as CIL. But conflicting circuit court holdings, as well as the Eleventh Circuit's prior acknowledgment that the principle of specialty stems from international comity, could result in the case being treated as an outlier. However, because of conflicting court decisions, it is unclear whether the principle of specialty is part of CIL, and the discussion is not yet finished despite the holdings of *Benitez* and *Valencia-Trujillo*.[229]

In short, the principle of specialty is a form of preclusion of prosecution for any offense other than the one for which the relator was extradited, without the express approval of the surrendering state or a waiver by the relator. Prosecution is also subject to limitations established by the requested state and which are binding on the requesting state. Thus, the extradition order can contain limitations, for example, as to sentence or other questions of law. In these cases, the requesting state is limited not only by the treaty, but also by the limitation contained in the extradition order. In that case the law of the surrendering state will apply concerning the interpretation of any such limitation.

Although there are no cases in the United States on the issue of standing[230] that distinguish between objections raised on the basis of a treaty and objections raised on the basis of limiting language in the extradition order, it would seem that limiting language in an extradition order can be raised by the relator at any stage of prosecution in the requested state irrespective of the need for any action by the surrendering state. Issues involving the principle of specialty, because they are questions of law, are reviewable de novo by the court of appeals.[231]

6.2. The Substantive Contents of the Principle of Specialty

In general, the requesting state can prosecute the surrendered individual for all lesser offenses included in the offense charged that are based on the same facts for which she was extradited, provided, however, that the lesser-included offense satisfies the requirement of "dual criminality"[232] and that the surrendering state did not reserve against it in the extradition order. In the latter case, there would be a clear limitation set under the terms of the extradition order, and the principle of specialty controls subsequent prosecution. A question not yet resolved in U.S. jurisprudence then arises: can a relator be prosecuted in the requesting state when the facts upon which extradition was granted were also the basis of prosecution in the surrendering state, but for only some of the charges for which the requesting state sought to prosecute the relator? The answer is contingent upon the following factors: if the prosecuting (requesting) state has a limitation on *ne bis in idem* (equivalent to, though broader than, "double jeopardy" in the United States) then the prosecuting state cannot prosecute the relator for substantially the same crime based on the same facts. If the prosecuting state does not have such a limitation, but the surrendering state does, then it depends on whether the extradition order specifically states, as part of the specialty limitation, that the relator cannot be prosecuted for a crime

229 For a state supreme court decision discussing specialty and CIL, see *Washington v. Shaw Pang*, 940 P.2d 1293, 1330 (Wash. 1997).

230 *See infra* Sec. 7.4.

231 *See* Ch. XI (Habeas Appeals).

232 *See* Ch. VII.

which he was already prosecuted for in the surrendering state; and if the extradition order is silent on the question, the relator can then raise the issue before the competent authorities of the surrendering state and request a ruling to be communicated by that state to the prosecuting state. The relator, as a defendant in the prosecuting state, can also raise the issue before the courts of that state as part of a specialty objection.

A prosecuting state can seek, by means of a supplemental extradition request, either a waiver of specialty or a variance. Any unauthorized prosecution at variance with the limitations mentioned above will be deemed a violation of the principle of specialty.[233] But if the prosecution is for a different offense, and provided that it does not violate the principle of specialty, the prosecution can introduce evidence that would be otherwise barred from use in a prosecution prohibited by specialty.[234]

If the relator commits another offense while in the custody of the requesting state pending prosecution on the charges for which extradition was granted, then the limitations imposed by the principle of specialty will not apply to the prosecution of the new crime.

An example of a holding that specialty requires a similarity between the charges contained in the indictment and the facts presented to the extradition magistrate is *United States v. Sensi*.[235] In *Sensi*, the U.S. government presented the United Kingdom with a request for the extradition of Sensi along with a twenty-six count indictment charging him with mail fraud, possession or receipt of stolen securities, first-degree theft, and transportation in interstate and foreign commerce of stolen securities and money. After a hearing, the magistrate in London granted extradition, concluding that eighteen charges of theft were made out by the evidence under UK law.[236] Sensi was subsequently tried in the United States and found guilty of twenty-one counts of the indictment and acquitted of five counts (possession or receipt of stolen securities transported in interstate and foreign commerce).

Sensi argued that his prosecution, as based on the indictment, violated the principle of specialty because he was not extradited on the charges contained in the indictment. He contended that his extradition was based on the eighteen counts of theft set out by the British magistrate, and not on the twenty-six counts in the indictment. After finding that the charge was an extraditable offense under the Extradition Treaty,[237] the circuit court looked to whether the

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233 United States v. Rauscher, 119 U.S. 407 (1886).

234 *See* United States v. Thirion, 813 F.2d 146 (8th Cir. 1987) (holding that the doctrine of specialty does not alter existing rules of evidence or procedure); United States v. Flores, 538 F.2d 939 (2d Cir. 1976); McGann v. U.S. Board of Parole, 488 F.2d 39 (3d Cir. 1973) (holding that the doctrine does not apply to the method of trial or admissibility of evidence in the requesting state), *cert. denied*, 416 U.S. 958 (1974), *reh'g denied*, 417 U.S. 927 (1974); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962). Furthermore, formal differences between the request for extradition and the actual charges, or variances in an indictment, do not violate the specialty principle, which applies to the substantive nature of the crime and the facts supporting it for which extradition was granted. *E.g.*, United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992) (holding that Colombia's failure to refer specifically to the CCE charge in its review of the extradition request did not violate the specialty principle as Colombia specifically included the charge by a divergent name in its order), *cert. denied sub nom.*, Reed v. United States, 506 U.S. 924 (1992); United States v. Levy, 905 F.2d 326 (10th Cir. 1990) (considering the totality of circumstances and concluding the variance did not violate the specialty principle), *cert. denied*, 498 U.S. 1049 (1991); United States v. Rossi, 545 F.2d 814 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977).

235 United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989). This case was, however, distinguished in *United States v. Khan*, 993 F.2d 1368, 1373–1374 (9th Cir. 1993). *See also* Ahmed v. Morton, 1996 WL 118543 (E.D.N.Y. Mar. 6, 1996); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal. Apr. 24, 1998).

236 *Sensi*, 879 F.2d at 892. *See also Siriprechapong*, 181 F.R.D. 416.

237 *Sensi*, 879 F.2d at 895.

prosecution was based on the same facts as those set forth in the extradition request.[238] The court rejected Sensi's argument and interpretation of the Supreme Court's holding in *United States v. Rauscher*[239] that the prosecution for offenses other than the ones for which he was extradited is prohibited, even if the same evidence underlies both offenses. The court stated:

> *Rauscher*. . . did not hold [an] indictment invalid simply because it charged a crime denominated differently from the crime charged before the British magistrate. Rather, *Rauscher* held that the indictment was invalid because it charged the defendant with a crime not enumerated in the Treaty.[240]

The court in *Rauscher* felt that if it upheld the defendant's trial for a charge of infliction of cruel and unusual punishment, a crime not enumerated in the Treaty when he was originally extradited on a charge of murder, then in essence:

> [T]he Treaty could always be evaded by making a demand on account of the higher offense defined in the Treaty, and then only seeking a trial and conviction for the minor offense not found in the Treaty.[241]

The court held that in this instance that the principle of specialty was satisfied because Sensi was charged with crimes equivalent to those defined in the treaty. Moreover, as the court found the evidence sufficient to support each count in the indictment, the principle of specialty was not violated.

In *United States v. Abello-Silva*,[242] the defendant unsuccessfully tried to gain support from *Sensi* for the proposition that the principle of specialty applied to additional facts rather than additional offenses. The defendant, Abello, was extradited to the United States under a superseding indictment charging him with: (1) conspiracy to import controlled substances, and (2) conspiracy to possess cocaine with intent to distribute.[243] After Abello was extradited to the United States, a second superseding indictment was obtained against him. The second superseding indictment charged Abello with the identical two offenses of the first superseding indictment and added more facts detailing Abello's illegal activities. Unlike the first, the second superseding indictment was directed only at Abello and focused particularly on his role in the conspiracy. Abello argued that the second superseding indictment violated the principle of specialty by containing broader allegations of facts than the indictment on which his extradition was based.

In assessing Abello's claims, the Tenth Circuit determined that it must first look to precedent to understand and apply the principle of specialty unless otherwise directed by treaty or statute.[244] Moreover, the cases cited by Abello and the bulk of authority applied the principle in terms of additional offenses and not additional facts. Accordingly, the court first found that additional evidence regarding the charge contained in the extradition request was not barred under specialty and held that specialty "recognizes the possibility, for strategic reasons, that evidence introduced at trial was withheld from the extradition request."[245] The court then looked to *Sensi* and held that the reference to facts in that case stemmed from the extradition treaty between the United States and the surrendering state, the United Kingdom.

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238 *Id.*

239 United States v. Rauscher, 119 U.S. 407 (1886).

240 *Sensi*, 879 F.2d at 896. *See also Siriprechapong*, 181 F.R.D. 416.

241 *Id.*

242 United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992), *reh'g denied*, 506 U.S. 1087 (1993). *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000).

243 *Abello-Silva*, 948 F.2d at 1172.

244 *Id.* at 1173–1174.

245 *Id.*

The *Sensi* test did not apply because: (1) Abello never alleged that his charges were not extraditable offenses, (2) similar treaty language did not appear in the relevant order in this instance, and (3) Abello never argued that insufficient facts supported his extradition. Moreover, the court held that the crux of the specialty question was whether the requested state has objected or would object to the prosecution. As the second indictment presented an even stronger case for the same offense, which satisfied the Colombian government's extradition requirements in the first indictment, the specialty principle was not violated, as Colombia would not object to this. The court reaffirmed that specialty requires that the defendant be tried only for those offenses that appear in the extradition request. As both counts of the second superseding indictment charged Abello with the same offenses mentioned in the extradition request, no violation of the principle of specialty occurred.

In *Peters v. Egnor*,[246] the court held that specialty was satisfied for the same reasons dual criminality was satisfied. In this case, the question of whether specialty was satisfied requires an examination of the congruity between the statutes of the requested and requesting states. The court held that the congruence between the Theft Act of the United Kingdom and the U.S. federal securities law was sufficient. As with dual criminality, identical statutes are not required, but the provisions must be analogous in substance. Statutes are substantially analogous when they punish conduct falling within the broad scope of the same generally recognized crime, that is, conduct directed at the same basic evil.[247]

The Ninth Circuit in *United States v. Khan*[248] took an enlightened view of the nature of the principle of dual criminality, holding that:

> Under the doctrine of "dual criminality," ' "an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations.' " *Id.* (quoting *Quinn v. Robinson*, 783 F.2d 776, 791–92 (9th Cir.), *cert. denied*, 479 U.S. 882, 107 S.Ct. 271, 93 L.Ed.2d 247 (1986)). The doctrine of dual criminality is incorporated in the operative extradition treaty between the United States and Pakistan: "Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties." Extradition Treaty, December 22, 1931, art. 3, 47 Stat. 2122, 2124.
>
> Khan contends that the act alleged in Count VIII of the indictment is not punishable as a crime under the laws of Pakistan. Count VIII charges Khan with violation of 21 U.S.C. § 843(b), i.e., the use of a telephone to facilitate the commission of a drug felony. [Citation omitted.] Count VIII also charges Khan with violating 18 U.S.C. § 2, aiding and abetting the commission of an offense against the United States.
>
> Kahn contends that using a telephone during the commission of a drug offense is not, by itself, a criminal act in Pakistan. Khan concedes that under Pakistani law drug trafficking conspiracies are criminal acts. [Citation omitted.] Khan also concedes that the lawful use of a telephone can be considered an "overt act" committed in furtherance of a criminal conspiracy (as in Count II), but contends that such use standing alone cannot be charged as a separate crime.
>
> The government argues that as long as the underlying conduct is criminal, dual criminality is satisfied. The government contends that because the telephone use is part of the overall criminal conduct of the conspiracy, it constitutes a punishable crime in Pakistan. But it appears that it would be punishable in Pakistan as part of the crime of conspiracy, which is charged in Count II.

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246 Peters v. Egnor, 888 F.2d 713 (10th Cir. 1989).

247 For another U.S.–UK extradition case similarly involving specialty and dual criminality concerns, see *United States v. Thomas,* 322 Fed. Appx. 177, 179 (3d Cir. 2009) (unpublished opinion).

248 United States v. Khan, 993 F.2d 1368 (9th Cir. 1993). *See also* United States v. Cosby, 53 Fed. Appx. 448 (9th Cir. 2002); Ahmed v. Morton, 1996 WL 118543 (E.D.N.Y. Mar. 6, 1996); *In re Extradition of Valdez-Mainero*, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

> It is true that dual criminality does not require that Pakistan have a provision that is the exact duplication of 21 U.S.C. § 843. *See Emami v. United States Dist. Court for N. Dist. of Cal.*, 834 F.2d 1444, 1450 (9th Cir. 1987); *Theron v. United States Marshall*, 832 F.2d 492, 496–97 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2830, 100 L.Ed.2d 930 (1988). But we have not been presented with a Pakistani crime that is even analogous to 21 U.S.C. § 843. We have reviewed other cases that address this issue. Many cases have held that dual criminality is satisfied even though the names of the crimes and the required elements were different in the two countries. But in each of these cases the laws of the two countries were sufficiently analogous to satisfy dual criminality. *See, e.g., Collins v. Loisel*, 259 U.S. 309, 312, 42 S.Ct. 469. 470, 66 L.Ed. 956 (1921) (dual criminality satisfied because Indian offense of "cheating" was analogous to Louisiana offense of "false pretenses"); *Kelly v. Griffin*, 241 U.S. 6, 14, 36 S.Ct. 487, 489, 60 L.Ed. 861 (1915) (dual criminality satisfied though Canadian perjury law did not require that statements be material, while Illinois law required materiality as an element of the offense); *Bozilov v. Seifert*, 983 F.2d 140, 143 (9th Cir. 1993) (dual criminality satisfied because defendant could have been charged with conspiracy in the United States if the two countries' positions had been reversed); *Emami*, 834 F.2d at 1450 (dual criminality satisfied because fraud under German Penal Code 263 comparable to U.S. crime of mail fraud under 18 U.S.C. § 1341); *Theron*, 832 F.2d at 497 (dual criminality satisfied because South African law, though broader, was analogous to U.S. bank fraud); *In re Russell*, 789 F.2d 801, 804 (9th Cir. 1986) (dual criminality satisfied even though Australian conspiracy law did not require "overt act"); *United States v. Sensi*, 879 F.2d 888, 893 (D.C. Cir. 1989) (dual criminality satisfied where, under U.K. law, to commit mail fraud one must succeed in stealing something whereas, under U.S. law, that is not a requirement).
>
> We are not aware of any Pakistani law that is analogous to 21 U.S.C. § 843. Consequently, we are not convinced that Khan could be charged and punished in Pakistan for the conduct underlying Count VIII, separate and apart from the crime of conspiracy. Therefore, the doctrine of dual criminality has not been satisfied with respect to Count VIII."[249]

The *Khan* case highlights the interrelationship between dual criminality and specialty.

The relator may waive the application of the principle of specialty by consenting to be prosecuted for the offense at variance with the offense charged in the extradition request.[250] In *United States v. DiTommaso*,[251] the court declined to decide whether the defendant had standing to raise the issue in the case where the defendant had voluntarily waived his extradition rights. The court held that the principle of specialty was limited to those cases where the extradition treaty was formally invoked, which was not the case in *DiTommaso*. Because the defendant waived his extradition rights, he was not extradited pursuant to a treaty but rather deported, and therefore the principle did not extend to him. The question arises here as to whether specialty applies to alternative methods of surrender such as deportation and unlawful seizures in other states.[252] With respect to waiver of extradition in the context of an extradition procedure, the principle applies on the basis of the original extradition request.

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249 *Khan,* 993 F.2d at 1372–1373 (citations omitted). *See also Ahmed*; *Valdez-Mainero*, 3 F. Supp. 2d 1112.

250 *See* United States v. Vreeken, 803 F.2d 1085, 1089 (10th Cir. 1986) (holding that the defendant's failure to raise the rule of specialty in a timely manner precluded him from raising it at all as a bar to prosecution for violations of U.S. income tax law, when extradition from Canada had been based on charges of wire fraud), *cert. denied*, 479 U.S. 1067 (1987). *See also* United States v. Davis, 954 F.2d 182 (4th Cir. 1992) (holding that the defendant waived his right to appeal on specialty grounds by his failure to object to the government's reference to illegal accounting practices in the initial indictment, which were not included in the extradition order).

251 United States v. DiTommaso, 817 F.2d 201, 212 (2d Cir. 1987).

252 *Id.*

The Ninth Circuit in *United States v. Anderson*[253] reasoned that the principle of specialty and the principle of dual criminality could apply to a situation involving an extradition intertwined with denaturalization proceedings. Shortly after the relator petitioned for naturalization in Costa Rica, the United States filed a formal request with Costa Rican authorities for his extradition.[254] Shortly after this extradition request was filed, Costa Rica granted the relator's naturalization petition, followed three weeks later by an annulment of the grant of citizenship.[255] Costa Rica extradited Anderson to the United States while his challenges to Costa Rica's annulment of his citizenship and decision to extradite him were pending in Costa Rican courts.[256] The relator was subsequently convicted in the United States of various fraud counts tied to an income tax avoidance scheme he was involved in.[257] Although the relator was extradited before his naturalization appeals were completed, the court found his removal proper given that Costa Rica, under the express terms of the extradition treaty, was required to suspend its decision on the relator's request for naturalization until after it surrendered him.[258]

Where a relator is charged with a crime for which he was not the principal offender, he may be tried as an accomplice without violation of the principle of specialty provided the applicable laws allow for accomplices to be tried as principals.[259]

6.3. Jurisprudential Applications

The principle of specialty is a substantive rule that relates to the very basis of the extradition process, as it is derived from the applicable treaty and 18 U.S.C. § 3186, which states:

> [The] Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government, *to be tried for the offense of which charged* . . .[260]

The principle of specialty was confirmed by the Supreme Court in the case of *United States v. Rauscher*,[261] which held:

> [A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition . . .[262]

In reaching its decision, the Court used the principles of the common law and international law to interpret the United States–United Kingdom Treaty, which did *not* contain a reference to a right not to be prosecuted for a crime for which extradition was not granted. The court held that "the fair purpose of the treaty is, that the person shall be delivered up *to be tried for*

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253 472 F.3d 662 (9th Cir. 2006).

254 *Id.* at 665.

255 *Id.*

256 *Id.*

257 *Id.* at 665–666.

258 *Id.* at 666–667. The extradition treaty between the United States and Costa Rica provided at article 8, section 2:

> The Requested State shall undertake all available legal measures to suspend proceedings for the naturalization of the person sought until a decision is made on the request for extradition and, if that request is granted, until that person is surrendered.

259 United States v. Samuels, 2009 U.S. Dist. Lexis 9616, at *17–*21 (E.D.N.Y. Feb. 10, 2009).

260 *See* 18 U.S.C. § 3186 (1994) (emphasis added). This section of the statute applies to the United States as a requested state when it is surrendering a felon to a foreign state. The applicable treaty controls when the United States is the requesting state to whom the person has been surrendered.

261 United States v. Rauscher, 119 U.S. 407 (1886).

262 *Id.* at 430.

[the extradited] offense, and for no other."[263] In reaching this conclusion, the *Rauscher* Court reviewed the terms and history of the treaty, the practice of nations in regard to extradition treaties, the case law from the states, and the writings of commentators, noting that:

> according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up.[264]

This is so because from a policy perspective:

> [i]t is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party.[265]

The Supreme Court continues to abide by these principles, as noted in 1992 by Justice John Paul Stevens when he interpreted *Rauscher* as "impl[ying] a covenant not to prosecute for an offense different from that for which extradition had been granted…"[266] Accordingly, the Court held the principle of specialty to be "conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this [country] under such proceedings."[267] United States courts have consistently recognized this principle.[268]

One option in cases where the court rules against a relator-defendant's claim is to permit an interlocutory appeal.[269] Specialty issues do not, however, only arise as questions of law, but also as questions of fact, and as mixed questions of law and fact.

The Supreme Court held in *Van Cauwenberghe v. Biard*[270] that a civil motion to dismiss based on the principle of specialty was not an immediately appealable interlocutory order.[271] The

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263 *Id.* at 423 (emphasis added).

264 *Id.* at 419.

265 *Id.*

266 United States v. Alvarez-Machain, 504 U.S. 655, 679–680 (1992) (Stevens, J., dissenting).

267 *Rauscher*, 119 U.S. at 424.

268 *See Alvarez-Machain*, 504 U.S. at 659–660 (noting that the issue in *Rauscher* was whether the United States–Great Britain Treaty "prohibited the prosecution of defendant Rauscher for a crime other than the crime for which he had been extradited"). *See also* United States v. Diwan, 864 F.2d 715, 720 (11th Cir. 1983) (stating that under the specialty doctrine, petitioning country may prosecute only those offenses for which accused was originally extradited), *cert. denied*, 492 U.S. 921 (1989); United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988) (same), *cert. denied*, 489 U.S. 1012 (1989); United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986) (holding that specialty doctrine "bars trial" on nonextradited offenses), *cert. denied*, 479 U.S. 1067 (1987); United States v. Jetter, 722 F.2d 371, 373 (8th Cir. 1983) (stating that under specialty doctrine, accused can be tried only for extradited offenses).

269 The trial court may allow an interlocutory appeal under the Federal Rules of Civil Procedure, but is not bound to do so. Under 28 U.S.C. § 1292(b), courts of appeals have jurisdiction to hear appeals of interlocutory orders made by district judges. *See* 9 Moore's Federal Practice, ¶ 110.21[1]. A district judge has authority, when making an order that would not normally be appealable, to state in writing his belief that an interlocutory appeal is warranted. 28 U.S.C. § 1292(b) (2000). The judge may make such an order at his discretion, if he is of the opinion that on some controlling question of law, a "substantial ground for difference of opinion" exists and that the order will "materially advance the outcome of the litigation." *Id.* The district court must, however, state its desire to stay proceedings pending the appeal, or else proceedings will continue. *Id.* In theory, appeals of interlocutory orders may expedite the final outcome of the litigation and may prevent unneeded litigation in the long run. In the context of extradition proceedings, it may prevent violations of treaty obligations as well as prevent trials of persons subsequently found to be immune.

270 Van Cauwenberghe v. Biard, 486 U.S. 517 (1988).

271 *Id.* at 523–524. The interlocutory appeal could, however, be denied if the issue can be preserved for review in the ordinary cause of an appellate review. *See* United States v. Sacoccia, 18 F.3d 79 (9th

Court held that even assuming *arguendo* that the principle of specialty confers immunity from service of process in civil matters, denial of a motion to dismiss based on immunity from process was not immediately appealable.[272]

In *Van Cauwenberghe* an extradited person who faced civil prosecution claimed that the principle of specialty afforded him the right while awaiting trial on the extradited charges to immediately appeal the issue of whether he was immune from the civil suit. In dismissing the petitioner's interlocutory appeal, the Court differentiated between criminal and civil prosecutions, and intimated that had the appeal challenged the U.S. government's criminal prosecution under the specialty doctrine, interlocutory appeals would have been allowed. Specifically, the Court held that "[u]nlike a criminal prosecution, in which the coercive power of the state is immediately brought to bear, the state's involvement in the conduct of a private civil suit is minimal."[273] The Supreme Court further distinguished civil from criminal prosecutions by noting that there was no "explicit agreement" in the controlling United States–Swiss Treaty, "to protect the extradited person from the burdens of civil suit," and that "[t]here is no possibility [in a civil suit] that the defendant will be subject to pretrial detention[,] . . . be required to post bail . . . [or] even [be] compelled to present at trial."[274] The Court concluded that forcing a prisoner to stand trial in a civil matter did not "significantly restrict [his/her] liberty."[275]

Interlocutory appeals are permitted unless the trial judge enters an order based on a finding that the appeal is frivolous; otherwise the appeal can proceed and the trial court is divested of jurisdiction.[276] In general, appeals in criminal cases require a district court to enter a final judgment on the merits prior to an appeal.[277]

Cir. 1994). *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); United States v. Tse, 135 F.3d 200 (1st Cir. 1998).

272 *Van Cauwenberghe,* 486 U.S. at 529–530.

273 *Id.* at 525.

274 *Id.* at 525–526.

275 *Id.* at 526. The Court based its judgment on its holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), requiring, inter alia, that an order be "effectively unreviewable" as an appeal of a final judgment. *See also* Catlin v. United States, 324 U.S. 229, 237 (1944) (denying motion to dismiss based on jurisdictional grounds in civil action not immediately appealable). Similarly, the *Van Cauwenberghe* court relied on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), in which the Court held that a district court order is appealable prior to trial if it (1) leaves no matter open or unfinished; (2) is collateral to the merits, insofar as it raises issues of law and fact having no bearing on the guilt or innocence of the defendant; and (3) risks denying an important right that would be irretrievably lost if appeal were postponed. The Supreme Court has consistently held that in similar actions, the right not to be tried fully meets the Cohen requirement of an important right that is irretrievably lost if appeal is postponed, and it has uniformly affirmed the right to be tried. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (denying qualified immunity); Helstoski v. Meanor, 442 U.S. 500 (1979) (regarding the assertion of immunity based on the Speech and Debate Clause of the Constitution); Abney v. United States, 431 U.S. 651 (1977) (stating that double jeopardy involves right not to be tried, so that interlocutory appeal was warranted). *See also* United States v. Abbamonte, 759 F.2d 1065, 1071 (2d Cir. 1985). The Court's decision in *Van Cauwenberghe* is distinguishable from other cases in that the question of immunity from service of process *was* reviewable on appeal, which made it inappropriate as an immediately appealable interlocutory order. If an interlocutory appeal is not granted, the relator-defendant is left with no choice but to make a record and preserve the issue for appeal after the district court enters a final judgment.

276 *See* Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1988).

277 *See* Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992); United States v. LaMere, 951 F.2d 1106, 1108–1109 (9th Cir. 1991); United States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980); United States v. Dunbar, 611 F.2d 985, 988 (5th Cir. 1980) (en banc).

In *Midland Asphalt Corp. v. United States*, the Supreme Court outlined three exceptions to the general rule preventing immediate appeal of motions in criminal appeals.[278] The Court considered satisfied the relevant test for all interlocutory appeals developed in *Coopers & Lybrand v. Livesay*[279] only if further delay would "destroy" the legal and practical value of the asserted right were it not vindicated before trial.[280] Accordingly, interlocutory appeals in criminal cases based on the principle of specialty must overcome the presumption against such an appeal, except for issues involving bail or double jeopardy.[281] This is particularly significant when the issue arising under the principle of specialty drives the prosecution's strategy of splitting a given criminal transaction or series thereof into more than one trial, and sometimes in more than a single district (where they would ordinarily be consolidated). The Fifth Amendment precludes such prosecutorial strategies.[282] Although courts allow few opportunities for interlocutory appeals in the criminal context, double jeopardy provides the most likely grounds for an interlocutory appeal based on claims arising out of the principle of specialty. Considering all the implications of going forward with a trial where the principle of specialty may be violated, it would seem that a better approach would be to allow interlocutory appeals on this issue if for no other reasons than judicial economy and fairness.[283]

Extradition issues merit interlocutory review. Justice Sandra Day O'Connor, writing for the Supreme Court in *Flanagan v. United States*,[284] explained that extradition cases share an important feature: they involve "more than the right not to be convicted," they involve "a right not to be tried."[285] In these cases the defendant challenges "the very authority of the Government [to] hale him into court to face trial on the charge against him."[286] Decisions that interpret and apply the principle of specialty are questions of law (and fact); they can therefore be decided de novo by the circuit court.[287]

In *Benitez v. Garcia*, the Ninth Circuit reviewed and reaffirmed its position on the principle of specialty, which reflects the position adopted in the *Restatement (Third) of Foreign Relations*. The district court held:

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278 *Midland*, 489 U.S. 794. The exceptions are: (1) motions to reduce bail, (2) motions to dismiss on double jeopardy grounds, and (3) motions to dismiss under the Speech and Debate Clause.

279 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

280 *Midland*, 489 U.S. at 799.

281 *Id. See also* Abney v. United States, 431 U.S. 651 (1977); Blockburger v. United States, 284 U.S. 299 (1932). *See also* United States v. Rashed, 83 F. Supp. 2d 96 (D.D.C 1999); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

282 *See* United States v. Felix, 503 U.S. 378 (1992) (disallowing splitting a conspiracy and its substantive offenses when committed after the conspiracy). *See also* Ciucci v. Illinois, 356 U.S. 571 (1958).

283 Only the Second Circuit has held that appeals raising claims under the rule of specialty are not subject to interlocutory review. *See* United States v. Levy, 947 F.2d 1032, 1034 (2d Cir. 1991). Reasoning that "the doctrine of specialty does not guarantee a right not to be tried, but rather a right to be protected from a court's authority," the Second Circuit concluded that the rights at issue "may be fully vindicated on appeal from a final judgment…." *Id.* This holding of the Second Circuit in *Levy* contravenes the Supreme Court's holdings in *Rauscher* and *Van Cauwenberghe*. Although the *Levy* court is correct that the restraints on a U.S. court's right to try an extradited defendant are expressed as limits on jurisdiction, other courts have consistently articulated the doctrine in terms of "a right not to be tried" that unquestionably merits interlocutory appellate review.

284 Flanagan v. United States, 465 U.S. 259 (1984).

285 *Id.* at 265–266.

286 Abney v. United States, 431 U.S. 651, 659 (1977).

287 *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1344 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992). *See also* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); Quinn v. Robinson, 783 F.2d

> The Restatement (Third) of Foreign Relations Law, section 477, in Comment (b) to the Doctrine of Specialty (emphasis added) supports the view that the doctrine is not limited to the characterization of crimes. That section describes, among other purposes: "The doctrine of speciality is designed to prevent prosecution for an offense for which the person would not have been extradited or to prevent punishment in excess of what the requested state had reason to believe was contemplated." Comment (f) further provides, in pertinent part: "if the requested state surrenders a person on condition that the death sentence not be imposed, the condition is binding on the requesting state." Although no United States Supreme Court decision directly on point has been identified, lower federal courts have addressed defendants' challenges to sentences in excess of the extraditing country's expressed expectations regarding maximum punishment. See, e.g., United States v. Casamento, 887 F.2d 1141 (2nd Cir. 1989); United States v. Campbell, 300 F.3d 202 (2nd Cir. 2002), cert. den., 538 U.S. 1049, 123 S. Ct. 2114, 155 L. Ed. 2d 1090 (2003), rehearing den., 539 U.S. 971, 123 S. Ct. 2668, 156 L. Ed. 2d 678 (2003).
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> The Casamento court reached the merits of a defendant's argument "that his forty-five year prison sentence violate[d] the terms of his extradition order from Spain" because in that extradition Order, as in Benitez's, the extraditing country "prohibited the court from sentencing him to more than thirty years in prison." Casamento, 887 F.2d at 1185. That court rejected the claim not by ignoring the terms of the extradition order, but rather by reconciling the sentence with the extradition order.
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> However, the extradition order requires only that "the maximum period of imprisonment may not in any event exceed 30 years." Instead of selecting a thirty-year sentence, which might have resulted in mandatory release after good time credits in twenty to twenty-three years, the district judge sentenced [the defendant] to prison for forty-five years but ordered that he be released after thirty years. Therefore, the sentence does not violate the extradition order. Casamento, 887 F.2d at 1185.
>
> Similarly, a defendant was extradited from Costa Rica to the United States pursuant to an extradition treaty and a judicial extradition decree containing a condition placing an outer limit on any eventual prison term. n7 Campbell, 300 F.3d at 205. After conviction but before sentencing, the United States government sought and received clarification from the Costa Rican government concerning the latter's position on the permissible form of sentence. Id. at 206–207. That clarification provided, in pertinent part: "the verdict in the United States against an extradited person can refer to the total years that the accused can be indicted for. Nevertheless, the sentence must state, in a clear and manifest way, that the maximum time the accused must serve is 50 years. This would be the real serving time." Id. at 207 (emphasis added).[288]

On appeal, the Ninth Circuit court held:

> We must look, first and foremost, to what the surrendering state expected and believed the extradited defendant would face. In *Browne,* the Supreme Court decided that "[w]hether the crime came within the provision of the treaty was a matter for the decision of the [surrendering] authorities." *Browne,* 205 U.S. at 316, 27 S.Ct. 539. Our foremost concern is to "ensur[e] that the obligations of the requested nation are satisfied." *United States v. Andonian,* 29 F.3d 1432, 1435 (9th Cir.1994). *See, e.g., United States v. Cuevas,* 847 F.2d 1417, 1428 (9th Cir.1988) (stating that "the appropriate test is whether the extraditing country" would object); *Restatement (Third) of the Foreign Relations Law* § 477 Comment b ("The standard for adjudicati[on]…in the United States is whether the requested state has objected or would object to prosecution.").
>
> As part of this assessment of "what the surrendering country wishes," *Najohn,* 785 F.2d at 1422, courts look to the extradition decree issued by the surrendering country, as well as documents

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776, 791 (9th Cir. 1986); *In re Extradition of* Chen, 161 F.3d 11 (9th Cir. 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990).

288 Benitez v. Garcia, No. 02-0489 J (LAB), 2003 U.S. Dist. LEXIS 27061, at *14 (S.D. Cal. 2003).

> related to that decree. In *Rauscher,* the Supreme Court explicitly looked at the "processes by which [extradition] is to be carried into effect." *Rauscher,* 119 U.S. at 420, 7 S.Ct. 234. *Id.* at 421, 7 S.Ct. 234 (ensuring that the "proceedings under which the party is arrested in a country" are given due respect). *See, e.g., Andonian,* 29 F.3d at 1436 (looking to the surrendering country's "extradition order"); *United States v. Cuevas,* 847 F.2d 1417, 1425 (9th Cir.1988) (same); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (same). Indeed, we have decided that implementing the Supreme Court's decision in *Johnson* requires that "deference [is] to be accorded a surrendering country's decision on extraditability." *United States v. Van Cauwenberghe,* 827 F.2d 424, 429 (9th Cir.1987). *See also United States v. Campbell,* 300 F.3d 202, 209 (2d Cir.2002) ("Whether or not express terms in a treaty make the extraditing country's decision final as to whether an offense is extraditable, deference to that country's decision seems essential to the maintenance of cordial international relations."); *Casey v. Dep't of State,* 980 F.2d 1472, 1477 (D.C.Cir.1992) ("[A]t a minimum, *Johnson* means that an American court must give great deference to the determination of the foreign court in an extradition proceeding."); *United States v. Jurado-Rodriguez,* 907 F.Supp. 568, 574 (E.D.N.Y.1995) (deciding that the United States must "must abide by the terms and limitations [the surrendering country] has explicitly included in its extradition decree").[289]

In *United States v. De Asa Sanchez*, District Court Judge Jack Weinstein held that federal courts should honor limitations in sentencing that are requested by the extraditing state:

> It is the court's preliminary view—subject to briefing and argument—that when a person is extradited with the limitation imposed by the extraditing state that a conviction will not result in a death sentence, federal courts will honor the limitations. *See, e.g.,* American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Comment f. (1987) ("If the requested state surrenders a person on condition that the death sentence not be imposed, the condition is binding on the requesting state."). *Cf.* Louis Henkin, Richard Crawford Pugh, Oscar Schochter & Hans Smit, International Law 1114 (1993) ("According to the principle of specialty, the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited."); M. Cherif Bassiouni, International Extradition: United States Law and Practice, Ch. VIII, § 5, Grounds Relating to the Penalty: The Death Penalty and Cruel and Unusual Punishment at 735–744 (4th ed.2002) (problems of enforceability of conditional extraditions; discussion of leading international cases); 3 The Dept. of Justice Manual at 9–15, 500 (2d ed. loose leaf current) (post extradition considerations); 4 The Dept. of Justice Manual at 1 ff. (2d ed. loose leaf current) (survey of death penalty cases in the federal courts).[290]

6.4. Variance in Prosecution and the Principle of Specialty

In cases of extradition from the United States to another state, the crimes for which a relator may be tried by a requesting state are determined by the extradition warrant signed by the secretary of state or his/her designee. If there is a variance between the U.S. extradition warrant and the finding of the U.S. extradition magistrate or judge, the warrant will control in the requesting state until such time as it may be amended to conform to the decision of the extradition judge. The United States may waive variances by express authorization from the secretary of state, but only to the extent that the new crimes are based on the same facts that were presented at the relator's extradition hearing, the new crimes satisfy dual criminality, and probable cause can be found. The relator is entitled to challenge this determination in court. This is usually raised in the context of ongoing criminal proceedings.

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289 Benitez v. Garcia, 449 F.3d 971, 976–977 (9th Cir. 2006).

290 United States v. De Asa Sanchez, 323 F. Supp. 2d 403 (2004).

With respect to the interpretation and application of the principle of specialty in the United States, it is a confused and unsettled part of extradition law. The reasons are in part because it poses several difficult legal questions that the circuits have approached in different ways. They are:

1. in the last twenty years the United States has enacted complex criminal statutes that for the most part have no counterpart in other legal systems;[291]

2. prosecutorial practice in United States frequently resorts to the use of superseding indictments whose substantive charges and factual recitations may vary from the original indictment on which extradition was secured;

3. federal prosecutors in the ninety-four federal districts may be unfamiliar with this area of the law and more so with respect to the set of issues involved in specialty (even though it should be noted the Office of International Affairs [OIA] of the United States Department of Justice provides valuable assistance and advice to the United States Attorneys' offices throughout the country);

4. some federal prosecutors tend to occasionally stretch the rules of permissibility with regard to their representations to the OIA, which are communicated to the requested state, and also stretch the limits of proper conduct in making representations to U.S. courts before which these issues are raised;

5. as a consequence of all these factors, there is inconsistency and uncertainty among the circuits as to what constitutes a variance and how to deal with it, and the distinction between preclusion of prosecution under specialty and the use of evidence for proving other legal propositions than guilt of the precluded crime; and

6. the conflicting positions of the circuits as to who can raise the issue of specialty, when, and how.[292]

The Ninth Circuit, in *United States v. Khan*, established an important requirement of unambiguousness, whereby if the surrendering state is not unambiguous about the charges for which extradition has been granted, then the U.S. courts would be required to determine whether it was the intention of the surrendering state to allow extradition for a particular offense, and in so doing, to determine whether that offense exists in the surrendering state. By implication, the Ninth Circuit suggested that U.S. courts, in cases of ambiguity, put themselves in the place of the surrendering state's courts to determine first the existence of dual criminality and second, based on the first determination, what the limits of specialty are. The court held:

> As a matter of international comity, "[t]he doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." *Van Cauwenberghe*, 827 F.2d at 428 (quoting *Quinn*, 783 F.2d at 783). *See United States v. Rauscher*, 119 U.S. 407, 419–421, 7 S.Ct. 234, 240–241, 30 L.Ed. 425 (1886).
>
> Khan contends that Pakistan agreed to extradite him on the basis of Count II, but not on Count VIII of the superceding indictment. Khan contends that the Pakistani extradition documents do not specifically refer to the allegations of Count VIII and therefore his conviction on Count VIII should be dismissed.
>
> The parties have provided two Pakistani documents, an Enquiry Report from a Deputy Commissioner Enquiry Officer dated February 14, 1990 ("commissioner's report") and a judgment

291 *See supra* Sec. 5.2.

292 *See infra* Sec. 6.6.

from the Lahore High Court at Lahore dated March 4, 1990 (this document is incomplete). The commissioner's report refers three times to 21 U.S.C. § 963 (the violation alleged in Count II) and makes no reference to 21 U.S.C. § 843 or 18 U.S.C. § 2 (the violations alleged in Count VIII). The Lahore judgment refers once to 21 U.S.C. § 963 and makes no reference to 21 U.S.C. § 843 or 18 U.S.C. § 2.

The Pakistani commissioner's report lists the documents received from the United States in connection with the extradition request. These documents included copies of the Stewart affidavit, which described the charges in Counts II and VIII, and the superceding indictment. The list in the report specifically noted that "the indictment relating to [Khan] is with regard to count No. II and VIII." In addition, the commissioner's report reviews the factual background of the extradition request including the various telephone calls between Khan and his codefendants throughout the course of the conspiracy. The commissioner stated that he had carefully examined the evidence presented by the prosecution.

The magistrate judge determined that the Pakistani commissioner had considered all the evidence presented by the United States, including the Stewart affidavit and Count VIII in the superceding indictment. Relying on *United States v. Sensi*, 879 F.2d 888, 896 (D.C Cir. 1989), the magistrate judge found the reference to the evidentiary materials sufficient to satisfy the doctrine of specialty. The district court found that it was "quite clear that the United States Government requested extradition on Count VIII, and that the Magistrate in Pakistan considered extradition on Count VIII and granted it."

The opinion in *United States v. Sensi* is not dispositive. In *Sensi*, 879 F.2d at 896, the D.C. Circuit focused on the evidence submitted with the United States' request for extradition and found it sufficient to support each count of the indictment. The British magistrate (England was the surrendering country) had not delineated the United States counts for which the defendant was extraditable, but had concluded that the defendant was extraditable. The magistrate found that 18 charges of theft were made out by the evidence under United Kingdom law. *Id.* at 892. The British magistrate had received a copy of the United States indictment. *Id.* at 896.

In *Sensi*, however, the operative extradition treaty contained the following language: "'A person extradited shall not be [prosecuted]...for any offense other than *an extraditable offense established by the facts in respect of which his extradition has been granted*.'" *Id.* at 895 (quoting 28 U.S.T. 233). The operative treaty in this case contains the following language: "A person surrendered can in no case be [prosecuted]...for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place." Extradition Treaty, December 22, 1931, art. 7, 47 Stat. 2124. We are not convinced that the doctrine or specialty is satisfied under all treaties as long as the prosecution is based on the same facts as those set forth in the request for extradition.

Language from our opinions in *Van Cauwenberghe* and *Quinn*, "for any offense other than that for which the surrendering state agreed to extradite," suggests the need for an affirmative statement by the surrendering country of the counts upon which extradition is based. In *United States v. Merit*, 962 F.2d 917, 923 (9th Cir.), *cert. denied*, 506 U.S. 85, 113 S.Ct. 244, 121 L.Ed.2d 178 (1992), the South African Supreme Court affirmatively found the defendant extraditable on Count 1 and Count 14 of the indictment. The South African Supreme Court's ruling was initially ambiguous regarding the other 12 counts for which the defendant was indicted. The United States requested clarification and the South African Department of Justice confirmed that the defendant was extraditable on Counts 1 and 14. *Id.* at 920. We found that the United States had adhered to the specialty requirement of the treaty because the defendant was tried and convicted of *only those two counts*. *Id.* at 923.

The extradition materials do not indicate that Pakistan unambiguously agreed to extradite Khan on both Counts II *and* VIII. The magistrate judge found it persuasive that "the commissioner's report does not suggest that Khan ought not to be extradited on the charge contained in Count VIII." But we will not infer an agreement to extradite from Pakistan's silence concerning Count VIII. [Citation omitted.]

> The government notes that the Pakistani commissioner directed that Khan could be "surrendered over to the authorities in the U.S.A. for trial under the relevant American Law." It is possible that the Pakistani commissioner was referring to the relevant American law of 21 U.S.C. § 963 (in Count II). It is also possible that Pakistan did not find the charges in Count VIII worthy of extradition. *See generally United States v. Rauscher*, 119 U.S. 407, 420–21, 7 S.Ct. 234, 241, 30 L.Ed. 425 (1886) (defendant extradited on murder charges could not be prosecuted for lesser offense of cruel and unusual punishment, which was not listed in the extradition treaty).
>
> Because Pakistan did not unambiguously agree to extradite Khan on the basis of Count VIII, the doctrine of specialty has not been satisfied. Khan's conviction on Count VIII should be reversed and dismissed.[293]

Another factor that adds to the present state of confusion is that U.S. judicial decisions frequently combine several issues arising under specialty without clearly distinguishing them for purposes of the ruling. Some cases also confuse issues of dual criminality and evidence in the context of specialty, while also discussing standing without clearly separating these different legal questions. The discussion of relevant cases that follows in this section reveals the extent to which these issues can are interrelated.

As stated above, in order to prosecute a relator in the United States for an offense at variance with the offense for which the extradition request was granted, the United States must obtain the consent of the requested state while the relator is still in U.S. custody for the offense for which extradition was granted.[294] But the United States does not proceed that way. Instead, it proceeds with prosecution based on other charges arising out of superseding indictments, and then argues that these charges satisfy specialty and dual criminality. It is this unfortunate hasty practice that brings about so many problems. The better practice would be for the prosecutor to convey his/her intentions to the Department of Justice's OIA, and let that office seek a supplemental extradition request or ask the surrendering state for clarification and authorization to proceed. That additional procedural demarche would clearly improve judicial economy and prevent unnecessary delays.

In *United States v. Diwan*,[295] the court held that the relator could be prosecuted on a conspiracy count notwithstanding her original extradition for only theft-related offenses, as the record of the case showed that the United Kingdom consented to the prosecution for the other lesser or related offenses. The Magistrates' Court in London had dismissed the conspiracy charge after conducting an evidentiary hearing to determine whether the offenses charged were triable

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293 United States v. Khan, 993 F.2d 1368 (9th Cir. 1993) (citations omitted).

294 Treaty of Extradition between the United States and Italy, Oct. 13, 1983, U.S.–Italy, art. XVI(1)(a), T.I.A.S. No. 10837 (*entered into force* Sept. 24, 1984), states:

> 1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting Party except for:
>
> (a) the offense for which extradition has been granted or when the same facts for which extradition was granted constitute a differently denominated offense which is extraditable . . . .

See United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986), in which the court found the requested state (Switzerland) had waived application of the principle of specialty, and Najohn, who had been extradited to Pennsylvania on charges of interstate transportation of stolen property, receipt of stolen property, and conspiracy, might also be tried in California on similar charges. *See also* United States v. Riviere, 924 F.2d 1289 (3rd Cir. 1991) (holding that defendant could not assert rights under extradition treaty in light of express waiver of Commonwealth of Dominica); United States v. Diwan, 864 F.2d 715 (11th Cir. 1989) (holding that the principle of specialty could not be successfully raised as the requested nation expressly consented to the relator's non–theft-related offenses, notwithstanding the extradition on the theft-related offenses), *cert. denied*, 492 U.S. 921 (1989).

295 *Diwan*, 864 F.2d 715.

offenses in the United Kingdom. The magistrate rejected the United States' argument that the conspiracy alleged in the indictment would justify committal in the United Kingdom if the offenses charged had been committed there. The extradition was, however, granted after the magistrate determined that the offense of mail fraud is analogous to the crime of theft.

The relator challenged prosecution on the conspiracy charges by arguing that the offenses for which she was extradited did not include conspiracy, as the UK magistrate had only detained her for the theft-related offenses. The court found this argument to be without merit because diplomatic correspondence between the two states indicated that the United Kingdom did not regard the prosecution of Diwan on the conspiracy count a breach of the extradition treaty. A letter from the UK's Secretary of State for the Home Office, who had the ultimate authority to determine whether extradition would be allowed, responded to a request for confirmation that the United Kingdom did not object to the prosecution of the defendant on all counts in the indictment by stating:

> I can therefore confirm your understanding of that decision and of the surrender warrant subsequently signed by the Secretary of State. Accordingly . . . I am able to confirm that the United Kingdom has no objection to the indictment of Ms. Diwan as proposed.[296]

The court held that the diplomatic correspondence between the two states unequivocally showed that the United Kingdom consented to the prosecution of Diwan on the conspiracy count. Therefore, the government could proceed with the prosecution of the relator on all counts in the original indictment.

A 2009 case elucidating this practice was *United States v. Iribe*,[297] where the relator challenged his prosecution under a second superseding indictment. The Mexican Supreme Court granted the relator's extradition for conspiracy to maim a person in a foreign country, but not for conspiracy to kill and kidnap a person in a foreign country insofar as those crimes carried the potential for a life sentence.[298] Nonetheless, a U.S. federal grand jury returned a second superseding indictment including conspiracy to kidnap and attempted kidnapping.[299] The government of Mexico delivered a diplomatic note in which it specified that:

> The Foreign Ministry does not object to the reclassification of the crime pursuant to Article 17.2, paragraphs a) and b) of the Extradition treaty between the United Mexican States and the United States of America.[300]

The court read this diplomatic note and the Mexican Supreme Court decision to show that Mexico had explicitly agreed to prosecution on the new charges, which did not carry a life sentence.[301]

Specialty also means that if the relator is acquitted of the extradition offense, he/she must be allowed to leave the country without hindrance, and he/she cannot be charged or even served with additional criminal charges while in the country.[302] The relator must be given a reasonable amount of time to leave voluntarily, and cannot be denied the right to return to his/her

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296 *Id.* at 721.

297 United States v. Iribe, 564 F.3d 1155 (9th Cir. 2009).

298 *Id.* at 1158.

299 *Id.*

300 *Id.*

301 *Id.* at 1159–1160.

302 S. Exec. Rep. No. 33, 98th Cong., 2d Sess. 7 (1984) states:

> Paragraph 3 provides that if the person leaves the requesting country after surrender and voluntarily returns to it, or if he/she does not leave that country within 30 days of being free to do so, the requesting country is free to prosecute or punish him/her for any other offense or to extradite him/her to a third country.

country of nationality, the state from which he/she was extradited if that state gives him/her permission, or any other state of his/her choice that gives him/her permission. The individual cannot be forced to go to a state that he/she does not wish to go to, nor can the United States use immigration laws to deport him/her or force "involuntary departure" upon him/her to send him/her to a country that may be seeking him/her for further prosecution.[303] The same rules apply to situations where the relator was tried and convicted for the extradition offense and has served the required sentence and been released. In these cases, he/she must be given the opportunity to leave the requesting state before he/she can be detained or tried for another offense, except for any offense he/she may have committed while in the United States after his/her surrender. In either case, when the relator has served the required sentence or been acquitted of the extradition offense, the requested state loses jurisdiction over the relator. Thus, if the requesting state seeks to obtain consent after acquittal or after completion of the sentence to prosecute the relator for an unrelated offense, such consent would be invalid as the requested state can no longer exercise any authority over the relator. Even in cases in which a timely request for the consent of the requested state is made, the requesting state should determine whether consent has been granted by the appropriate authority of the requested state. Thus, if the proper authority in the originally requested state is a judicial one, the authorization cannot be granted by an administrative authority. For example, the appropriate authority in France is the *chambre de mises en accusation* of the Court of Appeals, and in Italy it is the counterpart chamber of the Court of Appeals of the judicial district where the relator was found. Only that judicial authority can grant a supplemental extradition request. But in one case, involving Italy, the United States requested and obtained a purported supplemental authorization from an official in the ministry of justice to prosecute the relator in formal extradition proceedings for another crime after the relator was acquitted of the original charges. But because the official, a judge in the ministry, was not the appropriate legal authority, the purported authorization was deemed invalid and the relator was allowed to leave the country.[304]

A question arises, however, as to whether the requesting state may, subsequent to the prosecution of an accused surrendered for a particular crime, re-extradite such a person to another state that may request his/her extradition, without seeking permission from the state that originally extradited him/her.[305] In other words, if *State* A requests the extradition of an individual from *State* B for *crime* X and extradition is granted, can *State* A re-extradite such a person to *State* C, which requests his/her extradition from *State* A for *crime* Y, without first securing the permission of *State* B? The answer depends on whether *State* B has a continuing interest in the accused. Such an interest could be that he/she is a citizen of *State* B or that *State* B granted the request of *State* A even though it could have prosecuted that individual for a crime in *State* B, or that *State* B waived its opportunity to retain jurisdiction over him/her for a criminal investigation or as a witness in another trial. Presumably once the individual is extradited, *State* B loses jurisdiction over him/her and its only surviving interest is to ensure that its processes have been used in a manner that complies with the principle of specialty. However, as extradition depends on a treaty and the requested state may grant it on the basis of certain policy considerations in those interests described above, its interest in such a person may survive with respect to re-extradition. However, such a survival of interest theory should depend on the condition that *State* A knew

303 For a discussion of those forms of disguised extradition, see Ch. IV.

304 As this outcome was administratively obtained, there is no reported decision.

305 *See* United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935). *See also* Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972) (granting re-extradition to New York in light of absence of protest from Italy. Extradition was granted on basis of comity to the district court of Massachusetts to face charges of conspiracy to import heroin; however, after arriving in the United States, a district court in New York handed the defendants a second indictment charging other narcotics offenses). *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998).

or had reasonable grounds to know that *State* C would ask it for the re-extradition of the relator at the time it made its request to *State* B. Otherwise the process of re-extradition would always be subject to the approval of the originally requested state, which would render the process of re-extradition too cumbersome. A better approach would be to regulate such practices by treaty, which is not the case under existing U.S. extradition treaties.

Another problem arises with respect to cases involving extradition by comity, in whole or in part. In 1972, the Second Circuit in *Fiocconi v. Attorney General of the United States*[306] affirmed the specialty principle even in cases of surrender by comity, by holding that the principle "reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government."[307] But the Second Circuit held that the application of the principle, when surrender is by comity, is primarily designed to inure to the benefit of the requested state. Thus, in such cases (in the Second Circuit) the surrendered person lacks standing to raise the issue unless the surrendering state protests, or when the prosecution breaks faith with the purposes of the surrender by comity. In that case, appellants, both French nationals, were originally indicted in the District Court of Massachusetts for conspiring to import heroin in violation of 21 U.S.C. § 171. Warrants at that time could not be executed, but the appellants were later found in Italy. The appellants were extradited from Italy to the United States on charges of importing heroin into the United States. Acknowledging that there was no provision for narcotic offenses in the 1868 Extradition Convention with Italy, 15 Stat. 269 and subsequent amendments, the Italian government granted extradition as an act of comity, independent of the treaty.

After the appellants were returned to the United States and released on $250,000 bail in the District of Massachusetts, they were subpoenaed to appear before a grand jury in the Southern District of New York. When they appeared, they were arrested under an indictment issued that day charging them with receiving, concealing, selling, and facilitating the transportation, concealment, and sale of thirty-seven kilograms of heroin in New York. Bail was set at $100,000, which neither could post. Appellants filed a petition for a writ of habeas corpus on the ground that their detention was on charges other than those for which they were extradited. The Southern District of New York, meanwhile, returned a superseding indictment charging appellants with conspiracy to violate the narcotics laws and two other substantive offenses. The petition for their release was denied, and they were tried on these charges and found guilty.

When the Second Circuit revisited the Supreme Court's decision in *United States v. Rauscher*,[308] it stated:

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306 Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972). *See also* Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979), wherein the court cited *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973), and *United States ex rel. Donnelly v. Mulligan*, 76 F.2d 511 (2d Cir. 1935), for the statement that "the rule of specialty is not a right of the accused but is rather a privilege of the asylum state by which its interests are protected." In *Mulligan*, the court concluded that "[e]xtradition treaties are for the benefit of the contracting parties and are a means of providing for their social security and protection against criminal acts, and it is for this reason that rights of asylum and immunity belong to the state of refuge and not to the criminal." *Id.* at 513. *See also* United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991) (stating that as a sovereign nation, the asylum nation has certain powers over the fugitives within its territory). Thus, a state that expels a person who is then seized by another state cannot subsequently claim the applicability of the principle of specialty. But if the person was expelled under false representations made by the prosecuting state, which pursued this practice instead of seeking extradition, the expelling state can request the return of the expelled individual on the basis of false representation and purposeful evasion of extradition by the prosecuting state. In a sense, this return request is akin to the remedy that the principle of specialty would give rise to.

307 *Fiocconi*, 462 F.2d at 481.

308 United States v. Rauscher, 119 U.S. 407, 409 (1886). *See supra* notes 196–202 and accompanying text.

> Rauscher's conviction of an offense for which he was not and could not have been extradited did not violate the treaty, which was silent as to the rights of a person extradited thereunder; it violated a rule of what we would now call United States foreign relations law devised by the courts to implement the treaty.[309]

Judge Henry Friendly saw no reason in principle to apply specialty when extradition has been granted by an act of comity by the surrendering nation, unless the prosecuting state acted in a way that would be deemed a breach of an implicit or explicit understanding between the United States and the surrendering state.

The court found that the remedy enunciated in *Rauscher*[310] must be applied in the context for which it was designed, in that the principle of specialty imposes limitations upon the requesting state not to prosecute the relator for any offense other than that for which he was surrendered in the context of extradition. The object of this rule is to prevent the requesting state from violating its international obligations vis-à-vis the surrendering state. By analogy, therefore, it was essential in *Fiocconi*[311] to determine whether the surrendering state would regard the prosecution at issue as a breach of its relations with the United States. In the absence of any affirmative protest from Italy, the court did not believe that the government would regard as a breach of faith by the United States the prosecution of appellants for subsequent offenses of the same character as the crime for which they were extradited.

Although the United States had not made a preliminary showing in Italy with respect to the New York indictment, as it did concerning the one in Massachusetts, the court noted:

> [W]e presume the United States is willing to submit such proof if Italy desires it, and with appellants now having been found guilty, there can scarcely be doubt that sufficient proof to warrant extradition exists.[312]

Fiocconi was later followed by the Fifth Circuit in *United States v. Kaufman*.[313] In that case, two relators, the Franks brothers, were originally brought to the United States after an arrest in Mexico by DEA agents and Mexican federal judicial police to face charges in Louisiana under a January 1986 indictment for participating in a drug conspiracy. After a trial conviction of one brother and dismissal of charges against the other, both brothers were transferred to Texas to face charges pursuant to a July 1986 indictment for various other drug offenses.

As in *Fiocconi*, the relators argued their detention and trial on the second Texas indictment were in violation of the CIL principle of specialty. The Franks brothers argued that because they had been extradited to the United States for the Louisiana charge, the district court in Texas lacked personal jurisdiction to detain or prosecute them, as Mexico had not granted extradition on the basis of these offenses. The court rejected this contention and followed *Fiocconi* for the basic principle that specialty preserves the requesting state from a breach of faith by the requested state whether or not the surrendering state acted pursuant to a treaty. The remedy required a determination of whether Mexico would regard the prosecution for the Texas indictment a breach of the United States' international obligations toward Mexico.

The court held that, given the nature of the charges alleged in Louisiana, the indictment was identical in character to the nature of the charges alleged in the Texas indictment. Given that

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309 *Fiocconi*, 462 F.2d at 479. *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998). For a critical appraisal, see Note, *International Extradition, the Principle of Specialty, and Effective Treaty Enforcement*, 76 Minn. L. Rev. 1017 (1992).

310 *Rauscher*, 119 U.S. at 409.

311 *Fiocconi*, 462 F.2d at 480.

312 *Id.* at 481.

313 United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988); *reh'g denied*, 874 F.2d 242 (5th Cir. 1989), *aff'd sub nom.*, Franks v. Harwell, 869 F.2d 1485 (5th Cir. 1989), *cert. denied*, 493 U.S. 895 (1989).

Mexico made no protest against the prosecution of the Franks brothers in Texas, the court concluded that no basis existed to conclude that Mexico was or had reason to be offended by the Texas prosecution, and therefore no breach of the treaty's provisions existed.

This view of specialty fails to take into account the relator as a participant in the extradition process and his/her right to uphold such a doctrine when a requested state acts at variance with an extradition order, regardless of whether the surrendering state deems such actions a breach of trust, or a breach of international relations. But it is important to note that if the relator is given the right (i.e., standing) to raise the question, and the Court's legal standard is whether the variance constituted a breach of faith with the surrendering state or of a rule of CIL, then the rights of the relator are properly guaranteed.[314] Thus, *Fiocconi* stands for the proposition that comity can supplement existing treaty practice, but by implication, comity does carry with it the same limitations as does treaty-based extradition.

United States v. Najohn[315] is a further example of a case in which specialty did not bar the prosecution of the defendant for an additional offense not contained in the original indictment, but to which the surrendering state agreed. Indeed it is well-established that a surrendering state can waive specialty without the relator's consent or knowledge unless the law of the surrendering state requires it. In *Najohn* the defendant was convicted in Pennsylvania on the charges for which he was extradited, namely interstate transportation of stolen property in violation of 18 U.S.C § 2314. While serving his sentence, the Northern District of California indicted Najohn for the same charge as well as for the receipt of stolen property and conspiracy.[316] The defendant moved to dismiss the indictment, arguing that the California charges were barred by the extradition treaty between the United States and Switzerland, as well as by specific language in the Swiss court's extradition order.

The principle of specialty, as contained in the extradition treaty between the United States and Switzerland, however, contained a specific provision relating to specialty, which defeated the defendant's argument, namely that "[T]he extradited party may be tried for a crime other than that for which he was surrendered *if the asylum country consents*."[317] Two letters regarding the original charge from the Magistrate of the District Court of Zurich and from the Swiss Embassy to the United States asking and agreeing that the principle of specialty be suspended were deemed to have authorized the waiver of the rule. In response to the defendant's argument that this was not sufficient proof of consent, the court stated: "Najohn suggests no reason why the requirement for Swiss consent to prosecution for these crimes should be more rigorous now that he is already in United States custody."[318] The defendant's motion was thus denied.

The legislative requirement that the United States grant extradition only by virtue of a treaty provides a guarantee to the relator that the provisions of the treaty will be applied. This position was developed in *United States v. Rauscher*.[319] The rule in the United States is that the

314 This position, which has been advanced by publicists and is found in the practice of many states, is also embodied in such multilateral treaties as the European Convention on Extradition, Dec. 13, 1957, 597 U.N.T.S 338. *See* M. Cherif Bassiouni, *International Extradition in the American Practice and World Public Order*, 36 Tenn. L. Rev. 1, 15 (1968). Because a relator raises a claim of the violation of specialty, this claim must fairly construe the scope of the extradition request as understood by the requested state. If the full context of the extradition proceedings between the requested and requesting states show that the conduct at issue was understood to be within the scope of the requesting state's extradition request, the relator's specialty argument will fail. *See* United States v. Bout, 2011 U.S. Dist. Lexis 84826, at *13–*17 (S.D.N.Y. 2011).

315 United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986).

316 18 U.S.C. § 2315 (2000) and 18 U.S.C. § 371 (2000), respectively.

317 *Najohn,* 785 F.2d at 1422 (emphasis added).

318 *Id.* at 1423.

319 United States v. Rauscher, 119 U.S. 407 (1886).

principle of specialty is a part of CIL as recognized and applied in the United States.[320] In *United States v. Paroutian*,[321] the court held that "[T]he test whether trial is for a 'separate offense' should not be some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate.' "[322] As further stated in *Fiocconi v. Attorney General*:[323] "The 'principle of specialty' reflects a fundamental concern of governments that persons who are surrendered should not be subjected to indiscriminate prosecution by the receiving government . . . "[324]

Evidentiary issues are also raised as a part of specialty in connection with dual criminality and double jeopardy. In *United States v. Saccoccia*[325] an interlocutory appeal before the Ninth Circuit was dismissed because the issues could be raised on appeal. Because the case had originated in Rhode Island, the appeal was before the First Circuit, which summarily rejected these claims, confusing the requirements of dual criminality and specialty. The First Circuit held that:

> Although the principles of dual criminality and specialty are closely allied, they are not coterminous. We elaborate below.
>
> 1. *Dual Criminality.* The principle of dual criminality dictates that, as a general rule, an extraditable offense must be a serious crime (rather than a mere peccadillo) punishable under the criminal laws of both the surrendering and the requesting state. See *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980). The current extradition treaty between the United States and Switzerland embodies this concept. See Treaty of Extradition, May 14, 1900, U.S.–Switz., Art. II, 31 Stat. 1928, 1929–30 (Treaty).
>
> The principle of dual criminality does not demand that the laws of the surrendering and requesting states be carbon copies of one another. Thus, dual criminality will not be defeated by differences in the instrumentalities or in the stated purposes of the two nations' laws. See *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir. 1989). By the same token, the counterpart crimes need not have identical elements. See *Matter of Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986). Instead, dual criminality is deemed to be satisfied when the two countries' laws are substantially analogous. See *Peters*, 888 F.2d at 719; *Brauch*, 618 F.2d at 851. Moreover, in mulling dual criminality concerns, courts are duty bound to defer to a surrendering sovereign's reasonable determination that the offense in question is extraditable. *See Casey v. Department of State*, 299 U.S. App. D.C. 29, 980 F.2d 1472, 1477 (D.C. Cir. 1992) (observing that an American court must give great difference to a foreign court's determination in extradition proceedings); *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987) (similar) cert. denied, 484 U.S. 1042, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988).

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320 Restatement (Third) of the Foreign Relations Law of the United States § 3(h) (1988).

321 United States v. Paroutia, 299 F.2d 486 (2d Cir. 1962).

322 *Id.* at 490–491. *See, e.g.*, United States v. Kaufman, 858 F.2d 994, 1008 (5th Cir. 1988) (concluding that Italy, the extraditing nation, would have regarded the superseding indictment, including the later narcotics charges in New York, as simply a technical jurisdictional question within the United States system, and not as a filing of new charges); United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y. 1987).

323 Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972). *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998).

324 *Fiocconi*, 462 F.2d at 481. *See* Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987); United States v. Jetter, 722 F.2d 371 (8th Cir. 1983); United States v. Rossi, 545 F.2d 814 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); United States v. Flores, 538 F.2d 939 (2d Cir. 1976); United States v. Sturtz, 648 F. Supp. 817 (S.D.N.Y. 1986); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977); Feller, *supra* note 124.

325 United States v. Saccoccia, 58 F.3d 754 (9th Cir. 1995). *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); United States v. Tse, 135 F.3d 200 (1st Cir. 1998).

Mechanically, then, the inquiry into dual criminality requires courts to compare the law of the surrendering state that purports to criminalize the charged conduct with the law of the requesting state that purports to accomplish the same result. If the same conduct is subject to criminal sanctions in both jurisdictions, no more is exigible. See *United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990), cert. denied, 498 U.S. 1049, 112 L. Ed. 2d 778, 111 S. Ct. 759 (1991); see also *Collins v. Loisel*, 259 U.S. 309, 312, 66 L. Ed. 956, 42 S. Ct. 469 (1992) ("It is enough [to satisfy the requirement of dual criminality] if the particular act charged is criminal in both jurisdictions.").

2. *Specialty.* The principle of specialty—a corollary to the principle of dual criminality, see *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027, 103 L. Ed. 2d 217, 109 S. Ct. 1158 (1989)—generally requires that an extradited defendant be tried for the crimes on which extradition has been granted, and none other. See *Van Cauwenberghe*, 827 F.2d at 428; *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir.) cert. denied, 479 U.S. 882, 93 L. Ed. 2d 247, 107 S. Ct. 271 (1986). The extradition treaty in force between the United States and Switzerland embodies this concept, providing that an individual may not be "prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted . . . ." Treaty, Art. IX.

Enforcement of the principle of specialty is founded primarily on international comity. See *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987). The requesting state must "live up to whatever promises it made in order to obtain extradition" because preservation of the institution of extradition requires the continuing cooperation of the surrendering state. *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), cert. denied, 479 U.S. 1009, 93 L. Ed. 2d 707, 107 S. Ct. 652 (1986). Since the doctrine is grounded in international comity rather than in some right of the defendant, the principle of specialty may be waived by the asylum state. See id.

Specialty, like dual criminality, is not a hidebound dogma, but must be applied in a practical, commonsense fashion. Thus, obeisance to the principle of specialty does not require that a defendant be prosecuted only under the precise indictment that prompted his extradition, see *United States v. Andonian*, 29 F.3d 1432, 1435-36 (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 883, 115 S. Ct. 938 (1995), or that the prosecution always be limited to specific offenses enumerated in the surrendering state's extradition order, see *Levy*, 905 F.2d at 329 (concluding that a Hong Kong court intended to extradite defendant to face a continuing criminal enterprise charge despite the court's failure specifically to mention that charge in the deportation order). In the same vein, the principle of specialty does not impose any limitation on the particulars of the charges lodged by the requesting nation, nor does it demand departure from the forum's existing rules of practice (such as rules of pleading, evidence, or procedure). *See United States v. Alvarez-Moreno*, 874 F.2d 1402, 1414 (11th Cir. 1989), cert. denied, 494 U.S. 1032 (1990); *Thirion*, 813 F.2d at 153; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986).

In the last analysis, then, the inquiry into specialty boils down to whether, under the totality of the circumstances, the court in the requesting state reasonably believes that prosecuting the defendant on particular charges contradicts the surrendering state's manifested intentions, or, phrased another way, whether the surrendering state would deem the conduct for which the requesting state actually prosecutes the defendant as interconnected with (as opposed to independent from) the acts for which he was extradited. *See Andonian*, 29 F.3d at 1439; *United States v. Cuevas*, 847 F.2d 1417, 1427–28 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012, 103 L. Ed. 2d 185, 109 S. Ct. 1122 (1989); *United States v. Paroutian*, 299 F.2d 486, 490–91 (2d Cir. 1962).

A district court's interpretation of the principles of dual criminality and specialty traditionally involves a question of law and is, therefore, subject to plenary review in the court of appeals. See *Andonian*, 29 F.3d at 1434; *United States v. Khan*, 993 F.2d 1368, 1372 F.2d 1168, 1173 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992). Marching beneath this banner, appellant urges that his conviction must be set aside for three related reasons. (There is some dispute whether alleged violations of the principle of specialty can be raised by a criminal defendant. See, e.g., *Demjanjuk*, 776 F.2d at 583–84 (questioning whether the person being extradited

> "has standing to assert the principle of specialty"); *Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D.D.C. 1993) (asserting that "the rule of specialty is not a right of the accused but is a privilege of the asylum state and therefore [the defendant] has no standing to raise this issue") (internal quotation marks omitted). We need not probe the matter of standing for three reasons.
>
> First, while we take no view of the issue, we realize that there are two sides to the story, and the side that favors individual standing has much to commend it. See, e.g., *United States v. Rauscher*, 119 U.S. 407, 422-24, 30 L. Ed. 425, 7 S. Ct. 234 (1886) (referring to specialty as a "right conferred upon persons brought from a foreign country" via extradition proceedings); *Thirion*, 813 F.2d at 151 & n. 5 (to like effect); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 659–60, 119 L. Ed. 2d 441, 112 S. Ct. 2188 (1992) (suggesting the continuing vitality of the Rauscher decision).
>
> Second, the government has advised us that, for policy reasons, it does not challenge appellant's standing in this instance. Third, appellant's asseverations are more easily dismissed on the merits. See *Norton v. Mathews*, 427 U.S. 524, 532, 49 L. Ed. 2d 672, 96 S. Ct. 2771 (1976) (explaining that jurisdictional questions may be bypassed when a ruling on the merits will achieve the same result). None has merit."[326]

In these cases, the defendants, Stephen and Donna Saccoccia, were extradited from Switzerland on money laundering and RICO charges, but the requested state refused to grant extradition on CTR violations. In the Rhode Island prosecution, the government introduced evidence of CTR violations to prove the necessary predicates for RICO. The question therefore was whether evidence that cannot be used to prove guilt can be used to prove a predicate crime without which conviction of the more serious crime cannot be obtained. The defense argued against it, in part in reliance upon *United States v. Najohn*.[327] The prosecution relied on *United States v. Thirion*,[328] *United States v. Kember*,[329] *United States v. Archhold-Newball*,[330] *United States v. Flores*,[331] and more particularly *United States v. Alvarez-Moreno*.[332] *Thirion* held that "the doctrine of specialty does not purport to regulate the scope of proof admissible in the judicial forum of the requisitioning state."[333]

It is indeed entirely valid that specialty does not control the admissibility of evidence needed to prove a crime for which extradition was granted. To hold otherwise would unjustifiably burden extradition requests with details of evidence intended to be introduced at trial. But there is nonetheless a distinction to be drawn between evidence needed to prove a crime for which extradition was granted and evidence of criminality for a crime that has been specifically excluded from the extradition granted by the requested state.[334] This is particularly significant

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326 *Saccoccia,* 58 F.3d at 766–776. For the First Circuit's opinion, see *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995). *See also* United States v. Hurley, 63 F.3d 1 (1st Cir. 1995).

327 United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986).

328 United States v. Thirion, 813 F.2d 46 (8th Cir. 1987).

329 United States v. Kember, 685 F.2d 451 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 832 (1982).

330 United States v. Archhold-Newball, 554 F.2d 665 (5th Cir. 1977), *cert. denied*, 434 U.S. 1000 (1977).

331 United States v. Flores, 538 F.2d 939 (2d Cir. 1976).

332 United States v. Alvarez-Moreno, 874 F.2d 1402 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990).

333 *Id.* at 1413–1414. For other cases allowing introduction of evidence of crimes or matters unrelated to the crimes for which extradition was granted, see *United States v. Bowe*, 221 F.3d 1183 (11th Cir. 2000); *United States v. Monsalve*, 841 F.2d 1120 (3d. Cir. 1999); *United States v. LeBaron*, 15 F.3d 621 (5th Cir. 1998); *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994); *United States v. Arcbold-Newhall*, 554, 2d. 6651, 685 (5th Cir. 1977); *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976).

334 This is a fine distinction to make, which has been made in various cases involving evidence that may be presented for conspiracy charges. *See* Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89 (2008).

with respect to RICO prosecutions, which are predicated on other crimes whose exclusion from prosecution by specialty should also be excluded from being used as evidence to *prove* a predicate offense, because the predicate offense cannot be charged as a crime. But without proof of guilt the legal elements of the ultimate crime cannot be proven. This situation is due to the nature and peculiarity of RICO, which relies on predicate offenses to create a new crime that is, ultimately, only a legislative fiction designed to enhance the penalties for persons who engage in multiple crimes of a certain type.

Applying specialty to evidentiary matters, the district court in *United States v. Kember*[335] found no requirement that evidence admitted at the trial of a relator extradited from the United Kingdom to the United States be limited to the evidence presented at the relator's extradition hearing. The *Kember* court noted that the scope of proof admissible into evidence in the requesting state was broadly interpreted in *United States v. Flores*,[336] which did not bar admissibility of evidence of prior offenses even though prosecution for such offenses was barred by the principle of specialty or other preclusions to prosecution.

The complexity of statutes such as RICO, money laundering, CTR requirements, and CCE in drug-related crimes frequently causes the government to issue superseding indictments after the surrender of a relator. In those cases, the United States can make a supplemental request to the requested state in order to obtain permission to prosecute on the new, additional, or altered charges. More commonly, these superseding indictments add newly discovered facts or refine the charges on the basis of which extradition was requested. These situations present mixed questions of law and fact. Where only questions of fact and supporting evidence arise, they usually are found not to be in violation of specialty. If the superseding indictment alters the charges to lesser ones, though still in reliance on the same substantial or essential facts, specialty is also not deemed to be violated. But, if the charges or facts are substantially different, then there is a violation of specialty. Because of the mixed question of law and fact, and also because treaty provisions differ, court decisions vary. *United States v. Andonian*[337] reviews some of these problems:

> We review de novo the district court's determination that the prosecution on the superseding indictment did not violate the doctrine of specialty. *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993).
>
> "The doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite."

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335 United States v. Kember, 685 F.2d 451 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 832 (1982).

336 United States v. Flores, 538 F.2d 939 (2d Cir. 1976). In *United States v. DiTommasso*, 817 F.2d 201 (2d Cir. 1987), the court narrowed the "specialty doctrine" where a person waived extradition and agreed to be "deported" to the United States and a second superseding indictment enlarged the conspiracy charges under which he was originally arrested in Bermuda. The court in effect treated the waiver of extradition under the United Kingdom's Fugitive Offenders Act of 1870 (applicable in Bermuda) as falling outside the narrower scope of "specialty," as required by the Treaty and U.S. precedents. The court thus also avoided the issue of whether the defendant could raise objections that the requested state could have raised. *See* United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986) (holding that the doctrine of specialty was not violated by the introduction of uncharged offenses admitted to prove the scope of the charged conspiracies, intent, and nature of the offenses charged where the defendant was tried only for the precise offense contained in the extradition order), *cert. denied*, 479 U.S. 1009 (1986); United States v. Alvarez-Moreno, 874 F.2d 1402 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990); United States v. Andonian, 29 F.3d 1432, 1435, (9th Cir. 1994); United States v. LeBaron, 15 F.3d 621 (5th Cir. 1998); *United States* v. Puentes, 50 F.3d 1567 (11th Cir. 1995); United States v. Arcbold-Newhall, 554 2d. 6651, 685 (5th Cir. 1977); United States v. Bowe, 221 F.3d 1183 (11th Cir. 2000); United States v. Monsalve, 841 F.2d 1120 (3d. Cir. Mar. 5, 1999); United States v. Flores, 538 F.2d 939 (2d Cir. 1976). *See also* Sara C. Schoenwetter, Comment, United States v. Flores, 3 Brook. J. Int'l. L. 293 (1977).

337 *Andonian,* 29 F.3d 1432. *See also* United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal. 1998).

United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987), *cert. denied,* 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 859 (1988).[338] The doctrine is based on principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States. *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1122, 103 L.Ed.2d 185 (1989). Our concern is with ensuring that the obligations of the requesting nation are satisfied. *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 652, 93 L.Ed.2d 707 (1986). "Because of this, the protection exists only to the extent that the surrendering country wishes." *Id*. An extradited person may raise whatever objections the extraditing country is entitled to raise. *Cuevas*, 847 F.2d at 1426; *Najohn*, 785 F.2d at 1422.

We look to the language of the applicable treaty to determine the protection an extradited person is afforded under the doctrine of specialty. The treaty with Uruguay, pursuant to which Vivas was extradited, provides:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted . . . unless . . . the requested Party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted . . . .

Treaty on Extradition and Cooperation in Penal Matters, April 6, 1973, U.S.–Uru., art. 13, T.I.A.S. No. 10850 at 17–18 [hereinafter "Treaty"]. An extradited person, in any case, "may be tried for a crime other than that for which he was surrendered, *if the asylum country consents*." *Najohn*, 785 F.2d at 1422 (quoting *Berenguer v. Vance,* 473 F.Supp. 1195, 1197 (D.D.C.1979) (emphasis in original)).

. . .

We agree with the government that the appropriate test for this case is "whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited." *Cuevas*, 847 F.2d at 1428 (citing *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962)).[339]

. . .

Vivas argues that the doctrine of specialty was further violated because he was not tried on the same facts as those presented to the government of Uruguay. Specifically, he asserts that the United States convinced Uruguay with insufficient and false evidence that Vivas was involved in drug trafficking and that the United States then tried him on different evidence.

The doctrine of specialty has been interpreted as requiring that "the prosecution be based on the same facts as those set forth in the request for extradition." *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir.1989) (quotation omitted). The defendant in *Sensi* argued that he could not be tried on a 26-count indictment naming offenses that had not been listed before the magistrate of the surrendering country. The court found that the language of the treaty required that the charges against the defendant be established "by the facts in respect of which his extradition [was] granted." *Id.* at 896 (quoting the relevant treaty).

. . .

Second, we note that the doctrine of specialty "has never been construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state, as distinguished from limiting the jurisdiction of domestic courts to try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited." *United States v. Thirion*, 813 F.2d 146, 153 (8th Cir. 1987) (quotations omitted). The doctrine of specialty is satisfied if the extraditing country honors the limitations placed on the prosecution by the

338 *Andonian*, 29 F.3d at 1434–1435. *See also Siriprechapong*, 181 F.R.D. 416.

339 *Andonian,* 29 F.3d at 1434–1435. *See also Siriprechapong*, 181 F.R.D. 416.

> surrendering state. *See Cuevas*, 847 F.2d at 1426. The government is not required, under the auspices of specialty, to try a defendant on the same *evidence* that was presented to the surrendering state, so long as it satisfies the requirement that trial is for the same offenses arising out of the same allegations of fact.[340]

In *United States v. Thirion*,[341] mentioned above, the Eighth Circuit held that this principle is not violated when the prosecution provides evidence at trial establishing a defendant's membership in a conspiracy even when the requested state claims that conspiracy is neither provided for under its laws nor included on the list of extraditable offenses. In this case, the United States requested extradition from Monaco for the return of Thirion to face charges relating to an advance fee loan scheme. Monaco agreed to Thirion's extradition for every offense except for conspiracy, as this crime is not provided for under the laws of Monaco, and is not included in the list of offenses giving rise to extradition under Article II of the bilateral Treaty.[342] At trial, inclusion of the conspiracy count was sustained over the defendant's objections. However, the court instructed the jury not to return a verdict on this count. Consequently, on appeal the issue was whether the principle of specialty prohibits the government from establishing Thirion's membership in the conspiracy as an evidentiary fact to prove guilt in other substantive offenses. In stating that the principle does not prohibit the introduction and use of evidence of a crime for which extradition was denied, the court held that the principle is not construed to permit alteration of existing rules of evidence or procedure "as distinguished from limiting the jurisdiction of domestic courts to try or punish the fugitive for any crimes committed before the extradition, except the crimes for which he was extradited."[343] The Eleventh Circuit has relied on *Thirion* as an analog with regard to a defendant's challenge to a *Pinkerton* instruction with respect to a charge where the relator was extradited as a principal, and ruled "that the doctrine of specialty did not prohibit the government from seeking to establish a defendant's membership in a conspiracy as an 'evidentiary fact to prove guilt' in connection with the offenses for which he had been extradited."[344]

In another case, the court held that the surrendering government's silence regarding prosecution of the defendant on all the charges in the extradition request did not provide a basis to conclude that prosecution of the relator on all such charges in the extradition request was not indiscriminate. The court in *Khan*[345] would not infer from Pakistan's silence concerning a particular count an agreement to extradite the relator on all counts in the extradition request where the extradition documents did not specifically refer to allegations of that count. The court held that the operative language of the treaty between the United States and Pakistan did not create a presumption that the principle of specialty would be satisfied in all cases where the prosecution is based on the same facts as those set forth in the request for extradition. The relevant provision of the treaty stated:

> A person surrendered can in no case be [prosecuted] . . . for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place.[346]

The court concluded that this language suggests the need for an affirmative statement by the surrendering country on the counts upon which the extradition is based. Because Pakistan did not unambiguously agree to extradite Khan on the basis of the particular count in question,

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340 *Andonian*, 29 F.3d at 1438. *See also Siriprechapong*, 181 F.R.D. 416.

341 United States v. Thirion, 813 F.2d 146 (8th Cir. 1987).

342 *Id.* at 150 n.4.

343 *Id.* at 153. *See also* United States v. Flores, 538 F.2d 939, 944 (2d Cir. 1976).

344 *See* Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89, 97–98 (2008) (discussing Gallo-Chamorro v. United States, 48 F.3d 502, 503 (11th Cir. 1995)).

345 United States v. Khan, 993 F.2d 1368 (9th Cir. 1993).

346 Extradition Treaty, Mar. 9, 1942, U.S.–Pak., Art. 7, 47 Stat. 2124.

the principle of specialty had not been satisfied, and the court reversed Khan's conviction on this count.[347]

An earlier Second Circuit case, *Shapiro v. Ferrandina*,[348] excluded prosecution in the requesting state for crimes committed before the request for extradition had been granted by the requesting state, if such crimes were not part of the extradition order. Nothing, however, precludes a requesting state from amending its request and including new offenses, provided they are within the meaning of the treaty and are offenses for which extradition can be granted. Similarly, nothing precludes a requesting state, which has received custody of an accused, from presenting a new request to the originally requested state for prosecuting the accused for another crime, and it would be the decision of the requested state to grant or deny it. In the United States such a procedure might require a new hearing, unless the new request is for a crime related to the one for which the original request was granted. This is particularly true with respect to any included offense.[349]

In *Berenguer v. Vance*,[350] where the United States was the extraditing state, the court consented to an expansion of an extradition order without a hearing before the final disposition of the accused's original case in Italy. Berenguer was extradited to Italy on a murder and aggravated battery charge, was acquitted, and subsequently arrested and detained following the U.S. government's consent to an expansion of the extradition order to include illegal possession of a military firearm. The court, in holding that a second hearing following extradition was not required, noted that "the rule of specialty is not a right of the accused but is rather a privilege of the asylum state by which its interests are protected."[351] Thus, the court stated that:

> Although the charges on which petitioner was extradited differ from that under which he stands accused, the Court cannot say that he has been deprived of his due process rights. As long as petitioner, who is a French national, was within the jurisdiction of the United States, this judicial system acted to protect the full panoply of his rights as vigorously as it would the rights of any citizen. Once his extradition was accomplished, however, he became subject to the judicial process of the receiving nation and could no longer claim a right to a judicial hearing on due process grounds. . . . This is not to say that a defendant could never successfully argue that he has a right to a hearing before expansion of an extradition order. If, for instance, a judicial officer refused to find probable cause on a specific charge and the requesting country thereafter sought to obtain the asylum country's consent to try the defendant on that same charge after accomplishing his extradition for a different offense, a court's determination might be very different. Such a situation would raise the possibility of a deliberate effort to evade the safeguards established to protect the defendant's rights.[352]

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347 *Kahn*, 993 F.2d at 1374. *See also* Ahmed v. Morton, 1996 WL 118543 (E.D.N.Y. Mar. 6, 1996); *In re Extradition of Valdez-Mainero*, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

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

349 *See* Bassiouni, *supra* note 67, at 505–507.

350 Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979). In *United States v. Van Cauwenberghe*, 814 F.2d 1329, 1334 (9th Cir.), *op. superceded*, 827 F.2d 424 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), the court characterized the "doctrine of specialty" as an act of "international comity," which the requested state can waive. Implicit in such a characterization is that in the case of prosecutorial variance by the requesting state, only the requested state can object and not the relator-defendant. It is the view of this writer that the rule of specialty is a rule of international law the breach of which gives rise to a relator's right to object to prosecutorial variance, and to be upheld by the court, if proven right, even without the intervention or objection of the requested state (*see infra* Sec. 7.4).

351 *Berenguer*, 473 F. Supp. at 1197 (citing *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973)). *See* also United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935).

352 *Berenguer*, 473 F. Supp. at 1198 (citations omitted).

Additionally, the court noted that the doctrine of separation of powers compelled its decision, noting that:

> Judge Friendly's observation in *Shapiro v. Ferrandina*, in commenting upon the American practice of refusing to try an extradited party for a crime other than one enumerated in a relevant treaty, seems particularly appropriate here:
>
> This self-imposed restraint, however, need not necessarily imply that in the converse situation, when courts of this country are examining an extradition request from a foreign nation, we should seek to impose limits on the scope of subsequent prosecution of a person who is to be extradited for at least one crime in any event. *Since such a ruling can only be advisory in character, and in certain circumstances might cause embarrassments to the executive branch in the conduct of foreign affairs, arguably it should be left to the Secretary of State to determine whether to seek to impose any limitations since he alone will have the duty of making a response if the requesting state chooses not to follow our limitations.*[353]

In any such event, the record of the original extradition hearing should contain evidence of probable cause that such a crime had been committed, as is required by legislation or by treaty.

The requirement of a new hearing to determine probable cause for an included or related offense depends on the applicable treaty or the legislation. No hearing is required in states that do not have a similar statutory requirement, such as the United States' § 3184, or that do not consider the principle of specialty as the prerogative of the requested state.[354]

6.5. Use of Evidence for Crimes for Which Extradition Was Not Granted and for Purposes of Sentencing Enhancement[355]

The Eleventh Circuit held in *United States v. Garcia* that a sentence enhancement was outside the purview of the principle of specialty and that specialty does not control evidentiary rules in U.S. courts.[356] The rule is not violated by the admission of evidence of crimes that an individual was not extradited for if it is relevant to the crime charged. The Court held:

> Thus, evidence of money-laundering (for which extradition was specifically refused) was nevertheless admissible as evidence within the trial court's discretion for the purpose of proving a drug conspiracy (the crime for which extradition was granted). *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1413–14 (11 Cir.1989). Similarly, even in the face of a refusal by a foreign government to extradite for aiding and abetting a drug conspiracy under 18 U.S.C. § 2, the doctrine of specialty was held not to preclude the instruction of the jury on the theory of vicarious liability approved in *Pinkerton v. United States*, 328 U.S. 640 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), *United States v. Gallo-Chamorro*, 48 F.3d 502 (11th Cir. 1995).[357]

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353 *Id.* (emphasis added).

354 *See* 2 Daniel P. O'Connell, International Law 805–806 (1965).

355 *See generally,* Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89, 101–104 (2008).

356 United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000). This case is peculiar in that the sentence enhancement was based on the relator's voluntary guilty plea, which the relator later argued was involuntary. He filed a petition for writ of habeas corpus; the federal district remanded to the magistrate for a hearing on voluntariness. The court found the guilty plea to be voluntary, and that the petitioner had full knowledge of what he was pleading guilty to, and was not misled or erroneously advised on the plea. The Supreme Court vacated the Eleventh Circuit judgment and remanded the case for further consideration in light of *Apprendi v. New Jersey,* 530 U.S. 466 (2000); on remand at 251 F.3d 160 (11th Cir. 2001), *cert. denied* 534 U.S. 823 (2001), *reh'g denied* 534 U.S. 1102 (2002), motion to vacate denied by 2006 U.S. Dist. LEXIS 42119 (N.D. Fla. 2006).

357 *Id.* at 1261.

The *Garcia* court continued:

> The doctrine of specialty, as interpreted in our law, does not call for the extradition crime to be handled in a vacuum, in any of its phases. Thus, for example, an indictment in existence at the time of extradition can be lawfully superseded after extradition by an indictment charging larger quantities of drugs. *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995). *See also United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir.1991); *United States v. Rossi*, 545 F.2d 814 (2d Cir.1976); *United States v. Paroutian*, 299 F.2d 486 (2d Cir.1962).
>
> With respect to the doctrine of specialty and U.S. law governing sentencing, the doctrine of specialty does not restrict the scope of proof of other crimes that may be considered in the sentencing process. The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of specialty.
>
> Appellant also challenges the District Court's enhancement of his sentence for obstruction of justice. The factual findings involved in such an enhancement are reviewed by this court for clear error. The application of the law to those factual findings is reviewed *de novo*, *United States v. Arguedas* 86 F.3d 1054, 1059 (11th Cir. 1996). The sentencing court made this finding by stating that "it is clear to this Court beyond a reasonable doubt this defendant did obstruct and attempt to obstruct justice by all of the activities following the murder . . . ." The Court found the position of the probation office on the question of obstruction to be the correct one. That position advocated enhancement for 3 reasons: first the burying of the guns, second, the instruction to the secretary and third, the flight to Canada.[358]

The Eleventh Circuit affirmed its position in *Gallo-Chamorro v. United States*.[359] Here, the court seemed to have taken too literally the *Restatement (Third) of Foreign Relations*, which referred to "specialty" as "comity."[360] In 2010 the Eleventh Circuit affirmed the rule set forth in *United States v. Bowe* that "the doctrine of specialty limits only the charges on which an extradited defendant can be tried; it does not affect the scope of proof admissible at trial for the charges for which extradition was granted, and it does not alter the forum country's evidentiary rules."[361] In *United States v. Knowles*, the relator argued that the principle of specialty barred the introduction of evidence related to a previous drug conspiracy case involving him (for which extradition had not been granted) to support the separate drug conspiracy case for which he was extradited.[362] The court rejected this argument, noting the holding in a prior Eleventh Circuit case that "the rule of specialty is not violated when evidence is properly admitted under the inextricably intertwined doctrine to reflect the scope of the conspiracies, to prove intent, and to aid the jury in determining the nature of the offenses charged."[363] The relator also challenged the forfeiture verdict against him as the forfeiture count was not contained in the warrant of surrender, and it was violative of the diplomatic note requiring the U.S. government to submit a formal application if it wished to waive the specialty rule.[364] The court rejected this argument

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358 *Id.*

359 Gallo-Chamorro v. United States, 2000 U.S. App. LEXIS 29555 (11th Cir. Nov. 21, 2000). *See also United States* v. Herbage, 850 F.2d 1463 (11th Cir. 1988) (relying on *United States v. Najhon*, 785 F.2d 1420 (9th Cir. 1986), United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988)); United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991).

360 United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989). *See also*, *however*, *United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991); United States v. Herbage, 850 F.2d 1462 (11th Cir. 1988); United States v. Najhon, 785 F.2d 1420 (9th Cir. 1986); United States v. Jetter, 722 F.2d 371 (8th Cir. 1983).

361 United States v. Knowles, 390 Fed. Appx. 915, 931 (11th Cir. 2010) (unpublished opinion).

362 *Id.* at 917, 931.

363 *Id.* at 931 (citing United States v. Lehder-Rivas, 955 F.2d 1510, 1520 (11th Cir. 1992)).

364 *Id.* at 935.

as well, reasoning that criminal forfeiture was an aspect of punishment that followed a substantive conviction, and did not constitute a substantive charge in itself.[365] Thus, the doctrine of specialty, governing substantive criminal charges, was not offended when the relator was subjected to criminal forfeiture charges in this case.[366]

In *Saccoccia v. United States*, the First Circuit held that introducing evidence of cash transactions requirements violations as a predicate for a RICO charge when the CTR charges were not held extraditable by Switzerland was a violation of the principle of specialty.[367] The problem in that case was that the introduction of CTR violations was not simply an evidentiary question, but was fundamental to establishing responsibility, as a predicate offense for the RICO charge. In this case, the government was able to accomplish through a back-door technique what it could not have accomplished had it made a clear and unambiguous representation to the Swiss government from which it requested extradition. The representation should have been that it needed to prove the CTR violation as a predicate for proving the RICO charge. Switzerland elected not to protest and the First Circuit concluded that proof of CTR violations was evidentiary in nature and was not used to prove the commission of CTR as a crime, but as premises for another crime for which extradition was granted.[368]

In *United States v. Garrido-Santana*, the relator was extradited from the Dominican Republic after jumping bail after his indictment in the United States. The relator argued that the government agreed to prosecute him only for a narcotics offense for which he was extradited. The relator assumed that the implicit promise that he would not be punished for his failure to appear at his pre-extradition trial for this offense. Thus, the relator combined the principle of specialty with a double-jeopardy argument. The court held that:

> In *United States v. Lazarevich,* 147 F.3d 1061, 1063 (9th Cir.1998), the Ninth Circuit held that the district court's consideration of a non-extraditable offense of child abduction in increasing the defendant's sentence for passport fraud—the offense for which defendant was extradited—did not constitute "punishment" so as to violate the extradition treaty's incorporated rule of specialty permitting punishment only for the extradited offense. As that court reiterated, extradition treaties are made "within an historical and precedential context . . . that includes the long-standing practice of United States['] courts of considering relevant, uncharged evidence at sentencing." *Id.* at 1064 (holding that, given the long history of considering relevant evidence, like other criminal behavior, in sentencing—consideration that the Sentencing Guidelines now mandates—as well as Supreme Court precedent, such as *Witte,* the extradition treaty contemplated consideration of relevant offenses).
>
> Here, we assume *arguendo* that the extradition treaty contains an implicit promise not to *punish* defendant for his failure to appear at his arraignment, rather than merely an express promise not to *prosecute* defendant for any offense other than that for which he was extradited. However, we find that, following the reasoning of both *Witte* and *Lazarevich,* the § 3C1.1 *enhancement to defendant's sentence on the narcotics offense based upon defendant's failure to appear at his arraignment did not constitute "punishment" for that conduct so as to violate any implicit proscription against such punishment in the extradition treaty.* (emphasis added).[10] The district court sentenced defendant on the narcotics charge to 97 months of imprisonment—well within that offense's statutory maximum of 480 months of imprisonment. *See* 21 U.S.C. § 841(b)(1)(B).
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>
> [10] We note that defendant, in challenging his sentence, may lack standing to rely upon the extradition treaty's incorporated rule of specialty. This circuit has not expressly decided

365 *Id.*

366 *Id.*

367 U.S. v. Saccoccia, 58 F.3d 754 (1st Cir. 1995).

368 *Id.*

> whether an extradited individual has standing to seek the enforcement of that rule. *See Demjanjuk,* 776 F.2d at 583–84 (observing that a serious question existed as to whether the defendant had standing to assert the rule of specialty because "[t]he right to insist on application of…[that principle] belongs to the requested state, not to the individual whose extradition is requested" yet addressing the merits of such a claim). Other circuit courts either have declined to decide this issue or have considered the issue yet disagree as to its proper resolution. *See United States v. Saccoccia,* 58 F.3d 754, 767 n. 6 (1st Cir.1995) (observing the inner-circuit split but taking no position on the issue); *United States v. LeBaron,* 156 F.3d 621, 627 (5th Cir.1998) (clarifying that the Fifth Circuit has yet to decide whether an extradited individual has standing to raise the rule of specialty); *United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 168 (3rd Cir.1997) ("Because treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation."); *United States v. Levy,* 905 F.2d 326, 329 n. 1 (10th Cir.1990) (holding that an extradited defendant has standing to assert a rule of specialty claim); *United States v. Najohn,* 785 F.2d 1420, 1422 (9th Cir.1986) (holding that an extradited individual "may raise whatever objections [based upon the rule of specialty that] the rendering country might have"); *United States v. Puentes,* 50 F.3d 1567, 1572 (11th Cir.1995) (same); *Leighnor v. Turner,* 884 F.2d 385, 388 (8th Cir.1989) (holding that it is bound to follow a prior opinion that held the same). However, because we find that defendant's sentence did not violate the extradition treaty's incorporated rule of specialty, we need not decide whether defendant has standing to assert such a claim. *U.S. v. Garrido-Santana,* 360 F.3d 565, 578 -579 (6th Cir. 2004).

In *United States v. Robinson*,[369] the Eighth Circuit held that the district court properly considered evidence of prior convictions in sentencing enhancement proceedings, as extradition did not affect the validity of those prior convictions. Following a jury trial involving drug and firearms charges, the relator was sentenced in absentia on all charges after he fled to Brazil after the trial but prior to sentencing.[370] The relator was captured in Brazil and extradited on the drug charges, but not the firearms charges.[371] After unsuccessfully appealing his convictions, the court remanded for resentencing, and the district court judge imposed a 292-month sentence for the drug related charges, but no sentence on the firearms convictions.[372] The extradition treaty provided that:

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering state so agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.[373]

As the relator was not tried or punished on the firearms charges, there was no violation of the extradition treaty.[374]

This was not applied in *Benitez v. Garcia*, where the Ninth Circuit reversed the district court as the surrendering state, Venezuela, had established a limit on the sentence to be imposed,

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369 503 F.3d 522 (6th Cir. 2007),

370 *Id.* at 525.

371 *Id.*

372 *Id*

373 *Id*. at 527

374 *Id.* Similarly, where a prisoner raises a specialty argument relative to transfer to a harsher prison, such a claim fails as transfer has been found analogous to parole and sentencing proceedings rather than criminal prosecution. *See* Palma-Salazar v. Davis, 2010 U.S. Dist. Lexis 135503 (D. Colo. 2010).

and at trial the sentence was enhanced by four years.[375] The court relied on the language of the treaty as well as its interpretation under *United States v. Rauscher*[376] and *Johnson v. Brown*.[377] The court held that:

> In this case, in addition to the Treaty itself, we agree with the state court that the only other sources of clearly established federal law we can locate are *Rauscher* and *Browne. Rauscher* and *Browne* both stand for the same principle: An extradited defendant can "only be tried for one of the offenses described in that [extradition] treaty." *Rauscher*, 119 U.S. at 430, 7 S.Ct. 234. *See also Browne,* 205 U.S. at 316, 27 S.Ct. 539 (stating that it is impermissible to try a defendant other than "for the crime for which he has been extradited"). Over time, this rule from *Rauscher* and *Browne* has come to be known as the doctrine of specialty. *See, e.g., Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir.1986) ("The doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.").
>
> The doctrine of specialty on its own terms, however, offers Benitez no relief, because it merely limits the crimes with which Benitez can be charged, not the punishments the state can impose. Because the Venezuelan treaty is sufficient to afford Benitez relief, we need not reach whether extending the doctrine of specialty is required here.
>
> We hold that we can enforce limitations on punishments following the extradition of a defendant, but we may do so *only if the contracting treaty nations agreed* to such a limitation in the particular case. *See Rauscher*, 119 U.S. at 422, 7 S.Ct. 234 ("This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, *is met by the manifest scope and object of the treaty* itself") (emphasis added); *Browne,* 205 U.S. at 318, 27 S.Ct. 539 ("*The manifest scope and object of the treaty* itself . . . limit[s] the . . . crime for which extradition had been demanded and granted.") (emphasis added). We must therefore examine the extradition agreement in this case, and ask the question: Did the treaty and extradition activities of the parties in this case provide for a clear limitation on the punishment Benitez could face? If the answer is yes, we must enforce whatever punishment limitation we find.[378]

The Ninth Circuit, in *United States v. Fischer*, affirmed the principle, concluding that "The doctrine of specialty does not apply to the consideration of other criminal behavior in sentencing."[379]

The First Circuit in *Saccoccia* allowed evidence of CTR violations for which Switzerland denied extradition as a predicate of offense for RICO.[380] Thus, it allowed a result that violates the spirit and purpose of specialty. However, because Switzerland did not object, the result remained.[381]

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375 Benitez v. Garcia, 449 F.3d 971 (9th Cir. 2006), *reversing* 419 F. Supp. 2d 1234 (S.D. Cal. 2004). *See also* United States v. Lazarevich, 147 F.3d 106 (9th Cir. 1998) (holding that enhancement of sentence based on non-extradited offense did not violate U.S.–Netherlands extradition treaty).

376 United States v. Rauscher, 119 U.S. 407, 430 (1886).

377 Johnson v. Browne, 205 U.S. 309, 316 (1907).

378 Benitez v. Garcia, 449 F.3d 971, 975–976 (9th Cir. 2006). In 2007, the Court of Appeals for the Ninth Circuit found that Benitez's extradition was conditioned on the sentence that could be entered against him and what sentence he could serve, making his appeal ripe when he received a sentence of fifteen years to life. This decision emphasized that the extraditing country's expectations regarding limitation on punishment must be respected in accord with the extradition treaty. *See* Benitez v. Garcia, 495 F.3d 640, 643–644 (9th Cir. 2007).

379 United States v. Fischer, 322 Fed. Appx. 521, 522 (9th Cir. 2009) (unpublished opinion), *cert. denied,* Fischer v. United States, 130 S. Ct. 1158 (2010). *See also* United States v. Muller, 305 Fed. Appx. 457, 459 (9th Cir. 2008) (unpublished opinion).

380 United States v. Saccoccia, 18 F.3d 795 (1st Cir. 1994).

381 *See also* United States v. Moss, 344 F. Supp. 2d 1142, 1147–1148 (W.D. Tenn. 2004) (relying on *Saccoccia*, 18 F.3d 795, even though it is not in the First Circuit).

The Eighth Circuit in *United States v. Lomeli*[382] followed the reasoning in many of the cases cited above to emphasize that "the doctrine is generally understood to prohibit indiscriminate *prosecution* of extradited individuals rather than to prohibit the receiving state's consideration of pre-extradition offenses while prosecuting the individual for crimes for which extradition was granted."[383] The court also noted Supreme Court precedent reasoning that admitting evidence of related criminal conduct for the purposes of sentence enhancement for a separate crime, within proper statutory limits, did not constitute punishment.[384] The court held that there was no violation of the extradition treaty because the relator's criminal history, for the purposes of sentencing enhancement, did not constitute punishment for non-extradited conduct.[385]

For all practical purposes, it seems the consistent recent practice in the United States has been to simply accept enhanced sentencing and upward departure of sentencing as not violative of the principle of specialty. In all of the cases where this situation occurred and is referred to above, there has not been to this writer's knowledge any formal protest by the surrendering state, thus, in effect, leaving both the government and the courts free to enhance sentencing even when the sentence enhancement is for a crime for which the original requested state refused to grant extradition.[386] It seems that the only resort left is for the surrendering state to file a formal protest with the U.S. government. But this is not likely to be the case in the normal course of affairs, as it would place a burden on the foreign relations of the surrendering state and the United States. An alternative that may develop is for surrendering states to include more specific statements in their extradition orders, in the hope that U.S. courts may interpret them as being more binding and thus insure compliance with the principle of specialty.

6.5.1. Sentences beyond Limitations Imposed by Extradition Orders

The United States faces a recurring problem with ceilings on penalties set by surrendering states, which U.S. courts occasionally violate.[387] This is also a problem in cases involving life imprisonment.[388] This is a result of federal courts interpreting the Federal Sentencing Guidelines that were previously mandatory but are now advisory.[389] The problem is also due to the fact that federal courts interpret sentences as actual time served as opposed to the length of the sentence.[390]

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382 596 F.3d 496 (8th Cir. 2010).

383 *Id*. at 501.

384 *Id.* at 502.

385 *Id.* at 503.

386 United States v. Lavaravich, 147 F.3d 1061 (9th Cir. 1998) (relator extradited from Netherlands for false statements on the passport application of his two children, whom he abducted from the United States to the Netherlands). Upon his return and conviction, the judge sentenced him for the base offense of child abduction even though the Netherlands had refused to extradite him for that crime. The Ninth Circuit supported that position in reliance on the Supreme Court's rulings on sentencing, in particular *Witte v. United States*, 515 U.S. 389 (1995); *United States v. Watts*, 519 U.S. 148 (1997). The Fourth and Eighth Circuits took the same positions in cases prior to *Witte* and *Watts*, namely *Leighorn v. Turner*, 884 F.2d 385 (8th Cir. 1989) and *United States v. Davis*, 954 F.2d 182 (4th Cir. 1992).

387 *See generally,* Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89, 104–109 (2008).

388 United States v. Armenta, 373 Fed. Appx. 685, 687–688 (9th Cir. 2010) (unpublished opinion) (relator's argument rejected that sentence of life imprisonment without release was in excess of U.S. affidavit of extradition to Mexico disclosing he was subject to a maximum term of life imprisonment).

389 *Id.* (where a 660-year sentence was meted our for money laundering). *See also* United States v. Booker, 543 U.S. 220 (2005) (rendering the Federal Sentencing Guidelines advisory).

390 *See* Gordon v. Warden, No. 02-427-M, 2003 U.S Dist. LEXIS 5190 (D.N.H. 2003) (following a fact-driven approach to the rule of specialty in sentencing).

This causes difficulties with the relator's ability to raise the issue under the principle of specialty, particularly in circuits that require the foreign state to protest.[391]

In *United States v. Badalamenti*, the U.S. District Court for the Southern District in New York revisited the forty-five year sentence imposed upon Badalamenti, whose extradition from Spain was conditional upon a maximum period of imprisonment not to exceed thirty years. The U.S. government indicated its understanding of this limitation on the Spanish extradition order.[392] However, it later changed its view on how it should be interpreted and District Court Judge Leval developed a strange interpretation by holding that Badalamenti could qualify for release after twenty to twenty-three years with good time credit and that this satisfied the requirements as opposed to the overall sentence.[393] In what is clearly a stretching of interpretation and common sense, Judge Leval came to the conclusion that the forty-five–year sentence did not violate the thirty-year limitation. The Second Circuit affirmed, and finally in 2003,[394] the district court held that:

> . . . Spain has never protested the sentence. Indeed, Badalamenti's petition to the Spanish courts for relief was dismissed.
>
> Finally, the language in the dismissal order relied on by Badalamenti simply does not call into question the correctness of the application of American law by Judge Leval in 1987 and by the Second Circuit in 1989.[395]

The implication of the first paragraph quoted above is that, had Spain protested the outcome, the court may have ruled differently. If this is the correct interpretation, it is truly unfortunate to think that U.S. courts can violate limitations imposed by other countries' extradition orders so long as the extraditing state does not protest.[396] Judicial inquiry should not be based on what clearly appears to be a violation of the extradition order, under the principle of specialty, and condition that inquiry upon a foreign government's protest, which can easily be conditioned by U.S. governmental pressures.

In *United States v. Campbell*, the Second Circuit considered the problem of sentencing enhancement based on the Federal Sentencing Guidelines.[397] It is not uncommon for the United States to represent to foreign governments that it will abide by limitations on the total duration of a sentence and then depart from these representations in the course of sentencing hearings, arguing that the original representations were predicated on the maximum sentence as contained in the statute.[398]

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391 Most of the time foreign states elect not to protest in order to avoid conflict with the United States, and the result is that the rule of specialty is occasionally violated without consequences.

392 *See* United States v. Casamento, 887 F. 2d 1141, 1185 (2d. Cir. 1989), *cert denied* 493 U.S. 1081 (1990). *See also* United States v. Baez, 349 F. 3d 90 (2d. Cir. 2003) (involving an extradition case from Columbia where that state had also imposed a limitation on the sentence).

393 United States v. Badalamenti, 641 F. Supp. 194 (S.D.N.Y. 1985).

394 United States v. Badalamenti, No. 84 CR. 236(DC), 2003 WL 22990069 (S.D.N.Y. 2003).

395 *Id.* at *2.

396 United States v. Cuevas, 402 F. Supp. 2d 504 (S.D.N.Y. 2005), *affirming sentence,* 112 Fed. Appx. 806 (2004) (holding extradition agreement did not prohibit the court from sentencing in excess of thirty years and extraditing state must raise protest). *See also United States v. Campbell*, 300 F.3d 202 (2d. Cir. 2002) (U.S. Department of State providing assurances through diplomatic note); United States v. Baez, 349 F.3d 90 (2d Cir. 2003) (assurances given in the form of two diplomatic notes); Vallenti v. United States, 111 F.3d 290 (2d. Cir. 1997) (holding that if that issue required an evidentiary hearing, it should be remanded to the district court).

397 *Campbell*, 300 F.3d 202 (holding that the relator could be sentenced in the range of the Guidelines, but was to be released according to the limitation in the extradition treaty).

398 *Id.*

In *United States v. Cuevas*, the Second Circuit considered whether the principle of specialty required the United States to apply the Dominican Republic's law maximum penalty provided in the extradition decree.[399] In this case, because the extradition treaty did not contain any limitation on sentencing and the United States never made a positive assurance to the Dominican Republic that the relator would not be sentenced to more than thirty years' imprisonment (indeed, the Dominican Republic never sought such an assurance), a sentence in excess of thirty years but within U.S. sentencing guidelines was deemed appropriate.[400]

6.6. Standing to Raise the Specialty Issue

As the requested state is intended to benefit from specialty and has the right to claim its enforcement, the question arises as to the right of the relator to insist on that requirement as the beneficiary of this right. The issue of whether an individual has standing to protest a violation of the principle of specialty in his/her own right is whether the right belongs solely to the surrendering state or whether it is the individual's as well. Another question is whether the individual can raise the issue in his/her own right, or whether it is conditional upon a protest from the surrendering state. In practice, when the issue arises, the relator will have already been surrendered, and thus is subject to the authoritative processes of the prosecuting state.[401] The relator's recourse at that point is limited to the remedies afforded by that state. The issue can, therefore, be raised by the surrendering state through a protest communicated to the prosecuting state by diplomatic channels or by other means, or by the relator being given the right to raise the issue irrespective of whether the surrendering state protests or not.[402] Notwithstanding the precedents established by the Supreme Court, the circuits are divided on these two formulas on standing. Some require a protest or some other form of objection by the surrendering state before the individual can raise the issue, while others recognize the relator's right to do so on his/her own without any action by the surrendering state. The latter position is strongly supported by the policy argument that it would be unwise and unnecessary to have foreign governments object or protest action by U.S. prosecutors, thus leading to

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399 United States v. Cuevas, 496 F.3d 256 (2d Cir. 2007). *See also* Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89, 104–106 (2008).

400 *Cuevas*, 496 F.3d at 262–264.

401 Collins v. O'Neil, 214 U.S. 113 (1909); Johnson v. Browne, 205 U.S. 309 (1907); Cosgrove v. Winney, 174 U.S. 64 (1899); Casey v. Department of State, 980 F.2d 1472 (D.C. Cir. 1992); United States v. Riviere, 924 F.2d 1289 (3rd Cir. 1991); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); Greene v. United States, 154 F. 401 (5th Cir. 1909), *cert. denied*, 207 U.S. 596 (1907). *See also* United States v. Medina, 985 F.Supp. 397 (S.D.N.Y. 1997); United States v. Bakhtiar, 964 F. Supp. 112 (S.D.N.Y. 1997); Bingham v. Bradley, 241 U.S. 511, 514 (1916) ("It is not to be presumed that the demanding government will suffer [the relator] to be tried or punished for any offense other than that for which he is surrendered…").

402 *See* United States v. Herbage, 850 F.2d 1463 (11th Cir. 1988); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987) (holding that the rule of specialty could be raised by a defendant if he is sought to be tried for an offense other than the one for which he was delivered); Taylor v. Jackson, 470 F. Supp. 1290 (S.D.N.Y. 1979); *cf.* United States v. Merit, 962 F.2d 917 (9th Cir. 1992), *cert. denied*, 506 U.S. 885 (1992), *reh'g denied*, 506 U.S. 1072 (1993); United States v. Riviere, 924 F.2d 1289 (3d. Cir. 1991) (holding that relator could not assert individual rights under the Treaty in light of the express waiver by the extraditing nation); United States v. Jetter, 722 F.2d 371, 373 (8th Cir. 1983). The court in *Thirion*, as well as in *Jetter*, affirmed the rule that the extraditing state may waive the rule of specialty. *See* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986). The court in *Thirion* also reaffirmed the rule in *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976), that an accused co-conspirator may be held responsible under the common law rules of responsibility for the conduct of another without violating the rule of specialty. *Cf.* United States v. Alvarez-Moreno, 874 F.2d 1402 (11th Cir.) (holding that evidence of prior arrest to reflect scope of conspiracies, to prove

friction between these governments. Indeed, it is best to leave the issue to the U.S. judiciary, which is quite capable of dealing with it without the need for a foreign government to point it out. The U.S. Department of Justice has followed this policy since 1995, and seldom objects to individual standing without a formal protest by the surrendering state.

In considering the nature of the principle of specialty, it is important to draw a distinction between substantive and procedural issues. As stated above, specialty is intended to protect the substantive rights of the relator as well as the rights of the requested state. Although the circuits disagree as to whether the relator, as a defendant before U.S. courts, has standing to raise the issue of noncompliance with the principle of specialty without the need for a the requested state to intervene or protest, this right arises only with respect to substantive issues and not procedural ones, which remain the exclusive rights of the requested state.[403]

The principle of specialty finds its basis in treaties, and thus is part of conventional international law as well. As a result of its inclusion in conventional international law and its consistent application in the domestic laws of different states, it has also become a customary rule of international law. In addition, national legislation includes the rule as does the jurisprudence of states engaging in extradition. Consequently, there are at least three sources for the principle of specialty: conventional international law, CIL, and national legislation or national jurisprudence.

The contents of the principle are slightly different depending upon which of these sources of law applies. Although treaties seem to be rather similar in the core elements of the rule, they usually do not go into such detail so as to address issues of standing and variances whether it be in respect to the charge or to the sentence. Consequently, CIL also lacks that specificity. As to national legislation/jurisprudence, there is greater uniformity in Europe, where the Council of Europe and the European Union have significantly enhanced harmony in the laws and practices of member states. Conversely, in the United States there is divergence in the circuits, as discussed below, probably due to two reasons. First, whenever circuits identify the source of the legal right there seems to be some confusion, particularly when they do not distinguish between overlapping sources. In other words, custom overlaps with treaties and should help interpret treaties, while at the same time custom is also an independent source. The *Restatement (Third) of Foreign Relations*, which reflects the jurisprudence and practice of the United States, relies in part on custom, jurisprudence, governmental positions, treaties, and interpretations of all of the above. These three layers of legal sources, which substantially overlap and which rely on each other, need to be sorted out so that there is clarity in a judicial decision as to the following: the legal source of the right, the scope and content of the right, and the application of the right in connection with a given set of facts.

To illustrate the above, if the legal right is predicated on a treaty, the next question is whether the treaty intended to provide a third party beneficiary right to the relator or not. This becomes a question of treaty interpretation, in which CIL, as well as the national legal practice of the two contracting states, is relevant. If the conclusion is that the treaty right is only designed for the benefit of the contracting states and is not intended to provide a third party beneficiary right to the individual, then the surrendering state can waive the right and the relator has no recourse, unless of course the national legislation/jurisprudence allows a defendant in a domestic criminal proceeding the right to raise such an issue. If not, and if the right is deemed

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intent, and to aid the jury in determining the nature of the offense charged did not violate the doctrine of specialty), *cert. denied*, 494 U.S. 1032 (1990). *See generally* Jonathan George, Note, *Toward a More Principled Approach to the Principle of Specialty*, 12 Cornell Int'l L. J. 309 (1979).

403 United States v. Antonakeas, 255 F.3d 714 (9th Cir. 2001). *See also Najohn*, 785 F.2d at 1422; United States v. Rauscher, 119 U.S. 407 (1886); United States v. Lombera-Camorlinga, 206 F. 3d 882 (9th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000) ("whether or not treaty violations can provide the basis for particular claims or defenses depends upon the particular treaty and claim involved" 206 F.2d at 885).

exclusively limited to the contracting states, then the prosecuting state that has obtained jurisdiction over an extradited person can prosecute him/her for whatever crime it wants, and mete out whatever punishment its law may provide without limitation. Under this theory, if the surrendering state objects, then the prosecuting state must conform to its treaty obligations, but that still does not give the relator in the national proceeding the right to raise the issue under the treaty unless national legislation/jurisprudence would allow him/her to do so. Another hypothesis is where the source of the right is a treaty, and the treaty is interpreted in accordance with CIL, which recognizes that the right is both for the benefit of the contracting states and of the individual who is the subject of the extradition. In that case the individual would have standing to raise an objection in national criminal proceedings, irrespective of whether the surrendering state protests and also irrespective of whether the surrendering state waives the right, as it is not exclusively the contracting state's right, but one which is also the relator's right.

Finally, it should be noted that the acceptance of the third party beneficiary theory does not mean that the prosecuting state and the surrendering state are without any powers to vary the charge and prosecution of the surrendered person. The substantive nature of the right is fact-driven and not law-driven in the technical sense of the word. In other words, if a set of facts on which extradition has been granted justifies prosecution for theft and the extradition has been granted on that basis, nothing prevents the prosecuting state from changing the charge to embezzlement if this charge is predicated on the same or substantially the same facts as those for which the relator has been extradited based on the charge of theft. Consequently, it is not the technical legal charge that controls, but the factual basis giving rise to the charge, which can be amended or changed depending upon the prosecution's or the court's judgment of which such facts warrant a criminal charge. In such situations, the relator cannot object even under the second hypothesis because there is no substantive change as to the right in question.

Under the "Contract Theory" the two contracting states can simply alter their understanding of that legal right on a case-by-case basis on the theory of waiver. The logical consequence of such an understanding is that such a right is no longer a justiciable issue because it is essentially based on the political relations of the two states, who are best suited to deal with it through their respective foreign ministries.

Obviously if such a theory were valid it would have been explicitly stated in the treaty. But it is difficult to imagine many states agreeing to put in a specialty provision that the two governments can decide to waive at will on a case-by-case basis. Thus, logically any court decision that assumes that this was the parties' intent is mistaken. In fact, it is precisely the absence of any such specificity that should warn the courts that this is not what the nature of the right is about.

What is surprising is that most, if not all, cases dealing with specialty cite *Rauscher*.[404] Yet it seems that the meaning of *Rauscher* has eluded its readers. Chief Justice Marshall seemed quite unequivocal considering both the time and the fact that this is a CIL right, and is not only for the benefit of the contracting states, but for that of the individual. Its enforceability has to do with the integrity of the judicial process. Why such a clear pronouncement has been lost over the years on a number of modern judicial interpreters is difficult to explain.[405]

Another hypothesis is where the treaty right is interpreted in accordance with national law and jurisprudence, in which case it will largely depend on whether the national law/jurisprudence has espoused the first or the second of the hypothesis stated above. In the United States, the *Restatement (Third) of Foreign Relations* reflects the country's practice and thus necessarily evidences the schism between the two first hypotheses, which is reflected in the jurisprudence of the different circuits. There is no doubt that the acceptance of the second hypothesis, namely

404 *Rauscher*, 119 U.S. 407 at 422.

405 For a discussion of specialty as a rule of customary international law, see *infra* Sec. 6.1.

that we are dealing with a right that the contracting states have stipulated to, not only for their own benefit, but for that of a third party beneficiary (i.e. the relator) reflects a position that is consonant with international human rights law. The latter grants individuals certain rights in national legal proceedings, particularly in criminal proceedings, by virtue of multilateral treaties, wherein the individual is the subject of certain rights and has standing to invoke these rights in national criminal and other legal proceedings. Conversely, the first hypothesis is one that existed in the earlier days of modern extradition, particularly in the 1800s, when extradition was deemed to be an accommodation between states based on a contract theory reflected in treaty. Government and prosecutorial attempts to revert to that position are essentially predicated on the same assumption, and on the proposition that the narrow interpretation of the right on the basis of the first hypothesis, the contract theory hypothesis, enhances law enforcement and prosecution endeavors in their combat against crime. Yet there is no empirical data whatsoever to justify that proposition. Adherence to the right may at worst, from a law enforcement/prosecutorial perspective, mean that a surrendered person will not be prosecuted for additional or different crimes, and will not be sentenced in a way that varies from the sentence limitation imposed by the surrendering state.

Thus, for example, some circuits will hold that the relator does not have the standing to raise the issue of specialty in his/her own right, but without indicating whether it is because that circuit has identified the source of the right being a treaty, or CIL. Admittedly, most of the cases derive from treaties. Consequently, one could assume that circuits have not addressed the issue of the source of the legal right, because it is so obviously derived from a bilateral treaty between the United States and a surrendering state. However, in interpreting the treaty the circuits have seldom taken into account CIL as a way of interpreting the relevant treaty position on specialty. Thus, on the whole the jurisprudence of the circuits concerning the various issues of specialty tend to spiral down to narrower considerations as opposed to spiraling up to the nature and purpose of the rule. The second reason is that the Supreme Court has not addressed the issue of specialty in over 120 years since *United States. v. Rauscher*, notwithstanding the fact that there is significant conflict among the circuits, something which would normally induce the Supreme Court to take certiorari.

The importance of extradition pursuant to treaties is underscored by the 2009 Eleventh Circuit decision of *United States v. Valencia-Trujillo*.[406] In this case, the relator was extradited pursuant to an extradition agreement as opposed to being extradited pursuant to the United States–Colombia extradition treaty.[407] When the relator attempted to raise the principle of specialty, the court held he lacked standing to do so because "the rule of specialty applies only to extraditions pursuant to a treaty," and as the court reasoned that the relator's right to raise the principle of specialty was derivative of the surrendering state's right to raise the principle of specialty, the court concluded that "because Colombia's extradition of Valencia-Trujillo to the United States was not based on an extradition treaty between the two countries Valencia-Trujillo lacks standing to assert the rule of specialty."[408]

6.6.1. Waiver of Specialty by the Relator

If a person waives objections to his/her extradition, whether it is from or to the United States, the waiver implicitly includes the waiver of the principle of specialty, unless the order of extraditability based on the waiver specifically includes a specialty limitation, either as to charge and/or to penalty. In other words, in the context of waiving extradition from the United States, the relator may specifically condition his/her waiver (somewhat analogous to a negotiated plea)

406 573 F.3d 1171 (11th Cir. 2009).

407 *Id.* at 1178.

408 *Id.* at 1178, 1181.

to include a specialty clause that limits prosecution in the requesting state to the charges on which the extradition requests were made. Thus, the waiver of extradition preserves the principle of specialty.[409]

The relator may also waive the ability to raise a specialty claim by failing to raise it in a timely manner under U.S. Federal Rule of Criminal Procedure 12.[410] The Eleventh Circuit reasoned as follows regarding the relator's procedural waiver or forfeiture of his/her specialty claim:

> Because the rules of specialty and dual criminality bar prosecution of an extradited relator for some offenses but not others, the doctrines initially may appear to limit the court's subject matter jurisdiction . . . . The extradition process, however, is the means by which a requesting country obtains personal jurisdiction over the relator . . . . Consequently, a claim of a violation of the rules of specialty and dual criminality raises the question of whether the extradition process conferred personal jurisdiction over the defendant . . . . Thus, a claim that the extradition violates the rules of specialty and dual criminality is a challenge to the court's personal jurisdiction over the defendant and must be raised in a pretrial motion pursuant to Rule 12.
>
> The district court set October 14, 2005 as the final deadline for submission of pretrial motions. Marquez did not assert the rules of specialty or dual criminality as a bar to his prosecution until he filed a motion to arrest judgment on March 3, 2008. Thus, Marquez waived his right to assert the protection of the rules of specialty and dual criminality.[411]

Although a court may grant relief for a procedural waiver or forfeiture of a specialty argument, the relator "must present a legitimate explanation for his failure to raise the issue in a timely manner."[412]

6.6.2. Waiver of Specialty by the Surrendering State

Whether a surrendering state can waive specialty, either explicitly or implicitly, without the consent of the surrendered person, depends on how the specialty provision in the treaty is interpreted. Historically, the principle has been for the benefit of the surrendering state. Consequently, that state has the right to waive it.[413] However, the historic practice was to obtain an explicit waiver from the surrendering state, as opposed to merely an implicit one, which the prosecuting state would allegedly derive from the surrendering state's failure to file a protest. The reason favoring an explicit waiver is that it avoids any unnecessary friction or tensions between the two governments, and also avoids having the prosecuting state trying to get away with its breach of specialty in the hope that the surrendering state will not protest, in order to avoid political tensions between the two governments.

So far, there have been no cases either in the United States or elsewhere holding that specialty is the exclusive right of the surrendered person, thus foreclosing a surrendering state's opportunity for waiving specialty. Similarly, if one concludes that specialty is a right available to both the surrendering state and the surrendered person, then neither one of them could invoke a waiver unilaterally without the consent of the other. This too is a position that finds no support in the law and practice of any country known to this writer.

The only contentious issue in some of the circuits in the United States is whether or not the surrendered person has standing to argue specialty in the absence of a protest by the surrendering

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409 *But see* Rogers v. U.S. Parole Commission, 113 Fed. Appx. 290 (9th Cir. 2004) (for a waiver that did not preserve specialty in extradition to the United States).

410 United States v. Marquez, 594 F.3d 855, 859 (11th Cir. 2010).

411 *Id.* at 859.

412 United Sates v. Anderson, 472 F.3d 662, 670 (9th Cir. 2006).

413 *See* United States v. Saccocia, 58 F.3d 754 (1st Cir. 1995); United States v. Stokes, 2010 U.S. Dist. Lexis 45366 (N.D. Ill. 2010) (Thailand waived the treaty's rule of specialty provision by the means specified

state.[414] It is the position of this writer that the mere silence by a surrendering state does not constitute a waiver of specialty, and unless and until such time as a surrendering state waives specialty, that right inures to the benefit of the surrendered person who has, as some of the circuits have held, the right to raise that issue without the need for any action by the surrendering state.[415]

A case that bears mention is *United States v. Riviere*[416] in which an apparently general waiver by the requested state was interpreted by the United States to allow the prosecution of the relator for the same crime for which he was already convicted of in that state, notwithstanding the specific prohibition contained in the extradition treaty against double jeopardy. The relator argued the applicability of the treaty, and the Third Circuit held that he had no standing to do so because of the general waiver that was presumed to have been granted by the requested state. From the language of the court's opinion, including what appears in dicta, the Third Circuit places itself among the circuits that are ambivalent about granting the relator standing to raise the specialty issue. The Third Circuit, however, places itself in the category of those that do not allow a relator to raise the specialty issue if there is an indication that the requested state waives the requirement that specialty be observed.

6.6.3. Guilty Pleas and Waiver of Specialty

A guilty plea in U.S. criminal proceedings implicitly includes a waiver of specialty.[417] However, because specialty is such an important right, the court accepting the guilty plea should ascertain whether the relator understood its implication with respect to the waiver of the doctrine of specialty. The test of "knowingly and intentionally" should be applied. If there is a question that arises subsequently, an evidentiary hearing should be held to determine the relator's knowledge of the waiver and his/her intention to waive specialty as well as whether he/she received the advice of counsel. If, for example, the relator did not receive the proper advice from counsel, this may be deemed ineffective assistance of counsel.[418]

6.6.4. Circuits Allowing the Individual to Object without the Need for the Requested State's Protest

The circuits that provide the individual with a right to claim the benefit of the specialty principle are the Eighth, Ninth, Tenth, and Eleventh Circuits, with some ambiguity within the Third Circuit.[419] Government protests vary in form and may be done either by a diplomatic note or a letter.[420]

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in the treaty, leaving the relator with no standing to raise a specialty argument); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).

414 *See infra* Secs. 6.6.4 and 6.6.5.

415 United States v. Saccocia, 58 F.3d 754 (1st Cir. 1995). *See also* Tse v. United States, 290 F.3d 462 (1st Cir. 2002).

416 United States v. Riviere, 924 F.2d 1289 (3rd Cir. 1991).

417 *See* Ch. VIII, Sec. 4.6. *See generally In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999), *citing* Santibello v. New York, 404 U.S. 257 (1971) (holding plea bargains are generally binding upon the government); United States v. Streebing, 987 F.2d 368, 372 (6th Cir. 1993); Plaster v. United States, 720 F.2d 340, 350 (4th Cir. 1983).

418 The objective standard of reasonableness is established in *Strickland v. Washington*, 466 U.S. 668 (1994). For a case discussing ineffective assistance of counsel in the extradition context, see *United States v. Painter*, 243 Fed. Appx. 818 (5th Cir. 2007) (unpublished decision); *United States v. Lopez-Pena*, 2011 U.S. Dist. LEXIS 46645 (S.D.N.Y. 2011).

419 *See* Kenneth E. Levitt, *International Extradition, The Principle of Specialty, and Effective Treaty Enforcement*, 76 Minn. L. Rev. 1017, 1030 (1992).

420 Government protests vary in form and may be done either by a diplomatic note or a letter. No set form exists for a protest, nor has the United States required such. A protest may come from the embassy of

The Eighth Circuit, in *United States v. Thirion*,[421] authorized such a position. In *Thirion*, the individual argued that his conspiracy count should have been dismissed under the terms of the extradition treaty, as Monaco had agreed to the extradition for all charges against him except the conspiracy count. The court rejected as without merit the government's argument that an extradited individual lacks standing to challenge a violation of an extradition treaty. The panel in *Thirion* held that an extradited individual "may raise whatever objections to his prosecution that [the surrendering country] might have."[422] The court further held (with jury instructions not to return a verdict on the conspiracy count of the indictment) that the government was not prohibited from establishing Thirion's membership in the conspiracy as an evidentiary fact to prove guilt in other substantive crimes. As Thirion was tried only for those crimes for which he was extradited, neither Thirion nor Monaco could be heard to complain.

The Ninth Circuit, in *United States v. Khan*,[423] also granted the extraditee standing to challenge his prosecution under the principle of specialty without an affirmative protest from the extraditing country. The extraditee argued that because the extradition documents did not specifically refer to the charge of using a telephone to facilitate the commission of a drug felony under 21 U.S.C. § 843, the conviction against him on this count should be dismissed. By presuming, without evidence to the contrary, that Pakistan would object to the extradition on this charge because the offense was not a crime in Pakistan, the court held Pakistan's ambiguous agreement to extradite the relator on this count did not satisfy the doctrine of specialty and reversed the conviction.

In *United States v. Herbage*,[424] the Eleventh Circuit assumed, without deciding, that the extradited relator had standing to allege a violation of the specialty principle irrespective of the fact that no evidence was presented that the requested nation, the United Kingdom, had protested the relator's charge of mail fraud. The court acknowledged the debate over whether an individual should be allowed to vindicate this right. The court cited *United States v. Najohn*,[425] stating "[T]he protection [of the specialty] principle exists only to the extent the surrendering country wishes.... However, the person extradited may raise whatever objections the rendering country might have." The court in *Herbage* found that the Ninth Circuit's position in *Najohn* was supported by the Supreme Court opinion in *United States v. Rauscher*,[426] which recognized a

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the requested nation to the secretary of state or the Department of Justice. Although it is customary for foreign ministries to communicate with the Department of State (in most other countries the ministry of foreign affairs), the United States has made agreements with some countries whereby communication is done directly between the foreign ministry and the Office of International Affairs (OIA) of the Department of Justice. It is also possible for the ministry of justice of other governments to deal directly with the OIA by special agreement. More recently, questions arose as to whether certain communications from the OIA's counterparts in other ministries of justice can qualify as protests if this or similar words are not specifically used. The better approach is to deem any form of objection by the appropriate authorities of the surrendering states as sufficient to raise the issue, or to give the relator-defendant standing to do so.

421 United States v. Thirion, 813 F.2d 146 (8th Cir. 1987). See also Leighnor v. Turner, 844 F.2d 385 (8th Cir. 1989); United States v. Robinson, No. 3:00-cr-129, 2006 U.S. Dist. LEXIS 27135 (E.D. Tenn 2006) (relying on Thirion).

422 *Thirion*, 813 F.2d at 151.

423 United States v. Khan, 993 F.2d 1368 (9th Cir. 1993). *See also* United States v. Foulie, 24 F.3d 1059, 1064 (9th Cir. 1994), *cert. denied*, 516 U.S. 933, 116 S.Ct. 341 (1995); *In re Extradition of* Valdez-Mainero, 3 F.Supp.2d 1112 (S.D. Cal. 1998); *but see* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986); *but see* United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994) ("An extradited person may raise whatever objections the extraditing country is entitled to raise.").

424 United States v. Herbage, 850 F.2d 1463 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027 (1989); United States *v.* Puentes, 50 F.3d 1567 (11th. Cir.), *cert. denied*, 516 U.S. 933, 116 S. Ct. 341 (1995).

425 *Najohn*, 785 F.2d 1420.

426 United States v. Rauscher, 119 U.S. 407, 422 (1886).

violation of the principle as involving both the party extradited and the surrendering country.[427] The Eleventh Circuit has denied the relator the right to raise a specialty challenge when the relator is a fugitive under the fugitive disentitlement doctrine.[428]

The Tenth Circuit followed this position in *United States v. Levy*,[429] where the relator challenged his prosecution for a CCE charge. The relator stated he was never extradited on the CCE charge because the order surrendering him to U.S. authorities neither mentioned CCE by name nor recited all of the elements of the crime. In rejecting the government's contention that a relator does not have a right to raise the issue of specialty, the court cited *Rauscher* for the proposition that the rule is a "right conferred upon persons brought from a foreign country to the [United States]" and "any person prosecuted in any court within the United States has the right to claim the protection" of the specialty provision in a treaty.[430]

In *United States v. Riviere*,[431] the Third Circuit held that a relator has standing to protest a violation of the principle of specialty, but that when the surrendering state waives its right to enforce the principle, the relator no longer has a right inuring to his/her benefit under the extradition process. In this case, the surrendering state expressly waived its rights under the treaty. When the Dominican government signed the extradition warrant for the removal of Riviere to the United States for "the offence of unlawfully exporting narcotics," it included a waiver of "any and all Rights of Objection and Protest of the Commonwealth of Dominica," which stated that Dominica did not and would not object to Riviere's prosecution for "any and all criminal offenses committed either prior to or subsequent to his Extradition."[432] Later, Riviere was further charged with various firearms offenses. Riviere then contended that his extradition violated the principle of specialty provided in the treaty because he was charged with crimes for which he was not surrendered.

In considering whether Riviere could assert rights under the treaty, the Third Circuit reviewed the Supreme Court opinion in *Rauscher*,[433] much of which suggests that the rights of a person extradited pursuant to a treaty are conferred upon the individual rather than the government. Unlike *Riviere*, however, the situation in *Rauscher* involved a surrendering state, the United Kingdom, which did not consent to the relator's prosecution on charges other than those for which he was extradited. The Third Circuit in *Riviere* found support in other circuits' opinions that addressed a similar situation. These cases held that an individual cannot avoid prosecution by asserting individual rights under the treaty where the surrendering state expressly or impliedly waived its rights under an extradition treaty. In particular, this circuit relied on decisions in three cases, *Fiocconi v. United States*,[434] *United States v. Najohn*,[435] and *United States v. Diwan*,[436] which collectively held that the principle of specialty was designed for the benefit of the asylum nation and that the extradited individual had standing only to raise those objections that the surrendering state might consider a breach of the treaty.[437] The Third Circuit in

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427 *Herbage*, 850 F.2d at 1466 n.7.

428 Weiss v. Yates, 375 Fed. Appx. 915, 916 (11th Cir. 2010) (unpublished opinion).

429 United States v. Levy, 905 F.2d 326 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991). For a more recent case recognizing this principle set forth in *Levy*, see *United States v. Feng*, 2009 U.S. Dist. Lexis 37903 (D. Kan. 2009).

430 *Id.* at 328 n.1.

431 United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991).

432 *Id.* at 1292.

433 United States v. Rauscher, 119 U.S. 407 (1886).

434 Fiocconi v. United States, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972). *See also* United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998).

435 United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986), *cert. denied*, 479 U.S. 1009 (1986).

436 United States v. Diwan, 864 F.2d 715 (11th Cir. 1989), *cert. denied*, 492 U.S. 921 (1989).

437 United States v. Riviere, 924 F.2d 1289, 1298–1300 (3d Cir. 1991).

United States ex rel. Saroop v. Garcia[438] stated in dicta that if the relator had invoked the principle of specialty, she would not have had standing to do so.[439] However, the court noted that rather than raise the issue of specialty, the relator challenged the validity of the treaty, which she had standing to do.[440]

The Eleventh Circuit decision in *United States v. Puentes* deserves particular attention, as it summarizes the principle so aptly.[441] In *Puentes* the court held:

> The government correctly points out that this circuit has not squarely addressed the issue of whether a defendant has standing to assert a violation of an extradition treaty. When faced with appellants' challenges to extradition, this court has assumed, without deciding, that the appellants had standing to bring the claim. *See, e.g., United States v. Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027, 109 S. Ct. 1158, 103 L.Ed. 2d 217 (1989); *United States v. Lehder-Rivas*, 955 F.2d 1510, 1520 n.7 (11th Cir.), *cert. denied*, *Reed v. United States*, 506 U.S. 924, 113 S. Ct. 347, 121 L.Ed. 2d 262 (1992).
>
> Under the doctrine of specialty, a nation that receives a criminal defendant pursuant to an extradition treaty may try the defendant only for those offenses for which the other nation granted extradition. *Herbage*, 850 F.2d at 1465; M. Bassiouni *International Extradition: United States Law and Practice*, vol. 1, ch. 7, p. 359–60 (2d rev. ed. 1987). The question of whether a criminal defendant has standing to assert a violation of the doctrine of specialty has split the federal circuit courts of appeals. (*Compare United States v. Kaufman*, 874 F. 2d 242, 243 (5th Cir. 1989) (per curiam) (denial of petition for rehearing and suggestion for rehearing en banc) (stating that only the offended nation that is a party to a treaty may complain of a breach of the treaty) and *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583–84 (6th Cir. 1985) (expressing doubt that the individual has standing on the grounds that "[t]he right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested") (citation omitted), *cert. denied*, 475 U.S. 1016, 106 S. Ct. 1198, 89 L.Ed. 2d 312 (1986) *with United States v. Levy*, 905 F.2d 326, 328 n. 1 (10th Cir. 1990) (extradited individual has standing to claim a violation of the rule of specialty), *cert. denied*, 498 U.S. 1049, 111 S.Ct. 759, 112 L.Ed. 778 (1991) and *United States v. Thirion*, 813 F. 2d 146, 151 n. 5 (8th Cir. 1987) (allowing the extradited individual to bring any objections the rendering country might have raised) and *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (same) *cert. denied*, 479 U.S. 1009, 107 S. Ct. 652, 93 L.Ed. 2d 707 (1986).) This case squarely presents us with the question, and we therefore decide it. We hold that a criminal defendant has standing to allege a violation of the principle of specialty. We limit, however, the defendant's challenges under the principle of specialty to only those objections that the rendering country might have brought.
>
> Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289, 22 S. Ct. 484, 492, 46 L.Ed. 534 (1902). As a matter of international law, however, nations are under no legal obligation to surrender a fugitive from justice in the absence of a treaty. Bassiouni, at 319; *Factor v. Laubenheimer*, 290 U.S. 276, 287, 54 S.Ct. 191, 193, 78 L.Ed. 315 (1933). An extradition treaty is, therefore, a cooperative agreement between two governments for the prosecution and punishment of criminal offenders. *See* Bassiouni at 319. Extradition treaties typically specify certain offenses for which extradition will be granted as between the two respective nations. Upon receipt of an extradition request, the surrendering nation may examine the substance of each of the charges specified in the request, and may

438 109 F.3d 165 (3d Cir. 1997).

439 *Id.* at 168.

440 *Id.*

441 United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995). *See* United States v. Gallo-Chamorro, 48 F.3d 502 (11th Cir. 1995).

choose to grant extradition for only the extraditable offenses listed in the treaty. The doctrine of specialty, therefore, provides the surrendering nation with a means of ensuring compliance with this aspect of the extradition treaty, and "reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government . . . ." *Fiocconi v. Attorney General of United States*, 462 F.2d 475, 481 (2d Cir.), *cert. denied*, 409 U.S. 1059, 93 S.Ct. 552, 34 L.Ed. 2d 511 (1972). Consequently, the principle is an implicit limitation on the requesting nation's ability to prosecute the defendant. (The surrendering nation may be particularly concerned that the individual be tried for only common crimes as opposed to political crimes. By confining the terms of the individual's extradition to certain specified offenses, the principle of specialty furthers this goal of the surrendering nation. *See* Note, *International Extradition, The Principle of Specialty*, and *Effective Treaty Enforcement*, 76 Minn. L. Rev. 1017, 1025 (1992).)

The Supreme Court first recognized the doctrine of specialty in *United States v. Rauscher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886). Great Britain surrendered William Rauscher, the second mate on an American ship, to the United States on a charge of murder. The United States, however, tried and convicted him of a charge of infliction of cruel and unusual punishment. The extradition treaty listed murder as an extraditable offense, but did not contain the crime for which the court convicted Rauscher. *Rauscher*, 119 U.S. at 411, 7 S.Ct. at 236. Great Britain, moreover, had not specifically objected to Rauscher's trial on the cruel and unusual punishment charge. The Court, however, inferred that Great Britain would object to Rauscher's prosecution on the charge of infliction of cruel and unusual punishment based on that country's previous refusal to surrender a fugitive within its borders in the absence of a pledge from the United States that it would not try him for any other offense than that for which it had demanded him. *Rauscher*, 119 U.S. at 415, 7 S.Ct. at 238. The Court held that because Rauscher had been brought within the jurisdiction of the court under an extradition treaty, he could only be tried for one of the offenses described in the treaty and for the offense with which he had been charged in the extradition proceeding. *Rauscher*, 119 U.S. at 430, 7 S.Ct. 246.

In *Rauscher*, the Court drew a distinction between this country's treatment of a treaty and other countries in which a treaty is essentially a contract between two nations. Under our Constitution, the Court explained, a treaty is the law of the land and the equivalent of an act of the legislature. *Rauscher*, 119 U.S. at 418, 7 S.Ct. at 239–40. The Court's opinion suggests that the rights described in the treaty are conferred on both the extradited individual and the respective governments. The Court stated:

> *[A] treaty may also contain provisions which confer certain rights upon the citizens* or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and *which are capable of enforcement as between private parties in the courts of the country* . . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that "The Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land, as an Act of Congress is, whenever its provisions prescribe a rule by which *the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Rauscher, 119 U.S. at 418–19, 7 S.Ct. at 240 (quoting *Chew Heong v. United States*, 112 U.S. 536, 540, 565, 5 S.Ct. 255, 256, 269-70, 28 L.Ed. 770 (1884)) (emphasis added). Moreover, the Court asserted that it was "impossible to conceive" of an exercise of jurisdiction which could ignore the principle of specialty and not implicate a *"fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition." Rauscher*, 119 U.S. at 422, 7 S.Ct. at 242 (emphasis added). Finally, the Court concluded that the rule of specialty is "conclusive

upon the judiciary of the right conferred upon persons brought from a foreign country into this [country] under such proceedings." *Rauscher*, 119 U.S. at 424, 7 S.Ct. at 243.

We find support for our holding in *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), a companion case to *Rauscher*. Law enforcement officers kidnapped Ker in Peru and forcibly brought him to the United States to face a state court charge of larceny. He argued that his kidnapping violated the provisions of the United States–Peru extradition treaty. The Court rejected Ker's claim on the grounds that the extradition treaty was inapplicable because Ker had been abducted rather than extradited. 119 U.S. at 442, 7 S.Ct. at 228–29. The Court distinguished *Rauscher* on the grounds that Rauscher "came to this country clothed with a protection which the nature of such [extradition] proceedings and a true construction of the treaty gave him." *Ker*, 119 U.S. at 443, 7 S.Ct. at 229. When read together, *Ker* and *Rauscher* establish that when personal jurisdiction over a criminal defendant is obtained through extradition proceedings, the defendant may invoke the provisions of the relevant extradition treaty in order to challenge the court's exercise of personal jurisdiction.

All of the circuit courts of appeals have not embraced the holding we announce today. Other courts have held that an extradited individual lacks standing to assert the doctrine of specialty in the absence of an express objection on the part of the requested nation. Invariably, the courts that adhere to this rule consider the principle of specialty to be a matter of international law that inures solely to the benefit of the requested nation, protects its dignity and interests, and confers no rights on the accused. *Cf. Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed. 2d 133 (1973). These courts have taken the international law rule of construction that only nations may enforce treaty obligations, and inferred that an individual cannot, therefore, assert any rights under a treaty in our national courts. This analysis is flawed, we submit, because it ignores both the history of the concept of extradition and *Rauscher*.

As we stated earlier, extradition is not a part of customary international law. Therefore, in order to broaden the reach of their criminal justice systems, two nations may enter into a cooperative agreement for the exchange of criminal suspects: an extradition contract. *See De Geofroy v. Riggs*, 133 U.S. 258, 271, 10 S.Ct. 295, 298, 33 L.Ed. 642 (1890) (characterizing treaties as contracts between nations). The doctrine of specialty is but one of the provisions of this contract. Of course, the rights conferred under the contract ultimately belong to the contracting parties, the signatory nations. This does not mean, however, that provisions of the contract may not confer certain rights under the contract on a non-party who is the object of the contract. *See generally Rauscher*. We believe that *Rauscher* clearly confers such a right on the extradited defendant. The extradited individual's rights, however, need not be cast in stone; rather, the individual may enjoy these protections only at the sufferance of the requested nation. The individual's rights are derivative of the rights of the requested nation. We believe that *Rauscher* demonstrates that even in the absence of a protest from the requested state, an individual extradited pursuant to a treaty has standing to challenge the court's personal jurisdiction under the rule of specialty. The courts which have adopted the contrary holding, in effect, consider the requested state's objection to be a condition precedent to the individual's ability to raise the claim. We believe the Supreme Court's recent opinion in *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) seriously undermines any vitality that approach may have once possessed.

A grand jury indicted Humberto Alvarez-Machain, a citizen and resident of Mexico, for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar. Following unsuccessful informal negotiations between the United States and Mexico to obtain Alvarez-Machain's presence in this country, DEA successfully contracted with certain individuals for Alvarez-Machain's forcible kidnap and delivery to the United States. Alvarez-Machain contested the district court's personal jurisdiction over him on the grounds that his abduction violated the extradition treaty between the United States and Mexico. The district court granted his request and ordered his return to Mexico. The court of appeals affirmed the district court. The Supreme Court reversed.

> The actual holding of the case is that Alvarez-Machain could not contest the court's jurisdiction over him under the extradition treaty because he was not extradited pursuant to treaty proceedings. *See Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). The Court's analysis, however, rejects the premise underlying the cases that require the requested nation to object as a condition precedent to the individual's ability to claim the benefits of the rule of specialty.
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> In *Alvarez-Machain*, the Court rejected the Court of Appeal's reasoning that found that the extradition treaty prohibited forcible abduction, but that the abducted individual could only raise the issue if the offended government had formally protested. (*Alvarez-Machain* was an appeal from the decision of a panel of the Ninth Circuit Court of Appeals in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991). Interestingly, the appellate court used that Circuit's rule recognizing an extradited individual's standing to contest jurisdiction under the rule of specialty as a basis for finding that an abducted defendant could also contest the exercise of personal jurisdiction. Unlike the Ninth Circuit's specialty cases, however, the panel imposed the additional requirement that the offended government object to the abduction in order for the individual to have standing to raise the claim. *Verdugo-Urquidez*, 939 F.2d at 1356-57.) In rejecting the notion of conditionally self-executing treaty provisions, the Court explained that "if the [e]xtradition [t]reaty has the force of law . . . it would appear that a court must enforce it on behalf of an individual *regardless of the offensiveness of the practice of one nation to the other nation." Alvarez-Machain*, 504 U.S. at—, 112 S.Ct. at 2195–96, 119 L.Ed.2d at 454 (emphasis added). Importantly, the Court cited *Rauscher* in support of this proposition:
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> In *Rauscher*, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, *but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder*.
>
> *Alvarez-Machain*, 504 U.S. at 667, 112 S.Ct. at 2195, 119 L.Ed.2d at 454 (emphasis added). *Alvarez-Machain* demonstrates the infirmity in the reasoning of those cases which require an affirmative protest by the requested nation in order for the extradited individual to contest personal jurisdiction under the rule of specialty.
>
> We, therefore, hold that an individual extradited pursuant to an extradition treaty has standing under the doctrine of specialty to raise any objections which the requested nation might have asserted. The extradited individual, however, enjoys this right at the sufferance of the requested nation. As a sovereign, the requested nation may waive its right to object to a treaty violation and thereby deny the defendant standing to object to such an action. *See United States v. Riviere*, 924 F.2d 1289, 1300–01 (3d Cir. 1991); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 652. 93 L.Ed.2d 707 (1986). (The requested state's waiver of a treaty provision may occur either contemporaneously with the extradition or after the defendant has been surrendered to the requesting state.)[442]

The U.S. Supreme Court, in *United States v. Alvarez-Machain*,[443] considered whether a relator obtains standing to assert rights under an extradition treaty when the individual is forcibly abducted to the United States from a nation with which it has an extradition treaty. In deciding that the relator did not have such a right, the Supreme Court reversed the decision of the Ninth Circuit and subsequently vacated another Ninth Circuit judgment in *United States v. Verdugo-Urquidez*,[444] which was remanded for further consideration in light of the *Machain* decision. But the Supreme Court recognized the relator's standing to raise the issue.

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442 *Puentes*, 50 F.3d at 1571–1575.

443 United States v. Alvarez-Machain, 504 U.S. 655 (1992).

444 United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992). *See* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).

In *United States v. Alvarez-Machain*,[445] the Ninth Circuit upheld the district court's order that the government-sponsored forcible abduction of a Mexican national, without the consent or acquiescence of the Mexican government, violated the 1980 Extradition Treaty between the United States and Mexico, and that the specific formal diplomatic protests of the Mexican government to the U.S. government provided standing for the relator to assert rights under the Treaty in U.S. courts.[446] The court further affirmed the lower court's order requiring the release of Alvarez-Machain and ordering his repatriation to Mexico. The court held that prevailing practice dictated that claims for a violation of an extradition treaty may be made by an individual only if the sovereign involved raised a protest. Therefore, a claim that the method of securing Alvarez-Machain's presence violated the procedures of the Extradition Treaty may have been raised only if Mexico raised the protest.[447] The court held that this issue was distinct from the issue of whether the individual had standing to raise a violation of the principle of specialty because some courts "have held that either the state or individual may raise [this issue]."[448] However, as the relator was not asserting that he was being prosecuted for a crime other than that to which Mexico agreed during the extradition proceedings, and no extradition proceedings actually took place, no basis existed for deciding if a violation of the specialty principle occurred. The court concluded by stating that specialty is for the surrendering state and not the individual to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty.[449] Because the government of Mexico had protested the abduction, the relator acquired the right to enforce the Treaty in a U.S. court.

In *United States v. Verdugo-Urquidez*,[450] the Ninth Circuit held that an individual has a right under the extradition treaty to raise an objection to his prosecution if one of the signatory nations may claim a violation of the Treaty and formally does so. The court also stated:

> It follows *a fortiori* from the specialty principle, that if an individual has been kidnapped by a treaty signatory—i.e., if he has not been extradited for *any offense at all*—he may not be detained, tried or punished for any offense without the consent of the nation from which he was abducted.[451]

For a discussion of standing to object to abduction, see Chapter V.

6.6.5. Circuits That Require Some State Action from the Requested State before Conferring Standing to the Relator

The circuits that require a protest or objection by the requested state are the Second, Fifth, Sixth, and Seventh Circuits.

Although the rule inherently provides an added degree of protection for the relator, a case frequently cited for the proposition that the specialty principle is not a right of the accused, but rather a privilege of the surrendering state[452] is the Second Circuit case *Shapiro*

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445 United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 505 U.S. 1024 (1992), *rev'd*, 504 U.S. 655 (1992), *on remand*, 971 F.2d 310 (1992). *See also* United States v. Lazore, 90 F. Supp. 2d 202 (N.D.N.Y. 2000). For a discussion of the issue of unlawful seizure, *see* Ch. V.

446 United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

447 *Id.* at 607.

448 *Id.*

449 *Id.* at 608.

450 United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992). In this case, however, Mexico did protest. *See also* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).

451 *Id.* at 1351. In *Alvarez-Machain*, the Supreme Court did not deal with this question because Mexico had indeed protested. 504 U.S. 655 (1992) (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1886)). *See also* United States v. Lazore, 90 F. Supp. 2d 202 (N.D.N.Y. 2000).

452 *See* Berenguer v. Vance, 473 F. Supp 1195, 1197 (D.D.C. 1979); Kaiser v. Rutherford, 827 F. Supp. 832, 835 (D.C. Cir. 1993); Casey v. Dep't of State, 980 F.2d 1472 (D.C. Cir. 1992). *See also* Levitt, *supra*

v. Ferrandina.[453] In *Shapiro*, Chief Justice Friendly stated: "the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interest, rather than a right accruing to the accused."[454]

In *United States v. Lara*, the Second Circuit found the relator's extradition from Colombia was conditional upon his prosecution only with acts committed after December 17, 1997, which is the effective date of Columbia's extradition law permitting extradition of its nationals.[455] In rejecting Lara's claim, the Second Circuit noted:

> Lara identifies four violations of the doctrine of specialty: (1) evidence of his criminal activity prior to December 17, 1997 was deemed admissible at his trial (which was never held because of Lara's guilty plea); (2) evidence of his criminal activity prior to December 17, 1997 was used in calculating his sentence; (3) evidence relating to his participation in a separate, uncharged conspiracy was used in his sentencing; and (4) Lara could only be sentenced to the maximum term of imprisonment authorized for his crimes under Colombian law.
>
> First, it is settled that the doctrine does not alter the procedural and evidentiary rules that apply in United States courts. *United States v. Flores,* 538 F.2d 939, 945 (2d Cir.1976). Second, Judge Berman expressly declined at sentencing to consider any evidence of Lara's criminal activity prior to December 17, 1997, a point conceded by Lara at oral argument. Third, as Judge Berman observed, the indictment drew no distinction between Lara's participation in multiple criminal organizations, as Lara now suggests. Finally, although this Court has recognized that an extraditing country may set a maximum term of imprisonment as a condition of extradition, *see United States v. Campbell,* 300 F.3d 202, 211 (2d Cir.2002), *cert. denied,* 538 U.S. 1049, 123 S.Ct. 2114, 155 L.Ed.2d 1090 (2003), there is no such limitation here, and there is no authority for extending the doctrine of specialty in the manner Lara urges.[456]

In *Martonak v. United States*, the court stated:

> Before Martonak's claim can be addressed, the court must first address the question of whether Martonak has standing to raise it. There appears to be divided authority on that point, *see United States v. Nosov,* 153 F.Supp.2d 477, 480 (S.D.N.Y.2001) (collecting cases), with some courts holding that only the asylum state may raise issues of specialty, inasmuch as the rationale for the rule of specialty rests on protecting the interest of that state in preserving the limits of its agreement to extradite a particular defendant, and others holding that the extradited defendant may raise whatever objections the asylum state might have had. *See id.*[457]

In *Demjanjuk v. Petrovsky*,[458] the Sixth Circuit found support from *Shapiro* when noting its attempt to address every issue raised by the relator, including the "serious question whether

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note 204, at 1030 n.56; David Runtz, *The Principle of Specialty: A Bifurcated Analysis of the Rights of the Accused*, 29 Colum J. Transnat'l L. 407, 412 (1991).

453 Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973). *See also* Antwi v. United States, 349 F. Supp. 2d 663 (S.D.N.Y. 2004); Fiocconi v. Attorney General, 462 F.2d 475 (2d. Cir. 1972), *cert. denied*, 409 U.S. 1059, 935 S. Ct. 552 (1972); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981); United States v. Nosov, 153 F. Supp. 2d 477, 480 (S.D.N.Y. 2001); United States v. Masefield, 2005 U.S. Dist. LEXIS 1570 (S.D.N.Y. 2005).

454 *Shapiro*, 478 F.2d at 906.

455 United States v. Lara, 67 Fed. Appx. 72 (2d Cir. 2003).

456 *Id.* at 73–74.

457 United States. v. Martonak, 187 F. Supp.2d 117, 121 (S.D.N.Y. 2002).

458 Demjanjuk v. Petrovsky, 776 F.2d 571, 583–584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). For a reconsideration of that decision, see *Demjanjuk v. Petrovsky*, 10 F.3d 383 (6th Cir. 1993). *See also* Alfred deZayas, *Demjanjuk: Examining His Human Rights*, Human Rights 28–29 (A.B.A., Sec. of Individual Rights and Responsibilities) (Winter 1994).

Demjanjuk has standing to assert the principle of specialty. The right to insist on the application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested."[459]

In *United States v. Quinceno De La Pava*,[460] a district court case in the Northern District of Illinois, the relators asserted their prosecution for a 215-kilogram cocaine transaction violated the principle of specialty because the United States had only sought their extradition for a 34-kilogram transaction.

The court relied on the Seventh Circuit case, *Matta-Ballesteros v. Henman*,[461] to determine that the right to insist on the application of the principle of specialty belongs only to a party to the extradition treaty, and not to the relator. *Matta-Ballesteros* held that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved. In particular, the panel in *Matta-Ballesteros* held that without an official protest from the requested nation, the court could not determine that the surrendering state had objected to the relator's arrest, and therefore his claims of violation of international law did not entitle him to relief.[462]

In the Fifth Circuit case of *United States v. Kaufman*,[463] the relators contested their detention and trial on the grounds that it violated the international law principle of specialty in a case where Mexico, the surrendering state, made no protest to the prosecution of the two individuals. The court found that it was unnecessary to determine whether the relators were brought to the United States pursuant to a formal extradition in order to determine that the principle of specialty had been violated. The court reviewed its prior decisions to determine whether the relators could protest a violation of specialty in their own right and found no Fifth Circuit cases directly on point. The cases *United States v. Zabaneh*[464] and *Fiocconi v. Attorney General of United States* (even though the extradition was based on comity and not on a treaty),[465] however, cleared the way for the court to deny standing to the relators to claim the principle's protection. In *Zabaneh*, the Fifth Circuit considered the question of whether an individual has standing to raise extradition treaty violations generally, but not specifically whether an individual has standing to raise violations of the principle of specialty. *Zabaneh* held that where no party to a treaty protests a treaty violation, an individual lacks standing to raise the treaty as a basis for challenging the court's jurisdiction.[466] The Second Circuit court in *Fiocconi* held that the principle of specialty is a rule of domestic law conferring a judicial remedy on an extraditee only if the surrendering government would object, as the underlying substantive wrong, which grows out of international law, confers only the latter.[467] The court followed the rule in *Fiocconi*, considering the substantial similarity between it and the instant case,[468] and it rejected the relator's claim to the right of specialty.

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459 *Demjanjuk*, 776 F.2d at 583.

460 United States v. Quinceno De La Pava, 1993 WL 50943 (N.D. Ill. Feb. 23, 1993) (citing *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990)).

461 *Matta-Ballesteros*, 896 F.2d 255; *affirmed in* United States v. Burke, 425 F.3d 400 (7th Cir. 2005).

462 *Matta-Ballesteros*, 896 F.2d at 260.

463 United States v. Kaufman, 858 F.2d 994, 1006–1009 (5th Cir. 1988), *reh'g denied*, 874 F.2d 242 (1989).

464 United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988).

465 Fiocconi v. Attorney General of United States, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

466 *Kaufman*, 858 F.2d at 1007 n.3 (citations omitted).

467 *Fiocconi*, 462 F.2d at 479–480 n.8.

468 *Kaufman*, 858 F.2d at 1008–1009.

6.6.6. Circuits in Which the Issue of Standing Is Not Clearly Decided

Thus far, the District of Columbia, the First, and Fourth Circuits remain ambiguous as to whether an individual has standing to raise the issue of specialty. In *Casey v. Department of State*,[469] the D.C. Circuit Court maintained that the question of whether the extraditee has standing to raise the specialty principle remains open, by stating: "As a contract between the United States and Costa Rica, the 1922 Treaty arguably protects the interests and rights of only the signatory nations, rather than those of the fugitive."[470] The Fourth Circuit case *United States v. Davis*,[471] directly acknowledged this, stating:

> We note preliminarily that the Circuits are split regarding whether an individual defendant has standing to raise the issue of a violation of the principle of specialty.... This court has not yet addressed the issue and, on the facts of this case, we decline to do so. Instead, we find that by failing to object to the district court... Davis has waived his right to appeal on this issue.[472]

The First Circuit in *Brauch v. Raiche*[473] gives a relator standing to raise the issue of dual criminality, but remains ambiguous as to specialty. The 1995 decision of *United States v. Sacoccia* allowed the raising of the issue of specialty, but rejected it as to dual criminality, using language indicating some confusion as to the standards applicable to the rule of dual criminality and the tenets of the principle of specialty.[474] Almost as if it were prescient of that confusion, the Eleventh Circuit in *United States v. Gallo-Chamorro*[475] stated:

> The doctrine of dual or double criminality is distinct from the doctrine of specialty.
>
> Double criminality refers to the characterization of the relator's criminal conduct insofar as it constitutes an offense under the laws of the respective states... "Double criminality" is in effect a reciprocity requirement which is intended to ensure each of the respective states that they (and the relator) can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct which it does not characterize as criminal.[476]

6.6.7. Eventual Supreme Court Review

It is assumed that the Supreme Court will, in the not-so-distant future, grant certiorari to a case involving specialty, if for no other reason than it cannot leave unresolved for too long the conflict among the circuits and because of its decision in *Medellin v. Dretke* on treaty interpretation.[477] The connection between the majority opinion in this case and the issues often raised at the district and appellate level are quite similar. In *Medellin v. Dretke* the Supreme Court stated:

> While treaties are compacts between nations, a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits

469 Casey v. Dep't of State, 980 F.2d 1472 (D.C. Cir. 1992).

470 *Id.* at 1476.

471 United States v. Davis, 954 F.2d 182 (4th Cir. 1992).

472 *Id.* at 186–187.

473 Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980); United States *v.* Saccoccia, 58 F.3d 754, 767 (1st Cir. 1995) ("while we take no view of the [standing] issue... the side that favors individual standing has much to commend it."), *cert. denied*, 517 U.S. 1105, 116 S. Ct. 1322 (1996).

474 United States v. Sacoccia, 58 F.3d 754, 769–776 (1st Cir. 1995); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); United States v. Tse, 135 F.3d 200 (1st Cir. 1998). *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000).

475 United States v. Gallo-Chamorro, 48 F.3d 502 (11th Cir. 1995).

476 *Id.* at 507.

477 Medellin v. Dretke, 544 U.S. 660 (2005).

> of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.[478]

If the Supreme Court recognizes that treaties not only create obligations for the benefit of the contracting states but also rights and privileges for the benefit of individuals, as third party beneficiaries, then the division between the circuits as to a person's standing to raise the issue of specialty without having to rely on a protest by the originally requested state, is a logical conclusion.

Moreover, the Supreme Court could also address the principle's scope particularly with respect to the issues of enhancement of penalties in the appropriate case that raises the issue of specialty.[479] Last, but not least, the Supreme Court, given the appropriate case, might consider another related issue of treaty interpretation, but which in this case also goes to prosecutorial conduct, namely that of carrying out the obligations arising under specialty in good faith.[480]

6.7. Extension of the Specialty Principle: Limitations on Re-Extradition[481]

One extension of specialty applies to re-extradition to a third state. In this situation, the state that originally sought the surrender of an individual secures the person and then considers further extraditing him/her to a third state that subsequently requests extradition from the first requesting state, which is now in custody of the individual. If this occurs, the re-extraditing state must first secure the consent of the original requested state before granting the extradition request of the third state.[482] This extension of the principle manifests the continued interest of the original requested state in compliance with the purposes and grounds for which its processes had been set in motion and for which it granted extradition.[483]

The limitation on re-extradition by means of extending the principle of specialty is particularly relevant in cases where the death penalty can be applied in the state to which the relator is to be re-extradited. Assurances from that state must be obtained unless the original extraditing state agrees to the re-extradition without such assurances.[484]

The issue of extension of the principle of specialty was raised in connection with extradition from the United States to Hong Kong pursuant to the treaty between the United States and the United Kingdom.[485] Sovereignty over Hong Kong, however, reverted to the People's Republic

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478 *Id.* at 680, quoting Edye v. Robinson ("Head Money Cases"), 112 U.S. 580 (1884).

479 *See infra* Sec. 6.4.

480 This relates to the Department of Justice providing assurances to foreign governments, which are not maintained. *See* United States v. Gonzalez, 275 F. Supp. 2d 483 (S.D.N.Y. 2003) (denying motion to dismiss charges where United States gave assurances in a diplomatic note but couched them in terms from which it could back out); for a discussion of *Kirkwood,* see *infra* Sec. 7.3. *See also* Gonzalez v. Justices of the Mun. Ct. of Boston, 420 F.3d 5 (1st Cir. 2005).

481 *See* Ch. XII.

482 *In re* Arietto, 7 Ann. Dig. 334 (Cass. 1933) (Italy).

483 *See* United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935). *See also* Note, *International Law—Re-extradition of Extradited Prisoner—Withdrawal of Asylum for Limited Purpose*, 35 Colum. L. Rev. 295 (1935).

484 *See generally* Speedy Rice & Renee Luke, *U.S. Courts, The Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 Santa Clara L. Rev. 1061 (2002).

485 Dated June 8, 1972, 28 U.S.T. 227 was made applicable to Hong Kong by an exchange of diplomatic notes on October 21, 1876. *See* 28 U.S.T. at 238–241. *See also* Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, T.I.A.S. No. 12050.

of China on July 1, 1997.[486] Surrender by the United States to Hong Kong does not guarantee that the PRC now deems itself bound by the United States–United Kingdom extradition treaty and its specialty obligations. The question therefore arises as to whether the United States can effectuate such a surrender without seeking assurances from the People's Republic of China that it shall be bound by the U.S. extradition order.[487]

As the PRC is not a party to the United States–United Kingdom Extradition Treaty extradition treaty, it does not have to abide by it. But under the People's Republic of China–United Kingdom agreement concerning the reversion of Hong Kong to Chinese control, the PRC has certain treaty obligations toward the United Kingdom—and that would include the UK's obligations to the United States with respect to extradited persons. But that is only a hypothesis, and it does not fully guarantee the United States and the relator for whose benefit that such assurances should be obtained. This question, however, is still open in the United States.[488]

Of particular importance is whether it is the judiciary that has to make sure that specialty is extended to another state and that assurances are obtained, or whether it is the executive branch that has that prerogative.[489] In the opinion of this writer, the judiciary should await receipt of assurances from the requesting state through the executive branch.

The requested state, through the principle of specialty, exercises a long-arm residual jurisdiction over the relator, who had been subject to its exclusive jurisdiction that it had exercised for a special purpose and that it is entitled to see is not abused or misused.

In *United States v. Feng*,[490] the U.S. government conceded that the extradition of one of the relators from Canada to Kansas to face prosecution on a charge violated the principle of specialty.[491] However, the U.S. government transferred the relator to the appropriate federal district in New Mexico where the case had been resolved, and the relator was returned to Canada

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486 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of China on the Question of Hong Kong, December 19, 1984.

487 Oen Yin-Cho v. Robinson, 858 F.2d. 1400 (9th Cir. 1988), *cert. denied* 490 U.S. 1106 (1989), partially addressed this question. *Cheng Ha-Yuet v. Hueston*, 734 F. Supp. 988 (S.D. Fla.), *aff'd.* 932 F.2d 977 (11th Cir. 1991) held that an extradition to Hong Kong before reversion was not an extradition to China because of the upcoming reversion. The same conclusion was reached by *Oen*, *id.* at 1403–1404. Both cases, however, do not address the issue of assurances that specialty will be respected by China.

488 It has been raised and derived by the extradition magistrate in *In re Extradition of Lui Kin-Hong a/k/a Jerry Lui* (D. Mass. No. 95-M 1072-2RK), to date an unpublished magistrate opinion of August 29, 1996. For the same case involving the other issues, see *In re Extradition of Lui Kin-Hong*, 913 F. Supp. 50 (D. Mass. 1996), and 926 F. Supp. 1180 (D. Mass. 1996), *order rev'd per curiam*, 83 F.3d 523 (1st Cir. 1996), *on remand*, 939 F. Supp. 934 (D. Mass 1996), *habeas corpus granted by* 957 F. Supp. 1280 (D. Mass. 1997), *reversed by* 110 F.3d 103 (1st Cir. 1997).

489 Several cases hold that such matters are better left to be handled by the secretary of state, who can obtain assurances and establish conditions to the surrender. *See* Demjanjuk v. Petrovsky, 776 F.2d 571, 589 (6th Cir. 1985); Emami v. U.S. Dist. Ct., 834 F.2d 1444, 1454 (9th Cir. 1987); Sindona v. Grant, 619 F.2d 167, 176 (2nd Cir. 1980). This solution is, however, subject to political considerations, both foreign and domestic. Because of the doctrine of separation of powers, a judicial officer cannot demand or receive assurances from foreign states. This is clearly part of the executive's constitutional prerogatives. United States v. Mazzi, 888 F.2d 204, 206 (1st Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1017 (1990); Koskotas v. Roche, 931 F.2d 169, 173–174 (1st. Cir. 1991). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

490 2009 U.S. Dist. LEXIS 37903 (D. Kan. 2009).

491 *Id.* at *15.

after serving his sentence.[492] After arriving in Canada, the relator was subsequently indicted in the United States for one count of failure to appear in the District of Kansas, which formed the basis of a new extradition request from the United States to Canada.[493] The relator was subject to an Immigrations and Customs Enforcement hold.[494] The relator argued that the prior violation of the principle of specialty required the dismissal of the charges, while the U.S. government argued that dismissal was inappropriate under the treaty as the relator was subject to prosecution if he left the United States and voluntarily returned or if he had not left the United States within thirty days after being free to do so.[495] The court found that any violation of specialty had been cured by the relator's transfer to the appropriate federal district court, and declined to dismiss the indictment at issue pending Canada's decision on the pending extradition request.[496] The court also reasoned that the United States was not prosecuting an indictment against the relator, but was merely pursing an indictment at the time, and "an indictment alone does not violate the principle of specialty; rather it is the prosecution of that indictment."[497]

6.8. Other Issues of Pertaining to Standing

A relator has no standing to object in the United States if the requested state waived the principle of specialty.[498] A relator has standing to object to retrial and other grounds arising under U.S. law, just as any other relator would. This includes all the defenses, exceptions, exemptions, and exclusions arising under the applicable treaty, and under the U.S. Constitution, state constitutions (where the case is before a state court), U.S. federal law, state laws, and case law (see Chapter VIII).

6.9. The United States as the Requested State and the Principle of Specialty

When surrendered by the United States, the surrender is accompanied by a certificate issued by the secretary of state and includes the judicial order upon which the individual is being extradited. It is on the basis of that final order that the prosecution in the foreign requesting state is conducted. Any variation requires the foreign requesting state to receive permission from the United States to proceed on the basis of the variance. The U.S. government, acting through the secretary of state, cannot grant a variance from a final judicial order without first seeking to have the court that issued the extradition order review it and decide whether the waiver is to be granted. In such a case, the court will ascertain whether the variance falls within its findings of probable cause pursuant to the applicable treaty and to § 3184. If the variance falls within the meaning of the earlier finding of probable cause by the court, it will be granted. If not, the court must hold a new extradition hearing. In any event, additional judicial hearings on variances are such as to give notice to the interested party and an opportunity to be heard through counsel. There are no cases whereby an extradited individual was allowed to return to the U.S. to argue in person against a request for a variance.

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492 *Id.* at *15, *19–*20.

493 *Id.* at *17.

494 *Id.* at *20.

495 *Id.* at *16, *18–*19.

496 *Id.* at *20.

497 *Id.*

498 United States v. Stokes, 2010 U.S. Dist. LEXIS 45366 (N.D. Ill. 2010); United States v. Tse, 135 F.3d 2000 (1st Cir. 1998); Berthaumieu v. Gibson, 1997 U.S. App. LEXIS 34867; United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal. 1998).

6.10. The Position of the *Restatement (Third) of the Foreign Relations Law of the United States* on Specialty

The American Law Institute's position on the doctrine of specialty is as follows:

> § 477. Doctrine of Specialty.
>
> Under most international agreements, state law, and state practices:
>
> (1) A person who has been extradited to another state will not, unless the requested state consents,
>
> (a) be tried by the requesting state for an offense other than one for which he was extradited; or
>
> (b) be given punishment more severe than was provided by law in the requesting state for the offense charged at the time of the request for extradition.
>
> (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state.
>
> Comment:
>
> *(a) Variance between request for extradition and prosecution.* Courts in some states construe the doctrine of specialty strictly, so that any variance between the charge on which the extradition was based and the charge on which the prosecution is founded must lead to dismissal of the prosecution. In other states, including the United States, Reporters' Note 1, if the prosecution is based on the same facts as those set forth in the request for extradition, the prosecution may go forward.
>
> The doctrine of specialty applies only to offenses committed prior to the person's extradition and does not preclude prosecution for an offense committed in the requesting state after the person had been returned there. See also Comment *e*.
>
> *(b) Doctrine of specialty as right of accused and of requested state.* The object of the doctrine of specialty is to prevent punishment of a person who might not have been extradited if the plans of the extraditing state had been fully disclosed. Both the person extradited and the extraditing state are beneficiaries of the doctrine. Even if the prosecution meets the criteria set forth in Comment *a*, i.e., the charges are based on the same set of facts as set forth in the request for extradition, the prosecution may not go forward if the crime charged is not one included in the treaty and in the request for extradition, unless the extraditing state consents expressly or by implication. While the case law in the United States and elsewhere is not consistent on the point, it appears that the person extradited has standing to raise the issue by motion during or in advance of his trial. The standard for adjudicating such a motion in the United States is whether the state from which the accused was extradited has objected or would object to prosecution on a given charge. However, the fact that the person extradited consents to prosecution on different charges is not determinative since the obligation embodied in the doctrine of specialty runs to the requested state.
>
> *(c) Evidence not submitted with extradition request.* So long as the evidence submitted with the request for extradition meets the standard of proof needed to extradite, § 476(1)(a) and Comment *b*, there is no obligation on the requesting state to set forth all its evidence in the request for extradition, or indeed to wait until the investigation is complete before making the request. Thus, there is no right to object to introduction of evidence in a trial that was not made part of the request for extradition, as long as it is directed to the charge contained in the request for extradition. Evidence of offenses prior to the offense on which the extradition was based may be introduced for purposes of multiple offender sentencing, demonstrating propensity to commit crime, and similar ancillary purposes, if otherwise admissible according to the law where the prosecution is brought.
>
> *(d) Re-extradition*. Under many treaties a person extradited from one state to another may not be extradited or otherwise surrendered to a third state for prosecution for an act committed prior

to his extradition, without the consent of the original extraditing state. See, e.g., Convention on Extradition between the United States and Sweden, 1963, Art. IX, 14 U.S.T. 1845, T.I.A.S. No. 5496, 494 U.N.T.S. 141.

(e) Effect of remaining in requesting state. Most modern extradition treaties provide a specified period, such as 45 days, after disposition of the charge, in which the person extradited is free to leave the state, i.e., after an acquittal, dismissal of prosecution, or service of sentence. If the person extradited remains in the requesting state beyond the period specified, he may be tried also for offenses alleged to have been committed prior to extradition and not contained in the extradition request.

(f) Death penalty. Generally, a sentence of death may not be imposed on a person extradited from another state unless the request for extradition expressly indicated that the accused might be subject to such a sentence and the requested state surrenders a person on condition that the sentence of death not be imposed, this condition is binding on the requesting state. See, e.g., Article VIII of the treaty between the United States and Sweden, Comment *d*.[499]

6.11. The Principle of Specialty and Assurances in Light of Governmental Interests[500]

The principle of specialty and diplomatic assurances are two of the most important mechanisms by which requested states ensure that an individual's rights are protected after extradition to the requesting state. As described above, the principle of specialty requires that the requesting state only prosecute the extradited individual for the exact crimes indicated in the extradition order. A diplomatic assurance is a statement in the form of a letter or diplomatic note by the requesting state to the requested state that the extradited individual will not be subjected to a particular charge, punishment, or treatment. This may include such matters as to the place and conditions of detention of the surrendered person, access to his/her counsel, and visitation by the consular representative of the surrendering state. Assurances may be, but are not usually, incorporated into the extradition order, but they are operative through the principle of specialty. In this way, the principle of specialty and assurances operate to protect individuals and enforce their rights under the laws of the requested state. When assurances are only in the form of a diplomatic note, and are not included in the extradition order, it is more difficult to enforce them before U.S. courts because the U.S. government may tend to consider the exchange of diplomatic notes or the issuance of unilateral assurances as being in the nature of diplomatic relations between the two states, and thus not justiciable. U.S. courts have been unsure as to how to deal with such situations.

Diplomatic assurances are conventionally made by the U.S. secretary of state or the foreign minister in another state to their respective counterparts in the requested state. As a matter of practice these notes are issued by the ambassador representing the state making the given representation. The problem with diplomatic assurances is that governments often approach them opportunistically and cynically by making vague assurances in order to ensure the extradition of the individual without regard to the actual enforceability of the assurance before the courts. Most often this occurs because the individual or governmental entity giving the assurance does not provide the requested state with a complete understanding of the extent of the assurance, or the legal context of the assurance in the requesting state, both of which are necessary in order to allow the requested state to make a complete and accurate assessment of the request in light of their own constitution, laws, and treaty obligations toward the requested individual. In other words, governments are often willing to make assurances that they cannot necessarily guarantee or enforce due to constitutional and structural limitations in order to secure the surrender of the sought individual. In the United States this is especially so because of the significant extent

499 Restatement (Third) of the Foreign Relations Law of the United States (1988) § 477.

500 *See also* Ch. II, Sec. 6.3 and Ch. VIII, Sec. 6.

to which powers are reserved to states, as well as to local judicial districts within states, and that the federal government cannot make a binding commitment on behalf of these state and local institutions. It has been the case on a number of occasions that the U.S. government has given assurances without informing the requested state of the ultimate authority of the state attorney general or local prosecutor to determine what charges or punishments to pursue, and on one occasion concerning the statutory limitation on its ability to influence the U.S. Bureau of Prisons.[501] This has led to significant problems for a number of foreign states that do not fully grasp the complex nature of American federalism and the limited capacity of the secretary of state to make a binding commitment for local jurisdictions and officials.

The lack of consistency on this issue raises questions over the enforceability of assurances, as part of the comity of nations that is part of customary international law and that is binding upon the United States.[502] In the end, the lack of transparency and consistency poses a threat to the relations between states and the extradition regime itself, which is built upon reciprocity.[503] This practice also raises the question of the need for states to receive assurances directly from the individual or institution with actual control over prosecutions. Short of receiving word from the entity with actual authority, assurances are not binding and should not be accepted by the requested state.

The death penalty is one of the most contentious aspects of extradition law, as there is a growing division between countries that have abolished the practice and those that retain it, as well as a greater willingness of abolitionist states to refuse extradition to retentionist states on humanitarian grounds, thereby rejecting the general prohibition against doing so found in the rule of non-inquiry.[504] One of the ways in which this is done is through the provision of assurances in the form of a letter or diplomatic note[505] that an individual will not receive a specific punishment if convicted, which in effect turns the extradition agreement, and the possible punishment, into one that is limited by the principle of specialty.

This is most often the case when an individual is charged for a capital crime and is sought for extradition from a state that does not have the death penalty and whose constitution, laws, or international treaty obligations prohibit it from extraditing individuals to retentionist countries for capital offenses.[506] In such instances the requesting state will have to provide diplomatic

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501 *See* United States of America v. David R. Mendoza,*Drug Trafficker Pleads Guilty to BC Bud Importation Conspiracy*, Department of Justice, June 19, 2009, *available at* http://www.justice.gov/usao/waw/press/2009/jun/mendoza.html.

502 U.S. Const. art. VI. Article 6 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

503 *See* Ch. I, Sec. 2.1.

504 *See infra* Sec. 8.

505 *See infra* Sec. 7.

506 Amnesty International estimates that as of April 2013, 140 countries are either abolitionist for the death penalty for all crimes, abolitionist for ordinary crimes, or abolitionitist in practice, while 58 retain the death penalty. Of these only 21 states actually executed individuals in 2012, and in practice the use of the death penalty is centered on five states, namely China, Iran, Iraq, Saudi Arabia, and the United States. In 2012, 43 executions were carried out in the United States. Belarus is the only country in Europe or Central Asia to have carried out an execution in 2012. *See* Amnesty International, Death Sentences and Executions 2012 (2012). In particular, according to Amnesty International:

- Ninety-seven (97) have abolished the death penalty for all crimes, namely: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bosnia-Herzegovina, Bulgaria, Burundi, Cambodia, Canada, Cape Verde, Colombia, Cook Islands, Costa Rica, Cote

assurances to the requested state to the effect that the requested individual will not be subjected to the death penalty. The same approach, namely obtaining assurances from the requested state, is followed with respect to torture and other forms of cruel, inhuman, or degrading treatment or punishment.[507]

6.11.1. The Death Penalty[508]

The use of assurances against the use of the death penalty most commonly arises within the context of extraditions from European states to the United States. The death penalty in Europe has been continually scaled back, beginning with Protocol 6[509] to the European Convention for the

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D'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome And Principe, Senegal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, and Venezuela.

- Eight (8) have abolished the death penalty for ordinary crimes, namely Bolivia, Brazil, Chile, El Salvador, Fiji, Israel, Kazakstan, and Peru.
- Thirty-five (35) are abolitionist in practice (i.e. "Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions."), namely Algeria, Benin, Brunei, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Ghana, Grenada, Kenya, Laos, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Morocco, Myanmar, Nauru, Niger, Papua New Guinea, Russian Federation, Sierra Leone, South Korea, Sri Lanka, Suriname, Swaziland, Tajikistan, Tanzania, Tonga, Tunisia, and Zambia.
- Fifty-eight (58) have retained the death penalty, namely: Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Democratic Republic of the Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, North Korea, Oman, Pakistan, Palestinian Authority, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad And Tobago, Uganda, United Arab Emirates, United States Of America, Viet Nam, Yemen, and Zimbabwe.

In 2012, the number of documented executions per country were at least: Afghanistan: 14; Bangladesh: 1; Belarus: 3; China: unknown; Gambia: 9; India: 1; Iran: 314; Iraq: 129; Japan: 7; North Korea: 6; Pakistan: 1; Gaza (Hamas): 6; Saudia Arabia: 79; Somalia: 6; Sudan: 19; South Sudan: 5; Taiwan: 6; United Arab Emirates: 1; United States: 43; and, Yemen: 28. There are no accurate figures for China, but it appears that several thousand were executed there.

507 *See* The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93 plen. mtg., at 395, U.N. Doc. A/64, at 63 (1984).

508 *See also* Ch. VIII, Sec. 6.

509 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, June 28, 1983, E.T.S. 114. There are forty-six state-parties to Protocol 6, namely: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United

Protection of Human Rights and Fundamental Freedoms (ECHR),[510] which abolished the practice in peacetime in 1982, and Protocol 13, which abolished the punishment at all times, whether in times of peace or war, in 2002.[511]

After the adoption of Protocol 6 in 1982 the question arose over the extradition of individuals from Europe to countries where the death penalty was still in force, and whether extradition in such circumstances would violate those states' treaty obligations under the ECHR. In order to secure the extradition of individuals from Europe, the U.S. government began giving assurances to requested states in the 1980s to the effect that the requested individual would not be subject to the death penalty. The first cases regarding extradition and assurances in death penalty cases came before the European Court of Human Rights in the petitions of *Kirkwood* and *Soering*, and both are landmarks on the issue.

The first of these cases arose in 1984 concerning Ernest Major Kirkwood, a U.S. citizen residing in the United Kingdom who was wanted by the state of California on a charge of double-homicide, a crime that was potentially subject to the death penalty. On the basis of the indictment the U.S. government sought Kirkwood's extradition from the United Kingdom.[512] In order to secure Kirkwood's extradition, the U.S. government made representations to the UK government that Kirkwood would not be subjected to the death penalty if extradited.[513] This representation was necessary for the United Kingdom to extradite him, as it had abolished the death penalty.[514] Kirkwood, however, filed a petition with the European Commission of Human Rights,[515] arguing

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Kingdom. Russia has signed but not ratified the Protocol. Amnesty International considers Russia to be abolitionist in practice.

510 European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45) (*entry into force* Sept. 21, 1970), Protocol No. 5 (ETS No. 55) (*entry into force* on December 20, 1971), Protocol No. 8 (ETS No. 118) (*entry into force* Jan. 1. 1990), Protocol No. 2 (ETS No. 44) (Sept. 21, 1970), Protocol No. 11 (ETS No. 155) (*entry into force* Nov. 1, 1998). For the European Convention's provisions on cruel, inhuman, and degrading treatment or punishment, see European Convention, *supra* at art. 3.

511 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, May 3, 2002, E.T.S. 187. There are forty-three state-parties to Protocol 13, namely: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Armenia and Poland have signed but not ratified the Protocol, but Amnesty International considers both to be abolitionist in practice.

512 The request was made under the 1972 United States–United Kingdom Extradition treaty, 28 U.S.T. 227. Article 4 of the Convention states: "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out."

513 The request was made under the 1972 UK–U.S. Extradition Treaty, 28 U.S.T. 227. Article 4 of the Convention states: "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out."

514 *See Regina v. Sec. of State for the Home Dept. ex parte Kirkwood*, [1984] EWHC (QB) 913, (1984) 1 W.L.R. 913 (Eng.).

515 *Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by Article 3 would be grossly violated by

that the delays in carrying out the death penalty and the resulting "death row syndrome" would constitute cruel, inhuman, and degrading treatment or punishment in violation of Article 3 of the ECHR. The Commission recognized the merits of Kirkwood's claim, but as the U.S. government presented assurances in writing to the UK government that the death penalty was not going to be sought by the State of California, his extradition was eventually granted.[516]

Although it was true that an understanding had been reached between UK and U.S. officials concerning the non-application of the death penalty should Kirkwood be extradited, and the U.S. government gave the United Kingdom a diplomatic assurance to this effect, neither the U.S. Department of State nor the Department of Justice had secured similar assurances from California's legal authorities, including the attorney general and the district attorney of San Francisco. Accordingly the assurance was not binding upon the local officials and was without effect because there was no constitutional basis allowing the federal government to tell the attorney general of California or the district attorney of San Francisco how to prosecute the case or what punishment to pursue.

A problem arose when the district attorney sought the death penalty against Kirkwood.[517] This was clear from the outset, however, to the secretary of state and anyone who followed the *Kirkwood* case in California. Under California law there is a bifurcated, dual track model for prosecutions that required the prosecutor to indicate prior to the commencement of the trial whether he/she was pursuing the death penalty in the case. Upon certifying to the court that the death penalty would be pursued special procedures are triggered, in particular special jury instructions at the start of the case, all of which is made public. In the course of the proceedings in *People of the State of California v. Kirkwood*, the United Kingdom realized that the assurances offered by the United States prior to Kirkwood's extradition could not effectively be relied upon to shield him from the death penalty. The U.S. government responded that it interpreted its assurance as being a "best efforts clause," and therefore that it had not violated its obligations or acted inconsistently with its constitutional authority when making the assurance. Eventually an evidentiary hearing was held at which the UK foreign office legal adviser and this writer testified as expert witnesses to explain that the assurance that had been given by the U.S. government was binding.[518] Eventually, the San Francisco district attorney dropped the death penalty charge, thereby removing from the jury the discretion of choosing the death penalty. In doing so the intent of the assurance was satisfied even though the district attorney's determination not to pursue the death penalty was not based on a legal obligation but on discretion and presumably back channel pressure.

The unfolding of the case and the apparent ineffectiveness of the U.S. government's assurance shocked European legal circles, and when a few years later a similar extradition request for murder was presented by the United States to the United Kingdom in the *Soering* case, the *Kirkwood* precedent loomed large. In *Soering*, the U.S. government again offered assurances, but Soering pled his case his case before British courts.[519] Soering argued that the British

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requesting nation). *See also* William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581, 596–598 (2003).

516 *See Regina v. Sec. of State for the Home Dept. ex parte Kirkwood*, [1984] EWHC (QB) 913, (1984) 1 W.L.R. 913 (Eng.).

517 People v. Kirkwood, San Francisco Superior Court, No. 115353 (1987).

518 Kirkwood was tried for first-degree murder on two counts. After his first trial resulted in a hung jury, he pled guilty on the eve of his second trial and received a sentence of seventeen years to life. *Kirkwood*, San Francisco Superior Court, No. 115353; Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases after* Soering, 17 Yale J. Int'l L. 85, 109 (Winter 1992), *citing* UPI, July 24, 1987, *available* in LEXIS, Nexis Library Wires File.

519 The European Commission of Human Rights accepts petitions from individuals who have exhausted all domestic remedies. Thereafter, actions can be filed with the European Court of Human Rights if the Commission makes a positive decision on the original petition. Such action before the Court,

Foreign Secretary had violated Article IV of the United States–United Kingdom Extradition Treaty by failing to obtain an ironclad promise from Virginia prosecutors not to seek the death penalty against him. Article IV of the treaty allows the requested state to refuse to surrender capital felons unless the requesting state gives assurances that the death penalty will not be carried out.[520] Soering argued that the Virginia prosecutor's assurances that the death penalty would not be carried out were far short of the requirements the treaty provision imposed on the foreign secretary. The divisional court disagreed,[521] and Soering applied to the European Commission on Human Rights, where he contended that his extradition would expose him to the "death row syndrome"—a severe form of emotional distress that is caused by the prolonged uncertainty during the lengthy appeals process in capital cases, combined with the severe conditions of confinement on death row—that he alleged constituted "inhuman or degrading treatment or punishment," thereby violating Article 3 of the ECHR. The Commission rejected Soering's Article 3 claim by a vote of six to five. In the majority's view, the "death row phenomenon" did not constitute inhuman or degrading treatment or punishment.[522] The Commission did, however, refer the case to the European Court of Human Rights (ECtHR). The Court, in *Soering v. United Kingdom*,[523] ruled that if the United Kingdom extradited Soering to the United States without sufficient assurances against the imposition of the death penalty, it would violate the ECHR.[524] The ECtHR further determined that the assurances by the United States notwithstanding, the "death row syndrome" that was the result of death penalty proceedings in the United States violated Protocol 6 to the ECHR.[525] It should be noted, however, that the Court did not hold that the imposition of the death penalty violated Article 3 per se. It explicitly refused to go that far, as it noted that Article 2 of the ECHR permits states to impose

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however, can be filed only by a member state to the European Convention. The same process applies to the Inter-American Commission on Human Rights and Inter-American Court on Human Rights. European Convention, *supra* note 510, arts. 24–25 at 236.

520 Extradition Treaty, June 8, 1972, U.S.–UK, 28 U.S.T. 227. Article IV provides:

> If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

Id. at 230.

521 *In re* Soering, 1988 Crim. L. Rev. 307. *See also* Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The* Soering *Case*, 11 Mich. J. Int'l L. 845 (1990); David L. Gappa, *European Court of Human Rights-Extradition—Inhuman or Degrading Treatment or Punishment,* Soering Case, *161 Eur. Ct. H.R. (Ser. A) (1989)*, 20 Ga. J. Int'l & Comp. L. 463 (1990); James M. Lenihan, Soering's *Case: Waiting for Godot—Cruel and Unusual Punishment?*, 4 Pace Y.B. Int'l L. 157 (1992); Shea, *supra* note 518.

522 Soering Commission Report, *reprinted in* 161 Eur. Ct. H.R. (ser. A) 1, 67–68 (1989), *and in* 28 I.L.M. 1063 (1989); *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989).

523 *Soering v. United Kingdom*, Judgment of the European Court of Human Rights, July 7, 1989, European Court of Human Rights, Series A, Vol. 16.

524 The European Court is the higher body. Note that since 1998, the Commission has been abolished by Protocol 11 of the ECHR, and all matters go directly to the Court. A chamber decides first on admissibility and after that, the case is presented for adjudication. Protocol No. 11 to the European Convention on Human Rights and Fundamental Freedoms (November 1998) (replacing the existing, part-time Court and Commission by a single, full-time Court).

525 *See* Christine Van Den Wijngaert,*Rethinking the Law of International Criminal Cooperation: The Restrictive Function of International Human Rights through Individual-Oriented Bars, in* 33 Principles and Procedures for a New Transnational Criminal Law 496 (Albin Eser & Otto Lagodny eds., 1991). *See also, e.g.*, William A. Schabas, The Abolition of the Death Penalty in International Law (1993).

capital punishment.[526] Instead, the Court limited itself to finding that the manner in which the death penalty was imposed in Virginia constituted inhuman or degrading punishment.

With regard to the death penalty and assurances, the ECtHR explained that:

> 69. Relations between the United Kingdom and the United States of America on matters concerning extradition are conducted by and with the Federal and not the State authorities. However, in respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State. If a State does decide to give a promise in relation to the death penalty, the United States Government has the power to give an assurance to the extraditing Government that the State's promise will be honoured.
>
> According to evidence from the Virginia authorities, Virginia's capital sentencing procedure and notably the provision on post-sentencing reports (see paragraph 47 above) would allow the sentencing judge to consider the representation to be made on behalf of the United Kingdom Government pursuant to the assurance given by the Attorney for Bedford County (see paragraph 20 above). In addition, it would be open to the Governor to take into account the wishes of the United Kingdom Government in any application for clemency (see paragraph 60 above).

The Court ultimately determined that

> the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out (see paragraphs 20, 37 and 69 above).[527]

The *Soering* decision was ultimately influenced by the lack of reliability of the U.S. government's assurances. Soering was ultimately extradited to the United States, but only after the United Kingdom secured much more stringent assurances than it had previously. There are several reasons for these different results in the *Kirkwood* and *Soering* cases, despite their similarities. First, the ECtHR was not bound to follow Commission precedent or its own case law, although it generally gave substantial weight to both.[528] Also, the ECtHR found that Soering's youth and alleged mental disorder would make his stay on death row particularly traumatic.[529] One can assume that the Commission remembered the *Kirkwood* case, as they ruled on the complaint as they had in *Kirkwood*, namely that "death penalty syndrome" in the United States constituted cruel treatment in violation of the ECHR.[530] With regard to the rationale of the Court, one is tempted to ask whether the *Soering* ruling would have been the same had the United States promptly and expeditiously carried out executions in death penalty cases? This writer's assumption is that the prevailing position in the member states of the Council of Europe is against the death penalty. This is evidenced by Protocols 6 and 13 to the ECHR,[531] and the ruling of the court in *Soering*.

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526 Article 2(1) of the European Convention states: "No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, *supra* note 510, at 224.

527 *Soering v. United Kingdom*, at ¶ 93.

528 John G. Merrills, The Development of International Law by the European Court of Human Rights 1 (1988).

529 Soering Commission Report, *supra* note 522, at 43.

530 *See* European Convention, *supra* note 510, art. 3 at 224.

531 Concerning the Abolition of the Death Penalty, *opened for signature*, Apr. 28, 1983, E.T.S 114, *reprinted in* 22 I.L.M. 538. *See* Model Treaty on Extradition, arts. 3, 4, Dec. 14, 1990, 30 I.L.M. 1407, *reprinted in* Bert Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 1992 Netherlands Y. B. Int'l L. 75, 197. Article 4(d) reflects the traditional reluctance of states whose laws do not provide for the death penalty to extradite offenders to other states where a death sentence is likely to be imposed. *Id.*

In the prominent case of Ira Einhorn, the question of death penalty assurances came up as well, and the ECtHR's decision in that case serves as a good template for the minimum requirements for assurances in death penalty cases. In *Einhorn v. France*,[532] the French government authorized Einhorn's extradition to the United States after receiving assurances from the U.S. government on behalf of the prosecuting district attorney in Philadelphia that there would be a retrial of the case at Einhorn's request (he had been convicted in absentia), and that he would not be subject to the death penalty. The ECtHR noted that

> it is clear from the affidavits sworn by the District Attorney, Ms Abraham, on 23 June 1997 and 10 June 1998 (see paragraph 12 above) that the prosecution will not seek the death penalty in respect of the applicant and that the trial court will be unable to impose the death penalty of its own motion. Ms Abraham states that the affidavit sworn by her in her capacity as District Attorney is binding on her, on all her successors in that post and on any other prosecutors who might deal with the case; that statement is confirmed by the diplomatic notes from the United States embassy. Secondly, the diplomatic note of 2 July 1998 from the United States embassy expressly states that "if the Government of France extradites Ira Einhorn to the United States to stand trial for murder in the Commonwealth of Pennsylvania, the death penalty will not be sought, imposed or executed against Ira Einhorn for this offense."
>
> Consequently, the Court notes that the circumstances of the case and the assurances obtained by the Government are such as to remove the danger of the applicant's being sentenced to death in Pennsylvania. Since, in addition, the decree of 24 July 2000 granting the applicant's extradition expressly provides that "the death penalty may not be sought, imposed or carried out in respect of Ira Samuel Einhorn," the Court considers that the applicant is not exposed to a serious risk of treatment or punishment prohibited under Article 3 of the Convention on account of his extradition to the United States.

A number of subsequent cases before the ECtHR have further detailed the nature of assurances and the obligations of ECHR member states in extradition cases. In *Baysakov and Others v. Ukraine*, the applicants argued that their extradition to Kazakhstan from the Ukraine would violate their rights under Article 2 (the right to life) of the ECHR, and that Kazakhstan's legal guarantees were insufficient to protect them from the possibility of execution. The Court rejected the applicants' arguments due to the fact that Kazakhstan had abolished the death penalty, and accordingly was "not persuaded that the first applicant risks the death penalty in case of his possible extradition to Kazakhstan. *The mere possibility of such a risk because of the alleged ambiguity of the relevant domestic legislation cannot in itself involve a violation of Article 2 of the Convention*."[533] Although in *Baysakov* the question was not about assurances per se, the provision of legal protections such as the abolition of the death penalty are analogous to, and indeed more stringent, than assurances. More important, the ECtHR expressed the possibility that these legal provisions, and by extension assurances, could be insufficient when there is more than a "mere possibility" of a violation of Article 2 of the ECHR.

In a 2005 case, *Shamayev and Others v. Georgia and Russia*, the ECtHR dealt with a complaint over the extradition of thirteen men from Georgia to Russia without guaranteeing assurances against their torture or execution beforehand.[534] With respect to the death penalty, the Court determined that in order to establish a potential violation the applicants would have to establish that

> when the Georgian authorities took their decision [to extradite], there were *serious and well-founded reasons* for believing that extradition would expose the applicants to a real risk of

532 *Case of Einhorn v. France*, Final Decision on Admissability, App. no. 71555/01 (Eur. Ct. H.R., Oct. 16, 2001).

533 *Id*. at ¶ 82 (emphasis added)

534 *Case of Shamayev and Others v. Georgia and Russia*, App. no. 36378/02 (Eur. Ct. H.R., Oct. 23, 2008).

> extra-judicial execution, contrary to Article 2 of the Convention. Accordingly, there has been no violation of that provision.[535]

In *Bader and Kanbor v. Sweden*, the ECtHR determined that where the applicant had been sentenced to death in absentia, his extradition to Syria would constitute a violation of the European Convention due to the "*real risk* of being executed and subjected to treatment contrary to Articles 2 and 3 if deported to his home country."[536]

On the basis of the case law of the ECtHR, which is not binding as there is no stare decisis, it appears that short of a showing that the assurance in question is manifestly unable to guarantee the rights of the relator, extradition will be approved. It is clear, however, that the ECtHR has calibrated its inquiry and become more critical of assurances in death penalty cases. Although it initially accepted blanket assurances from the U.S. government in the *Kirkwood* case, it required a more substantial showing in *Einhorn* from the relevant prosecutor, further noting that she had committed not only herself but her office in perpetuity to not seek the death penalty against Einhorn. Clearly the ECtHR is not only demanding more exact and exacting assurances in death penalty cases, but it is also opening the possibility that assurances are insufficient where they cannot be reasonably relied upon, as is the case with the extraditions to Russia and Kazakhstan. It is not inconceivable that given this trend that all assurances will be found insufficient one day, although it is a slow process and the nature of the case and other factors still influence the acceptability of assurances and require a sometimes complex case-by-case analysis.

Domestic courts have also taken up this issue, notably in the Italian case *Venezia v. Ministero de Grazia e Giustizia*.[537] In *Venezia* the Italian Constitutional Court held that death penalty assurances by the requesting state could not satisfy the protections afforded individuals by the Italian Constitution. The Constitutional Court grounded its judgment on the fact that due to the separation of powers, the executive branch of the requesting state cannot give a definitive assurance over the finding of the judicial branch, and that it similarly cannot be assured that the executive will have the ability to grant clemency or pardon to the individual should he/she be sentenced to death.

The rulings of the ECtHR and domestic practice has influenced treaty practice as well. An example of this is Article 12 of the United States–Germany Extradition Treaty, which contains a specific provision on the Death Penalty and Assurances. The treaty provides:

> When the offense for which extradition is requested is punishable by death under the laws of the Requesting State and the laws of the Requested State do not permit such punishment for that offense, extradition may be refused unless the Requesting State furnishes such assurances as the Requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

German domestic law provides a similar requirement. Article 8 of the Act on International Cooperation in Criminal Matters similarly provides that "If the crime is punishable by death

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535 *Id.* at ¶¶ 371–372 (emphasis added).

536 *Case of Bader and Kanbor v. Sweden*, App. no. 13284/04 (Eur. Ct. H.R., Feb. 8, 2006).

537 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). Venezia was subsequently tried in Italy for the crime for which he was requested in the United States and convicted thereof. Recently, a similar case involving a request by the United States of the state of Connecticut followed the same approach. *See* Giulaino Vassali, *Pena Di Morte E Richiesta Di Estradizione Quando Il Ministero Scavalca la Consulta (Death Penalty and Extradition Request When the Ministry Tries to Bypass the Constitutional Court)*, 22 Diritto E Giustizia 76 (June 2006). *See also* Schabas, *Indirect Abolition, supra* note 515.

under the law of the requesting state, extradition shall only be granted if the requesting state provides assurances that the death penalty will not be imposed or carried out."[538]

6.11.2. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[539]

As discussed in Chapter VIII, the United States and a number of other states are parties to the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which contains a specific prohibition in Article 3 that prohibits the extradition of "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[540] The discussion bellow investigates whether assurances will be sufficient to overcome the Article 3 limitation on extradition.

The reliability of assurances has also come before the ECtHR in cases pertaining to torture, inhuman or degrading treatment, or punishment of individuals rendered to other countries. Although the Court has not rejected outright the assurances given by some states, including the United States, concerning the death penalty, there is a subtext of suspicion toward them, as is apparent in a number of rulings on assurances regarding torture. In *Baysakov and Others v. Ukraine*, also discussed above in the context of the death penalty, the Court considered a challenge to the extradition of a number of individuals from Ukraine to Kazakhstan, where the relators argued that they would be subjected to torture and inhuman or degrading treatment or punishment. The Court considered the assurances in light of Kazakhstan's practice, and denied extradition on two grounds, first over its concern that the government organ giving the assurance lacked the competence to do so, and second that given the significant evidence of torture in Kazakhstan "it would be difficult to see whether such assurances would have been respected."[541] As indicated above, the ECtHR refused to find that their extradition would constitute a violation to Article 2 of the ECHR, but did in the context of a case where the possibility of torture, inhuman, and degrading treatment or punishment was a real possibility.

The ECtHR arrived at a similar finding in *Soldatenko v. Ukraine*, noting that the numerous credible reports of torture in Turkmenistan rendered "the assurances given in the present case . . . [insufficient] to guarantee against the serious risk of ill-treatment in case of extradition."[542] In *Shamayev and Others v. Georgia and Russia*, discussed above, the European Court determined that in order to prove a violation of the duty to collect assurances, the applicants would have to make a "beyond any reasonable doubt" showing that

> at the time when the Georgian authorities took the decision [to extradite the individuals], there were *real or well-founded grounds* to believe that extradition would expose the applicants to a real and personal risk of inhuman or degrading treatment, within the meaning of Article 3 of the Convention. There has accordingly been no violation of that provision by Georgia.[543]

The nature of assurances was succinctly outlined in the partly dissenting opinion of Judges Bratza, Bonello, and Hedigan in *Mamatkulov and Askarov v. Turkey*.[544] In that case, the

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538 Gesetz über die internationale Rechtshilfe in Strafsachen [Law on International Cooperation in Criminal Matters], Oct. 18, 2010, BGBl. I S. 1408 (Ger.) ("Ist die Tat nach dem Recht des ersuchenden Staates mit der Todesstrafe bedroht, so ist die Auslieferung nur zulässig, wenn der ersuchende Staat zusichert, daß die Todesstrafe nicht verhängt oder nicht vollstreckt werden wird.").

539 *See also* Ch. VIII, Sec. 5.

540 CAT, *supra* note 507.

541 *Case of Baysakov and Others v. Ukraine,* App. no. 54131/08, ¶ 51 (Eur. Ct. H.R., May 18, 2010).

542 *Case of Soldatenko v. Ukraine*, App. no. 2440/07, ¶ 74 (Eur. Ct. H.R., Oct. 23, 2008).

543 *Id.* at ¶ 353 (emphasis added).

544 *Case of Mamatkulov and Askarov v. Turkey*, App. no. 46827/99 and 46951/99 (Eur. Ct. H.R., Feb. 4, 2005) (partly dissenting opion of Judges Bratza, Bonello, and Hedigan) (emphasis added).

applicants had been extradited to Uzbekistan, but the court failed to find a violation of the European Convention as they were not actually tortured or ill-treated. The partly dissenting judges argued:

> 9. In concluding that the required level of risk had not been sufficiently shown, the majority of the Court place reliance on three particular features of the case—the assurances given by the Uzbek Government; the statement by the Public Prosecutor of the Republic, which accompanied those assurances, to the effect that Uzbekistan was a Party to the United Nations Convention against Torture and accepted and reaffirmed its obligation to comply with the requirements of that Convention; and the medical reports from the doctors of the Uzbek prison in which the two applicants were being held.
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> 10. We do not consider any of these factors to be compelling or to be sufficient, either individually or collectively, to allay the serious concerns about the treatment which was liable to await the applicants on their return. As to the assurances, we find it striking that the only assurance which was received prior to the applicants' surrender (namely, that of 9 March 1999) was not even communicated to the Court until 19 April 1999, well after the application of Rule 39 and after the extradition had been effected in disregard of the Court's interim measures. Moreover, an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation (see, for example, the Chahal v. the United Kingdom judgment, cited above, § 105). *The weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time.* The evidence as to the treatment of political dissidents in Uzbekistan at the time of the applicants' surrender is such, in our view, as to give rise to serious doubts as to the effectiveness of the assurances in providing the applicants with an adequate guarantee of safety.[545]

In the United Kingdom the issue of the quality of assurances also came up in *Russia v. Zakaev*,[546] where Russia sought the extradition of the former Chechen government official Akhmed Zakaev, who had gone into exile there, for various terrorism-related offenses.[547] Ultimately, the extradition judge refused to grant extradition, noting:

> The Defence case is that if Mr Zakaev is returned he will subject to torture whilst in detention. The Deputy Minister responsible for Russian prisons gave evidence to me about the very considerable improvements that have taken place within Russian prisons in the past few years. They are commendable improvements made in difficult circumstances. He gave me an assurance that Mr Zakaev would come to no harm whilst he was detained in a Russian Ministry of Justice institution. I am sure that he gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate. I consider that such a guarantee would be almost impossible in any country with a significant prison population. I was also concerned as to the type of institution to which the defendant would be sent. Although the Minister indicated that he would be detained in a Ministry of Justice institution, another witness eventually confirmed that the decision could be taken by the Prosecutor who could choose to place Mr Zakaev in an institution run by the FSB.
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> Against that undertaking, I have to weigh the other evidence I have received and in particular the public statement made by the Council of Europe Anti-Torture Committee which assesses "that there is a continued resort to torture and other forms of ill treatment by members of the Law Enforcement Agencies and Federal forces operating in the Chechen Republic." It is apparent from the United Nations Committee on torture that there is a deep concern over the Russian

545 *Id.* at ¶¶ 9–10.

546 Russia v. Akhmed Zakaev, [2003] Bow Street Magistrates' Court (unreported decision) (Eng.), *available at*: http://www.tjetjenien.org/Bowstreetmag.htm.

547 *Id.*

> treatment of Chechens and they have identified numerous and consistent allegations of widespread torture of detainees.
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> . . .
>
> When those factors are added together the inevitable conclusion is that it would now be unjust and oppressive to return Mr Zakaev to stand his trial in Russia.
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> . . .
>
> With some reluctance I have to come to the inevitable conclusion that if the Authorities are prepared to resort to torturing witnesses there is a substantial risk that Mr Zakaev would himself be subject to torture. I am satisfied that such punishment and detention would be by reason of his nationality and political opinions.[548]

With respect to the United States, the problem of assurances concerning treatment or punishment arises in both the contexts of the United States being a requested and requesting state. As a requesting state, the United States will frequently face issues concerning the condition of prisons and the treatment of detainees, particularly those in pretrial detention.[549] These issues arise mostly with respect to prolonged solitary confinement and prison overcrowding, as well as internal prison security. As the requesting state, the United States is reluctant to provide assurances other than in the most general terms. Whenever it does so the diplomatic assurances do not include a commitment from the U.S. Bureau of Prisons if the crime for which the person is sought is a federal one, or from the competent state authority for its prison system. As a result, the diplomatic assurances may not be enforceable in the United States because the Department of State did not secure the commitment of the competent administrative authority under the relevant law. In other words, the U.S. Bureau of Prisons as well as the state penitentiary authorities have the right to exercise their discretion by law, which cannot be overridden by the executive with respect to states. Within the federal structure it means that one federal agency cannot override another. These problems arise when the Department of State does not make these matters clear to its counterpart in the requested state, and problems with enforceability arise once the relator is surrendered to the custody of the United States, whether federal or state.

When the United States is the requested state, similar problems arise when the government seeks to gain assurances from the requesting state, whether about the possibility of torture, the treatment of the detainee, and the rights of the detainee in that foreign prison system, and also with respect to penalties that may be considered "cruel or unusual." The United States, for example, would require assurances from the requesting state that would seek to impose a death penalty by stoning, the imposition of a penalty of amputating a hand for theft, or flogging, as these penalties exist in countries that apply the *sharīʿā*.[550] In these cases the shoe is on the other foot, as it is the U.S. government that is seeking assurances from a requested state. In the few cases in which such a question as arisen the diplomatic practice of the United States, particularly with regard to U.S. citizens, has been to be very vigilant of the need to protect the human rights of the person sought for surrender. One cannot help but note that the same vigilance is not applied when assurances are sought from the United States, as discussed above.[551]

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548 *Id.*

549 *See infra* sec. 7.

550 *See generally* M. Cherif Bassiouni, The *Sharīʿā* and Islamic Criminal Law in Time of Peace and War (forthcoming 2013).

551 *See also* Ch. VIII, Sec. 6.

6.11.3. Conclusion

As described above, the legal, political, and practical issues arising with respect to the death penalty on the one hand, and for torture, cruel, inhuman, and degrading treatment or punishment on the other, are different, though they share many similarities. This is due to the difference that exists between the death penalty, which is still considered a lawful penal sanction, and torture, inhuman, and degrading treatment or punishment, which is absolutely prohibited under both the CAT[552] and customary international law. Because of this legal difference, issues arise with respect to enforceability of the principle of specialty and diplomatic assurances because of their informality. Such assurances are not always incorporated in the formal extradition order, and where they are the courts of the requesting state may find such diplomatic assurances to be ambiguous, particularly when the issuing state seeks to use any ambiguity in the assurances as a way of avoiding its enforcement as understood by the requested state. This is why abolitionist states have started to reject the extradition of individuals sought by retentionist states, notwithstanding any assurances that the requesting state may have given, such as in the *Venezia* case in Italy.[553] As to torture and other forms of cruel, inhuman, and degrading treatment or punishment, it is clear that the ECtHR, for example, is having growing concerns about the enforceability of assurances. But this is more obvious in the bilateral relations between a number of European countries and requesting states who are reputed to engage in torture and other forms of cruel, inhuman, and degrading treatment or punishment than it is at present for death penalty assurances. It may well be the case that the ECtHR will reject all assurances by retentionist states as posing an unreasonable risk to the individual.

7. Diplomatic Assurances

7.1. Introduction: The Meaning of Assurances

The term "assurance" refers to a situation in which a requesting state makes a formal representation to a requested state through a competent state organ with respect to a certain issue that is of concern to the requested state. In other words, the assurance allows the requesting state to assuage a concern of the requested state in connection with the surrender of a person. In this context, the state seeking the assurances must be satisfied that the state organ issuing the assurances is the competent legal/administrative organ in the issuing country, and that the person signing the letter on behalf of that state organ has the proper authority to do so.[554]

These concerns usually implicate substantive or procedural human rights issues in the law or practice of the requesting state. These concerns may stem from the requested state's international legal obligations (arising under conventional or customary international law), its constitution, or its national laws. States resort to assurances in this context because they are the best way to directly address issues that may impede cooperation between the requesting and requested states. Thus, resorting to assurances has become the technique by which states enhance their prospects of cooperation and thereby increase their potential for combating crime and advancing the process of criminal justice. Without assurances, there would be many

552 CAT, *supra* note 507.

553 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). *See* Giulaino Vassali, *Pena Di Morte E Richiesta Di Estradizione Quando Il Ministero Scavalca la Consulta (Death Penalty and Extradition Request When the Ministry Tries to Bypass the Constitutional Court)*, 22 Diritto E Giustizia 76 (June 2006). *See also* Schabas, *Indirect Abolition, supra* note 515.

554 For an overview of the use of assurances in the context of state compliance with international obligations where there are concerns regarding torture in the receiving state, see Ashley S. Deeks, *Avoiding Transfers to Torture*, Council on Foreign Relations Council Special Report No. 35, 4–9 (June 2008).

incidents in which extradition and mutual legal assistance would be denied simply because the concerns of the requested state have not been addressed.

As assurances are given by government representatives, there may be cases where the government official is under instruction by his/her superiors to make statements that the government does not intend to honor, and sometimes the government official or his/her superior may be acting without sufficient authority from senior decision-makers. The representations they may make to their counterparts therefore raise questions as to the source of the representation in question. This may arise during the granting of extradition by a requested state, but it can also occur in the requesting state during criminal proceedings. In a 2009 case involving Columbia, Valencia-Trujillo was extradited to the United States without an extradition treaty existing between the two countries but on the basis of specific representations made by the U.S. government to the Columbian government.[555] This included a limit on the maximum sentence. Valencia-Trujillo was extradited to the United States, tried, and convicted. At the sentencing hearing, the court asked the Assistant U.S. Attorney about the assurances given by the U.S. government to Columbia concerning the maximum sentence, and whether he was bound by them. The Assistant U.S. Attorney responded in a manner that can only be considered as a bad faith representation to the effect that "you [the judge] are not bound to these assurances, but we are." This is one of the numerous issues arising in connection with assurances that has discredited the U.S. government abroad and rendered its assurances less than trustworthy or reliable.

7.2. Legal Nature and Enforcement of Assurances

Assurances may be offered either *sua sponte* or at the request of the state seeking the assurance, and both methods are practiced by states. If the requested state offers an assurance as a binding obligation it may be enforced by diplomatic and other legal means, including an action before the International Court of Justice (ICJ) subject to meeting the jurisdictional requirements. In the extradition practice of the United Kingdom,[556] Switzerland,[557] and the United States, concerns raised by the court adjudicating a case in question are conveyed to the Ministry of Justice (or its equivalent) who then either addresses the counterpart in the requesting state, or through the Ministry of Foreign Affairs (or its equivalent)—the diplomatic channel. More often than not, the process is carried out through the Ministry of Justice (or its equivalent), but the method ultimately depends on the given state's preference. Upon receipt of the answers to the questions raised or concerns expressed, it is presented by the prosecutor or public legal representative to the court. In reviewing the assurance, the court is in a better position to evaluate to determine whether the concerns raised by the relator are sufficient to bar extradition.

The practice of giving assurances enhances cooperation between states and thereby contributes to achieving the goals of extradition. Examples of assurances sought and obtained by states include the non-applicability of certain penalties deemed cruel, inhuman, or degrading; limits on sentences; guarantees of a fair trial, such as right to counsel; and conditions on

555 United States v. Valencia-Trujillo, 573 F.3d 1171 (11th Cir. 2009).

556 *See* Alun Jones, Jones on Extradition and Mutual Legal Assistance (2005); Clive Nicholls, Clare Montgomery & Julian Knowles, The Law of Extradition and Mutual Legal Assistance (2d ed. 2007). The United Kingdom has upheld the extradition of a British national after receiving assurances from the U.S. Department of Justice that the relator's health condition and United Kingdom recommendations and findings will be considered in any sentencing proceeding. This was necessary to comply with the United Kingdom's obligations under the European Convention on Human Rights. *See* Bruce Zagaris, *English High Court Upholds Hacker's Extradition to the U.S.*, 25 Int'l Enforcement L. Rep. 403–405 (Oct. 2009).

557 *See* Lionel Frei, Drei Jahre Rechtshilfevertrag Mit Den USA, Scweizerische Zeitschrift für Strafrecht (1981); Robert Zimmerman, La Coopération Judiciaire Internationale en Matière Pénale (3d ed. 2009).

imprisonment and treatment of detainees, including places of detention.[558] An example of an assurance is the one sought by Colombia as a prelude to extraditing paramilitary leaders to the United States on drug charges, in order to ensure the relators are not subject to a life sentence.[559]

It should be noted that there are different executive and/or judicial organs in different countries that are involved in extradition processes. This institutional and bureaucratic diversity creates difficulties with respect to the interpretation and enforcement of assurances. However, there are different executive and judicial organs that carry out the aforementioned extradition processes between states, and this institutional and bureaucratic diversity poses certain obstacles to the application of assurances in a given extradition matter. The difference in practices among states may result in a hindrance of communication due to the rigidity of institutional functions and internal bureaucracy. For example, if the state giving assurances applies a high level of positivistic formalism to the interpretation, the problem-solving function of assurances may be subordinated to the state's formalism.

The United States has adopted a case-by-case approach regarding extradition requests from China, with whom there is no bilateral extradition treaty, wherein it has relied, in part, on diplomatic assurances from China regarding the treatment of individuals sought by the Chinese government for criminal activity affecting China.[560] In the case of China, although its record of reliability of diplomatic assurances is poor, the U.S. policy of negotiating with China on a case-by-case basis has the advantage of providing the United States with flexibility to refuse extradition based on current human rights conditions in China at the time of the request or on the content of Chinese diplomatic assurances.[561] This flexibility is markedly and purposefully absent in the context of extradition pursuant to bilateral treaties, whose nature is to provide a uniformly applicable structure to extradition requests between contracting states. Furthermore, through such negotiation, Western states may be able to drive the Chinese to reform certain objectionable practices in order to enter into extradition treaties, which would facilitate and expedite the return of Chinese nationals abroad as compared to the time-consuming process of individualized diplomatic negotiations.[562]

Two questions that arise regarding enforceability of the assurance are: first, whether the assurance was given by a competent state organ through an individual with appropriate authority

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558 *See also* Deeks, *supra* note 554. The use of assurances also serve as a means of comporting with the recent concern over victims' rights, reflected in national and some international rights such as the concept of *partie civile* in the French system, *parte civile* in the Italian system, and the 2006 U.N. General Assembly's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 147 U.N. Doc. A/RES/60/147 (Mar. 21, 2006). For a state to assume prosecution is obviously more onerous than to obtain assurances that would make extradition possible. Thus, the practice of assurances is a way of achieving the goals of victims' rights to the accountability of perpetrators. In addition, the use of assurances also aids in fulfillment of a state's obligations under the principle of *aut dedere aut judicare*.

559 *See* Bruce Zagaris, *Colombia Extradites Paramilitary Leader to the U.S. on Drug Charges*, 24 Int'l Enforcement L. Rep. 267–269 (July 2008).

560 The Chinese government has pursued a rigorous policy of prosecuting Chinese nationals accused of corruption, particularly with regard to financial crimes. Although different states have taken different approaches to Chinese requests for the return of these individuals, due in large part to the poor record of Chinese compliance with human rights principles, the United States has used a case-by-case approach under which it has either extradited or deported the requested individuals. *See* Matthew Bloom, Note: *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 Yale J. Int'l L. 177, 199–202, 205–207.

561 *Id.* at 206–207.

562 *Id.* at 207–208.

to issue assurances; and second, whether those assurances are sufficiently clear, unambiguous, and specific to give rise to claims by the requesting state in case it believes the requested state breached its assurances. Examples of this second issue will be discussed below. In addition to formal legal enforcement, a state that breaches its assurances risks strained diplomatic relations and a blow to the state's international credibility in negotiations.

In one UK decision regarding the sufficiency of assurances provided by the United States in connection with a request for the extradition of alleged "terrorists," the court expressed the following understanding of the nature and enforceability of "assurances" from the United States:

> . . . as I understand it there is no issue of domestic American law. The United States government does not rely on any rule of domestic law giving binding or enforceable effect to the assurances set out in the Notes. The real question is whether in all the circumstances, against the background of relevant international law and practice, this court should accept the Notes as being in fact effective to refute, for the purposes of the 2003 Act, the claims of potential violation of Convention rights and associated bars to extradition.[563]

7.3. Assurances Distinguished from the Principle of Specialty and U.S. Practice

There is a distinction in the jurisprudence of the U.S. federal courts concerning the principle of specialty, and the practice of the executive branch with respect to diplomatic assurances. The former are enforceable in U.S. federal courts, but subject to conditions of standing that differ among the several federal circuit courts of appeals, and the latter, which are offered to foreign governments in connection with extradition, are not enforceable in U.S. federal courts.

The jurisprudence of U.S. federal courts have acknowledges the applicability of the principle of specialty since 1886, as expressed in *United States v. Rauscher*, wherein Chief Justice Miller posited the principle as follows: the extradited relator "shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country."[564] Since then, U.S. federal courts have enforced the principle of specialty, but differently.

There has never been a question in any of the federal circuit courts of appeals as to the applicability of the principle. However, the circuits have differed with respect to the right of an extradited person to raise the question of violation of the principle of specialty.[565] In those federal

563 *Ahmad & Aswat v. United States,* [2006] EWHC 2927 (admin).

564 United States v. Rauscher, 119 U.S. 407, 424 (1886).

565 One reason for the difference of opinion is that the intended beneficiary of the "Principle of Specialty" is the requested state. Although the individual relator could be considered a third party beneficiary under an extradition treaty, whether a U.S. court adopts this perspective depends on the U.S. court's method of interpreting the underlying bilateral extradition treaty, if such a treaty is in effect between the receiving and surrendering states. Thus, how a federal circuit court of appeal resolves the question regarding an individual relator's standing to raise the "principle of specialty" depends on whether the particular court views the right as belonging solely to the surrendering state or also to the individual relator. The Second, Fifth, Sixth, and Seventh Circuit Courts of Appeal require a protest or some other form of objection by the surrendering state before the individual can raise the issue. The Eighth, Ninth, Tenth, and Third (albeit with some ambiguity) Circuit Courts of Appeal allow the individual relator to raise the "principle of specialty" on his or her own without the need for any protest by the surrendering state. *See* M. Cherif Bassiouni, International Extradition: United States Law and Practice (5th ed., 2007), at 581–585, 595–600. Recently the Ninth Circuit in *Benitez v. Garcia,* 449 F.3d 971 (9th Cir. 2006) declared that it could only enforce limitations on penalties if the states had agreed to it by treaty or by a written "assurance." *Id.* at 975–976 (stating "We hold that we can enforce limitations on punishments following the extradition of a defendant, but we may do so *only if the contracting treaty nations agreed* to such a limitation in the particular case. . . . We must therefore examine the extradition

circuit courts of appeal where a relator does not have the right to raise a violation of specialty before the district court without a protest by the surrendering state, the relator similarly does not have the right to raise violations of conditions of the extradition order or any assurances given. Should there be such a violation the government of the surrendering state would have to formally file a protest over the failure to implement or execute any of the conditions contained in the extradition order issued by the judicial authority in the surrendering state. This means that the rights of the relator to uphold the principle of specialty in U.S. courts would be entirely dependent on the political will of the executive branch of the surrendering government. Absent a formal protest by the surrendering government in the event the U.S. Attorney, the U.S. government, or U.S. court fails to implement or execute any condition included in the extradition decree or order from the surrendering government's court, the relator may have no recourse in U.S. courts.

Conditions contained in an extradition order issued by the competent judicial authority of the surrendering state and that fall within the meaning of the principle of specialty are distinguishable from assurances given by a representative of the U.S. government to any authority in the surrendering state. In other words, the relator cannot enforce the contents of any assurances given by the U.S. government in certain federal circuit courts of appeals, whether they relate to the return of the surrendered person to the surrendering country for purposes of execution of the sentence, the imposition of a limitation on the maximum penalty, the guarantee of certain conditions of incarceration, or the application of substantive and procedural guarantees contained in various human rights conventions. Thus if the executive branch of the surrendering state does not wish to protest the violation of an assurance given by the U.S. government in connection with the extradition, the relator could not invoke the assurance, nor could he/she have it enforced by U.S. courts. The reason for this practice is the constitutional separation of powers,[566] which distinguishes between the powers of the executive branch in dealing with foreign affairs, and the limited role of the federal judiciary in dealing with cases and controversies arising out of justiciable issues.

Assurances given by the U.S. government are usually interpreted in a limited and restrictive manner. This is probably closer in approach to a strict interpretation of contractual language in a contract as understood in the U.S. legal system.[567] If the language embodied in an assurance

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agreement in this case, and ask the question: Did the treaty and extradition activities of the parties in this case provide for a clear limitation on the punishment Benitez could face? If the answer is yes, we must enforce whatever punishment limitation we find." [citations omitted]). The court in this case focused on the treaty and assurances, thus raising the implication that it is not relying on customary international law. Whether the court intended to signal that in the future it would only consider specialty when it arises out of a treaty or a specific assurance offered by the U.S. government and ignore customary international law is yet to be determined.

566 U.S. Const. Art. I, II, III; The U.S. Supreme Court has described the separation-of-powers principle as follows: "The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers. *INS* v. *Chadha*, 462 U.S. 919, 946, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). While the boundaries between the three branches are not "hermetically" sealed,' see *id.* at 951, the Constitution prohibits one branch from encroaching on the central prerogatives of another." Miller v. French, 530 U.S. 327, 341 (2000), *accord.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3165 (2010). *See* Lo Duca v. United States, 1996 U.S. App. Lexis 28746, at *22–*30 (2d Cir. 1996) (discussing the constitutional separation of powers in the context of a relator's challenge to extradition proceedings held pursuant to 18 U.S.C. §3184), *cert. denied,* 519 U.S. 1007 (1996). *See* Bassiouni, *supra* note 565, at 152–153.

567 *See* Restatement (Second) of Contracts, Certainty §33 (1981) ("(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

is not specific, or does not specifically address a given condition in the surrendering state's extradition order, it will not be deemed binding by the U.S. government.[568] Moreover, the U.S. government does not consider such "assurances" as a bilateral treaty obligation. Instead, it considers "assurances" as a diplomatic understanding.[569] Although this may seem strange to those unfamiliar with the practices of the U.S. government, it is not uncommon for qualified

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(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance").

568 Where the United States represented to Austria that Count 93 against the relator would not be enforced but be vacated, the Eleventh Circuit rejected the relator's argument that this statement misled Austria to believe that the relator would additionally be re-sentenced and permitted a full appeal. Rather, all that was required was that Count 93 be vacated, the sentence be recalculated without that count, and the relator be given an opportunity for a full appeal of the conviction and sentence. Weiss v. Yates, 375 Fed. Appx. 915, 916–917 (11th Cir. 2010) (unpublished opinion), *cert. denied* 2011 U.S. LEXIS 3062 (U.S. 2011). In a different context, namely the use of "assurances" obtained by the United States in connection with "extraordinary rendition" to certain foreign governments known to engage in torture, this is indicative of how reliable and credible the United States views such "assurances." *See* Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 Fla. J. Int'l L. 531, 549 (2007). Button states:

> The United States is not alone in claiming that obtaining a diplomatic assurance from the country of return that the transferee will not be harmed prevents a rendition or extradition from breaching international law. In a string of cases discussed in Human Rights Watch briefs "Empty Promises:" Diplomatic Assurances No Safeguard Against Torture and Still at Risk: Diplomatic Assurances No Safeguard Against Torture, Canada, Germany, Austria, Sweden, the United Kingdom, and others attempt to defend transfers on the basis of diplomatic assurances.
>
> The Human Rights Watch reports argue emphatically that because of the clandestine nature of torture, and because neither the sending nor receiving governments have an interest in exposing a human rights abuse arising from a rendition, *diplomatic assurances cannot be relied on to prevent torture. By its very nature, a diplomatic assurance is not a legal safeguard: it is an unreliable, unaccountable, unenforceable diplomatic measure.* But from a state responsibility perspective, can a diplomatic assurance have legal effect by vitiating the transferor's actual knowledge of the risks of torture? (emphasis added)

See also Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture,* 16 Hum. Rts. Watch (Apr. 2004), *available at* www.hrw.org/reports/2004/un0404/diplomatic0404.pdf; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, 17 Hum. Rts. Watch (Apr. 2005), *available at* http://www.hrw.org/reports/2005/04/14/still-risk.

The United States has never protested to these governments the fact that they gave "assurances" not to torture probably because it knew that to be the case. *See* M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (2010) at 141–182 (discussing "extraordinary rendition" and CIA "Black Sites").

569 Restatement (Third) of Foreign Relations Law of the United States, Extradition between States: The Basic Rule § 475 (1987) ("A state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state (a) for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requesting state, or (b) for punishment after conviction of such a crime and flight from that state, provided that none of the grounds for refusal to extradite set forth in § 476 is applicable"); Restatement (Third) of Foreign Relations Law of the United States, Doctrine of Specialty §477 (1987) ("Under most international agreements, state laws, and state practice: (1) A person who has been extradited to another state will not, unless the requested state consents, (a) be tried by the requesting state for an offense other than one for which he was extradited; or (b) be given punishment more severe than was provided by the applicable law of the requesting state at the time of the request for extradition. (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state").

representations to be made to different governments in connection with extradition matters, which are ultimately not carried out.

The different treatment of the principle of specialty and assurances is illustrated in *Romero v. Ryan.*[570] In that case the government of Mexico agreed to extradite the relator to the United States pursuant to a formal U.S. extradition request, after receiving assurances that the relator would not be subject to life imprisonment, and if convicted, that Arizona would not "seek or recommend a penalty of 25 years to life imprisonment at the sentencing phase," but rather that it "would recommend imposition of a sentence of 50 to 60 years' imprisonment."[571] Accordingly, Mexico agreed to the relator's extradition on first-degree murder charges, which were later reduced to second-degree murder on the state's post-trial motion without objection by the defense.[572] The relator argued that the reduction in charge violated the "doctrine of specialty" as the extradition agreement did not allow for extradition on second-degree murder charges. He also argued that the first-degree murder charge would violate the United States–Mexico extradition treaty as it could result in life imprisonment.[573] In rendering a decision on the interconnection of the relator's specialty claim and assurances claim, the court did not distinguish the two. The court analyzed the issue as follows:

> Petitioner contends that the trial court violated the extradition treaty between the United States of America and Mexico by convicting him of first degree murder because, Petitioner argues, the governing treaty did not allow for a Mexican national's extradition for prosecution on an offense which could result in life imprisonment. Petitioner also contends that reducing the conviction from first-degree murder to second-degree murder violates the specialty doctrine, i.e., the doctrine that one can only be tried for the offense specified in the extradition agreement.
>
> Petitioner raised these issues in a pre-trial motion. The motion was denied by the state trial judge after briefing and oral argument regarding the diplomatic note, the relevant treaty, the current status of the interpretation and extension of the treaty, the circumstance of Petitioner's case, including the exchange of notes between Mexican and United States officials regarding Petitioner's extradition agreement, and Arizona law.
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> The Arizona Court of Appeals denied the extradition-based claims on the merits when presented in petitioner's direct appeal. The Court of Appeals determined:
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> > The doctrine of specialty provides that a state that has obtained extradition of a person is prohibited from prosecuting that person "for any offense other than that for which the surrendering state agreed to extradite." United States v. Andonian, 29 F.3d 1432, 1434–35 (9th Cir. 1994) (internal citations omitted).
> >
> > An extradited person may be tried for offenses other than those for which the person was surrendered if the extraditing country consents. The proceedings did not violate the doctrine of specialty. Romero was extradited for first-degree murder, all in compliance with the extradition agreement and the doctrine of specialty. The subsequent reduction to the lesser-included offense of second-degree murder in order to comply with the sentencing provisions of the agreement does not mandate reversal of Romero's conviction.
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> > ***
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> > Extradition treaties are construed liberally to effect their purpose of surrendering fugitives to be tried for their alleged offenses. United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984). Under these circumstances, the reduction of Romero's conviction to a lesser-included offense constituted a reclassification contemplated by the treaty. Romero does not contest

570 2009 U.S. Dist. Lexis 87444 (D. Ariz. 2009).

571 *Id.* at *4–*5.

572 *Id.* at *5–*9.

573 *Id.* at *13–*14, *21.

> that the charge of second-degree murder, as a lesser included offense of first-degree murder, was based on the same factual allegations as those established in the request for extradition based on first-degree murder, or that the punishment for second degree murder provided for a sentence of less than life imprisonment. Therefore, the treaty itself permitted a conviction for second-degree murder.
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> In "United States v. Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886), and Johnson v. Browne, 205 U.S. 309, 27 S. Ct. 539, 51 L. Ed. 816 (1907), the Supreme Court set forth principles for interpreting extradition treaties and analyzed the effect of limitations on what offenses may be punished by the extraditing country." Rodriguez Benitez v. Garcia, 495 F.3d 640, 643 (9th Cir. 2007). The Arizona Court of Appeals' decision denying Petitioner's claim was not an objectively unreasonable application of the holdings in these cases.
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> Rauscher established the doctrine of specialty, which provides that an extradited defendant may not be prosecuted for any offense other than that for which the surrendering country agreed to extradite.[].
>
> . . .
>
> In Browne, a defendant who was convicted in the United States of conspiracy to defraud the government fled the country and was extradited from Canada under a treaty which did not cover conspiracy. [] Because of the treaty's limitations, Canadian authorities surrendered the defendant for another offense but not for the conspiracy charge. [] The Supreme Court, looking to the agreed-upon terms of extradition and to the relevant treaty language, refused to uphold a reinstated conviction on the conspiracy charge.
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> Rodriguez Benitez, 495 F.3d at 643–44 (internal citations and quotations omitted).
>
> Similar to the circumstance of the petitioner in Rodriguez Benitez, the terms of the agreement regarding the Petitioner's extradition indicated Mexico's concern about the sentence which could be imposed on Petitioner and not the degree of murder on which Petitioner could be tried. The Arizona trial court's reduction of the crime of conviction, which was supported by the evidence adduced at trial and which reduction was not contemporaneously opposed by Petitioner, did not deprive Petitioner of a substantive constitutional right. Cf. United States v. Campbell, 300 F.3d 202, 211 (2d Cir. 2002) (recognizing a difference between extradition terms limiting what sentence could be entered by the receiving state's courts and what sentence the receiving state could force the prisoner to serve).
>
> The Ninth Circuit Court of Appeals concluded in Rodriguez Benitez that, because Supreme Court precedent, i.e., Rauscher and Browne, addressed limitations on charged offenses and the case before them involved limitations on the petitioner's sentence, it could not be said that the state court's opinion was contrary to clearly established federal law because to decide otherwise would have required an extension of the specialty doctrine. See 495 F.3d at 644. "Only if the refusal to extend Rauscher's and Browne's holdings was objectively unreasonable must Benitez be granted a writ." Id. "Refusing to extend Supreme Court holdings governing limitations on charged offenses to unilaterally imposed sentencing conditions was not objectively unreasonable, and therefore AEDPA requires us to leave the decision of the California court undisturbed." Id. Similarly, the Arizona court's decision regarding Petitioner's claims based on the specialty doctrine and the reduction of Petitioner's conviction was not objectively unreasonable and Petitioner is not entitled to habeas relief on this claim.[574]

A British court has discussed the relationship between assurances and the principle of specialty in U.S. extradition practice as follows:

> . . . the United States is also a State with which the United Kingdom has entered into five substantial treaties on extradition over a period of more than 150 years. Over this continued and

574 *Id.* at *21–*26.

uninterrupted history of extradition relations there is no instance of any assurance given by the United States, as the requesting State in an extradition case, having been dishonoured. In *Bermingham & ors* [2006] EWHC 200, [2006] 3 AER.239 and *Welsh and Thrasher* [2006] EWHC 156, [2006] 3 AER.204, decided in this court, Ouseley J and I were much concerned with a similar issue—or perhaps a particular application of the same issue—being called on in effect to decide whether the United States authorities could be relied on to abide by the specialty rule in relation to the prospective extradition of the appellants in those cases. Undertakings had been given on the point. In *Thrasher* Ouseley J said (paragraph 35):

> "First, if there had been a routine disregard of the specialty rule, I would have expected that over the decades of extradition to the US from the UK, and in particular from those countries with which the US enjoys a land frontier, the UK Courts and the Courts of other sending states would have refused extradition in decisions which would be available to us. The 1972 and 2003 Treaties would not have been agreed in the terms on which they were agreed."

In *Bermingham* I said (paragraph 142):

> "In the present case I consider that the undertaking confirms the position which the United States courts would anyway adopt. They will be satisfied, not least by the terms of this court's judgment, that the defendants' extradition is ordered on the precise basis that the accusation they will face at trial will be limited to, and travel no wider than, the case which is essentially formulated in paragraphs 10 and 23 of the Texas indictment and reflected in the charge drafted for the proceedings at Bow Street. And the American courts will be loyal to this expectation: not merely because in general they respect the specialty rule, but because by their own express jurisprudence . . . it is "essential to determine . . . whether the surrendering state would regard the prosecution as a breach" . . . This test is meticulously applied. It means, in short, that the American courts will give effect to the views of the Secretary of State and of this court (as to which there will be no room for doubt) of the requirements of s.95 of the 2003 Act."

I see no reason to doubt that the American authorities would likewise give effect to the views of this court as to the critical importance of the integrity of the Diplomatic Notes. Indeed the case may perhaps be said to be *a fortiori*: the Notes have the special status of having been issued out of the Embassy. The American authorities will appreciate, not least from the terms of the judgments in this case, that their request for the appellants' extradition to the United States has been acceded to expressly on the faith of the Notes, read and interpreted as this court reads and interprets them. Acts of the US executive such as have attracted the kind of criticisms described and levelled by Mr Stafford Smith and Mr Loflin, being, however, acts touching only the internal affairs of the United States, cannot in my judgment begin to constitute a premise from which this court should conclude that the Diplomatic Notes will not be fully honoured.

. . .

Before leaving this part of the case I should specifically address the contention that the appellants, if returned, might face the death penalty. None of the charges levelled against either appellant is punishable by the death penalty. As I have said the Diplomatic Note in Mr Ahmad's case contains a specific assurance that the death penalty will not be imposed and such an assurance is expressly contemplated as part of the mechanics of extradition arrangements between the United States and the United Kingdom: see Article IV of the 1972 Treaty. Accordingly, were the United States authorities to bring about a state of affairs (whether by way of a superseding indictment—as Mr Aswat contended—or trial by military commission, or by "extraordinary rendition" with which I will deal separately) in which either appellant was sentenced to death, that would violate the specialty rule or the assurances or both. The United States' adherence to the specialty rule has been firmly vouchsafed by decisions of the Supreme Court beginning with *United States v Rauscher* 119 US 407 decided in 1886. The general position is discussed in detail in Ouseley J's judgment in *Welsh and Thrasher* to which I have already referred. I will just cite this extract:

> "84. The US Courts do not infer consent merely because there is silence. They do not turn a blind eye to what are obvious problems in the sending state's known attitude, whether from past extradition requests or from the particular case or Treaty involved. Rather . . . they adopt a realistic assessment of the sending state's attitude, in recognition of the specialty doctrine as a principle of international comity and out of respect for a foreign state's sovereignty. But the Courts do not treat it as a technical hurdle devised for the benefit of properly convicted criminals, enabling them to take points which truly belong to the sending state and which the Courts properly infer that the sending state does not take.
>
> 85. There is nothing in the cases which would justify the conclusion that the US Government or Courts would not respect the express limits in the UK–US Treaty or in the 2003 Act or in any judgment of this Court . . . "
>
> Adherence to the specialty rule is required by the domestic law of the United States, which incorporates, as I have said, Article XII of the 1972 Treaty. In this jurisdiction it is right, of course, that it is the Secretary of State's duty under s.95 of the 2003 Act to safeguard the specialty rule, rather than that of the court. I have not set out s.95 given that the appeals against the Secretary of State's decisions have been withdrawn, as I have explained. But the fact that we may, for reasons given in *Welsh and Thrasher* and in *Bermingham*, be confident of the United States' general loyalty to the specialty rule tends to contradict Mr Fitzgerald's argument that the district judge should have found bars to extradition (such as potential exposure to the death penalty) where the claimed bar involves an assumption that the specialty rule will be violated.
>
> On this part of the case I conclude for all the reasons I have given that the district judge was right to place confidence in the Diplomatic Notes.[575]

Following are a number of cases that exemplify how the United States deals with assurances.[576]

In *People v. Kirkwood* the U.S. government gave the United Kingdom an assurance that it would recommend that Ernest Major Kirkwood would not be tried in California in accordance with a procedure that could lead to the imposition of a death sentence. The United Kingdom had abolished the death penalty and could not extradite a person to a country where the death penalty was still in force. In that case the U.S. government did not specifically represent that the federal government does not have the power to dictate to a state government, namely California, the procedures and penalties that can be imposed on a given prosecutor. The U.S. government took the position that it was incumbent on the UK government to know that the U.S. federal government could not make any binding representations with respect to matters that are within the jurisdiction of the different states. The United Kingdom, however, considered the U.S. government's positoon to be a breach of good faith, and opposed the death penalty proceedings in the California.[577] Upon Kirkwood's surrender, the California district attorney proceeded in accordance with California procedural law to channel the prosecution as if the death penalty was going to be requested at the end of the case. Kirkwood, who was represented by the San Francisco Public Defender's Office, called Sir Ian Sinclair, the Legal Advisor to the United Kingdom Foreign Office, and on this writer, to testify in court on the binding nature of the assurances made by the U.S. Department of Justice. The U.S. Department of Justice argued that its assurances were in the nature of good faith efforts, as it could not lawfully force the state of California to do anything given the nature of the U.S. federal system. This was not conveyed to the United Kingdom at the time and the United Kingdom took

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575 *Ahmad & Aswat v. United States,* [2006] EWHC 2927 (admin).

576 For a discussion of judicial review of diplomatic "assurances" against torture in the context of removal proceedings, see Aaron S.J. Zelinsky, Comment: Khouzam v. Chertoff: *Torture, Removal, and the Rule of Non-inquiry*, 28 Yale L. & Pol'y Rev. 233, 239–243 (2009). The Third Circuit has held that judicial review of diplomatic assurances regarding torture is not barred by the political question docrine. Khouam v. Chertoff, 549 F.3d 245, 249–253 (3d Cir. 2008).

577 *See* People v. Kirkwood, San Francisco Superior Court No. 115353 (1987) (unpublished).

these "assurances" as a firm commitment.[578] The matter was resolved pragmatically between the presiding judge, the district attorney, and the public defender. The death penalty was not sought, and the case proceeded.[579]

In another case, *Curtis v. United States*, the U.S. government gave Spain assurances over Curtis's potential sentencing.[580] In this case, Spain agreed to extradite the relator "if the U.S. Government agreed to the terms of a Diplomatic Note specifying that Curtis would not be sentenced to an indeterminate sentence of life without the possibility of parole."[581] Curtis was eventually tried in two separate cases and received consecutive life sentences in one of the cases.[582] The relator appealed against the sentences and the Eleventh Circuit upheld his right to challenge his sentence as a third-party beneficiary of a diplomatic note between Spain and the United

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578 For an unambiguous "assurance" on the non-applicability of the death penalty but an ambiguous "assurance" as to the non-applicability of life imprisonment in an extradition case between the United States and Venezuela, see *Benitez v. Garcia*, 449 F.3d 971, 977–978 (9th Cir. 2006), *opinion withdrawn by* Benitez v. Garcia, 2007 U.S. App. Lexis 1340 (9th Cir. 2007). The following is taken from the 2006 *Benitez* opinion at pages 977–978:

> The Venezuelan Ministry of Foreign Affairs wrote to the Embassy of the United States to explain the extradition decree, stating that "[s]aid extradition *is conditioned* to the understanding that the aforementioned citizen will not be sentenced to death or life in prison or incarceration for more than thirty (30) years." (emphasis added). Because we must examine and defer to the surrendering country's wishes, particularly as they are expressed in its extradition decree, these statements are telling.
>
> If this particularly probative evidence of Venezuela's pre-extradition behavior were not sufficient to prove that Venezuela understood this extradition to encompass a limitation on the punishment Benitez could face, the sequence of events following Benitez's extradition confirm Venezuela's understanding of the punishments Benitez would not face. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996) ("[Courts] traditionally consider[] as aids to . . . interpretation . . . the postratification understanding of the contracting parties."). After Benitez was extradited but before his trial, the Venezuelan Embassy sent the Department of State a diplomatic note indicating that it was "concerned that [life imprisonment] may violate the provisions of the Extradition Treaty . . . as well as the conditions established in the sentence of the Supreme Court of Venezuela which approved the extradition request."
>
> It is also settled that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999) (*citing Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982)). Rather than disagreeing with Venezuela, the United States Department of State faxed a letter to the District Attorney that "it would be in the best interests of our extradition relationship for Mr. Rodriguez Benitez *not to serve* a life sentence." While this letter also indicated the request was not legally binding, it does cast doubt on the notion that there is a clear executive position in favor of permitting life imprisonment to which we must defer in deciding this case.

See also Barbara Merry Boudreaux, Benitez v. Garcia: *An Extradition Arrangement Lost in Translation*, 15 Tul. J. Int'l & Comp. L. 661 (2007).

579 For a commentary on this case, see Shea, *supra* note 518. The case of Kirkwood had already been the subject of a petition by him against the United Kingdom before the European Commission of Human Rights; *see Kirkwood v. United Kingdom,* 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984), App. No. 10479/83. Perhaps as a result of this case and that of Soering, which also involved the United Kingdom and the United States, the United Kingdom is presently more cautious in seeking "assurances" from the United States.

Soering v. United Kingdom, 161 Ect. H.R. Ser. A, Vol. 16 (July 7, 1989). *See also* Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition, The Soering Case*, 11 Mich. J. Int'l L. 845 (1990); Soering Commission Report, 161 Eur. Ct. H.R. (ser. A) 1, 67–68 (1989).

580 Curtis v. United States, 376 Fed. Appx. 902 (11th Cir. 2010) (unpublished opinion).

581 *Id.* at 903.

582 *Id.*

States. On appeal Curtis made a contract-based argument regarding his status as a third-party beneficiary and claims of fraudulent inducement by the United States to Spain to secure extradition where the United States never intended to limit the sentences imposed.[583] Although the Eleventh Circuit did not rule on the merits, it held that dismissal was premature and remanded to the district court for further proceedings.[584]

Procedurally, the language of an assurance will be strictly interpreted and must be unambiguous to create a binding obligation on the United States.[585] In *United States v. Salinas Doria*,[586] a Diplomatic Note was given by the United States to Mexico, in which the U.S. government affirmed that:

> The maximum penalty for each of the crimes for which extradition is sought is not more than 40 years incarceration. Therefore, I would like to convey to Your Excellency that the United States Government assures the Government of Mexico that, if the fugitive is extradited to . . . the United States of America, neither a sentence of death nor life imprisonment will be sought or imposed in this case.[587]

The relator argued that the language in the diplomatic note constituted an assurance that he would not be subject to more than forty years' imprisonment.[588] The court concluded that the "extradition documents at issue cannot be construed as an *assurance* to Mexico that Salinas's sentence would be limited to 40 years."[589] The court emphasized the rule requiring substantive assurances must be unambiguous to create a binding obligation by stating that "a foreign sovereign's 'unilateral belief' regarding the applicable maximum sentence 'is insufficient to bind the United States,' " and that in the case before it,

> If Mexico required such an assurance it could have sought clarification of the ambiguity in [a subsequent diplomatic note], particularly in light of the unambiguous statement in Note No. 501 that [the subsequent diplomatic note] expressly purported to paraphrase. But there is no reason to believe that the precise length of the maximum term of years faced by Salinas was important to Mexico, or that Mexico ever sought any assurance from the United States on that subject.[590]

The court concluded that the language of the diplomatic note only "guaranteed" that the United States would not sentence the relator to the death penalty or life imprisonment.[591]

In another case, a relator challenged the sentence imposed by the court on the grounds that it was the result, in part, of a misrepresentation of the diplomatic assurances given by the United States to the requested state. In *United States v. Pileggi*,[592] Costa Rican authorities agreed to extradite the relator to the United States after the exchange of diplomatic notes regarding limitations on punishment.[593] The diplomatic note provided that:

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583 *Id.*

584 *Id.* at 905.

585 *See also* Benitez v. Garcia, 476 F.3d 676, 682 (9th Cir. 2007) (withdrawn by the court) ("We are wary, however, of enforcing extradition conditions that are neither expressly agreed to by both countries nor contemplated by the relevant extradition treaty").

586 2008 U.S. Dist. LEXIS 86170 (S.D.N.Y. 2008).

587 *Id.* at *2–*3.

588 *Id.* at *28.

589 *Id.* at *29.

590 *Id.* at *31–*32.

591 *Id.* at *33–*34.

592 361 Fed. Appx. 475 (4th Cir. 2010) (unpublished opinion).

593 *Id.* at 476.

> "Costa Rica requested assurances that, upon extradition to the United States . . . Giuseppe Pileggi . . . will not be subjected to the death penalty or life imprisonment." (J.A. 16.) In response, the United States assured "the Government of Costa Rica that if extradited . . . Giuseppe Pileggi . . . will not receive a penalty of death or one that requires that [he] spend the rest of [his] natural [life] in prison." (J.A. 17.)[594]

The government, when asked by the court prior to sentencing if the assurance was binding on the court or executive branch, stated "I think technically what it says is that the United States, the executive branch will not seek a sentence in excess of fifty years."[595] The court found that it was bound to sentence the relator to a term of months, and sentenced the relator, who was fifty years' old at the time, to fifty years in prison followed by three years of supervised release.[596] The relator challenged his sentence, in part, based on the district court's reliance on the government's misrepresentation concerning diplomatic assurances.[597] The court, although noting that the misstatement was inadvertent, reasoned that the misstatement put false information before the district court and was left uncorrected.[598] As the only mention of a fifty- year sentence came from the government's misrepresentation, the court reasoned that the district court relied on the government's erroneous representation to sentence the relator.[599] The court held that this sentencing constituted plain error, vacated the relator's sentence, and remanded for resentencing, stating:[600]

> Given the Government's misrepresentation, we have zero confidence that had the district court known the true content of the assurances provided to Costa Rica, it would have sentenced Pileggi to 600 months in prison. The only reference during sentencing to the assurances provided to Costa Rica was erroneous, and the sentence arrived at by the court mirrored the Government's misstatement. In addition, no information independent from the misstatement was before the court that suggested a sentence of fifty years in prison.[601]

Not every conversation between a foreign official and a U.S. prosecutor constitutes an enforceable assurance. In *Simpson v. Caruso*,[602] the relator challenged the duration of his sentence and sought money damages based on alleged assurances given to British officials during a telephone conversation.[603] The relator claimed that the following telephone conversation occurred between a Michigan prosecuting attorney and a British consular official regarding the duration of a sentence if extradited:

> [British Consulate]: What happens in practice in Michigan in cases where a prisoner is convicted of first degree murder, does he stay inside for life or does he have license or release or parole ever take place?
>
> [Michigan Prosecuting Attorney]: No. There is no parole or release. The only way that he can be released from confinement is by commutation of sentence by the elected governor of the State of Michigan.

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594 *Id.*

595 *Id.*

596 *Id.* at 477.

597 *Id.* at 477–478.

598 *Id.* at 478.

599 *Id.*

600 *Id.* at 478–479.

601 *Id.* at 478.

602 355 Fed. Appx. 927 (6th Cir. 2009) (unpublished opinion).

603 *Id.* at 929.

> [British Consulate]: If release is possible, could any indication be given as to how long Simpson might be expected to serve?
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> [Michigan Prosecuting Attorney]: I find this somewhat difficult to answer. I do know that there are many commutation[s] of sentences. I did confer with Mr. Brown at the Department of Corrections and he advised me that the average term in confinement of first degree murder prisoners is 23 years.[604]

The relator argued that this conversation meant that, if extradited, he would serve only twenty-three years if convicted for first-degree murder.[605] However, the court rejected this argument, stating:

> Simpson misconstrues this conversation as an assurance to British authorities that his life sentence would be limited to twenty-three years. In fact, Delhey specifically states that only the governor of Michigan may reduce Simpson's sentence. Therefore, accepting all facts in the complaint as true, Simpson can prove no set of facts in support of this claim which would entitle him to relief. Accordingly, we affirm the district court's dismissal of Simpson's second claim on other grounds supported by the record.[606]

In a case before the Court of Appeals of Scotland the specificity of the assurances given by the U.S. Department of Justice in connection with the place of detention of the person whose extradition was granted but not surrendered, pending receipt of these assurances, was at issue. In that case the specific request of Scotland was that Brian Howes would not be confined to Maricopa County prison in Arizona, as the conditions there amount to a violation of Article 3 of the ECHR.[607] The U.S. Department of Justice, however, avoided making a specific assurance. After several qualified offers of assurances presented by the U.S. Department of Justice, the Court of Appeals of Scotland refused to accept them as they were so qualified as to indicate a high possibility that the assurances would not be observed and could not be enforced.

In *United States of America v. Mendoza*, the issue arose over U.S. government assurances given to the government of Spain that Mendoza would be transferred back to Spain if he were found guilty of the charges for which he was extradited. The *Note Verbal* provided by the United States stated that it would "not object" to Mendoza's transfer to Spain for the execution of his sentence, should he be found guilty. The government of Spain considered the *Note Verbal* to be an assurance that corresponded to the judicial order issued for the surrender of Mendoza to U.S. authorities. On that basis, the government of Spain surrendered Mendoza to the United

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604 *Id.* at 928.

605 *Id.* at 931.

606 *Id.*

607 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Sept. 5, 2011). Three recent cases decided by the European Court of Human Rights are relevant. They are: Case of Kabulov v. Ukraine (Application no. 41015/04), Judgment entered Nov. 19, 2009; Case of Soldatenko v. Ukraine (Application no. 244/07), Judgment October 23, 2008; and Case of Bayasakov and Others v. Ukraine (Application no. 54131/08), Judgment February 18, 2010. Soldatenko was an extradition to Turkmenistan. It was referred to in *Bayasakov*, which was also an extradition case. Kabulov, however, did not mention *Soldatenko*. In Kabulov, § 113, it was implied that sufficiently detailed assurances could make extradition to Kazakhstan possible, while *Bayasakov* ¶ 51 holds that "given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected." These cases illustrate the following: (1) the uncertainty concerning the source and type of evidence that is to be relied upon by the court making a determination on the merits of extradition; (2) the discretion given to the court in making such a determination based on the evidence it may deem appropriate; and (3) the placing the burden on the court as to the reliability of the "assurances" given and the legal authority of its source in the requesting state.

States pursuant to an *Acta de Entrega* signed by a representative of the United States embassy in Madrid. After being convicted Mendoza sought to have the condition enforced and be returned to Spain for the execution of his sentence. The U.S. government, however, took the position that it only promised "not to object" to his transfer to Spain as opposed to having committed itself to the certainty of his return. The U.S. Department of Justice maintained that the final decision of whether to transfer Mendoza to Spain for the execution of his sentence was exclusively in the hands of the Bureau of Prisons, as if it were a separate legal entity that was not bound by the assurance. The U.S. government thus concluded that it did not breach its assurance insofar as it did "not object" to Mendoza's request to the Bureau of Prisons that he be transferred to Spain. Mendoza has yet to be transferred to Spain.

In a South African case, the South African Consitutional Court held that an assurance must be obtained that the death penalty will not be imposed whenever an individual is removed to another country to face charges for which the death penalty is a possible sentence regardless of whether the person is removed by deportation or extradition.[608] The court surveyed Canadian and European practices regarding obtaining assurances from the United States, and reasoned as follows:

> Deportation or extradition and the death penalty
>
> [38] The lawfulness of the conduct of the South African immigration officers in handing over Mohamed to the FBI for them to take him to the United States was challenged on a further, even more fundamental and entirely different basis. The argument is derived from the obligation imposed on the South African state by the Constitution to protect the fundamental rights contained in the Bill of Rights.[25] The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way.[26] According to the argument the Constitution not only enjoins the South African government to promote and protect these rights but precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment. In particular, so the argument runs, this strikes at the imposition of a sentence of death. Therefore, even if it were permissible to deport Mohamed to a destination to which he had consented and even if he had given his informed consent to such removal, the government would have been under a duty to secure an undertaking from the United States authorities that a sentence of death would not be imposed on him, before permitting his removal to that country.
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> [39] The cornerstone of this argument is the finding of this Court in *S v Makwanyane and Another*[27] that capital punishment is inconsistent with the values and provisions of the interim Constitution. When, subsequent to this decision, the Constitutional Assembly came to deal with a Bill of Rights for the "final" Constitution, capital punishment was raised as an issue and the question whether there should be an exception to the right to life permitting such punishment was debated.[28] No such exception was, however, made; nor is there anything in the 1996 Constitution to suggest that the decision in *Makwanyane* has ceased to be applicable. On the contrary, the values and provisions of the interim Constitution relied upon by this Court in holding that the death sentence was unconstitutional are repeated in the 1996 Constitution. The importance of human dignity to which great weight was given in *Makwanyane* is emphasised in the 1996 Constitution by including it not only as a right, but also as one of the values on which the state is founded.[29]
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> [40] In the various judgments given in *Makwanyane* the history of capital punishment, its application in South Africa under apartheid, the attitude of other countries to such punishment, and the international trend against capital punishment in recent times were dealt with at length. This Court, after a full and detailed consideration of the relevant provisions of the interim Constitution and the arguments for and against capital punishment, concluded unanimously that

608 *Mohamed & Another v. Pres. of the Rep. of South Africa 2001* (17) CCT 01 (CC) at 24–42 (S. Afr.).

the death sentence was inconsistent with the values and provisions of the interim Constitution. There is no need to cover that ground again. It should be added, however, that the international community shares this Court's view of the death sentence, even in the context of international tribunals with jurisdiction over the most egregious offences, including genocide.[30] Counsel for the government correctly accepted that capital punishment is also inconsistent with the values and provisions of the 1996 Constitution and that the issues in this appeal must be dealt with on the basis of the decision in *Makwanyane*.

[41] As had been the case in the High Court, much of the argument in this appeal was directed to the question whether the removal of Mohamed to the United States was a deportation or a disguised extradition. The distinction was said to be this. If he was deported that would have been a lawful act on the part of the South African government. The fact that Mohamed was to be "deported" to the United States where he would immediately be put on trial for an offence that carried the death penalty was not relevant. There is nothing in our Constitution that precluded the government from deporting an undesirable alien, or that required it to secure an assurance from the United States government that the death sentence would not be imposed on Mohamed if he were to be convicted. If, however, what happened was in substance an extradition, it would have been unlawful because the correct procedures were not followed. Moreover, if the removal had been effected by way of extradition, it might have been necessary to secure an assurance from the United States government as a condition of the extradition that the death sentence would not be imposed.[31]

[42] Deportation and extradition serve different purposes. Deportation is directed to the removal from a state of an alien who has no permission to be there. Extradition is the handing over by one state to another state of a person convicted or accused there of a crime, with the purpose of enabling the receiving state to deal with such person in accordance with the provisions of its law. The purposes may, however, coincide where an illegal alien is "deported" to another country which wants to put him on trial for having committed a criminal offence the prosecution of which falls within the jurisdiction of its courts.

[43] Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences may be material in specific cases, particularly where the legality of the expulsion is challenged. In the circumstances of the present case, however, the distinction is not relevant. The procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the "deportation" or "extradition" is carried out.

[44] Mohamed entered South Africa under an assumed name using a false passport. He applied for asylum giving false information in support of his application and was issued with a temporary visa to enable him to remain in South Africa while his application was being considered. Those facts justified the South African government in deporting him. That, however, is only part of the story, for the crucial events are those that happened after Mohamed had secured his temporary visa. Having been identified by the FBI as a suspect for whom an international arrest warrant had been issued in connection with the bombing of the United States embassy in Tanzania, he was apprehended by the South African immigration authorities in a joint operation undertaken in cooperation with the FBI. Within two days of his arrest and contrary to the provisions of the Act he was handed over to the FBI by the South African authorities for the purpose of being taken to the United States to be put on trial there for the bombing of the embassy. On his arrival in the United States he was immediately charged with various offences relating to that bombing and was informed by the court that the death sentence could be imposed on him if he were convicted. That this was likely to happen must have been apparent to the South African

authorities as well as to the FBI when the arrangements were made for Mohamed to be removed from South Africa to the United States.

[45] Another suspect, Mr Mahmoud Mahmud Salim, alleged to be a party to the conspiracy to bomb the embassies, was extradited from Germany to the United States. Germany has abolished capital punishment and is also party to the European Convention on Human Rights. The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death. This is consistent with the practice followed by countries that have abolished the death penalty.

[46] Recently, in *Minister of Justice v Burns,*[32] the Supreme Court of Canada had occasion to reconsider its attitude to the extradition of fugitives to a country where they would face the death penalty. It had previously been held by a majority of that Court in *Kindler v Canada (Minister of Justice)*[33] and *Reference re Ng Extradition (Canada)*34 that there was no obligation on Canada before extraditing a suspect to a country that has the death penalty to seek an assurance from the receiving state that the death penalty will not be imposed. In a unanimous judgment the Court held in *Burns*[35] that in the light of developments since the decisions in *Kindler* and *Ng*, there is now an obligation on the Canadian government, in the absence of exceptional circumstances, to seek such an assurance. The Court deliberately refrained from anticipating what those circumstances might be.[36]

[47] The decision in *Burns* turned on section 7 of the Canadian Charter which provides that:

> "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the provisions of fundamental justice."

The two suspects whose extradition was sought faced charges of murdering the father, mother and sister of one of them, in what are described in the judgment as "brutal and shocking cold-blooded murders." After weighing the factors for and against extradition without assurances, the Court concluded that in the circumstances of that case, extradition without assurances that the death penalty would not be imposed violated the principles of fundamental justice, and was not justifiable under section 1 of the Charter.[37]

[48] Our Constitution provides that "everyone has the right to life."[38] There are no exceptions to this right. However, like all other rights in the Bill of Rights, it is subject to limitation in terms of section 36 of the Constitution. The requirements prescribed by section 36 are that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those mentioned in the section.[39] These considerations were taken into account by this Court in *Makwanyane* in holding that capital punishment was not justifiable under the interim Constitution. In the light of these provisions of our Constitution we can revert to the argument mentioned above[40] that a "deportation" or "extradition" of Mohamed without first securing an assurance that he would not be sentenced to death or, if so sentenced, would not be executed would be unconstitutional.

[49] In *Makwanyane* Chaskalson P said that by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that "this must be demonstrated by the State in everything that it does."[41] In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.

[50] Counsel for the government contended that although this requirement might be applicable to extraditions, it is not applicable to deportations. In support of this contention he relied on a series of Canadian cases the last of which is *Halm v Canada (Minister of Employment and Immigration)(T.D.)*[42] and on the judgment of the Court of Appeal of the United Kingdom and Wales in *Soblen*.[43] These cases dealt with the validity of deportation proceedings in circumstances where the deported person was likely to face a criminal charge in the country to which he or she was

to be deported. In all the cases a challenge to the procedure adopted based on a contention that there should have been a resort to extradition and not deportation was rejected.

[51] The decisions in these cases are referred to in the judgment of the High Court. They are, however, not directly relevant to the question that has to be decided in the present case, which depends upon the values and provisions of our Constitution. *Soblen*'s case was decided before the implementation in Britain of the European Convention on Human Rights. At that time there were no constitutional or treaty constraints which curtailed the powers of the executive. The only question was whether the removal of the applicant complied with the requirements for deportations under English law. The Court held that it did. That decision is of little assistance in deciding what our Constitution required our government to do in the present case.

[52] The Canadian cases were all decided before the decision of the Supreme Court of Canada in *Burns*. Canadian law did not then consider the removal of a person to another country where he or she would face a death sentence to be contrary to the principles of fundamental justice. In *Kindler,* La Forest J suggested that there is no reason why the same considerations should not apply to deportations and extraditions in determining what is required to meet the standards of the fundamental principles of justice.[44] The deportation cases may therefore have to be reconsidered by the Canadian courts in the light of the decision in *Burns* if in the future deportation rather than extradition is used as the means of removing a fugitive to a country where he or she faces the death penalty.

[53] But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated.[45] There can be no doubt that the removal of Mohamed to the United States of America posed such a threat. This is perhaps best demonstrated by reference to the case of Salim who was extradited from Germany to the United States subject to an assurance that the death penalty would not be imposed on him. This assurance has been implemented by the United States and Salim is to be tried in proceedings in which the death sentence will not be sought.

[54] If the South African authorities had sought an assurance from the United States against the death sentence being imposed on Mohamed before handing him over to the FBI, there is no reason to believe that such an assurance would not have been given. Had that been the case, Mohamed would have been dealt with in the same way as his alleged co-conspirator Salim. The fact that Mohamed is now facing the possibility of a death sentence is the direct result of the failure by the South African authorities to secure such an undertaking. The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed.

[55] It is not only sections 10 and 11 of the Constitution that are implicated in the present case. According to section 12 (1)(d) and (e) of our Constitution, everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. For the reasons given in *Makwanyane*, South African law considers a sentence of death to be cruel, inhuman and degrading punishment.

[56] Article 3 of the European Convention on Human Rights provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." In *Soering v United Kingdom*[46] the European Court of Human Rights held that:

> "[i]t would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article."[47]

[57] *Soering*'s case was concerned with extradition, but similar sentiments were expressed by the same Court in *Hilal v United Kingdom*,[48] a case dealing with the deportation of a Tanzanian citizen from the United Kingdom to Tanzania, which was held to breach Article 3 of the Convention because the deportee would face a serious risk of being subjected to torture or inhuman and degrading treatment in Tanzania. The Court there said:

> "The Court recalls at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (e.g. the *Ahmed v Austria* . . . and *Chahal v the United Kingdom* judgment[s])."[49] (Citations omitted.)

[58] An equally instructive case is *Chahal v United Kingdom*[50] where the Grand Chamber of the European Court of Human Rights held that deportation of an individual to his state of origin where he would face inhuman or degrading treatment or punishment would be contrary to the provisions of Article 3 of the Convention. The Court said it was:

> "well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct . . . The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."[51] (Footnote omitted.)

[59] These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights[52] and the positive obligation that it imposes on the state to "protect, promote and fulfil the rights in the Bill of Rights."[53] For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.

[60] The fact that the government claims to have deported and not to have extradited Mohamed is of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of

which South Africa is a signatory and which it ratified on 10 December 1998. Article 3(1) of this Convention provides:

> "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[54]

It makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.

[61] The removal of Mohamed to the United States could not have been effected without the cooperation of the South African immigration authorities. They cooperated well knowing that he would be put on trial in the United States to face capital charges. That he should be arrested and put on trial was clearly a significant and possibly the predominant motive that determined the course that was followed. Otherwise, why instruct the officials at the border to prevent him from leaving South Africa? And why cooperate in the process of sending him to the United States, a country with which he had no connection? They must also have known that there was a real risk that he would be convicted, and that unless an assurance to the contrary were obtained, he would be sentenced to death. In doing so they infringed Mohamed's rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights.

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25 Section 7(2) of the Constitution provides as follows:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."
>
> In terms of s 8(1) of the Constitution the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state."

26 Above n 8.

27 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

28 The question whether, in the light of the decision in *Makwanyane*, an exception should be made to the right to life to allow for the death sentence to be passed in serious cases, was thoroughly debated in the course of the deliberations of the Constitutional Assembly, e.g. during the second reading debate on 7 May 1996. Among other matters, the question of a qualification to the right to life to allow for the death sentence was expressly raised and debated. Ultimately a decision was taken that this should not be done. Although unanimity could not be reached on this particular question, the Constitution was adopted by an overwhelming majority of the members of the Constitutional Assembly.

29 Section 1(a) of the Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> > (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

30 In 1993 the Security Council unanimously adopted the statute for the International Criminal tribunal for the former Yugoslavia (Resolution 827 (1993)). In paragraph 1 of the resolution it approved the report of the Secretary-General of 3 May 1993 in which he recommended in paragraph 112 that "[t]he International Tribunal should not be empowered to impose the death penalty." That is reflected in Article 24 which provides that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment." See Morris and Scharf *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* Vol 1 (Transnational Publishers Inc, New York, 1995) at 274 and especially fn 713. Even in the face of the terrible genocide

in Rwanda where over 500 000 people were murdered, the Security Council was not prepared to compromise on the inclusion of the death penalty. The statute was adopted by the Security Council with one dissent (Rwanda) and one abstention (China). In terms of Article 23 the penalty which may be imposed by a trial chamber is limited to imprisonment. In its explanation of vote on Resolution 955, New Zealand stated:

> "For over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable—and a dreadful step backwards—to introduce it here."

Morris and Scharf *The International Criminal Tribunal for Rwanda* Vol 1 (Transnational Publishers Inc, New York, 1998) at 71–2. During the Rome Diplomatic Conference which drafted and adopted the Statute for the International Criminal Court there was much long debate on capital punishment. In the end it was agreed to exclude it as a competent sentence. In all 139 states signed the ICC Statute and 31, including South Africa, have ratified or acceded to the treaty.

31 Cf *Mackeson v Minister of Information, Immigration and Tourism and Another* 1980 (1) SA 747 (ZR) at 753-7.

32 *United States v Burns*, 2001 SCC 7, as yet unreported.

33 (1991) 6 CRR (2d) 193.

34 (1991) 6 CRR (2d) 252.

35 At paras 131–2.

36 At para 65.

37 Section 1 provides that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

38 Section 11.

39 Factors that have to be taken into account in terms of the section are:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

40 Above para 38.

41 Above n 27 at para 144.

42 [1996] 1 F.C 547.

43 Above n 18.

44 Above n 34 at 203.

45 Albeit subject to possible limitation under s 36.

46 (1989) 11 EHRR 439.

47 Id at para 88.

48 Application no. 45276/99, 6 March 2001.

49 Id at para 59.

50 (1996) 23 EHRR 413.

51 Id at para 79–80.

52 Section 39(2).

53 Section 7(2).

54 "torture" is defined in Article 1(1) as including "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . ," while providing that "torture" does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The South African Constitutional Court went on to reason that the individual's consent to his removal would only be enforceable against the individual if it were given with the knowledge that the South African government was obligated to obtain assurances, thus giving the individual a "right to demand this protection against exposure to the death penalty."[609] After this decision was reached, Mohamed presented it to the U.S. federal district court where he was being tried. The U.S. court refused to direct the U.S. government to not seek the death penalty against Mohamed, but allowed Mohamed to introduce the South African decision as a mitigating factor at sentencing.[610] Mohamed was sentenced to life imprisonment.[611]

7.4. Conclusion

These cases indicate how the narrow interpretation of assurances and their application is carried out in the United States, as well as how assurances are deemed different from the principle of specialty.[612] Concerns about the reliability and enforceability of governmental assurances in extradition cases have been addressed by the ECtHR and some domestic courts. Assurances are not in the nature of treaty obligations, even though they are binding upon the requesting state. Their enforceability is like other forms of representations made by governments to one another in connection with their multifaceted dealings. In the context of possible torture, the use of assurances from the receiving state has been criticized by human rights groups. The nature of torture being conducted in secret makes it difficult to discover and stop. Thus, assurances have not protected certain transferred individuals in the past, and assurance creates a two-tiered system where certain individuals receive special protection that undercuts the sending state's claim that torture in its entirety should be done away with.[613]

8. The Rule of Non-Inquiry[614]

8.1. Nature and Scope of the Rule

United States courts have thus far refused to inquire as to the processes by which a requested state secures evidence of probable cause to request extradition, the means by which a criminal conviction is obtained in a foreign state, or the penal treatment to which a relator may be subjected to upon extradition.[615] Even habeas corpus is not a valid means of inquiry into the

609 *Mohamed & Another v. Pres. of the Rep. of South Africa 2001* (17) CCT 01 (CC) at 48 (S. Afr.)

610 United States v. Bin Laden, 156 F. Supp. 2d 359, 366–368 (S.D.N.Y. 2001) (citing the *Ker-Frisbie* doctrine to establish the court's jurisdiction over Mohamed, and reasoning that the South African decision was directed to matters of diplomacy addressed to the other branches of government).

611 *Id.* at 371.

612 *See* Bassiouni, *supra* note 565, at 537 *et seq*.

613 Deeks, *supra* note 554, at 21–23.

614 *See generally*, *In re* Kasper-Ansermet, 132 F.R.D. 622, 630 (D. N.J. 1990) (*citing* International Extradition: United States Law and Practice (1983)). Christopher H. Pyle, Extradition, Politics, and Human Rights 118–129 (2001).

615 Rachel A. Van Cleare, *The Role of United States Federal Courts in Extradition Matters: The Rule of Non-inquiry, Preventive Detention, and Comparative Legal Analysis*, 13 Temp. Int'l & Comp. L. J. 27

treatment of the relator in the requesting state, save for narrow exceptions. One court considered the argument raised by the relator that the requesting country's motives and policy choices in changing the treaty to allow for extradition of relators similarly situated was "specious" as well as precluded by the rule of non-inquiry.[616]

The rule of non-inquiry also extends to the irregularity of a requested state's extradition procedure or of its own substantive law.[617] None of the above can, as a general rule, be used on a procedural basis to challenge the validity of the extradition request made to the United States.[618]

8.2. The Rule of Non-Inquiry as Applied by U.S. Courts in Passive Extradition (When the United States Is the Requested State)

This rule has been developed in deference to the sovereignty of the requesting state. No state can sit in judgment on another state's legal system or process.[619] However, considering the existence of international human rights law norms that apply to national legal systems, some limited inquiry is permitted.[620]

(1999); Jacques Semmelman, *Federal Court, The Constitution, and the Rule of Non-inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198, 1207 (1991).

616 United States v. Ramnath, 533 F. Supp. 2d 662, 671–672 (E.D. Tex. 2008) (discussing an argument raised in support of a finding of "special circumstances" warranting release on bail).

617 There is an ongoing controversy regarding the United States' extradition request to Jamaica for the extradition of Christopher "Duke" Coke. The extradition request was based in large part on wiretap evidence, which was initially believed to have been obtained in violation of Jamaican law. The Jamaican government's continued handling of the extradition request and other narcotics issues is marred by corruption, particularly as the Jamaican prime minister admitted to hiring a U.S. law firm to lobby the United States not to pursue Coke's extradition. It was also revealed that the Jamaican police force authorized the initial transfer of wiretap evidence to the United States. which contradicted the Jamaican government's claim that a lone police officer revealed the questionable evidence. For a detailed discussion of this controversy, see Bruce Zagaris, *Jamaican Prime Minister Will Allow Court to Decide U.S. Extradition Request*, 26 Int'l Enforcement L. Rep. 225–227 (June 2010); Bruce Zagaris, *Jamaican PM Approves Extradition after Admission of Hiring U.S. Lobbyist to Oppose U.S. Extradition of Coke*, 26 Int'l Enforcement L. Rep. 268–269 (July 2010); Bruce Zagaris, *Former Jamaican Police Commissioner Contradicts Prime Minister and Violence Breaks Out Over Coke Extradition*, 26 Int'l Enforcement L. Rep. 309–311 (Aug. 2010). Coke was ultimately extradited to the United States where he pled guilty to racketeering charges against him. *See* Reuters, *Jamaican Coke Admits to Drug, Racketeering Charges*, New York, Aug. 31, 2011, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2011/08_-_August/Jamaican_Coke_admits_to_drug,_racketeering_crimes/ (last visited Sept. 19, 2011). *See also* United States v. Gray, No. 07-00971 (S.D.N.Y. 2011).

618 Ahmed v. Morton, 1996 WL 118543 (E.D.N.Y. Mar. 6, 1996); *In re Extradition of* Sandhu 886 F. Supp. 318 (S.D.N.Y. 1993); United States v. Levy, 947 F.2d 1032 (2d. Cir. 1991); United States *ex rel.* Cabera v. Warden Metro, Correctional Ctr., 629 F. Supp. 699 (S.D.N.Y. 1986).

619 *See* Ramirez v. Chertoff, 267 Fed. Appx. 668 (9th Cir. 2008) (unpublished opinion) (refusing to apply a "humanitarian exception" where relator challenged the harshness of punishment in Mexico as compared to the United States, stating that the rule of non-inquiry leaves it to the state, not the courts, to determine whether to deny extradition on humanitarian grounds, and that "it is a longstanding principle that we do not parse the differences between our own criminal law and that of a requesting country.") *See also In re Extradition* of Bilanovic, 2008 U.S. Dist. Lexis 97893, at *34 (W.D. Mich. Dec. 3, 2008) (" 'Under the rule of non-inquiry, courts refrain from investigating the fairness of the requesting nation's justice system, and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country.' ").

620 *See* John T. Parry, *International Extradition, the Rule of Non-inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973 (2010).

In *Neely v. Henkel*,[621] the relator contended that amendments to the extradition statutes were unconstitutional, in that he was not assured the rights, privileges, and immunities guaranteed by the U.S. Constitution upon surrender to the requesting state. The protections specifically alluded to by Neely were the constitutional prohibitions against bills of attainder and ex post facto laws, and the Due Process Clause of the Fourteenth Amendment. The Supreme Court held:

> [T]hose provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not…entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.[622]

The rule of non-inquiry is brought into sharp focus in the line of cases dealing with convictions in absentia. In such cases, the United States follows the general practice in international law that convictions in absentia are not conclusive of the individual's guilt but are regarded as equivalent to indictments or formal charges against the individual sought to be extradited.[623] A careful reading of the decisions applying the rule of non-inquiry in such cases reveals that although the courts prefer not to inquire into the treatment to be received by the relator upon surrender, or the quality of justice he or she is expected to receive, there is nonetheless in some instances a finding of non-extraditability on other grounds. Three such cases are particularly revealing.

The first case, *Ex parte Fudera*,[624] involved a conviction in absentia of a fugitive found guilty and sentenced for the crime of murder by the Italian courts, the district court, on a writ of habeas corpus, chose to pass over the question of the propriety of the in absentia criminal prosecution and sentencing. The court instead rejected the Italian government's evidence of guilt on the grounds that it was based on pure hearsay and released the relator on the grounds of insufficient evidence.

The second case, *Ex parte La Mantia*,[625] similarly involved a murder conviction by an Italian tribunal. This time the fugitive alleged that the Sixth Amendment of the U.S. Constitution had been violated as he had been denied the right of confrontation and cross examination. The federal district court held that this did not apply to "persons extradited for trial under treaties with foreign countries whose laws may be entirely different."[626] However, the fugitive was again

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621 Neely v. Henkel, 180 U.S. 109 (1901). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

622 *Id.* at 122–123. *See also* Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (holding that the United States has neither the right nor the power to insist that the Spanish courts comply with the United States laws concerning extradition proceedings or criminal procedure), *cert. denied*, 489 U.S. 1087 (1989); Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (1990) (holding that the U.S. courts are not required to impose the details of the Constitution or procedural system on a requesting country's judicial system when reading and interpreting treaty obligations). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997).

623 *See generally* Ch. IX.

624 *Ex parte Fudera*, 162 F. 591 (S.D.N.Y. 1908), *appeal dismissed sub nom.*, Italian Gov't v. Asaro, 219 U.S. 589 (1911).

625 *Ex parte* La Mantia, 206 F. 330 (S.D.N.Y. 1913).

626 *Id.* at 332. *See also* Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984) (holding that the Mexican government is not bound by the requirements of our Constitution even when prosecuting a U.S. citizen, and stating it is not this court's responsibility to supervise the integrity of the judicial system of another sovereign), *cert. denied*, 474 U.S. 830 (1985).

ordered to be released and extradition was refused because of the insufficiency of evidence presented by the Italian government.

In the third case, *In re Mylonas*,[627] the district court ruled that Mylonas's conviction in absentia did not preclude extradition, even though the fugitive, convicted of embezzlement, was not represented by counsel and had no one appear for him. Again, however, the court found grounds upon which it ordered the accused discharged from custody, namely that under Article V of the 1931 Treaty of Extradition with Greece, the Greek government's long-delayed effort to take the accused into custody exempted Mylonas from extradition "due to lapse of time or other cause."

In these three cases, the courts, though recognizing the limited scope of habeas corpus and the rule of non-inquiry, freed the relators and denied extradition on other grounds. Notwithstanding these cases, U.S. practice allows extradition based on in absentia convictions. Two opinions, however, voiced disenchantment with the established rule.

In *Argento v. Horn*,[628] the U.S. Court of Appeals for the Sixth Circuit felt constrained to submit to precedent on this question. Argento, the fugitive, had been convicted in absentia by Italian courts for the crime of murder. The murder occurred in 1921 and the conviction was obtained in 1931, but the Italian government did not initiate proceedings for Argento's extradition until the 1950s. The court stated:

> The appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court, sensible of the great Constitutional immunities . . . [H]owever, we conceive it our obligation to do so.[629]

The test of the rule of non-inquiry is applied in cases where the relator is likely to encounter such treatment in the requesting state that is significantly offensive to the minimum standards of justice, treatment of individuals, and preservation of basic human rights as perceived by the requested state.[630]

In *Gallina v. Fraser*,[631] the Second Circuit bowed to precedent and followed the rule of non-inquiry, but indicated in dicta that given a proper case the rule might not be followed. In this case, Gallina had been tried and convicted in absentia by the Italian courts for the crime of robbery. Gallina petitioned the federal district court for a writ of habeas corpus, contending that if extradited to Italy, he would be imprisoned without retrial and without an opportunity to face his accusers or conduct any defense. Judge Waterman stated:

> [W]e have discovered no case authorizing a federal court in a *habeas corpus* proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. . . . *Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment*

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627 *In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960).

628 Argento v. Horn, 241 F.2d 258 (6th Cir.), *cert. denied*, 355 U.S. 818, *reh'g denied*, 355 U.S. 885 (1957).

629 *Id.* at 263–264.

630 *See* Ch. VIII. *See also In re Extradition of* Manzi, 888 F.2d 204 (1st Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); *In re Extradition of* Sandhu, 886 F. Supp 318 (1993).

631 Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990).

so antipathetic to a federal court's sense of decency as to require re-examination of the principle set out above.[632]

The surrender of a relator, whether a U.S. citizen or not, is unimpaired by the absence in the requesting state of specific safeguards available in the U.S. legal system, and therefore no judicial inquiry into the requesting state's legal system is permitted.[633] Nothing, however, prevents the executive branch from considering policies and practices in the requesting state that may be deemed too fundamentally unfair and contrary to U.S. public policy, thereby permitting the exercise of executive discretion[634] and refusal to surrender the person otherwise judicially found extraditable.[635]

The rule of non-inquiry finds support in the treaties between the United States and certain states on the transfer of prisoners.[636] Under Title 18 § 4100. U.S. courts cannot inquire into

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632 *Gallina*, 278 F.2d, at 78–79 (emphasis added). *See also In re* Ryan, 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (1973); *cf.* Esposito v. INS, 936 F.2d 911 (7th Cir. 1991) (holding that the relator may present evidence that calls into question the fundamental fairness of the proceedings that generated an in absentia conviction, and if that evidence is sufficiently compelling, the Board will be precluded from giving it any weight at all). The *Gallina* dicta has been eroded by *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (1990). In *Peroff v. Helton*, 1542 F.2d 1247 (4th Cir. 1976), the Fourth Circuit on the basis of the rule of non-inquiry denied petitioner's habeas corpus petition; nevertheless, it made a judgment on the capability of the Swedish criminal justice to ensure the safety of petitioner's while he is in custody in Sweden.

633 Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972). A requesting state's internal procedures will only be examined when they are antithetical to the federal court's sense of decency. United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (holding that a defendant cannot defeat an extradition order by a claim that the extradition treaty does not guarantee the requesting state will give him notice of the charges and opportunity to challenge his arrest and extradition), *cert. denied*, 489 U.S. 1087 (1989); Esposito v. Adams, 700 F. Supp. 1470 (N.D. Ill. 1988). *See also In re Extradition of* Powell, 4 F.Supp. 2d 945 (S.D. Cal. 1998); but see Tracey Hughes, Comment, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 Int'l & Comp. L. Rev. 293, 303–312 (1986) (discussing cases in which the rule of non-inquiry has been eroded); Basso v. Pharo, 278 Fed. Appx. 886 (11th Cir. 2008) (unpublished opinion) (stating after finding no due process right to a "speedy extradition" that "the rule of non-inquiry prevents an extradition magistrate, without exception, from assessing the receiving country's judicial system.")

634 *See* Ch. IX.

635 Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977). In dicta, the court held that the rule of non-inquiry into the future treatment of the offender in the requesting state applies to the judiciary. The proper forum to raise such questions is the executive branch of the government, as that branch can exercise executive discretion in denying a person's surrender to a foreign state (*see* Executive Discretion, Ch. XI). *See Bloomfield*, 507 F.2d 925 (2d Cir. 1974); *cf.* Emami v. U.S. Dist. Ct. for Northern District of California, 834 F.2d 1444 (9th Cir. 1987) (stating that although Congress has provided that extraditability shall be determined by the judge or magistrate in the first instance, the ultimate decision to extradite is ordinarily a matter within the exclusive purview of the executive). *See also In re Extradition of* Chen, 161 F.3d 11 (9th Cir. 1998); *In re Extradition of* Lehming, 951 F. Supp. 505 (D.Del. 1996); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

636 *See* Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican–American Transfer of Penal Sanctions Treaty*, 64 Iowa L. Rev. 275 (1979); M. Cherif Bassiouni, *Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada*, 11 Vand. J. Transnat'l L. 249 (1978); Detlev F. Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 Iowa L. Rev. 325 (1979). *See also* M. Cherif Bassiouni, II International Criminal Law 229–240 (2d ed. 1999).

the manner in which a person was found guilty in the state from which the prisoner has been transferred in order to execute his/her sentence in the United States. This position may be viewed as an extension of the policy of non-inquiry into the manner by which a person was brought into the United States.

In *Rosado v. Civiletti*,[637] the Second Circuit considering the validity of the provisions of the Treaty on Transfer of Prisoners between the United States and Mexico and its implementing legislation, reviewed at length the record of torture of the petitioners in Mexico and similar practices in that country. Though expressing strong disapproval, the Court concluded it could not inquire into the internal practices of a sovereign state. The court cited *Neely v. Henkel*,[638] *United States v. Toscanino*,[639] *United States v. Lira*,[640] and *Reid v. Covert*,[641] to underscore that the U.S. Constitution applies extraterritorially and imposes limitations on U.S. government agents acting outside the territory of the United States, if that conduct violates certain due process standards, in particular the Fourth and Fifth Amendments. But such limits do not apply to sovereign states, which would not in any event be deterred by judicial sanctions in the United States, as they would have no effect on the states' policies and practices.

In *Rosado*, the court found that the petitioners' request for transfer from Mexico was voluntary, even though the record supported a different conclusion. The court reasoned that its decision was a question of policy. Therefore, it held that the petitioners' detention in the United States on the basis of the treaty and the implementing legislation was valid. This is regrettably a narrow view, though clearly the court felt it best to let the practice of transfer of prisoners continue to proceed unimpeded, as U.S. prisoners transferred to the United States would be better off than had they remained in Mexico. It is the view of this writer, as expressed in testimony before the Senate and House on this treaty[642] and the implementing legislation,[643] that if a foreign penal judgment is based on evidence patently violative of U.S. public policy and minimum standards of justice, the judiciary of the United States should not give it recognition.

The same argument was presented by this writer and others in *Escobedo v. United States*,[644] but the Fifth Circuit refused to disregard evidence that was proffered supporting a finding

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637 Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856, *reh'g denied*, 449 U.S. 1027 (1980). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980); *cf. In re Requested Extradition of* Smyth, 820 F. Supp. 498 (N.D. Cal. 1993) (the United Kingdom sought the extradition of the defendant to serve the remainder of his sentence for a conviction in Belfast, Northern Ireland. The court rejected Smyth's defense that his situation fell under the Supplemental Extradition Treaty between the United States and the United Kingdom and concluded the treaty did not nullify the traditional rule of non-inquiry.)

638 Neely v. Henkel, 180 U.S. 109 (1901). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

639 United States v. Toscanino, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *remand*, 398 F. Supp. 916 (1975).

640 United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

641 Reid v. Covert, 354 U.S. 1, 60–61 (1957).

642 *Implementation of Treaties for the Transfer of Offenders to or from Foreign Countries, 1977: Hearings Before the Subcommittee on Immigration, Citizenship and International Law*, 95th Cong., 1st Sess., 18; *Transfer of Offenders and Administration of Foreign Penal Sentences, 1977: Hearings on S.1682 before the Subcommittee on Penitentiaries and Corrections*, 95th Cong., 1st Sess.; *Penal Treaties with Mexico and Canada, 1977: Hearings Before the Committee of Foreign Relations*, 95th Cong., 1st Sess. on Ex. D, H.

643 18 U.S.C. § 3244 (1994).

644 Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980), *cert. denied sub nom.*, Castillo v. Forsht, 450 U.S. 922, *reh'g denied*, 451 U.S. 934 (1981). *See also* Linna v. INS, 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986), *reh'g denied*, 479 U.S. 1070 (1987) (regarding an allegation that subject of deportation proceedings faced death sentence and absence of due process);

of probable cause, although the requesting state (Mexico) had obtained it by means of torture. Thus, the United States has so far refused to inquire into foreign states' judicial and administrative practices in observance of the rule of non-inquiry, except if U.S. agents are directly involved in conduct that constitutes a serious violation of due process against a U.S. citizen (and presumably also against a permanent resident of the United States).

There is, however, increasing dicta in the opinions of some circuits to believe the rule of non-inquiry could be eroded given the appropriate case. This could arise in two types of cases: (1) where the evidence presented by a requesting state is the product of a serious violation of due process (such as torture), the court could give no weight or even refuse to admit that evidence; and (2) where there is evidence that the individual may be subjected to cruel, inhuman, or degrading treatment in the requesting state, the court could refuse to order the relator's extradition. Such a holding could easily rely on existing international instruments binding upon the United States. Among these international instruments are: the Universal Declaration of Human Rights,[645] the International Covenant on Civil and Political Rights,[646] the Inter-American Convention on Human Rights,[647] and others.[648] The 1967 Protocol relating to the Status of Refugees[649] does not permit a court to rely on the rule of non-inquiry to refuse inquiry into the possible persecution of the relator once returned to the requesting state.[650]

The rule of non-inquiry is frequently argued by the government to preclude judicial consideration of issues whose outcome may either not be favorable to the government's position, or which, in its estimation, would tend to prolong the legal proceedings. At times the government argues that judicial inquiry into the political motivation of a requesting state[651] is not justiciable under the rule of non-inquiry and should be left to the secretary of state. Other similar arguments are raised in respect to the interplay between immigration proceedings and extradition (*see* Chapter IV on Disguised Extradition). Last, the argument is used in connection with any attempt to discover prosecutorial misconduct and "working" arrangements between certain representatives of the U.S. government and foreign governments.[652] Newer cases, however, have tended to bring to light some occasionally improper practices by overzealous prosecutors who tend to put winning cases above the integrity of the legal process of which they are such an important part.[653] Treaties and their judicial interpretations show, however, that there is no uniformity in the articulation and application of the rule of non-inquiry.

Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990) (concerning the allegation that extraditee's conviction came under his confederates' coerced confessions and that he faced torture if returned to requesting state). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3d Cir. 1997); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003).

645 G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

646 G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 6, 1496th plen. mtg., at 165, U.N. Doc. A/6316 (1966).

647 O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Nov. 22, 1969.

648 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., 93 plen. mtg., at 395, U.N. Doc. A/64, at 63 (1984). *See* M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 Rev. Int'le de Droit Pénal 17 (1977). *See also* M. Cherif Bassiouni, I International Criminal Law 363 (2d ed. 1999).

649 *See* Ch. III.

650 *See* Ch. III, Sec. 4.2.

651 See Ch. VIII, Sec. 2.1 for the political offense exception.

652 See *supra* Sec. 7 for a discussion of diplomatic assurances and misrepresentations.

653 *See* Wang v. Reno, 81 F.3d. 808 (9th Cir. 1995*). See also* Demjanjuk v. Petrovsky, 10 F.3d 338, 355 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 295, 130 L. Ed. 2d 205 (1994) (prosecuting attorneys engaged

In Article 3(a) of the 1985 United States–United Kingdom Supplemental Extradition Treaty, extradition is prohibited when the individual, if surrendered, would be prejudiced at trial or punished, detained, or restricted because of race, religion, nationality, or political opinions. Further, in regard to this defense, the trier's findings are immediately appealable either to the U.S. district court, or court of appeals.[654] This clearly alters the traditional view on the rule of non-inquiry,[655] but does not entirely abolish it.[656]

The case of *In re Requested Extradition of Artt, Brennan and Kirby*[657] involved the 1985 United States–United Kingdom Supplementary Treaty, which was designed to facilitate extradition to the United Kingdom of IRA members who committed acts of violence in Northern Ireland or elsewhere in the United Kingdom. Under Article 3(a), the Treaty requires the court to inquire "to some degree" into whether the relators "were actually guilty of the crimes of which they were convicted."[658] In considering the claims of one of the relators, who was tortured in order to extract a confession, the court did not look at that conduct by the requesting state as dispositive of the issue, namely the refusal to extradite on the grounds that the foreign conviction was based on a confession obtained by torture. Instead, it considered whether the conviction

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in prosecutorial misconduct when they recklessly disregarded their obligation to provide information specifically requested by detainee, thereby endangering detainee's defense); United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) ("It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.") (citing instances of prosecutorial misconduct). In so doing, the government failed in its duty to "win fairly, staying well within the rules" and, more important, to "serve truth and justice first." *Kojayan*, 8 F.3d at 1323. The district court found that in this case, the government strayed from its responsibility "to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Id.* Thus,

> [i]n a situation like this, the judiciary—especially the court before which the primary misbehavior took place—may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events.

Kojayan, 8 F.3d at 1325. *See also In re Massieu,* 897 F. Supp. 176 (D.N.J. 1995) and United States v. Criollo, 962 F. 2d 241 (2d Cir. 1992) wherein the court, rejecting petitioner's claim for review (in an immigration case), did not however foreclose an eventual review by reason of the rule of non-inquiry. Thus, the Second Circuit held:

> [I]n Linnas v. INS, 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995, 107 S.Ct. 600, 93 L.Ed.2d 60 (1986), this court stated "that there could arise a situation in which the person to be removed from the United States would be subjected to 'procedures or punishment so antipathetic to a federal court's sense of decency' as to require judicial intervention." *Id.* at 1032 (quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d. Cir.) *cert. denied*, 364 U.S. 851, 81 S.Ct. 97, 5 L.Ed.2d 74 (1960)). Although we conclude herein that Saleh's claims on appeal are without merit, this ruling does not foreclose the possibility, under appropriate circumstances, of judicial intervention into such matters.

Id. at 241.

654 Supplementary Extradition Treaty, U.S.–UK, art. 3(a), June 25, 1985, TIAS 12050, *entered into force* December 23, 1986.

655 *See Senate Foreign Relations Committee, 99th Congress, First Session, Hearings of September 18, 276–305* (1985) (testimony of M. Cherif Bassiouni), and M. Cherif Bassiouni, *The Political Offense Exception Revisited: Extradition between the U.S. and the U.K.—A Choice between Friendly Cooperation among Allies and Sound Laws and Policy*, 15 Den. J. Int'l L. & Pol'y 255 (1987). The Fifth Circuit recognized that right and its reviewability on appeal; however, an extradition target must establish by a preponderance of credible evidence that the legal system of the requesting country would treat him differently than other similarly situated individuals because of race, religion, nationality, or political opinions. *In re Extradition of* Howard, 996 F.2d 1320 (5th Cir. 1993). This Treaty provision allows for a right of appeal within the meaning of 28 U.S.C. § 1291.

656 *Howard*, 996 F.2d at 1331.

657 *In re* Artt, 972 F. Supp. 1253 (N.D. Cal. 1997).

658 *Id.* at 1261.

rested on other evidence, which the U.S. court accepted (on the basis of the UK court's characterization) as "overwhelming evidence of Brennan being caught with the bomb and its paraphernalia."[659] Probably with that conclusion in mind, the court took a narrow approach to what it refers to as the "humanitarian international law exception,"[660] citing several cases.[661]

In *Crudo v. United States*, the Ninth Circuit affirmed the district court's denial of relator's request to introduce evidence that his confession was coerced in the requested state, the Philippines.[662] Thus, in similar issues involving coerced confessions, the Ninth Circuit reversed a district court's decision and affirmed another. As the question of law appears the same, it must surely be the difference in the facts that led the court to opposite conclusions. Admittedly, in the *Crudo* case, the circuit court characterized the legal issue in terms of admissibility of the evidence, an area in which the extradition judge has traditionally been given wide latitude.

In determining whether there has been a violation of the doctrine of specialty, courts have consistently examined the terms of the treaty for any limitations on prosecution.[663]

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659 *Id.* at 1268.

660 *Id.* at 1268.

661 Gallina v. Fraser, 278 F.2d 77, 69 (2nd Cir. 960), Quinn v. Robinson, 783 F.2d 776, 789–790 (9th Cir. 1986), Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983), Wang v. Reno, 81 F.3d 808 (9th Cir. 1996) (in which, however, extradition was denied), Sidali v. INS, 107 F.3d 191, 195 (3rd Cir. 1997), Martin v. Warden, 993 F.2d 824, 830 (11th Cir. 1993), Ahmad v. Wigen, 726 F. Supp. 389, aff'd 910 F.2d 1063, 1967 (2nd Cir. 1990), Escobedo v. United States, 623 F.2d 1098, 1107 (5th Cir. 1980), Sinderia v. Grant, 619 F.2d 167, 174 (2nd Cir. 1980); Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003).

662 106 F.3d 407 (9th Cir. 1997).

663 *See, e.g.,* United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995) (citing Treaty on Extradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.–Uru., Art. XIII, P.I.A.S. 10850), *cert. denied*, 516 U.S. 933, 133 L. Ed. 2d 239, 116 S. Ct. 341 (1995); United States v. Fowlie, 24 F.3d 1059, 1064 n.2 1065 (9th Cir. 1994) (citing Extradition Treaty Between U.S. and Mex., May 4, 1978, U.S.–Mex, 31 U.S.T. 5059, T.I.A.S. 9656), *cert. denied*, 513 U.S. 1086, 115 S. Ct. 742, 130 L. Ed. 2d 643 (1995); United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994) (citing Treaty on Extradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.–Uru., Art. 13, T.I.A.S. 10850), *cert. denied*, 513 U.S. 1228, 130 L. Ed. 2d 883, 115 S. Ct. 938 (1995); United States v. Khan, 993 F.2d 1368, 1373 (9th Cir. 1993) (citing Extradition Treaty, Dec. 22, 1931, U.S.–Pak., Art. 7, 47 Stat. 2124); United States v. Levy, 905 F.2d 326, 328 (10th Cir. 1990) (citing Extradition Treaty, June 8, 1972, U.S.–U.K., Art. XII, 28 U.S.T. 227), *cert. denied*, 498 U.S. 1049, 112 L. Ed. 2d 778, 111 S. Ct. 759 (1991); Leighnor v. Turner, 884 F.2d 385, 286 T.S. No. 354 (8th Cir. 1989) (citing Treaty Concerning Extradition, June 20, 1967, U.S.–F.R.G., 32 U.S.T. 1485, T.I.A.S. No. 9785); United States v. Sensi, 279 U.S. App. D.C. 42, 879 F.2d 888, 895 (D.C. Cir. 1989) (citing Extradition Treaty, June 8, 1972, U.S.–U.K., Art. XII, 28 U.S.T. 227, T.I.A.S. 8468); United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir. 1988) (citing Extradition Treaty, June 8, 1972/Oct. 21, 1976, U.S.–U.K., Art. XII, 28 U.S.T. 227, T.I.A.S. 8468), *cert. denied*, 489 U.S. 1027, 103 L. Ed. 2d 217, 109 S. Ct. 1158 (1989*);* United States v. Cuevas, 847 F.2d 1417, 1427 (9th Cir. 1986) (citing Treaty on Extradition, U.S.–Switz., May 14, 1900, 31 Stat. 1928, T.S. No. 354, Art. IX), *cert. denied*, 489 U.S. 1012, 103 L. Ed. 2d 185, 109 S. Ct. 1122 (1989); United States v. Thirion, 813 F.2d 146, 151 (8th Cir 1987) (citing Treaty Respecting Extradition, Feb. 15, 1939, U.S.–Monaco, 54 Stat. 1780); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (citing Treaty on Extradition, May 14, 1900, U.S.–Switz., Art. IX, 31 Stat. 1928, T.S. No. 354); Fiocconi v. Attorney General, 462 F.2d 475, 481 (2d Cir. 1972) (citing Extradition Convention between U.S.-Italy (1868), Art. III, 15 Stat. 631), *cert. denied*, 409 U.S. 1059, 34 L. Ed. 2d 511, 93 S. Ct. 552 (1972). More specifically *see Andonian*, 29 F.3d at 1435; *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989) ("the objective of the rule [of specialty] is to insure that the treaty is faithfully observed by the contracting parties.... The extradited individual, therefore, can raise only

It should be noted, however, that the rule of non-inquiry bars U.S. courts from entertaining claims that the judicial or executive branches of the requested state violated their own laws. Thus, a relator who has been extradited from a foreign state to stand trial in the United States cannot claim that he was surrendered in violation of the foreign requested state's interpretation of what is an extraditable offense.[664]

In *In re Extradition of Lui Kin Hong a/k/a Jerry Lui*[665] the Massachusetts district court held in support of the rule of non-inquiry, but nonetheless gave the relator great latitude in introducing evidence, and thus making a record, concerning the potential treatment of the relator once he was surrendered to Hong Kong. The court cited the well-established position of the First Circuit in *Koskotos v. Roche*[666] wherein the court held: "concerns of the sort raised here are for the executive branch because of its exclusive power to conduct foreign affairs, as extradition proceedings necessarily supplicate the foreign policy interests of the United States."[667]

The First Circuit in the cases cited above, as well as the Second,[668] Fourth,[669] and Ninth[670] Circuits, have allowed a relator to make a record of his/her concerns, presumably so that the record can be reviewed by the secretary of state for consideration of "executive discretion."[671] This is probably the best approach, namely, to allow the relator to make a record; only in cases involving obviously egregious results should the extradition court deny extradition. Otherwise, the judicial record can be relied upon by the secretary of state, which conserves time and effort instead of briefing the facts for the secretary's benefit. Furthermore, this gives the government an opportunity to contradict the relator's assertions and to make its own record in an open manner. On the basis of such a record, the secretary of state can make a more enlightened and transparent decision.

The rule of non-inquiry extends to the laws, judicial acts, and administrative decisions of foreign legal systems as part of the deference that states give to each other in respect of their separate sovereignties. Thus, as stated in *Mainero v. Gregg*[672] the Ninth Circuit found "to date no court [had] ever denied extradition based on a fugitive's anticipated treatment in the requesting country."[673] But courts have nonetheless allowed a limited inquiry as evidenced by the cases cited in this section. The contemporary U.S. practice of "extraordinary rendition"[674] and other forms of abductions and unlawful seizures justify expanding the exception to the rule of

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those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty." (citations omitted)), *cert. denied*, 492 U.S. 921, 106 L. Ed.2d 595, 109 S. Ct. 3249 (1989).

664 United States v. Medina, 985 F. Supp. 397 (S.D.N.Y. 1997).

665 *In re Extradition of Lui Kin Hong a/k/a Jerry Lui*, 939 F. Supp. 934 (D. Mass. 1996), *habeas corpus granted by* Kin Hong v. United States, 957 F. Supp. 1280 (D. Mass 1997), *reversed by* United States v. Kin Hong, 110 F. 3d 103 (1st Cir 1997) (rehearing en banc denied), *stay denied by* Lui Kin Hong v. United States, 520 U.S. 1206, 117 S. Ct. 1491, 137 L. Ed. 2d 816 (1997).

666 Koskotos v. Roche, 931 F.2d 169 (1st Cir. 1991).

667 *Id.* at 174. *See also* United States v. Manzi, 888 F.2d 204, 206 (1st Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1017, 110 S. Ct. 1321 (1990).

668 Gallina v. Fraser, 278 F.2d 77 (2d. Cir. 1960), *cert. denied*, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 74 (1960); Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).

669 Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S. Ct. 787, 50 L. Ed. 2d 778 (1977).

670 Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

671 *See* Ch. II. *See also* Sean Murphy, 2 United States Practice in International Law: 2002–2004 (2006).

672 Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1999).

673 *Id*. at 1210. *See also* Murphy, *supra* note 671.

674 *See* Ch. V.

non-inquiry as indicated by the Second Circuit in *United States v. Toscanino*[675] for "egregious conduct" whether by U.S. agents abroad or by foreign agents acting as de facto agents for the United States. This limited inquiry may be expanded whenever a treaty allows it, or when an international legal obligation arises under international human rights treaties.

8.3. The Rule of Non-Inquiry: The Death Penalty and Torture

As stated above, the rule of non-inquiry is based on the deference that the judiciary in one state gives to another sovereign state with respect to its laws, judicial practice, and administrative procedures.[676] With the development of international and regional human rights protections, which in turn have permeated national legal systems through constitutions and laws, it has become progressively more difficult since the 1960s to maintain the rigidity of the rule of non-inquiry as it had once existed. Nevertheless, the judiciary continued to give it a high level of adherence, preferring to defer judgment on the laws and practices of requesting states to the executive branch. In time, international treaty obligations on the protection of human rights became justiciable and thus more difficult to avoid by the judiciary in the context of extradition. However, the executive branch, eager to avoid having the judiciary expand its inquiry into human rights issues, sought to reaffirm not only the validity of the rule, but its own primacy in dealing with foreign governments on matters involving the treatment of persons surrendered by the United States. This became particularly evident with respect to torture after the United States adopted national implementing legislation for the CAT.[677] Article 3 of the CAT prohibits extradition whenever there is a likelihood that the relator will be tortured.[678] Because the threat of torture is a substantive bar to extradition, even though it is to be determined by the executive branch, its procedure is covered in Chapter VIII. The Bush administration, rather than allowing the judiciary to make such a determination and to create a legal exception to the rule of non-inquiry, preferred to have these issues determined solely by the secretary of state.[679] Courts, in reliance that the issue of the realtor's torture is properly considered by the secretary of state, have declined to entertain torture as a bar to extradition where the secretary of state has not made a final determination regarding whether the relator will be extradited.[680] One U.S. court held that there was no humanitarian exception available to the relator, because although some federal courts recognized the possibility of such an exception,

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675 United States v. Toscanino, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *remand*, 398 F. Supp. 916 (1975).

676 This principle was noted in one author's analysis of the likely argument that could be raised by counsel for Roman Polanski in connection with his extradition to the United States. *See* Bruce Zagaris, *Swiss Government Arrests Polanski on U.S. 1977 Sex Case*, 25 Int'l Enforcement L. Rep. 484, 485 (Dec. 2009). The extradition request for Mr. Polanski was ultimately denied and he was freed. *See* Dave Itzkoff, *Polanski Is Free after Swiss Reject U.S. Extradition Request*, N. Y. Times, July 12, 2010.

677 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), U.N. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197 (1984), which entered into force with respect to the United States on November 20, 1994; Torture Victims Protection Act, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73. The rule of non-inquiry has been relied on to bar the relator's ability to raise a "humanitarian exception" argument in the context of a CAT claim.*See In re Extradition of* Santos, 2011 U.S. Dist. LEXIS 62672, at *69–*72 (C.D. Cal. June 13, 2011).

678 CAT, *supra* note 507, at Art. 3.

679 *See* Ch. VIII. *See also* M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2005–2006).

680 *In re Extradition of* Tawakkal, 2008 U.S. Dist. LEXIS 65059, at *42–*46 (E.D. Va. Aug. 22, 2008); *In re Extradition of* Avdic, 2007 U.S. Dist. LEXIS 47096, at *29–*32 (D.S.D. June 28, 2007). This does not, however, prevent the relator from presenting evidence of his or her fear of torture to the secretary of state.

no federal court has applied it.[681] Other issues involving torture usually arise in the context of the rule of non-inquiry.

Notwithstanding what was mentioned above, the Eighth Amendment to the U.S Constitution concerning cruel and unusual punishment cannot be suspended by the rule, nor can the Fifth Amendment's Due Process Clause. Consequently, the rule of non-inquiry is subject to being set aside if any of these two constitutional issues are deemed meritorious enough by the extradition court to consider. This was indicated in dicta in *Gallina v. Fraser*.[682]

The rule of non-inquiry has not necessarily been without exceptions with respect to foreign requested states, particularly those states that have abolished the death penalty and those states that are bound by regional human rights treaties, such as the European states. In these cases discussed in Chapter VIII extradition to the United States has been denied because of either the possibility of the execution of the death penalty or because of death row syndrome.[683]

There are a number of cases in the United States that specifically address the rule of non-inquiry in the context mentioned above, as well as others.[684] They include: non-inquiry into evidence obtained in what would be considered violations of the Fourth, Fifth, and Sixth Amendments (whether against U.S. or noncitizens, or whether by foreign agents acting alone, or with U.S. agents, or U.S. agents alone); torture resulting in confessions abroad; convictions abroad without due process; potential torture; mistreatment of the relator upon return, including inhuman, cruel, or degrading treatment or punishment; and excessive penalties (so far there have been no cases involving corporal punishment save for one case involving flogging, but no cases involving more serious corporal punishment, amputations, stoning, or beheadings). Last, one could argue that abductions are also covered by the rule of non-inquiry even though U.S. courts admitted to abductions but refused to consider them as an impediment to valid U.S. jurisdiction.[685]

8.3.1. International Human Rights Treaty Law

An exception to the rule of non-inquiry may be gradually developing under the general limitations imposed by human rights conventions. The various human rights conventions consider

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681 *In re Extradition of* Stern, 2007 U.S. Dist. LEXIS 79486, at *11–*13 (S.D. Fla. Oct. 25, 2007).

682 278 F.2d 77 (2d Cir. 1960).

683 *See infra* Sec. 8.3 discussing *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96 (June 27, 1996) n. 223, 79 Rivista di Diritto Internazionale 825 (1996); *Mohamed & Another v. Pres. of the Rep. of South Africa* 2001 (17) CCT 01 (CC) (S. Afr.); Kirkwood v. United Kingdom, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by Article 3 would be grossly violated by requesting nation); *Regina v. Sec. of State for the Home Dept. ex parte Kirkwood*, [1984] EWHC (QB) 913, (1984) 1 W.L.R. 913 (Eng.); People v. Kirkwood, San Francisco Superior Court, No. 115353 (1987); Soering Commission Report, *reprinted in* 161 Eur. Ct. H.R. (ser. A) 1, 67–68 (1989), *and in* 28 I.L.M. 1063 (1989); Soering v. United Kingdom, 161 EUR. CT. H.R. (ser.A) (1989); *United States v. Burns*, [2001] 1 S.C.R. 283, 360.

684 Hoxha v. Levi, 371 F. Supp. 2d 651, 660 (E.D. Pa. 2005); *In re Extradition of* Atuar, 300 F. Supp. 2d 418, 431 (S.D. W. Va. 2003), 156 Fed. Appx. 555 (4th Cir. 2005), *cert. dismissed* 2006 U.S. LEXIS 5244 (2006); Buell v. Mitchell, 274 F. 3d 337 (6th Cir. 2001); Elzbieta Klimowicz, *Article 15 of the Torture Convention: Enforcement in U.S. Extradition Proceedings*, 15 Geo. Imm. Law. J. 183 (Fall 2000). *See, e.g.,* Mironsecu v. Costner, 345 F. Supp. 2d 538 (M.D.N.C. 2004) (reaffirming the rule of non-inquiry in connection with the issue of torture); Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000) ("*Cornejo-Barreto I*"); Cornejo-Barreto v. Siefert, 379 F.3d 1076 (9th Cir. 2004) ("*Cornejo-Barreto II*"); Cornejo-Barreto v. Siefert, 386 F.3d 938 (9th Cir. 2004) ("*Cornejo-Barreto III*"); Cornejo-Barretto v. Siefert, 389 F.3d 1307 (9th Cir. 2004) ("*Cornejo-Barreto IV*"). *See also supra* Secs. 7.1–7.2.

685 United States v. Alvarez-Machain, 504 U.S. 655, 679–680 (1992).

cruel and unusual punishment violative of those minimum standards of human rights that require protection. Among the relevant provisions are the following excerpts.

The Universal Declaration of Human Rights states in Article 5:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[686]

The International Covenant on Civil and Political Rights states in Article 7:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[687]

The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 3:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[688]

The American Declaration of the Rights and Duties of Man states in Article XXV:

> He also has the right to humane treatment during the time he is in custody.[689]

The American Convention on Human Rights states in Article 5:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.[690]

So far, however, no multilateral extradition convention has taken up the theme of cruel and unusual punishment, nor has any bilateral treaty embodied any of these provisions. There are, of course, other provisions intended to accomplish, at least in part, the same result, as is the case for provisions relating to non-extradition of nationals, double jeopardy, and the death penalty. None of these, however, covers the issue of treatment of accused offenders, whether it is in the nature of the type of corporal punishment, length or type of incarceration, or the conditions to which the relator may be subjected in the requesting state after surrender.[691]

The wide divergence in penological theories and standards of treatment of offenders among countries is such that no uniform standard exists. The United Nations, however, in an effort to provide such a basis, adopted the Standard Minimum Rules for the Treatment of Offenders,[692] which were adopted as a resolution and as such are not binding international obligations. The prohibition

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686 G.A. Res. 217, *supra* note 645, Art. 5.

687 G.A. Res. 2200, *supra* note 646, Art. 7.

688 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

689 Organization of American States Res. XXX, adopted by Ninth Int'l Conf. of American States (1948), Organization of American States Off. Rec., OEA/Ser. L/V/I.4 Rev. (1965).

690 Organization of American States Off. Rec., OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (1969).

691 *See generally*, Vanessa Maaskamp, *Extradition and Life Imprisonment*, 25 Loy. L.A. Int'l & Comp. L. Rev. 741 (Summer 2003); Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 Brook. L. Rev. 719 (Spring 2002); Daniel J. Sharfstein, *Human Rights beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 Santa Clara L. Rev. 1137 (2002).

692 United Nations Conference on the Prevention of Crime and the Treatment of Offenders of 1955, E.S.C. Res. 663c, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc E/3048 (1957). *See also* United Nations Congress on the Prevention of Crime and Treatment of Offenders, U.N. ESCOR, 21st Sess., 522d mtg., U.N. Doc. E/CN.5/SR.522 (1970).

against cruel and unusual punishment can be said to constitute a general principle of international law because it is so regarded by the legal systems of civilized nations. But that alone does not give it a sufficiently defined content bearing on identifiable applications capable of more than general recognition. The application of such a principle to sentences, types and conditions of incarceration, and other correctional questions is therefore still very much in doubt with respect to extradition law and practice, where the rule of non-inquiry precludes the extradition magistrate from inquiring into the treatment that the relator may receive in the requesting state upon his/her return. The rule works well in those states that do not extradite their nationals because the interest of such states in the face of other nationals whom they extradite may well be limited, if it exists at all. The emergence of the individual as a recognized participant in the process of extradition and the applicability of internationally protected human rights are likely to curtail, if not eliminate, the rule of non-inquiry.

The problems presently existing in extradition practice stem from the fact that there is no alternative to denying extradition where a requested state is concerned about the fate of a surrendered person. The alternative is then for the requested state to prosecute the relator on behalf of the requesting state, and punish the person in a manner that is not cruel or unusual, or to permit temporary extradition for the relator's trial in the requesting state and his/her return to the requested state for sentencing or carrying out of a sentence in a manner that would not be cruel or unusual. Such an alternative would avoid pitting two states against each other and the accused's evasion of the process for reasons that do not arise from his/her conduct. This is one of the premises the United States has with certain states on the transfer of prisoners.[693] These treaties and the implementing U.S. legislation provide for a transfer of the respective national of the contracting parties to one another.[694] But in the event of a transfer, the original conviction cannot be subsequently challenged on grounds of cruel and unusual treatment, as was held in *Rosado v. Civiletti*.[695]

8.4. The Rule of Non-Inquiry as Applied by Courts of Foreign States in Active Extradition (When the United States Is the Requesting State)

The rule of non-inquiry is followed in most legal systems. Some states apply it in the same manner as does the United States. But extradition requests from the United States have been the object of "inquiry" by some states, particularly European states with respect to the death penalty and to the death row syndrome.[696] Other states have followed the European lead.[697]

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693 *See* Rishi Hingoraney, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 Ga. J. Int'l & Comp. L. 331 (2002); Abraham Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 Wisc. L. Rev. 25; Abramovsky & Eagle, *supra* note 636; M. Cherif Bassiouni, *A Practitioner's Perspective on Prisoner Transfer*, 4 J. Crim. Def. 127 (1978); M. Cherif Bassiouni, *Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada*, 11 Vand. J. Transnat'l L. 29 (1978); Jordan J. Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 Vand. J. Transnat'l L. 67 (1979); Vagts, supra note 636; David Vaida, Recent Development, *Treaties—Mexican–American Treaty on the Execution of Penal Sentences—Custody of a Prisoner under the Mexican–American Treaty Is Unlawful When Consent to the Transfer Is Coerced:* Velez v. Nelson, 475 F. Supp. 865 (D. Conn. 1979), 3 Fordham Int'l L. J. 107 (1979–1980).

694 18 U.S.C. § 4082 (2000).

695 Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *cf.* Esposito v. Adams, 700 F.Supp. 1470, 1481 (N.D. Ill. 1988). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998).

696 *See* Vanessa Maaskamp, *Extradition and Life Imprisonment*, 25 Loy. L.A. Int'l & Comp. L. Rev. 741 (Summer 2003); Sharfstein,*European Courts*, *supra* note 691; Sharfstein, *Human Rights beyond the War on Terrorism*, *supra* note 691.

697 *See, e.g.*, *In re* Pedro Alejandrino Flores, 5 Ann. Dig. 289, 290 (CSJN 1929) (Arg.); *Mohamed & Another v. Pres. of the Rep. of South Africa* 2001 (17) CCT 01 (CC) (S. Afr.); Rishi Hingoraney, *International*

8.4.1. The Death Penalty[698]

The argument that "death row syndrome" is "cruel" and is barred by general human rights provisions, is the basis for arguments against extradition. The irony in this argument is that "death row syndrome" is caused by the time it takes for U.S. courts to hear appeals and review evidence resulting in a conviction, which is itself an issue of fundamental concern for these states. Opponents of the death penalty argue that these same judicial delays based on concern for the rights of the condemned person are grounds to oppose the extradition, as it results in "death row syndrome." Implicitly, this means that if the execution was swift and the condemned person did not have several opportunities for review, the argument against extradition would fail.

There is no easy answer to the problems posed by the death penalty. Those opposing and those favoring the practice have valid arguments. In the end, it is both a moral and a social policy debate. As the French philosopher Victor Hugo once said, "an irreparable penalty presupposes an infallible jury." In the case of the death penalty, it is clear that the penalty is irreparable, but it is not always clear that the jury or judge who imposes the sentence is infallible. So long as the Gordian knot is not cut, this issue will continue to be with us for years to come. The solution in these cases is for the requested state to assume prosecution as Italy did in 1996 in the case *Venezia v. Ministero de Grazia e Givstizia*.[699]

Because the United States still allows for the death penalty,[700] many countries refuse extradition outright in capital cases or make the grant of extradition conditional

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Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium, 30 Ga. J. Int'l & Comp. L. 331 (2002); Abramovsky, *supra* note 693; Abramovsky & Eagle, *supra* note 636; Bassiouni, *A Practitioner's Perspective on Prisoner Transfer*, *supra* note 693; Bassiouni, *Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada*, *supra* note 693; Jordan J. Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 Vand. J. Transnat'l L. 67 (1979); Vagts, *supra* note 636; Vaida, *supra* note 693. *See* Alan W. Clarke et al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty*, 30 Queen's L.J. 260, 273–274 (2004); Andrew J. Parmenter, *Death by Non-inquiry: The Ninth Circuit Permits the Extradition of a U.S. Citizen Facing the Death Penalty for a Non-violent Drug Offense* [Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005)], 45 Washburn L.J. 657, 670 (2006).

698 *See* Schabas, *supra* note 515, at 596–598. *See also* Craig Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 Cal. W. Int'l L. J. 189, 230–231 (1994). The United States has had a number of problems with extradition from Canada. *See* J.G. Kastel & Sharon A. Williams, *The Extradition of Canadian Citizens and § 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, 25 Can. Y.B. Int'l L. 263 (1987), and Sharon A. Williams, *Nationality, Double Jeopardy, Prescription, and the Death Sentence as a Basis for Refusing Extradition*, 62 Revue Int'le de Droit Pénal 259 (1990); Daniel J. Sharfstein, *Human Rights beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 Santa Clara L. Rev. 1137 (2002).

699 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). *See* note 546 for a full discussion of the case.

700 Parmenter, *supra* note 466; Elizabeth Burleson, *Juvenile Execution Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 Alb. L. Rev. 909 (2005). *See* Alan W. Clarke et al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty*, 30 Queen's L.J. 260, 273–274 (2004); Schabas, *supra* note 525; David M. Rogers, *International Law*—Extradition and the Death Penalty—United States v. Bin Laden, 156 F. Supp. 2d 359 (S.D.N.Y. 2001), 26 Suffolk Transnat'l L. Rev. 223 (Winter 2002); Craig Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 Cal. W. Int'l L. J. 189, 230–231 (1994); Bassiouni, *A Practitioner's Perspective on Prisoner Transfer*, *supra* note 693; Roper v. Simmons, 125 S. Ct. 1183 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

on not applying the death penalty.[701] Although in most legal systems courts apply the rule of non-inquiry, an exception is often made when the death penalty is a possible

701 *See supra* Sec. 7.3, discussing cases involving "assurances" including sentencing and the death penalty. *See, e.g.,* Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, ouncil of Europe, ETS No. 187 (May 2002), *entered into force* July 1, 2003; Council of Europe Resolution No. 1044 (1994); Protocol No. 6 the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, as amended by Protocol No. 11, Council of Europe ETS No. 114, ETS No. 155, *entered into force* November 1, 1998; Giulaino Vassali, *Pena Di Morte E Richiesta Di Estradizione Quando Il Ministero Scavalca la Consulta (Death Penalty and Extradition Request When the Ministry Tries to Bypass the Constitutional Court)*, 22 Diritto E Giustizia 76 (June 2006). Gary Botting, Extradition between Canada and the United States (2005); Robert Harvie & Hamar Foster, *Shocks and Balances:* United States v. Burns*, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty*, 40 Gonz. L. Rev. 293 (2004–2005). *See* Michael J. Kelly, Aut Dedere Aut Judicare *and the Death Penalty Extradition Prohibition*, 10 Int'l Legal Theory 53 (Fall 2004); Murali Jasti, *Extraditing Terrorists Hits a Death Penalty Kibosh*, 22 Wis. Int'l L. J. 163 (Winter 2004); M. Cherif Bassiouni, *Death as a Penalty in the Shari'a*, *in* Capital Punishment: Strategies for Abolition (Peter Hodgkinson & William A. Schabas eds., 2004); James Finsten, *Extradition of Execution? Policy Constraints in the United States' War on Terror*, 77 S. Cal. L. Rev. 835 (May 2004); Michael J. Kelly, *Cheating Justice. by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of* Aut Dedere Aut Judicare *into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 Ariz. J. Int'l & Comp. L. 491 (Fall 2003); Vanessa Maaskamp, *Extradition and Life Imprisonment*, 25 Loy. L.A. Int'l & Comp. L. Rev. 741 (Summer 2003); Kathryn F. King, *The Death Penalty, Extradition and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, 9 Buff. Hum. Rts. L. Rev. 161 (2003); Robert Badinter et. al, Death Penalty—Beyond Abolition (2004); Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 Brook. L. Rev. 719 (Spring 2002); Rishi Hingoraney, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 Ga. J. Int'l & Comp. L. 331 (2002); M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation and Rule-Making*, 1 UCLA J. Islamic & Near E. L. 135 (Spring 2002); William A. Schabas, Abolition of the Death Penalty in International Law (2002); Robert Gregg, *The European Tendency toward Non-extradition to the United State in Capital Cases: Trends, Assurances, and Breaches of Duty*, 10 U. Miami Int'l & Comp L. Rev. 113 (Fall 2002); Matthias Wentzel, *Extradition Involving the Possibility of the Death Penalty*, 62 Rev. Int'l de Droit Pénal 335 (1991); Sharon A. Williams, *Nationality, Double Jeopardy, Prescription, and the Death Sentence as a Basis for Refusing Extradition*, 62 Revue Int'le de Droit Pénal 259 (1990); J.G. Kastel & Sharon A. Williams, *The Extradition of Canadian Citizens and § 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, 25 Can. Y.B. Int'l L. 263 (1987); Abramovsky & Eagle, *supra* note 636; M. Cherif Bassiouni, *Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada*, 11 Vand. J. Transnat'l L. 249 (1978); Jordan J. Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 Vand. J. Transnat'l L. 67 (1979); Vagts, *supra* note 636; Vaida, supra note 683; Öcalan v. Turkey, App. No. 00046221/99, Judgment of March 12, 2003 (ECHR); *Judge v. Canada*, U.N. Human Rights Comm., 78th Sess., para. 10.4, U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003); *United State v. Burns*, [2001] 1 S.C.R. 283, 360 (Can.); *Mohamed & Another v. Pres. of the Rep. of South Africa*, 2001 (17) CCT 01 (CC) (S. Afr.); Cobb v. United States, 2001 SCC 19 (Can.); *Kwok v. United States of America*, 2001 SCC 18 (Can.); *Tsibouris v. United States of America*, 2001 SCC 20 (Can.); *Shulman v. United States of America*, 2001 SCC 21 (Can.); *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996); *Cazzetta v. United States of America,* 108 CCC 3rd 536 (1996); *Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by Article 3 would be grossly violated by requesting nation); People v. Kirkwood, San Francisco Superior Court, No. 115353 (1987); Shea, *supra* note 518, at 109, *citing* UPI, July 24, 1987, *available* in LEXIS, Nexis Library Wires File; *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989); *In re* Soering, 1988 Crim. L. Rev. 307. *See also* Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The* Soering *Case*, 11 Mich. J. Int'l L. 845 (1990); David L. Gappa, *European Court of*

punishment.[702] The rationale for refusing extradition on the grounds that the relator is likely to incur the death penalty is twofold:

1. The abolition of the death penalty by a given state is predicated on constitutional grounds based on humanitarian considerations and public policy;[703] and

2. Therefore, it would be abhorrent to that state to grant extradition because this would entail using its processes to reach an outcome that is in violation of its laws and public policy.

The number of states that have abolished the death penalty and those that have not are roughly the same.[704] It cannot therefore be said that there is a CIL basis for or against the death penalty on a purely numerical basis. More evidence can be adduced to support that proposition.[705] However, it can be said that the trend toward eliminating the death penalty is more evident because most of the states having the death penalty have limited it only to a few crimes.[706] Moreover, the actual carrying out of the death penalty in these states has significantly diminished in numbers and continues to do so on a yearly basis.[707]

No human rights convention has so far recognized an absolute right to life, and none of the sources of international laws to date elevate the right to life to an absolute right that cannot be abridged. However, several national constitutions do recognize it, and that has a significant impact on extradition with the United States. Western European states have consistently carved an exception to the rule of non-inquiry, not only with respect to the death penalty but to "Death-Row Syndrome."[708]

Human Rights-Extradition—Inhuman or Degrading Treatment or Punishment, Soering Case*, 161 Eur. Ct. H.R. (Ser. A) (1989)*, 20 Ga. J. Int'l & Comp. L. 463 (1990); James M. Lenihan, Soering's *Case: Waiting for Godot—Cruel and Unusual Punishment?*, 4 Pace Y.B. Int'l L. 157 (1992); *In re* Pedro Alejandrino Flores, 5 Ann. Dig. 289, 290 (CSJN 1929) (Arg.).

702 *See supra* Sec. 7.2 (inquiry into U.S. Practices by Foreign Courts).

703 The humanitarian exception was qualifiedly formulated in *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960).

704 For a list of these states, see Amnesty International, The Death Penalty, *available at* http://www.amnesty.org/en/death-penalty/numbers. For a general discussion of the abolition of the death penalty in various regions of the world, and an argument that the growing abolition of the death penalty and reliance on assurances against the death penalty is making U.S. extradition more difficult, see Alan W. Clarke & Laurelyn Whitt, The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty 31–49 (2007).

705 *See* Kelly, *Aut Dedere Aut Judicare*, *supra* note 701; Kelly, *Cheating Justice supra* note 701; Jasti, *supra* note 701.

706 Amnesty Death Penalty Website, *supra* note 704.

707 *Id.* Except for China, where the official numbers seem to be increasing and have been mostly related to corruption crimes. Some estimate are that the number of annual executions are between 2000 and 8000. Amnesty Death Penalty Website, *supra* note 704. In Muslim countries, many of whom eschew the *Sharī'ā* for criminal codes, the death penalty is limited to two major crimes: high treason and murder with intent to kill. They do extend to more complex crimes such as terrorism when death results or forcible felonies, which also result in death. M. Cherif Bassiouni, *Death as a Penalty in the Shari'a*, *supra* note 701; Finsten, *Extradition of Execution, supra* note 470; Bassiouni & Gamal M. Badr, *The Shari'ah*, *supra* note 701; Schabas, *supra* note 525.

708 *See Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by article 3 would be grossly violated by requesting nation); *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989). Both cases involved the United States as the requesting state. A total of 129 states have abolished the death penalty in law or practice, while 68 states have retained it. Amnesty International Death Penalty Website, *supra* note 704. In 2005, 94 percent of all known executions took place in China, Iran, Saudi Arabia, and the United States. *Id.*

The Council or Europe's member states are required to sign and ratify Protocol 6 to the ECHR, which abolishes the death penalty during times of peace and requires at a minimum a moratorium on the death penalty.[709] The members of the European Union are also signatories to Protocol 6, as well as Protocol 13.[710] Protocol 13 abolishes the death penalty in all times, including times of war or imminent threat of war.[711]

> Protocol 13 states:
>
> Article 1—Abolition of the death penalty. The death penalty shall be abolished. No one shall be condemned to such penalty or executed.
>
> Article 2—Prohibition of derogations. No Derogation from the provision of this Protocol shall be made under Article 15 of the Convention.
>
> Article 3—Prohibition of Reservations. No reservation may be made under Article 57 of the Convention in Respect of the provisions of this Protocol.[712]

The 2003 United States–European Union extradition treaty allows E.U. member states to make a conditional grant of extradition provided that the death penalty shall not be carried out; otherwise the request for extradition can be denied.[713]

The United States–European Union Extradition Treaty states in Article 13:

> Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.[714]

The 1957 European Convention on Extradition states in Article II:

> If the offense for which extradition is requested is punishable by death under the law of the requesting state, and if in respect of such offense the death penalty is not provided for by the law of the requested state or is not normally carried out, extradition may be refused unless the requesting state gives such assurance as the requested party considers sufficient that the death penalty will not be carried out.[715]

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709 Council of Europe Resolution No. 1044 (1994); Protocol No. 6 the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, as amended by Protocol No. 11, Council of Europe ETS No. 114, ETS No. 155, *entered into force* November 1, 1998. *See also* Kathryn F. King, *supra* note 701; *The Death Penalty, Extradition and the War against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, 9 Buff. Hum. Rts. L. Rev. 161 (2003); Gregg, *supra* note 701.

710 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Council of Europe, ETS No. 187 (May 2002), *entered into force* July 1, 2003.

711 *See* Ch. II, Sec. 4.3 (Multilateral Treaties).

712 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Council of Europe, ETS No. 187 (May 2002), *entered into force* July 1, 2003. Protocol 6 is essentially identical to the provision of Protocol 13, except Protocol 13 applies during times of war as well as times of peace.

713 EU–U.S. Extradition Treaty, 2003, Art. 13, Capital Punishment. Senate Doc. 109-14 (June 25, 2003).

714 *Id.*

715 European Convention on Extradition, Dec. 13, 1957, art. 2, 597 U.N.T.S. 338. *See also* Wentzel, *supra* note 701 at 335.]

The European approach is the product of a long history of opposition to the death penalty, which is prohibited by a number of constitutions, such as those of the Federal Republic of Germany, Italy, the Netherlands, and the Scandinavian countries.

The same prohibition is also embodied in the Inter-American Convention on Extradition.[716] The Organization of American States has also adopted a Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[717] However, only eight states have ratified the protocol and it has not entered into force. The United States is not a party to the Extradition Convention or the Protocol to the American Convention on Human Rights.

The Inter-American Convention on Extradition States:

> The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.[718]

Certain extradition treaties specifically state that where the death penalty is likely to be imposed for a given offense, extradition for that offense shall be denied. An exception thereto could be made if the surrender is conditional,[719] and the requesting state agrees not to impose the death penalty.

One example is the 2003 United States–United Kingdom extradition treaty, which states in Article 7:

> When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.[720]

The United States–Brazil treaty of 1961 also provides in Article VI:

> When the commission of the crime or offense for which the extradition of the person is sought is punishable by death under the laws of the requesting state and the laws of the requested state do not permit this punishment, the requested state shall not be obligated to grant the extradition unless the requesting state provides assurances satisfactory to the requested state that the death penalty will not be imposed on such person.[721]

The exemption from the obligation to extradite can be total or partial, as reflected in the 1962 treaty between the United States and Israel, which states in article VII:

> When the offense for which the extradition is requested is punishable by death under the laws of the requesting state and the laws of the requested state do not permit such punishment for that offense, extradition may be refused unless the requesting state provides such assurances as the requested state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.[722]

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716 Inter-American Convention on Extradition, O.A.S. Doc. B-47, art. 9, *entered into force* March 28, 1992.

717 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S. Doc. A-53, signed June 8, 1990.

718 *Id.*

719 *See* supra Sec. 1.

720 United States–United Kingdom Extradition Treaty, March 31, 2003, art. 7, S. Treaty Doc. 108-23.

721 United States–Brazil Extradition Treaty, Jan. 13, 1961, June 18, 1962, art. 6, 15 U.S.T. 2093.

722 Extradition Treaty, Dec. 10, 1962, U.S.–Isr., art. 7, 14 U.S.T. 1707 (*entered into force* Dec. 5, 1963).

The United States–Italy Extradition Treaty of 1983 states in Article IX:

> When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.[723]

But conditional extradition presents certain problems of enforceability. In *Venezia v. Ministero de Grazia e Giustizia*, an extradition case involving Italy, the Italian Constitutional Court held that the prohibition on the death penalty in the Italian constitution precluded granting extradition to any state that imposes the penalty for the crime charged by the requesting state, irrespective of any assurances given.[724] As such, Italy found that even if it obtained assurances from the requesting state that the penalty would not be applied, it would not grant extradition.[725] This conclusion is founded on the fact that the requesting state's executive cannot a priori give a definitive assurance that when the death penalty is decided by the judiciary that the executive will grant clemency or issue a pardon.

Whenever there is no such provision in a treaty or whenever the practice is based on reciprocity or comity, the national laws of the requested state shall be controlling. If these laws prohibit the death penalty, it is likely that extradition will be denied.

An illustration of this proposition is found in a case in which Chile requested the surrender of a fugitive from Argentina for an offense punishable by death.[726] Argentina had abolished the death penalty, and there was no extradition treaty in force between the two states. The practice between these states was, therefore, based on reciprocity. The Supreme Court of Chile informed Argentina that, if extradited, the relator would be judged according to Chilean law, and although it could not give assurance that the lesser penalty would be imposed, it would try to comply with the Argentine conditional extradition. The lower Argentine court held that this was not satisfactory compliance with the condition of Argentine law. On appeal, this view was upheld, but it was found that under the Chilean constitution, the president had the power to pardon, which would thus make possible the fulfillment of a promise to inflict the lesser penalty. On further appeal, the Federal Supreme Court of Argentina held that extradition should be allowed only on a promise of pardon or commutation of sentence by the Chilean executive in case the death sentence was imposed. The Court stated:

> The simple manifestation of good offices of the Supreme Court of Justice of the requesting country does not amount to the promise which the Argentine law imposes as necessary, together with reciprocity, to concede extradition without treaties.[727]

In the United States, the death penalty is permissible, and there is no specific constitutional provision against it except for the constitutional prohibition of "cruel and unusual punishment," which has not been held per se to be applicable thereto.[728] The Supreme Court has,

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723 U.S.–Italy Extradition Treaty, Oct. 13, 1983, art. IX, 35 U.S.T. 3023, TIAS 10837 (*entered into force* Sept. 24, 1984).

724 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). As indicated above, Venezia was later tried and convicted in Italy for the same crime under Italian law.

725 *Id.*

726 *In re Pedro Alejandrino Flores*, 5 Ann. Dig. 289, 290 (CSJN 1929) (Arg.).

727 *Id.*

728 Furman v. Georgia, 408 U.S. 238 (1972). *See* M. Cherif Bassiouni et al., *La peine de mort aux Etats-Unis l'état de la question en 1972*, *in* 1973 Rev. de Science Criminelle et de Droit Pénal Comparé 23 (1973).

however, ruled that it is unconstitutional to execute defendants under the age of eighteen[729] or those with a mental disability.[730]

Extradition from a country that has abolished the death penalty to the United States has been the subject of increased restrictions. Conditional extradition and assurances against the application of the death penalty have been used, but with less success.[731] In countries where the executive branch cannot commit the judiciary or place limitations on its powers to impose sanctions, the only avenue is that of presidential pardon. But very rarely, if ever, do heads of state issue a pardon before the sentence is carried out. In other situations, such as in the case of the United States, the federal system precludes the U.S. government from imposing limitations on the powers of states and state judiciaries with respect to the imposition of penalties. The U.S. government can, through the Department of Justice, obtain such a commitment from a governor or the attorney general of the state where the prosecution is to take place. Even then, neither the governor nor the attorney general could limit the application of a sentence mandated by law and which only the judiciary can mete out. The only solution in such a case is a prior commitment by the governor to commute the sentence or exercise clemency. This solution is not without its problems either, as some states have different procedural tracks for cases involving the death penalty, and governors are not likely to make such assurances before a final judicial determination.

With regard to the ECHR as it relates to extradition, there are two ways to apply human rights considerations to the extradition process: either that a relator should not be extradited if extradition would result in the infringement of his/her basic human rights in the *requesting* state, or that the extradition proceedings in the *requested* state should comply with human rights.[732] There are signs that indicate that modern extradition law is evolving toward an increasingly explicit recognition of at least certain human rights. Examples of this evolution are the recent extradition laws of Switzerland, Austria, and the Federal Republic of Germany, which have adopted the principle that extradition shall be refused if the procedure in the requesting state is contrary to the European Convention on Human Rights.[733] The *Soering* decision indicates that ECtHR case law is evolving in the same direction.[734] The question arises as to which human rights, in particular, are obstacles to extradition.[735]

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729 Roper v. Simmons, 125 S. Ct. 1183 (2005). *See also* Burleson,*Juvenile Execution*, *supra* note 700.

730 Atkins v. Virginia, 536 U.S. 304 (2002).

731 In the United States, courts generally view the secretary of state's decision to present the extradition request as a signal of confidence that the fugitive will receive fair treatment in the requesting state. The State Department generally does not present extradition requests from governments whose human rights records are widely condemned. John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1480 (1988). The process is similar in the United Kingdom, except that the fugitive may seek judicial review of the Foreign Minister's final decision to extradite. *See, e.g., Re* Chinoy CO/792/89 (Q.B. 1990) (LEXIS, Enggen library, Cases file). British courts employ a standard first articulated in *Associated Provincial Picture Houses v. Wednesbury Corp.*, which permits a court to strike down executive decisions only when "no reasonable" executive official would have made them. [1948] 1 K.B. 223, 234. Canadian courts also review the government's final decision to extradite, and they also generally defer. *E.g., Kindler v. Canada*, [1991] 2 S.C.R. 779 (Can.).

732 Christine Van den Wijngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 Int'l & Comp. L.Q. 757, 758 (1990).

733 *Id.* at 758–759, 760.

734 *See also Öcalan v. Turkey*, App. No. 00046221/99, Judgment of March 12, 2003.

735 This question becomes more marked given a different approach by the United Kingdon to a U.S. extradition request where torture was at issue. A UK court allowed the extradition of a Muslim cleric, Abu Hamza al-Masri, to the United States despite allegations that certain individuals had been tortured to obtain some of the evidence leading to the U.S. extradition request. This case implicates the U.S. policies of the war on terror, and the relator in this case is wanted in the United States on charges that he

Probably as a result of these two cases, the Constitutional Court of Italy in 1996 in the *Venezia* case[736] ruled that Italy could not extradite to the United States a person charged with murder in Florida for which the death penalty could be imposed. The Italian Constitutional Court held that the prohibition of the death penalty in the Italian constitution precluded granting extradition to any state that imposes the penalty for the crime charged by the requesting state, irrespective of any assurances given.[737] As such, Italy found that even if it obtained assurances from the requesting state that the penalty would not be applied, it would not grant extradition.[738] One problem is that the requesting state's executive cannot a priori give a definitive assurance that when the death penalty is decided by the judiciary, executive clemency or pardon shall be granted. The Department of Justice, supported by the state of Florida, offered assurances that the death penalty would not be sought in the case. The Italian Constitutional Court concluded that it could not accept such assurances, as it did not feel that they displaced the risk of the imposition of the death penalty in case of extradition. Italy, however, proceeded to prosecute Venezia with the cooperation of the Florida prosecutors, resulting in the conviction of Venezia and a sentence to life in prison.

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provided logistical support to al-Qaeda and the Taliban and that he had a role in the 1998 kidnapping of sixteen Westerners in Yemen. *See* Bruce Zagaris, *U.K. Court Rules Abu Hamza al-Masri Can Be Extradited to the U.S.*, 24 Int'l Enforcement L. Rep. 1–2 (Jan. 2008); Bruce Zagaris, *British Appellate Court Affirms Extradition of Radical Muslim Cleric to U.S.*, 24 Int'l Enforcement L. Rep. 314–315 (Aug. 2008). The ECtHR considered al-Masri's case, and rejected his arguments based on diplomatic assurances, extraordinary rendition, the death penalty, and special administrative measures related to his detention in the United States; *see* Ahmad et al. v. United Kingdom, App. Nos. 24027/07, 11949/08, and 36742/08, (2010). The court did allow al-Masri to raise a claim based on a possible life sentence and detention conditions in the United States. *Id.* at ¶ 153. Regarding evidence obtained by torture, the ECtHR dismissed the relator's arguments as issues of admissibility of evidence could be fairly decided by U.S. courts. *Id.* at ¶¶ 159–160. *See also* European Court of Human Rights Registrar, *Applications from Alleged International Terrorists Detained in the UK Pending Extradition to the USA Partly Admissible*, Press release 549 (July 08, 2010).

736 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). Venezia was subsequently tried in Italy for the crime for which he was requested in the United States and convicted thereof. Recently, a similar case involving a request by the U.S. based on an indictment by the the state of Connecticut for one Benedetto Cipriani did not follow the same approach in that the Italian minister of justice allowed extradition with U.S. assurances that the crime charged was not subject to the death penalty. But because Cipriani could be charged subsequent to his surrender to the United States with a death penalty crime, the minister's decision was appealed to the Administrative Tribunal of Lazio, with Jurisdiction over Rome's Administrative Agencies. The Tribunal ruled on June 23, 2006, with a decision No. 1046106, Registro Sentenze No. 997/2005, that the minister erred and that even in the case where the crime charged does not carry the death penalty, the assurances of the U.S. government are insufficient. Both this case and the *Venezia* case evidence Italy's judiciary's distrust of U.S. government assurances. *See* Giulaino Vassali, *Pena Di Morte E Richiesta Di Estradizione Quando Il Ministero Scavalca la Consulta (Death Penalty and Extradition Request When the Ministry Tries to Bypass the Constitutional Court)*, 22 Diritto E Giustizia 76 (June 2006). The decision declares Article 698 of the Italian Code of Criminal Procedure of 1989 as unconstitutional in that it allows extradition in cases where the death penalty can be applied subject to assurances by the requesting state that it shall not apply the penalty. *See also* William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581, 596–598 (2003). It also declares Article 9 of the U.S–.Italy extradition treaty of 1984 as unconstitutional. The French Consel d'Etat (the Supreme Administrative Court in France) ruled on October 15, 1993, *re Joy Davis-Aylor*, that assurances given by a requested state are not only that the death penalty will be excluded, but that it will not be enforced. 1994 La Semaine Juridique 22257. *See also* Dominique Poncet & Paul Gully-Hart, *Extradition: The European Approach*, in 2 Bassiouni ICL at 297–298.

737 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996).

738 *Id.*

The death penalty is explicitly abolished by the above-mentioned Protocols 6 and 13, which were adopted in 1983 and 2002, respectively.[739] Both protocols amend Article 2 of the ECHR. States that have ratified the Protocol can henceforth refuse extradition in a capital case by virtue of Article 2 in combination with Protocol 13, without having to invoke death row or other circumstances that may bring the case under Article 3.

The 1966 International Covenant on Civil and Political Rights (ICCPR),[740] which was ratified by the United States,[741] provides under Article 6, paragraph 2 the same right as provided for in Article 2 of the ECHR. Though neither provision deals with extradition, they have both been used to oppose extradition in death penalty cases. The *Kirkwood* and *Soering* cases discussed above relied on the European Convention. In connection with the ICCPR, a number of communications have been presented to the Human Rights Committee concerning extradition cases that relied on the *Soering* case.

Among these are the *Kindler*[742] and *Ng*[743] cases.[744] In these, the United States sought the extradition of individuals from Canada, which does not have the death penalty. Both of the relators were charged with capital offenses within the jurisdiction of the United States,[745] and both

739 In 1989 the United States had asked from the Netherlands for the surrender of Short, a U.S. serviceman who had murdered his wife while stationed under the NATO allied forces agreement in the Netherlands. The surrender request was based on capital murder. In its decision of March 30, 1990, the Dutch Supreme Court confirmed a lower court's injunction prohibiting the Dutch government from surrendering Short if and in so far as the possibility existed that he would be executed. Surrender resulting in the imposition and execution of the death penalty was held to be contrary to the Sixth Protocol. The Commission rejected the applicability of Article 6, not in general terms, but because the respondent government could not be held directly responsible under the Convention for the absence of legal aid under Virginia law—a matter entirely within the responsibility of the United States. Even though the Court did not find a violation of Article 6 in the case before it, this conclusion is of crucial importance: it shows that the application of Article 6 is no longer excluded per se. Consequently, it can be said that an "opening" has been made toward recognizing international responsibility of requested states in extradition cases on account of Article 6. *Id.* at 770. *See also* Ch. IX (concerning procedure); Van den Wijngaert, *supra* note 525, at 773–779 (discussing human rights in extradition proceedings).

740 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

741 *See* M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DePaul L. Rev. 1169 (1993). It should be noted that the United States holds the unique position that the ICCPR is not applicable within the United States until national implementing legislation has been adopted. None has been presented so far. This unilateralist position is unique in the array of multilateral treaties because President Bush in transmitting the ICCPR to the Senate for "advice and consent" indicated that the ICCPR's legal obligations would not be binding upon the United States until Congress adopted national legislation and that he did not intend to present any. As of this writing, no such legislation has been presented and adopted. Thus, the United States has signed a treaty it declared would not be enforceable. This is truly a novel approach to treaties.

742 Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991, Nov. 11, 1993.

743 Communication No. 539/1993, U.N. Doc. CCPR/C/52/E/539/1993, Dec. 9, 1994.

744 *See generally* Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 Yale J. Int'l L. 193 (Winter 2002).

745 The cases of *Kindler* and *Ng* involved two fugitives from the United States in Canada who contested extradition on the basis that the requesting state did not prohibit the death penalty while the requested stated did. The court in *Ng* held that the discretion to extradite lies with the executive. Further, courts can exercise judicial review only after discretion has been exercised at first in the federal court of appeals, but not during the extradition hearing. In Canada, where the Charter of Rights and Freedoms prevails over the Extradition Act, the court held in *Kindler* that capital punishment is not cruel and unusual within § 12 of the charter. Finally, the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter, and in 1988 the federal court of appeals declined to

cases were submitted to the Human Rights Committee, which is the adjudicating body of experts established pursuant to the ICCPR. In *Kindler* and *Ng* the Committee ruled that the reasoning in *Soering* was not applicable to these cases, though some of the dissenting opinions on the Committee held otherwise. Subsequently, in the *Cox* case,[746] the Committee reexamined *Kindler* and *Ng*, as well as the "death row phenomenon" (the effects of prolonged detention on the convicted person) and whether it constitutes "cruel and inhumane or degrading treatment or punishment." Unlike the decision of the ECtHR in *Soering*, the Human Rights Committee concluded that this phenomenon is not a bar to extradition. However, in 2003, the United Nations Human Rights Commission stated that nations that have abolished the death penalty have a duty to refuse extradition or deportation where there is a possibility that the individual will face the death penalty.[747]

A decade after the *Kindler* and *Ng* cases, Canada began refusing to extradite individuals to the United States unless it receives assurances that the death penalty will not be executed. Traditionally, Canada applied the rule of non-inquiry to extradition requests and has deferred to the Canadian Minister of Justice to deny extradition requests.[748] The Supreme Court of Canada amended this procedure in 2001 in *United States v. Burns*.[749] In *Burns*, the Supreme Court held that the Minister of Justice could not extradite individuals to the United States who would face the death penalty, without assurances that it would not be imposed.[750]

Canada's courts have also inquired critically into U.S. practices with respect to other areas. One such case was *Cazzetta v. United States of America*,[751] first decided by the Quebec Court of Appeals. The case involved threats made by a U.S. judge that, unless the person sought gave up his legal right to oppose extradition in Canada, he would have to endure imprisonment in a way that would likely result in his homosexual rape. The Canadian court found that this behavior "shocks the Canadian conscience" and "is simply not acceptable." In another case, *Cobb v. United States*, the Canadian Supreme Court refused to grant extradition to the United States because of similar threats by the prosecutor and the judge.[752]

The obligation to protect individual rights guaranteed by human rights conventions and by national constitutions prompted courts in many countries to inquire into requesting states' legal systems and practices. The United States should, therefore, abandon its rigid interpretation of the rule of non-inquiry.

In the last few years, probably as a result of the United States' lead after September 11, a renewed interest has seemingly emerged on the part of some states to impose the death penalty for a number of terrorism-related offenses.[753] For those states that impose the death penalty

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hold that capital punishment is inevitably cruel and unusual within the meaning of § 12 of the charter. *See* Williams, *supra* note 698, at 272–275.

746 Communication No. 539/1993, *supra* note 743.

747 *Judge v. Canada*, U.N. Human Rights Comm., 78th Sess., para. 10.4, U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003). *See also* Parmenter, *supra* note 697, at 670.

748 *See* Clarke, *Does the Rest of the World Matter? Supra* note 697, at 273–274; Parmenter, *supra* note 697, at 670.

749 *United States v. Burns*, [2001] 1 S.C.R. 283, 360; Clarke, *supra* note 469, at 670. *See also* Harvie & Foster, *supra* note 701.

750 *United States v. Burns*, [2001] 1 S.C.R. 283, 360.

751 The decision of the Court of Appeals for Quebec is reported in 108 CCC 3rd 536 (1996). Leave to appeal to the Supreme Court of Canada, which was denied, can be found in 3 S.C.R. xiv (1996).

752 2001 SCC 19. The other companion cases were *Kwok v. United States of America*, 2001 SCC 18, *Tsioubris v. United States of America*, 2001 SCC 20, and *Shulman v. United States of America*, 2001 SCC 21. *See also* Gary Botting, Extradition between Canada and the United States (2005).

753 *See* Rogers, *supra* note 700. Nevertheless, it should be noted that the Supreme Court has limited the application of the death penalty with respect to the mentally ill and those under age eighteen. *See Roper*

for intentional killings, these may not be innovations, unless these laws expand the application of the death penalty to preparatory acts and to aiding and abetting.[754] Not all have followed this trend, however. In the 2001 decision in *Mohamed v. President of the Republic of South Africa*, the South African Constitutional Court has also refused extradition to the United States because of the death penalty.[755] South Africa had abolished the death penalty in 1994 and the FBI was attempting to have Mohamed surrendered to the United States to face the death penalty on terrorism charges. The South African Supreme Court ruled that surrendering Mohamed to the United States by removal or extradition would be unconstitutional because it would violate his right to life under the South African Constitution.[756]

The arguments for and against the death penalty have historically been consistent. Not much has changed in the positions of proponents of opponents of the penalty. Proponents claim that their arguments are bolstered because of the occurrences of crimes producing greater harm, such as terrorism, and the prospects of the use of weapons of mass destruction against innocent civilians. Conversely, these proponents tend to ignore the use of excessive military force by governments against civilian populations either in the context of international or non-international armed conflicts.[757] Ultimately, as the member states of the European Union have asserted in the United States–European Union Extradition Treaty and as the member states of the Council of Europe have expressed in their adoption of Protocol 13 to the European Convention on Human Rights, it is both an issue of principle and a symbol. The former emphasizes the sanctity of life, irrespective of whether a criminal offender deserves or not to be deprived of life, and the latter symbolizes adherence to this principle. In short, it is a position that reflects the humanism of Western civilization.[758]

8.5. Revisiting the Rule of Non-Inquiry

The rule was developed in deference to the national sovereignty of a requesting state. As such, it applies not only to extradition but to all aspects of international cooperation in penal matters.[759] The treatment that the relator is likely to receive in the requesting state upon his/her

v. Simmons, 125 S. Ct. 1183 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). This is relevant insofar as the United States has not ratified the Convention on the Rights of the Child (CRC), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. At one time arguments presented by the United States for not ratifying the CRC were that the Supreme Court had not pronounced itself on the application of the death penalty for minors under the age of eighteen. Obviously after *Roper*, this argument is no longer valid. The other argument that has not been raised at the international level is the strong lobbying of the American Rifle Association (ARA), which has taken the position that minors under the age of eighteen can be conscripted to bear arms and fight in defense of the country. The CRC prohibits the forceful use of minors in armed conflict, as a result of the horrible experiences in African conflicts in which thousands of children were forced to fight internal wars. The ARA argument leaves much to be desired, and would be an embarrassment for the United States to offer to the international community.

754 One of the problems with terrorism is that it is not defined internationally. There are fifteen conventions that deal with the subject, but on the basis of specific conduct, such as aircraft hijacking, kidnapping of civilians, kidnapping of diplomatic personnel, attacks upon civilians and civilian installation, and using explosives. *See* M. Cherif Bassiouni, 1 Interanational Terrorism: A Compilation of U.N. Documents (1972–2001) (2001).

755 *Mohamed & Another v. Pres. of the Rep. of South Africa* 2001 (17) CCT 01 (CC) (S. Afr.).

756 *Id.*

757 *See generally,* M. Cherif Bassiouni, A Manual on International Humanitarian law and Arms Control Agreements (2000).

758 Badinter, *supra* note 701.

759 For the transfer and execution of foreign sentences in the United States, see *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980). The Second Circuit refused, on policy grounds, to inquire into how a

return there has not been the object of specific provisions in extradition treaties, whether bilateral or multilateral. The reason is that between coequal authoritative decision-making processes there can be no inquiry by one state into the internal affairs of the other.[760]

There are two areas in which inquiry could be made as exceptions to the rule. The first is procedural, where a legal system denies an accused fundamental fairness as established by international human rights standards.[761] Western legal procedures are substantially similar with respect to affording an accused fundamental fairness rights, which, notwithstanding their differences, are such that inquiry into the states' respective legal systems would not be warranted. However, even traditionally fair systems such as that of the United States may, during certain periods, undergo exceptions. This is the case with respect to "unlawful enemy combatants," military commissions, and those incarcerated in facilities such as Guantánamo Bay and detention facilities in Iraq and Afghanistan.[762] It would be reasonable for a requested state, particularly one subject to the ECHR[763] or the Inter-American Convention of Human Rights (IACHR)[764] to deny extradition of a person to the United States if that person were to be designated as an enemy combatant, or if that person would likely be incarcerated in military facilities controlled by U.S. forces in Afghanistan[765] or Iraq. With the exception of these aberrations, Western legal systems are quite similar in the fundamental fairness protection that they offer, particularly due to the influence of the ECHR and IACHR, as well as other international human rights norms, such as those embodied in the ICCPR.[766]

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conviction was obtained in Mexico, even though it was evident from the record that the conviction was based on tortured confessions. In this case, the Second Circuit opted for not inquiring into this egregious violation by Mexico, on the grounds that it was better not to inquire and have U.S. citizens convicted in that country, then transferred to the United States for the execution of their sentences. *See* M. Cherif Bassiouni & Grace M.W. Gallagher, *Policies and Practices of the United States: Transfer of Sentenced Persons*, *in* 2 International Criminal Law: Procedural and Enforcement Mechanisms (M. Cherif Bassiouni ed., 1999). This would be the case in certain U.S. instances such as designation of a person as an enemy combatant. This policy consideration is different from the one applicable to extradition, which allows for some exceptions. *But see* Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980) (involving an extradition request from Mexico that was based on tortured confessions). *Escobedo* rigidly applied this rule. Even though the record showed that the only evidence relied upon by the Mexican government were two tortured confessions, which the Mexican government did not deny, the Fifth Circuit for no apparent policy reasons opted not to inquire into the facts. Escobedo v. United States, 623 F.2d, 1098.

760 *See* Ch. VII, Sec. 8 (discussing the rule of non-inquiry).

761 *See generally*, M. Cherif Bassiouni, The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards (1994); Human Rights and the Administration of Justice: International Instruments (Christopher Gane & Mark Mackarel eds., 1997); Stefan Trechsel, Human Rights in Criminal Proceedings (2005).

762 *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); Rasul v. Bush, 542 U.S. 466 (2004). *See also* M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2006).

763 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols No. 11 (ETS 155), which entered into force on November 1, 1998.

764 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

765 M. Cherif Bassiouni, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, to the Commission on Human Rights, U.N. Doc. E/CN.42005/122 (March 11, 2005); M. Cherif Bassiouni, *Report of the Independent Expert of the Commission on Human Rights on the Situation of Human Rights in Afghanistan*, to the General Asembly, U.N. Doc. A/59/370 (Sept. 21, 2004).

766 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

Thus, the need for inquiry into their legal processes is eliminated, even though some may have certain peculiarities.[767] Precisely because of these reasons, Western states may have a justified reason for slightly opening the door of inquiry if a person is requested by a state that does not adhere to international standards of fairness. This would provide that the inquiry encompasses the overall nature of the system to determine if, in the aggregate, it has in the past and is likely to in the present to offer fundamental fairness, thus excluding any inquiry into specific rights and specific procedures.[768] United States courts, however, have not been sympathetic to the raising of the lack of due process in the requesting state as a basis for opening the rule of non-inquiry.[769]

Another possible exception to the rule of non-inquiry is in the case of the use of torture to gain evidence. Evidence of torture should be held inadmissible under Article 15 of the CAT, which states: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[770] As no signatory besides the United States objected or made a reservation to this provision, excluding torture evidence used by the United States as a basis for extradition requests will not unduly burden these states.[771] In the domestic context, the First Circuit Court of Appeals has stated:

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case. This was the thinking of the *Jackson* court; and precisely because the jury's concern with convicting a guilty defendant might lead it to credit a coerced confession, the Court required a separate hearing. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.
>
> > "Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. [footnote omitted] A conviction supported only by such a confession could be but a variation of trial by ordeal."[772]

The court made the above statement regarding inculpatory statements made by an adverse witness that were given to the jury to consider without first giving the defendant an opportunity to confront the witness or a court determination as to whether the statement was voluntarily made.[773]

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767 The United States is among the few countries that have the jury system, and the fact that a person would be extradited to a country that does not have a jury system does not mean that the person would be denied a fundamental fairness right that affects the legal quality of a trial's outcome.

768 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

769 *But see* Martin v. Warden, 993 F.2d 824 (11th Cir. 1993) (possibly the only exception, holding "although the combination of delay and other factors could entitle a U.S. citizen subject to extradition to a foreign country to due process protection, that right being superior to the government's treaty obligation, there are no facts present in this case to trigger that right."). The panel also held "there is no due process to a speedy extradition." *Id.* at 825. *See also* McMaster v. United States, 9 F.3d 47 (8th Cir. 1993); *In re* Burt, 737 F.2d 1477 (7th Cir. 1984); Kamrin v. United States, 725 F.2d 1225 (9th Cir.).

770 CAT, *supra* note 507, at Art. 15; Meredith Angelson, Note: *Beyond the Myth of "Good Faith": Torture Evidence in International Extradition Hearings*, 41 N.Y.U.J. Int'l. L. & Pol'y 603, 633–634 (2009).

771 *Id.* at 633 (also noting that the ICCPR and European Convention on Human Rights have similar evidentiary exclusion provisions regarding the admissibility in extradition hearings of evidence obtained by torture).

772 LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir. 1974).

773 *Id.* at 32.

The second exception is the humanitarian exception, which was first formulated in *Gallina v. Fraser*.[774] The humanitarian exception has to do either with the treatment of the person while in the custody of the requesting state, or the penalty. With respect to the latter, it has mostly been applied where the requested state is opposed to the death penalty, and the requesting state carries out the death penalty with respect to the crime for which extradition is sought. Western European states have consistently carved an exception to the rule of non-inquiry, not only with respect to the death penalty in the United States but to "Death-Row Syndrome."[775] States that have ratified the CAT are prohibited under Article 3 from extraditing a person to a state where he/she is likely to be tortured.[776] The United States has created a separate legal approach for dealing with this issue. It has not allowed the issue to be raised at the extradition hearing, but instead before the secretary of state. Consequently, it has changed its nature from that of a legally justiciable issue into an administrative one, which is subject to political considerations. Under the U.S. approach, if a person is requested for extradition to a state likely to torture a person or to subject him/her to cruel, inhuman, or degrading treatment or punishment as provided for in CAT, and for which extradition is explicitly forbidden, the United States has allowed the issue to be decided on an administrative discretionary basis by the secretary of state, subject only to review under the Administrative Procedure Act.[777] Thus, the burden of proof is on the person sought for extradition. That person does not have a right to an administrative hearing before the secretary of state or any administrative judge, however. The only remedy available is for the person in question to show that the secretary of state's decision constitutes an abuse of discretion in accordance with the Administrative Procedure Act—a very unsatisfactory way of addressing a binding treaty obligation upon the United States.[778]

United States courts have given great deference to the rule of non-inquiry as discussed throughout this section, preferring to leave such discretionary matters to the secretary of state.[779] To the best of this writer's knowledge, the secretary of state has never exercised discretion in this area, although there could be classified cases where that occurred.[780] There have only been a handful of cases where courts have applied the doctrine of non-inquiry while admitting that

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774 Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960). *See also* Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir. 1980); *United States v. Burns*, [2001] 1 S.C.R. 283, 360; *Netherlands v. Short*, 29 I.L.M. 1375, 1383 (Neth. 1990).

775 *See supra* Sec. 8.4.*See also Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by Article 3 would be grossly violated by requesting nation); *Soering v. United Kingdom,* 161 EUR. CT. H.R. (ser.A) (1989).

776 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, art. 3.

777 Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2000).

778 *Id.*

779 Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005), *affirming* 294 F. Supp.2d 1165 (C.D. Cal. 2003); Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); United States v. Kraiselburd, 786 F.2d 1395, 1399 (9th Cir. 1986); Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991) ("discovery is not only discretionary with the court, it is narrow in scope"); Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1407 (9th Cri. 1988). *See also* Emami v. U.S. Dist. Ct., 834 F.2d 1444, 1452 (9th Cir. 1987) ("in deciding discovery issues in extradition hearings, one consideration is 'whether the resolution of the contested issue would be appreciably advanced by the requested discovery' "), *quoting* Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986); *In re Extradition of* Drayer, 190 F.3d 410, 415 (6th Cir. 1999), *citing* Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

780 *See* Ch. XI.

there existed a serious risk of physical harm to the relator.[781] Indeed, in the current U.S. political climate where torture has been used as a tool in the "war on terror," it is unlikely that a relator's interests would play a substantial part in the secretary of state's calculus.[782] In light of the anomalous result that one U.S. court, applying the *non-refoulement* provision of Article 3 of the CAT, barred the return of an individual to Egypt where he faced torture, another U.S. court refused to consider the prohibition on torture in Article 3 of the CAT when the alleged torturers were members of the U.S. military.[783] Whether a noncitizen can expect relief under similar circumstances remains unresolved, although there is a strong argument to be made that such noncitizens are entitled to protection under the CAT.[784] In short, the prototype of an obvious egregious practice, which would warrant a court to rely on the humanitarian exception to the rule of non-inquiry, has yet to be adjudicated.

The latest pronouncement on the rule of non-inquiry relative to claims of torture was given by the Supreme Court in *Munaf v. Geren*.[785] The Supreme Court cited this writer for the proposition that concerns regarding possible torture are to be addressed by the political branches rather than the judiciary.[786] The proper vehicle for providing some protection from the practices of a foreign legal system that may not comport with the U.S. Constitution should, according to the Court, be resolved in the treaty-making process to ensure U.S. citizens' procedural rights are protected abroad.[787] More specifically regarding the possibility of a "humanitarian exception" to extradition based on possible mistreatment, the Court stated:

> The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result. Brief for Federal Parties 47; Reply Brief for Federal Parties 23. In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have " 'generally met internationally accepted standards for basic prisoner needs.' " *Ibid.* The Solicitor General explains that such determinations are based on "the Executive's assessment of the foreign country's legal system and . . . the Executive['s] . . . ability to obtain foreign assurances it considers reliable." Brief for Federal Parties 47.
>
> The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. See The Federalist No. 42, p 279 (J. Cooke

781 John T. Parry, *International Extradition, the Rule of Non-inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973, 1990–1991 (2010).

782 M. Cherif Bassiouni, The Institutionalilzation of Torture in the Bush Administration: Is Anyone Responsible? (2010).

783 *See* David Mueller, Comment: *Unsafe Haven: Could Article 3 of the U.N. Convention against Torture Prevent the Extradition of Terrorist Suspects to U.S. Custody?*, 28 Penn. St. Int'l. L. Rev. 549, 551–553 (2010).

784 For a detailed analysis of the requirements of the CAT regarding torture and the applicability of Article 3 to an individual's situation, as could be applied to detainees alleging torture at the hands of the United States, *see generally*, Mueller, *supra* note 783, at 551–553.

785 Munaf v. Geren, 553 U.S. 674, 700–705 (2008). For a discussion of the facts, see Ch. II, Sec. 4.5.

786 *Id.* at 700.

787 *Id.* at 701.

> ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"). In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks." 479 F.3d at 20, n. 6 (dissenting opinion).[788]

Justice Souter's concurring opinion indicated that the Court would be willing to provide U.S. citizens facing transfer from the American military to a foreign government relief in an "extreme case" including circumstances where "the probability of torture is well documented, even if the Executive fails to acknowledge it."[789] Whether the Supreme Court will extend this principle to provide protection to individuals in an extradition or removal context remains to be seen. The Third Circuit Court of Appeals has considered the implications of *Munaf* in the context of extending the rule of non-inquiry beyond extradition.[790] Although it ultimately concluded that *Munaf*'s reasoning did not apply to the CAT context presented in *Khouzam*, the Third Circuit decision illustrates the ambiguities left unresolved by the Supreme Court regarding how far the rule of non-inquiry should extend in proceedings involving the formal transfer of persons between or among states. The idea discussed above, that the judiciary may lack the institutional competence to adjudicate the prospective treatment of the relator upon transfer, defies logic, as the same federal courts carry out this very inquiry on a regular basis at the Federal Court of Appeals level.[791] One commentator has noted that the Supreme Court in *Munaf* opened the door to inquiry in a small number of cases where torture was possible, but that the broad statements made therein have created tensions that the federal courts must now resolve, such as what standard of review a court should apply to ensure the decision by the executive in such a case is not arbitrary.[792] As illustrated above, a circuit split is beginning to form regarding the ability of courts to review the executive's determination regarding torture and CAT claims. The Supreme Court may review the issue in the near future to provide necessary clarity, especially given the executive's concern over review of situations involving possible torture, as has been discussed throughout this book.

It should be noted on a procedural level that the issue of an exception to the rule of non-inquiry arises in the context of a request for discovery.[793] Discovery is not only finite, but discretionary. Extradition proceedings are limited and do not involve the adjudication of guilt or innocence.[794]

A final case of note is the Sixth Circuit case of *Demjanjuk v. Petrovsky*,[795] which involved essentially two issues. The first was whether the government's attorneys failed to disclose exculpatory information in their possession at extradition proceedings.[796] Second and related to the first question, was whether Demjanjuk was the person who was charged with the commission of the extraditable offense. The identification of the person sought is obviously pivotal to any extradition proceedings, and quite clearly if the government has any

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788 *Id.* at 702–703.

789 *Munaf,* 553 U.S. at 706 (Souter, J. concurring).

790 Khouzam v. Chertoff, 549 F.3d 245, 254 (3d Cir. 2008).

791 *See* Parry, *supra* note 781, at 2004–2006.

792 *Id.* at 2016–2017.

793 *See* Ch. IX, Sec. 13.

794 *Id.*

795 10 F.3d 338 (6th Cir. 1993).

796 *Id.* at 339.

information showing that the person brought before extradition proceedings is not the one who is wanted by the requesting state in accordance with the extradition request and the crime charged, then it has an obligation to disclose it. In this case, discovery is appropriate, but it differs from seeking discovery in order to determine whether in the requesting state the person sought will be denied procedural fundamental fairness, and/or will be treated in a manner that violates the CAT and other cruel inhuman, degrading treatment (the humanitarian exception).[797]

797 In 2005 the Ninth Circuit, in *Prasoprat v. Benov*, upheld the restrictive view concerning the rule of non-inquiry. Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005), *aff'g* 294 F. Supp. 2d 1165 (C.D. Cal. 2003) (holding that an inquiry into the possible application of the death penalty for a drug violation was not the type of obvious egregious treatment that would fall within the meaning of the humanitarian exception). *See, e.g.,* Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (inquiring into discovery reflected the same issue argued at the hearing that the United Kingdom had suspended fundamental fairness rights in connection with IRA investigations and prosecutions by subjecting individuals who were related to IRA terrorism to torture and cruel, inhuman, or degrading treatment or punishment.)

Chapter VIII

Denial of Extradition: Defenses, Exceptions, Exemptions, and Exclusions

Contents

1. Introduction

Extradition will be denied if any of the substantive requirements[1] or formalities of the practice[2] are not met. In addition, extradition will be denied by reason of the existence of certain specific exceptions, exemptions, exclusions, and defenses that arise out of a treaty or other legal bases. This chapter deals with these specific factors, which constitute grounds for denial of an extradition request that has otherwise met all substantive and formal requirements.

The theoretical foundations of these exceptions, exemptions, exclusions, and defenses vary. They can be distinguished substantively, but they result in the same outcome in that they constitute grounds for denial of the request.

There are four categories of such grounds that, if found to exist, result in denial of an extradition request. They are:

1. Grounds relating to the offense charged:
   a. political;
   b. military; and
   c. fiscal.
2. Grounds relating to the relator:
   a. nationals; and
   b. persons performing official acts and persons protected by special immunity.
3. Grounds relating to the criminal charge or to prosecution of the offense charged:
   a. legality of the offense charged;
   b. double jeopardy;
   c. statute of limitations;
   d. speedy trial;
   e. immunity and plea bargain;
   f. amnesty and pardon; and
   g. trial in absentia.
4. Grounds relating to the penalty and punishability of the relator:
   a. cruel and unusual punishment; and
   b. death penalty.

A fifth category could also be suggested that relates to the expected or anticipated violation of the relator's human rights by the requested state.[3] These potential violations are found in the human rights program as expressed in the United Nations Charter; the Universal Declaration of Human Rights; the two United Nations covenants on civil and political rights, and economic, social and cultural rights; multilateral treaties; and in other sources of international law that constitute a scheme for the protection of minimum standards of human rights.[4] However, because these rights also find some of their application in the four categories described above, they are dealt with therein. This methodological choice is dictated by the contemporary state of extradition

1 *See* Ch. VII.

2 *See* Ch. IX.

3 *See Report of the Committee on Extradition and Human Rights*, ILA 67th Conference, Helsinki, May 1996. *See also* Christine Van Den Wijngaert, The Political Offence Exception to Extradition 89–93 (1980).

4 International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 6, U.N. Doc. A/6316, at 49 (1976); International Covenant on Economic and Social Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 6, U.N. Doc. A/6316, at 49 (1976);

law and practice, which does not recognize the applicability of those minimum standards of human rights to its existing processes,[5] except in the case of asylum[6] and the grounds for denial. These specific exceptions, exemption, exclusions, and defenses are included in extradition treaties, the applicable national legislation, or in the jurisprudence of U.S. courts (as derivatives of treaty rights or constitutional guarantees). Because U.S. legislation does not comprehensively cover such grounds for denial of extradition, the applicable treaty will apply in each case in addition to relevant constitutional provisions. There is therefore no uniformity on these questions.

As a general rule in U.S. practice, the extradition judge will first turn to the treaty to identify any existing defenses, exceptions, exemptions, and exclusions, which some decisions cumulatively refer to as defenses.[7] However, the narrow view that there are 'no defenses' outside that which a treaty provides, ignores the fact that the United States is obligated under other multilateral treaties, such as the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment (CAT).[8]

1.1. The Position of the American Law Institute: The *Restatement (Third) of the Foreign Relations Law of the United States*[9]

The American Law Institute has adopted the following statement on grounds for refusal of extradition:

> § 476. Grounds for Refusing Extradition
>
> Under most international agreements, state laws, and state practice:
>
> 1. A person sought for prosecution or for enforcement of a sentence will not be extradited
>
> (a) without a showing that there is cause for holding him for trial for the offense with which he is charged, or that he has been duly convicted of the offense;
>
> (b) if prosecution in the requesting state would be, or was, in contravention of an applicable principle of double jeopardy;
>
> (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and the requested state; or
>
> (d) if the applicable period of limitation has expired.

American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, O.A.S. Off. Rec. OEA/Ser. K/SVI/1.1, O.A.S.T.S. No. 36, O.A.S. Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) *See also* The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards (M. Cherif Bassiouni ed., 1994) [hereinafter Bassiouni Compendium].

5 *See* Ch. VII, Sec. 8 (discussing rule of non-inquiry).

6 *See* Ch. III.

7 *See* DeSilva v. DiLeonardi, 125 F.3d 1110, 1112 (7th Cir. 1997), *citing* Charlton v. Kelly, 229 U.S. 447 (1913); Collins v. Loisel, 259 U.S. 309 (1922); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (Holmes, J.); ("The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.").

8 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 7, 1984, G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72, Annex (1984), reprinted in 23 I.L.M. 1027 (1984). Consequently, the opinion written by Judge Easterbrook mentioned in note 7 above, *DeSilva* at 1112, is not entirely accurate. Moreover, there could be "defenses" established by statute, and certainly the Supreme Court could find that some provisions of the Constitution may be deemed applicable.

9 Restatement (Third) of Foreign Relations (1987) (hereinafter Restatement (Third)).

2. A person will not be extradited if the offense with which he is charged or of which he has been convicted is a political offense.

3. A state may defer extradition of a person if it is itself holding him for prosecution or punishment for a serious crime, whether or not that crime is connected with the crime for which extradition is sought.

Comment:

(a) Conditions for extradition. The law of extradition as reflected in treaties and statutes, § 475, Comment a [*reprinted* in Ch. I], balances the demands of the international legal order that serious crime not go unpunished with concern that persons accused of crime not be subjected to unfair methods of adjudication or punishment. This section and § 477 [*reprinted* in Ch. VII] set forth principles contained, expressly or by implication, in a substantial majority of extradition treaties and statutes, and followed by states even in the absence of treaty or statute. Where an applicable treaty expressly provides otherwise, one or more of the conditions here set forth may not apply.

Although most treaties do not make express provision for judicial hearings, the nearly universal practice is that some type of judicial hearing is provided in the requested state, to insure that the conditions for extradition are complied with. In addition, the executive branch of the requested state generally exercises review, either before or after the judicial hearing, to see that the restraints on extradition are not transgressed.

Extradition ordinarily is initiated by a request transmitted through diplomatic channels. Though the obligations in an extradition treaty run from state to state, typically observance of the requirements and conditions for extradition may be invoked by the person sought to be extradited. In general, a determination as to whether particular defenses to extradition apply is made by the courts or other authorities of the requested state.

In most states, including the United States, if a request for extradition is denied, whether by the executive or by the courts, the requesting state may renew its application, for example on the basis of additional evidence or to cure a technical defect in the extradition papers. In some states, a refusal to extradite bars further efforts to have the person extradited to the same requesting state for the same offense.

(b) Required showing of extraditability. [*See* Ch. IX.] Extradition laws and treaties use various formulations to describe the proof required to support extradition. Under United States law and treaties, the standard is generally such evidence of criminality as would justify the requested state in holding the accused for trial if the act had been committed within its jurisdiction. In Great Britain and states following the British model, the standard is stricter, equivalent to a prima facie case, *i.e.*, such showing as, in the absence of a defense, would be required for committal of the accused. Among some states, including the parties to the European Convention on Extradition *inter se*, no review of the evidence is conducted in the requested state.

An extradition hearing, Comment *a*, is not a trial. Ordinarily, the accused is entitled to introduce evidence only to establish that he is not the person whose extradition is sought; that he is a national of the requested state, if the applicable law or treaty precludes extradition of such nationals; that the crime with which he is charged or of which he has been convicted is not covered by the treaty under which extradition is sought; or that he is not extraditable by reason of one of the provisions of this section. Evidence going to the merits of the charge, including an alibi, a challenge to the veracity of the prosecution witnesses, or justification, duress, insanity, or lack of criminal intent, ordinarily is not admitted in an extradition hearing, on the ground that guilt or innocence is most suitably determined by a court of the state whose law is alleged to have been violated. In some instances, however, the court in the requested state has permitted challenge to the fairness of the procedure or the veracity of the assertions made in support of the request for extradition. See, *e.g.*, § 478 [*reprinted* in Ch. X], Reporters' Note 2.

With respect to persons whose extradition is sought after conviction in the requesting state, the requirement of Subsection (1)(a) is met by proof of the judgment of conviction and, where applicable, of sentence. For convictions *in absentia*, see § 475, Comment *h*.

(c) Double jeopardy. [*See infra* Sec. 4.3]. The principle that a person should not be subject to double jeopardy is common to legal systems generally and in many countries is constitutionally mandated. Under most treaties, the requested state does not extradite a person if he has already been prosecuted in that state for the acts on the basis of which extradition is sought, whether that prosecution resulted in conviction or acquittal. Some laws and treaties also preclude extradition if the person sought for prosecution has previously been prosecuted for the same offense in the requesting state; some preclude extradition if the person sought has been prosecuted in a third state. The rule of Subsection (1)(b) applies to persons who have been convicted upon prosecution that was in violation of the principle of double jeopardy, as well as where between conviction and enforcement of the sentence in the requesting state the person has been convicted and served a sentence for the same offense in another state.

In general, it is not the denomination of the crime but the act constituting the crime that determines whether the principle of double jeopardy—*ne bis in idem* in international usage—is applicable. For those states parties to the International Covenant on Civil and Political Rights (see Introductory Note to Part VIII), the prohibition against double jeopardy in Article 14(7) may be applicable even if not spelled out in an applicable extradition treaty.

(d) Double criminality principle. [*See* Ch. VII, Sec. 2]. Double criminality is required expressly or by implication in the great majority of extradition treaties, and is usually a condition as well for extradition by states that extradite without or apart from treaties under a regime of reciprocity. Under this principle, extradition does not go forward unless the acts charged constitute a serious crime, § 475, Comment *c*, under the law of both the requesting and the requested state. This requirement is not necessarily met by the fact that the offense charged falls within the definition of extraditable offenses or appears in a schedule of offenses in an applicable treaty. For instance, if perjury is a crime in both states and is specified in the treaty, but in the requested state it is defined as swearing falsely in court while in the requesting state it includes swearing falsely before a government official or legislative hearing, only a charge of swearing falsely in court will satisfy the double criminality rule. See Reporters' Note 1. However, the fact that a particular act is classified differently in the criminal law of the two states would not prevent extradition under the double criminality rule. For instance, if the requesting state charged the person sought with embezzlement but the acts alleged would constitute larceny by trick or fraud in the requested state, extradition would be required.

To satisfy the double criminality principle, the offense charged must have been a serious crime in both states at the time it was committed. Extradition is not precluded by the fact that the treaty pursuant to which extradition is sought entered into force, or was amended to include the crime in question, after the act was committed.

In general, unless a plausible challenge is raised by the person sought, the authorities in the requested state will presume that the acts alleged constitute a crime under the law of the requesting state, and will consider whether the acts alleged constitute a crime under the law of the requested state. The fact that defenses may be available in the requested state that would not be available in the requesting state, or that different requirements of proof are applicable in the two states, does not defeat extradition under the double criminality principle.

If extraditable offenses are defined in the applicable treaty in terms of permissible punishment—for instance, "offenses punished by imprisonment for one year or more"—and the person whose extradition is sought has already been convicted and sentenced, the critical element for purposes of the double criminality principle is the possible sentence under the requesting state's law, not the sentence actually imposed or remaining to be served. However, many treaties preclude extradition if the time left to be served under the sentence is less than a specified period, such as six months.

(e) Extradition and periods of limitation. [*See infra* Sec. 4.4]. Nearly all extradition treaties provide for the effect of the passage of time. Many bilateral treaties, and the European Convention on Extradition, Introductory Note to this Subchapter, note 3, preclude extradition if prosecution for the offense charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested state, in others

that of the requesting state; under some treaties extradition is precluded if either state's statute of limitations has run. The United States is party to treaties of all three types. When a treaty provides for time-bar only under the law of the requesting state, or only under the law of the requested state, United States courts have generally held that time-bar of the state not mentioned does not bar extradition. See Reporters' Note 3. If the treaty contains no reference to the effect of a lapse of time, neither state's statute of limitations will be applied.

For purposes of applying statutes of limitation to requests for extradition in accordance with Subsection (1)(d), the period is generally calculated from the time of the alleged commission of the offense to the time of the warrant, arrest, indictment, or similar step taken in the requesting state, or of the filing of the request for extradition, whichever occurs first. The period may be tolled if the accused has fled from the requesting state or concealed his whereabouts. For differing interpretations of flight or concealment for this purpose, see Reporters' Note 3.

Under the law of the United States and of most common law countries, there is no period of limitations for enforcement of sentences, so that if a person is duly convicted and escapes, either from confinement or pending confinement, he may be returned to serve out his sentence, regardless of when he is captured or when a request is made for his extradition. Under the law of many civil law states, a fugitive from custody who remains at large for the period of his sentence plus a specific additional time may not be returned to custody. When such a law is applicable under a treaty, either as law of the requested or as law of the requesting state, the period of time between escape and recapture must be taken into account in determining whether the treaty requires extradition.

(f) Trial in ordinary courts. [*See infra* Sec. 2.2]. States are not required to, and normally do not, extradite civilians sought for prosecution before an extraordinary tribunal or court, including a military court, and they extradite military personnel only for common crimes, not for purely military offenses. In general, any substantial departure from the ordinary procedures applicable to prosecution and punishment of serious crimes in the requesting state may be a basis for refusing extradition. The surrender of military personnel of one state stationed in another state is not governed by the rules of extradition, but is generally provided for in Status of Forces or comparable agreements. See § 422 Reporters' Notes 4 and 5. However, persons formerly in military service may be extradited for crimes committed while they were in military service.

(g) Political offense exclusion. [*See infra* Sec. 2.1]. The substance of Subsection (2) is contained in virtually all extradition treaties (except those between Communist states), and reflects also the practice of states that extradite without a treaty. The definition of "political offense" for purposes of extradition has been subject to various understandings in different states and at different times. See Reporters' Note 5. It may cover both "pure" political acts and so-called "relative" political offense, *i.e.*, ordinary crimes undertaken from political motive, Reporters' Note 4. Some treaties provide that specified offenses may not be classified as political regardless of motive. See § 475, Reporters' Note 5, and Reporters' Note 6 to this section.

(h) Danger of persecution or unfair trial. [*See infra* Sec. 4]. Extradition is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution, or because the person sought belongs to a particular political movement or organization, or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state. See § 475, Comment *g*. In the case of a refugee, as defined, extradition to a state where the individual would be subject to persecution may also be prohibited by the United Nations Convention Relating to the Status of Refugees, and the Protocol thereto, § 711, Reporters' Note 7.

(i) Deferred and temporary extradition. [*See infra* Ch. X]. If criminal proceedings are pending in the requested state with respect to a person sought for extradition, or if he is serving a sentence there, the extradition hearing may nevertheless go forward and a determination may be made as to whether the request is well founded. If the person sought is determined to be extraditable, but extradition is deferred under Subsection (3), extradition may take place after conclusion

of the proceedings against him in the requested state and the service of any sentence imposed upon him, subject to an applicable principle against double jeopardy, Subsection (1)(b) and Comment *c*.

Under some extradition treaties, the parties may make arrangements that a person serving a sentence in the requested state be extradited to the requesting state for prosecution of charges there pending against him while the evidence is fresh; that he then be returned to the requested state to serve the remainder of his sentence; and, if he is convicted in the requesting state, that he be re-extradited to the requesting state following completion of his sentence in the requested state. See 6 Whiteman, Digest of International Law 1052–53 (1968).[10]

2. Grounds Relating to the Offense Charged

2.1. The Political Offense Exception

2.1.1. Historical Development and Meaning

Historically, extradition was the means to which states resorted for the surrender of political offenders. These individuals were guilty of crimes of lèse-majesté, which included, inter alia, treason, attempts against the monarchy or the life of a monarch, and even contemptuous behavior toward the monarch.[11] The first known European political offense was reached in accordance with the laws of the requested state. This development gave rise to the increased role of the judiciary in the practice, which, except for England and Belgium since 1833, had played no part in the process.[12] A treaty that dealt with the surrender of political offenders was entered into in 1174 between England and Scotland.[13] It was followed by a treaty in 1305 between France and Savoy.[14] In the 1600s, Hugo Grotius gave the practice a theoretical framework, which is still the cornerstone of classic extradition law.[15] Until the nineteenth century, extradition constituted a manifestation of cooperation between the family of nations, as attested by various alliances in existence between the reigning families of Europe.[16] The French Revolution

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10 Restatement (Third) § 476

11 *See* Christopher Pyle, Extradition, Politics and Human Rights (2002); Christine Van den Wyngaert, *The Political Offense Exception to Extradition: How to Plug the "Terrorists" Loophole' without Departing from Fundamental Human Rights*, *in* International Criminal Law and Procedure (John Dugard & Christine van den Wyngaert eds., 1996); Ivan A. Shearer, Extradition in International Law 166–169 (1971); Harvard Research in International Law, *Extradition*, 29 Am. J. Int'l. L. 108 (Supp. 1935) [hereinafter *Harvard Draft*]. *See generally* Thomas E. Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 Am. Soc'y Int'l Law 1 (1977); Marcella D. Malik, *Comment, Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offense Exception*, 3 Fordham Int'l L. J. 141 (1980).

12 The Belgian courts were given limited judicial control with the passage of the Extradition Act of 1833. Other countries introduced judicial control much later: England and Luxembourg in 1870, the Netherlands in 1875, Switzerland in 1892, France in 1927, and Germany in 1929. Van Den Wijngaert, *supra* note 3, at 12.

13 Extradition Treaty, Dec. 8, 1174, Eng.–Scot., *reprinted in* 1 Corps Universal Diplomatique du Droit des Gens 92 (J. Dumont ed., 1726). *See* Paul O'Higgins, *The History of Extradition in British Practice*, *1174–1194,* 1964 Ind. Y.B. Int'l Aff., 80–81.

14 Extradition Treaty, May 20, 1303, Eng.–Fr., *reprinted in* 1 Corps Universal Diplomatique de Droit des Gens, *supra* note 11, at 334. *See* Andre Rolin, *Quelques Questions Relatives à L'Extradition*, 1 Rec. Cours Acad. D. Int'l 197 (1925).

15 Hugo Grotius, De Jure Belli ac Pacis bk. 11, ch. 21, § 5 (1625) (enforcing extradition as used for crimes that affect public order, or which are atrociously criminal).

16 This practice continued into the nineteenth century. In 1834, the so-called "Holy Alliance" (Russia, Austria, and Prussia) concluded a treaty for the extradition of crimes such as high treason, *lèse-majesté*,

of 1789 and its aftermath started the transformation of what was the extraditable offense par excellence into what has is now the non-extraditable offense par excellence. In 1833, Belgium became the first country to enact a law on non-extradition of political offenders,[17] and by the beginning of the twentieth century almost every European extradition treaty contained an exception for political offenses.[18] By 1875, the practice was sufficiently established that the determination of what constituted a political offense was reached in accordance with the laws of the requested state.

The political offense exception is now a standard clause in almost all extradition treaties of the world, and is also specified in the municipal laws of many states.[19] Questions involving

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armed revolt, and acts against the safety of the throne. *See* André Billot, Traité de L'Extradition 108 (1874).

17 The Belgian Extradition Act of October 1, 1833, *reprinted in* Official Bulletin (Belg.), No. 77 (1833) (unofficial translation), *quoted in Harvard Draft*, *supra* note 11, at 362–363. *See also* Lhassa Oppenheim, International Law 704, 706 (Hersch Lauterpacht ed., 8th ed. 1955); Carbonneau, *supra* note 11, at 7.

18 The first treaty containing the political offense exception was between Belgium and France in their treaty of 1834. Extradition Treaty, Nov. 22, 1834, Belg.–Fr., art. 5, 84 Consol. T.S. 457, 562. For an in-depth analysis of the historical background of the political offense exception in the American treaty process, see Malik, *supra* note 11.

19 Marjorie Whiteman writes:

> Most extradition laws and treaties provide that extradition need not or shall not be granted when the acts with which the accused is charged constitute a political offense or an act connected with a political offense. Generally, a distinction is drawn between "purely" political offenses (e.g., treason, sedition) and "relative" political offenses or offenses "of a political character" (e.g., murder committed in the course of a rebellion), although generally both types are excepted from extradition . . . In the case of laws and treaties which contain a list of specific offenses for which extradition shall be granted, exception of "purely" political offenses is usually considered unnecessary since such offenses may be excepted by merely not being included in the list. However, provision is often made regarding "relative" political offenses.

Marjorie Whiteman, Digest of International Law (1963), § 15 at 800 [hereinafter Whiteman Digest]. *See also* Satya D. Bedi, Extradition in International Law and Practice 179–191 (1968); Shearer, *supra* note 11, at 166–198; *Harvard Draft, supra* note 11, at 21 107. Typical of the language of the political exception is that found in the extradition treaty between Great Britain and the United States:

> (1) Extradition shall not be granted if . . . (c)(i) the offense for which extradition is requested is regarded by the requested party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

Extradition Treaty, June 8–Oct. 21, 1972, U.S.–U.K., art. 5, 28 U.S.T. 227, 230 (entered into force Jan. 21, 1977). Similarly, the extradition treaty between the United States and Japan states:

> Extradition shall not be granted under this Treaty in any of the following circumstances:
>
> (1) When the offense for which extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying or punishing the person sought for a political offense. If any question arises as to the application of this provision, the decision of the requested Party shall prevail.

Extradition Treaty, Jan. 21, 1972, U.S.–Japan, 31 U.S.T. 892 (*entered into force* Mar. 26, 1980). Other extradition treaties add a list of offenses that are exempted from the political offense exception. For example, the treaty between the Federal Republic of Germany and the United States includes such a list:

> (1) Extradition shall not be granted if the offense in respect of which it is requested is regarded by the Requested State as a political offense, an offense of a political character or as an offense connected with such an offense.

the "political offense exception" are, like mixed questions of law and fact, subject to a de novo review on a petition for a writ of habeas corpus.[20]

Interestingly, however, the rise of terrorism and other forms of international and transnational criminality is causing some governments to make an about-face and to seek to exclude the exception for international crimes and for serious crimes of violence.[21]

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(2) Extradition also shall not be granted if the Requested State has substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for an offense mentioned in paragraph (1).

(3) For the purpose of this Treaty the following offenses shall not be deemed to be offenses within the meaning of paragraph (1):

(a) A murder or other willful crime, punishable under the laws of both Contracting Parties by a penalty of at least one year, against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family, including attempts to commit such as offense, except in open combat;

(b) An offense which the Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multilateral international agreement.

Extradition Treaty, June 20, 1978, U.S.–F.R.G., 32 U.S.T. 1485 (*entered into force* Aug. 29, 1980). The extradition treaty between the United States and the United Mexican States also incorporates such a list of exemptions from the political offense exception, but includes a clause vesting the determination of political offenses in the executive:

(1) Extradition shall not be granted when the offense for which it is requested is political or of a political character. [If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.]

(2) For the purpose of this Treaty, the following offenses shall not be considered to be offenses included in paragraph (1):

(a) The murder or other willful crime against the life or physical integrity of a Head of State or Head of Government or of his family, including attempts to commit such an offense.

(b) An offense which the Contracting Parties may have the obligation to prosecute by reason of a multilateral international agreement.

(3) Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

Extradition Treaty, May 4, 1978, U.S.–Mex. 31 U.S.T. 5059 (*entered into force* Jan. 25, 1980).

20 *See* Ch. XII (habeas corpus).

21 *See* Kenneth S. Sternberg & David L. Skelding, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 Case W. Res. J. Int'l L. 137 (1983) (recognizing that international events might enable terrorists to avoid extradition under the political offense exception and proposing that political offense exceptions should be narrowed by Congress to exclude terrorist acts from the protection of the political offense exception). For examples of treaty provisions excluding terrorist offenses from the political offense exception, see Hungarian Extradition Treaty, art. 4(2), *entered into force* Mar. 18,1997, S. TREATY DOC. 104-5 ("For purposes of this Treaty, the following offenses shall not be considered to be political offenses: a. a murder or other willful crime against the person of a Head of State of one of the Contracting Parties, or a member of the Head of State's family; . . . c. murder, manslaughter, or other offense involving substantial bodily harm; d. an offense involving kidnaping or any form of unlawful detention, including the taking of a hostage; e. placing or using an explosive, incendiary or destructive device capable of endangering life, of causing substantial bodily harm, or of causing substantial property damage; and f. a conspiracy or any type of association to commit offenses as specified in Article 2, paragraph 2, or attempt to commit, or participation in the commission of, any of the foregoing offenses"); Polish Extradition Treaty, art.5(2), *entered into force* Sept. 17, 1999, S. TREATY DOC. 105-14 (murder or other offense against heads of

Even though widely recognized, the very term "political offense" is seldom defined in treaties or national legislation, and judicial interpretations have been the principal source for its meaning and application.[22] This may be due to the fact that whether a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition, which could restrict the flexibility needed to assess the facts and circumstances of each case.[23]

As a consequence of the preeminent role played by the judiciary in defining and applying this exception, the courts of the requested state unavoidably apply national conceptions, standards, and policies to an inquiry that relates to a process transcending the interests of that one participant.[24] The term "political offense," according to Oppenheim, was unknown to international law until the French Revolution,[25] and even when the European practice was to secure the surrender of political offenders, the term was not employed.[26]

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state or their families; murder, manslaughter, assault; kidnaping, abduction, hostage taking; bombing; or attempt or conspiracy to commit any of those offenses); Extradition Treaty with Luxembourg, art. 4(2), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-10, TIAS 12804 (virtually the same); Costa Rican Extradition Treaty, art. 4(2)(a), *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17 (violent crimes against a Head of State or a member of his or her family). *See also* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties* at 7, Congressional Research Service report for Congress 98-958, Mar. 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

22 Lora L. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 Am. J. Int'l L. 247, 250 (1933). *See also* Alona E. Evans, *Reflections upon the Political Offense in International Practice*, 57 Am. J. Int'l L. 1, 15 (1963); Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226, 1230 (1962) [hereinafter *Nature of Political Offenses*]; Manuel R. Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. Pitt. L. Rev. 371, 371–372 (1953). But recently there has been a movement in the United States to transfer the discretionary power to determine political offenses from the judiciary to the executive branch. *See* Eain v. Wilkes, 641 F.2d. 504, 513 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996). Proposed Amendment No. 2373 to S. 1772, Criminal Code Reform. Two bills, each cited as Extradition Act of 1981, were proposed amendments to chapter 209, title 18, United States Code. H.R. 5227, 97th Cong., 2d Sess. (1982); S. 1639, 97th Cong., 1st Sess. (1981). This effort failed, however. *See* William M. Hannay, *Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorist's Loophole*, 13 Denv. J. Int'l L. & Pol'y 53 (1983).

23 *Nature of Political Offenses*, *supra* note 22, at 1229. On December 14, 1990, the General Assembly of the United Nations adopted four model treaties on international cooperation in criminal matters. One of these treaties deals with extradition; human rights considerations weigh heavily in the mandatory and optional grounds for refusal set forth in the treaty. Model Treaty on Extradition, arts. 3, 4, Dec. 14, 1990, 30 I.L.M. 1407, *reprinted in* Bert Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 1992 Netherlands Y.B. Int'l L. 75 [hereinafter U.N. Model Extradition Treaty]. Article 3(a) of the model treaty states that extradition shall not be granted if the offense for which extradition is requested is regarded by the requested state as an offense of a political nature. The model does not attempt to define the political offence, but requires that where an extradition request is for a political offense the requested state not surrender the individual. In other words, the model treaty makes non-extradition for political offenses mandatory, not optional. However, a footnote has been added to the model, suggesting two different limitations to the exception. On one hand, countries may choose to exclude "any offense in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite." Furthermore, the note adds that other offenses, which the parties have agreed not to consider as political offenses for the purpose of extradition, may be excluded. *Id.* at 186–187.

24 Evans, *supra* note 22, at 17.

25 Oppenheim, *supra* note 17, at 704.

26 *See* Van Den Wijngaert, *supra* note 3, at 5–6 (referring to treaties contemplating the surrender of political offenders and not common criminals, as in the Treaty of 1179 between Henry II, King of

The history of the political offense exception is inexorably linked to the rise of eighteenth-century political theories on freedom, democracy, and the right to rebel against oppression.[27] Since then, the development of this exception has been intricately linked to asylum,[28] even though prior to the eighteenth century, this relationship was very tenuous. Indeed asylum, as practiced in the Mediterranean Basin (Egypt, Mesopotamia, Greece, and Rome), had little resemblance to the later European practice bearing the same nomenclature.

The introduction of the political offense exception in the practice of extradition, after Belgium's legislative initiative in 1833, was aptly discussed in the case of *In re Fabijan*,[29] where in 1933 the Supreme Court of Germany stated:

> What the Belgian legislature understood by the term "political offense" is to be ascertained from the Belgian public and criminal law of the time when the law of 1833 was made. . . . Using the term not in the legal sense but as it is understood in politics, the legislature meant essentially high treason, capital treason, acts against the external security of the state, rebellion and incitement to civil war. . . .Since these acts, because they were political, were not listed among the offenses and crimes enumerated in Article I of the law and were thus not extraditable, it was not necessary to provide specifically in Article 6 that no extradition was admissible in respect of political offenses. This followed also from the so-called principle of identity of extradition and prosecution, laid down elsewhere in the law. [Double criminality is discussed *supra* Ch. VII.] But special mention of the matter had to be made because the legislature did not merely wish to exclude from extradition offenses against the state, but also certain connected offenses. It was considered that an offense against the state, especially when it took the form of an armed rising against the existing state authority, ought (in order to make the principle of nonextradition effective) to embrace other acts attending it and contributory crimes in themselves, in particular offenses against life and property, as well as offenses respecting the person and liberty of the individual. For persons committing such offenses in connection with and in furtherance of an offense against the state appeared to be not less deserving of asylum than the principle actors themselves. Looked at alone, such offenses are "ordinary offenses." By them the Belgian legislature meant such offenses as were "ordinary" crimes and were closely connected with a "political" offense. . . The term "connected offense" is clearly borrowed from Article 227 of the *Code d'Instruction Criminelle,* where it is used with reference to the joinder of several counts in one indictment. In the Law of Extradition, just as in the Code of Criminal Procedure, the term refers to a plurality of criminal acts which are connected by some common feature. It follows from this that an offense against the state in the above sense must actually exist and have taken shape. "Connection" exists if another offense, itself an "ordinary" offense, stands in a particular relation to this "principal fact." A purely external connection—identity of time, place, occasion or person—is not alone enough; rather, what is required is a conscious and deliberate relation of cause and effect. The "ordinary" criminal act must, in fact, have been a means, method or cloak

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England, and William, King of Scotland, and the Treaty of Paris of 1303 between the English and French kings). This history is described in O'Higgins, *supra* note 13. *See also* Edward Clarke, A Treatise on International Criminal Law 18–22 (4th ed. 1903) [hereinafter Clarke Treatise]; Arthur Nussbaum, A Concise History of the Law of Nations 214–215 (1954); Paul O'Higgins, *The History of Extradition in British Practice, 1174–1794*, 13 Ind. Y.B. Int'l Aff. 78 (1964) (showing "treason" and "rebellion," the two main extraditable offenses, as nonpolitical, even though they are both deemed examples of political offenses par excellence); Charles de Visscher, Theory and Reality in Public International Law 243 (1957). As late as 1834, a treaty among Austria, Prussia, and Russia called for the surrender of persons accused of high treason, armed rebellion, acts against the security of the throne or the government, and acts of *lèse-majesté*. *See* 15 G.F. de Martens, Nouveau Recueil Général de Traités (Gottingue, Dieterich 1841).

27 *See* Van den Wijngaert, *supra* note 3, at 8–9; Carbonneau, *supra* note 11, at 5.

28 *See* Ch. III.

29 7 Ann. Dig. 360 (Sup. Ct. 1933) (Germany).

> for the carrying out of the "political" offense. To this extent—and to this extent only—the political object of the criminal is relevant for the determination of the question whether his crime is a "connected" act. The antithesis of a "connected" offense is an "isolated" offense, e.g., the murder of a statesman unconnected—or at least without the connection being discerned—with any political revolt. Such "isolated" offenses are extraditable notwithstanding that the motive is political; political asylum does not extend to them.[30]

After Belgium's legislative initiative in 1833, France,[31] and Switzerland[32] enacted similar laws in 1834, and England followed suit in 1870.[33] Initially, the only related U.S. legislation was the provision on political asylum in immigration statutes,[34] but the United States made the exception part of its practice in 1843.[35]

2.1.2. Ideologically Motivated Offenders and Political Offenses[36]

To secure their institutions, societies have devised laws to punish those who seek to affect the existence or functioning of these institutions. These laws may be designed to preclude change altogether or to prevent change by certain means. They are enacted to protect a given social interest and presuppose a value judgment as to the social significance of what is sought to be preserved.[37] Paradoxically, those who violate these laws are usually committed to affecting the very interest sought to be preserved and do not perceive their conduct as morally blameworthy. Indeed, the converse is almost always true. Such an offender is referred to as the ideologically motivated offender. This type of an offender denies the legality of the system, the legitimacy of a given law or the social order it seeks to protect, claiming adherence to a higher legitimating principle.[38] This perception may be based on commonly understood ideals of political freedom or other specific notions, which may or may not reflect the common values of the ordinary reasonable person in that society or in internationally recognized minimum standards of human rights. This type of violation of the law is, therefore, incidental to the ideological or political purposes of the offender and the social order that he/she confronts with such conduct. In a democratic society, where laws are said to embody social values and to change accordingly, the element of social or moral blameworthiness will depend largely on the degree to which the violated law truly embodies prevailing social values. This is particularly true with respect to the enforcement of criminal laws, but even among such laws distinctions must be made.

Throughout the history of mankind, organized societies have characterized certain forms of behavior as offensive to their common morality. These forms of behavior have invariably included that which harmfully affects a commonly shared interest, perceived by almost every

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30 *Id.* at 363–365. *See* Billot, *supra* note 16, at 109; Shearer, *supra* note 11.

31 Law of March 10, 1927, tit. 1, art. 5, para. 2, *in Harvard Draft*, *supra* note 11, at 380–381.

32 Federal Extradition Law of Jan. 22, 1892, art. 10, *in Harvard Draft*, *supra* note 11, at 423.

33 33 & 34 Vict., ch. 52.

34 *See* Ch. III.

35 William M. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 526 (1910). *See also* John B. Moore, Digest of International Law (1901) [hereinafter Moore Digest] § 604 at 332.

36 This section is based in part on M. Cherif Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DePaul L. Rev. 217, 218–226 (1969).

37 *Id.* at 228. *See also* M. Cherif Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, *in* International Terrorism and Political Crimes 398 (M. Cherif Bassiouni ed., 1975); Remmelinck, *Politieke Delicten*, *in* Vrijheid en Recht 177–180 (1975), *cited in* Van Den Wijngaert, *supra* note 3, at 28–29.

38 Bassiouni, *supra* note 36, at 228.

member of society, irrespective of ideology. Among these have been certain acts affecting the life and physical integrity of individuals, which, by virtue of their consistent recognition in the legal controls of almost all social systems, are referred to as "common crimes."[39]

Every legal system also contains enactments that do not enjoy the same level of recognition granted to "common crimes." These offenses may lack the foundation of commonly perceived and shared values, or they may simply be regulatory norms, as was the case at common law between crimes, *mala in se* and *malum prohibitum.* Furthermore, certain offenses may embody ideological values that do not correspond to the commonly perceived values of almost all members of a given society, as in the case of dictatorial regimes.

Some legal doctrines (the positivist, for example) contain no basis for distinguishing between these different types of legal controls, on the assumption that all violations of the law are equal in that they are violations.[40] Other doctrines (the utilitarian and naturalist) seek to distinguish between types of violations because such distinctions would, if nothing else, correspond to a gradation of the violation in terms of the interest it affects or because of a greater degree of individualization of the penalty, both reasons also being based on a certain criminological policy. As applied to the ideologically motivated offender, the latter approach would be of questionable value when applied to an offender who cannot be resocialized and is seldom deterred by the penalty attached to the transgressed legal mandate.[41] However, the inquiry must not be limited to an examination of the professed motivations of the actor; it must also take into account the legal norm that was transgressed in order to have an objective basis, which controls the administration of justice.

There is a distinction between offenses that embody ideological goals and ideologically motivated offenders. Some may well argue that all laws are based on ideological values, and that those who have opposing ideologies in their violation of the law express their own values. However, not every ideologically motivated offender necessarily commits an ideological offense by breaching the law. The two concepts must be distinguished because the nature of the offense may not confer upon the actor certain motives that were not present at the commission of the violation. The character of the offense emanates from the social interest it seeks to preserve, whereas the characterization of the actor's conduct stems from a differing individual perception of the social interest. The ideologically motivated offender, therefore, acts in a way so as to harm the legally protected social interest in order to protect or promote another interest he/she perceives to be more socially redeeming.[42]

When the law that was violated embodies the protection of sociopolitical structures and the actor, moved by a commitment to differing ideological values or beliefs, harms those interests without committing a "common crime," the offense is said to be "purely political." However, if such an offense also involves the commission of a "common crime," usually a private wrong, it ceases to be a purely political offense and could then be labeled either a "relative political offense" or a "common crime."[43]

The problem lies in distinguishing between types of offenses and typology of offenders. Western European doctrine makes a classification whereby it separates relative political offenses into *délits connexes* and *délits complexes*.[44] In both cases a common crime is committed with or

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39 *Id.* at 229.

40 *Id.* at 229–230. *See also* H.L.A. Hart, Punishment and Responsibility (1968).

41 *See* M. Cherif Bassiouni, Substantive Criminal Law 73–84 (1978).

42 Bassiouni, *supra* note 36, at 229–230.

43 This distinction between *délits complexes* and *délits connexes* was first made by Andre Billot. Billot, *supra* note 16, at 104. *See* Shearer, *supra* note 11, at 181–183.

44 Shearer, *supra* note 11, at 181–183.

without the commission of a purely political offense, but is actuated by ideological motives. This approach, however, fails to appreciate the distinction between the nature of the offense and the motives of the actor. These approaches will be discussed below, but two general observations must be borne in mind throughout the discussion of this exception:

1. The significance of value-oriented legal mandates, which by their very nature fluctuate in time and are relative to a given societal framework and cannot therefore give rise to their international recognition, except when the proscribed conduct is sanctioned by the common morality of mankind, as in the case of international crimes (discussed below).

2. However, it must be recognized that although every offense committed by an ideologically motivated offender is an attack upon the law, not every attack upon the law should benefit from the characterization of political offense as an exception to extradition.

The purpose of the political offense exception is to shield persons whose prosecution or punishment by the requesting state is politically motivated or for an offense whose genesis is the criminalization of conduct that constitutes an expression of political or religious belief.[45]

2.1.3. The Political Function and Political Activities of a Relator and the Political Offense Exception

The political offense exception is in a large part designed to ensure that the integrity of the legal processes of the requested state will not be used by the requesting state to achieve certain political ends by prosecuting an individual for his/her political beliefs or politically motivated conduct. It does not, however, mean that a given person who is a public official or political figure in a given country can rely on his/her status to oppose extradition for an offense that does not otherwise fall within the meaning of the relative political offense exception,[46] although he/she may rely on this status to argue the purely political offense exception.[47] The political function of a person or his/her position does, however, raise the issue of immunity with respect to heads of state, and with respect to those with diplomatic immunity. The first is essentially covered by customary international law,[48] and the second by the Vienna Convention on Diplomatic Immunity.[49] The political offense exception also should not be confused with a claim arising under the 1967 Protocol amending the 1951 Refugee Convention,[50] which allows a refugee to oppose return to a state where he/she is likely to be persecuted on grounds of, inter alia, political beliefs.[51]

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45 *In re Requested Extradition of Smyth*, 61 F. 3d 711, 720 (9th Cir. 1995); *In re the Requested Extradition of* Artt, Brennan and Kirby, 972 F. Supp. 1253 (N.D. Cal. 1997).

46 *See infra* Sec. 2.1.5.

47 *See infra* Sec. 2.1.4.

48 Heads of state and other internationally protected persons are also protected by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166, U.N. GAOR, 28th Sess., Supp. No. 30, at 146, U.N. Doc. A/9030 (1974).

49 Vienna Convention on Diplomatic Immunity, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S 95.

50 G.A. Res. 2198, U.N. GAOR, 21st Sess., Supp. No. 6, at 48, U.N. Doc. A/6316 (1966).

51 *See* Ch. III. For examples of treaties that extend the political offense exception to individuals whose prosecution is politically or discriminatorily motivated, see Jamaican Extradition Treaty, art. III(2), *entered into force* July 7, 1991, S. TREATY DOC. 98-18 ("Extradition shall also not be granted if… (b) it is established that the request for extradition, though purporting to be on account of the extraditable offence, is in fact made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality, or political opinions; or (c) the person sought is by reason of his race, religion, nationality, or political opinions, likely to be denied a fair trial or punished, detained or restricted in his personal liberty for such reasons"); Extradition Treaty with the Bahamas, art. 3(1)(c), *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17 ("Extradition shall not be granted when: …the executive authority of the Requested State determines that the request was politically or racially motivated"); Extradition Treaty with Cyprus, art.4(3), *entered into force* Sept. 14, 1999, S. TREATY DOC. 105-16 (politically motivated); French Extradition Treaty, art.4(4), *entered into force* Feb. 1, 2002, S. TREATY

Two major cases arose in the United States involving heads of state claiming a mixture of head of state immunity and political motivation in the conduct of their governments as well as the government of the United States. These cases involved the former presidents Ferdinand Marcos[52] of the Philippines and Manuel Noriega[53] of Panama. Although neither case involved extradition issues per se, these two cases deserve to be mentioned because of the possible confusion they raise due to the political personality of the individuals involved. On the bases of these cases, if a requesting state asks for the extradition of a former head of state found in the United States or a senior political personality, such personal factors as the public office they held and the activities they conducted may be relevant to determining the motive of the requesting state.[54] They are not, however, sufficient in and of themselves to characterize the nature of the act if the offense charges a common crime that does not qualify for the criteria of the pure political offense. Thus, the embezzlement by a head of state of public funds or the commission of other crimes such as traffic in drugs, money laundering, or ordering political assassination and torture could not be characterized as a part of the relative political offense on the grounds that the person was a head of state or a senior public official. Furthermore, when such acts constitute international crimes such as crimes against humanity, war crimes, or torture, the exception to the relative political offense will not apply.[55]

2.1.4. The Purely Political Offense

The purely political offense is usually conduct directed against the sovereign or its political subdivisions, and constitutes opposition to a political, religious, or racial ideology or to its supporting structures (or both) without having any of the elements of a common crime. The conduct is labeled a crime because the interest sought to be protected is the *sovereign* or *public order*, as distinguished from any private wrong.[56] The word "sovereign" includes all the tangible and intangible factors pertaining to the existence and functioning of the state as an organization. It refers to the violation of laws designed to protect the public interest by making an attack upon it a public wrong as opposed to a private wrong, as in the case of common crimes. Such laws exist solely because the very political entity, the state, has criminalized such conduct for its self-preservation. It is deemed a crime because it violates positive law, but it does not cause a private wrong.[57]

DOC. 105-13 (prosecution or punishment on account of the fugitive's "race, religion, nationality or political opinions").

52 Republic of the Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1989). *See also* Republic of Philippines v. Marcos, 806 F.2d. 344 (2d Cir. 1986), *cert. denied*, New York Land Co. v. Republic of Philippines, 481 U.S. 1048 (1987). There are numerous other cases in the Second Circuit involving non–heads of state. *See In re Extradition of* McMullen, 989 F.2d 603 (2d Cir. 1993); Doherty v. Thornburgh, 943 F.2d 204 (2d Cir. 1991); *In re Extradition of* Mackin, 668 F.2d 122 (2d Cir. 1981).

53 United States v. Noriega, 683 F. Supp. 1373 (S.D. Fla. 1988), *mot. denied*, 746 F. Supp. 1506 (S.D. Fla. 1990); *cf.* Jose v. M/V Fir Grove, 801 F. Supp. 349 (D. Or. 1991).

54 *See* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

55 *See infra* Sec. 2.1.7 (dealing with international crimes; an exception to the political offense exception). *See also Marcos*, 818 F.2d 1473; United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990). For a general discussion of the political offense exception, see William J.A. Hobson, *A Canadian Perspective on the Political Offense Exception in Relation to War Crimes*, 62 Rev. Int'l de Droit Pénal 339, 340–342 (1991).

56 As one commentator noted, "[b]ecause these acts are not acts against common humanity but only against the state whose interests will suffer in their wake, other states are reluctant to condemn the perpetrator and may in fact praise him." Jan Schreiber, The Ultimate Weapon 153 (1978).

57 "[T]hey are exclusively directed against the state or the political organization without injuring private persons, property, or interests." Van Den Wijngaert, *supra* note 3, at 106. For a discussion of this

Treason, sedition, and espionage are offenses directed against the state itself, and are therefore, by definition, a threat to the existence, welfare, and security of that entity. As such, they are purely political offenses.[58] A purely political offense, when linked to a common crime, loses its political character.[59] This is illustrated in the following case.

In 1928, Germany sought the extradition of Richard Eckermann from Guatemala for the crime of murder. It was charged that in 1923 Eckermann was a prominent member of the Black Army, a secret organization of former military officers in Germany whose purported purpose was to protect Germany in case of attack by its neighbors, and to suppress communism and Bolshevism in Germany. When a man named Fritz Beyer tried to join the Black Army, its members thought him to be a spy, and eventually it was alleged that Eckermann gave directions to a subordinate that resulted in the shooting, killing, and burying of Beyer. The crime was not discovered until more than a year later. The subordinate and four others who took part in the crime were tried and imprisoned, but Eckermann escaped to Mexico and then to Guatemala. The extradition case eventually came before the Supreme Court of Justice of Guatemala. Eckermann claimed that the crime was political, particularly in the context of the abnormal conditions that prevailed in Germany after WWI as a result of social, political, and economic upheavals. The Guatemalan constitution provided that "extradition is prohibited for political crimes or connected common ones." In 1929, the court held that extradition should be granted, stating:

> The fact that Eckermann formed part of a patriotic society secretly organized to cooperate in the defense of his country cannot in any way give the character of political crimes to those committed by its members.... Universal law qualifies as political crimes sedition, rebellion and other offenses which tend to change the form of government or the persons who compose it; but it cannot be admitted that ordering a man killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime.[60]

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principle, *see* Medelius-Rodriguez v. United States, 2007 U.S. Dist. LEXIS 96667, at *17 (E.D.N.C. 2007) (*citing* International Extradition: United States Law and Practice (4th ed. 2002)).

58 "These pure political crimes have usually been limited to treason, sedition and espionage." Charles Cantrell, *The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 Marq. L. Rev. 777, 780 (1977). *See* Deere, *supra* note 22, at 247; *Harvard Draft, supra* note 11, at 113.

59 *See* Van Den Wijngaert, *supra* note 3, at 106 ("[political offenses] are not accompanied by the commission of common crimes.").

60 *In re* Eckermann, 5 Ann. Dig. 293, 295 (Sup. Ct. 1929) (Guat.). *See In re* DeBernonville, 22 I.L.R. 527, 528 (STF 1955) (Braz.) (stating that "treason to a country [is] among political crimes, [and] the authors are not subject to extradition"); *accord* Chandler v. United States, 171 F.2d 921 (1st Cir. 1949) (holding, inter alia, that political offenders include persons charged with treason); Ex parte *Kolcyznski* [1955] 1 Q.B. 540, 547 (Eng.) ("Treason is an offense of a political character."); *In re Ockert*, 7 Ann. Dig. 369, 370 (Federal Tribunal 1933) (Switz.) (stating "high treason, capital treason and the like" are political offenses because "the offense is against the State and its principal organs"); *cf. Public Prosecutor v. Zind*, 40 I.L.R. 214 (Cass. 1961) (Italy). In *Zind*, the extradition request of West Germany was denied by Italy on the grounds that the relator's anti-Jewish statements constituted political crimes. Although the court did not characterize the offense as purely political, the absence of the element of a common crime was implicit in its reasoning:

> In fact, when a man professes a particular ideology he cannot always be in harmony—indeed, he is almost always at variance—with the principles of moral order and social doctrine held by the majority of those who live in his society. Such principles exist on a level above that of the various social groups taken together and considered as a whole.

Id. at 216. *See also* Manuel R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, 26 U. Pitt. L. Rev. 65 (1964).

Proceeding from the question of what elements and what facts are needed to constitute the offense of treason, the concept of treasonous conduct gives rise to a variety of byproducts, which differ from country to country. For example, as one author noted:

> Although the Soviet formulation reflects the traditional law in regarding treason as breach of allegiance to the State, it nevertheless goes amazingly far in lumping together treason, desertion and espionage, and, even more striking, in setting up escape or flight abroad as a treasonable act.[61]

By contrast, under U.S. law, sedition requires only a communication intended to incite a violation of public peace with intent to subvert the established form of government. The offense is complete upon the utterance, and there is no necessity for the occurrence of a riot or rebellion. In other words, sedition is an insurrectionary movement tending toward treason, but lacking an overt act. It disturbs and affects the stability and tranquility of the state by means not actionable as treason. The distinction among treason, sedition, and incitement to riot is, therefore, relative.[62]

Espionage, on the other hand, has a more easily recognized common denominator, which is the act of obtaining or attempting to obtain information deemed secret or vital to the national security or defense of a given state for the benefit of another state. Unlike treason, there is no element of allegiance required on the part of the offender, and hence no duty that must be breached. As with treason and sedition, it is predicated on the notion that what offends the public interest constitutes a public wrong.

Treason, sedition, espionage, peaceful dissent, and freedom of expression and religion, if they do not incite to violence, are considered purely political offenses because they lack the essential elements of a common crime in that the perpetrator of the alleged offense acts on the basis of his/her beliefs, alone or as an instrument or agent of a political or religious thought or movement, but does not commit a common crime that results in a private harm. There is no way of defining a purely political crime in a manner that would exhaust the imagination of lawmakers, but it could be defined as follows:

> A purely political offense is one whereby the conduct of the actor based on ideology or belief manifests an exercise in freedom of thought, expression and belief (by words, symbolic acts or writings not inciting to violence), freedom of association and religious practice, all of which are committed in violation of a positive law designed to prohibit such conduct.[63]

2.1.5. The Relative Political Offense

The relative political offense can be an extension of the purely political offense when, in conjunction with the latter, a common crime is also committed, or when, without committing

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61 Garcia-Mora, *supra* note 60, at 74. With respect to treason, compare the Soviet Criminal Code and Act of June 25, 1948, ch. 645, 62 Stat. 745 (codified at 18 U.S.C. §§ 951–969) and Act of June 25, 1948, ch. 645, 62 Stat. 807 (codified at 18 U.S.C. §§ 2381–2390). *See also* Harold Berman, Soviet Criminal Law and Procedure 178–186 (1966); The Criminal Justice System of the U.S.S.R. (M. Cherif Bassiouni & Valeri M. Savitski eds., 1979); M. Cherif Bassiouni, *The Criminal Justice System of the U.S.S.R. and the Peoples Republic of China*, 11 Revista de Derecho Puertorrique ñ o 168 (1971).

62 *See* Bassiouni, *supra* note 41, at 404 (discussing sedition in U.S. law).

63 Civil disorders in the United States, such as the riots of the 1960s in major American cities, could be considered common crimes, relative political offenses, or purely political offenses, depending upon one's ideological position. The U.S. government under 18 U.S.C. §§ 231–232 (1988), considers such acts common crimes, as witnessed by the Chicago Seven conspiracy trial of the seven defendants accused of such crimes during the 1968 Democratic Convention in Chicago. All states have legislation that prohibits conduct such as disturbing the peace and arson; such legislation is used against rioters who have engaged in ideologically motivated demonstrations. *See* M. Cherif Bassiouni, The Law of Dissent and Riots (1971).

a purely political offense, the offender commits a crime prompted by ideological motives.[64] Although the purely political offense exclusively affects the public interest and causes only a public wrong, the relative political offense also affects a private interest, and constitutes, at least in part, a private wrong in the nature of a common crime against person or property, and is committed in furtherance of a political purpose.[65] The term "relative political offense" is at best a descriptive label of dubious legal accuracy because it purports to alter the nature of the crime committed depending upon the actor's motives.[66] There is nothing that makes a given common crime political, because the nature of the criminal violation and the resulting harm constitute a private wrong that, by definition, is a common crime. That the actor seeks to use the offense or its impact for ulterior political purposes does not alter the nature of the act or its resulting harm, nor does its ulterior or ultimate purpose change its character. The circumstances attending the commission of the crime and the factors and forces that may have led the actor to such conduct render the actor's motivations complex, but not the offense. To call such crimes *délits complexes* or *délits connexes*[67] only because the motives of the actor are taken into account, even when they deserve special consideration, is to confuse the nature of the crime with the motives of the actor.[68] Considerations focusing on the offender's motives are not always accepted in all criminal justice systems. For example, U.S. criminal law does not include motive as an element of a criminal offense.[69] The element of intent required for all serious crimes bears upon the state of the actor's mind at the time the actus reus was committed. As such, mens rea in the common law system does not include motive—the underlying reason, the ulterior purpose or the motivating factor that helped form a given state of mind.[70] Certainly, motive is relevant in proving intent, but it is not an element of the crime and, therefore, has no bearing on whether the actor's overall conduct, the accompanying mental state, and its resulting harm will be characterized as a crime. It may, however, be relevant in the determination of the sentence. This, however, is not the case in Roman civil systems, wherein motive in serious crimes is part of the *dolus*, the intent.

The criminality of an actor is determined by what he/she did and whether he/she acted knowingly and voluntarily, rather than by the ulterior purpose at which the conduct was aimed. Motive is, therefore, a secondary factor in determining whether criminal intent existed.[71] The significance of motive in different penal systems varies greatly. Furthermore, it must be recalled that extradition is an interstate system of cooperation in penal matters. Consequently, the internal views of a given system should not necessarily prevail over the goals of inter-state cooperation, particularly when what is at stake is alleged violative conduct in the requested state.

The issue of motive is complex, particularly because a state that does not share the interest in maintaining the political ideology, system, or policies of another state is less likely to exhibit concern or interest in the maintenance of the internal structures and public safety of that state.

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64 *See generally*, *In re Extradition of* Bravo, No. 10-20559-MC-Dubé, (S.D. Fla. 2010) (shooting was incident to and in course of suppressing a violent terrorist revolution at Trelew, Argentina).

65 *See* Cantrell, *supra* note 58, at 780; *Nature of Political Offenses*, *supra* note 22, at 1230–1231; Bassiouni, *supra* note 36, at 248.

66 For a discussion of the terminology difficulties caused by the use of the terms "relative," "related," "mixed," "complex," and "connex political offenses," see Van Den Wijngaert, *supra* note 3, at 108–110. There are various theories on the subject, which are discussed below.

67 *See id.* at 109–110 (discussing background and applicability of these terms).

68 *But see Yousef Said Abu Dourrah v. Attorney General*, 10 Ann. Dig. 331, 332 (Sup. Ct. Palestine 1941) ("We know of nothing in the criminal law of this country or of England that creates a specific offense called political murder.").

69 *See* Bassiouni, *supra* note 41, at 170–171.

70 *Id.* at 168–190.

71 *Id*. at 173–175.

In such a case the requested state is more likely to examine the motives of the offender and to find some redeeming value in his or her conduct, and eventually deem it political in order to deny extradition.[72] Another problem that generally affects all theories on the relative political offense deals with the technical or factual multiplicity of offenses arising out of the same criminal transaction perpetrated by the ideologically motivated offender.

Most penal systems in the world have adopted a policy of grading or dividing crimes designed to protect a given societal interest into various levels of accountability. The purposes of this policy vary, but in general they signify that the criminality of an actor, being dependent upon what he/she does and how he/she does it, must be graded in such a manner as to have the punishment fit the presupposed criminality of the actor. It is further believed that because punishment is a deterrent, the multiplicity of offenses that relate to the same social interest by virtue of such grading will induce the potential offender to do less harm whenever he/she engages in his/her intended criminal conduct. Whatever the reasons for a grading policy, one thing remains certain: too many technically different offenses cover or relate to the same social interest presumably sought to be protected.

In addition to these considerations, a given social harm by reason of its significance will invariably contain lesser or included offenses that, taken independently, are the subject of separate offenses, but in the context of what the offender actually did may be part of the same criminal design or transaction.

The ideologically motivated offender is likely to engage in conduct that will encompass several lesser-included offenses or bear upon other non-included but related offenses. These multiple offenses may either arise out of a single criminal act (for example, a bomb placed on a plane that kills ten persons and destroys the plane will produce at least eleven different crimes), or from the same criminal transaction (for example, an elaborate scheme involving several different crimes related by the single design or scheme of the actor). These related offenses technically may be considered "included offenses" whenever the elements of the higher-degree offense are predicated on some or all of the elements of the lesser-degree offense. In that case, the existence of the lesser-included offense would only be technical and not real. Other offenses deemed related but not included may be committed only by reason of the actor's design, or by the necessity of the scheme, such as when one crime is only a stepping stone or a means to reach the ultimate act sought to be committed. Lesser-included offenses are vertically related in that the elements of the lesser are included in the higher offense. Other related offenses are at best horizontally linked, but only when the actor's design relates them by reason of this scheme and not because of the interrelationship between the elements of the various offenses charged. This problem, more than any other, causes wide disparity in the application of the relative political offense in national laws and judicial decisions and, as a result, precludes a uniform international practice.[73] Invariably, however, three factors are taken into account: (1) the degree of the political involvement of the actor in the ideology or movement on behalf of which he/she acted, his/her personal commitment to and belief in the cause (on behalf of which he/she had acted), and his/her personal conviction that the means (the crime) was justified or necessitated by the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed in (1)), and the crime committed; and (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relation to the political objective to be served.[74] The first of these factors is wholly subjective, the second can be evaluated somewhat objectively, and the last is sui generis.

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72 M. Cherif Bassiouni, Criminal Law and Its Processes 62 (1969).

73 *See generally* Oppenheim, *supra* note 17, at 707; 6 Whiteman Digest, *supra* note 19, at 779–857.

74 These factors were also cited as a common denominator among the tests applied by three countries compared by the commentator. Cantrell, *supra* note 58, at 781.

A dominant factor that emerges in the practice of all states recognizing the relative political offenses as falling within the purview of the political offense exception is that the political element must predominate over the intention to commit the common crime. It must constitute the purpose for the commission of that crime.[75] The *Bressano* court found that the possible international impact of the relator's activities transformed them into matters of international law enforcement.[76] Thus, although it is not clear from the court's reasoning, it appeared to regard as common crimes acts committed in one state that may have international repercussions. In such a case, the court believed, the relator is no longer engaged in a political struggle with the requesting state, but is of concern to other states as well.

In *Arambasic v. Ashcroft*, which distinguished a purely political offense from a relative political offense, the federal district court concluded that the burden of proving the elements of the political offense exception rests on the relator, and thereafter the requesting state had to prove that the crimes charged were not of a political character. The court stated:

> A purely political offense involves conduct directed against the sovereign or its political subdivisions but does not have any of the elements of a common crime. Treason, sedition and espionage are examples of purely political offenses. A relative political offense involves a crime prompted by ideological motives. It involves a private wrong directed against person or property, but committed in furtherance of a political purpose. M. Bassiouni, International Extradition: United States Law and Practice, Ch. VIII, §§ 2.1.4–2.1.5. Petitioner contends that the crimes for which Croatia seeks extradition are relative political offenses subject to protection under Article VI of the Extradition Treaty.
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> Although the political offense exception is a standard clause in almost all extradition treaties of the world, the term "political offense" is seldom defined in the treaties or national legislation. Judicial interpretations, therefore, have been the principal source for the meaning and application. See generally, M. Bassiouni, International Extradition: United States Law and Practice, Ch. VIII, § 2.1.1 (4th Ed.2002).[77]

The court concluded that the existence of political strife or internal conflict "is not a license for the military or anyone else to do whatever they wish to the defenseless that have come under their power."[78] In the court's opinion, the Republic of Croatia, the requesting state, had shown that the crimes charged in the request constituted war crimes, and did not fall within the meaning of the political offense exception.[79]

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75 *See* Belgian Extradition Law of Oct. 1, 1833, Les Codes 698 (31st ed. 1965); *In re Fabijan*, 7 Ann. Dig. 360 (Sup. Ct. 1933) (Germany); *cf. Re Bressano*, 40 I.L.R. 219, 221 (CFed. 1965) (Arg.) (finding that common crime elements for the alleged offenses of bank robbery and assault predominated over the political element and accordingly granting extradition, despite the relator's assertions that the purpose of these acts was to prepare for guerrilla warfare and to change the system of government in Latin American countries).

76 *Bressano*, 40 I.L.R. 219.

77 Arambasic v. Ashcroft, 403 F. Supp. 2d 951, 956 (D.S.D. 2005) (*citing* International Extradition: United States Law and Practice (4th ed. 2002)). The court relied on *Quinn v. Robinson*, 783 F. 2d 776 (9th Cir. 1986) and discussed *Barapind v. Enomoto,* an *en banc* decision that reexamined the analysis and holding in *Quinn*. 400 F.3d 744 (9th Cir. 2005) (reversing *Quinn* in part). The Ninth Circuit however reaffirmed *Quinn*'s analysis of the political offense exception and overruled *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). But *Arambasic* is a case arising in the District of South Dakota, which is in the Eighth Circuit, where the Ninth Circuit's *Quinn* decision has not been adopted. Instead, the Eighth Circuit adopted the positions of the Seventh Circuit in *Ain v. Wilkes*, 671 F.2d 504 (7th Cir. 1981) and that of the Second Circuit in *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989).

78 *Arambasic*, 403 F. Supp. 2d at 963.

79 *Id.*

Several theories concerning the relative political offense have emerged from the jurisprudence of the different legal systems. Three major ones are: (1) the political-incidence theory, (2) the injured rights theory, and (3) the political-motivation theory. The European literature on the subject usually refers only to these theories as *délits complexes* and *délits connexes*, but they encompass the distinctions made herein. An analysis of certain landmark cases will illustrate the application of these three divisions.

2.1.5.1. The Political-Incidence Theory: The Anglo-American Approach

The political-incidence theory was developed in an early English case, *In re Castioni*,[80] in which Great Britain refused to extradite a person whose surrender had been requested by the Swiss government for murdering a member of the state council of a Swiss canton. The court held that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbance."[81]

The court in this case set up a threefold standard which must be met for a common crime to be regarded as a relative political offense: (1) there must be a political revolt or disturbance, (2) the act for which extradition is sought must be incidental to the disturbance or form a part of it, and (3) the ideological or political motivation must be established.[82] The court stated: "[t]he question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part."[83]

The *Castioni* ruling reflects the liberal English philosophy of the late-nineteenth century, and is a consequence of its political theories and theories of government. British and U.S. cases recognize *In re Castioni* as precedent.[84]

This view was confirmed in England, though somewhat liberalized, three years after *Castioni* in the case of *In re Meunier*,[85] where the court held a confessed anarchist extraditable. The court stated:

> [I]n order to constitute an offense of a political character, there must be two or more parties in the State each seeking to impose the government of their own choice on the other . . . . In the present case there are not, . . . for the party with whom the accused is identified [anarchists] . . . by his

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80 [1891] 1 Q.B. 149 (Eng.).

81 *Id*. at 156 (Hawkins J., quoting 2 J.F. Stephen, A History of the Criminal Law of England 71 London (1863)). Hawkins further stated:

> [T]here are many acts of political character done without reason . . . [I]n heated blood men often do things which are against or contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which *may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.*
>
> [1891] 1 Q.B. at 167 (emphasis added).

82 *See* M. Cherif Bassiouni, *International Extradition in the American Practice and World Public Order*, 36 Tenn. L. Rev. 1, 17 (1968).

83 [1891] 1 Q.B. at 159.

84 *See In re Extradition of* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963). The court stated: "[a]pplying, by analogy, the action of the English Court in [*Castioni*,] . . . the conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed force, are of political character." *Id*. at 999. *See* also 1 Charles C. Hyde, Digest of International Law § 316 at 573 (1922); *Nature of Political Offenses*, *supra* note 22, at 266.

85 [1894] 2 Q.B. 415 (Eng.). *See also* Re *Arton*, [1896] 1 Q.B. 108 (Eng.).

> own voluntary statement . . . is the enemy of all governments. Their efforts are directed primarily against the general body of citizens.[86]

Notwithstanding the validity of this position, it must be emphasized that the political offense exception as applied by British courts remains essentially a flexible one.[87] Judge Denman in *In re Castioni* stated: "I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly . . . every state of things which might bring a particular case within the description of an offense of a political character."[88] This opinion presaged the holding of the English court in *Ex parte Kolczynski*,[89] that mutiny by the crew of a small Polish fishing trawler was a political offense, notwithstanding that it was not incident to a political uprising. The *Kolczynski* case indicates that (1) there is no absolute requirement that there be a political uprising in order for the political offense exception to be applicable, but that the only indispensable ingredient is that the acts be politically motivated and directed toward political ends; and (2) the political offense exception can be legitimately applied with greater liberality where the requesting state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom. Indeed, these two factors are closely related, particularly because in an effectively repressive totalitarian regime, traditional political disturbances or uprisings may be unknown, despite deep and widespread hostility toward the regime.

In 1973, the UK House of Lords, in *Cheng v. Governor of Pentonville Prison*, held that for the exception to apply (in addition to the predominance of a political purpose) the act must also be directed against the opposed government.[90]

The United States, as discussed below, adheres mostly to *Castioni* without due regard to *Meunier*, *Kolcyznski*, and other cases that did away with the rigid requirement of an uprising, civil disturbance, or the like.

In a British decision, *Matter of Budlong and Kember*,[91] the United States sought the extradition of the relators for ten charges of burglary. The relators were charged with trespassing upon various offices of the U.S. Internal Revenue Service (IRS) and U.S. Department of Justice, and taking photocopies of confidential government documents relating to the affairs of the Church of Scientology, of which the relators were members. The court found that the Church of Scientology was engaged in a protracted struggle with the IRS to secure tax-exempt status as a religious organization. It also contested with the Food and Drug Administration the use of a piece of equipment in Scientology's religious practices. There was additional evidence of criminal activity by the Church and its members. The court held that the alleged burglaries

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86 *In re Meunier*, [1894] 2 Q.B. 415 (Eng.).

87 As one commentator noted, "[w]hile the *Castioni* test was affirmatively adopted by American courts, judges for the United States have applied the standard more mechanically, or inflexibly, than have their British counterparts." Note, *American Courts and Modern Terrorism: The Politics of Extradition,* 13 N.Y.U. J. Int'l L. & Pol. 617, 626 (1951) [hereinafter Note, *Politics of Extradition*].

88 [1891] 1 Q.B. 149, 155 (Eng.). *See* Bassiouni, *supra* note 36, at 255.

89 [1955] 1 All E.R. 31 (Eng.). *See also* Schtraks v. Government of Israel, [1962] 3 All E.R. 529 (Eng.). *See generally* Oppenheim, *supra* note 17, at 704–710.

90 [1973] 2 All E.R. 204. *See* also Regina v. Government of Singapore, Ex parte Fernandez, 51 I.L.R. 312 (H.L. 1971) (U.K.) (granting extradition on grounds that, inter alia, relator had failed to show the possibility that he would be detained or restricted on political grounds); *Keane v. Governor of Brixton Prison*, 51 I.L.R. 366 (H.L. 1971) (U.K.) (granting extradition despite relator's contention that he would be prosecuted for political offense, on grounds relator produced no evidence of such offense).

91 [1980] 1 All E.R. 701 (Eng.).

did not constitute political offenses within the meaning of the English Extradition Act. The English court stated:

> The Applicants did not order these burglaries to take place in order to challenge the political control or Government of the United States; they did so to further the interests of the Church of Scientology and its members . . . [I]t would be ridiculous to regard the Applicants as political refugees seeking asylum in this country . . . [92]

This approach has been followed by some Latin American courts, even though their interpretation is often more liberal because of Western European influence and indigenous traditions toward political struggles.[93] This position is illustrated in a case decided by the Supreme Court of Chile. Argentina had requested the extradition from Chile of Guillermo Patricio Kelly and others for murder, robbery, and other offenses allegedly committed by Kelly when, during a raid on local communist headquarters in Buenos Aires, in which typewriters and other equipment were taken from the office, he shot and killed the gatekeeper. The Supreme Court of Chile concluded that the exemption from extradition for political offenses applied only when the offense is a purely political offense or is an ordinary crime connected with a political offense. The court held that Kelly should be extradited on the murder and robbery charges, stating:

> These crimes did not occur during an attack [by Kelly] on the security of the state, such as to be considered connected to a separate political offense. They took place at a time of public tranquility during which the murder and theft were isolated acts. The ultimate objective may have been the political one of annihilating communists, but the principles of public international law which this decision accepts do not admit that an ordinary crime is converted into a political one solely because of its ultimate objective.[94]

The court further stated that:

> "Political offense" does not appear to be defined in our positive legislation, nor in the international conventions and treaties previously enumerated, but generally accepted principles are in agreement that a political offense is that which is directed against the political organization of the state or against the civil rights of its citizens and that the legally protected right which the offense damages is the constitutional normality of the country affected. Also included in the concept are acts which have as their end the alteration of the established political or social orders established in the state.
>
> A majority of the authorities consider, moreover, that in order to distinguish between ordinary and political crimes, it is necessary to take into account the goals and motives of the persons charged; that is to say, to consider the objective aspect of the offense as well as its subjective one. Political and social offenses obey motives of political and collective interest and are characterized by the sense of altruism or patriotism which animates them, while ordinary criminal offenses are motivated by egoistic sentiments, more or less excusable (emotion, love, honor), or to be reproached (vengeance, hate, financial gain).
>
> In this area [of non-extraditable offenses] there are to be identified, *purely political* offenses, which are directed against the form and political organization of the state; *improper political offenses,* which embitter social or economic tranquility; *mixed* or *complex political offenses,* which damage at the same time public order and ordinary criminal law, such as the assassination of the head of state for political reasons; and *connected political offenses,* which are common crimes

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92 *Id.* at 714. *See generally* 1 V.E. Hartley Booth, British Extradition Law and Procedure (1980); Valerie Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61 (1979).

93 Garcia-Mora, *supra* note 22, at 378.

94 *In re Extradition of Hector Jose Campora and Others*, *reprinted in* 53 Am. J. Int'l L. 671, 693, 694–695 (1959).

> committed in the course of attempts against the security of the state or related to political offenses, it being necessary to examine intent to determine whether the ordinary crime is one connected, or not, to a political one.[95]

The extension of the political-incidence test may often come from the executive rather than the judiciary.[96] This was revealed in the *Rudewitz* case in 1908 when a Russian revolutionary and member of the Social Democratic Labor Party, was sought by the Czarist government from the United States for the common crimes of murder, arson, burglary, robbery, and larceny. The U.S. secretary of state, subsequent to the decision of the extradition magistrate to grant the request, concluded that the offenses charged were political in nature and exercised his discretionary power in refusing to issue the surrender warrant.[97]

Another example of judicial–executive correlation in U.S. extradition practice was the case of *Chandler v. United States*.[98] In that case an American citizen was charged with treason for broadcasting hostile propaganda to the United States from Germany during WWII, thereby giving aid and comfort to enemies of the United States. Chandler claimed that his arrest, which occurred after the war while he was in Germany, violated his rights of asylum conferred by international law. The U.S. Supreme Court held that in the absence of a treaty a state does not violate any principle of international law by declining to surrender a fugitive offender, but that the right is that of the state (Germany) to offer asylum, not that of the fugitive to claim. It also held that because treason is a violation of allegiance, such conduct may be deemed an offense against the United States, even though the acts were committed outside its territorial jurisdiction. The court also found that the acts were political crimes for which extradition is not usually granted, and that, had Germany extended asylum to the offender and requested his return from the United States to Germany, it is quite possible that, in keeping with U.S. custom and practice, Chandler would have been returned to Germany. Although Chandler was in U.S. custody, the court held that international law principles were not violated by his arrest in Germany and his return to the United States. Germany did not object, and therefore there was no claim of violation of German sovereignty with respect to his forcible return to the United States. There was consequently no opportunity to see how executive discretion might have been exercised in this instance.[99]

The position of the United States as a requesting state has usually been consistent with that of U.S. courts. In a memorandum submitted to the French courts in support of an extradition request of two U.S. nationals accused of hijacking, the Department of State stated:

> Common crimes do not constitute offenses of a political character unless they form part of a civil war or similar political disturbance. Political motive alone does not give rise to a political

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95 *Id.* at 693–694.

96 *Compare In re Fabijan*, 7 Ann. Dig. 360 (Sup. Ct. 1933) (Germany):

> [N]either the actual attack on the policeman engaged in the lawful discharge of his duties, nor the "demonstration" of the accused and his three companions against the Carabinieri barracks, constitute a "political crime" in the strict sense of the term. Both parts of the whole act were directed, not against the central political authority, but only against individual organs of the State . . . . There is no proof of a principal political crime with which the acts of the prisoner could possibly be connected. Moreover, he himself has not sought to allege the existence of any such crime, but has merely contended that he had a "political motive." However, as has been explained already, proof of political motive does not make an act a "connected" act when there is no "concrete" political act.

Id. at 367. *See also* the case of *Rudewitz*, discussed in Green Haywood Hackworth, Digest of International Law § 316 at 49–50 (1944) [hereinafter Hackworth Digest].

97 Letter from Elihu Root, Secretary of State, to Rosen, Russian Ambassador (1908) (on file in Dep't of State, File No. 16649/9, *reprinted in* Hackworth Digest, *supra* note 96 at 49–50). *See also* Ch. XI.

98 Chandler v. United States, 171 F.2d 921 (1st Cir. 1949), *cert. denied,* 336 U.S. 918 (1949).

99 *See* Ch. IX.

> offense. In the case of violent crimes particularly, the offense must have a direct relationship to a well-defined political end and must not be out of proportion with it.[100]

These cases, however, serve to demonstrate that the political offense exception is also within the scope of executive discretion. In this context executive discretion can be used to deny extradition even if the judiciary finds the relator extraditable. The role of the judiciary in U.S. practice is conclusive in finding that the exception applies, but is not definitive in its findings that the exception is inapplicable, because executive discretion can override such findings.

The position of the U.S. judiciary with respect to the political offense exception was first enunciated in *In re Ezeta*.[101] In that case, the government of El Salvador sought the extradition of General Ezeta and four companions on charges of murder and robbery that allegedly occurred while the relators unsuccessfully fought to suppress a revolution. Extradition was denied on the grounds that the offenses were political in character. Citing *Castioni*, the court adopted the principle that offenses committed in the course of a civil war, insurrection, or political commotion constituted political crimes.[102]

A few years later, and under comparable circumstances, the U.S. Supreme Court adopted the political incidence test as defined in *Ezeta.* In *Ornelas v. Ruiz*,[103] the Mexican government requested the extradition of Ruiz and two others for the crimes of murder, arson, robbery, and kidnapping allegedly committed during an attack on a Mexican village, after which the relators fled back to the United States. The Supreme Court held that these offenses were not political and reasoned that the relators, who styled themselves as revolutionaries, were not engaged in a political struggle with Mexican government forces at the time that the alleged crimes occurred.[104] The Court's formulation of the relative political offense within the context of the political incidence test clearly implied that the acts of the relators were not predominately attributable to political motives.

In *Ramos v. Diaz*,[105] Cuba sought the extradition of the relator for murder of a prisoner whom he was responsible for guarding following the overthrow of the Batista government. The relator allegedly shot the prisoner while he attempted to escape. The relator was convicted of murder and was serving a prison term when he escaped to the United States. The court found that the alleged offenses were political and thus non-extraditable under the then-applicable United States–Cuba extradition treaty. The court reasoned that the relator was a member of a revolutionary movement to which the crime was incidental, because the act happened during the first days of the Castro regime.[106] It is apparent from this case that with the application of the United States' political incidence test, only an attenuated connection need be shown between the common crime and the political act. There was little reason to believe that the murder in *Ramos* was in any sense closely linked to an offense against the state.

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100 Extradition: Hijacking, 1975 Digest § 5 at 169. The opportunity to exercise executive discretion was blocked by the Seventh Circuit Court of Appeals in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981), when the court rejected the first attempt by the U.S. government to argue that the determination of political offenses should properly be vested in the executive branch rather than the judiciary. In rejecting the government's contentions, the court stated that although these arguments may be meritorious, this issue is for Congress to decide, not the courts. *Id.* at 517.

101 *In re Ezeta*, 62 F. 972 (C.C.N.D. Cal. 1894). *See also In re Extradition of* Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988).

102 *Id.* at 997. It has been argued that this case illustrates that the connection between the common crime and the political disturbance need only be attenuated. *The Nature of Political Offenses*, *supra* note 22, at 1241.

103 Ornelas v. Ruiz, 161 U.S. 502 (1896).

104 *Id.* at 511–512.

105 Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959).

106 *Id.* at 462–463. One commentator has suggested that the political offense exception was invoked to prevent the surrender of fugitives to a politically hostile government. Epps, *supra* note 92, at 72–73.

Consistent with this policy and with the precedents discussed above, U.S. courts decided the *Artukovic* cases.[107] In the appellate court decision concerning the applicability of the political offense exception, *Karadzole v. Artukovic*,[108] the court of appeals affirmed a district court ruling that the crimes charged against the petitioner (murder and participation in murder occurring while he served as minister of the interior of Yugoslavia), were of a political character within the meaning of the treaty, and that Artukovic could not be extradited. The Yugoslav government charged that more than 30,000 unidentified persons and over 1,200 identified persons were killed on orders of the accused in 1941 and 1942. The appellate court found that the district court properly took judicial notice of the fact that various factions representing different theories of government were struggling for power during this period. In reviewing the appellate court's decision in *Karadzole v. Artukovic*,[109] the U.S. Supreme Court held, with Justices Black and Douglas dissenting, that the judgment of the court of appeals should be vacated and remanded for hearings on the matter of the political offense. However, prior to this ruling, the Department of State, representing the executive branch of government, expressed its views to the court on the extradition issue that murder, even though committed solely or predominantly with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, is nonetheless murder within the meaning of the extradition treaty involved, and is not thereby rendered an offense of a "political character within…the treaty…. It does not appear on the face of the pleadings that all of the offenses…were necessarily connected with such struggle for power."[110]

In *United States v. Artukovic*,[111] the U.S. commissioner found that there was insufficient evidence upon which to believe the accused was guilty of the alleged offenses and in part that "the evidence presented, as well as historical facts of which I take judicial notice, proves…as a fact that the crimes charged in all counts of the amended complaint are political in character." Accordingly, the court denied extradition.[112] That disposition of the case reflected the U.S. commissioner's acceptance of the *Castioni* standards in finding that a political offense existed in fact and, therefore, that the relator was not extraditable. However, because U.S. practice does not favor the exercise of executive discretion to grant the request after its denial by the judiciary, a conflict was averted that could have arisen between the two branches had the executive overridden the court's findings as indicated by the Department of State's views.[113] It must be noted that this case also included a charge that the relator committed international crimes, which should have precluded the court's findings that the offenses were political in

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107 Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952) (holding that no extradition treaty existed between the United States and Yugoslavia), *rev'd sub nom.,* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954) (holding that a valid extradition treaty existed), *on remand sub nom.,* Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956) (holding that political offense exception precluded extradition), *aff'd sub nom.*, Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *rev'd,* 355 U.S. 393 (1958) (holding that full hearing on political offense required), *on remand sub nom.*, United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959) (insufficient evidence to find guilt, but offenses would be considered political), *rev'd* Lopez-Smith v. Hood, 121 F.3d 383 (S.D. Cal. 1959) (ruling that mental competence is not relevant or necessary in extradition proceedings). Artukovic was finally extradited in 1986. *In re Extradition of* Artukovic, 628 F. Supp. 1370 (C.D. Cal.), *aff'd*, 784 F.2d 1354 (9th Cir. 1986). He was executed in the former Republic of Yugoslavia. *See also* Bozilov v. Seifert, 967 F.2d 353 (9th Cir. 1992), *amended by* 983 F.2d. 140 (9th Cir. 1993).

108 Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *rev'd*, 355 U.S. 393 (1958).

109 Karadzole v. Artukovic, 355 U.S. 393 (1958).

110 Letter from the Legal Advisor of the Department of State to the Acting Assistant Attorney General McLean, *cited in* 6 Whiteman Digest § 15, *supra* note 19, at 823–824 (submitted by the Solicitor General, Jan. 1958, in No. 462, in the Supreme Court of the United States (Oct. Term, 1957), Karadzole v. Artukovic, on petition for *writ of certiorari*).

111 United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

112 *Id.* at 392–393.

113 *See* Letter from the Legal Advisor of the Department of State to the Acting Assistant Attorney General McLean, *supra* note 110.

character, but in fact did not. But twenty-two years later, the United States changed its position and extradited Artukovic to Yugoslavia.[114]

In a 2009 case involving political unrest in the Former Yugoslavia, the Eleventh Circuit affirmed the long-standing political-incidence theory. In *Pajkanovic v. United States*, the relator claimed that his offense of aggravated robbery fell within the political offense exception.[115] The court cited to *Escobedo v. United States* for the definition of "political offense" in the context of extradition treaties as "an offense committed in the course of and incidental to a violent political disturbance such as war, revolution and rebellion. An offense is not of a political character simply because it was politically motivated."[116] Because the relator was unable to connect his charged offense to a violent political disturbance or show that it was political in nature, the court affirmed the magistrate's denial of the relator's habeas petition.[117]

In another case, the U.S. Supreme Court left undisturbed findings of the extradition magistrate but affirmed the position that relative political offenses are non-extraditable, and that the best test is one of "political incidence."[118] In that case, Italy requested the extradition from the United States of Vincenzo Gallina, who had been convicted in absentia of robbery in the *court of Assizes* of Caltenisetta on May 30, 1949. After being found extraditable at the extradition hearing, Gallina applied for a writ of habeas corpus contending, inter alia, that the offense was not extraditable under the Extradition Convention of 1868 between the United States and Italy,[119] in particular article III, which provides that "the provisions of this treaty shall not apply to any crime or offense of a political character." The district court rejected Gallina's contention, and the court of appeals affirmed, stating:

> Relator contends that the hearing before the Commissioner established beyond doubt that the offenses for which extradition is sought were of a political character and, under Article III of the Convention of 1868, nonextraditable. Counsel for relator has briefed the point extensively. According to relator, the acts to which he admitted might be ordinary crimes in an atmosphere free of any political ramifications, but because of the motivation for their commission, they must necessarily be deemed of a "political character." While the court is in general agreement with the relator's exposition of the principles of law governing the nonextraditability of political offenders who have found asylum in this country, nevertheless it is the opinion of the court that the Commissioner's decision that the specific acts ascribed to relator in the complaint of the Republic of Italy were not of a political character, whatever his other acts during the period in question might have been, is supported by the evidence in the record…

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114 Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986).

115 Pajkanovic v. United States, 353 Fed. Appx. 183 (11th Cir. 2009) (unpublished opinion).

116 *Id.* at 185.

117 *Id.* at 185–186. Another court similarly denied a political offense claim where a relator was charged with killing another Bosnian for hiding salt from him and another individual while they were fleeing from Serbian forces that had taken control of Srebrenica, because the relator could not show that the killing was "incidental to" the political disturbance. United States v. Avdic, 2007 U.S. Dist. Lexis 47096, at *28–*29 (D.S.D. 2007) (*citing* International Extradition: United States Law and Practice (4th ed. 2002)). In a case involving an extradition request from Albania, the relator was unable to establish that his shooting resulted from any political activity, uprising, or turmoil, so that the political offense exception was not applicable to his situation. *In re Extradition of* Harusha, 2008 U.S. Dist. Lexis 28812, at *2–*31 (E.D. Mich. 2008).

118 Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied,* 364 U.S. 851 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y, Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, (9th Cir. 1990).

119 Extradition Treaty, Mar. 23, 1868, U.S.–Italy, T.S. No. 174, *as amended by* 16 Stat. 767 (1869), 24 Stat. 1001 (1884), 61 Stat. 3687 (1946).

> The claim that what appeared to be common, ordinary crimes were so admixed with political motives and aims as to be of a political character within the meaning of the Convention of 1868 was based solely on testimony of the relator himself. This testimony, to the effect that relator worked for Torrese and that Torrese took orders from Giuliano, all to advance the political aims of a Sicilian separatist movement, was contradicted by statements taken from relator's admitted accomplices after their arrest in Italy, which tended to indicate that private gain was the sole motivating factor in these robberies. There was also testimony from a Mr. Russo, a witness offered as an expert by the Republic of Italy, who had spent considerable time in Sicily during the years when a Sicilian separatist organization was active, as a member of the Office of Strategic Services, a branch of our wartime forces. Russo testified at length and unqualifiedly, both on direct and on cross-examination, that Guiliano was a bandit who had no legitimate connection with the actual separatist movement, and that Guiliano described his activities as "political" to cloak their true purpose, i.e., private gain for himself and his followers. With the evidence before the Commissioner in such posture, this court cannot say that the Commissioner's decision was not supported by competent, legal evidence. The evidence was conflicting, it is true, but it did not preponderate so heavily in the relator's favor as to require a decision that his offenses were political as a matter of law.[120]

What appears to be a contrary view in a situation equally complex and laden with political implications is the *Jimenez* case.[121] In that matter a former president of the Republic of Venezuela was sought from the United States for financial crimes and murder. The district court found the murder charge to be non-extraditable on grounds of the political offense exception, but that the financial crimes were not within the exception and granted extradition. Thus the precedent was established that where multiple charges exist, some of which fall outside of the political offense exception, extradition shall be granted unless all charges are related or connected to the political motive, and are incidental thereto. Where there is no such connection and the charges are severable, extradition can be granted on the assumption that the rule of specialty[122] shall preclude the prosecution of the relator for those charges. In view of the fact that the ideologically motivated offender is a more sought-after person than any other person alleged to have committed a common crime because he/she has struck at the very foundation of the requesting state's existence or order, it is naive to believe that the doctrine of specialty can operate as a protective shield to the relator.

One year after the decision in *Jimenez*, a U.S. court was faced with a request from the Dominican Republic for extradition of a relator accused of torturing and killing two prisoners while acting in a military or quasi-military capacity under a former regime. The U.S. district court in *In re Extradition of Gonzalez*,[123] citing *Castioni* as precedent, found the charges to be non-political, and the relator was extradited. The court ruled that in order for a crime to constitute a political offense, "there must be an 'uprising' and . . . the acts in question must be incidental to it." The doctrinal significance of this case is that the U.S. court continued to hold firmly to the political incidence test of *Castioni*, despite its reference in dicta to the more recent liberal British decisions. The *Gonzalez* court stated:

> The issue is whether the acts of the relator should be deemed politically motivated because directed towards political ends; . . . nothing in the record suggests that the second factor is applicable [the second factor allows for greater liberality in applying the political offense exception where the demanding state is a totalitarian regime seeking the extradition of one who has opposed

120 *Gallina*, 177 F. Supp. at 867–868. *See also Ernst*, 1998 WL 395267; *Sandhu*, 1996 WL 469290; *Fernandez-Morris*, 99 F. Supp. 2d 1358; *Mainero*, 164 F.3d 1199.

121 *See* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

122 *See* Ch. VII, Sec. 8.

123 *In re Extradition of Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963).

> that regime in the cause of freedom] as this does not appear to be a case in which the acts in question were blows struck in the cause of freedom against a repressive totalitarian regime.[124]

Another case, consistent with prior political offense decisions that apply the political incidence test enunciated in *Castioni*, is *Garcia-Guillern v. United States*,[125] in which the government of Peru sought the extradition of the relator on the charge of embezzlement by a public officer. Responding to the relator's claim that the alleged offense was political in character, the court stated: "A political offense . . . must involve an 'uprising' or some other violent political disturbance. Moreover, the act in question must have been incidental to the occurrence . . . "[126] The court found that no evidence had been presented to warrant a finding of a political offense, and, therefore, found the relator to be extraditable.[127]

In *Barapind v. Enomoto*, the relator argued that if some of the charges for which he was sought were not extraditable because of the political offense exception, then he could not be extradited for other crimes for which the political offense exception would not apply.[128] The Ninth Circuit rejected this proposition, in reliance on *Quinn v. Robinson*.[129] However, it should be noted that although this is a valid proposition, it does not exclude inquiry into whether or not the requesting state is seeking extradition for what otherwise appears as valid criminal charges but with the intent to use them for a political motivation. For example, if as in *Barapind* and

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124 *Id.* at 723 n.9. The court in *Gonzalez* noted the liberal language of *Kolczynski* but nonetheless chose to follow *Castioni* as precedent. Despite the dictum in *Gonzalez* acknowledging the progressive English position, extradition decisions subsequent to that case strictly adhered to the political incidence test enunciated in *Castioni*. *See* Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971) (holding that "a political offense . . . must involve an 'uprising' or some other violent political disturbance."), *cert. denied,* 405 U.S. 989 (1972); Ornelas v. Ruiz, 161 U.S. 502, 511–512 (1896).

125 *Garcia-Guillern*, 450 F.2d 1189; *cf.* Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989). Although this case raises issues pertaining to the relative political offense exception as relating to an internal armed conflict, it does not depart from existing positions expressed in *Eain v. Wilkes,* 641 F.2d 504 (7th Cir. 1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), *cert denied*, 479 U.S. 882 (1986). It does, however, involve questions of terror violence in the conduct of such an internal conflict and in that respect it follows the line of cases raising the same issues such as *In re Mackin*, 668 F.2d 122 (2d Cir. 1981). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. Sep. 4, 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990). *See also In re* McMullen, Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979); *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); *infra* notes 122, 124. It also raises issues with respect to international criminal conduct, and in that respect the decision also follows the *Demjanjuk* case, *infra* note 266 and accompanying text. In this context it particularly discusses the international regulation of armed conflicts and the Geneva Convention of 1949, *infra* note 228, and two additional protocols of 1977. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), June 8, 1977, 16 I.L.M. 1391, 1413; Protocol Additional to the Geneva Convention of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(2)(d), 16 I.L.M. 1442, 1444 (1977). The case however also emphasizes that the State Department retains a key role in the determination of whether the political offense exception applies.

126 *Garcia-Guillern,* 450 F.2d 1189 at 1192.

127 For a case affirming a magistrate's findings that charges associated to a relator's forgery of signatures and fingerprints of actual voters to register a political party and take part in a presidential election constituted a crime, *see Medelius-Rodriguez v. United States*, 2007 U.S. App. Lexis 24137 (4th Cir. 2007).

128 Barapind v. Enomoto, 400 F.3d 744, 749 (9th Cir. 2005). *See In re Extradition of* Solis, 402 F. Supp. 2d 1128 (C.D. Cal. 2005); *In re* Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001). *See also* David M. Rogers, *International Law—Extradition and the Political Offense Exception—In Re Extradition of Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001),* 26 Suffolk Transnat'l L. Rev. 479 (Summer 2003).

129 Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

Quinn, a relator was found to have committed a number of crimes related to a political purpose for which the political offense exception was recognized as applicable, he/she may nonetheless have committed another crime that may not be connected with the former in terms of the facts but that is related to the overall political activity of the relator. Thus, for example, if as in the case of someone who in the course of an uprising commits a crime for which the political offense exception applies and then, while trying to flee the country, steals a car or food and these acts are directly related to the political uprising, then it should be accepted that the political offense exception does extend to these types of crimes.[130]

In *Matter of Sindona*,[131] the extradition of a relator was sought by the Italian government from the United States for the alleged crime of "fraudulent bankruptcy," as provided in the extradition treaty between the United States and Italy. In *Sindona*, the relator sought to raise the political offense exception on the grounds that the alleged offense was "an outgrowth of political events," in that his misappropriation of bank funds was in response to certain governmental decisions influenced by left-wing politicians in the Italian government. Relying upon the political incidence test as formulated in *In re Castioni*, the *Sindona* court concluded that Sindona's theory did not meet this test, and stated that "there is no persuasive authority under the law of any country which supports Sindona's position that misappropriation of bank funds becomes a political offense, where it is allegedly carried out in response to actions of government regulations."[132] The court thus implied that the actions by the Italian government did not constitute a political disturbance to which the relator's offense was incidental. On appeal, the U.S. Court of Appeals for the Second Circuit also rejected the relator's claim, and found that his actions were of a nonpolitical character due to the absence of a severe political disturbance such as war, revolution, or rebellion in Italy at the time the crimes were committed.[133]

In *Koskotas v. Roche*,[134] the First Circuit held that the political offense exception did not apply to financial crimes, although the crimes allegedly caused violent political uprising. The petitioner alleged neither an intention to promote violent political change nor an intention to repress violent political opposition and ascribed no political motive for criminal conduct with which he was charged. The court embraced the traditional view that criminal financial conduct is not an acceptable means of political expression:

> The "political offense" exception historically has embraced only offenses aimed either at accomplishing political change by violent means or at repressing violent political opposition. [In re *Castioni*, *supra* note 72]. The exception is "applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective." *Quinn*, 783 F.2d at 897; *see also Escobedo*, 623 F.2d at 1104 (kidnapping of Cuban consul for alleged purpose of

130 *Barapind*, 400 F.3d 744.

131 *In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *cf. In re Extradition of Montiel Garcia*, 802 F. Supp. 773, 777 (E.D.N.Y. 1992).

132 *Sindona*, 450 F. Supp. at 692. *See also* Koskotas v. Roche, 740 F. Supp. 904 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991); *cf. In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960) (holding that the relator's alleged offenses constituted political crimes and hence were non-extraditable).

As these two cases show, the flexibility with which courts apply the political offense exception adds to its lack of clarity. *See also In re Extradition of* Montiel Garcia, 802 F. Supp. 773 (E.D.N.Y. 1992).

133 Sindona v. Grant, 619 F.2d 167, 173 (2d Cir. 1980). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); *Elcock v. United States*, 80 F. Supp. 2d 70 (E.D.N.Y. 2000) (*citing* International Extradition: United States Law and Practice (3d ed. 1996)); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *cf.* Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989). The relator-defendant was extradited to Italy and was later found dead in her cell, presumably killed by the Mafia. *See also* Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997).

134 Koskotas v. Roche, 931 F.2d. 169 (1st Cir. 1991).

ransoming political prisoners in Cuba, not "political offense" because not "committed in the course of and incidental to a violent political disturbance").

Criminal conduct in the nature of financial fraud, even involving political corruption, traditionally has been considered outside the "political offense" exception. *See*, *e.g., Sindona*, 619 F.2d at 173 (fraudulent bankruptcy, even if "it resulted from political maneuvering and is pursued for political reasons," not an offense of a political character); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir.), *cert. denied,* 429 U.S. 833, 97 S. Ct. 97, 50 L.Ed.2d 98 (1976) (embezzlement by public official, "not in any sense a political offense"); *Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S. Ct. 1251, 31 L.Ed.2d 455 (1972) (financial crimes by Peruvian public official, not political offenses); *Jimenez v. Aristeguieta*, 311 F.2d 547, 560 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, 83 S. Ct. 1302, 10 L.Ed.2d 415 (1963) (financial crimes by former chief executive of Venezuela, not political offenses). *Id.*

The most controversial cases that U.S. courts were confronted with in the 1970s and '80s involved Irish Republican Army (IRA)-related acts of violence. Three different circuits addressed these four cases though some of them involved multiple district court and circuit court proceedings. They are *In re McMullen*,[135] *In re Mackin*,[136] *In re Doherty*,[137] and *Quinn v. Robinson*.[138]

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135 *In re McMullen*, Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979). Since the denial of the United Kingdom's extradition request, the Immigration and Naturalization Service sought McMullen's deportation. McMullen v. INS, 788 F.2d 591 (9th Cir. 1986) (denying review of finding of ineligibility for asylum), *overruled in part by* Barapind v. Enomoto, 400 F.3d. 744 (9th Cir. 2005) (relying on the incidental prong of Quinn v. Robinson). On the date of McMullen's deportation in 1986, a supplementary treaty between the United States and United Kingdom entered into force. 769 F. Supp. 1278 (1991) (*citing* International Extradition: United States Law and Practice at 1287 n.10; International Extradition: United States Law and Practice (1983) at 1293), *aff'd,* 953 F.2d 761 (2d Cir. 1992)). On this same day, a second extradition request was filed. The supplemental treaty would have made McMullen extraditable based on its narrowly defined political offense exception. *Id.* at 1282–1283. The district court granted habeas corpus, holding that the supplementary treaty, as applied retroactively to a particular alleged fugitive, was an unlawful bill of attainder. *Id.* at 1279. *See* also Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000). On rehearing, the appellate court held that the district court erred in classifying the Supplementary Treaty as a prohibited bill of attainder and remanded the case to the district court for resolution of the due process issues that remain unresolved. *In re Extradition of* McMullen, 989 F.2d 603, 604 (2d Cir. 1993).

136 *In re Mackin*, No. 86 Cr. Misc. 1, at 47, 1988 U.S. Dist LEXIS 7201, at *1 (S.D.N.Y. Aug. 12, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981).

137 In a similar case, the extradition of Doherty, a PIRA member, to the United Kingdom was denied under the political offense exception. *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). The U.S. government, on behalf of the United Kingdom, then sought a declaratory judgment as a collateral attack on the denial of extradition, which both the district court and the Second Circuit found to be procedurally improper and denied. United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986). An order for Doherty's deportation was obtained and affirmed on appeal. Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986). Doherty sought review of the orders of the Attorney General denying his motion to reopen deportation proceedings for the purpose of applying for asylum or withholding of deportation. The court of appeals reversed the Attorney General's order denying the motion to reopen, and remanded. Doherty v. INS, 908 F.2d. 1108 (2d Cir. 1990), *cert. granted,* 498 U.S. 1081 (1991), *rev'd,* INS v. Doherty, 502 U.S. 314 (1992). The Supreme Court held that the Attorney General did not abuse his discretion in denying the motion to reopen deportation proceeding. *Id.*

138 Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. 1997); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990).

In *In re McMullen*,[139] the United Kingdom requested the extradition of a member of the Provisional Irish Republican Army (PIRA) for an alleged bombing attack against Claro Barracks, a British Army installation, and the magistrate allowed for the exception. In finding that the political offense exception applied, the magistrate held that the accused was a person engaged in acts of political violence with a political end on the simple grounds that he was a member of the PIRA. As to the requirement of an uprising, the court adopted a somewhat liberal view:

> A political disturbance, with terrorist activity spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain to further its cause of nationalism of Ulster on the day Claro Barracks were bombed.[140]

Thus, the court found that the act fell within the exception because it occurred in the larger context of an ongoing political strife and upheaval between the PIRA and the British government over the nationalism of Northern Ireland. The court found that the common crime need not occur as an immediate and direct incidence of the political disturbance in order to constitute a political offense. The court also found a rational nexus between the political objective and the act of violence, and that the killing of an innocent civilian was unintended and incidental to the permissible target, which was a military barracks. A similar conclusion was reached in *In re Mackin*,[141] concerning another alleged PIRA member who shot a British soldier in civilian clothes. In *Mackin*[142] the Second Circuit in 1981 held:

> The Government's argument that the Magistrate had no jurisdiction to decide the political offense question begins with the language of the Treaty. Article V(1)(c)(i) speaks of an offense which "is regarded by the requested Party as one of a political character." As a matter of the ordinary meaning of language, "the requested Party" would seem in this case to be the Government of the United States, represented, as is uniformly true in matters of foreign relations, by the President, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20, 57 S. Ct. 216, 220–21, 81 L.Ed. 255 (1936); L. Henkin, Foreign Affairs and the Constitution 45–50, 93 (1972), and not by a judicial officer. The Government asserts that this construction is reinforced by other provisions of the Treaty, notably Articles XIV(1) and XI(1), where it claims the term "requested Party" must mean the Government of the United States and not the courts.
>
> (*Note 17*) Article XI(1) of the treaty provides that "[t]he requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition." This provision hardly establishes that "requested Party" can refer only to the Government (i.e., the State Department), as the Government's brief asserts, p. 28. The term "requested Party" is most naturally interpreted as a reference to the government of the United States or Great Britain, as the case may be, without any intent to refer to a particular branch of those governments. The separate reference to "the diplomatic channel" would be unnecessary if "requested Party" did in fact mean the State Department.
>
> Article XIV(1) of the treaty provides "[t]he requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition." It does this provision no violence to read it as fixing the international legal obligations of the United States and Great Britain without speaking to the manner in which each nation goes about meeting these obligations as a domestic matter.
>
> Against this Mackin argues that the Government's equation of "the requested Party" with the executive branch does not fit Article V(2) which provides that extradition may be refused

139 *In re McMullen*, Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979). *See also supra* note 135.

140 *McMullen*, Magis. No. 3-78-1099 MG at 5.

141 *In re Mackin*, No. 86 Cr. Misc. 1, at 47, 1988 U.S. Dist LEXIS 7201, at *1 (S.D.N.Y. Aug. 12, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981). *See also supra* note 136.

142 *In re Mackin*, 668 F.2d at 122. Notes 17–20 of the opinion are included below.

> on any ground specified by "the law of the requested Party." This same argument applies to the numerous references in the treaty to "the territory of the requested Party," e.g., Arts. VI, VII, VIII, and IX. Likewise, Article VII(5)(a) speaks of certification of arrest warrants by "a judge, magistrate or other competent authority of the requesting Party," a usage inconsistent with the notion that "requested Party" refers specifically to the executive branch.

It tells us further that the phrase "regarded by the requested Party as one of a political nature" represents a change from the language of older treaties and argues that by calling for the subjective opinion of the requested Party, the Treaty thus refers to the Secretary of State.

The Government's argument ignores the fact that the "new" language or an equivalent has been used in United States treaties at least since the turn of the century. The Extradition Treaty with Peru, 31 Stat. 1921 (1900), at issue in *Garcia-Guillern v. United States, supra*, 450 F.2d 1189, contained a provision stating "[i]f any question shall arise as to whether a case comes within . . . [the political offense exception] the decision of the authorities of the government on which the demand for surrender is made . . . shall be final." Identical language was contained in a 1901 treaty with Serbia, 32 Stat. 1890, Art. VI. If anything, reference to the "authorities" of the United States Government is more suggestive of the executive branch than is the broader phrase, "requested Party," at issue in this case, thus undercutting the Government's theory that the "requested Party" language was intended to change existing law. Moreover, the phrase "requested Party" was used in the 1963 Extradition Treaty with Israel, 14 U.S.T. 1707, Art. VI(4), as to which the Seventh Circuit has rejected an argument by the Government similar to that here considered, see *Eain v. Wilkes, supra*, 641 F.2d at 517. See also Extradition Treaty with Brazil, 15 U.S.T. 2093 (1961).

The Government's textual argument also ignores the existence of numerous treaties whose language explicitly envisions that courts will decide the political offense question. For example, a 1932 extradition treaty with Greece provides that "[t]he State applied to, or courts of such State, shall decide whether the crime or offense is of a political character," 47 Stat. 2185. See also Treaty Concerning the Mutual Extradition of Criminals with Czechoslovakia, 44 Stat. 2367 (1925); Treaty of Extradition with Albania, 49 Stat. 3313 (1935); Treaty for the Extradition of Fugitives from Justice with Austria, 46 Stat. 2779 (1930). The Government has suggested no reason, and we are unable to envision any, why courts should determine political offense questions under some treaties, but not under others. If the State Department had wanted to change the rule reflected in the above treaties and in the cases cited *infra*, it would hardly have done so on a piece meal basis in treaties with individual foreign states and without disclosing its intention to the Senate.

> (*Note 18)* As far as we are aware, following Justice Nelson's opinion in *Ex parte Kaine*, supra, the argument that the "requested party" language made the political offense decision solely for the executive branch was not made again until 1980 in *Abu Eain*, *supra*.

Rather it would have adopted the more open and decisive approach of seeking legislation, as it is currently attempting to do, see p. 137, *infra*. It seems much more likely that the language was intended to preclude a foreign state from arguing that the United States was bound by a definition of political offense derived from international law or the law of the requesting state.

The Government seeks to buttress its textual argument with arguments of policy and analogy. It calls attention to decisions that determination whether a case falls within the exception provided by Article V(i)(c)(ii), to wit, that "the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for on offense of a political character" lies solely with the executive branch. See In re Lincoln, 228 F. 70, 73–74 (E.D.N.Y 1915), *aff'd per curiam,* 241 U.S. 651, 36 S. Ct. 721, 60 L.Ed. 1222 (1916); *Garcia-Guillern v. United States, supra,* 450 F.2d 1189 at 1192; *In re Gonzalez,* 217 F. Supp. 717, 722 (S.D.N.Y. 1963). Recognizing the latter principle, the Seventh Circuit in *Abu Eain, supra,* 641 F.2d at 516–17, perceived no inconsistency between confiding to the courts a decision with respect to past facts and refusing to allow them to probe the motives of a requesting government—a conclusion with which we agree. The Government

notes that a judicial decision on the political offense exception may cause difficulties in this country's foreign relations; such difficulties would exist also, indeed might be heightened, if the decision were placed solely in the executive branch, unless the political offense exception were to be eviscerated in practice in the case of extradition treaties with nations with which we are allied or whose favor we especially desire. See also I.A. Shearer, Extradition in International Law 197-98 (1971). The Government relies on cases such as *The Three Friends*, 166 U.S. 1, 17 S. Ct. 495, 41 L.Ed. 897 (1897), and *Underhill v. Hernandez*, 168 U.S. 250, 18 S. Ct. 83, 42 L.Ed. 456 (1897), holding that [the] determination when a state of war or belligerency exists in a foreign country is solely for the executive; these are adequately distinguished in the Seventh Circuit's opinion in *Abu Eain*, 641 F.2d at 514 n.14. That court likewise sufficiently answered, *id*. at 514–15, the arguments made here by the Government, on the basis of *United States v. Curtiss-Wright Export Corp., supra*, and *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 436, 92 L.Ed. 568 (1948), as to the special ability of the executive branch to acquire the facts with respect to conditions in foreign countries.

Moreover, whatever we might decide if we were writing on a clean slate, the rock on which the Government's arguments shatter is the long-standing recognition that courts shall determine whether a particular offense comes within the political offense exception. This principle was in existence at least as long as when *In re Kaine, supra,* was decided in 1852. Four years after enactment of the Act of August 12, 1848, Justice Catron, speaking for four members of the Supreme Court, wrote that "extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought never to be allowed in this country," *In re Kaine, supra,* 55 U.S. (14 How.) at 113. Although this statement is directed at extradition proceedings in general and not specifically at the political offense issue, Justice Catron's opinion gives no indication that the political offense issue ought to be treated differently from other issues at the extradition hearing. More importantly, an example cited by Justice Catron, relating to the alleged mistreatment of one Jonathan Robbins, suggests that the members of the Court joining in his opinion were of the view that "an unbiased hearing before an independent judiciary" was particularly necessary in cases where the political offense exception is at issue.

In 1799 Jonathan Robbins (also variously referred to as Thomas Nash and Nathan Robbins) was surrendered by the United States to British naval officials, pursuant to Article 27 of Jay's Treaty. The British sought Robbins' extradition for a murder allegedly committed aboard a British naval vessel. Jay's Treaty contained no provision regarding the procedure to be followed in extradition cases, and at the time there was no legislation on the subject. Believing he had a relatively free hand, President Adams arranged the delivery of Robbins by instructing District Judge Bee of South Carolina to hand the extraditee over to the British. Adams' action caused an extraordinary national outcry. See, e.g., 10 Annals of Congress 580–640 (1800). As Professor Moore notes, "[t]he case created great excitement and was one of the causes of the overthrow of John Adams' administration." 1 Moore, Extradition 550-51 (1922); see also *In re Kaine,* 55 U.S. (14 How.) at 111–12. The outcry against Adams' action seems to have arisen, in large part, from the widespread perception that Robbins was an American seaman who had been impressed into the British navy and that the murder for which he was charged had occurred either in the course of a mutiny or while fleeing from the British in an escape attempt. See Speech of John Marshall, 10 Annals of Congress 613 (1800), reprinted in, 18 U.S. at 5 Wheat, App. 201, 204–05, 215 (1820). Robbins' supporters apparently conceded that he had committed a murder, yet argued that a murder committed in fleeing from illegal impressment should not be extraditable.

Although the term "political offense" was not current at the time, and apparently was not used in the debates surrounding the *Robbins* case, 10 Annals of Congress 580–640 (1800), the argument made on Robbins' behalf bears many resemblances to the political offense doctrine. In both instances an otherwise extraditable crime is thought to be rendered nonextraditable by the circumstances surrounding its commission and by the motives of the criminal. Significantly, in later years the *Robbins* case came to be regarded as centering on the political offense question. As Justice Nelson wrote in *Ex parte Kaine,* 14 Fed.Cas. 78, 81 (No. 7597) (C.C.S.D.N.Y.) (1853),

"It was the apprehension of the people of this country, at the time, that the offense of Jonathan Robbins, who was delivered up under the treaty with Great Britain of 1794, was a political offense…."

The circumstances of the *Robbins* case described above assume importance because, as Justice Catron noted in *In re Kaine, supra*, "[t]hat the eventful history of *Robbins'* case had a controlling influence on our distinguished negotiator [Daniel Webster], when the Treaty of 1842 was made; and especially on Congress, when it passed the Act of 1848, is, as I suppose, free from doubt." 55 U.S. (14 How.) at 112. With the *Robbins* case thus firmly in the legislature's mind, it is difficult to avoid the conclusion that when Congress charged commissioners and judges with determining whether evidence exists to "sustain [a] charge under the provisions of…[a] treaty," 9 Stat. 302, sec. 1, it had no intention of silently excepting the political offense issue from the magistrates' consideration. Rather, the combination of the view that the Robbins case involved the political offense question, and the perception that extradition without judicial oversight was "highly dangerous to liberty and ought never to be allowed in this country," *In re Kaine, supra*, 55 U.S. (14 How.) at 113, strongly suggests that it was precisely the political offense question that was of the greatest concern to Congress in passing the Act of August 12, 1848. This view is buttressed by the references to the political offense issue in the debates on the act, see Cong. Globe, July 28, 1848 (remarks of Mr. King and Mr. Bedger).

We recognize that Justice Nelson's later opinion as a Circuit Judge in *Ex parte Kaine, supra*, 14 Fed. Cas. at 81, contained language suggesting that decisions concerning the political offense exception are solely for the executive branch. Justice Nelson wrote "the surrender, in such cases, involves a political question, which must be decided by the political, and not by the judicial, powers of the government. It is a general principle, as it respects political questions concerning foreign governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and is, therefore, presumed to best understand what is fit and proper for the interest and honor of the country." We think Justice Nelson misunderstood the import of the Robbins incident, and that Justice Catron's view of the mistrust of exclusion of the judiciary from the extradition process is a far sounder interpretation of the views of the times. Moreover, this view is more consistent with the concern with individual liberties that formed the basis for Justice Nelson's dissenting opinion in *In re Kaine, supra*, 55 U.S. (14 How.) at 141-43, 147. If there is to be a change in this, the alteration should come from Congress.

The doctrine that a decision with respect to the political offense exception is for the courts was also recognized in *In re Castioni, supra*, [1891] 1 Q.B. 149, although, as the Government points out, there was no need to address the question there since the British Extradition Act of 1870 provided a defense to any person who could "prove to the satisfaction of the…magistrate or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." 33 & 34 Vict., c. 52, §3(1). In *In re Ezeta,* 62 F. 972 (N.D. Calif. 1894), the court assumed that it had power to determine whether the offense was political. It evidently regarded this as part of its duty, imposed by 18 U.S.C. §3184, to hear and consider the evidence of criminality and to determine whether there is evidence "to sustain the charge under the provisions of the treaty." In *Ornelas v. Ruiz*, 161 U.S. 502, 16 S. Ct. 689, 40 L.Ed. 787 (1896), the Supreme Court reversed a ruling by a district judge discharging, as a political offender, a person whom a magistrate had found not to be one; the Court expressed no disapproval at the magistrate's having decided the question, although saying, *id.* at 512, 16 S. Ct. at 692, that "[t]he contention that the right of the executive authority to determine what offenses charged are or are not purely political is exclusive is not involved in any degree." The principle that the judicial officers named in §3184 are to determine whether or not the crime charged is a political offense has been sustained in a number of other reported cases, *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir. 1962), *cert. denied,* 373 U.S. 914, 83 S. Ct. 1302; 10 L.Ed.2d 415 (1963); *Garcia-Guillern v. United States,* 450 F.2d 1189 (5 Cir. 1962); *Shapiro v. Ferrandina,* 478 F.2d 894 (2 Cir.),

cert. dismissed, 414 U.S. 884, 94 S. Ct. 204, 38 L.Ed.2d 133 (1973); *Jhirad v. Ferrandina,* 536 F.2d 478 (2 Cir.), *cert. denied,* 429 U.S. 833, 97 S. Ct. 97, 50 L.Ed. 2d 98 (1976); *Abu Eain v. Wilkes,* 641 F.2d 504 (7th Cir. 1981), *cert. denied,* 454 U.S. 894, 102 S. Ct. 390, 70 L.Ed.2d 208 (1981); *In re Lincoln,* 228 F. 70, 74 (S.D.N.Y. 1915) (dicta); *United States ex rel. Karadzole v. Artukovic,* 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos v. Diaz,* 179 F. Supp. 459 (S.D. Fla. 1959); *In re Gonzalez,* 217 F. Supp. 717 (S.D.N.Y. 1963), although only *Abu Eain* and *In re Lincoln* contain discussion of the issues.

One reason for the lack of discussion is that the position that the judicial officers designated in §3184 lack power to determine whether the offense was political is a new one for the executive branch. In 1908, a foreign ambassador wrote to the Secretary of State, proposing that a provision be included in the extradition treaty about to be entered into, whereby the political offense determination would be made by the courts of the requested country. In response, Secretary Elihu Root wrote:

> According to the system of jurisprudence obtaining in the United States, the *question as to whether or not an offense is a political one is always decided in the first instance by the judicial officer* before whom the fugitive is brought for commitment to surrender. If the judicial authorities refuse to commit the fugitive for surrender on the ground that he is a political offender, or for any other reason, the matter is dead . . . Bearing in mind, therefore that under our system of jurisprudence, it is not possible for any fugitive who claims to be a political offender to be extradited, it is hoped that your Government will be satisfied without insisting upon the insertion of an express stipulation providing that the question as to whether an offense is political shall be decided by the judicial authorities. (Emphasis added.)

Letter from Secretary of State Root, dated June 12, 1908; quoted in 4 G. Hackworth, Digest of International Law 46 (1942). In 1960 the Assistant Legal Advisor to the Department of State wrote a United States Attorney:

> With regard to the assertion that Mylonas' extradition is being sought for acts connected with crimes or offenses of a political character, it should be noted that *this is a matter for decision, initially, by the extradition magistrate* on the basis of the evidence submitted to him. (Emphasis added.)

Letter of State Department Assistant Legal Advisor to U.S. Attorney, dated June 22, 1960, concerning *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960); cited in 6 M. Whiteman, Digest of International Law 842–853 (1968).

> (*Note 19)* The word "initially" refers to the fact that when the judicial officer on a habeas court decides that the offense is not political, the Secretary of State may still decline to order extradition. See Note, Executive Discretion in Extradition, 62 Colum. L. Rev. 1313, 1315 & cases cited in note 18 (1962); 1 Moore, Extradition 549–76 (1891); Hyde, International Law 606–08 (1922).

The view of the Department of Justice and Department of State with respect to the existing law appears also in the materials recently presented to the Senate in connection with S. 1639, §3194(a) of which would remove from the court's jurisdiction "to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person of his political opinions." The Senate was told in the Legal Memorandum accompanying the bill, 127 Cong. Rec. S9956 (Sept. 18, 1981):

> Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense . . . citing in n.56 four of the cases cited above. An almost identical statement was made by Deputy Legal Advisor McGovern, p. 4.

> It follows that, as the law now stands, both the judicial and the executive branches have recognized that, under §3184, [the] decision whether a case falls within the political offense exception is for the judicial officer. The Government cites us to no overriding principle which dictates a contrary result. The Court said in *Baker v. Carr,* 369 U.S. 186, 211, 212, 82 S. Ct. 691, 706, 707, 7 L.Ed.2d 663 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" and "a court can construe a treaty and may find it provides the answer." While the policy arguments made by the Government are not without force, particularly in an age of spreading terrorism, they are not so overwhelming as to justify us in concluding that the 1848 statute and its successors did not mean that the judicial officer should decide whether the offense for which extradition is sought is political. Whether the national interests would be better served by the position here advocated by the executive branch, which it has asked Congress to adopt in S. 1639, is for that body to determine. We therefore conclude that the Magistrate correctly sustained her own power to decide the political offense question and thus, for reasons heretofore explained, there is no basis for our issuing mandamus.
>
> Immediately after the Magistrate's decision the Government refiled its extradition request before District Judge Sand in accordance with the procedure recognized in *Hooker v. Klein, supra*, 573 F.2d 1360, and applied for a new warrant of arrest. Believing that the question of appealability should be resolved before action by him the judge held this request in abeyance pending a request for a stay to the Magistrate. She granted such a stay pending application to this court for a stay pending expedited appeal, which this court granted. Before we granted the stay, Mackin filed a petition for *habeas corpus* with this court and a motion for immediate release. Since our stay of the Magistrate's decision will terminate upon the coming down of the mandate, unless the Government should request and we should see fit to grant an extension of the stay pending application for certiorari or the decision of the renewed application before Judge Sand we must consider the petition for *habeas corpus.*
>
> > (*Note 20)* Judge Sand should consider the renewed application on the record before the magistrate and such other relevant evidence as the United States or Mackin may introduce and give such weight to the Magistrate's conclusions as he deems appropriate. See Hooker v. Klein, *supra,* 573 F.2d 1360 at 1369–70 (concurring opinion of Judge Chambers).
>
> This need not detain us long. The statute, 28 U.S.C. § 2241, provides that writs of *habeas corpus* may be granted by "the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions." A court of appeals is conspicuously absent from this list. It has repeatedly been held that courts of appeals have no jurisdiction to entertain petitions such as Mackin's. *Posey v. Dowd*, 134 F.2d 613 (7 Cir. 1943); *Jensen v. Teets*, 219 F.2d 235 (9 Cir. 1955); *Loum v. Alvis*, 263 F.2d 836 (6 Cir. 1959); *Parker v. Sigler*, 419 F.2d 827 (8 Cir. 1969). See also FRAP 22(a) and accompanying Notes of Advisory Committee on Appellate Rules.
>
> The Government's appeal is dismissed for lack of jurisdiction. Its alternative application for mandamus is entertained solely on the issue of the Magistrate's jurisdiction to rule on the political offense exception and is otherwise dismissed; the portion entertained is denied on the merits. Mackin's petition for *habeas corpus* is dismissed for want of jurisdiction. Mackin may recover his costs.[143]

The U.S. government at the time also sought an alternate avenue using deportation proceedings, as exemplified in the *Doherty* case. In *Doherty* the Supreme Court held that:

> After more than eight years of proceedings concerning Doherty's status in the United States, the question presented here is whether the Attorney General abused his discretion in refusing to reopen the deportation proceedings against respondent to allow consideration of respondent's claims for asylum and withholding of deportation which he had earlier withdrawn. We conclude that the Attorney General did not abuse the broad discretion vested in him by the applicable regulations.

143 *Id.* at 132–137 and n.17–20.

In 1982 . . . [the INS] began deportation proceedings against him. Respondent applied for asylum under § 208 of the Immigration and Nationality Act, as added by the Refugee Act of 1980, 94 Stat. 105, 8 U.S.C. § 1158. The immigration proceedings were suspended to allow completion of extradition proceedings which were initiated by the United States at the request of the United Kingdom.

In December 1984 . . . [the extradition magistrate] held that respondent was not extraditable because his crimes fell into the political offenses exception to the extradition treaty between the United States and the United Kingdom. *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (SDNY 1984). The attempts of the United States to attack this conclusion collaterally were rebuffed. *United States v. Doherty*, 615 F. Supp. 755 (SDNY 1985), aff'd, 786 F.2d 491 (CA2 1986). Respondent, who has been confined since his arrest by the INS, has also twice unsuccessfully filed for habeas corpus relief. *Doherty v. Meese*, 808 F.2d 938 (CA2 1986); *Doherty v. Thornburgh*, 943 F.2d 204 (CA2 1991).

When the extradition proceedings concluded, the deportation proceeding against respondent resumed. On September 12, 1986, at a hearing before the Immigration Judge, respondent conceded deportability and designated Ireland as the country to which he be deported pursuant to 8 U.S.C. § 1253(a). In conjunction with this designation, respondent withdrew his application for asylum and withholding of deportation. The INS unsuccessfully challenged respondent's designation on the basis that Doherty's deportation to Ireland would, in the language of § 1253(a), "be prejudicial to the interests of the United States." . . . The Board of Immigration Appeals (BIA) affirmed the deportation order, concluding that the INS had never before rejected a deportee's designation and that rejection of a deportee's country of designation is improper "in the absence of clear evidence to support that conclusion." *Id.*, at 155a.

The Government appealed the BIA's determination to the Attorney General pursuant to 8 CFR § 3.1(h)(iii) (1987). While the order to deport respondent to Ireland was being reviewed by the Attorney General, respondent filed a motion to reopen his deportation proceedings on the basis that the Irish Extradition Act, implemented by Ireland in December 1987, constituted new evidence requiring that his claims for withholding of deportation and asylum now be reopened. In June 1988, Attorney General Meese reversed the BIA and ordered respondent deported to the United Kingdom. . .

The BIA granted respondent's motion to reopen, concluding that the 1987 Irish Extradition Act was a circumstance that respondent could not have been expected to anticipate, and that the result of his designation would now leave him to be extradited from Ireland to the United Kingdom, where he feared persecution. The BIA's decision to reopen was appealed by the INS and was reversed by Attorney General Thornburgh who found three independent grounds for denying Doherty's motion to reopen. The Court of Appeals for the Second Circuit reviewed both the order of Attorney General Meese which denied respondent's designation of Ireland as the country of deportation and Attorney General Thornburgh's order denying respondent's motion to reopen his deportation proceeding. It affirmed the Meese order, but by a divided vote reversed the Thornburgh order. *Doherty v. United States Dept. of Justice, INS*, 908 F.2d 1108 (CA2 1990) . . .

The Court of Appeals [also] held that the Attorney General had abused his discretion by relying on foreign policy concerns in denying respondent's motion to reopen his claim for asylum . . . The Attorney General had abused his discretion "in denying Doherty's application for reasons that congress sought to eliminate from asylum cases. . . . " *Doherty v. United States Dept. of Justice, INS,* 908 F.2d, at 1121.

We granted certiorari, 498 U.S. 1081, 111 S. Ct. 950, 112 L.Ed.2d 1039 (1991), and now decide that the Court of Appeals placed a much too narrow limit on the authority of the Attorney General to deny a motion to reopen deportation proceedings. The Attorney General based his decision to deny respondent's motion to reopen on three independent grounds. First, he concluded that respondent had not presented new evidence warranting reopening; second, he

> found that respondent had waived his claims to asylum and withholding of deportation by withdrawing them at his deportation hearing in September 1986; and third, he concluded that the motion to reopen was properly denied because Doherty's involvement in serious nonpolitical crimes in Northern Ireland made him statutorily ineligible for withholding of deportation, as well as undeserving of the discretionary rules of asylum. Because we conclude that the Attorney General did not abuse his discretion in denying the motion to reopen either on the first or second of these grounds, we reverse the Court of Appeals, and need not reach the third ground for denial of reopening relied upon by the Attorney General."[144]

Doherty is a case of a failed extradition attempt with a resort to deportation or exclusion proceedings under the Immigration and Nationality Act (INA) in order to accomplish the same result. By compartmentalizing these two sets of legal proceedings and by emphasizing the discretionary authority of the executive branch in immigration matters, a dual standard is institutionalized whereby the government can exploit the easier one under immigration practices to defeat the higher standard established in extradition proceedings. This double legal standard flies in the face of the integrity of the legal process and reduces it to formal gamesmanship. Further evidence of the disregard for the integrity of the judicial process manifested by the government is the resort to kidnapping abroad when extradition fails.[145] One cannot help escape the conclusion that the cumulative effect of these practices reduces the credibility of the United States and damages the integrity of its legal processes both when the United States is a requested state and a requesting state. To kidnap abroad or forcefully deport at home are not the types of practice that evidence the high standards of legal integrity in the U.S. process.

In *Quinn v. Robinson*,[146] the Ninth Circuit considered the application of the political offense exception to "international terrorism."

> The recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political offense exception . . . The premise of the analyses performed by modern courts favoring the adoption of new restrictions on the use of the exception is either that the objectives of revolutionary violence undertaken by dispersed forces and directed at civilians are by definition not political . . . or that, regardless of the actors' objectives, the conduct is not politically legitimate because it "is inconsistent with international standards of civilized conduct," *Doherty* 599 F. Supp. at 274. Both assumptions are subject to debate.
>
> A number of courts appear tacitly to accept a suggestion by some commentators that begins with the observation that the political offense exception can be traced to the rise of democratic governments . . . . Because of this origin, these commentators argue, the exception was only designed to protect the right to rebel against tyrannical governments . . . and should not be applied in an ideologically neutral fashion. . .
>
> These courts then proceed to apply the exception in a non-neutral fashion but, in doing so, focus on and explicitly reject only the *tactics*, rather than the true object of their concern, the political

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144 INS v. Doherty, 502 U.S. 314, 317–323 (1992). *See also* Ch. IV for a discussion of the use of immigration as an alternative to extradition.

145 *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992). *See also* Ch. V for a discussion of abduction and unlawful seizure.

146 Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. Sep. 4, 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d. 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re* Ang, 486 F.Supp. 1193 (D. Nev. 2006).

objectives. . . . The courts that are narrowing the applicability of the exception in this manner appear to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not "legitimate."

We strongly believe that courts should not undertake such a task. The political offense test traditionally articulated by American courts, as well as the text of the treaty provisions . . . is ideologically neutral. We do not believe it appropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government . . . . Such judgments themselves cannot be other than political and, as such, involve determinations of the sort that are not within the judicial role . . . .

A second premise may underlie the analyses of courts that appear to favor narrowing the exception, namely, that modern revolutionary *tactics* which include violence direct at civilians are not politically "legitimate." This assumption, which may well constitute an understandable response to the recent rise of international terrorism, skews any political offense analysis because of an inherent conceptual shortcoming. In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted.

The structure of societies and governments, the relationships between nations and their citizens, and the modes of altering political structures have changed dramatically since our courts first adopted the *Castioni* test. Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. Both the nature of the acts committed in struggles for self-determination . . . and the geographic locations of those struggles have changed considerably since the time of the French and American revolutions. Now challenges by insurgent movements to the existing order take place most frequently in Third World countries rather than in Europe or North America. In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power.

It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments. Often these tactics are employed by persons who do not share our cultural and social values or mores. Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

. . .

One of the principal reasons our courts have had difficulty with the concept of affording certain contemporary revolutionary tactics the protection of the political offense exception is our fear and loathing of international terrorism . . . . The desire to exclude international terrorists from the coverage of the political offense exception is a legitimate one; the United States unequivocally condemns all international terrorism. However, the restrictions that some courts have adopted in order to remove terrorist activities from coverage under the political offense exception are overbroad. . . .

The policy and legal considerations that underlie our responses to acts of international terrorism differ dramatically from those that form the basis for our attitudes toward violent acts committed as a part of other nations' internal political struggles. The application of the political offense exception to acts of domestic political violence comports in every respect with both the original justifications for the exception and the traditional requirements of the incidence test. The application of that exception to acts of international terrorism would comport with neither. First, we

doubt whether the designers of the exception contemplated that it would protect acts of international violence regardless of the ultimate objective of the actors. Second, in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed; frequently that is not a government the accused has sought to change. In such cases there is less risk that the accused will be subjected to an unfair trial or punishment because of his political opinion. Third, the exception was designed, in part, to protect against foreign intervention in internal struggles for political self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any *internal* struggle; rather, it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

There is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering are met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. While the precedent that guides us is limited, the applicable principles of law are clear. The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.

. . .

The incidence test has two components—the "uprising" requirement and the "incidental to" requirement. The first component, the requirement that there be an "uprising," "rebellion," or "revolution," has not been the subject of much discussion in the literature, although it is firmly established in the case law. . . . Most analyses of whether the exception applies have focused on whether the act in question was in furtherance of or incidental to a given uprising. Nevertheless, it is the "uprising" component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect.

. . .

The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective. . . .

Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations—even to the homeland of the oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially. . . .

In short, the *Eain* and *Doherty* courts' objective that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. It is met by interpreting the political offense exception in light of its historic origins and goals. Such a construction excludes acts of international terrorism. There is no reason, therefore, to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove.

. . .

Commentators have criticized United States courts for applying the "incidental to" component too loosely or flexibly. . . . We disagree with this criticism. To put the matter in its proper context,

> it is necessary to bear in mind that the offense must occur in the context of an "uprising." Acts "incidental to" an uprising are, as we have noted, limited by the geographic confines of the uprising. In addition, the act must be contemporaneous with the uprising.... The act must be causally or ideologically related to the uprising....
>
> We believe that the traditional liberal construction of the requirement that there be a nexus between the act and the uprising...is appropriate. There are various types of acts that, when committed in the course of an uprising, are likely to have been politically motivated. There is little reason, under such circumstances, to impose a strict nexus standard. Moreover, the application of a strict test would in some instances jeopardize the rights of the accused.
>
> Under the liberal nexus standard, neither proof of the potential or actual effectiveness of the actions in achieving the group's political ends...nor proof of the motive of the accused...is required. Nor is the organization or hierarchy of the uprising group or the accused's membership in any such group determinative.
>
> When extradition is sought, the "offender" at this stage of the proceedings has ordinarily only been accused, not convicted, of the offense. It would be inconsistent with the rights of the accused to require proof of membership in an uprising group.... Furthermore, requiring proof of membership might violate the accused's Fifth Amendment rights both because it might force him to supply circumstantial evidence of guilt of the charged offense and because membership in the group itself might be illegal. Also, we question how one proves membership in an uprising group. Uprising groups often do not have formal organizational structures or document membership. In addition, it is entirely possible to sympathize with, aid, assist, or support a group, help further its objectives and its activities, participate in its projects, or carry on parallel activities or one's own, without becoming a member of the organization. Still, one may be acting in furtherance of an uprising.
>
> On the other hand, a number of factors, though not necessary to the nexus determination, may play a part in evaluating the circumstances surrounding the commission of the offense. For example, proof of membership in an uprising group may make it more likely that the act was incidental to the uprising.... The similarity of the charged offense to other acts committed by the uprising group, and the degree of control over the accused's acts by some hierarchy within the group, may give further credence to the claim that the act was incidental to the uprising. And while evidence of the accused's political motivation is not required and is usually unavailable, evidence that the act was "committed for purely personal reasons such as vengeance or vindictiveness," In re *Doherty*, 599 F. Supp. 270, 277 n. 7 (S.D.N.Y. 1984), may serve to rebut any presumption that a nexus exists. The exception is not designed to protect mercenaries or others acting for nonpolitical reasons.[147]

The Ninth Circuit then examined the district court's application of the two tests to the facts in *Quinn*. The court agreed with the lower court's conclusion that the incidence test had been met. However, it disagreed with the magistrate's factual finding of an uprising in the United Kingdom at the time Quinn was alleged to have committed the acts for which his extradition was sought, stating:

> The magistrate correctly concluded that there was an uprising in Northern Ireland at the time of the offenses with which Quinn is charged. PIRA members, although a minority faction, sought to change the structure of the government in that country, the country in which they lived. Criminal activity in Northern Ireland connected with this uprising would clearly fall within the political offense exception.

147 *Id.* at 803–810 (citations omitted).

> We cannot conclude, however, that the uprising extended to England . . . [S]ome politically motivated violence was taking place in England as well as in Northern Ireland . . . However . . . in general the violent attacks and the responses to them were far less pronounced outside of Northern Ireland. It is clear . . . that the magistrate correctly concluded that the level of violence outside Northern Ireland was insufficient in itself to constitute an "uprising."
>
> There is a second and even more significant reason why the "uprising" prong is not met in this case . . . [W]hat violence there was was not being generated by citizens or residents of England . . . The critical factor is that nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change across the seas to a separate geographical entity—and conducted that struggle in a country in which the nationals and residents were not attempting to alter their own political structure.
>
> We do not question whether the PIRA sought to coerce the appropriate sovereign. Nor do we pass judgment on the use of violence as a form of political coercion or the efficacy of the violent attacks in England. But, as we have already said . . . the word "uprising" means exactly that: it refers to a people *rising up*, in their own land, against the government of that land. It does not cover terrorism or other criminal conduct exported to other locations. Nor can the existence of an uprising be based on violence committed by persons who do not reside in the country or territory in which the violence occurs.[148]

Quinn v. Robinson is one of four cases in which Great Britain sought the extradition of members of the PIRA from the United States. Although Quinn was found extraditable, the extradition of the relators in the other three cases was denied on the grounds of the political offense exception. These three cases, *In re McMullen*,[149] *In re Mackin*,[150] and *In re Doherty*,[151] were decided under the 1972 Treaty of Extradition between the United States and the United Kingdom,[152] in accordance with the long-standing jurisprudence of the United States on the political offense exception.

These cases led to the conclusion of the Supplementary Treaty Concerning Extradition between the United States and the United Kingdom of June 25, 1985.[153] As a bilateral treaty, the Supplementary Treaty has no effect on the general law and jurisprudence of the United States concerning the limits of the political offense exception, except insofar as relations with the United Kingdom are concerned. Article I of the Supplementary Treaty limits the political offense exception by removing certain crimes from the purview of the exception. Article I excludes:

> (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
>
> (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
>
> (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
>
> (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;
>
> (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such as offense.

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148 *Id.* at 813–814 (citation omitted). *See c.f.* Ordinola v. Clark, 402 F. Supp. 2d 667 (E.D. Va. 2005).

149 *In re McMullen*, Magis. No. 3-78-1099 MG (N.D. Cal. May 11, 1979). *See also supra* note 135.

150 *In re Mackin*, No. 86 Cr. Misc. 1, at 47, 1988 U.S. Dist. LEXIS 7201, at *1 (S.D.N.Y. Aug. 12, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981). *See* also *supra* note 136.

151 *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). *See also supra* note 137.

152 Extradition Treaty, *supra* note 19, 28 U.S.T. at 227.

153 The Supplementary Treaty was ratified by the United States Senate on July 17, 1986. For a discussion of the Northern Ireland conflict in relation to Irish and U.S. extradition laws, see 132 Cong.

The Supplementary Treaty was a landmark in the history of U.S. extradition law and policy. It signaled the end of the Reagan administration's support for years of legislative efforts to revise and update U.S. extradition law, which, for all practical purposes, had remained virtually unchanged since 1848. In addition, the Supplementary Treaty indicated that the selective bilateral treaty approach, rather than the legislative reform approach, had come into favor. The bilateral treaty approach relies on politically convenient bilateral treaties with friendly states and political allies, and denies similar favored-state treatment to less friendly states. In some respects such a policy is a reminder of the time when only friendly sovereigns and states practiced extradition. Extradition was then viewed as a process designed to benefit the mutual interests of political allies, to be used against those individuals who affected the political order or stability of the cooperating monarchs or states. The bilateral treaty approach also reflects a definite choice to revert to the nineteenth-century–view that extradition is a contract between states, for the benefit of states, in which individuals are objects of the process, rather than its subjects.

The position of the United States has been to consider the question of whether an offense is of a political character; this is a mixed question of law and fact, but chiefly one of fact.[154] The extradition magistrate, therefore, has the preponderant role, leaving to the reviewing courts an examination of the interpretation of the law and its proper application to the facts stated in the record. It is important to note that no established standards in the jurisprudence of the United States exist with respect to proof of the political offense exception. The various decisions referred to in this section differ widely on this point. They range from allowing the burden of proof to shift to the prosecution if the defense was raised by "some evidence," at which point the government is to prove its inapplicability by the "preponderance of the evidence," to requiring the defense to do so, or to prove it by "clear and convincing evidence." The latter is the preferable approach, but the circuits vary widely, and there is no national standard that can be relied upon.

The Supplementary Treaty was, for all practical purposes, in the nature of a bill of attainder designed to reach specific individuals who otherwise could not be extradited. In making its decision regarding the existence of a bill of attainder in *McMullen*,[155] the court relied on a three-pronged test, adopted by the Supreme Court. The test considers, inter alia, whether the act imposed punishment. The court concluded that:

> because the Supplementary Treaty does not in any sense "inflict punishment without a judicial trial," Lovett, 328 U.S. at 315, 66 S. Ct. at 1078 (quoting Cummings, 71 U.S. (4 Wall.) at 323), it cannot be classified as a bill of attainder as applied to McMullen. Although punishment may follow extradition, extradition itself never has been considered punishment.[156]

The court continued, arguing that according to 18 U.S.C. § 3184

> the extradition proceeding culminates in a "surrender" to the foreign government rather than in punishment of any sort.... The consequence of McMullen's "surrender" may be punishment

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Rec. S9119-S9171 (daily ed. July 16, 1986); Michael P. Simon, *The Political Offense Exception: Recent Changes in Extradition Law Appertaining to the Northern Ireland Conflict*, 1988 Ariz. J. Int'l & Comp. L. 244. *See also* M. Cherif Bassiouni, *The Political Offense Exception Revisited: Extradition between the U.S. and the U.K.—A Choice between Friendly Cooperation among Allies and Sound Law and Policy*, 15 Denv. J. Int'l L. & Pol'y 255 (1987); Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 Denv. J. Int'l L. & Pol'y 109 (1986); William M. Hannay, *An Analysis of the U.S.–U.K. Supplementary Extradition Treaty*, 21 Int'l L. 925, 928 (1987) (discussing limitation of the political offense exception); T.E. Molner, *Recent Development, Extradition: Limitation of the Political Offense Exception*, 27 Harv. Int'l L. J. 266 (1986); Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, 15 Denv. J. Int'l L. & Pol'y 125 (1986).

154 Ornelas v. Ruiz, 161 U.S. 502 (1896). *See also* Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959).

155 *In re Extradition of* McMullen, 989 F.2d 603 (2d Cir. 1993).

156 *Id.* at 611.

> in Great Britain, but that will follow a trial in the common law tradition from which our own criminal justice system is derived. Trial in Great Britain itself is by no means certain, because the government first must prevail at the extradition hearing.[157]

The court concluded that "We do not think that the burdens imposed upon McMullen are so severe that they eclipse the legitimate purposes of the Supplementary Treaty."[158] And that "Even without the retroactive provision, if the United Kingdom were again to request McMullen's extradition, his case would be reevaluated under the Supplementary Treaty. Surely, then, another extradition hearing does not constitute an unconstitutional burden.... A clearly non-punitive purpose has been identified here."[159] The court also noted that Senator Lugar stated that the purpose of the Supplementary Treaty, in the eye's of the Senate was "to reverse the three cases where extradition was denied."[160]

Even though the court found it difficult to conclude that the Supplementary Treaty targeted a certain number of individuals such as McMullen,[161] Mackin,[162] and Doherty,[163] there is no doubt that the purpose of the treaty was to reach individuals who under the traditional doctrine of the political offense exception would not have been found extraditable.

In another landmark extradition case, *Eain v. Wilkes*,[164] the U.S. Court of Appeals for the Seventh Circuit added to the political incidence test that the offense must be directed against the political organization of the state. Applying this formulation to the facts of the case, where an alleged member of the Palestine Liberation Organization (PLO) allegedly set off a bomb in a

157 *Id.* at 611–612.

158 *Id.* at 612.

159 *Id.*

160 *Id.*

161 *See supra* note 135.

162 *See supra* note 136.

163 *See supra* note 137.

164 Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981); *cf.* Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990) (dealing essentially with weighing evidentiary considerations, particularly the statements of the realtors as they were used in this case as well as in the *Eain* case); *In re Extradition of* Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988). The court in *Quinn* was critical of the decision in *Eain* because that decision "superimposed a number of limitations on the exception that had not previously been a part of the US law." 783 F.2d 802. Essentially, *Quinn* rejected the notion that courts should balance policy considerations so that the exception, as stated in *Eain*, "did not afford a haven for persons who commit the most heinous atrocities for political ends." Quinn v. Robinson, 783 F.2d 776, 803 (9th Cir. 1986) (quoting *In re* Doherty, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984)). The same reasoning was also used in *Doherty*, 599 F. Supp. 270. *Quinn* also rejected that notion in those terms. Thus, the *Doherty* court, like the *Eain* court, concluded that the traditional incidence test is insufficient to determine which offenses are protected by the exception. Both courts felt it necessary and appropriate to judge the political legitimacy of various ends and means and to exclude "illegitimate" acts from protection even if the incidence test was met.

Although not identifying their new limitations as such, both incorporated significant aspects of the Swiss ends-means or proportionality test into Anglo-American jurisprudence. *Quinn* concluded "we believe that tactics that are used in such internal political struggles are simply irrelevant to the question of whether the political exception is applicable." 783 F.2d 805. The essential difference between *Quinn* and *Eain*, the two leading cases on the relative political offense exception, is that *Eain* considered certain policy and political factors as well as the tactics and nature of the act committed by the realtors, while *Quinn* focused more on the political motivation of the actor within the context of the civil strife or domestic uprising and other relevant factors to the political incidence test. The two decisions do not substantially differ in their substance but they do in relation to the factors to be taken into account in weighing policy and factual considerations for the determination of the ultimate judgment.

public market square killing two people and injuring thirty-six, the court found that there was no link between the means employed and the target chosen so as to constitute an attack against the state. The court stated that:

> The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of the country.[165]

Thus, the accused failed to show a link between the act and the political objective, notwithstanding that he was a member of the PLO, whose avowed aim is opposition to the government of Israel. The court, affirming the holding of the magistrate, found that the position of the United States rests on the following tests:

1. The existence of war, revolution, civil strife, or civil upheaval;
2. the ideological motivation of the actor;
3. the target is the state or its political structures; and
4. the existence of a link or nexus between the motive of the actor, and the target of the act.

The court excluded other forms of violence directed at the society at large. The case, though relevant and significant as to the "political offense exception," is clouded by the questionable "probable cause" relied upon, as it was based on the confession of a Palestinian held in an Israeli military prison who subsequently recanted the confession.

The Ninth Circuit in *Vo v. Benov* summarized the theory of the political offense doctrine as follows:

> The political offense doctrine covers two types of crimes. *Quinn,* 783 F.2d at 793. The first are "relative" political offenses, which are "otherwise common crimes committed in connection with a political act," or "common crimes . . . committed for political motives or in a political context." *Id.* at 794 (citations omitted) (alteration in original). For this type of crime, we use the two-prong "incidence" test to decide whether a crime falls under the political offense exception. *Id.* The second are "pure" political offenses, such as treason, sedition, and espionage. *Id.* at 793–94. Because these crimes are by definition political, courts generally do not apply the incidence test to them. *Id.* at 794. Vo's offense is of the first type, and thus the incidence test applies.
>
> We explained the requirements of the incidence test in *Quinn, id.* at 794–811, which this court, sitting en banc, recently reaffirmed in *Barapind v. Enomoto,* 400 F.3d 744, 750–51 (9th Cir.2005) (en banc) (per curiam). For a crime to qualify for the political offense exception under the incidence test, there must be "(1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is 'incidental to' 'in the course of,' or 'in furtherance of' the uprising." *Quinn,* 783 F.2d at 797 (quoted in *Barapind,* 400 F.3d at 750) (internal citations omitted).
>
> The uprising prong constitutes the critical part of the incidence test. *See Quinn,* 783 F.2d at 806 ("[I]t is the 'uprising' component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect."). This prong has a number of facets that must be satisfied in order for an individual's conduct to be protected by the political offense exception. First, a "certain level of violence" must exist for the uprising prong to be satisfied. *Id.* at 807. Second, the prong involves a geographic limitation. An uprising "can occur only within the country or territory in which those rising up reside," and the

165 *Eain*, 641 F.2d at 520. *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

charged offense must take place in that geographic area. *Id.* at 807 ("[T]he uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place."). This limitation ensures that the political offense exception will not serve to protect international terrorism. *Id.* at 813–14 ("[T]he word 'uprising' . . . does not cover terrorism or other criminal conduct exported to other locations.").[4] Third, the individual charged with the offense must be "seeking to change the form of the government under which [he] live[s]." *Id.* at 818. If the individual's conduct does not meet these criteria, the individual does not qualify for the political offense exception.[5] Because the level of violence in Vietnam falls far short of that required to qualify as an uprising, we hold that Vo's offense is not protected by the political offense exception to the Treaty. In the alternative, we hold that Vo does not qualify for the exception because his conduct does not satisfy the geographic requirement of the uprising test.

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[4] *See also Quinn,* 783 F.2d at 807 ("The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations.").

[5] The government points to another potential facet of the uprising prong: the political offense exception cannot apply where the government seeking extradition is not the same as the government against which the political violence is aimed. In support, it cites *Quinn,* which states that "in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not a government the accused has sought to change." 783 F.2d at 806. Neither the district court nor the magistrate judge directly addressed this facet of the doctrine, and it is unnecessary to reach it here as Vo fails to satisfy the uprising prong of the incidence test for other reasons.

1. "A Certain Level of Violence"

The degree of violence in Vietnam at the time of Vo's conduct does not reach the level necessary to characterize it as an "uprising." *Quinn* described an uprising as synonymous with "rebellion" or "revolution" and involving "a certain level of violence." 783 F.2d at 807. The term does not "apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil." *Id.* Rather, an uprising "refers to a people *rising up,* in their own land, against the government of that land." *Id.* at 813.

The application of this facet of the uprising prong in other cases clearly demonstrates that the degree of violence in Vietnam at the time of the offense did not reach the level of an uprising. In *Quinn,* we held that an uprising occurred in Northern Ireland because there had been "a number of bombing campaigns" during a very long and frequently violent period of conflict between Irish nationalists and the United Kingdom. *Id.* at 812–13 (noting the Provisional Irish Republican Army, of which Quinn was a member, "advocated armed insurrection"). More recently, we found that "'[t]ens of thousands of deaths and casualties' . . . as Sikh nationalists clashed with government officers and sympathizers in Punjab" constituted "[s]ubstantial violence" sufficient to rise to the level of an uprising. *Barapind,* 400 F.3d at 750. Similarly, a continuing clash between indigenous people and police in northern Canada that was "not just an isolated violent disturbance" but part of a long history of struggle between native people and the government of Canada was found to constitute an uprising. *United States v. Pitawanakwat,* 120 F.Supp.2d 921, 935 (D.Or.2000).[6] Other courts analyzing the uprising prong have looked for "endemic and widespread violence." *Ahmad v. Wigen,* 726 F.Supp. 389, 409 (E.D.N.Y.1989), *aff'd,* 910 F.2d 1063 (2d Cir.1990) (holding that violence against Israeli settlers in the West Bank, before the Intifada of the 1980s, was not an uprising). The analysis in these cases shows that in order to constitute an uprising, a conflict must involve either some short period of intense bloodshed

or an accumulation of violent incidents over a long period of time. *Barapind,* 400 F.3d at 750; *Quinn,* 783 F.2d at 812.

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[6] The district court there stated that: Native people from multiple tribes undertook simultaneous, if not coordinated, action in defense of their unceded lands and in defense of their people on more than one front by petitioning the Queen of England, setting up armed encampments, creating a supply network with other tribes, overtaking a Canadian military base, and taking control of large areas of land. *Pitawanakwat,* 120 F.Supp.2d at 935.

[. . .]

2. The Territory of the Uprising

Even were we to consider the level of violence in Vietnam at the time of Vo's conduct sufficient to constitute an uprising, Vo still would not qualify for the political offense exception because his crime did not occur "within the country or territory in which those rising up reside," as required by the incidence test. *Quinn,* 783 F.2d at 807.

[. . .]

Not only does Vo's interpretation of the geographic requirement of the uprising prong conflict with the text of *Quinn,* it conflicts with the requirement's underlying purpose as well. As we have previously noted, the territorial limitation on the uprising prong plays a critical role in the political offense doctrine—it ensures that the political offense exception is not used to allow international terrorists to escape prosecution or to encourage the spread of civil insurrections to neighboring states. *Id.* at 813–14.[9] Vo's construction of the territorial restriction would extend the scope of the political offense exception to cover many acts of international terrorism. Under Vo's understanding of the geographic requirement of the uprising prong, an offense that is sufficiently "symbolic"—in terms of either its location or its timing—need not occur in the country or territory of an uprising to be protected by the political offense exception. As many acts of international terrorism are committed for their symbolism (including the September 11, 2001 attacks on the World Trade Center) and often meet the other requirements of the incidence test, Vo's interpretation would allow such acts to be covered by the political offense exception—precisely what the geographic limitation of the uprising prong is designed to prevent. Similarly, the requirement is intended to prevent the use of the political offense exception by those seeking to spread internal conflicts to neighboring countries and thus to turn civil insurrections into regional conflicts. The essence of the exception is to protect against extradition those trying to change their own government by actions within their own territory.[10] Accordingly, we reject Vo's effort to create a discretionary exception to the territorial component of the political offense exception.

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[9] We emphasized the function of the territorial limitation of the political offense exception in *Quinn,* stating that "the word 'uprising' means exactly that: it refers to a people *rising up,* in their own land, against the government of that land. It does not cover terrorism or other criminal conduct exported to other locations." *Id.* at 813–14; *see also id.* at 805 ("The application of [the political offense] exception to acts of international terrorism would comport with neither [the original justifications for the exception or the traditional requirements of the incidence test].").

[10] *See id.* at 807 ("[T]he uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. . . . [The political offense exception] was not designed to protect . . . the exportation of violence and strife to other locations—even to the homeland of an oppressor nation. Thus, an uprising is . . . limited spatially.").

We also reject Vo's claim that when an offense is committed in another nation against the embassy of the country in which an uprising is occurring, the uprising prong's geographic requirement is

met, even though the offense is committed outside of the borders of the country that is the object of the insurrection. We also reaffirm what we said in *Quinn:* in order to satisfy the geographic requirement of the incidence test's uprising prong, an offense must occur within the geographic borders of the nation at which the uprising is directed or within its occupied territory. *Id.* at 807. The geographic requirement is *not* satisfied when an offense occurs on property owned or controlled by that nation that is located within the geographic borders of another state. Because Vo committed the offense outside the territorial boundaries of the state in which the uprising was allegedly occurring, his conduct does not meet the geographic requirement of the incidence test's uprising prong, and therefore the crime does not qualify for the political offense exception.[166]

The third factor has to do with the intent of the person charged with the offense, namely that he/she is seeking to change the forum of government under which he/she lives, thus excluding any person acting with a personal motive as a profit motive.

2.1.5.2. The Injured Rights Theory

The injured rights theory has its basis in the French Extradition Law of March 10, 1927, and suggests that extradition cannot be granted when the circumstances show that it is sought exclusively for a political end.[167] It is not, however, the only theory followed by the French courts, and is considered a supplemental theory rather than an exclusive one. The principal theory followed in Europe is the political motivation theory, discussed below. In practice the injured rights theory often appears as a part of the political motivation theory, and has been evident in the reasoning of cases in France, Belgium, San Marino, Italy, Switzerland, and Germany. The leading case following this theory is *In re Giovanni Gatti*,[168] where the Republic of San Marino requested extradition of a member of a communist cell for attempted homicide. The court granted extradition and held that: "Political offenses . . . are directed against the constitution of the Government and against Sovereignty . . . and disturb the distribution of powers . . . [S]uch an offense affects the political organization of the state . . . The offense does not derive its political character from the motive of the offender, but from the nature of the rights it injures."[169]

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166 Vo v. Benov, 447 F.3d 1235, 1243, 1240–1242, 1244–1245 (9th Cir. 2006).

167 *See* 2 George Levasseur, Juris Classeur de Droit International 405–410 (1965). For other European positions, see P. Lanza, L'Estradizion (1910); Pierre Papadatos, Le Délit Politique (1954); Dominique Poncet & Phillipe Neyroud, L'Extradition et L'Asile Politique en Suisse (1976); Hans Schultz, Das Schweizerische Auslieferungsrecht (1953); Theo Vögler, Auslieferungsrecht und Grundgesetz (1970). *See also* Laferriere, L'Evolution Récente du Droit Français de L'Extradition, Chronique Administrative Français (1978); Thomas Carbonneau, *The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists*, 1983 Mich. Y.B. Int'l Legal Stud. 209; Thomas E. Carbonneau, *The Provisional Arrest and Subsequent Release of Abou Daoud by French Authorities*, 17 Va. J. Int'l L. 495 (1977); Martin E. Gold, *Non-extradition for Political Offenses: The Communist Perspective*, 11 Harv. Int'l L.J. 191 (1970); René Koering-Joulin, *De Quelques Aspects, Judiciaries des Affaire des Autonomiste Basques Espagnols*, Revue Française de Droit Administratif 165 (1985); Antonio Pagliaro, *La Nozione di Reato Politico Agli Effeti Dell'Estradizione*, 26 Rivista Italiana di Diritto e Procedura Penale 807 (1983); Mario Pisani, *Delitto Politico Estradizione, Diritto D'Asilo*, *in* 24 Estratto da Diritto Internazionale 213 (1970); Ray Riggle, *L'Affaire Abou Daoud: Some Problems of Extraditing an International Terrorist*, 12 Int'l Law 333 (1978); Christine Van den Wijngaert, *L'Espace Judicaire Européen; Face à L'Euro- Terrorisme; et la Sauvegarde des Droits Fondementaux au Marché Commun*, *in* Revue Internationale de Criminologie et de Police Technique 289 (1969).

168 14 I.L.R. 145 (Ct. App. Grenoble 1947) (Fr.).

169 *Id.* The Court of Appeal of Grenoble, France, further stated:

> Political offenses are those which injure the political organism, which are directed against the constitution of the Government and against sovereignty, which trouble the order established by the

A second case, *In re Colman*,[170] allowed extradition at the request of Belgium of an individual sought for and previously convicted in absentia of the crimes of collaboration with the enemy, carrying arms against the state, and assassination. The court reasoned 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."[171] In the context of executive discretion, it should be noted that the offenses charged against Colman were not covered by the extradition treaty between France and Belgium.[172] An exchange of notes between the two governments, which took place after the commission of the offenses, set forth the terms for the exchange of such offenders, considering them as falling within the scope of the treaty.[173] The court stated that "[the offender] has no right not to be surrendered for facts which were not provided for, at the time of the consummation of the offenses at the time when they were committed."[174] This insistence stretches the principle of nonretroactivity of criminal laws, and somewhat subverts the legislative effect of an extradition theory by its ex post facto amendment.

2.1.5.3 The Political Motivation Theory

The political motivation theory was developed by the Swiss courts, which attempted to modify the political incidence theory[175] developed by the English courts. Under this theory, the court does not look strictly to the nature of the rights injured, but rather tries to correlate the

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> fundamental laws of the state and disturb the distribution of powers. Acts which aim at overthrowing or modifying the organization of the main organs of the state, or at destroying, weakening or bringing into disrepute one of these authorities, or at exercising illegitimate pressure on the play of their mechanism or on their general direction of the state, or which aim at changing the social conditions created for individuals by the constitution in one or all of its elements, are also political offenses. In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state.

Id.

170 14 I.L.R. 139 (Ct. App. Paris 1947) (Fr.).

171 *Id.* at 141 (emphasis added).

172 Extradition Treaty, Fr.–Belg., Aug. 15, 1874, *cited in In re* Colman, 14 I.L.R. 139 at 139.

173 In a case decided by the same court nine months prior to the *Colman* decision, France refused Belgium's extradition request for the crime of economic collaboration with the enemy, holding that the exchange of notes between the countries could not be considered as it was not mentioned by the requesting government as a grounds for granting surrender. Also, it was stated that "such a convention [the notes] . . . cannot, without ratification and publication, have force of law in the meaning of Article 26 of the Constitution of the French Republic of 1946."

In re Talbot, 14 I.L.R. 142, at 142 (Ct. App. Paris 1947) (Fr.).

174 *In re* Colman, 14 I.L.R. 139 at 140. For the opposite holding, see *Denmark (Collaboration with the Enemy) Case*, 14 I.L.R. 146 (STF 1947) (Braz.).

175 Concerning relative political offenses, the Federal Tribunal of Switzerland has stated:

> A relative political offense is one which, while having the characteristics of a common offense, acquires a political character by virtue of the motive inspiring it, of the purpose for which or the circumstances in which it has been committed; in other words, it is in itself a common offense but has a predominantly political character.

In re Ficorilli, 18 I.L.R. 345, 345 (Federal Tribunal 1951) (Switz.). *See also In re* Barratini, 9 Ann. Dig. 412 (Ct. App. Liege 1936) (Belg.). Frequently, the term "political offense" is used to cover both "purely" political offenses and "relative" political offenses. Thus, the Belgian court of appeal stated in *Barratini*:

ideological beliefs of the offender and the proportionate effect of his/her acts or offenses, and the political purpose in trying to reach an equitable result which locks in the other theories.

In 1908, the Swiss Federal Tribunal stated in the case of *V.P. Wassilief*[176] that three general principles had to be met in order for an offense to be political: (1) that the offense was committed for the purpose of helping or ensuring the success of a purely political purpose, (2) that there was a direct connection between the crime committed and the purpose pursued by a party to modify the political or the social organization of the state, and (3) that the political element predominated over the ordinary criminal element.

The problem of interpretation appears in the case of *In re Pavan*,[177] where the French government requested extradition of an anti-fascist journalist accused of murdering an Italian fascist. The Swiss court, rejecting the defense's plea of political offense, held that the crime

> is invested with a predominately political character only where the criminal action is immediately connected with its political object. Such connection can only be predicated where the act is in itself an effective means of attaining this object or where it is an incident in a general political struggle . . . .[178]

The same reasoning was applied in the *Ockert* case. In 1933, the Prussian minister of justice requested the extradition from Switzerland of Ockert on a charge of homicide. It appeared that Ockert, a member of the Reichsbanner, a quasi-military organization of the German Social-Democratic Party, became involved in an altercation on a street in Frankfurt with certain members of the National Socialist Party, particularly Bleser, whom he struck with his fist. Ockert then ran and when pursued by the group fired several shots at them with his pistol, killing Bleser. Ockert contended that the charge came within Article 4 of the Swiss-German Extradition Treaty of 1874, which prohibited extradition for offenses of a political character. The Federal Tribunal of Switzerland agreed. The Tribunal referred to previous cases involving similar facts, particularly a case in which a Swiss Federal Court had refused extradition of a person convicted of complicity in a brawl between members of the Fascist Party in a small Italian village and their local antagonists on the grounds that the clashes between such groups were not mere casual disputes arising from local or personal enmity, but part of a struggle that was on such a wide scale that it came near to being a civil war. In the instant case, the Tribunal noted that reports of the incident in German newspapers spoke of "Marxist Murder Tactics" and "Sacrifice in the Service of the New Reich," and concluded that the case was essentially one of political conflict and that Ockert was thus not extraditable.[179]

> A political offense is one which, in essence, is directed against the political regime or which, though normally constituting an ordinary crime ("crime de droit commun"), assumes the character of a political crime because the aim of the author of the crime was to injure the political regime. However, an ordinary crime committed under the influence of party passion against an adversary cannot be regarded as political unless it occurred as an episode in a civil war between combatants engaged in a violent struggle in which the constitution of the State was in issue.
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> 9 Ann. Dig. at 412.

176 Papers Relating to the Foreign Relations of the United States 520–521 (1909). *See also* Deere, *supra* note 22, at 253.

177 4 Ann. Dig. 347 (Federal Court 1928) (Switz.). *See also In re* Peruzzo, 19 I.L.R. 369 (Federal Tribunal 1951) (Switz.).

178 *Id.* at 348–349.

179 *In re* Ockert, 7 Ann. Dig. 369 (Federal Tribunal 1933) (Switz.). In *In re Ragni*, 2 Ann. Dig. 286 (Federal Court 1923) (Switz.), Italy unsuccessfully sought the extradition for attempted homicide of one Ragni, who took part in an encounter between fascists on the one hand and socialists, communists, and "Popolari" on the other, in which a number of persons were injured by shots and otherwise. Similarly, a Swiss Federal Court refused an Italian request for the extradition of one Camporini, former mayor of Corresio and secretary of the Social-Democratic Party, accused of shooting and fatally wounding Tizzoni, a

Relating what is called passive resistance to political regimes and the relative political offense, the Swiss approach in the case of *In re Kavic*[180] linked the noncommission of an act of opposition to the commission of an act likely to be deemed criminal. In this case, Yugoslavia sought the extradition of the members of an airplane crew who had diverted a local flight and landed in Switzerland. They were charged with the crimes of endangering the safety of public transport and wrongful appropriation of property. The Swiss court, in denying the extradition request, held that although the political character of the offense must outweigh its common characteristics (the danger of harm to the passengers being minimal), it need not be related to a realization of political objectives or occurring within a fight for political power.[181] This position is no longer valid in light of the 1963 Tokyo Convention and the 1970 Hague Convention, which established unlawful seizure of aircrafts as an international crime.[182]

An illustrative case outlining the political motivation theory is the *Ktir* case.[183] The appellant, a French national, was a member of the Algerian Liberation Movement (FLN). Kitr was responsible, along with three other persons, for the November 14, 1960 murder in France of another member of FLN who was suspected of treason by the relator's chiefs. Kitr then fled to Switzerland, and France requested his extradition. He contested the request on the ground that France was at war with the FLN and that the act he had committed was that of killing an enemy. He further contended that, if extradition were granted, it had to be made subject to the condition that he would not be executed, as the offense would not be punished by capital punishment in Switzerland. The Court held that extradition must be granted for the following reasons:

> 1. Political offenses included common crimes which had a predominately political character, from their motive and factual background. However, the damage had to be proportionate to the aim sought; in the case of murder, this had to be shown to be the sole means of attaining the political aim. The offense in this case did not satisfy this requirement of proportionality.
>
> 2. A condition that the accused would not be sentenced to death could be attached to the extradition only if the relevant treaty expressly prohibited capital punishment.
>
> 3. The extradition should be subject to the condition that the appellant would not be prosecuted or sentenced for other activities. This was required in order to give effect to the principle of specialty contained in Article 8 of the Extradition Treaty [of July 9, 1869].
>
> . . .
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> 4. According to Articles 1 and 2 of the Treaty, extradition is authorized if the acts committed are punishable under both Swiss and French law; if they constitute one of the offenses listed in the Convention; and if they do not constitute political offenses. Political offenses include offenses which, although constituting acts falling under the ordinary criminal law, have a *predominately* political character as a result of the circumstances in which they are committed,

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Fascist, during disturbances accompanying the Italian parliamentary elections in 1924. *In re* Camporini, 2 Ann. Dig. 283 (Federal Court 1924) (Switz.). The Swiss Federal Tribunal, recognizing this deficiency, has said in *In re Kavic, Bjelanovic, and Arsenijevic*:

> That restrictive interpretation does not, however, bear re-examination; it does not meet the intention of the law, nor take account of recent historical developments, such as the growth of totalitarian States. In such States all political opposition is suppressed and a fight for power is, if not impossible from the start, at least practically without any chance of success. Those who do not wish to submit to the régime have no alternative but to escape it by flight abroad. . . . This more passive attitude for the purpose of escaping political constraint is no less worthy of asylum than active participation in the fight for political power used to be in what were earlier considered to be normal circumstances. 19 I.L.R. 371, 373–74 (Federal Tribunal 1952) (Switz.).

180 19 I.L.R. 371 (Federal Tribunal 1952) (Switz.). *See also* Poncet & Neyroud, *supra* note 167.

181 19 I.L.R. at 373.

182 *See infra* Sec. 2.1.7.

183 34 I.L.R. 143 (Federal Tribunal 1961) (Switz.).

> in particular as a result of the motives inspiring them and the purpose sought to be achieved. Such offenses, akin to relative political offenses, presuppose that the act was inspired by political passion, that it was committed either in the framework of a struggle for power or for the purpose of escaping a dictatorial authority, and that it was directly and closely related to the political purpose. A further requirement is that the damage caused be proportionate to the result sought, in other words, that the interests at stake should be sufficiently important to excuse, if not to justify, the infringement of private legal rights. Where murder is concerned, such a relationship exists only if homicide is the sole means of safeguarding more important interests and attaining the political aim.[184]

Even though the *Ktir* case also involved an issue of exclusion for military offenses and the death penalty, the court found that if extradition were granted for one or more offenses charged and not for others, the rule of specialty[185] would preclude the prosecution of the relator for such offenses but would not constitute a bar to his extradition for other offenses deemed extraditable.[186] (The position of the United States is to that extent partially compatible with that of Switzerland, and the general practice under customary international law.)

In *Ktir*, the required *ultima ratio* was evaluated on an objective basis and examined whether the act was in reality the only possible alternative.[187] This objective approach, however, was abandoned a few years later in the *Watin* case,[188] where the *ultima ratio* was determined by a subjective analysis. In that case the French government requested the extradition of the relator for his alleged participation in an attack by the Secret Army Organization against General de Gaulle at Petit-Clamart. In assessing the extradition request the court inquired into whether, in the perpetrator's opinion, the act was the only alternative. The federal tribunal held that Watin's act constituted an *ultima ratio*, stating that:

> [E]xtradition can be refused even if homicide was not, in reality, the only means to reach the goal sought. It should have appeared in fact to the culprit as the most appropriate means under the given circumstances, even if the interest at stake could, in principle, have been safeguarded in another manner, for example by an electoral victory.[189]

The courts of the Netherlands have adopted the Swiss proportionality theory. In *In re Joseph Jean B.*,[190] France requested the extradition of a relator who, after being conditionally released from a prison term for participation in a holdup organized by the Secret Army Organization, was then sought to serve the rest of his term because the release decision had been revoked. The Supreme Court of the Netherlands held that although the political motive for the robbery gave a political aspect to the case, this political aspect, when evaluated in light of the other circumstances, was not of primary importance. Thus, the crime in question was determined to be a common offense giving rise to extradition.[191]

In three other cases involving terrorist acts, namely *Folkerts*, *Wackernagel*, and *Schneider*,[192] the relators, all members of the Red Army Faction (also known as the Baader-Meinhof group),

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184 *Id.* at 143–144.

185 *See* Ch. VII., Sec. 6.

186 *See supra* note 122 and accompanying text.

187 *See* Van Den Wijngaert, *supra* note 3, at 129.

188 90 Arrêts Tribunal Fédéral Suisse 299 (1964), *cited in* Van Den Wijngaert, *supra* note 3, at 129.

189 *Id.* at 300–301, *cited in* and *translated by* Van Den Wijngaert, *supra* note 3, at 130.

190 Judgment of Nov. 9, 1976, HR, NJ No. 75 (1977) (Neth.), *cited in* Van Den Wijngaert, *supra* note 3, at 131.

191 *See* Van Den Wijngaert, *supra* note 3, at 131.

192 Folkerts, Judgment of Jan. 25, 1978, Trib. Maastricht (Neth.); Wackernagel, Schneider, Judgment of Jan. 26, 1978, Trib. The Hague, *cited in* Van Den Wijngaert, *supra* note 3, at 131.

were requested for terrorist acts committed by that organization, and the courts of the Netherlands applied the Swiss proportionality test. After being confirmed by the Supreme Court, the extradition requests were granted by the government of the Netherlands.[193]

Although, as mentioned earlier, the French courts have a history of following a more objective approach to the political offense exception, two decisions have added subjectivity to this analysis by expressly emphasizing the seriousness of the act as a requirement for the request for extradition.[194] In *Croissant*[195] the relator was accused by the German government of establishing communications between criminal organizations and granting indirect assistance to the Red Army Faction, a political organization that engaged in acts of a criminal nature. In rejecting Croissant's claims to the political offense exception, the Court of Appeals of Paris found that the crimes were not inherently political, and that the political motivation was not sufficient to characterize the crime as a political offense. The court stated that the crimes of the accused:

> [d]o not present any common feature which would allow them to be integrated in a systematically organized struggle against something in favor of something else, but which, on the contrary, are characterized by the contempt towards the life [sic] of the victims, innocent because not involved in the political facts, and towards the property of other persons . . . [E]ven assuming that the crimes alleged to the "Baader Gang"—and these are essentially blood crimes—would reveal a certain political motivation, this circumstance would not by itself constitute an obstacle to the extradition of Croissant.[196]

In 1979, the Court of Appeals of Paris confirmed this position in the *Piperno* case,[197] in which the Italian government requested the extradition of the accused on charges of participating in the kidnapping and murder of Aldo Moro, the former Italian prime minister. The court rejected the relator's contention that this act was of a political character and held that this case, stating that:

> [R]eveals the extreme seriousness of the facts alleged since, in addition to the physical and mental torture implied by a sequestration of many weeks, they have consisted of the killing of the innocent hostage. Whatever be the purpose pursued or the context in which such acts are located, they cannot, taking into account their seriousness, be considered as being of a political character.[198]

The position of Western European states is still ambiguous as to what constitutes a relative political offense, even though the 1957 European Convention on Extradition contains the exception in its Article 3. Member states of the Council of Europe recognize that it is a judicial question that depends essentially on the facts and circumstances of every case. Recent extradition legislation in several of the European states has yet to be applied, and its jurisprudential significance remains to be established.

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193 Folkerts, Judgment of May 8, 1978, HR, NJ No. 314 (1978) (Neth.); Wackernagel, Judgment of May 8, 1978, HR, NJ No. 315 (1978) (Neth.); Schneider, Judgment of May 8, 1978, HR (not published) (Neth.) *cited in* Van Den Wijngaert, *supra* note 3, at 131.

194 *See* Christopher L. Blakesley, *Extradition between France and the United States: An Exercise in Comparative and International Law*, 13 Vand. J. Transnat'l L. 653 (1980). This approach has been referred to by one commentator as "the mixed approach." Van Den Wijngaert, *supra* note 3, at 123.

195 Croissant, Judgment of Nov. 16, 1977, 2d decision, Cour d'Appel de Paris, 93 J. Trib. 52 (1978) (Fr.), *cited in and translated by* Van Den Wijngaert, *supra* note 3, at 124.

196 *Id.*

197 Piperno, Judgment of Oct. 17, 1979, arret no. 1343-79, at 14, Cour d'Appel de Paris (not published) (Fr.), *cited in and translated by* Van Den Wijngaert, *supra* note 3, at 124.

198 *Id.*

The 1975 Additional Protocol to the European Convention on Extradition addresses many of the questions raised in the practice of European states but since the additional protocol was adopted, the positions of different member states of the Council of Europe have remained somewhat at variance.[199] Though almost all European states have limited the application of the political offense exception, differences among states remain as to such matters concerning whether the entry of the criminal transaction must be motivated by a political purpose to the exclusion of other motives. On the whole, motives have become secondary to the specific prohibitions in the protocol concerning certain acts. These acts are totally excludable from the political offense exception irrespective of the perpetrator's motives. The protocol supersedes prior differences that existed in the laws and practices of European states. Nevertheless, to the extent that this prior jurisprudence may have an impact on contemporary and future cases, it is described below as illustrative of the variances that existed in European states.

2.1.5.4. International Limitations on the Relative Political Offense

Contemporary political terrorism poses a new dilemma to extradition.[200] Although terrorism is not a new phenomenon, scientific and technological advances have given it new characteristics. In particular the prevalence of mass communication in modern society has made attacks on unknown innocent civilians just as effective in attracting attention as the killing of heads of states, ambassadors, or prominent politicians. In addition, developments in mass transportation have made it easier for an offender to seek refuge in other states. Moreover, the increased availability and destructive use of technological advancements, such as incendiary, biological, chemical, or even nuclear weapons, leave the full potential of terrorist activities unknown.[201] Despite this growing concern there has been no successful, worldwide response. This is due to factors such as the absence of an international consensus, the low level of "prosecutorial fervor" in many states, and the broad interpretation given political offenses in extradition.[202]

In 1972,during the drafting of the United Nations a Draft Convention on the Prevention and Suppression of Terrorism the United States introduced the obligation for signatories to prosecute or extradite any person accused of committing a terrorist act of international

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199 *See* http://conventions.coe.int/Treaty/en/Treaties/Html/086.htm.

200 For a case noting this issue as discussed further herein, see *In re Smyth*, 863 F. Supp. 1137, 1149 (N.D. Cal. 1994).

201 For an in-depth discussion of the trends in modern terrorism, see Louis G. Fields, Jr., *Bringing Terrorists to Justice—The Shifting Sands of the Political Offense Exception*, *in* International Aspects of Criminal Law: Enforcing United States Law in the World Community 15 (Richard B. Lillich ed., 1981); William M. Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Colum. J. Transnat'l L. 381, 381–382 (1979); Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. Crim. L. & Criminology 193, 193–195 (1980); Note, *Politics of Extradition*, *supra* note 87, at 632–636.

202 *See* Christopher L. Blakesly, Terrorism, Drugs, International Law, and the Protection of Human Liberty (1992); Jeffrey B. Gaynes, *Note, Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 73 (1978). *See also* M. Cherif Bassiouni, *International Control of Terrorists: Some Policy Proposals*, 37 Int'l Rev. Crim. Pol'y 44 (1981); M. Cherif Bassiouni, *Terrorism, Law Enforcement and the Mass Media: Perspectives, Problems, Proposals*, 72 J. Crim. L. & Criminology 1 (1981); M. Cherif Bassiouni, *Prolegomenon to Terror Violence*, 12 Creighton L. Rev. 745 (1979); Cantrell, *supra* note 58; Carbonneau, *supra* note 11; Geoffrey S. Gilbert, *Terrorism and the Political Offense Exception Reappraised*, 34 Int'l & Comp. L.Q. 695 (1985); Steven Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 Cornell Int'l L. J. 247 (1982); Note, *Politics of Extradition*, *supra* note 87; Kenneth S. Sternberg & David L. Skelding, *Note, State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 Case W. Res. J. Int'l L. 137 (1983).

significance, but the draft was not adopted.[203] The danger to innocent lives and the threat to international order were advanced as the rationale for the convention. Nevertheless, a number of states have consistently opposed such measures because of concern that action against international terrorism would encompass legitimate national liberation movements, and also because there has been some success in the development of conventions to prevent and punish specific types of terrorist conduct, such as hijacking, attacks on diplomats, and hostage taking. In 1976, however, a European Convention on the Suppression of Terrorism[204] was adopted, which lists several offenses that may not be regarded as political offenses. Although the Convention represents progress in the prevention and punishment of terrorism, it falls short of its goal by containing language that permits a requested state to determine whether an offense is one of a political character and to exempt extradition on that basis.

The narrowing view of the political offense exception was expressed by the Supreme Court of Greece in the 1976 extradition of Rolf Pohle, a German accused of terrorism. The Greek Supreme Court adopted "a very narrow definition of a political crime, taking it to cover only the actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives."[205] Two cases decided in France also reflect this growing trend.[206] The Paris Court of Appeals, acting on an Italian request for extradition of Francesco Piperno and Lanfranco Pace, two fugitives implicated in the brutal kidnap-murder of Aldo Moro, found that the charges were undeniably common crimes. Despite the political context, the court noted the extreme seriousness of the charges, which involved the murder of an innocent person held against his will. These cases demonstrate persuasively that European courts are beginning to narrow the political offense exception.

2.1.6. A Proposed Juridical Standard of Inquiry into the Political Offense Exception[207]

To determine the relationship of the offenses committed as a part of a political scheme, and particularly under the relative political offense, as shown in the theories discussed above, the motive of the offenses must be examined. But further inquiry must be made into the nature of the criminal transaction. This inquiry leads to the following questions: (1) Were all the offenses committed part of the same (political) criminal transaction? (2) What was the number or extent of these violations? (3) How were they related in scope, time, place, and social significance? (4) To what extent did the political scheme necessitate the commission of such multiple offenses? and (5) Could they readily be identified as lesser-included offenses, or did they appear to be related only by the actor's design?

One interesting question arises at this point: if this inquiry concludes only partially in favor of the relator, should the extradition judge or executive authority weigh the degree of compliance of the relator's conduct to these tests versus his/her noncompliance and determine its outcome by a "preponderance of compliance" test? Or, should the judge disqualify the relator from the

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203 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, U.N. GAOR 6th (Legal) Comm., 27th Sess., U.N. Doc. A/C.6/L850 (1972). *See also* Robert Friedlander, Terrorism: Documents of International and Local Control (vols. 1–6, 1981); Bassiouni, *supra* note 36.

204 Jan. 27, 1977, 15 I.L.M. 1272. *See also* Christine Van den Wijngaert, *La Belgique et l'Exception pour Délits Politiques en Matière d'Extradition: Analyse Critique de la Pratique Judiciaire et Administrative*, 59 Rev. de Droit Pénal et de Criminologie 833 (1979).

205 *See* Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am. U. L. Rev. 219, 302–303 (1977).

206 *In re* Piperno, [1979] T.A.C.P. 376 (Fr.); *In re* Pace, [1979] T.A.C.P. 367.

207 *See* Bassiouni, *supra* note 36, at 254–257.

benefit of the "political offense" exception because there was a single instance of noncompliance? In this case, we also see the limited chances of a juridical solution in a world system in which the ultimate relationship between political units is predicated upon a concept of coequal sovereigns exercising all-too-often conflicting coequal authority. Were the alternative a vertical jurisdictional authoritative process, the issue would then be removed from the contentious or opposing coequal horizontal authoritative process and the opportunity for direct conflict would be greatly reduced.

The search for an objective standard can be analogized to the principle of self-defense. Self-defense, the justified use of force against another to insure one's own safety, is commonly accepted in all penal systems. The primary consideration in the law of self-defense is a value judgment based on the inherent justification of self-preservation and the potential harm to be inflicted upon the aggressor. The means authorized, the use of force, is dependent upon the nature of the potential harm sought to be inflicted upon the aggressor. It is also dependent upon the nature of the potential harm sought to be inflicted by the aggressor on the victim, and the latter's need to prevent such harm from occurring. Hence, if an individual's fundamental human rights are seriously violated, either by an institutional entity or a person or persons wielding the authority of the state and acting on its behalf without lawful means of redress, then the individual's conduct, which was necessitated by the need to redress a continuing wrong, is justified or mitigated, and therefore the request for the extradition of the individual warrants a denial.

This right to ideological self-preservation or political self-defense is predicated on three categories of factors: the nature of the rights involved, the conduct of the violative nation-state, and the individual who exercised self-defense. The first, *factors bearing upon the nature of the "rights" that were originally violated,* include: (1) the nature of those "rights" and their sources; (2) the extent to which those "rights" are indispensable or necessary to the survival or basic values of the people; (3) the historical and traditional existence of those "rights" and the degree of their availability and enjoyment by the people; (4) the extent of the people's reliance upon them in relation to their implantation in the social psychology as necessary, indispensable, or fundamental to the way of life; (5) the duration of their abridgment and, if sporadic, their recurrence; (6) the potential or foreseeable voluntary termination of the transgression by the violating body or person; and (7) the existence or reasonable availability of a local or international remedy or legal method of redress of such wrongs. These factors, for the most part, can be ascertained objectively and tangibly by impartial and objective inquiry into their existence and their validity by the extradition magistrate or the executive authority in the exercise of his/her discretionary power to grant or deny extradition.

The second category includes *factors bearing upon the conduct of the nation-state that were seriously violative of these "fundamental rights*." These include the following: (1) the nature of the transgression, abridgment, violation, termination, subversion, or abolition of the "right" or "rights" claimed; (2) the quantitative and qualitative evaluation of the violations; (3) the manner in which they were violated, the extent of the violation, the means used to accomplish it, the duration of the violation, and the frequency of their recurrence; (4) the avowed or implicit intentions of continuing these violations or their termination within a declared or foreseeable future time; (5) the issue of whether these violations were conditioned, caused, prompted or forced by conditions or necessity such as natural catastrophes, disasters, war, insurrection or other factors affecting the physical and tangible existence or viability of the nation-state that would justify or mitigate such conduct; (6) the existence of any methods or means of redress, remedies, or channels that were open or made available to the aggrieved party or group to which the relator belongs; and (7) the existence of any repressive actions taken against those who claimed grievance and pursued legal channels of remedy in the prescribed manner or who challenged the offensive public conduct in a manner deemed lawful by the common standards of the ordinary times of that nation. The factors in this category also lend themselves to objective inquiry.

The third category assumes the existence and validity of the conditions of the factors in the first and second categories, and includes factors bearing upon the conduct of the individual who violated the positive law of the state in defense of these "fundamental human rights." These include: (1) the exhaustion of all available local and international remedies, excepting risks or repression; (2) the explicit or implicit common understanding in the ordinary reasonable person (of the nation-state in question) that no redress was available in the reasonably foreseeable future and that such conduct was, if not warranted, at least excusable (exonerating or mitigating) because no other alternative existed; (3) the issue of whether the individual's conduct was proportionate or commensurate with the nature of the right or rights violated in terms of their objective significance in the common understanding of the ordinary reasonable person of the nation-state in which the conduct took place; (4) the issue of whether the individual's conduct was related only to the original wrong in a negative or vengeful way, or whether it was also intended to terminate it or to affect its redress and, thus, has a positive aspect to it; (5) the issue of whether the means used were limited to achieve these purposes, and there was no violation committed that was not necessitated by the attainment of such goals through the least harmful manner; and (6) the issue of whether the assumption of any risks created would fall on the individual perpetrator, and whether the means and tactics used would not endanger innocent persons.

This theory of ideological self-preservation is not advanced as a means to warrant or justify lawlessness or anarchy; rather, the theory is intended to relate an otherwise nebulous concept—the subject of nefarious political manipulations—to the sphere of a legally or judicially manageable theory of law. Although it is beyond the scope of this chapter to expose and discuss the ramifications of such a proposition, this proposed theory is intended to set forth a juridical framework as to what could be considered a politically motivated offense that would shield its perpetrator from the repressive powers of the state against which the violation was directed.

To discern between objective and subjective standards of evaluating the nature of the relator's conduct is not only a procedural question, but also a substantive one, because it is outcome-determinative of the issue of extraditability of the relator. Such a choice by national public policy is one that is largely determined by the overall political outlook of the state in terms of its place in the relationship between the nation-states of the world community and the ideological political alignment of the state in question. To promulgate an objective standard, however, requires the acceptance of a decision made in furtherance thereof, and would eliminate opportunities for conflicts.

2.1.7. International Crimes: The Exception to the Political Offense Exception

Offenses against the law of nations of *Delicti Jus Gentium* by their very nature affect the world community as a whole. As such, they cannot fall within the political offense exception because, even though they may be politically connected, they are in derogation of the "laws of mankind" in general and international criminal law in particular.[208]

208 *See,* e.g., M.Cherif Bassiouni, Introduction to International Criminal Law (2003); M. Cherif Bassiouni, A Draft International Criminal Code & Draft Statute for an International Criminal Tribunal 21-65 (1987) [hereinafter Bassiouni Draft Code]; 1 M. Cherif Bassiouni, International Criminal Law (Crimes) (2d ed. 1999) [hereinafter Bassiouni I ICL]. *See also* Bart B. Deschutter, La Belgique et le Droit International Pénal (1975); Henri Donnedieu de Vabres, Les Priniples Modernes du Droit Pénal International (1928); Henri Donnedieu de Vabres, Introduction a L'étude du Droit Pénal International (1922); Stefan Glaser, Droit International Pénal Conventionnel (vol. 1 1977, vol. 2 1978); Stefan Glaser, Infraction Internationale (1957); Stefan Glaser, Introduction a L'étude de Droit International Pénal (1954); Hans-Heinrich Jescheck, Die Verantwortlichkeit der Staatsor- gane Nach

The concept of crimes against "international law" is a vague and generic term intended to cover all acts proscribed by an international convention declaring the conduct specifically to be an "international crime" or requiring its parties to "prosecute or extradite." Thus, they would constitute an "exception to the exception." In other words, international crimes would be extraditable offenses without the benefit of the political offense exception.[209] International crimes should indeed be considered extraditable offenses without the benefit of the political offense exception, but in order for this position to be accepted as a rule of international law, it must be based either on conventional international criminal law, or customary international law. To date, there is only scant indication that it is recognized as a custom evidenced by the practice of states. A growing trend exists, however, toward acceptance of this position in furtherance of the preservation of a minimum world order.[210] Nevertheless, it must be emphasized that a clear definition of those international crimes falling within the doctrine of the "exception to the exception" must be set forth in conventional international criminal law. Without such clear understanding of those crimes specifically encompassed within the meaning of international criminal law, the rule cannot be effectively or uniformly applied, and consequently such a situation would be detrimental to the goals of judicial assistance and cooperation in extradition.[211] Summarizing this problem, this writer noted:

> In the application of extradition treaties to the cases of persons charged with, or convicted of crimes under municipal law it may be essential, in the exercise of the generally beneficent principle that political criminals shall not be subject to extradition to decide whether or not a crime was political. But where an offense is made by treaty a crime under international law, the principle of non-extradition of political criminals would be contrary to public policy.[212]

Volkerstrafrecht (1952); Joachin Kohler, Internationales Strafrecht (1917); Nino Levi, Diritto Penale Internazionale (1949); Jean Claude Lombois, Droit Pénal International (2d rev. ed. 1979); Friedrich Meili, Lehrbuch des Internationalen Strafrechts und Strafprozessrechts (1910); Friedrich Meili, Bartolus Als Haupt der Ersten Schule des Internationalen Strafrechs: Ein Historisches Bild (1908); Gerhard O. Mueller & Edward M. Wise, International Criminal Law (1965); Dietrich Oehler, Internationales Strafrecht (1973); Vespasian V. Pella, La Codification du Droit Pénal International (1928); Roberto Quadri, Diritto Penal Internationale (1944); Antonio Quintano Ripoles, Tratado de Derecho Penal Internacional e Internacional Penal (2 vols. 1955–1957); Maurice Travers, Le Droit Pénal International et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre (5 vols. 1920–1922); Otto Triffterer, Dogmatische Untersuchungen Zur Entwicklung Des Materillen Volkerstrafrechts Seit Nuremberg (1966); Diritto Penale Internazionale (Consiglio Superiore della Magistratura 1979). *See generally* M. Cherif Bassiouni, International Criminal Law Conventions and Their Penal Provisions (1997) [hereinafter Bassiouni, Conventions].

209 *See* Manuel R. Garcia-Mora, *Crimes against Humanity and the Principle of Non-extradition of Political Offenders*, 62 Mich. L. Rev. 927 (1964); Manuel R. Garcia-Mora, *War Crimes and the Principle of Non-extradition of Political Offenders*, 9 Wayne L. Rev. 269 (1963) [hereinafter *War Crimes*]; Jean Graven, *L'extradition des Auteurs de Crimes de Guerre et de Crimes Contre L'humanité*, 24 Annals de Droit Int'l Medical 7 (1973); Leslie C. Green, *Extradition v. Asylum for Aerial Hijackers*, 10 Isr. L. Rev. 207 (1975); Leslie C. Green, *Political Offenses, War Crimes and Extradition*, 11 Int'l & Comp. L.Q. 329 (1962); Robert G. Neumann, *Neutral States and the Extradition of War Criminals*, 45 Am. J. Int'l L. 495 (1951); Gian Domenio Pisapia, *Brevi Note in Tema di Estradizione per I Delitti di Genocidio*, 9 Rivista del Diritto Matrimoniale e Dello Stato Delle Persone 1 (1967).

210 *See, e.g.*, Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order (1961).

211 *See* A Treatise on International Criminal Law (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1973) [hereinafter Bassiouni & Nanda Treatise]. *See generally*, 2 M. Cherif Bassiouni, International Criminal Law (2d ed. 1999) [hereinafter Bassiouni, 2 ICL].

212 M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (2d ed. 1999) [hereinafter Bassiouni, Crimes against Humanity]; M. Cherif Bassiouni, *The History of the*

The concept of international crimes encompasses two sources of offensive conduct: (1) that which offends the common morality of mankind, and is recognized as offensive to mankind at large; and (2) that which by treaty has been recognized as an international crime. Only the latter can be recognized as falling within the "exception to the exception."

The process of positing international criminal law and attempting to codify it must be credited to the United Nations, even though certain international crimes, such as piracy and war crimes, long predated the United Nations' efforts. On November 21, 1947, the General Assembly established the International Law Commission as a permanent body, and charged it with "the promotion of the progressive development of international law and its codification."[213] In another resolution adopted on the same day, the Commission was specifically directed to:

> (a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the tribunal, and
>
> (b) Prepare a draft code of offenses against the peace and security of mankind indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.[214]

In its report of 1950, the International Law Commission set forth the various principles of international law as recognized in the Charters of the Nuremberg and Tokyo war crimes trials, and in the judgments of those tribunals.[215] In 1954, the Commission formulated the Draft Code of Offenses against the Peace and Security of Mankind.[216]

Among the considerations underlying the principles of international criminal responsibility is the belief that duties may be imposed on individuals by international law without any interposition of municipal law, because, as Justice Robert Jackson said at Nuremberg in his capacity as chief prosecutor: "crimes against international law are committed by men, not by abstract entities."[217] Only by punishing individuals guilty of an international crime independently of the law of any particular country can the peace and security of mankind be preserved. This belief implies that individuals have international duties that transcend national obligations of obedience imposed by individual states, and places a duty upon each state to prosecute or surrender for prosecution such offenders. This principle was not always successfully put to the test. A case in point is that of Kaiser Wilhelm II and other German officials who, under Articles 227 and 228 of the Treaty of Versailles (1919),[218] were to be prosecuted for an "offense against international law, morality, and the sanctity of treaties." The kaiser, who sought refuge in the Netherlands, was not surrendered to the Allies. The Dutch government refused his surrender on the grounds that it had a tradition of granting asylum to those "vanquished in

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Draft Code of Crimes against the Peace and the Security of Mankind, 11 Nouvelles Études Pénales 1 (Ass'n Int'l de Droit Pénal 1993); D.H.N. Johnson, *The Draft Code of Offenses against the Peace and Security of Mankind*, 4 Int'l & Comp. L.Q. 445, 456–457 (1955).

213 G.A. Res. 174, U.N. Doc. A/519, at 105 (1947). The latest draft is the 1991 Draft Code of the Crimes Against the Peace and Security of Mankind (Report of the International Law Commission, 43rd. Sess., Apr. 29–July 19, 1991, 46th Sess., Supp. (No. 10), A/46/10), *cited in* Association Internationale de Droit Pénal, Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against Peace and Security of Mankind (M. Cherif Bassiouni ed., 1993). *See also* Bassiouni Draft Code, *supra* note 205; Bassiouni, I ICL, *supra* note 205; Bassiouni, Conventions, *supra* note 208.

214 G.A. Res. 177, U.N. GAOR, 2d Sess., U.N. Doc. A/519, at 111–112 (1947). *See also supra* note 213.

215 U.N. GAOR, 5th Sess., Supp. 12, at 11–14, U.N. Doc. A/1316 (1950).

216 U.N. GAOR, 9th Sess., Supp. No. 9, at 11–12, U.N. Doc. A/2693 (1954). *See also* Johnson, *supra* note 212.

217 1 Trials of the Major War Criminals before the International Military Tribunal 223 (1947).

218 *See* 13 Am. J. Int'l L. 151 (Supp. 1919) (setting forth the text of the treaty).

international conflict."[219] The Dutch government also refused on the grounds of the political offense exception, and no such exception was found applicable because the crimes charged were of an international character. It is significant to note, however, that whenever the international crime does not contain elements that could be characterized as political (such as in the case of aggression,[220] and even in the case of war crimes[221] and crimes against humanity[222]), the world community has found itself cooperating in matters such as suppression of slavery and slave trade,[223] illicit traffic of narcotics,[224] counterfeiting,[225] piracy,[226] and aircraft hijacking.[227]

The following is a catalog of twenty-eight recognized international crimes, each of which should, therefore, constitute an exclusion from the political offense exception: aggression;[228] genocide;[229] crimes against humanity;[230] war crimes;[231] crimes against United Nations and associated

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219 *See* James W. Garner, *Punishment of Offenders against the Laws and Customs of War*, 14 Am. J. Int'l L. 70 (1920); Quincy Wright, *The Legal Liability of the Kaiser*, 13 Am. Pol. Sci. Rev. 120 (1919).

220 For a summary of its development, see Bassiouni & Nanda Treatise, *supra* note 211, at ch. 3; Julius Stone, Aggression and World Order (1958).

221 *See* Garcia-Mora, *Crimes against Humanity*, *supra* note 209. *See also* 12 Dep't State Bull. 155, 160 (1945).

222 *See* M. Cherif Bassiouni, *International Law and the Holocaust*, 9 Cal. W. Int'l L.J. 201 (1979); Bassiouni, Crimes against Humanity, *supra* note 212.

223 M. Cherif Bassiouni, *Enslavement as International Crime*, 23 N.Y.U. J. Int'l L. & Pol. 445 (1991). *See* Ved P. Nanda & M. Cherif Bassiouni, *Slavery and Slave Trade: Steps Toward Its Eradication*, 12 Santa Clara L. Rev. 424 (1972).

224 M. Cherif Bassiouni, *The International Narcotics Control System: A Proposal*, 46 St. John's L. Rev. 713 (1972).

225 Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1920. *See also* 4 Manley O. Hudson, International Legislation 2692–2705 (1931).

226 *See* Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (*entered into force* Dec. 4, 1969). *See also* 4 Whiteman Digest, *supra* note 18, at 657.

227 *See* 1958 Geneva Convention, *supra* note 226, art. 15; Tokyo Aviation Convention, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (*entered into force* Dec. 4, 1969); Hague Hijacking Convention, Dec. 16, 1970, 22 U.S.T. 1641 (*entered into force* Oct. 14, 1971). *See also* 4 Whiteman Digest, *supra* note 18, at 657–659; Alona E. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 Am. J. Int'l L. 695 (1969); Arthur I. Hirsch & David Otis Fuller, *Aircraft Piracy and Extradition*, 16 N.Y.L.F. 392 (1970).

228 G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31 at 142, U.N. Doc. A/9631 (1974). *See also* Benjamin B. Ferencz, Defining International Aggression (2 vols. 1975); M. Cherif Bassiouni, *A Definition of Aggression in International Law: The Crime against Peace*, *in* 1 Bassiouni & Nanda Treatise, *supra* note 211, at 159.

229 The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Article III states that genocide shall not be considered as a political crime for the purpose of extradition.

230 Charter of the International Military Tribunal, art. 6, annexed to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], August 8, 1945, 59 Stat. 1544, 8 U.N.T.S. 279, *reprinted in* 3 Bevans 1238 (*entered into force* August 8, 1945; *entered into force* with respect to the United States August 8, 1945). *See also* Bassiouni, Crimes against Humanity, *supra* note 212.

231 *See* Convention Respecting the Laws and Customs of War on Land [Second Hague, IV] October 18, 1907, 36 Stat. 2277, 1 Bevans 631 (*entered into force* January 26, 1910; *entered into force* with respect to the United States January 26, 1910); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* August 12, 1949; *entered into force* with respect to the United States February 2, 1956); Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, August 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62 (*entered into force* October 21, 1950; *entered into force* with respect to the United States February 2, 1956); Convention for the Amelioration of the Condition of Wounded, Sick

personnel; unlawful possession or use or emplacement of weapons;[232] theft of nuclear materials;[233] mercenarism;[234] apartheid;[235] slavery and slave-related practices;[236] torture and other forms of cruel, inhuman, or degrading treatment or punishment;[237] unlawful human experimentation;[238] piracy;[239] aircraft hijacking and unlawful acts against international air safety;[240] unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas;[241] threat

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and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, art. 50, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116 (*entered into force* October 21, 1950; *entered into force* with respect to the United States February 2, 1956); Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* October 21, 1950; *entered into force* with respect to the United States February 2, 1956); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts [1977 Protocol I] of June 8, 1977, U.N. Doc. A/32/144 (1977) annex 1, reprinted in 16 I.L.M. 1391 (*entered into force* December 7, 1977); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, [1977 Protocol II], U.N.Doc. A/32/144 (1977) Annex II, reprinted in 16 I.L.M. 1391 (*entered into force* December 7, 1978). *See also* The Laws of Armed Conflicts (Dietrich Schindler et al. eds., 1988); Howard S. Levie, Terrorism in War—The Law of War Crimes (1993); The Law of War (Leon Friedman ed., 1972).

232 *See, e.g.,* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, October 10, 1980, U.N. Doc. A/Conf. 95/15 (1980), *reprinted in* 19 I.L.M. 1523. *See also* Schindler, *supra* note 231, at 101–201.

233 Convention on the Physical Protection of Nuclear Material, March 3, 1980, *reprinted in* 18 I.L.M. 1419 (*entered into force* February 8, 1987).

234 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1990, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (December 11, 1989).

235 International Convention on the Prevention and Suppression of the Crime of Apartheid, November 30, 1973, G.A. Res. 3068, U.N. GAOR, 28th. Sess., U.N. Doc. A/9030, at 42 (1973), *reprinted in* 13 I.L.M. 50 (*entered into force* July 18, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (*entered into force* January 4, 1969). *See also* M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 Hofstra L. Rev. 523 (1981) (embodying this writer's report to the United Nations Commission on Human Rights, E/CN.4/AC/22CRP.19/Rev. 1 (Dec. 10, 1980)).

236 *See* Bassiouni, Conventions, *supra* note 208, at 419–512. *See also* Bassiouni, *supra* note 223.

237 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 7, 8; G.A. Res. 46, U.N. GOAR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (*entered into force* June 26, 1987; *entered into force* with respect to the United States November 20, 1994). *See also* M. Cherif Bassiouni, *An Appraisal of Torture in International Law and Practice*, 48 Rev. Int'le de Droit Pénal, nos. 3–4 (1977).

238 M. Cherif Bassiouni, *An Appraisal of Human Experimentation in International Law and Practice: The Need for Regulation of Human Experimentation*, 72 J. Crim. L. & Criminology 1597–1666 (1981).

239 Geneva Convention on the High Seas, *supra* note 226, 13 U.S.T. 2312; Convention on the Law of the Sea (Montego Bay Convention), December 10, 1982, U.N.Doc. A/CONF.62/122, 516 U.N.T.S. 205, *reprinted in* 21 I.L.M. 1261 (*entered into force* November 16, 1994).

240 Tokyo Aviation Convention, *supra* note 227, 20 U.S.T. 2941, *reprinted in* 2 I.L.M. 1042; Hague Hijacking Convention, *supra* note 227, 22 U.S.T. 1641, *reprinted in* 10 I.L.M. 133; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177, *reprinted in* 10 I.L.M. 1151 (*entered into force* January 26, 1973); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention done on September 23, 1971, adopted on February 24, 1988, S. Treaty Documents 100–119, *reprinted in* 27 I.L.M. 627 (*entered into force* November 18, 1994).

241 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, arts. 10, 11, March 10, 1988, I.M.O. Doc. SUA/CON/15 (1988), *reprinted in* 27 I.L.M. 672 (*entered into force* March 1, 1992); Protocol for the Supression of Unlawful Acts Against the Safety of Fixed

and use of force against internationally protected persons;[242] taking of civilian hostages;[243] unlawful use of the mail;[244] unlawful traffic in drugs and related drug offenses;[245] destruction and/or theft of national treasures;[246] unlawful acts against certain internationally protected elements of environment;[247] international traffic in obscene materials;[248] falsification and counterfeiting;[249] unlawful interference with international submarine cables;[250] bribery of foreign public officials;[251] financing terrorism;[252] and organized crimes.[253]

Platforms Located on the Continental Shelf, March 10, 1988, I.M.O. Doc. SUA/CON/16/Rev.1 (1988), *reprinted in* 27 I.L.M. 685 (*entered into force* March 1, 1992).

242 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (Inter-American), arts.3,7, February 2, 1971, O.A.S. Doc. A6/doc.88 rev.1, corr. 1, 27 U.S.T. 3949, *reprinted in* 10 I.L.M. 255 (*entered into force* October 16, 1973; *entered into force* with respect to the United States October 20, 1976); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, arts. 7,8, Dec. 28, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167, *reprinted in* 13 I.L.M. 41 (*entered into force* February 20, 1977).

243 International Convention Against the Taking of Hostages, art. 10, December 17, 1979, T.I.A.S. No. 11081, U.N. G.A. Res.34/145 (XXXIV), 34 U.N. GAOR Supp. (No.46) at 245, U.N.Doc. A/34/46 (1979), *reprinted in* 18 I.L.M. 1456 (*entered into force* June 3, 1983; *entered into force* with respect to the United States January 6, 1985); European Convention on the Supression of Terrorism (European Terrorism Convention), arts. 1, 2, 3, 4, January 27, 1977, Europ. T.S. No.90, *reprinted in* 15 I.L.M. 1272 (*entered into force* August 4, 1978).

244 *See* Bassiouni, Conventions, *supra* note 208, at 311.

245 Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 (*entered into force* December 13, 1964); Convention on Psychotropic Substances, February 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 175, *reprinted in* 10 I.L.M. 261 (*entered into force* August 16, 1976); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, December 20, 1988, U.N. Doc. E/Conf.82/15 Corr.1 and Corr.2, *reprinted in* 28 I.L.M. 493 (*entered into force* November 11, 1990).

246 Convention on the Protection of the Archaelogical, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador), art. 14, June 16, 1976, O.A.S. G.A. Res.210 (VI-0/76) Organization of American States, I Proceedings of the General Assembly, 6th Regular Session, Santiago, 4–18th June 1976, *reprinted in* 15 I.L.M. 1350; Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property (UNESCO Cultural Convention), November 14, 1970, 823 U.N.T.S. 231, *reprinted in* 10 I.L.M. 289 (*entered into force* April 24, 1972). *See also* Hague Convention (1907) and Geneva Conventions (1949), *supra* note 231.

247 *See* Bassiouni, Conventions, *supra* note 208.

248 Agreement for the Suppression of the Circulation of Obscene Publications of May 4, 1919 and Amended by Protocol of May 4, 1949, 47 U.N.T.S. 159 (*entered into force* March 1, 1950).

249 International Convention for the Suppression of Counterfeiting Currency, art.10, April 20, 1929, 112 L.N.T.S. 371, *reprinted in* 4 Hudson 2692 (*entered into force* February 22, 1931); and its optional Protocol of April 20, 1929, 112 L.N.T.S. 395 (*entered into force* February 30, 1930).

250 Convention for the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, in 11G.F. de Martens Nouveau Recueil Général de traités (ser.2) 281 (Gottingue, Dieterich 1841) (*entered into forc*e May 1, 1888, *entered into force* with respect to the United States May 1, 1888). *See also* Montego Bay Convention, *supra* note 239.

251 International Agreement on Illicit Payments, (Economic and Social Council Committee) art.11, May 25, 1979, U.N.Doc.E/1979/104, *reprinted in* 18 I.L.M. 1025.

252 International Convention for the Suppression of Financing Terrorism, G.A. Res. 54/109 (Dec. 9, 1999).

253 Convention Against Transnational Organized Crime; Annex I: Convention Against Transnational Organized Crime; Annex II: Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children; Annex III: Protocol Against the Smuggling of Migrants by Land, Sea and Air, G.A. Res. 24, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Vol. I.) (2001) (*entered into force* Sept. 29, 2003).

Of those, the following contain the duty to extradite: genocide; crimes against humanity; war crimes; crimes against United Nations and associated personnel; theft of nuclear materials; apartheid; mercenarism; slavery and slave-related practices; torture; piracy; aircraft hijacking and unlawful acts against international air safety; unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; threat and use of force against internationally protected persons; taking of civilian hostages; unlawful traffic in drugs and related drug offenses; destruction and/or theft of national treasures; falsification; and counterfeiting.

Only some of these instruments contain a specific requirement that extradition be granted.[254] In all these cases, however, the obligation to extradite arises by multilateral treaty, binding only upon its signatories (subject to proper ratification) and does not constitute a self-executing obligation but must be embodied in bilateral extradition treaties. In the case of all other international crimes, the obligation to extradite arises under customary international law and general principles of international law. But these two sources are somewhat challenged by those states that will not recognize an obligation to extradite outside their treaties,[255] as well as by other states for different reasons.[256] There is a question as to whether violations of minimum standards of human rights have ripened into a crime under international law, but so far there has been no such recognition either by treaty or customary international law.[257] Consequently, such violations cannot be construed, as yet, as international crimes. Similarly, proposals covering terrorism and conscription of minors, which have often been discussed at international conferences, have not been adopted and therefore are not included in this catalog of international crimes. However, the United Nations Convention on the Rights of the Child has an optional protocol regarding the involvement of children in armed conflict, which extends special protections to persons under eighteen years of age and is intended to limit their participation in hostilities and prohibit their forced conscription into armed conflicts.[258]

The issue of international crimes was raised in the *Artukovic* case, in which the United States Court of Appeals stated:

> We now consider the question whether because the offenses are also called "war crimes" they have lost their character as "political offenses" within the meaning of the treaty. Appellant argues

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254 *See supra* notes 228–252. *See also* Ch. I, Sec. 2. For examples of treaties limiting the reach of the political offense exception to conform to multinational agreements, see Costa Rican Extradition Treaty, art. 4(2)(b), *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Peruvian Extradition Treaty, art. IV(1)–(3), *entered into force* Aug. 25, 2003, S. TREATY DOC. 107-6; Korean Extradition Treaty, art. 4(2)(b), *entered into force* Dec. 20, 1999, S. TREATY DOC. 106-2, TIAS 12962; Indian Extradition Treaty, art.4(2), *entered into force* July 21, 1999, S. TREATY DOC. 105-30, TIAS 12873; Hungarian Extradition Treaty, art. 4(2), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5 ("For purposes of this Treaty, the following offenses shall not be considered to be political offenses…an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution").

255 *See* Ch. I.

256 In the case of neutral states, for example, see Neumann, *supra* note 209.

257 For a survey of international crimes including certain violations of human rights, see 1 Bassiouni & Nanda Treatise, *supra* note 211. *See also* M. Cherif Bassiouni, *The "Human Rights Program:" The Veneer of Civilization Thickens*, 21 DePaul L. Rev. 271 (1971). Future developments will depend largely on what the late Professor W. Friedmann wrote in his article on changes that must be made to "material" sources of international law. Wolfgang Friedmann, *The Use of "General Principles" in the Development of International Law*, 57 Am. J. Int'l L. 279 (1963). *See generally* Bin Cheng, General Principles of Law as Applied by International Court and Tribunals (2d ed. 1987).

258 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222. This optional protocol entered into force February 12, 2002, and has 128 signatories and 142 parties. *See* United Nations Treaty

> that "war crimes" are crimes for which extradition is to be granted within the meaning of international acts to which the United States is a party. It is argued by recent legal writers that the "barbarity and atrocity of the crimes as in crimes against the law of war and crimes against humanity" when committed weigh so heavily upon the common crime element that the political act has practically ceased to exist and, therefore, that the extradition of the offender is the only justifiable course of action.
>
> Appellant in essence argues that by virtue of resolutions taken in 1946 and 1947 by the United Nations General Assembly as to the surrender of alleged war criminals, it is incumbent on this Court to hold that Artukovic is charged with an offense which is extraditable.
>
> We have examined the various United Nations Resolutions and their background and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions. Perhaps changes should be made as to such treaties . . . .[259]

On appeal, the Supreme Court vacated the judgment and remanded the case to the district court,[260] but in a clear and uncompromising decision, the district court declined "to go into the question of extradition for so-called war crimes,"[261] and emphatically held that Artukovic's offenses were of a political character, and thus denied his extradition.[262] The district court apparently saw a close connection between the common crime with which Artukovic was charged and his political activity. As one author noted:

> A case comparable to the *Artukovic* case is that of *Jan Durcansky*, recently decided by the Buenos Aires Court of First Instance, and involving a request from the Czechoslovakian Government for the surrender of a person accused of having participated in mass murders of civilians in Czechoslovakia during the period from November, 1944 to the end of the war. In refusing his extradition, the Court said that Durcansky was protected by extinctive prescription according to Article 16 of the Argentine Penal Code. Though apparently the General Assembly's resolutions urging the members of the United Nations to surrender war criminals were before the Argentine court in the same manner as they were before the Court of Appeals in the *Artukovic* case, the result was still the same since, admittedly, such resolutions are too tenuous to have any legally binding force.
>
> Apart from the countries above mentioned, it has already been seen that Great Britain and Australia have also refused to extradite war criminals upon essentially similar grounds, while Italy has based its refusal to surrender on the well established principle that a State is not required to extradite its own nationals.[263]

Collections, *available at:* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited Sept. 20, 2011).

259 Karadzole v. Artukovic, 247 F.2d 198, 204–205 (9th Cir. 1957).

260 355 U.S. 393 (1958).

261 United States v. Artukovic, 170 F. Supp. 383, 392 (S.D. Cal. 1959). *See also* Bozilov v. Seifert, 967 F.2d 353, 355 (9th Cir. 1992), *amended by* 983 F.2d 140 (9th Cir. 1993).

262 *Artukovic*, 170 F. Supp. at 393.

263 Garcia-Mora, *War Crimes*, *supra* note 209. Garcia-Mora further states:

> [T]hat the reluctance to extradite war criminals is almost universal among the States is excellently illustrated by the Brazilian case *In re Kahrs* et al., [15 I.L.R. 301 (STF 1948) (Braz.)] involving the request for the extradition of certain Norwegian nationals accused of having been members of an organization guilty of war crimes. In denying their extradition, the Brazilian Supreme Court firmly held that "The accused . . . are charged with genuinely political crimes. They are being prosecuted for their political ideas, such as supporting a nationalist organization or sympathizing with the ideas propagated by the same . . . There arises a question of crimes distinctly political in nature when Norwegian law punishes expressions of thought, opinion, or related matters." [Id. at 301–02.] This decision is quite consistent with the previous Denmark (Collaboration with the Enemy) Case, [14 I.L.R. 146 (STF 1947) (Braz.)] involving the extradition of certain Danish nationals convicted in

Yugoslavia's efforts to extradite Artukovic were renewed in 1985. This time the extradition request was granted by the district court,[264] and affirmed by the Ninth Circuit.[265] The Ninth Circuit found that the earlier classification of his offenses as being political had no bearing on the renewed extradition request[266] and so made its own determination that the crimes with which Artukovic was charged were beyond the scope of the political offense exception.

On other grounds, the United States refused extradition to the Soviet Union of a Lithuanian national to whom it had granted asylum. The relator had been convicted in absentia by a Russian tribunal for the mass murder of some 50,000 civilians while in command of a German punitive battalion in 1941. In rejecting the Soviet request, the Department of State vigorously asserted that "a person accused of war time mass murders might not get a trial in the Soviet Union that would be considered fair according to United States standards."[267]

In another case, Israel's request for the extradition of John Demjanjuk, accused of being a Nazi death camp guard known as "Ivan the Terrible," was granted on the basis of the theory of universality of jurisdiction in *In re Demjanjuk.*[268] The court, however, held Israel's exercise

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> Denmark of collaborating with the German occupation forces. In refusing their extradition, the Brazilian Supreme Court succinctly 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." [Id. at 146–47.] The difference between these two Brazilian cases and the Artukovic case is radically important, for while the latter involved the commission of atrocities allegedly in the pursuit of a political end, the Brazilian cases, on the other hand, dealt with the expression of unpopular political opinion and the crime of treason, both of which have been generally regarded as purely political offenses. Thus, the reason for giving asylum to the offenders in the Brazilian cases appears fairly plain.
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> Id. at 289–290.

264 628 F. Supp. 1370 (C.D. Cal. 1986). In 1985, a class action by Jewish persons who had been citizens of Yugoslavia while Artukovic was in the government there during WWII was dismissed. The suit sought damages from Artukovic for his alleged involvement in deprivations of life and property. The district court dismissed the action on the grounds that the plaintiffs had no private right of action, and that thirty-five years was beyond the time in which the plaintiffs should have brought their claims. Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985).

265 784 F.2d 1354 (9th Cir. 1986).

266 *Id.* at 1356. Artukovic was extradited in February 1986. In May of that year, he was convicted of the murders of thousands of civilians and prisoners of war during WWII and was sentenced to death. In September 1986, the Yugoslav Federal Court upheld the death sentence for the eighty-six–year-old Artukovic. *See Yugoslavia Upholds Nazi's Death Penalty*, Chi. Trib., Sept. 3, 1986, at A6. *See also* Bozilov v. Seifert, 967 F. 2d 353 (9th Cir. 1992), *amended by* 983 F. 2d 140 (9th Cir. 1993).

267 N.Y. Times, Sept. 17, 1962, at 12. *See generally* Hyde, *supra* note 84. In the note of Secretary of State Lansing to the governor of Texas explaining the refusal to extradite General Huertas to Mexico, the Department of State rejected a demand for his extradition because of the probable doubt as to the political character of the crimes charged, the lack of orderly machinery of justice by which a fair trial could be expected, and the possibility that accomplices in Mexico may take this means of obtaining the release and return of their leader. 1915 Foreign Relations of the United States 834. This position is difficult to reconcile with the government's position in other cases on the rule of non-inquiry. *See* Ch. VII, Sec. 8.

268 *In re Demjanjuk*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). In earlier opinions issued in the course of the extradition proceedings, the district court considered whether an extradition request alleging war crimes had to be heard by a military tribunal, and the credibility of the evidence relied upon by Israel to establish that Demjanjuk was "Ivan the Terrible." *In re* Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984). The court concluded that a military tribunal was unnecessary and then set out the parameters of the issues to be decided, including whether the authority existed to extradite Demjanjuk to Israel when the alleged crimes had not occurred there, and whether the alleged crimes were political offenses. *Id. But see* United States v. Abello-Silva, 948 F.2d

of jurisdiction to be consistent with Israel's municipal law[269] and international law. The court found that international law did not prohibit the exercise of a state's jurisdiction over noncitizens or acts committed outside its territory, and that international law provided that punishment for certain offenses could be undertaken by any state where the offenses had been the subject of "universal condemnation and [a] general interest in cooperating to suppress [such offenses], as reflected in widely-accepted international agreements and resolutions of international organizations."[270]

Another case that attracted international attention was that of Klaus Barbie, the "Butcher of Lyon." Barbie's deportation from Bolivia, where he had lived for thirty years as Klaus Altman, was sought by both France and Germany. Rather than extradite him, however, Bolivia expelled him to French Guiana for violating immigration regulations, where he was immediately seized by French authorities and flown to France.[271] While being prosecuted in Lyon

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1168 (10th Cir. 1991); Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989); United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988).

269 Israel enacted the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, in 1950, making crimes against humanity, crimes against the Jewish people, and war crimes punishable in Israel.

270 *In re* Demjanjuk, 612 F. Supp. 544, 555–556 (N.D. Ohio 1985). Demjanjuk sought habeas corpus relief, which was denied. Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). *See In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 17, 1998); *In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999); United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997). *See also* Demjanjuk v. Meese, 784 F.2d 1114 (D.C. Cir. 1986). Demjanjuk sought and was denied a stay of execution of an extradition warrant under the International Convention on the Prevention and Punishment of the Crime of Genocide because, inter alia, petitioner was extradited for murder, not genocide. Demjanjuk was extradited to Israel in February 1986, and his trial there began in January 1987. *See* Stephen Broder, *"Ivan the Terrible" Case Isn't Open and Shut, Israelis Admit,* Chi. Trib., Sept. 28, 1986, at A4. Demjanjuk was convicted in 1988 and while his final appeal was being argued before the Israeli Supreme Court, the Cincinnati court ordered the case reopened. Mark Hansen, *Extradition Reopened: Justice Denies It Withheld Evidence about Ivan the Terrible*, ABA J., Sept. 1992, at 33. A subsequent ten-month inquiry by U.S. District Judge Thomas A. Wiseman, Jr. unearthed evidence that suggests that John Demjanjuk is not the murderous Ivan of the Treblinka death camp. In Jerusalem, the Justice Ministry said that Judge Wiseman's report was "irrelevant" to the Israeli case and prosecutors criticized the evidentiary value of the statements. David Johnston, *Doubt Cast on Identification of Man as Nazi Guard "Ivan,"* N.Y. Times, July 1, 1993.

> The Cincinnati court's action was unique in at least two respects. No appeals court has ever reopened an extradition case on its own motion. And no extradition case has ever been reopened on the basis of news accounts and other evidence that is not part of the record . . . By reopening the case, the court also has raised a number of complex legal questions involving jurisdiction, the separation of powers and other matters of international law and diplomacy, experts say . . . . If the appeals court were to decide that Demjanjuk should not have been extradited, the U.S. could ask Israel to send him back, leaving the Israelis free to file a new extradition request for him. But if the Israelis refused, experts say that a recent U.S. Supreme Court ruling, U.S. v. Alvarez-Machain, could prove instructive. In Alvarez-Machain, the Court held that a Mexican doctor who was kidnapped and brought to the United States could be tried here for the torture and murder of a Drug Enforcement Administration agent. The Supreme Court did not find *the* abduction precluded U.S. jurisdiction, but rather upheld the *finding of jurisdiction because the treaty did not explicitly prohibit kidnapping.*

Hansen,*supra* at 33–34. For subsequent developments concerning Demjanjuk, see Ch. IXI, Sec. 13 & Ch. XI, Sec. 2 on Prosecutorial Misconduct. Demjanjuk was ultimately extradited to Germany where he was convicted of war crimes and sentenced to five years in prison. *See* Jack Ewing & Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, N.Y. Times, May 12, 2011.

271 *See Bolivia Expels Fugitive Nazi Barbie*, Chi. Trib.., Feb. 5, 1983, at A3; *"Butcher of Lyon" Awaits Trial*, Chi. Trib., Feb. 6, 1983, at A3; *France to Retry Gestapo Murderer*, Chi. Trib., Feb. 7, 1983, at A3.

for crimes against humanity, Barbie made a procedural objection to the court's jurisdiction and argued for the applicability of the statute of limitations. However, the Cour de Cassation found that the exercise of jurisdiction was appropriate, that crimes against humanity are not subject to any statute of limitations, and that the procedure followed by the Lyon court was in accordance with both French and international law.[272]

In the 1980s, three states, Australia, Canada, and the United Kingdom, enacted enabling statutes to prosecute war criminals based on a modified version of universal jurisdiction couched in terms of extended and retrospective national criminal jurisdiction.[273] The Australian War Crimes Amendment Act of 1988 allows for the prosecution, in national courts, of war criminals whose crimes were committed between September 1, 1939, and May 8, 1945.[274] Although limited in time, the statute is based upon an application of universal jurisdiction, as it applies to crimes committed outside of Australia and by and against individuals with whom Australia had only a tenuous connection at the time of the crime.[275]

The Canadian legislation is not temporally limited as is that of Australia. The 1987 Act to amend the Criminal Code provides that any person who commits a war crime or a crime against humanity "shall be deemed to have committ[ed] that [crime] in Canada at the time of the act or omission, if the crime, if committed in Canada would constitute an offence against the laws of Canada in force at [that] time."[276] In 1989, Canada made its first prosecution for "crimes against humanity," *Regina v. Finta*,[277] under the 1987 statute that incorporates this international crime into Canadian criminal law. This statute, which is retrospective but not retroactive, requires that "crimes against humanity" be established under international law at the time the alleged crime was committed and that the specific crimes charged also constitute a violation of Canadian criminal law when the alleged criminal conduct occurred. There are also other jurisdictional requirements needed to satisfy the Canadian law.[278]

In *Finta*, a former Hungarian Gendarmerie Captain named Imre Finta was charged, inter alia, with the deportation of 8,617 Jews from Szeged, Hungary, to Auschwitz, Poland, and Strasshof, Austria, in June 1944 as a part of Nazi Germany's plan to exterminate Jews.[279] No one knows how many of the deportees died in transit, in that death camp, or in other slave-labor camps. Finta was acquitted on May 25, 1990, and the judgment was upheld by the Ontario

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272 Judgment of May 7–8, 1986, GP Nos. 127, 128, at 4 (Cass. crim. Dec. 20, 1985) (Fr.). On July 3, 1987, he was convicted of crimes against humanity and sentenced to life imprisonment. Barbie died in 1991. *Nazi Sympathizer in France Gunned Down; Victim Persecuted Thousands of Jews*, Chi. Trib., June 9, 1993, at 6; Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L. 32 (1994). *See* Bassiouni, Crimes against Humanity, *supra* note 212, at 431.

273 Bassiouni, *supra* note 212, at 511.

274 War Crimes Amendment Act 1988, § 9, 1989 Austl. Acts 926; 119 Parl. Deb., S. 497 (1987); 157 Parl. Deb., H.R. 1613 (1987), *cited in* Bassiouni, *supra* note 212, at 512.

275 Bassiouni, *supra* note 212, at 512. *See* Maryann Stenberg, *Australia: Trial Opens for Pensioner Accused of War Crimes*, The Age (Melbourne), *source* Reuter Textline, Mar. 19, 1993 (stating: "Ivan Timofeyevich Polyukhovich, 77, is charged with two counts relating to his alleged involvement in the 1942 mass annihilation of European Jews. This case is the first under the War Crimes Amendment Act of 1988.").

276 Bassiouni, *supra* note 212, at 512. As of this writing, the United Kingdom has not formally charged any war criminals, although in 1991, investigators estimated that there would be enough evidence to put the first of more than seventy suspected Nazi war criminals living in Britain on trial by the next year. Alastair Percival, *War Criminal Trials a Race against Time*, Press Association Limited Press Association Newsfile, May 10, 1991.

277 [1989] 61 D.L.R. 4th 85 (Ontario High Court of Justice) (Can.).

278 Bassiouni, *supra* note 212, at ix.

279 *Id.*

Court of Appeal in 1992.[280] The Federal Government later appealed to the Supreme Court of Canada, which upheld the lower court's decision.[281] This writer was asked by the Canadian Department of Justice to serve as its legal expert, and reviewing such horrors, even forty-five years later, was deeply moving. Because the facts in this case occurred in 1944, this writer could not rely on the Law of the Charter for precedent. Thus, working on the *Finta* case was its own small "Nuremberg"—a daunting task.[282]

Trying to establish that "crimes against humanity" existed as an international crime in 1944 left this writer with the conclusion that the legal validity and viability of "crimes against humanity" still needs to be made, Nuremberg and Tokyo notwithstanding, or perhaps despite these precedents. This conclusion leads one to the belief that nothing short of a new comprehensive convention can resolve the problems left to us by the Nuremberg and Tokyo legacy.[283]

As described by this writer in *Crimes against Humanity: Historical Evolution and Contemporary Application*:

> Post-Charter legal developments apply to the substance of CAH [Crimes Against Humanity] as well as to procedural or enforcement aspects related to CAH. There are also other substantive proscriptive norms that encompass the same protected interests as CAH, which are embodied in different international instruments. They are: genocide, war crimes, torture, slavery and slave-related practices, and some aspects of terror-violence.
>
> In the course of CAH's historical evolution from 1945 to 1998, there have been slight variations in the succeeding formulations of CAH. The International Law Commission (ILC) alone had four different formulations. The first was in 1950, when it codified the Nuremberg Principles, then it varied from that text in its 1954 Draft Code of Offences against the Peace and Security of Mankind, then again it set aside this formulation in favor of a new text adopted in 1991, and lastly that text was abandoned in 1996 in favor of another one. In 1993 and 1994 respectively, the Security Council established two *ad hoc* international criminal tribunals, the ICTY and ICTR, and their respective statutes had different definitions of CAH. In 1998 the Rome Statute of the ICC was adopted, and it too had a different formulation than all other definitions that preceded it.[284]

As described above, crimes against humanity were prominently included in the statues of the International Criminal Tribunal for the former Yugoslavia (ICTY)[285] and the International Criminal Tribunal for Rwanda (ICTR),[286] which follow the formulations found in the statutes

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280 Regina v. Finta, [1992] 92 D.L.R. 4th 1, (Ontario Ct. App.) (Can.).

281 [1994] 1 S.C.R. 701 (Supreme Court of Canada).

282 Bassiouni, *supra* note 212, at ix. *See also* J.G. Castel & Sharon Williams, *The Extradition of Canadian Citizens and Sections I and 6(I) of the Canadian Charter of Rights and Freedoms*, 1987 Can. Y.B. Int'l L. 263.

283 Bassiouni, *supra* note 212, at ix. *See also* M. Cherif Bassiouni, *Revisiting the Architecture of Crimes against Humanity, in* Forging a Convention for Crimes against Humanity 43 (Leila N. Sadat ed., 2011); M. Cherif Bassiouni, *Crimes against Humanity: The Case for a Specialized Convention*, 9 Wash U. Global Stud. L. Rev. 401–593 (2011).

284 M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application 167–168 (2011). *See also id.* at 171–183.

285 The International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993).

286 Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994).

of the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo.[287] Article 5 of the ICTY statute provides that:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts.

Article 3 of the ICTR statute criminalizes crimes against humanity using the same language.

The Rome Statute of the International Criminal Court has equally criminalized crimes against humanity in Article 7,[288] although with a slightly longer list of crimes and expansive descriptions:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

On the basis of the incorporation of crimes against humanity into the criminal statutes of the ICTY, ICTR, and ICC, as well as the mixed-model tribunals in Sierra Leone, Cambodia, and

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287 *See also* Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application, *supra* note 284, at 183–189.

288 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

Lebanon, most prominently, and the convictions based on these provisions, have firmly established crimes against humanity as an international crime under customary international law, independent of the IMT and IMTFE.

Despite the evolution of crimes against humanity and other substantive principles of international criminal law, their application in domestic courts has been less universal, although this is slowly changing. Only very few extraditions have been requested or granted for an international crime, other than for war crimes and crimes against humanity arising out of WWII.

The most prominent of these is the *Habré* case, in which Belgium requested the extradition of the former Chadian president Hissène Habré from Senegal for violations of the CAT.[289] In that case Belgium sought Habré's extradition from Senegal, which refused his surrender, and after more than a decade the case was brought before the International Court of Justice (ICJ), which ruled in 2012 that Senegal was in violation of its obligations under the CAT to prosecute or extradite.[290] In the aftermath of the ruling, Senegal has reformed its criminal code and worked with the African Union and the Economic Community of West African States to establish an internationalized tribunal in Senegal to prosecute Habré, with proceedings hopefully commencing in 2013.

Another landmark case involved the issuing of a Belgian arrest warrant for Abdoulaye Yerodia Ndombasi,[291] the former acting Minister of Foreign Affairs of the Democratic Republic of the Congo, for incitement to genocide.[292] In response to the Belgian action the DRC filed an application before the ICJ in 2000, seeking to annul the warrant. In *Case Concerning the Arrest Warrant of April 11, 2000* (Congo v. Belgium), the ICJ ruled that under the Vienna Convention on Diplomatic Relations[293] and customary international law, sitting heads of state and government ministers enjoy temporal immunity, as its removal would hinder the minister's capacity to execute his/her duties, and thereby harm the ability of the minister's state to function properly.[294] The *Habré* and *Yerodia* cases thus reveal the increasing effects of extra-territorial jurisdiction by states for crimes under international law, and the role of extradition law in that process.

Beyond the *Habré* and *Yerodia* cases, which are in the nature of traditional extradition cases, the re-emergence of international criminal tribunals has also required the development of mechanisms for the surrender of accused from national jurisdictions to tribunals.[295] As the ICTY and ICTR began to scale back their operations in advance of their closure they also developed a mechanism for transferring cases and accused back to national jurisdictions for further proceedings under Rule 11*bis* of the Rules of Procedure and Evidence of each tribunal. Rule 11*bis* of the ICTY provides in pertinent part that:

> (A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
>
> (i) in whose territory the crime was committed; or

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289 *See* Ch. I, Sec. 3.4 and Ch. VI, Sec. 8.1. *See also* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. ____ ¶ 99 (July 20).

290 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), *supra* note 289.

291 *See also* Ch. VI, Sec. 7.4.1.

292 *Case Concerning the Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 121 (Feb. 14, 2002).

293 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95. Article 29 of the Vienna Convention provides that "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

294 *Case Concerning the Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 121 (Feb. 14, 2002).

295 *See also* Ch. I, Sec. 7.

> (ii) in which the accused was arrested; or
>
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.[296]

The provision in the ICTR is the same. Under the Rule 11*bis* procedure the ICTY has referred thirteen cases to national jurisdictions,[297] and the ICTR has transferred four to a national jurisdiction.[298]

In addition to these international developments, a number of states have adopted national legislation incorporating crimes against humanity as part of their domestic crimes. Some of these national laws were passed before the entry into effect of the ICC in 2002, while others were passed subsequently as part of these states' implementation of the Rome Statute through the adoption of national legislation.[299] As detailed by this writer in *Crimes against Humanity: Historical Evolution and Contemporary Application*, as of 2011:

> Fifty-five states have legislation criminalizing CAH [crimes against humanity], most of which were developed post-2002. They are Albania (2002); Argentina (2007); Australia (2002); Bangladesh (1973); Belarus (2001); Belgium (2003); Bosnia and Herzegovina (2003); Burkina Faso (2009); Burundi (2003); Canada (2000); Chile (2009); Congo Brazzaville (1998); Costa Rica (2002); Croatia (2003); Cyprus Democratic Republic of the Congo (2005); El Salvador; Estonia (2002); Ethiopia (1957); Fiji (2009); France (1994); Georgia (2003); Germany (2002); Indonesia (2000); Iraq (2005); Ireland (2006); Israel (1950); Kenya (2008); Lithuania (2000); the Former Yugoslav Republic of Macedonia (2003); Mali (2001); Malta (2002); Montenegro (2003); the Netherlands (2003); New Zealand (2000); Niger (2003); Norway (2008); Panama (2007); the Philippines (2009); Portugal (2004); Republic of Korea (2007); Romania; Rwanda (2003); Samoa (2007); Senegal (2007); Serbia (2005); Sierra Leone (2002); South Africa (2002); Spain (2004); Sudan (2009); Timor Leste (2009); Trinidad and Tobago (2006); Uganda; United Kingdom (2001); and Uruguay (2006).
>
> . . . [In addition there are states] whose legislation has a label such as genocide or crimes against peace and security that include acts deemed part of CAH under customary international law. Countries in this category include Azerbaijan, Colombia, Hungary, Latvia, Peru, Poland, and Slovenia.[300]

There is no case in which a state upheld the doctrine of an "exception to the exception" after asylum was granted. Even in hijacking cases from Poland and Czechoslovakia to Germany, the requested states, France and Germany, relied on the 1963 Tokyo Convention and prosecuted the hijackers rather than surrender them.[301] Also in cases involving illicit international traffic of narcotic drugs, the request and surrender of such offenders was always on the basis of the

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296 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Nov. 19, 2012, U.N. Doc. IT/32/Rev.48.

297 Key Figures of the Cases, International Criminal Tribunal for the Former Yugoslavia (Apr. 15, 2013), http://www.icty.org/sid/24. The thirteen are: Rahim Ademi, Dušan Fuštar, Momčilo Gruban, Gojko Janković, Vladimir Kovačević, Duško Knežević, Paško Ljubičić, Željko Mejakić, Mirko Norac, Mitar Rašević, Radovan Stanković, Savo Todović, and Milorad Trbić.

298 Status of Cases, International Criminal Tribunal for Rwanda (Apr. 16, 2013), http://www.unictr.org/Cases/tabid/204/Default.aspx. The four are Laurent Bucyibaruta, Bernard Munyagishari, Wenceslas Munyeshyaka, and Jean Bosco Uwinkindi.

299 For a survey of national legislation and practice, see M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application 660–664 (2011).

300 *Id*. at 660–663.

301 *See* Bassiouni, *supra* note 36, at 219 n.5.

conduct being an extraditable offense in current treaty practice rather than its being an international crime.[302]

There is still difficulty, however, in determining what constitutes international offenses, the elements thereof, and the factual establishment of their occurrence. However, some international agreement exists on the notion that such offenses should constitute an "exception to the exception."[303]

2.1.8. The Political Offense Exception and World Public Order: A Proposed Standard

The reasons for the political offense exception rest in part upon the asylum state's sense of humane treatment and belief in human rights, as well as personal and political freedom.[304] Furthermore, it is generally acknowledged that political crimes affect the requesting state's most sensitive interests, and therefore inspire a passionately hostile atmosphere, which makes an orderly and fair trial very difficult. The asylum state also sees the political offense, unlike ordinary crimes, as a reflection of the individual's resistance to the regime of the requesting state, and therefore the presence of the offender in the requested state is not usually a threat to its domestic tranquility.[305] Consequently, the requested state will not be moved by ordinary criminological considerations but is more likely to be persuaded by political factors, which it will determine by its own interpretation of the meaning of the political offense exception.

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302 An example was the extradition of August Ricord from Paraguay, charged with smuggling two tons of heroin into the United States. The Paraguayan Supreme Court granted his extradition on September 2, 1972.

303 The late Judge Hersch Lauterpacht said in this connection that acts that per se constitute common crimes and that are contrary to the rules of war cannot legitimately be assimilated to political offenses. Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944 Brit. Y.B. Int'l L. 58, 91. For a more recent position predicated on empirical data, see *Aut Dedere Aut Judicare*: The Duty to Extradite or Prosecute in International Law (M. Cherif Bassiouni & Edward M. Wise eds., 1995) [hereinafter Bassiouni & Wise, *Aut Dedere Aut Judicare*].

The question of prosecution and extradition of accused war criminals arose in the Priebke matter, which involved Argentina and Italy, and now Germany.

On November 20, 1995, Argentina extradited to Italy Erich Priebke, a former SS Captain, who was convicted in absentia for war crimes by the Military Tribunal of Rome, July 20, 1948 (sentence No. 631). At that time he was found guilty of an unlawful reprisal killing of 335 Italians in the Adreatine Caves outside Rome. In his Argentina extradition proceedings, his argument of the "political offense exception" was rejected. Upon his return to Italy he was retried on the same charges of which he was found guilty in 1948 (which is customary in legal systems who allow trials in absentia) and once again he was found guilty. But the court found that he should be released because the Italian statute of limitations on war crimes, thirty years, had lapsed. Italy has neither ratified the 1968 U.N. Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, nor its European counterpart. However, on October 14, 1996, the Italian Supreme Court reversed and remanded for a new trial because of prejudicial pretrial statements made by the presiding judge. Priebke was, nevertheless, held in custody pending an extradition request from Germany. Argentina granted permission to Italy to re-extradite Priebke to Germany where he is eventually to be tried, presumably for the same crime. The European Convention on Human Rights and Fundamental Freedoms does not specifically prohibit trials for the same crime between state-parties on the basis of *ne bis in idem*; it only prohibits them when the retrial is by the same state. In July 1997, a second military court sentenced him to fifteen years in prison, but then reduced the sentence to five years for mitigating circumstances. The case was appealed in 1998 and he was sentenced to life in prison by the Military Court of Appeals.

That sentence was affirmed by the Court of Cassation. He died in October 2013.

304 *See* Manuel Garcia-Mora, International Law and Asylum as a Human Right (1956). *See also* Ch. III (discussing asylum).

305 *See* Garcia-Mora, *Present Status of Political Offenses*, *supra* note 22, at 373–374.

The commendable humanitarian objectives of the political offense exception have unfortunately seldom been realized. The reason for this lies in the fact that in every case the definition of political offenses and the determination of whether the crimes charged by the requesting state constitute a political offense are made by the requested state in accordance with its public policy or political interests.

In addition, courts all over the world have invariably experienced difficulty in arriving at a workable definition of what constitutes a political offense.[306] The political offense exception is a double-edged sword. Although it is intended to protect individual rights and personal freedom, it imposes national standards and values on other states. More significant, however, states can, for self-serving interests, deny extradition because the presence of the fugitive in the requested state serves its political purposes. The fugitive may well have committed an extraditable offense, but his/her sudden political opposition to a foreign regime may render him/her so desirable to the requested state that his/her extradition will be denied on political offense exception grounds when, under circumstances involving a friendly state, the fugitive would be surrendered.

The benefits of luring foreign defectors and offering them asylum may sometimes be commendable in terms of human rights or explainable in terms of realpolitik, but it is highly explosive in terms of global strategy for minimum world order when the defector happens to have committed common crimes or international crimes to which the (political) human rights aspect is only tenuously related. This is particularly true with respect to certain acts of terrorism.

Also at times, the political refugee will be a highly placed foreign official who may have committed common crimes or international crimes, the enormity of which will sometimes cast his/her acts in a political character.[307] It would seem that humane considerations and inducements to foreign exiles, defectors, or fugitives should not overshadow concern with the punishability of those who have also committed common crimes and international crimes.

The realization that such problems exist, few and far between as they may be, is, to say the least, problematic and compels the search for a new outlook to avoid the potentially detrimental effects of such problems on the preservation of a minimum world order. One solution is to remove the question in its entirety from the decision-making process of the nation-states involved. This presupposes an international organ, such as the ICJ or a specialized branch thereof, or an international criminal court, which would have either exclusive or review jurisdiction over such matters. This could be accomplished by a universal treaty-statute on extradition,[308] or by granting an international judicial decision-making body the exclusive jurisdiction over such cases, so as to avoid inflammatory situations that may precede a decision on the merits.

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306 For the intricacies and complexities in determining the nature of a political offense, see *Nature of Political Offenses*, *supra* note 22.

307 See the *Artukovic* cases discussed above and in notes *supra* 262–266, where the relator was accused of being responsible for the deaths of an estimated 200,000 people. See also the case of Czechoslovak General Jan Sejna, who sought asylum in the United States in 1968 after Dubcek took over. General Sejna was accused of the death of some 10,000 persons, but was granted asylum. *See* Time, Mar. 15, 1968, at 27.

308 This was proposed by this writer at the 1968 Freiburg International Colloquium on extradition and was submitted to the 10th International Congress on Penal Law, held in Rome in 1969. *See* M. Cherif Bassiouni & Edward M. Wise, *Rapport, Etats-Unis d'Amérique*, 39 Rev. Int'l de Droit Pénal 494, 496, 516–517 (1968); *Resolution*, 39 Rev. Int'l de Droit Pénal 856 (1968). *See also* M. Cherif Bassiouni, Remarks, *in* Actes du Pre-Congres International de Syracuse 475 (Ass'n Int'l de Droit Pénal 1969); *Communications*, Actes du Pre-Congres International de Syracuse, *supra*, at 299–378; *Resolutions of the Xth International Penal Law Congress of Rome 1969*, 40 Rev. Int'l de Droit Pénal 299 (1969).

The problem of the political offense, however, goes further. The definitional issue could be resolved by an international treaty-statute, but the interpretive issue remains until it can be based on certain objective evaluations presently undertaken by most countries, particularly with respect to executive discretion in conceding or denying extradition. With the admitted difficulties of implementing such a proposal, alternatives must nonetheless be found for the serious question of ensuring a fair trial to the relator faced with extradition to the jurisdiction in which the ideologically motivated offense took place. An alternative would be to have the state of asylum or the state of which the relator is a national, if it is not the requesting state, exercise jurisdiction over him/her and prosecute him/her on behalf of the jurisdiction where the offense took place, using the substantive laws of that jurisdiction against which the accused relator committed the alleged offense.[309] If found guilty, the offender could, depending upon the situation, be confined, if the sentence is imprisonment, in the state where the offense was committed, in the state where the offense was prosecuted, or in the state of which he/she is a national. Thus *aut dedere aut judicare* would be ensured without potentially violating the human rights and the right to procedural fairness of the relator, while simultaneously avoiding disruptions of a world public order, as there would be an alternative to pitting two or more nation-states against each other.[310] Ideally, of course, the offender should be tried by an international criminal court and imprisoned in an international institution, as in the instance of the IMT at Nuremberg and the Spandau prison, respectively, which stand as primary examples of the feasibility of this proposal.

World peace depends on maintaining rules designed to safeguard world public order and to establish legal channels as alternatives to the violent means that prevail in their absence. The Rule of Law is not an ideological equalizer or a method of compromising opposing political doctrines, but instead a process of ordering and channeling conflicts through legal institutions designed for the peaceful resolution of conflicts in a judicial context. It is the gradual building of needed international legal structures not by ideologically superimposing such structures on the nation-states, but by creating them so as to service special purposes designed to eliminate direct confrontations between states, which have potential for disruption of world public order.

2.1.9. The Need for a More Consistent Approach to the Application of the "Political Offense Exception"

The positions of circuit courts have shown a certain inconsistency and sometimes even misunderstanding of what needs to be established in order to determine the existence of the legal elements justifying recognition of the political offense exception to extradition.[311] The following is therefore suggested:

1. There should be both a subjective and objective test. The objective test should require evidence that the acts of violence were directed against a target deemed within the scope of the

309 For an analogy, see Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

310 *See* Chs. I and X.

311 *Compare* Quinn v. Robinson, 783 F.2d 776 (9th Cir.) (1986) (*citing* International Extradition: United States Law and Practice (1983)) and Barapind v. Enomoto, 400 F.3d 754 (9th Cir. 2005, *en banc*) (Rymer, J. Dissenting) (calling for *Quinn* to be overruled); Ordinola v. Hackman, 478 F.3d 588, 2007 WL 52968 (4th Cir. 2007) (*citing* International Extradition: United States Law and Practice (4th ed. 2002)). The Fourth Circuit took a position contrary to *Quinn*. For a discussion of these contrasting approaches, see Rachael MacKenzie, Case Comment: *International Law—Limiting the Political Offense Exception to Extradition Treaties to Crimes Objectively Political*—Ordinola v. Hackman, *478 F.3d 588 (4th Cir. 2007)*, 31 Suffolk Transnat'l L. Rev. 711 (2008). These two contrasting positions are particularly evident in *United States ex rel. Branko Karadzole v. Artukovic*, 170 F.Supp. 383, 392 (S.D. Cal. 1959) (finding that the political offense exception applies, while rejecting the inquiry

war or insurrection,[312] and for the subjective test evidence that the person engaging in the conduct in question is ideologically motivated. The Second, Fifth, and Seventh Circuits require both the objective and the subjective tests.[313]

2. Not any type of act under the objective test is sufficient. If it is related to the intended struggle then it is subject to international constraints,[314] which are contained in international humanitarian law prohibitions, which include attacks upon noncombatants, and the prohibitions of attacks upon certain targets such as hospitals, religious places, archaeological monuments, and others.[315] This was the test in *In re Castioni*.[316] Justice Dennman noted that "[i]t must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political manner, a political uprising, or a dispute between two parties in the state as to which is to have the government in its hand."[317] The U.S. Supreme Court followed that position in *Ornelas v. Ruiz*.[318] In *Eain v. Wilkes*,[319] the Seventh Circuit noted that the political offense exception should not extend to "[i]solated acts of social violence undertaken for person[al] reasons…simply because they occurred during a time of political upheaval."[320] The court further noted that "[t]he indiscriminate bombing of a civilian populous [*sic*] is not recognized as a protected political act."[321]

3. The exception applies to those who are fighting government and to those who are fighting on behalf of governments provided that their conduct conforms to international law.[322]

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into whether the perpetrators' actions constituted war crimes) and *Ahmad v. Wigen*, 727 F.Supp. 389, 408 (E.D.N.Y. 1989) (holding that an action cannot be defined as a political offense if it violates the law of armed conflict).

312 The Seventh Circuit in *Earn v. Wilkes*, 641 F.2d 504 (7th Cir. 1981) requires both the objective and the subjective test, as does the Second Circuit in *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990); and the Fifth Circuit in *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980). *Contra* Quinn v. Robinson, 783 F.2d 776 (9th Cir.) (1986).

313 *See* Ordinola v. Hackman, 2007 WL 529 689 (4th Cir. 2007); *supra* note 311.

314 This was the test in *In re Castioni* [1891] 1 Q.B. 149, 158 (1890). *See also* the Fourth Geneva Convention: http://mineaction.org/downloads/Emine%20Policy%20Pages/Geneva%20Conventions/Geneva%20Convention%20IV.pdf

315 Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflct (2005); Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., International Commission of Jurists 2006); Frits Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law (2001).

316 [1891] 1 Q.B. 149, 158 (1890) (opinion of Dennman, J.).

317 *Id.*

318 161 U.S. 502 (1896) (citing *Castioni*, 1 Q.B. at 511). *See also* Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) (stating "an attack on a commercial bus carrying civilian passengers on a regular route is not a political offense. Political motivation does not convert every crime into a political offense.")

319 641 F.2d 504, 521 (7th Cir. 1981).

320 *Id.*

321 *Id. See also In re Extradition of* Marzook, 924 F. Supp. 565, 577 (S.D.N.Y. 1996) (rejecting the political offense exception because indiscriminate killings of civilians were in the nature of international crimes), and thus qualifying for what this author qualified above as "the exception to the exception." *Id.* This position was followed in *Orindola v. Hackman*, which rejected the claim of the relator of the political offense exception for violent acts committed by him allegedly on behalf of his government against innocent civilians. Ordinola v. Hackman, 2007 WL 529, 689 (4th Cir. 2007).

322 *See supra* note 3 and accompanying text. *See also In re Requested Extradition of* Mason, 694 F. Supp. 679, 705 (N.D. Cal. 1988).

2.2. Offenses of a Military Character

A considerable number of bilateral treaties and national statutes expressly prohibit granting extradition for acts punishable under the military laws of the requesting state.[323] There are, however, two conditions that limit this exemption, namely: (1) that the acts charged do not constitute a crime under the ordinary laws of the requesting state; and (2) that the acts do not constitute a violation of the laws of war, which would be international crimes.

The problems arising from that category of exemption are those of draft evasion, particularly draft evasion for political purposes.[324] Examples of such cases arose in significant numbers during the military involvement of the United States in Southeast Asia between 1965 and 1972, when draft evaders and deserters from the United States took refuge, and were granted asylum in Canada and Sweden.[325] These problems are usually solved between states maintaining cooperative relations by some alternative means to extradition,[326] although this was not the case with Sweden or Canada in the example cited above.

The problem of military offenses, duty of allegiance, and extradition between friendly or allied states is illustrated in the English case of *Ex parte Duke of Chateau de Thierry*,[327] where a French citizen had defected to England to avoid serving in the military forces of France during WWI. The English lower court held for the relator in agreeing that the Home Secretary had no power to order an alien deported to a particular country, which had been ordered as an alternative to extradition. On appeal, the decision was reversed on the grounds that, although the Home Secretary had no power to order deportation to a particular country, he could select the particular ship upon which the offender must sail. Even if such ship should happen to sail for the requesting state, it would be of no concern. The court concluded that the duke was not a political refugee,[328] and as French authorities had assured the British government that the offender would be tried solely as a military absentee for desertion, the court, in effect, condoned disguised extradition between allies for the return of those accused of such offenses as the military crime of desertion.

A violation of military laws and regulations, which does not also constitute a crime under the ordinary criminal laws, by a person subject to such military laws (provided also that such violation does not constitute a violation of the laws of war) is recognized as an exclusion from extradition under customary international law.[329] The relationship among military offenses,

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323 Bedi, *supra* note 19. *See* U.N. Model Extradition Treaty, *supra* note 23, at 187–188 (including no provision for exclusion of offenses under military law); Michael D. Wims, *Re-examining the Traditional Exceptions to Extradition*, 62 Rev. Int'l de Droit Pénal 325 (1991) (discussing a proposal to renegotiate treaties among free and democratic governments to include provisions for extradition for purely military offenses). For examples of treaties excluding extradition for military offenses with no equivalent in civilian criminal law, see Extradition Treaty with Latvia, art. 4(4), *entered into force* Apr. 15, 2009, S. TREATY DOC. 109-15, art. 4(4)

("The executive authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law."); Italian Extradition Treaty, art. V(3), *entered into force* Sept. 24, 1984, 35 U.S.T. 3023 ("Extradition shall not be granted for offenses under military law which are not offenses under ordinary criminal law").

324 *See* David A. Tate, *Draft Evasion and the Problem of Extradition*, 32 Alb. L. Rev. 337 (1968).

325 The Canadian position has changed, and Canada has deported various U.S. deserters of the recent war in Iraq. *See* Ch. IV.

326 *See* Ch. IV.

327 Ex parte *Duke of Chateau de Thierry*, [1917] 1 K.B. 552 (Eng.). *See* Ch. IV, Sec. 2 (discussing this case).

328 *Duke of Chateau de Thierry*, *Id.*

329 *In re* Girardin, 7 Ann. Dig. 357 (CFed. 1933) (Arg.).

common crimes, and the political offense exception with respect to wars of national liberation is illustrated by the *Ktir* case,[330] wherein the Swiss court stated:

> The question at issue, accordingly, is whether it is a political offense and what importance is to be attached to the fact that the act committed by Ktir was, as alleged by him, committed in a war between France and the F.L.N.
>
> As regards the second point, the appellant probably means to rely on Article II of the [Swiss Federal Law of January 22, 1892, on extradition to foreign states], which provides that "extradition shall not be granted . . . for purely military offenses." That provision is not, however, applicable, since the Treaty does not contain any analogous reservation. Furthermore, murder has never been regarded as a "purely military" offense, because it affects human life and does not relate to military organization or military duties.
>
> As regards the political nature of the offense, it should be pointed out, first of all, that the F.L.N. is fighting for power in Algeria. It is active not only in that country, but also in France. The character of the organization is clearly political. The appellant states that he is a member of the F.L.N. and that he committed the act with which he is charged by virtue of that membership and on the orders of his superiors. His declarations are plausible. It may be deduced therefrom that he acted for political, not personal, reasons. It does not, however, follow that the act had a predominantly political character. For this to be the case it is necessary that the murder of Mezai should have been the sole means of safeguarding the more important interests of the F.L.N. and of attaining the political aim of that organization. That is not so. It has not been shown that the interests of the F.L.N. were so gravely compromised by the alleged treason of Mezai that his "suppression" was the sole means of effectively safeguarding them. Nor is it possible to conclude that the murder in which Ktir took part in any way advanced the liberation of Algeria. That murder was primarily an act of vengeance and terror. Its relationship to the political aims of the F.L.N. is too loose to justify it and to give it a predominantly political character. It is, accordingly, not a political offense in the meaning of Article 2, paragraph 1, set forth in the Treaty. Since the other conditions set forth in the Treaty are satisfied, extradition must in principle be granted.[331]

The rationale for this exclusion rests on the appraisal of the very offense, that is, it is particular rather than general, and affects a disciplinary aspect of an internal organization within a given state without causing any private wrong, as in the case of common crimes, or without causing any harm to the world community, as in the case of international crimes. It is also important to reassert that extradition is a means of cooperation between states to combat common criminality and therefore such offenses are excludable from that objective. States that are bound by mutual security pacts and other military agreements are likely to include such offenses in their treaties, or in any event to engage in the practice of disguised extradition to accomplish their purposes of exchanging such fugitive offenders.

2.3. Offenses of a Fiscal Character

Theoretically, the rationale for exclusion of these offenses is said to be the same as in cases of offenses of a military character.[332] It should be stated at the outset that even though there is little practice in extradition for fiscal offenses, there is nothing in customary international law that prohibits it. Furthermore, the term "fiscal" has often encompassed offenses of an economic nature,

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330 34 I.L.R. 143 (Federal Tribunal 1961) (Switz.).

331 *Id*. at 145.

332 *See* Bedi, *supra* note 19, at 198. Exceptions with respect to fiscal offenses are usual in extradition treaties and extradition laws. Nevertheless, important changes in attitude may be observed. The Second Additional Protocol to the European Convention on Extradition (1978), 17 I.L.M. 813, abolished the exception, as did the German law on international judicial cooperation of 1982, 30 I.L.M. 84. The 1990 Convention applying the Schengen Agreement of June 14, 1985, between the governments of the

even though they involve the public interest as opposed to a private interest. It must be recalled that extradition before the twentieth century was closely interwoven with European history, and between the sixteenth and eighteenth centuries Europe's fiscal and economic structure was chaotic and oppressive. This explains the origin of the exclusion. Between the eighteenth and early twentieth centuries, economic and fiscal reorganization in European states was interrupted by two world wars, and the emergence of socialism and communism in Eastern and Central Europe. These factors contributed to the continued lack of acceptance of such violations as grounds for extradition except between compatible economic systems. The change occurred after the political and economic transformation of the world and with the recognition that states, in order to carry their public charges, must enforce their economic and fiscal laws.[333] The economic social contract theory of the twentieth century is, however, likely to bring about a radical change in the category of economic offenses, as was the case in the socialist countries of Eastern Europe and Asia, where such offenses ranked with the more serious common crimes, as witnessed by laws on smuggling, traffic in currency, etc. After the beginning of the global financial crisis in 2007 the question of extradition for economic crimes became increasingly important, as a number of "rogue traders" and investment bankers exploited the law and exacerbated existing financial instabilities. One of the most prominent of these is Florian Homm, a German hedge fund manager who disappeared in 2007 after his fund imploded, prompting an investigation by the Securities and Exchange Commission and a federal indictment in California. After five years in hiding, some of which included living under an assumed name in Colombia, Homm was arrested in Italy in March 2013 and now awaits extradition to the United States.[334] Another example of extradition for financial crimes is the case of Kareem Serageldin, the London City trader who was sought for extradition on fraud charges related to a coverup of $540 million in losses;[335] he was eventually surrendered, and pleaded guilty in April 2013.[336]

The willingness to include economic crimes among extraditable offences is a newer practice. As early as 1891 Moore criticized the U.S. position on that score, stating:

> In the refusal to include in its treaties of extradition crimes of fraud, the government of the United States failed to recognize the change which, in the development of civilization, has taken place in the relative importance of criminal offenses.[337]

Such offenses are, however, gradually appearing in extradition treaties, but the difficulty remains in satisfying the requirement of double criminality[338] because of the problem of defining such offenses and determining their significance in the economic system of each particular country. Growing international concern over tax evasion and violation of currency restrictions in many

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states of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 30 I.L.M. at 110, eliminates the exception only for offenses involving the evasion of indirect taxation. *See* U.N. Model Extradition Treaty, *supra* note 23, at 188. The model does not exclude fiscal offenses from extradition. *Id.*

333 A.N. Sack, *(Non-)Enforcement of Foreign Revenue Laws in International Law and Practice*, 81 U. Pa. L. Rev. 559 (1933).

334 Jack Ewing, *Hedge Fund Manager Found and Jailed in Fraud*, N.Y. Times, Mar. 10, 2013. *See also* Marianne Barriaux, *Hedge Fund Shares Crash Again as Spat Continues*, Guardian, Sept. 20, 2007.

335 *Ex-Credit Suisse Trader Faces US Extradition*, Reuters, Sept. 27, 2012.

336 Paul Calahan, *Trader, Kareem Serageldin, Pleads Guilty to Role in Banking Crash*, Independent, Apr. 14, 2013.

337 John B. Moore, A Treatise on Extradition and Interstate Rendition 111 (1891) [hereinafter Moore, Extradition]. Such offenses are extraditable under the Bustamante Code (1928), 86 L.N.T.S. 120, *in* 4 Manley O. Hudson, International Legislation 2283 (1931). *See also* In re *Nunez*, 7 Ann. Dig. 335 (Sup. Ct. 1934) (Peru).

338 *See* Ch. VII, Sec. 2.

countries is causing this exception to disappear from contemporary treaties. In fact, states are entering into special treaties on mutual assistance and cooperation in fiscal and financial matters.

The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the "United Nations Convention"), a fine example of global cooperation, requires both bilateral participation and domestic legislation to effectuate any bilateral agreement.[339] The Convention reflects the desire of states to utilize the immobilization and forfeiture of assets as a means to combat drug trafficking and the accompanying money laundering. This convention is the first step toward recognizing and codifying an international commitment to the suppression of illegal drug trade.

Article 3 defines the offenses and sanctions covered by the United Nations Convention.[340] The United Nations Convention applies to the various crimes associated with drug trafficking. Specifically, the Convention obligates states to criminalize nearly every conceivable facet of the production, cultivation, distribution, sale, or possession of illicit drugs.[341]

The Convention requires the "widest measure of mutual legal assistance" in investigations, prosecutions and judicial proceedings under Article 7. The types of mutual assistance include: taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing records and documents, including bank, financial, corporate, or business records; and identifying, or tracing proceeds, instrumentalities, or other things for evidentiary purposes.[342] The United Nations Convention also contains several provisions designed to curb the effects of money laundering associated with illicit drug trafficking. The Convention requires the signatory states to adopt legislation to facilitate the freezing, seizure, and forfeiture of assets.[343] The provisions of the convention are broad and they clearly indicate the prosecutorial perspective that motivates the creation of drug trafficking instruments.

The United Nations Convention is a significant step toward an integration of several forms of interstate cooperation in penal matters. The Convention incorporates provisions for: extradition (Article 6); transfer of proceedings (Article 8); mutual legal assistance (taking of statements, service of process, provisions of evidentiary items, executing searches and seizures, etc.) (Article 7); and the seizure and confiscation of assets (Article 5), the newest modality of assistance in penal matters. This instrument is limited, however, by the complications of its global scope and, to be truly effective, requires the conclusion of bilateral and multilateral agreements. As a result, a state must rely on one of several instruments depending on the type of cooperation required, and this type of fragmentation creates a number of gaps and loopholes that often make these bilateral agreements ineffective.[344]

Due to this limitation, the Convention contemplates integrated regional instruments such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[345] The Convention represents a partially integrated, regional approach to mutual legal assistance, investigative assistance, provisional measures, and

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339 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493 [hereinafter UN Convention].

340 *Id.* at art. 3.

341 *Id.*

342 *Id.* at art. 7(2)(a)–(g). With regard to introduction of evidence for a crime that cannot be prosecuted, see Ch. VII, Sec. 6 (discussing specialty).

343 *Id.* at arts. 5(2), 4(g).

344 M. Cherif Bassiouni, *Effective National and International Action against Organized Crime and Terrorist Criminal Activities*, 4 Emory Int'l L. Rev. 9, 37–40 (1990).

345 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, No. 141 Europ. T.S. No. 141, 30 I.L.M. 148 [hereinafter COE Convention].

confiscation of assets, and is intended to work in concert with other Council of Europe conventions on judicial assistance. In regard to the seizure and eventual forfeiture of assets, the Council of Europe Convention is perhaps the most forceful international instrument yet contemplated. The European Convention's focus is to criminalize the offense of money laundering and to provide states the means to confiscate illicit proceeds—including provisional measures to immobilize those assets for eventual forfeiture. The Council of Europe Convention, unlike the United Nations Convention, extends the definition of money laundering beyond drug-related offenses. Whereas the United Nations Convention treats money laundering as tangential to illicit drug trafficking, the Council of Europe Convention tackles money laundering as a major offense in and of itself.

In 1991 the European Council of Economic and Finance Ministers (ECOFIN) passed a directive on the Prevention and Use of the Financial System for the Purpose of Money Laundering.[346] The agreement calls for a multilateral declaration and applies sanctions to financial institutions that do not comply with the reporting requirements.[347]

The prohibition against extradition for fiscal offenses is waning in the practice of states, and recent bilateral extradition and tax treaties provide for extradition for such crimes. In addition, as some of the manifestations of fiscal offenses are linked to money laundering, which is increasingly found in the criminal law of many states, the facts underlying fiscal offenses may also be the basis for money laundering, and thus satisfy the requirements of double criminality for extradition (*see* Chapter VII, Sec.2).

The United Nations, in response to the difficulty of preventing and punishing financial crimes, enacted the United Nations Convention Against Corruption (hereinafter the "CAC") in October 2003, which entered into force December 2005.[348] This instrument was passed with particular concern for the relationship among corruption, organized crime, and economic crimes such as money laundering.[349] The scope of the CAC is broad, covering "the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention."[350] To accomplish this, the CAC calls upon state-parties to enact relevant domestic mechanisms to prevent corruption, as well as to collaborate with each other to develop international programs and projects to prevent corruption.[351] State-parties are to enact domestic systems and regulations to promote the transparency of public officials' actions and hold them to a code of conduct.[352] Significantly, state parties are to look beyond the public sector, establish proper standards for business in the private sector, and make efforts to promote broader societal participation in their effort to combat corruption.[353] The particular financial crimes targeted by the CAC are money laundering,[354] bribery of public

346 1991 O.J. (L 167) 77 (June 10, 1991) [hereinafter EC Directive].

347 Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 Nova L. Rev. 551 (1991).

348 *See* United Nations Office of Drugs and Crime, *Background of the United Nations Convention Against Corruption*, *available at* http://www.unodc.org/unodc/en/treaties/CAC/index.html (last visited Sept. 20, 2011).

349 United Nations Convention Against Corruption, Preamble, G.A. Resolution A/RES/58/4 (October 31, 2003).

350 *Id.* at Art. 3(1).

351 *Id.* at Art 5.

352 *Id.* at Arts. 7–10.

353 *Id.* at Art 12, Art. 13.

354 *Id.* at Art. 14.

officials,[355] embezzlement,[356] trading in influence,[357] abuse of function,[358] illicit enrichment,[359] bribery in the private sector,[360] embezzlement in the private sector,[361] laundering of proceeds,[362] concealment of property resulting from an offense under the CAC,[363] and obstruction of justice.[364] Furthermore, legal persons were subject to these offenses, and participation or attempt were also criminalized.[365] Thus, the CAC casts a broad net to capture as much illicit activity as possible, and recognizes the complex interrelation between the private and public sector in these matters. International cooperation under the CAC is similarly expansive. The CAC provides that double criminality is satisfied as long as the underlying conduct was a criminal offense in both countries.[366] The CAC also provides for extensive mutual legal assistance (evidence, service of process, searches and seizures, freezing assets, etc.).[367] The section on extradition, while requiring parties to deem all the offenses included in the CAC to also be included in existing treaties between the individual parties, goes further in stating that parties who use the CAC as a basis for an extradition request "shall not consider any of the offenses established in accordance with this Convention to be a political offense."[368] Although a party may consider the CAC as the legal basis for extradition with a country with which it does not have an extradition treaty, the United States has rejected this in a declaration made pursuant to the CAC.[369] This reflects the U.S. practice of [370]relying exclusively on bilateral extradition treaties, as discussed in Chapter II.[371]

3. Grounds Relating to the Person of the Relator

3.1. Exemption of Nationals

Unlike the political offense exception and the exception or exclusion of military and fiscal offenses, the exemption of nationals has to do with the person rather than with the offense.

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355 *Id.* at Art 15, Art. 16.

356 *Id.* at Art 17.

357 *Id.* at Art 18.

358 *Id.* at Art 19.

359 *Id.* at Art 20.

360 *Id.* at Art 21.

361 *Id.* at Art 22

362 *Id.* at Art 23

363 *Id.* at Art 24.

364 *Id.* at Art 25.

365 *Id.* at Art. 26, Art. 27.

366 *Id.* at Art 43.

367 *Id.* at Art. 46.

368 *Id.* at Art 44(4)

369 S. Exec Doc. No. 109-18 (2005) (stating "the United States declares that the provisions of the Convention (with the exception of Articles 44 and 46) are non–self-executing. None of the provisions of the Convention creates a private right of action").

370 This is the case for Russia and Brazil, and has resulted in diplomatic friction with various requesting states. *See* Bruce Zagaris, *Russia Denies U.K. Request for Lugovoi Extradition*, 23 Int'l Enforcement L. Rep. 343–344 (Sept. 2007); Bruce Zagaris, *Brazil Unlikely to Extradite Military Officers to Italy for Operation Condor Crimes*, 24 Int'l Enforcement L. Rep. 91–93 (Mar. 2008); Bruce Zagaris, *Controversy between U.S. and Brazil over Extradition for Alleged Murder*, 24 Int'l Enforcement L. Rep. 45–47 (Feb. 2008).

371 For example, the United States–Dominican treaty of 1909 does not require extradition of nationals. Convention for the Mutual Extradition of Fugitives from Justice, United States–Dominican Republic, Art. VIII, June 19, 1909, 36 Stat. 2468, TS 550; 7 Bevans 200. There is a contemporary trend to

The exemption of nationals takes two forms: absolute and qualified. It may be found in the constitution of a given country, in extradition treaties, or in its municipal laws.[372] Many states exempt nationals from extradition, but in these cases, the requested state has the duty to prosecute.[373] A problem arises when an individual is a dual nationality and the requested state does not extradite its nationals. Each state has the power to determine who is a national, but it is well-established that the state with the dominant contacts is the one entitled to assert its

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either limit the nationality exemption or provide an obligation to prosecute in the state of nationality. *See* Extradition Treaty with the United Kingdom, art. 3, *entered into force* Apr. 26, 2007, S. TREATY DOC. 108-23 ("Extradition shall not be refused based on the nationality of the person sought."); South African Extradition Treaty, art. 3, *entered into force* June 25, 2001, S. TREATY DOC. 106-24 (same). *See also* Argentine Extradition Treaty, art. 3, *entered into force* June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866; Extradition Treaty with the Bahamas, art. 4, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Extradition Treaty with Belize, art. 3, *entered into force* Mar. 27, 2001, S. TREATY DOC. 106-38 ("Extradition shall not be refused on the ground that the person sought is a national of the Requested State."); Jordanian Extradition Treaty, art. 3, *entered into force* July 29, 1995, S. TREATY DOC. 104-3 ("If all conditions in this Treaty relating to extradition are met, extradition shall not be refused based on the nationality of the person sought."); Italian Extradition Treaty, art. IV, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023 ("A Requested Party shall not decline to extradite a person because such a person is a national of the Requested Party."); Extradition Treaty with Uruguay, art. 4, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197 (similar). Bolivian Extradition Treaty, art. III(1), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22 ("Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to . . . (b) murder; voluntary manslaughter; kidnaping; aggravated assault; rape; sexual offenses involving children; armed robbery; offenses related to the illicit traffic in controlled substances; serious offenses related to terrorism; serious offenses related to organized criminal activity; fraud against the government or involving multiple victims; counterfeiting of currency; offenses related to the traffic in historical or archeological items; offenses punishable in both States by deprivation of liberty for a maximum period of at least ten years; or (c) an attempt or conspiracy, participation in, or association regarding the commission of any of the offenses described in subparagraphs (a) and (b)"). Extradition Treaty with Malta, art. 3(1), *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-17 (precluding fugitive's nationality from serving as the sole basis to refuse extradition in relation to thirty listed offenses); Bulgarian Extradition Treaty, art. 3(1), *entered into force* May 21, 2009, S. TREATY DOC. 110-12 (same). Bolivian Extradition Treaty, art. III(1)(a), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22 ("Neither Party shall be obligated to extradite its own nationals, except when the extradition request refers to: (a) offenses as to which there is an obligation to establish criminal jurisdiction pursuant to multilateral international treaties in force with respect to the Parties"). Hungarian Extradition Treaty, art. 3(2), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5 ("If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution"); Austrian Extradition Treaty, art. 3(2), *entered into force* Jan. 1, 2000, S. TREATY DOC. 105-50, TIAS 12916; Extradition Treaty with Cyprus, art. 3, *entered into force* Sept. 14, 1999, S. TREATY DOC. 105-16; Bolivian Extradition Treaty, art. III(3), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Extradition Treaty with Thailand, art. 8(2), *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Costa Rican Extradition Treaty, art. 8(3), *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Jamaican Extradition Treaty, art. VII, *entered into force* July 7, 1991, S. TREATY DOC. 98-18 (similar, but also requiring extradition if a fugitive is a national of both the requesting and requested State). *See also* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties,* at 13–14, Congressional Research Service report for Congress 98-958, March 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

372 Guyana law has such provisions. *See* Bruce Zagaris, *Guyana Denies Extradition of Guyanese Drug Suspects to the U.S.*, 25 Int'l Enforcement L. Rep. 228–229 (June 2009).

373 *See* U.N. Model Extradition Treaty, *supra* note 23, at 192; *cf.* Extradition Treaty, May 4, 1978, U.S.–Mex., art. 9, 31 U.S.T. 5059, 5065 (reserving to the state-parties the right to refuse extradition of nationals); Extradition Treaty, U.S.–U.K. June 25, 1985, 24 I.L.M. 1104; (1985) (*entered into force* Dec. 23, 1986) (having no provision for excluding nationals). Article 4(a) of the Model Treaty does not rule out

nationality.[374] The fact that a person is a national of another state does not preclude another state from exercising its criminal jurisdiction.

United States extradition treaties generally contain three types of provisions for dealing with nationality. The first does not refer to nationals specifically, but agrees to the extradition of all persons. Judicial construction,[375] as well as executive interpretation,[376] of such clauses have consistently held that the word "persons" includes nationals, and therefore refusal to surrender a fugitive because he/she is a national cannot be justified under such treaty provisions. The second and most common type of treaty provision provides that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."[377] The official policy of the United States in treaty negotiations has been, until lately, to prevent when possible the surrender of nationals,[378] but this is no longer the case. The secretary of state can always refuse to surrender a citizen of the United States unless there is an explicit treaty provision providing for reciprocity.[379] The third type of treaty provision states

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extradition of nationals but only makes nationality an optional ground for refusal. It adds that in case of refusal the requested state shall, if the other state so requests, submit the case to its competent authorities with a view to taking appropriate action against its national. *Id.* For example, extradition in Canada is viewed as a reasonable limitation on the right of a Canadian citizen to remain in Canada [Section 6(1) of the Canadian Charter of Rights and Freedoms provides that: "Every citizen has the right to enter, remain in and leave Canada"], especially where the objective is the effective prosecution and suppression of international crime. Sharon Williams, *Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition*, 62 Rev. Int'l de Droit Pénal 259 (1991). In *Federal Republic of Germany v. Rauca,* [1986] 1 S.C.R. 441 (Can.), the Ontario Court of Appeals held that extradition prima facie infringes upon a Canadian citizen's right to remain in Canada, which is guaranteed by section 6(1) of the Canadian charter. Williams, *supra* at 262. The court did extradite, however, because it held that the infringement of a citizen's right to remain in Canada was "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" because at the time, the facts of the case would not have allowed for his prosecution in Canada had he not been extradited. *Id.* The 1987 case of *Canada v. Schmidt,* [1987] 1 S.C.R. 500, endorsed the approach of *Rauca*. Williams, *supra* at 262. In the case where a fugitive could be extradited to another state or prosecuted in Canada, the Supreme Court of Canada held, in *United States v. Cotroni* and *United States v. El Zein*, [1989] 1 S.C.R. 1469, that although due consideration must be given to constitutional rights in many cases it may be preferable for the accused to be tried in the foreign country and that the decision to extradite must be based upon the prosecutorial discretion of the requested state. Williams, *supra* at 263. *See also* Geoff Gilbert, Aspects of Extradition Law 96 (1999); Michael Plachta, *(Non)-Extradition of Nationals: A Neverending Story*, 13 Emory Int'l L. Rev. 77 (1999); Joshua S. Spector, *Extraditing Mexican Nationals in the Fight against International Narcotics Crimes*, 31 Mich. J. L. Ref. 1007 (1998); Aristide Baltatzis, *La non-extradition des nationaux*, 13 Revue Hellenique de Droit International 190 (1960).

374 *Nationality Decrees in Tunis and Morocco* (Fr. V. Gr. Brit), Advisory Opinion, 1923 PCIJ (Ser. B) No. 4 at 24. For references to national laws, judicial decisions, and scholarly writings, see Zsuzsanna Deen-Racsmány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 A.M. J. Int'l L. 606, 614–615 (2001).

375 *Charlton v. Kelly*, 229 U.S. 447, 447–457 (1913) (holding that executive recognition of the obligation of the United States to surrender its own citizens under the extradition treaty with Italy of 1868, waived any breach by Italy and left the treaty in force as the supreme law of the land). *See also In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 18, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

376 *Id.* at 475–476 (noting memorandum from Secretary of State Knox, which sets forth executive position).

377 *See, e.g.,* Extradition Treaty, U.S.–Iraq, June 7, 1934, T.S. No. 907; Extradition Treaty, Jan. 19–21, 1922, U.S.–Venez., T.S. No. 675.

378 *See* 4 Hackworth Digest, *supra* note 96, § 318.

379 Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936). *See also* James Wilford Garner, *Comment, Non-extradition of American Citizens—The* Neidecker *Case*, 30 Am. J. Int'l L. 480 (1936)*; cf.* Moses v. Allard, 779 F. Supp. 857 (E.D. Mich. 1991). *See also* Ch. XI.

that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver the individual if, in its discretion, it be deemed proper to do so."[380] Exercise of such discretion would be consistent with the treaty obligation, and the secretary of state has both granted and denied surrender of U.S. nationals under a treaty of this type. An examination of some landmark cases will better illustrate the application of these provisions.

In *Charlton v. Kelly*, the Supreme Court of the United States stated:

> That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The [United States–Italian] treaty contains no reservation of citizens of that country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included.
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> …
>
> The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens…[381]

As to the obligation to surrender a national, the Supreme Court, in *Valentine v. United States ex rel. Neidecker*,[382] stated:

> It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties…But, in this instance, there is no question for construction so far as the obligations of the treaty are concerned. The treaty is explicit in the denial of any obligation to surrender citizens of the asylum state—"Neither of the contracting Parties shall be bound to deliver up its own citizens."
>
> Does the treaty, while denying an obligation in such case, contain a grant of power to surrender a citizen of the United States in the discretion of the Executive?
>
> Obviously the treaty contains no express grant of the power so invoked. Petitioners point to Article I which states that the two governments "mutually agree to deliver up persons" who are charged with any of the specified offenses. Petitioners urge that the word "persons" includes citizens of the asylum state as well as others. But Article I is the agreement to deliver. It imposes the obligation of that agreement. Article I does not purport to grant any power to surrender, save as the power is related to and derived from the obligation. The word "persons" in Article I describes those who fall within the agreement and with respect to whom the obligation is assumed. As Article V provides that there shall be no obligation on the part of either party to deliver up its own citizens, the latter are necessarily excepted from the agreement in Article I and from the "persons" there described. The fact that the

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380 *See, e.g.,* Extradition Treaty, *supra* note 19, U.S.–Japan, art. 5, 31 U.S.T. 892, 897; Extradition Treaty, Jan. 21, 1972, U.S.–Arg., art. 4, 23 U.S.T. 3501; Supplementary Extradition Convention, Feb. 12–June 11, 1970, U.S.–Fr., art. 3, 22 U.S.T. 407, 407 (*entered into force* Apr. 3, 1971); Extradition Treaty, U.S.–Fr., Jan. 6, 1909, T.S. No. 561.

381 Charlton v. Kelly, 229 U.S. 447, 465–468 (1913). *See also In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 18, 1998), *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000). Canadian courts have taken the same view. *See In re* Burley, 1 Can. L. J. 34 (1865). *See also* Hilario v. United States, 854 F. Supp. 165, 169 (E.D.N.Y. 1994).

382 Valentine v. United States *ex rel. Neidecker*, 299 U.S. 5, 10 (1936).

> exception is contained in a separate article does not alter its effect. That effect is precisely the same as though Article I had read that the two governments "mutually agree to deliver up persons except its own citizens or subjects."
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> . . .
>
> Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.
>
> However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens, and not with the courts.[383]

Among the problems of nationality are those raised by the loss and acquisition of nationality, dual nationality, and the time of loss or acquisition. In the absence of a specific provision on this point in the law of the requested state or in the extradition treaty under which the request is made, it appears that acquired nationality brings the accused within the nationality exemption regardless of when it was lost or acquired.[384]

A Swiss court held that, as regards the nationality of the person sought for extradition, the material moment was that of the extradition proceedings. In that case Italy sought the extradition from Switzerland of a woman who had lost her Swiss nationality after committing the offense for which extradition was sought. The Switzerland–Italy Extradition Treaty provided that neither country was bound to extradite one of its own subjects, and the Swiss Extradition Law prohibited the extradition of Swiss citizens. Noting that there was considerable difference of opinion as to the extradition of a national who acquired the nationality of the country of refuge after the commission of the offense for which extradition was sought, the court said that there could be no doubt under the Switzerland–Italy Treaty and the Swiss Extradition Law that the determinative moment was that of the extradition proceedings. The court stated that the surrender of a former subject who was a Swiss citizen, when the crime was committed or when the individual was convicted but who later lost Swiss nationality, could not be called the extradition of a Swiss citizen, and that the primary reasons for refusing to surrender citizens (i.e., special ties that bind the subject to his country and his unconditional right to remain in his own country) did not obtain with regard to a person who had lost her nationality. Accordingly, extradition was granted.[385]

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383 *Id*. at 11, 18. It appears that in the case of the treaty with Canada and Great Britain, the court considered surrender of nationals discretionary with the executive of those governments. *See* George V. LaForest, Extradition to and from Canada (1977). It should be noted that in Canada and Great Britain the authority to surrender individuals to foreign governments is found in municipal legislation.

384 *See In re D.G.D.*, 7 Ann. Dig. 335 (Ct. Thrace 1933) (Greece). In 1932, Bulgaria requested the extradition from Greece of one D.G.D., who had been convicted and sentenced in Bulgaria in 1930, but had escaped to Greece and acquired Greek nationality. The court of Thrace held that extradition must be refused, stating: "By Article 2 of the Extradition Treaty . . . the Contracting Parties do not extradite their own nationals. No distinction is made between nationality acquired before and nationality acquired after the act for which extradition is requested." *Id*. at 335.

In another case the Court of Appeal of Aix-en-Provence held, in 1951, that France could surrender to Italy an individual charged with having committed certain offenses in Italy in 1945 and who had acquired French nationality by naturalization in 1950, although the France–Italy Extradition Treaty of 1870 provided for the non-extradition of nationals of the contracting parties. *In re A.,* 18 I.L.R. 324 (Cour d'Appel d'Aix-en-Provence 1951) (Fr.).

385 *In re Del Porto*, 6 Ann. Dig. 307 (Federal Court 1931) (Switz.). In 1929, a Greek court refused the request of Albania for the extradition of a person of Albanian nationality but of Hellenic race on the ground that Article 3 of the Extradition Treaty between Greece and Albania, which prohibited the

The issue of the extradition of nationals, when prohibited by the constitution or municipal law of a given state, has been addressed by the Federal Supreme Court of Germany, the constitution of which prohibits the extradition of nationals. In 1954, the Federal Supreme Court of the German Federal Republic held that an effort by German authorities to return to Italy a German national whom Italy was willing to "temporarily extradite" to Germany, on assurances that he would in due course be returned to Italy, would not be contrary to the provision of the Constitution of the Federal Republic prohibiting the extradition of German nationals. The Court distinguished between temporary and definitive extradition, and the return of the person to the country that has temporarily extradited him, holding essentially that the latter restores the situation to its status quo ante.[386]

The rationale for this exemption rests on the notion that the requested national is likely to receive ill-treatment or an unfair trial in the requesting state. To that extent it is a discriminatory practice that differentiates between nationals and non-nationals. The presupposition is that the relator will receive worse treatment in the requesting state than in the requested state of which he/she is a national, if he/she were to be tried or punished therein. Therefore, the same consideration is not afforded to a non-national. Professor Shearer sees the contemporary rationale as follows:

1. A person ought not be withdrawn from his (indigenous) natural judges; and
2. A state owes its citizens the protection of its laws.[387]

This rationale derives to a large extent from a jealously guarded conception of national sovereignty, and presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment. The alternative to such an exemption is to try the relator in the requested state, using the substantive laws of the requesting state based on the doctrine of renvoi. Such a proposal resembles federal practice in the United States.[388] This approach was adopted by the Supreme Court of Colombia, which stated:

> The reason for prohibiting the extradition of nationals on the request of another State is obvious. It is due to the risk of possible grave dangers in the trial abroad. In Colombia the prohibition rests also on the basis that such possible risks are unnecessary, since this Republic, with the intention of internationalizing penal law and with the laudable purpose of beginning to make effective the solidarity of nations in the repression of delinquency, has adopted…rules enabling it to apply the Colombian penal law to nationals and foreigners who have perpetrated an offense abroad…. Art. 7 of the Penal Code guarantees that the homicide with which the prisoner is charged will, if it was criminal, not remain without consign judgment in Colombia. In that manner the Colombian State

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surrender of Greek "nationals," must be understood to include persons of Hellenic race though of a different nationality. Extradition (Albanian National) Case, 5 Ann. Dig. 281 (Areopagus 1929) (Greece).

In opposing their extradition to Italy from Palestine, one Goralschwili and another contended that they should be treated as British subjects and thus, under the British–Italian Extradition Treaty of 1873, applicable to Palestine, not extraditable. It appeared that the accused were ex-Ottoman subjects who had applied for and obtained provisional certificates of special citizenship issued by the government of Palestine pending the enactment of the Palestine Citizenship Order. The High Court of Palestine rejected their contention, holding that the Crown had not acquired sovereignty by accepting the Mandate for Palestine and that the subjects of the mandated territory did not become British subjects. They could, therefore, be extradited to Italy, if it were found that they had committed an extraditable offense. Attorney-General v. Goralschwili and Another, 3 Ann. Dig. 47 (High Ct. Palestine 1925).

386 Extradition of German National Case, 21 I.L.R. 232, 234 (BGH 1954) (F.R.G.).

387 Shearer, *supra* note 11, at 118–119.

388 *See* 28 U.S.C. § 1332 (1994) (governing diversity of citizenship); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See also* Jessup, *supra* note 309.

> will exercise social defense against delinquency, as Venezuela would, leaving intact, at the same time, the sovereignty by which the Republic of Colombia may prohibit the extradition of Colombians and of politico-social delinquents at the request of another State.[389]

The United States frequently finds itself hampered by the failure to secure extradition from a treaty partner on the basis of the exclusion of the extradition of nationals from the requested state. In some cases this is dictated by the constitution of such countries,[390] but in these cases it should be possible for these countries to prosecute such persons provided that national legislation permits it.[391] Most developing countries that have no national legislation on extradition, and whose practice in extradition has been limited, take the position that customary international law precludes extradition of nationals.[392]

However, there is a trend to rectify the situation through national legislation in several countries, as evidenced in the case of Scheinbein. The relator was born a U.S. citizen, and prior to having been formally charged with a murder fled to Israel, where he had never lived previously, in order to benefit from the Israeli law of return, and from that country's ban on extraditing

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389 *In re* Arevalo, 10 Ann. Dig. 329, 330 (Sup. Ct. 1942) (Col.). In *In re Rojas*, the Supreme Court of Costa Rica advised the executive to refuse the request of Nicaragua for Rojas's extradition for the crime of swindling under the Central American Extradition Convention of 1923, on the grounds that Rojas was a Costa Rican and that, under Article 4 of the Convention, the contracting parties are not obliged to surrender their nationals but must prosecute them for the offense. 10 Ann. Dig. 330 (Sup. Ct. 1941) (Costa Rica). In *In re Artaza*, the Argentine court reversed the decision of the lower court in favor of granting the extradition of Artaza, an Argentine national, to Brazil, where he was charged with homicide. The court noted that there was no extradition treaty in force between the two countries and stated: "In the absence of an extradition treaty with the demanding State, the provisions of Title V, Chapter II, of Book IV, Section II, of the Code of Criminal Procedure govern the proceedings. According to Article 669 of this Code an Argentine citizen has the right to request a trial before an Argentine court. As the appellant has exercised this right, the extradition request is denied." 18 I.L.R. 333 (Ct. Second Inst. 1951) (Arg.). In 1932, Tom Coumas, a naturalized U.S. citizen of Greek origin, fled to Greece after allegedly committing a murder and an assault with a deadly weapon in California. In 1934, the United States, on behalf of California, requested his extradition from Greece under the United States–Greece Extradition Treaty of 1931, U.S.T.S. 355, 47 Stat. 2185. Coumas successfully resisted extradition on the ground that he was a Greek citizen as he had never divested himself of his Greek citizenship, and that under the 1931 Treaty his extradition was not obligatory and was, under Greek law, prohibited. He was, however, tried in Greece for the crimes for which his extradition had been sought, convicted, and sentenced to four years' and four months' imprisonment. After serving his sentence in Greece, he returned to the United States where he was arrested in 1947 on the same charges. The Supreme Court of California held that his prosecution in California was barred by California law, which provided that conviction or acquittal in another state or country also having jurisdiction over an offense within the jurisdiction of California is a bar to prosecution thereof in California. Coumas v. Superior Court, 192 P.2d 449 (Cal. 1948). *See also* The Bustamante Code of Private and International Law (1928), 86 L.N.T.S. 120 (making extradition of nationals optional).

The United States permits extradition of its nationals irrespective of reciprocity. *See* Castillo v. Forsht, 450 U.S. 922. This is also the position of the *Harvard Draft*, *supra* note 11, at 128. *See also* C. Shachor-Landau, *Extraterritorial Penal Jurisdiction and Extradition*, 29 Int'l & Comp. L. Q. 274, 288 (1980); *cf.* Baltazis, *La Non-extradition Des Nationaux*, 13 Rev. Hellenique de Droit Int'l 190 (1960).

390 For example, Germany and Italy, as well as a number of Latin American states, including Mexico and until recently Colombia. *See supra* note 355.

391 *See* Ch. I, Sec. 5.1. This was the case with Italy with respect to *Venezia v. Ministero de Grazia e Givstizia*, Corte cost., June 27, 1996, 79 Rivista di Diritto Internazionale 815.

392 This is the position adopted by Arab states, as well as many African states.

its own nationals. As a result of this unseemly situation, the Israeli Parliament enacted Amendment VI to its extradition act on April 9, 1999, to allow extradition for similar situations.[393]

The loophole of the non-extradition of nationals is one that needs to be closed, because it allows a person, solely on the basis of nationality, to evade the consequences of his/her criminal action. This goes contrary to a basic concept of justice, and also violates the maxim of *aut dedere aut judicare*.[394]

Contemporary extradition treaties of the United States permit the extradition of U.S. nationals even to states that prohibit the extradition of their nationals to the United States. Thus, reciprocity is not a *conditio sine qua non* for the United States, but the secretary of state has the discretion, under 18 U.S.C. § 3196, to refuse the surrender of a U.S. citizen. However, a problem exists in that there are no guidelines for the secretary of state to exercise his/her discretion. Consequently, it makes it very difficult for a petitioner to have any assurance of fair and equal treatment. It also makes it difficult for a petitioner to seek review of the secretary's discretion under the Administrative Procedure Act, which requires that the petitioner seeking review demonstrate that the decision is arbitrary or contrary to the law.[395]

3.2. Persons Performing Official Acts and Persons Protected by Special Immunity under International Law[396]

Individuals performing official acts and those who are protected by special immunities are in different categories, but they share in common the immunity of the actor. The first of these categories applies to persons who, by reason of their official capacity or functions, are immune from the judicial and administrative processes of their own state, the state where they are performing such recognized official acts, or in any state where their official acts have effects. Insofar as diplomats are concerned, their immunity from prosecution arises under customary international law and treaty law (e.g., the Vienna Convention on Diplomatic Immunity), while that of other public officials of a given state arises under the act of state doctrine, which is also recognized in customary international law. Both forms of immunity derive from the doctrine of sovereignty. Other persons protected by special immunity are heads of state. This type of immunity applies to prosecution. Implicit in it is an exemption from extradition. There are no references in extradition treaties or national extradition laws to such persons covered by immunity. Whenever the case arises, the matter is determined by the international law of immunity and the act of state doctrine, rather than that of extradition.[397]

It should be noted, however, that no immunity applies to jus cogens crimes, namely: genocide, crimes against humanity, war crimes, torture, apartheid, piracy, and slavery and slave-related practices. Nor does it apply where a specific treaty precludes it, as with those dealing with terrorism. In these cases, the immunity of diplomats requires the sending state to prosecute the

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393 Abraham Abramovsky & Jonathan I. Edelstein, *The Post-Sheinbein Israeli Extradition Law: Has It Solved the Extradition Problems between Israel and the United States or Has It Merely Shifted the Battleground?*, 35 Vand. J. Transnat'l L. 1 (Jan. 2002).

394 M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Extradite or Prosecute in International Law (1995).

395 Administrative Procedure Act, 5 U.S.C. §701 (a) (2000). *See also* Ch. VII, Sec. 8 (The Rule of Non-Inquiry).

396 *See* 6 Whiteman Digest, *supra* note 19, at 1–66, 342–351, 428–436.

397 Recently, Italy has convicted twenty-three Americans for their role in the U.S. "extraordinary rendition" process. Three of these Americans were acquitted on diplomatic immunity grounds. For a discussion of the applicability of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, see Erik Sapin, *Italy Convicts 23 Americans for Alleged Rendition of Terrorism Suspect*, 26 Int'l Enforcement L. Rep. 11–14 (Jan. 2010).

offending diplomat, and with respect to immunity of heads of states, it becomes a temporal immunity, and not a substantive one. Thus, if the diplomat is not prosecuted by the sending state, he/she can be prosecuted by any state where the diplomat is not accredited, and with respect to heads of states, they can be prosecuted once they no longer have that status. These immunities, do not however, apply to international criminal tribunals, as discussed in Chapter 2, Section 4.

4. Grounds Relating to the Criminal Charge or to the Prosecution of the Offense Charged

4.1. Introduction

There are several grounds that can be relied upon to deny extradition based on the criminal charge or the prosecution of the offense charged, although they are quite different. The distinction between these grounds and the extent of their legal effect depends upon whether, in a given legal system, they are considered substantive or procedural. The doctrinal basis of such a distinction and its legal consequences also differs in the various legal systems. It would therefore be very difficult to attempt to characterize each of these grounds as substantive or procedural, particularly with reference to the many different legal systems of the world. But from a practical viewpoint U.S. extradition proceedings have the same legal basis, though they vary in their effect because they can be raised as a defense to extradition. The term "defense" in this context means that the relator can advance these grounds, which the court can rely upon to deny the extradition request. In addition, each of these grounds is a valid basis for a petition for executive discretion,[398] and the secretary of state can rely on these grounds in the exercise of this discretionary power, as indeed has been the case. Because of the differences in defenses, they will be discussed separately. They are:

1. The legality of the offense charged, ex post facto, and the retroactive application of the extradition treaty;
2. Double jeopardy—*ne bis in idem*;
3. Statute of limitations;
4. Right to a speedy trial;
5. Immunity from prosecution and plea bargain;
6. Amnesty and pardon; and
7. Conviction based on a trial in absentia.

It must be noted that these defenses are principally found in extradition treaties and in the jurisprudence of the courts. Regrettably, they are not included in applicable municipal legislation, which would produce greater national harmony and uniformity. Instead, this task is left to the judiciary, subject to the limitations of each applicable treaty.

4.2. The Legality of the Offense Charged, Ex Post Facto, and the Retroactive Application of the Extradition Treaty

The relator must be formally charged with an offense, be the subject of a valid and outstanding arrest warrant,[399] or be convicted of a crime. The offense charged or the crime for which he/she was convicted must be listed in the treaty,[400] and the charge must satisfy the principle

398 *See* Ch. IX, Sec. 2 (procedure in the United States).

399 *Id.*

400 *See* Ch. VII, Sec. 3 (extraditable offenses).

of "double criminality."[401] If any of the above "substantive requirements"[402] are not satisfied, extradition will not be granted. In practical terms, if the government fails to comply with these requirements, the relator will raise this noncompliance as a defense. In addition, the relator could claim that at the time of the alleged offense the offense was not a crime under the laws of either the requesting or requested state. That type of ex post facto or retroactivity argument would be a valid defense on the general grounds of the "principles of legality."[403]

If the offense in question existed in the requesting state but not in the requested state at the time the alleged act was committed, the same general argument could be made, namely that it would violate the "principles of legality" of the requested state, as these principles relate to the requirement of "double criminality."[404] Nevertheless, it could be argued that there is no constitutional guarantee applicable in this case to one who is not a U.S. national or permanent resident, especially if the relator is a national of the requesting state.

The specific language of the relevant treaty controls, but in the absence of any specific treaty provision the court should consider that "principles of legality" are part of the public policy of the United States and are therefore applicable. In the United States it is not deemed a violation of the "principles of legality"[405] and, in particular, ex post facto laws, that treaty provisions apply retroactively. The earliest case in point is *In re De Giacomo*.[406] Various decisions have followed, in particular *Gallina v. Fraser*,[407] but none has been decided by the Supreme Court, although its denial of certiorari of some of these cases may be deemed an implicit recognition of this position. In *United States v. Flores*,[408] the Second Circuit held in 1976, however, that the "principles of legality," which include the nonretroactivity of criminal laws and the prohibition

401 *See* Ch. VII, Sec. 2 (Dual Criminality).

402 *See* Ch. VII (Substantive Requirements).

403 Bassiouni, *supra* note 36, at 25–26. *See also* Ennio Amodio & Oreste Dominioni, *L'Extradizione e il Problema de ne bis in idem*, *in* Anno X-N. 2 Rivista Del Diritto Matrimoniale e Dello Stato Delle Persone 363 (1968). M. Cherif Bassiouni, *Draft Statute of the International Criminal Tribunal*, 9 Nouvellesétudes Pénales 35 (1993); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 Ind. J. Int'l & Comp. L. 1 (1991). M. Cherif Bassiouni & Christopher Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 Vand. J. Transnat'l L. 151, 174–176 (1992). Recently, France denied a U.S. request for the extradition of an Iranian accused of exporting over one million dollars of dual-use electronics to Iran. The relator's attorney argued, in part, that the charges arose from transactions that arose prior to the enactment of the relevant U.S. export controls on dual-use technology being sent to Iran. *See* Bruce Zagaris, *France Considers Extradition of Iranian for Alleged Dual Use Items*, 26 Int'l. Enforcement L. Rep. 227–228 (June 2010); *U.S. Extradition Request Denied in France for Alleged Iranian Military Parts Smuggler*, Institute for Science and International Security, May 12, 2010, *available at* http://www.isisnucleariran.org/brief/detail/us-extradition-request-denied-in-france-for-alleged-iranian-military-parts-/ (last visited Sept. 20, 2011).

404 *See* Ch. VII, Sec. 2.

405 Moore, Extradition, *supra* note 337, at § 86.

406 7 F. Cas. 366, 368 (C.C.S.D.N.Y. 1874).

407 Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied,* 364 U.S. 851 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F.Supp.2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, 99 Cal. Daily Op. Serv. 200, (9th Cir. 1990) (NO. 98-55069); Markham v. Pitchess, 605 F.2d 436 (9th Cir. 1979), *cert. denied*, 447 U.S. 904 (1980); United States *ex rel.* Oppenheim v. Hecht, 16 F.2d 955 (2d Cir. 1927), *cert. denied,* 273 U.S. 769 (1927); *cf.* United States v. McMullen, 953 F.2d 761 (2d Cir. 1992).

408 United States v. Flores, 538 F.2d 939 (2d Cir. 1976).

against ex post facto laws, are part of the public policy of the United States and must be relied upon in extradition cases, unless a specific treaty provision denies or alters their application.[409]

A treaty may provide for extraditability for a given offense when the alleged offense was committed before the treaty entered into effect. However, for this to be so, at the time the alleged offense was committed[410] it would have to be a crime in the laws of both states.[411] Even in the absence of a specific treaty provision, such an argument could be made on the ground that retroactivity is contrary to U.S. policy and can only be resorted to when specifically authorized by a treaty. It must also be noted that the entire treaty may also be held to apply retroactively. Whatever the basis for a retroactive application of the treaty or a specific provision thereof, the requirement of double criminality must be satisfied, and the offense charged must have existed in both legal systems at the time of the alleged crime. The problem may arise when a state elects to waive this requirement. In the United States it cannot be waived except by a treaty, and if it were, a constitutional issue would arise with respect to U.S. citizens and permanent residents on due process and equal protection grounds. In most countries of the world these questions would be substantive (or constitutional), but in U.S. extradition cases they have more often been dealt with procedurally, in that they are included in the issue of treaty interpretation, except in the dictum of some opinions.[412]

4.3. Double Jeopardy—*Ne Bis In Idem*[413]

A Roman law maxim holds *nemo bis in idem debet vexari* (it is also known as *ne bis in idem*) and embodies the principle that no one shall be twice placed in jeopardy for the same offense. A corollary of that principle is that society (and the victim) is entitled to but one satisfaction, and that no more than a single penalty should be exacted for a single offense. Criminal punishment has traditionally been retributive, but even the *lex talio* never required more than an "eye for an eye."

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409 *Id.* The *Flores* case dealt with the 1970 Treaty with Spain, which specifically overcomes the presumption of non-retroactive application of the treaty to crimes committed before the treaty entered into effect. *Id*.

410 429 F. Supp. 1215 (D. Conn. 1977). *See* Michael P. Peck, Recent Decision, *Extradition—Double Jeopardy Provision of Extradition Treaty Applies even Where Crime Committed before Ratification*, 11 Vand. J. Trans. L. 833 (1978); Extradition Treaty, Dec. 3, 1971–July 9, 1974, art. 18, U.S.–Can., 27 U.S.T. 983 (*entered into force* Mar. 22, 1976) (excluding retroactivity explicitly).

411 For double criminality, see Ch. VII, Sec. 2.

412 In the case of the extradition of Doherty, *supra* note 137, the United States and the United Kingdom, by renegotiating their existing extradition treaties, in effect retroactively applied the supplementary treaty to Doherty.

413 For other sections also discussing *ne bis in idem*, see Ch. I, Secs. 4.1 (European Regimes), 7.2 (ICC); Ch. II, Sec. 5.3.3(a) (Interpretive Criteria; Resort to National Legislation); Ch. VI, Sec. 2.2. (Subjective-Objective Territorial Theory), Sec. 3 (Active Personality Theory); Ch. VII, Sec. 2 (Dual Criminality); Ch. VIII, Sec. 1.1 (Restatement), Sec. 4.1 (Grounds Relating to the Criminal Charges). For examples of treaty provisions on Double Jeopardy, *see* Italian Extradition Treaty, art. VI, entered into force Sept. 24, 1984, 35 U.S.T. 3023 ("Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same act for which extradition is requested"). Extradition Treaty with the United Kingdom, art. 5, *entered into force* Apr. 26, 2007, S. TREATY DOC. 108-23 ("1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. 2. The Requested State may refuse extradition when the person sought has been convicted or acquitted in a third state in respect of the conduct for which extradition is requested. 3. Extradition shall not be precluded by the fact that the competent authorities of the Requested State: (a) have decided not to prosecute the person sought for the acts for which extradition is requested; (b) have decided to discontinue any criminal proceedings which have been instituted against the person sought for those acts; or (c) are still investigating the person sought for the same acts for which extradition is sought."); Bolivian Extradition Treaty, art. V(2), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22 ("Extradition shall not be granted when the person sought has been

A general principle, which has developed throughout history, requires that no person shall be punished twice for the same offense. The application of this principle has, however, been different in the various legal systems of the world and there has always been a question as to its applicability between different legal systems. The reason is that conduct that affects more than one state can be considered as a separate violation, because each state is a separate sovereign. As a result, each state seeks its satisfaction independently of any other state. This approach derives from the doctrine of separate sovereignties whereby each sovereign, considering only the violation of its own public order, enforces its laws regardless of whether the same conduct also affected another state, which may have already prosecuted or punished the offender for the same crime or conduct.[414] But this traditional view is rapidly changing with the development of international and regional human rights norms. In addition certain regions (such as the European members of the Schengen Agreement) and subregional groups of states (such as members of the Benelux countries or Scandinavia) have developed treaties with broader prohibitions of *ne bis in idem*, which is broader than the double jeopardy principle found in the Fifth Amendment to the U.S. Constitution.

Among the problems arising out of the application of this prohibition are the following:

1. Whether punishment in one state for certain conduct satisfies another state if the same conduct is also punishable under its laws?

2. Whether acquittal by one state for a given offense satisfies another state if the same conduct is also punishable under its laws?

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convicted or acquitted in the Requested State for the offense for which extradition is requested. Extradition shall not be precluded by the fact that the authorities of the Requested State have decided to refrain from prosecuting the person sought for the acts for which extradition is requested or to discontinue any criminal proceedings which have been initiated against the person sought for those acts."). *See also* Extradition Treaty with Sri Lanka, art. 5, *entered into force* Jan. 12, 2001, S. TREATY DOC. 106-34; Extradition Treaty with Trinidad and Tobago, art. 5, *entered into force* Nov. 29, 1999, S. TREATY DOC. 105-21; Extradition Treaty with the Bahamas, art. 5, *entered into force* Sept. 22, 1994, S.

TREATY DOC. 102-17; Jordanian Extradition Treaty, art. 5, *entered into force* July 29, 1995, S. TREATY DOC. 104-3. Some include language to avoid confusion over whether an American dismissal with prejudice is the same as an acquittal, Hungarian Extradition Treaty, art. 5(1), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5 ("Extradition shall not be granted when the person sought has been convicted or acquitted or the case dismissed by court order with finding and final effect in the Requested State for the offense for which extradition is requested").

414 Bassiouni, *supra* note 41, at 499–511. *See* Bartkus v. Illinois, 359 U.S. 121 (1959) (upholding the doctrine of separate sovereigns between states). *See also* Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. Rev. 1096 (1959). It is usual for extradition laws and treaties to exclude extradition if there has been a final judgment rendered against the person in the requested state with regard to the offense for which his extradition has been requested. The United Nations model treaty contains the double jeopardy exception in Article 3(e). The situation is different with respect to final judgments rendered in third states. Provisions excluding extradition in such cases are relatively rare. There may, however, be a development toward also applying the exception of *ne bis in idem* to judgments rendered in the third states. For example, the First Additional Protocol to the European Convention on Extradition, Trb. 1979 No. 119, Europe. T.S. No. 86, makes refusal of extradition possible. U.N. Model Extradition Treaty, *supra* note 23, at 199–200. *See* also Williams, *supra* note 373, at 266 ("[a] majority on the Canadian Supreme Court felt that a [plea of double jeopardy] could only be raised at trial . . . [and] is not appropriate for an extradition hearing."). In Germany, the law and constant practice have thus far recognized the *ne bis in idem* principle only in the domestic arena (in which it is guaranteed by the Constitution), but not in relation to foreign judgments. Peter Wilkitski, *Defences, Exceptions and Exemptions in the Extradition Law and Practice and the Criminal Policy of the Federal Republic of Germany (Excluding the "Political Offense" Defence)*, 62 Rev. Int'l de Droit Pénal 281, 282 (1991).

3. Whether prosecution or any of its preceding stages precludes another state from prosecuting a person for conduct claimed criminal under both laws?

4. Whether the state seeking to prosecute or punish a person already prosecuted or punished by another state for the same conduct considers itself bound by the prior prosecution or punishment, or in reliance upon a technical difference as to the offense charged, will it deem itself free to pursue that same offender?

5. Whether the inquiry be made as to the entirety of a given criminal transaction, or will be made as to each chargeable offense arising out of the respective laws of each state?

These threshold questions make the principle *ne bis in idem* difficult to apply in extradition with any degree of uniformity, in the absence of internationally accepted doctrines of criminal justice that could provide a conceptual framework for the application of the prohibition. So far, the commonly accepted statement of this principle is that, at a minimum, a person shall not be punished twice for the same crime. At the other end of the spectrum is the prohibition to prosecute for any offense arising out of the same facts that were part of or which formed the basis of the former prosecution. In short, it gives the prosecution one bite of the apple.

Extradition treaties contain specific provisions on *ne bis in idem* or double jeopardy, and they will usually specify that the law of the requested or requesting state applies.[415] Such a treaty provision will also refer to the prohibition as applying to the "same offense" or to the "same facts" on which the offense charged in the requested state was predicated. Most U.S. extradition treaties refer to the "same offense" or substantially the same offense; some (such as the treaty with France) refer to the "same facts." The use of the term "same facts" creates a broader protection than "same offense."[416]

The distinction between same offense and same facts is indeed considerable, but it stems in large part from the differences between the common law and civilist systems.[417] In the former, the prosecutor has prosecutorial discretion and can therefore select from the facts in a given situation what crimes to prosecute. In that case, the prosecution is barred from retrying the same person for substantially the same crime based on substantially the same facts. In the latter the prosecutor is obligated to prosecute for all crimes that arise from the facts known to him/her at that time. Thus, the prosecutor is barred from any future prosecution of any crime arising out of the same facts irrespective of the legal characterization of the offense charged in the earlier prosecution, and in the subsequent one.

The difference between legal systems may occasion difficulties in the United States, as the civilist concept of *ne bis in idem* is not only broader than double jeopardy, but it is also based on the prohibition of prosecution for the same facts, and not only for the same or substantially the same crimes arising out of the same facts. The concept of same facts includes same evidence and material propositions of fact.

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415 Bedi, *supra* note 19, at 171–179.

416 In an extradition from Mexico, the Mexican Attorney General explained that the relator was extraditable despite having been tried and sentenced for the criminal activity at issue because "facts for which his extradition is sought differ from those for which Mr. Arellano Felix was tried and sentenced." The facts in the U.S. case involved conduct that occurred temporally after the Mexican case. *See* Bruce Zagaris, *Mexico Extradites Benjamin Arellano Felix to the U.S.*, 25 Int'l Enforcement L. Rep. 101 (Mar. 2009). *See also In re Extradition of* Garcia, 802 F. Supp 773, 777 (E.D.N.Y. 1992) regarding what constitutes an "offense" under *ne bis in idem*).

417 *See* Articles 6 and 368 of the French Code de Procédure Pénale (1994) prohibiting *ne bis in idem*. For a more ample discussion, see 2 Roger Merle & André Vitu, Traitéde Droit Criminal: Procédure Penale 871 (3d ed. 1979); Gaston Stefani et al., Procédure Pénale 794–804 (15th ed. 1993); 2 Albin Eser et al., Internationale Rechtshilfe in Strafsachen 1949-1992 at 149, 373, 611–613 (1993). *See also* Christine Van Den Wijngaert, Criminal Procedure Systems in the European Community (1993).

Contemporary extradition law concerns itself with these questions, but there are few cases on point thus far, because few criminal acts have multi-state effects that are simultaneously or concurrently pursued by more than one state. The range of treaty provisions and judicial interpretation include the following applications:

1. The requested state shall not surrender the relator if he/she was prosecuted and acquitted, or prosecuted and convicted and served his sentence, if he/she is sought for the same offense, with the following variances:

   a. regardless of the state wherein this occurred; or

   b. provided it occurred in the requesting state;[418] or

   c. provided it occurred in the requested state.

2. The requested state shall not surrender the relator if he/she was convicted of an offense and served his/her sentence and was sought for the same offense, with these variances:

   a. by the same state which convicted him; or

   b. by its own judicial authorities; or

   c. by any other state.

3. The requested state will extradite the relator subject to a limitation (contained in the extradition order) on the future prosecution of the relator in the requesting state. Such a limitation will function like any other limitation arising under the principle of specialty (*see* Chapter VII, Sec. 6). In that case, the specific language of the limitation controls, and it is to be construed in accordance with the laws of the surrendering state.

Ne bis in idem or double jeopardy issues arise, inter alia, in the following instances:

1. Whenever the relator has been prosecuted and convicted by the requested state and is sought by the requesting state for the identical or substantially similar criminal conduct. The rationale in this instance is essentially fundamental fairness, but also that it would be repugnant to the requested state to use its processes to place an individual twice in jeopardy for the same conduct, particularly after that very state had prosecuted and punished the offender for the conduct.

2. Whenever the relator had been prosecuted and acquitted by the requesting state and was not a fugitive there from when he/she came to the requested state. The rationale is also fundamental fairness, but also that the requested state is not likely to lend its processes to give the requesting state another opportunity to prosecute the same person for the same offense of which he/she was found not guilty.

3. A more difficult problem, for which there are no decisions in the United States (and none elsewhere that are known to this writer), is when the relator has been prosecuted, convicted, or acquitted in a given state other than in the requesting or requested state. In this situation and in the absence of a controlling treaty, the requested state can rely on its own public policy, which may differ depending on whether the relator is a national of the requested state.

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418 This arose in the legal proceedings surrounding the extradition of Japanese businessman Kazuyoshi Muira to California after being acquitted of the same charges in Japan. *See generally, Commonwealth of the Northern Mariana Islands v. Muira*, 2010 MP 12 (CNMI Supreme Court, 2010). Mr. Muira committed suicide after he was extradited to the United States and before his trial could commence, and the case was dismissed. *See Case Dismissed against Muira After Jail Suicide*, AP Worldstream, Oct, 15, 2008, *available at* http://www.highbeam.com/doc/1A1-D93QJOAG0.html (last visited Sept. 20, 2011).

It should be noted that the statutes of the ICTY, ICTR, and the ICC contain a provision on double jeopardy. These provisions are:

Article 10 of the ICTY statute states:[419]

> 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
>
> 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 9 of the ICTR states:[420]

> 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
>
> 2.A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
>
> a) The act for which he or she was tried was characterised as an ordinary crime; or
>
> b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 20 of the Rome Statute of the International Criminal Court states:[421]

> 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court
>
> 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
>
> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

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419 Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993).

420 Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994).

421 Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Difficulties also arise when relators enter into plea agreements or are extradited based on "assurances," and attempt to raise claims that their subsequent prosecution on given charges would violate the terms of these agreements.[422]

A difficult problem lies in the interpretation of the words "same conduct" and "same offense." The two terms can be interpreted as follows:

1. Same conduct:
   a. Identical acts; or
   b. A series of acts related to each other by the scheme or intent of the actor; or
   c. Multiple acts committed at more than one place and at different times, but related by the actor's criminal design.
2. Same offense:
   a. Identical charge; or
   b. Lesser included offense; or
   c. Related offenses, but not included.

Last, there is the problem of distinguishing between "same facts" and "same acts." The term "same facts" is broader and refers to all legally relevant facts to the charge for which the person was prosecuted, whereas "same acts" refers to the elements of the offense charged. One can therefore conclude that:

> 1. The applicable extradition treaty language controls, unless there is a superseding multilateral treaty that applies to the question. The extradition treaty is, in any event, subject to the national constitution of the requesting state seeking to prosecute a surrendered person.
>
> 2. In the absence of the above and subject to the requirements of the principle of specialty (*see* Chapter VII, Sec. 6), any limitations contained in the judicial extradition order or executive warrant issued by the surrendering state will control. In that case, the law of the surrendering state will have to be applied in the requested state.

As stated above, various multilateral extradition conventions embody this defense in their provisions, but the choice of terminology reflects different approaches outlined above and thus does not provide a single standard of application.

The relevant provisions of these conventions follow as evidence of the general application of the prohibition, though they also illustrate the different formulations adopted by these instruments.

The Arab Convention on Extradition states in Article V:

> Extradition shall not be granted in case the person sought for has already been committed to trial for the offense for which his extradition is being requested and has not been found guilty, or has been already convicted, or if he is under investigation, or if trial had been started for the same offense in the State from which extradition is being requested.
>
> In case the person in question is under trial for another offense, committed in the state which is being asked to surrender him, his extradition shall be postponed until the trial is terminated

422 *See* United States v. Salinas-Doria, 2008 U.S. Dist. Lexis 86170 (S.D.N.Y. 2008) (relator raising the *ne bis in idem* issue based on assurances given to Mexico by the United States); Ramanauskas v. United States, 526 F.3d 1111 (8th Cir. 2008) (relator raising the *ne bis in idem* issue based on a plea agreement between him and the U.S. government).

> and the penalty inflicted has been executed. However, provisions may be made for the temporary surrender to stand trial in the requesting state, on condition that at the end of such trial and before the execution of the penalty inflicted, he will be returned to the state applying for his extradition.[423]

The Benelux Convention on Extradition and Mutual Legal Assistance states in Article 8:

> Extradition shall not be granted if final judgment has been passed on the person claimed by the competent authorities of the requested state in respect of the punishable facts for which extradition is requested. Extradition may be refused if the competent authorities of the requested state have decided either not to institute proceedings in respect of the same facts, or to terminate proceedings already instituted.[424]

The European Convention on Extradition states in Article 9:

> Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested state upon the person claimed in respect of the offense or offenses for which extradition is requested. Extradition may be refused if the competent authorities of the requested state have decided either not to institute or to terminate proceedings in respect of the same offense or offenses.[425]

The European Convention on the International Validity of Criminal Judgments states in Article 9:

> A sentenced person detained in the requesting State who has been surrendered to the requested State for the purpose of enforcement shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than for which the sentence to be enforced was imposed.[426]

The Inter-American Convention on Extradition states in Article 13:

> When the person sought is under prosecution or is serving a sentence in the requested state, his surrender shall be deferred until his trial is ended if found not guilty, or until the sentence has been served, as the case may be.[427]

The Schengen Agreement states in Article 54:

> A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party.[428]

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423 1952 B.F.S.P. 159, at 606, League of Arab States Treaty Series 27-32, *reprinted in* 8 Rev. Egyptienne de Droit Int'l 328–332 (1952). *See also* Said Hussein Youssef Khadr, Extradition Law and Practice in Egypt and Other Arab States (School of Oriental and African Studies, London W.C. 1, Apr. 1977).

424 The Benelux Convention on Extradition and Judicial Assistance in Penal Matters, Tractatenblad van het Koninkrijk der Nederlanded No. 97 (1962).

425 European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273, *reprinted in* 1 European Inter-State Cooperation in Criminal Matters 212 (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 1991).

426 European Convention on the International Validity of Criminal Judgments, May 28, 1970, 973 U.N.T.S. 57, E.T.S. No.70, *reprinted in* 1 European Inter-State Cooperation in Criminal Matters 519 (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 1991).

427 Second Draft Convention on Extradition, adopted by the Inter-American Juridical Committee, July 10, 1957.

428 Convention Applying the Schengen Agreement of June 14, 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, June 19, 1990, 30 I.L.M. 84; H. Meijers

These multilateral conventions, as well as bilateral treaties, national laws, and customary practice, warrant the conclusion that the principle is a part of conventional and customary international law. While the principle of *ne bis in idem* reflects the penological policy of the state applying it, its general acceptance by the world community gives it recognition as a "general principle of international law." As such, it is also embodied in human rights conventions.

The International Covenant on Civil and Political Rights (ICCPR) states in Article 14(7):

> No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[429]

The Inter-American Convention on Human Rights (IACHR) states in Article 8(4):

> An accused person acquitted by a nonapplicable judgment shall not be subjected to a new trial for the same cause.[430]

The historical recognition given the principle *ne bis in idem* in various legal systems, its enunciation in human rights conventions, and its embodiment in bilateral and multilateral extradition treaties make it a part of all the sources of international law. As such, it operates either as a bar to extradition or as a bar to prosecution after extradition. However, there are problems in its application, as each state will apply the prohibition in accordance with its laws and jurisprudence, unless it is required to apply the law of the surrendering state.

An analysis of U.S. precedent dealing with the double jeopardy issue is instructive. The basic test for double jeopardy within the federal system, as well as within the state systems, is found in *Blockburger v. United States*.[431] In the United States, the doctrine of double jeopardy does not bar one state from prosecuting crimes for which another state or the federal government, a separate sovereign, has prosecuted the same individual.[432] In *United States v. Ryan*,[433] it was found that no constitutional right existed for a non-U.S. citizen to be protected against double jeopardy as between separate sovereignties.[434] This is true unless a treaty provision holds otherwise.[435] The basis for this and other similar decisions appears in *United States v. Martinez*,[436]

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et al., Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security, and the Police 173 (1991).

429 G.A. Res. 2200, *supra* note 4, art. XIV; *Symposium: The Ratification of the International Covenant in Civil and Political Rights*, 42 DePaul L. Rev. 4 (1993).

430 Nov. 22, 1969, Organization of American States Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2, *reprinted in* 9 I.L.M. 673.

431 Blockburger v. United States, 248 U.S. 299 (1932). In *Blockburger* the Supreme Court held that "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304.

432 *See* Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1979). *See also* Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, Harv. L. Rev. 1 (1960). For estoppel of subsequent prosecution in violation of double jeopardy, which is also part of the due process provisions of the Fourteenth and Fifth Amendments to the U.S. Constitution, see *Ashe v. Swenson*, 397 U.S. 436 (1970). *See also* Hurtado-Hurtado v. United States Attorney General,2009 U.S. Dist. LEXIS 125460, at *12–*14 (S.D. Fla. 2009).

433 United States v. Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973).

434 *Id.* at 274. *See also* Coumas v. Superior Court, 192 P.2d 449 (Cal. 1948) (barring subsequent prosecution in California, pursuant to extradition treaty between Greece and United States, of a naturalized American citizen [a native Greek who naturalized without consent of the Greek government] convicted in Greek court); *cf.* People v. Mims, 289 P.2d 539, 542 Cal. Ct. App. (1955).

435 *See* Ch. II, Sec. 5.4, discussing *Sindona v. Grant.*

436 United States v. Martinez, 616 F.2d 185 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981). *See* also Gusikoff v. United States, 620 F.2d 459 (5th Cir. 1980); *supra* note 199 and accompanying text.

in the case of a relator subject to double jeopardy (prosecuted in Cuba and then in the United States). In addition, if the case involved a non-U.S. citizen, the claim could be made that the prohibition against double jeopardy applies territorially within the United States to all persons,[437] but does not extend extraterritorially except to U.S. citizens. It must be noted, however, that the Universal Declaration of Human Rights,[438] the ICCPR,[439] and the IACHR[440] provide for protection against double jeopardy. It can therefore be argued that such a prohibition can be raised as a bar to prosecution in the requested state. However, in the case of the ICCPR, one court found the treaty to be non–self-executing and as such Article 14(7) was not judicially enforceable.[441]

The Second Circuit court, in *Galanis v. Pallanck*,[442] stated that double jeopardy is a treaty right. Thus, when the crime for which extradition is sought occurred before ratification of the applicable treaty, but the extradition proceedings had begun after ratification, the double jeopardy provision of that treaty applies.[443]

In *Sindona v. Grant*,[444] the Second Circuit, relying on this writer's position, held that the defense of double jeopardy can be validly raised as a bar to extradition, but construed it narrowly as the language of the 1973 United States–Italy Extradition Treaty was law-driven, namely by the offense charged, the facts being a secondary test, namely whether to mean the same or substantially the same crime based on the same or substantially the same facts upon which the relator has been or is being prosecuted in the United States.[445] The 1983 United States–Italy Extradition Treaty

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437 The prohibition against double jeopardy does not bar prosecution by two or more states for the same offense. Heath v. Alabama, 474 U.S. 82 (1985), *cert. denied*, Heath v. Jones, 502 U.S. 1077 (1992). *See also* United States v. Rashed, 83 F. Supp. 2d 96 (D.D.C. 1999); James A. Shellenger & James A. Strazella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. I (1995).

438 G.A. Res. 217, *supra* note 4.

439 G.A. Res. 2200, *supra* note 4, at art. XIV.

440 *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

441 Hurtado-Hurtado v. United States Attorney General,2009 U.S. Dist. Lexis 125460, at *14–*18 (S.D. Fla. 2009).

442 Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977). *See* Peck, *supra* note 410. *See also* Smalis v. Penn., 476 U.S. 140 (1986) (ruling on defendants' demurrer holding that evidence insufficient to establish factual guilt was an acquittal under double jeopardy clause and barred the Commonwealth of Pennsylvania's appeal).

443 *See also* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 869 (1972); *cf. In re Extradition of* Singh, 123 F.R.D. 127 (D.N.J. 1987); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. 1998), United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

444 Sindona v. Grant, 619 F.2d 167, 178 (2d Cir. 1980), *aff'g* 461 F. Supp. 199 (S.D.N.Y. 1978). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Jurado-Rodriguez & Garcia-Montilla, E.D.N.Y. CR 94-547, Nov 3, 1995, Memorandum and Order on Double Jeopardy. Only four reported federal decisions and one state decision refer to the doctrine of *ne bis in idem*. *See* Bartkus v. Illinois, 359 U.S. 121 (1959) (Black J. dissenting); Garcia v. United States, 987 F.2d 153 (2nd Cir. 1993) ("Garcia II"); Sindona v. Grant, 619 F.2d 1967 (2d Cir. 1980); Garcia v. United States, 802 F. Supp. 773 (E.D. N.Y. 1993) ("Garcia I"); State v. Barger, 242 Md. 616, 220 A. 2d 304 (Md. 1966) Of those five, only *Sindona* and *Garcia I* have any substantive discussion whatsoever of the doctrine.

445 *See also In re* Gambino, 2006 WL 709445 (D. Mass. 2006). *See* Ch. II, Sec. 5.4. In a similar but unrelated issue, Judge Weinstein concluded that "same offense" and "same conduct" are subject to broad interpretative leeway, and that unless a treaty specifies whether the determination is to be law-driven that it should be considered fact-driven. *See also* United States v. Jurado-Rodriguez, 907 F. Supp. 568 (E.D.N.Y. 1995) (relying on Gallanis v. Pallanck, 568 F.2d 234 (2d. Cir. 1977) and the Restatement

contains a similar provision in Article VI. It states that extradition is not available in cases where the requested person has been acquitted or convicted of the "same acts" in English and the "same facts" in the Italian text. It is obvious that any exercise in treaty interpretation needs to ascertain the parties' intention by relying on the plain language and meaning of the words, if possible. Thus, the real inquiry must be into the parties' intentions. In the case of Italy, the parties intended to reflect their national legislation in the treaties. For example, Italy's law prohibiting *ne bis in idem* specifically uses the words *stessi fatti*, which are the same words used in the Italian version of Article VI, which mean "same facts." Understandably, Italy could not ratify a treaty that was inconsistent with its national legislation. Therefore, Italy intends the "same facts" to prevail, as opposed to the more narrow meaning of "same acts," because *fatti*, or "facts," may include multiple acts. One district court discussed the "discredited dictum in the Sindona opinion" and applied the "same conduct" test in finding a relator extraditable to Mexico.[446]

United States courts may still make a constitutional determination under the Fifth Amendment of the applicability of double jeopardy to extradition cases, particularly with respect to a requesting state's right to keep on reviewing its request for the same facts in the hope of finding a sympathetic magistrate or judge while the requested person remains in custody.[447]

Title 18 §§ 3181–3196 does not contain a provision applicable to double jeopardy. Consequently, the question is left to be answered by the various bilateral treaties between the United States and other countries. Where the United States relies on a bilateral treaty that is silent on double jeopardy, or on a multilateral treaty that does not contain reference to double jeopardy or a source of reliance, the U.S. courts will have to consider whether the Fifth Amendment to the Constitution of the United States applies. So far, that issue has been avoided because the

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(Third), § 476 & comment); Sindona v. Grant, 619 F. 2d 167 (2d. Cir. 1980). Even though civilest countries do not recognize the concept of conspiracy, many European countries are now moving toward legislation of attempt that is closer to conspiracy, and also includes participation in a criminal organization as a basis for criminal responsibility. This is the case with Italy. *See* Article 416 and 416*bis* of the Italian Criminal Code with respect to *associazione per delinquere* and *associazione per delinquere di stampo Mafioso*. France has a similar article in its criminal code called: *Association de Malfaiteurs*. As foreign legislation may seek to emulate the United States' general conspiracy provision, as well as narrowly defined conspiracies to commit certain crimes, it is likely that issues of interpretation will arise, and in that case comparative legal analysis will be required.

446 *In re Extradition of* Ye Gon, 2011 U.S. Dist. Lexis 12559, at *54–*62 (D.D.C. Feb. 9, 2011).

447 In *Ahmad v. Wigen*, the Court held:

> Judge Korman held that as a matter of law the United States Attorney was entitled to file a second extradition complaint after Magistrate Caden had denied the initial extradition request. Ahmad, 706 F. Supp. at 1036. Even though this procedure permits the United States Attorney to relitigate issues of fact and law that have been decided by a magistrate, a de novo extradition hearing is permissible and does not violate principles of res judicata or double jeopardy. See, e.g. Collins v. Loisel, 262 U.S. 426, 429-30, 43 S. Ct. 618, 619, 67 L.Ed. 1062 (1923) (double jeopardy principles are inapplicable to multiple extradition applications); United States v. Doherty, 786 F.2d 491, 501 (2d Cir. 1986) (upon denial of extradition request, sole recourse for government is to file request for another proceeding; application of res judicata is inappropriate); Hooker v. Klein, 573 F.2d 1360, 1366 (9th Cir.), cert. denied, 439 U.S. 932, 99 S. Ct. 323, 58 L.Ed.2d 327 (1978) (only limitation on number of extradition requests is that each such request must be based on good faith determination "that extradition is warranted").
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> The proceedings here were neither vindictive nor designed to harass the petitioner—two of the evils which double jeopardy prevents. Cf. Green v. United States, 355 U.S. 184, 187–88, 78 S. Ct. 221, 223–24, 2 L.Ed.2d 199 (1957). They were intended to meet the problem of the government's lack of power to appeal the denial of extradition. See United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y.1985), aff'd, 786 F.2d 491, 495–96 (2d Cir. 1986). It would be desirable to allow an appeal by either side from an extradition decision. But this is a matter for the legislature, not the courts. (Legislation to this effect has been proposed but not yet enacted. See Proposed Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. § 3195(a)(1),

various cases in which the constitutional issue was raised were deemed to be controlled by the applicable bilateral treaty. Nevertheless, U.S. courts may still determine the applicability of a constitutional provision despite the fact that there is an existing treaty. So far there has been some reticence on the part of U.S. courts to apply constitutional protections to extradition, as evidenced in judicial reluctance to apply the Fourth Amendment "probable cause" requirement to provisional arrest (*see* Chapter IX, Section 9), and to extradition hearings (*see* Chapter X) (essentially because Section 3184 requires "probable cause") the right to bail (*see* Chapter IX, Sec. 12), and the Fifth Amendment right to be protected against self-incrimination (*see* Chapter VII, Sec. 8). As the jurisprudence of the United States presently stands, the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution does not prevent extradition to another state unless the relevant treaty provides that double jeopardy shall apply. Nor does it apply to sentencing enhancement based on evidence of relevant conduct of another crime. Thus, the relevant extradition treaty will control as to whether it is the law of the requesting state or that of the requested state that will apply. If it is that of the requesting state, the court will either have to take judicial notice of the law of that country or seek to have it proven as a matter of fact through the laws, judicial decisions, and the writings of authoritative commentators. If it is the law of the requested state, namely the United States, the issue is whether to apply exclusively U.S. domestic legal standards applicable to criminal cases, or whether in addition to that, U.S. courts will take into account the applicability of international law.

In *Elcock v. United States*,[448] Judge Targer held in a learned opinion that:

> The Fifth Amendment's protection against double jeopardy extends only to successive prosecutions brought by the same sovereign. *See Abbate v. United States,* 359 U.S. 187, 193-195, 79 S. Ct. 666, 670, 3 L. Ed. 2d 729 (1959) (enunciating separate sovereign theory of double jeopardy); *United States v. Lanza,* 260 U.S. 377, 382, 43 S. Ct. 141, 142 67 L. Ed. 314 (1922); *Moore v. Illinois,* 55 U.S. (14 How.) 13, 19–20, 14 L. Ed. 306 (1852) (same). As a result, the Double Jeopardy Clause of the Constitution does not prevent extradition from the United States for the purpose of a foreign prosecution following prosecution in the United States for the same offense. *See In re Ryan,* 360 F. Supp. 370, 274 (E.D.N.Y.), *aff'd,* 478 F.2d 1397 (2d Cir. 1973) (Table). The principle of double jeopardy, or *ne bis in idem* as the concept is more commonly known in civil law, is, however, an internationally recognized principle of criminal justice. *See Sindona v. Grant,* 619 F.2d 167, 177 (2d Cir.1980) (Friendly, J.); M. Cherif Bassiouni, International Extradition: United States Law and Practice 598 (3d rev. ed. 1996) [hereinafter Bassiouni, International Extradition], as negotiated since World War II—contain provisions on double jeopardy. *See Sindona,* 619 F.2d at 177 (citing numerous examples); 4 Michael Abbell & Bruno A. Ristau, International Judicial Assistance 109 (1990 & Supp. 1997).[449]
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> …

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reprinted in H.Rep. 998, 98th Cong., 2d Sess. 54 (1984) (permitting appeal from an extradition order by government or defendant)).

Ahmad v. Wigen, 726 F. Supp. 389, 397 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990), *cert. denied*, 497 U.S. 1054 (1990). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997). *See contra*, *In re* Ryan, 360 F. Supp. 370 (E.D.N.Y), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

448 Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000). *See also* United States v. Rashed, 83 F. Supp. 2d 96 (D.D.C. 1999); United States *v.* Rashed, 234 F.3d 1280 (D.C. Cir. 2000) (applying the treaty between United States and Greece); United States v. Rezak, 899 F. Supp. 697 (D.D.C. 1998).

449 *Elcock,* 80 F. Supp. at 70. A number of circuits have made an exception in the dual sovereignty theory for "sham prosecutions." *See, e.g.*, United States v. Raymer, 941 F.2d 1031 (10th Cir. 1991); United States v. Bernhardt, 831 F.2d 181 (9th Cir. 1987); United States v. Balsys, 524 U.S. 666, 118 S. Ct. 2218 (1998).

Relying in part on Judge Friendly's opinion in *Sindona v. Grant,* 619 F.2d 167 (2d Cir. 1980), the Government urges that Article should be interpreted solely in light of the domestic law of double jeopardy and that this court should apply the Blockburger or "same elements" test to determine whether the German charges concern the same offense as the charges for which Elcock has been prosecuted in the United States. *See* Resp't's Mem. Opp. at 5, 8–9. *See generally United States v. Dixon,* 509 U.S. 688, 703–12, 113 S. Ct. 2849, 2859–64, 125 L. Ed. 2d 556 (1993) (adopting Blockburger as the exclusive test for determining whether multiple prosecutions violate the Double Jeopardy Clause); *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932) (holding that two crimes constitute different "offences" within the meaning of the Double Jeopardy Clause if each "requires proof of an additional fact which the other does not").

In *Sindona,* Judge Friendly was required to construe the prior jeopardy clause of the United States' then-current extradition treaty with Italy. In language close to that of Article 8, the treaty with Italy barred extradition in cases where the "person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested." Treaty on Extradition, Jan. 18, 1973, U.S. –Italy, art. VI(1), 26 U.S.T. 493 (superseded by Treaty on Extradition, Oct. 13, 1983, U.S.–Italy, T.I.A.S. No. 10,837). Italy had requested Sindona's extradition to face charges of fraudulent bankruptcy in Italy following his prosecution in the United States for securities fraud and other securities law offenses. Rejecting Blockburger as too narrow a test for determining identity of "offenses" within the meaning of the treaty, Judge Friendly instead looked for guidance in Justice Brennan's concurring opinion in *Ashe v. Swenson,* 397 U.S. 436, 453–54, 90 S. Ct. 1189, 1199, 25 L. Ed. 2d 469 (1970) (Brennan, J., concurring) (stating that the Double Jeopardy Clause requires joinder of "all the charges against a defendant which grow out of a single criminal act, occurrence, episode or transaction") and the Department of Justice's (then-current) Petite n9 policy, *See* United States Attorneys' Manual § 9-1.242 (n.d.) (Barring federal prosecutors from trying a case where there has been a state prosecution for "substantially the same act or acts" unless there are "compelling Federal interests for such prosecution"), quote in *Sindona,* 619 F.2d at 178. *See Sindona,* 619 F.2d at 178–79. Applying these principles, Judge Friendly determined that the Italian charges against Sindona did not involve the same "offense" as did his American prosecution.

Although Judge Friendly's opinion has sometimes been cited for the proposition that domestic law should be applied to determine the effect of a double jeopardy clause in an extradition treaty. *see* e.g., United States v. Jurado-Rodriguez, 907 F. Supp. 568, 577–78 (E.D.N.Y. 1995), such a view may well represent a misreading of the opinion. The passage in Sindona generally cited for the proposition that recourse to domestic law is appropriate in these cases is not actually a holding or even dictum of the court. Rather, it is a paraphrase of a descriptive observation by a commentator:

> Perhaps because of the diverse origins of the rule . . . no established solution exists for the famous problem of identity of offenses for application of *ne bis in idem* . . . Thus, he [commentator M. Cherif Bassiouni] observes, the scope of any given double jeopardy provision will hinge in large part on the interpretations given these terms that are borrowed from the domestic law and policies of the contracting parties.

Sindona, 619 F.2d at 177 (citing M. Cherif Bassiouni, International Extradition and World Public Order 459 (1974) [hereinafter Bassiouni, World Public Order]) (internal quotations and other citations omitted) (second emphasis added). Nowhere in the opinion does Judge Friendly expressly endorse the observation as a normative principle. On the contrary, Judge Friendly subsequently cautioned that:

> In construing a double jeopardy clause in a treaty, embodying an ancient and widely recognized principle of civilized conduct, a court should not deem itself bound by a quiddity of the law of the requested party.

Sindona, 619 F.2d at 178. Although Judge Friendly did ultimately look to domestic principles, "Justice Brennan's concurring opinion in *Ashe v. Swenson,* and the Department of Justice's Petite policy" in deciding the scope of the double jeopardy protection in Sindona, he did so simply to find a familiar standard that was broad enough to capture what he saw as the most likely understanding of the principle in the international law context. Far from being a ringing endorsement of the application of domestic law, Judge Friendly's Sindona opinion appears instead to be a qualified acceptance of domestic law as a second-best solution to the difficult problem of applying a transnational legal concept whose precise meaning is not fixed by international law. *See In the Matter of the Extradition of Montiel Garcia,* 802 F. Supp. 773, 778 (E.D.N.Y. 1992) (commenting that Sindona "recognized the need for some reference to domestic law in light of the absence of international agreement on the scope of the concept" (emphasis added)), *aff'd,* 987 F.2d 153 (2d Cir. 1993) (*per* curiam). It is, therefore, a distortion of Judge Friendly's reasoning to suggest that he concluded that extradition treaties should, in the first instance, be interpreted in light of domestic law, and then to argue that if Judge Friendly had had the benefit of the Supreme Court's later opinion in Dixon, he would have necessarily applied the Blockburger test to Sindona's extradition. *See Resp't's Mem. Opp.* at 5, 8-9.[450]

. . .

Notably, in *Sindona*, the Government argued that a substantially identical clause in the treaty there under consideration required that the determination whether two "offenses" are the same be made in accordance with domestic double jeopardy law. *See* Sindona, 619 F.2d at 178. Although Judge Friendly never expressly rejected nor endorsed this reading of the clause, his remark that "a court should not deem itself bound by a quiddity of the law of the requested party" would seem to be an implicit rejection of a reading of the clause that would require an extradition court to apply domestic double jeopardy law.. *Id.* at 178.[451]

. . .

Although double jeopardy is a widely accepted principle of criminal justice with roots in Roman law, *see Bartkus v. Illinois,* 359 U.S. 121, 151-55, 79 S. Ct. 676, 695–97, 3 L. Ed. 2d 684 (1959) (Black, J., dissenting); Sindona, 619 F.2d at 177; M. Cherif Bassiouni, International Extradition: United States Law and Practice 598 (3d rev. ed. 1996) [hereinafter Bassiouni, International Extradition]; J. A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 120–21 (1969), there is no international consensus on its precise meaning or the general rules governing its application to particular cases, *See* Sindona, 619 F.2d at 177; Montiel Garcia, 802 F. Supp. at 778; Bassiouni, International Extradition, *supra* at 598-699; 2 M. Cherif Bassiouni & Ved P. Nanda, Treatise on International Criminal Law § 7.9, at 273 (1973). Although it appears relatively clear that use of the term "same acts" in a *ne bis in idem* clause confers broader protection against extradition than a clause that uses the term "same offense" (as does Article 8 and the *ne bis in idem* clauses in most United States extradition treaties), *see* Sindona, 619 F.2d at 177; 4 Abell & Ristau, *supra,* at 110–11, 215–216, 320; bassiouni, international extradition, *supra* at 600, little more can be said with certainty other than that a *non bis en idem* clause is more likely to be applied "when the requested state has already commenced prosecution for 'the same, meaning identical, conduct,' " Sindona, 619 F.2d at 177 (quoting bassiouni, international extradition, *supra* at 602). *See generally* 4 Abbell & Ristau, *supra*, at 109–11, 214–16, 320 (discussing judicial uncertainty over the scope of *ne bis in idem* clauses); bassiouni, international extradition, *supra,* at 605–07 (same).[452]

. . .

To prove Elcock guilty of smuggling, the United States was required to show that Elcock knowingly or fraudulently (1) either imported or brought into the United States, or received after importation, (2) merchandise, (3) contrary to law. *See* 18 U.S.C. § 2315 (Supp. 1999).

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450 Elcock v. United States, 80 F. Supp. at 77.

451 *Id.* at 78.

452 *Id.* at 80.

> Clearly, the German theft offense includes elements not included in any of the American offenses. For example, the German theft charge requires proof that Elcock took the personal property of another (or did so jointly), whereas the American international transportation, smuggling, and receipt or possession charges do not. Conversely, the American charges include elements that the German theft charge does not. The German theft charge does require proof that Elcock transported, transmitted, or transferred the stolen property in foreign commerce, or that he imported or brought merchandise into the United States unlawfully, or that the stolen property crossed a United States boundary, as do the American international transportation, smuggling, and receipt or possession charges, respectively. Thus, under Blockburger and the Treaty, the German theft charge is a different "offense" than the charges in the American indictment.
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> The result is [sic] same with respect to the second charge of the German arrest warrant. In order to prove Elcock guilty of grand larceny under the German statute, the prosecutor must establish, in addition to the requirements for theft, that the items taken were "protected in a special manner against removal by a locked container or by another protective device." German Crim. Code § 243 (1). Again, the German charge is not the same "offense" as any of the American charges under the Blockburger test. None of the American charges include any requirement that the stolen money or merchandise had to have been protected by a locked container or any other protective device. Conversely, the German grand larceny charge does not require proof that the item taken was subsequently transported in international commerce or that it crossed United States borders in any way.
>
> Because neither of the charges in the German arrest warrant constitute the same "offense" as any of the charges in the American indictment, Elcock's conviction on Counts One and Three and the dismissal of Count Two of the indictment do not bar Elcock's extradition to Germany under Article 8 n.18.[453]
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> . . .
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> For the reasons stated, Article 8 of the Treaty does not bar Elcock's extradition to Germany to face prosecution for the 1997 bank robbery. Accordingly, Elcock's petition for *writ of habeas corpus* prevent his extradition is denied.[454]

The contemporary position in the United States, based on the more recent treaties, is fact-driven. In contemporary practice, the extradition judge will have to look at the underlying facts and conduct of the relator to determine whether the situation in the request is based on the same facts and therefore is part of the same conduct and therefore supports the two charges, which are presumably different and which are barred by *ne bis in idem*. Obviously if the treaty specifies that extradition is barred only if it is for the same crime, then *ne bis in idem* will be law-driven and it will be the specific charge that will be controlling. In both of these cases, this will be considered an issue of fact, which will have to be proven in court. The burden of proof is by preponderance of the evidence. The government will have to establish that the two charges, which are contended, do not violate the *ne bis in idem* provision.

It should be noted that in the United States a claim of double jeopardy is controlled by *Blockburger v. United States*.[455] Double jeopardy does not apply as between separate sovereignties, as in *Bartkus v. Illinois*.[456] Among the future issues likely to arise are those relating to multiple conspiracies, each constituting a separate crime for double jeopardy purposes.[457]

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453 *Id.* at 85.

454 *Id.* at 87.

455 Blockburger v. United States, 248 U.S. 299 (1932). *See also In re Extradition of* Coleman, 473 F. Supp.2d 713 (N.D. W. Va. 2007).

456 *See* Bartkus v. Illinois, 359 U.S. 121 (1959).

457 Katteakos v. United States, 328 U.S. 750 (1946).

Finally, it appears from *United States v. Riviere*[458] that an apparently general waiver by the requested state can allow the prosecution of a relator for the same crime for which he was already convicted of in the requested state, notwithstanding the specific prohibition contained in the extradition treaty against double jeopardy. In *Riviere* the relator argued the applicability of the treaty but the Third Circuit held that he had no standing to do so because of the general waiver that was presumed to have been granted by the requested state.

4.3.1. *Ne Bis In Idem* as between International and National Tribunals

A number of international judicial bodies were established in the 1990s, starting with the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, followed by the International Criminal Court (ICC) in 1998. Several mixed national/international bodies were also established soon after, such as the Special Panels for Serious Crimes of the Dili District Court in East Timor in 2001, the Special Court for Sierra Leone (SCSL) in 2002, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003, and the Special Tribunal for Lebanon (STL) in 2007.[459]

These international and mixed-model tribunals have different relationships with national criminal jurisdictions, depending upon the legal basis upon which these bodies were established. Thus, in the case of the ICTY and ICTR, the Security Council established them, and consequently, any request for the surrender of individuals by these tribunals is backed by the authority of the Council, which can exercise its sanctions power to enforce the surrender request. However, the ICC was established by treaty, and although there is mutuality of legal obligations for member states to carry out the duty to surrender, there is no coercive enforcement mechanism, nor are there any sanctions other than suspending the applicability of the ICC treaty to the non-complying state. The question remains whether the Security Council has an obligation to enforce its own referrals under Article 13(b) of the Rome Statute, as is the case with the Sudan and Libya, although the actions of the Council after making the referrals indicate that it is not interested in enforcing the compliance of states in surrendering indicted individuals to the ICC. Similarly, the SCSL, ECCC, and STL were created by individual states primarily, and although they work with the United Nations to various degrees, they do not have the backing authority of the Security Council, and are thus left without the means to enforce compliance.

These and other international mechanisms may face situations where the person they are seeking to prosecute may have been previously convicted or acquitted by a given state for the same or substantially the same facts. The reverse also applies, where a national criminal jurisdiction seeks to prosecute a person for a crime based on the same or substantially the same facts for which the person was previously acquitted or convicted before an international or mixed-model judicial body. In these cases, the question arises as to how the concept of *ne bis in idem* will apply.

First, it is important to note that there is no international treaty compelling one state to recognize another state's penal judgments or to give recognition to another state's judgment of acquittal or conviction. In other words, there is no interstate *ne bis in idem*. The ICCPR, the European Convention on Human Rights and Fundamental Freedoms (ECHR), and the IACHR recognize *ne bis in idem*, but its applicability is within a given state and not between states. This is based on the concept that each state is a separate sovereignty. Thus, even though the same facts may be the basis for multiple prosecutions in the two separate states, the fact that they are separate sovereignties does not, so far, permit overriding of the exercise of their

458 United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991).

459 *See* M. Cherif Bassiouni, Introduction to International Criminal Law: Second Revised Edition 721–784 (2d ed. 2013). *See also* Post Conflict Justice (M. Cherif Bassiouni ed., 2002).

respective national criminal jurisdiction. The same principle presumably applies to relations between a state and a given international judicial body unless that body's statute provides otherwise. In that case its statute would be binding upon it, but only binding upon other states if the international judicial body was established by the Security Council, which would bind the statute upon all states that are members of the United Nations. If the statute is part of a treaty, like that of the ICC, it would be binding only on the member states. In these cases, as mentioned above, it is the statutes and jurisprudence of these international judicial bodies that control. However, each state will also be able to rely on its own national legislation and jurisprudence unless the statute and jurisprudence of the international judicial body are binding upon a given state. As can be seen from the above, the situation is far from clear and the relationship between the international judicial bodies and national legal system is not uniform.

In prosecutions before international criminal tribunals and mixed-model tribunals, it seems that the applicable standard is the same fact-based one found in *Blockburger v. United States*.[460] This would apply with respect to the prosecution by these bodies following national prosecutions. Within the international and mixed-model, the same standard seems to apply whenever the person is charged with multiple crimes arising out of the same conduct. The jurisprudence of the ICTY and ICTR, which is likely to serve as a valid precedent for the ICC and other similar bodies that may be established in the future, is likely to be the following: if the same set of facts evidence the commission of separate crimes requiring different elements, *ne bis in idem* would not apply and, therefore, it would be possible to prosecute a person either in the same or subsequent trials for different crimes arising from the same set of facts provided that any crimes require proof of a separate or different fact or a separate or different intent.

The ICTY Appeals Chamber decision in the *Čelebići* case is the leading case addressing the issue of cumulative charges and convictions in the jurisprudence of the ICTY and ICTR.[461] Before *Čelebići,* both the ICTY and the ICTR Trial Chambers had dealt with the issue of cumulative charging and convictions (based on the same set of facts) at various stages of their proceedings.[462] In the *Čelebići* case, the Trial Chamber of the ICTY found three of the accused

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460 *See* Attila Bogdan, *Cumulative Charges, Convictions and Sentencing at the At Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 Melbourne J. Int'l L. 1 (2002) (hereinafter "Bogdan, *Cumulative Charges*"). *See also* Hong Wills, Comment: *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 Emory Int'l L. Rev. 341 (2003); Nisha Valabhji, *Cumulative Convictions Based on the Same Acts under the Statute of the I.C.T.Y.*, 10 Tul. J. Int'l & Comp. L. 185 (2002). On the application of *ne bis in idem* in the context of the ICC, see Immi Tallgren, *Article 20:* Ne Bis In Idem,*in* Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 419–435 (Otto Triffterer ed., 1999); Machtel Boot, Genocide, Crimes against Humanity, War Crimes: *Nullum Crimen Legel* and the Subject Matter Jurisdiction of the International Criminal Court (2002).

461 *Prosecutor v Mucić* et al.(*Appeals Chamber Judgment)* ("*Čelebići*"), Case No IT–96–21–A (Feb. 20, 2001). In *Čelebići* the indictment charged the accused, Mucić, Delić, Landžo and Delalić, with a total of forty-nine counts under Articles 2 and 3 of the Statute of the ICTY. Although separate tribunals, the ICTR and ICTY share a common Appeals Chamber.

462 *See Prosecutor v Kupreškić (Decision on Defence Challenges to Form of the Indictment)*, Case No IT–95–16–PT (May 15, 1998): "the Prosecutor may be justified in bringing cumulative charges when the Articles of the statute referred to are designated to protect different values and when each Article requires proof of a legal element not required by the others." In *Prosecutor v Krnojelac (Decision on the Defense Preliminary Motion on the Form of the Indictment)*, Case No IT–97–25–PT (Feb. 24, 1999), at paras.5–10, the Trial Chamber noted that:

> [T]he prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event, in order to reflect the totality of the accused's conduct so that the punishment imposed will do the same. *Id.* at 10.

guilty of both grave breaches of the Geneva Conventions and violations of laws or customs of war based on the same facts.[463] The defense appealed these convictions, arguing in part the convictions imposed by the ICTY Trial Chamber violated the U.S. Supreme Court's *Blockburger* standard, as well as prior Trial Chamber decisions that have addressed the issue.[464] In considering the matter, the Appeals Chamber considered the *Blockburger* standard, several other national approaches, as well as the jurisprudence of the U.S. Military Tribunal established pursuant to Allied Control Council Law No. 10 in the aftermath of WWII.[465] With respect to the issue of charging, the Appeals Chamber held that:

> Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.[466]

It concluded that the same conduct can offend more than one of Arts 2, 3, and 5, as they are each "designed to protect different values, and…each requires proof of a particular element which is not required by the others." *Id.* at 8. In *Prosecutor v Naletilić and Martinović (Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment)*, Case No IT–98–34–PT (Feb. 14, 2001), the issue of cumulative charging was raised in the context of a preliminary objection insofar as it related to a new charge. The Trial Chamber noted that "the fundamental harm to be guarded against by the prohibition on cumulative charges is to ensure that an accused is not punished more than once in respect to the same criminal act." However, it warned that a strict prohibition on cumulative charging could interfere with the work of the prosecutor. The Trial Chamber asserted that:

> As the Tribunal's case law develops, and the elements of each offence are clarified, it will become easier to identify overlap in particular charges prior to the trial, but at present, and certainly in this case, it is enough that permitting cumulative charging results in no substantial prejudice to the accused.

See also Prosecutor v Kvočka (Decision on Defense Motions for Acquittal), Case No IT–98–30/1–T (Dec. 15, 2000), where the Trial Chamber found that:

> Issues of cumulative charging are best decided at the end of the case. So long as the proof adduced by the Prosecution could satisfy a reasonable court beyond reasonable doubt that the elements of one of the allegedly cumulative charges had been satisfied, the case continues.

For the jurisprudence of the ICTR, see *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR–96–4–T (Sept. 2, 1998) ("*Akayesu*") and *Prosecutor v Kayishema and Ruzindana*, Case No ICTR–95–1–T (May 21, 1999) ("*Kayishema*"). For the jurisprudence of the ICTY and ICTR on the issue of cumulative charging and convictions *see* Bogdan, *Cumulative Charges*, *supra* note 460, at 9–30.

463 *See Čelebići Trial Judgment,* Case No IT–96–21–T (Nov. 16, 1998).

464 The defense also relied on the ICTY Trial Chamber Judgment in the *Kupreškić* case, which heavily relied in the U.S. Supreme Court decision in *Blockburger* in addressing the issue of cumulative charging and convictions. For example, in relation to the *Blockburger* test, the Trial Chamber in *Kupreškić* noted that:

> The test then lies in determining whether each offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision.

See Prosecutor v Kupreškić (Trial Chamber Judgment), Case No IT–95–16–T (Jan. 14, 2000) ("*Kupreškić*"). *See also* Bogdan, *Cumulative Charges*, *supra* note 460, at 9–15.

465 The Appeals Chamber examined the German and Zambian law on the issue, as well as the U.S. Military Tribunal decision *Trial of Josef Alstötter*. U.S. Military Tribunal, Nuremburg (Dec. 3–4, 1947), extracted in UN War Crimes Commission, *Law Reports of Trials of War Criminals* (1948) vol 6, 1. *See Čelebići*, Case No IT–96–21–A, at ¶¶ 401–410.

466 *Čelebići*, Case No IT–96–21–A, at ¶ 400.

With respect to the issue of cumulative convictions based on the same set of facts, the Appeals Chamber concluded that:

> [M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.[467]

In cases where this test is not satisfied, the Appeals Chamber stated that:

> [T]he Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[468]

The holding in *Čelebići* on the issue of cumulative charges and convictions based on the same set of facts was later followed in the jurisprudence of both the ICTY and ICTR.[469]

In *Prosecutor v. Tadić* at the ICTY, the issue of *ne bis in idem* was also raised.[470] The German Federal Supreme Court had issued an indictment against Tadić for charges of aiding and abetting genocide during the conflict in the former Yugoslavia.[471] Shortly thereafter, the ICTY Prosecutor requested from Germany the deferral of the case to the international tribunal.[472] This request was complied with and Tadić was transferred to the ICTY. In his *Motion on the Principle of Non-Bis-In-Idem*, the accused argued that because his trial in Germany has already begun, the proceedings before the ICTY constituted a separate prosecution prohibited by the principle of *ne bis in idem*.[473] After reviewing Article 14(7) of the ICCPR, the European Convention on the Transfer of Proceedings in Criminal Matters, and the Draft Statute of the ICC, the Trial Chamber held that:

> [T]here can be no violation of *non bis in idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgment on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges. As a result, the principle *non bis in idem* does not bar this trial before this Tribunal.[474]

Another issue arises whenever a prosecution before an international criminal tribunal or national/international tribunal is concluded by an acquittal or conviction of a crime arising out of a given

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467 *Id.* at ¶ 412.

468 *Id.* at ¶ 413.

469 *See, e.g., Prosecutor v Jelisić (Trial Chamber Judgment)*, Case No IT–95–10–T (Dec. 14, 1999); *Prosecutor v. Krstic,* Case No IT–98–33 (Aug. 2, 2001). *See also* Bogdan, *Cumulative Charges, supra* note 460.

470 *Prosecutor v. Tadić*, *Decision on the Defense Motion on the Principle of* Non-Bis-In-Idem (Case No. T-94-1-T) (Nov. 14, 1995) ("Tadić, *Decision*").

471 Tadić, *Decision*, *supra* note 470, at 4.

472 *Id.*

473 *Id.* at 2. The defense also argued that "the transfer of the Accused to the International Tribunal was contrary to the European Treaty on the Transfer of Proceedings in Criminal Matters of 1972, that because the International Tribunal may intervene in legal proceedings before national courts, pursuant to Article 9 of the Statute only in a situation covered by Article 10(2) of the Statute; and that the exercise of jurisdiction by the International Tribunal in this case, pursuant to the procedure provided for in Rule 9(iii) of its Rules, is contrary to the Statute." *Id.*

474 *Id.* at 9. Addressing the defense argument that Germany could still prosecute Tadić after the proceedings before the ICTY were concluded, the Trial Chamber rejected the defense argument, noting that "having deferred the case of the accused to the International Tribunal, Germany could not proceed to retry him for the same acts after the disposition of his case here." *Id.* at 6.

set of facts for which the same person is sought to be prosecuted before a national tribunal, either for the same or another crime arising from the same set of facts. In this case, national law would control the application of *ne bis in idem*. In all cases involving prosecution before a national criminal tribunal, international criminal tribunal, or mixed-model tribunal, international human rights norms on *ne bis in idem* are applicable. For example, the ICCPR,[475] ECHR,[476] and the IACHR[477] contain provisions on *ne bis in idem*. However, these norms only apply with respect to *ne bis in idem* within the same system, and not with respect to other legal systems, in view of the fact they constitute separate sovereignties. The only exception is the ICC, which is considered complementary to national criminal jurisdictions, and thus presumably, these international norms would apply with respect to *ne bis in idem*.

4.3.2. The United States and International Tribunals as to *Ne Bis In Idem*

The ICTY and ICTR, to which the United States is obligated to surrender felons charged with a crime (*see* Chapter I, Section 7 and Chapter II, Section 4), contain provisions prohibiting *ne bis in idem*, respectively in Articles 10 and 11. The ICC also contains a similar provision in Article 20, but the United States is not a party to it.

Consequently, the United States and the ICTY and ICTR must reciprocally recognize the principle in accordance with their respective jurisprudence, but not in accordance with the ICTY and ICTR statutes. The statutes of the ICTY and ICTR, having been promulgated by the Security Council pursuant to the law of the U.N. Charter, are binding on the United States, which is a party to the charter. The jurisprudence of the ICTY and ICTR have interpreted *ne bis in idem* in a manner consistent with the U.S. Supreme Court decisions in *Blockburger* and *Ashe*.[478]

4.4. Statute of Limitations

There are two approaches to the legal effects of a statute of limitation. The first is that it is merely a bar to prosecution (procedural) and the second is that it extinguishes the offense for purposes of its legal effects (substantive). The legal effects of a statute of limitation and amnesty[479] may be treated alike regardless of whether they extinguish the criminality of the actor or constitute a bar

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475 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at Art. 14(7).

476 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols No. 3, 5, 8, and 11, which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998 respectively.

477 American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

478 Ashe v. Swenson, 397 U.S. 436 (1970). In *Ashe*, the Court held that

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U. S. 85. As Mr. Justice Holmes put the matter in that case,
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> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

Id. at 443.

479 *See infra* Sec. 4.7.

to prosecution. It must be noted, however, that in the United States a statute of limitation bars prosecution, as those statutes of limitations are provided for in the relevant treaty, but does not extinguish the criminality of the actor, whereas amnesty may be construed as doing so.[480]

The question of whether the offense exists and is prosecutable goes to the requirement of whether an extraditable offense exists, and if so, whether double criminality is satisfied. The answer to this question largely depends on the legal bases of the practice. If it is a treaty practice, then the treaty is controlling, and in the absence of any reference to statute of limitation therein, the defense may not be accepted. This is the prevailing view in the United States.

Whiteman described the defense of lapse of time or statute of limitation as follows:

> One of the most common exemptions from extradition relates to offenses for which prosecution or punishment is barred by lapse of time, usually referred to as barring by "lapse of time," prescription, or statute of limitation. A provision prohibiting extradition in such cases appears in most treaties and laws dealing with the subject of extradition. In treaties, the provision sometimes appears in the form of a prohibition of extradition where punishment or enforcement of penalty is barred by the law of the requesting state or is or would be barred by the law of the requesting or the requested state.[481]

The manner in which the treaty or national law provision is applied varies from country to country.[482] The requested state may consider the case as if the offense had been committed in the requested state and apply its own statute of limitation to determine whether prosecution would be barred. If so, extradition will be refused.[483]

Prior to the 1982 Extradition Act, there were two conflicting views in the United States on the question of whether the requested state's statute of limitation applies in the absence of a treaty.

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480 *See generally,* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, at 15–16 and accompanying footnotes, Congressional Research Service report for Congress 98-958, Mar. 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

481 6 Whiteman Digest, *supra* note 19, at 859.

482 *See In re* Plevani, 22 I.L.R. 514 (Cass. 1955) (Fr.); *In re* Romaguera de Mouza, 19 I.L.R. 378 (Cass. 1952) (Venez.); *In re* Weill, 10 Ann. Dig. at 334 (CSJN 1939) (Arg.); *In re* Addis, 6 Ann. Dig. 306 (Ct. App. Brussels 1931) (Belg.); Bedi, *supra* note 19, at 168–171. With regard to an unreasonable delay in extradition, in *The Republic of Argentina v. Hector Mellino*, [1987] 1 S.C.R. 536, the Supreme Court of Canada faced an application by the fugitive to stay the extradition on two grounds. First, Mellino argued that extradition violated his right under section 11(b) of the Charter to a trial within a reasonable time. *Id.* at 537. Second, he contended that the extradition proceedings constituted an abuse of process. *Id.* The Supreme Court of Canada held that the appeal should be allowed in favor of Argentina, and that the matter should be remitted to the extradition judge to continue the proceedings. *Id.* at 537–539. The Court ruled that section 11(b) of the Charter did not apply to extradition hearings. *Id.* at 538. It applies only to charges made in Canada for prosecutions in Canada. *Id.* With regard to the claim that the delay resulted in an abuse of process and that the proceedings should be stayed, the court found that the extradition hearing is more closely related to a preliminary hearing than a criminal trial in the Canadian criminal law system. *Id.* at 538–539. According to Canadian jurisprudence, the power to stay proceedings has occurred only in clear cases, and most important, only in actual criminal trials. *Id.* at 539. Again, such a matter should be raised at trial in the foreign country. The extradition judge's role is not to find guilt or innocence, or comment on any defenses. *Id.* at 538–539. *See* Williams, *supra* note 373, at 268–269, 271.

483 *See also Public Prosecutor v. Muller*, 43 I.L.R. 243 (Ct. App. Brussels 1965) (Belg.) (holding that under Belgian law the prosecution of the relator in Switzerland, the requesting country, was time-barred, even though the formal steps taken by Swiss authorities had the effect of suspending the period of limitation in Switzerland).

The position holding that the defense is unavailable without an express treaty provision is well summarized in *Freedman v. United States*, in which the disctrict court stated:[484]

> As a general proposition it is well established that in the absence of a treaty provision, a statute of limitations may not be raised as a defense to the extradition proceedings. *E.g., Merino v. United States Marshal*, 326 F.2d 5 (9th Cir. 1963), *cert. denied*, 377 U.S. 997, 84 S. Ct. 1922, 12 L.Ed.2d 1046; *Hatfield v. Guay*, 87 F.2d 358, 364 (1st Cir. 1937). *See First National Bank of New York v. Aristeguieta*, 287 F.2d 219, 227 (2d Cir. 1960) (citing the general proposition without, however, applying the rule). Petitioner has not raised the five-year statute of limitations provided by 18 U.S.C. § 3282, in the traditional sense that such term was used in the foregoing decisions announcing the general rule. On the contrary, petitioner contends that "the statute of limitations is applicable as an element of the crime which must be considered in determining probable cause under the terms of the treaty," even in the absence of any specific treaty provision compelling reference to the statute of limitations of either the asylum or the demanding state.
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> While the argument *sub judice* has been raised on several prior occasions, *e.g., Vaccaro v. Collier*, 38 F.2d 862 (D.Md 1930) *modified on other grounds*, 51 F.2d 17 (4th Cir. 1931); *Asselin v. Jenkins* (Commissioner's Docket 1, Case No. G-12) (N.D. Cal. 1966) [Dept. of State File PS 10-4 CAN-US]; *In the Matter of the Extradition of Daniel William O'Connor*, No. 4825 (W.D. Wash. 1959), it has only been authoritatively ruled upon in one decision. *Asselin v. Jenkins*, *supra*. Moreover, one of the leading authorities on Canadian extradition law has observed that:
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> > Whether in the absence of express provisions [in a treaty] extradition will be granted where exemption has been obtained by the lapse of time according to the laws of the requested country has not been decided. G. La Forest, *Extradition To and From Canada* 4 (1967).
>
> The cases cited for the general proposition that absent a specific treaty provision, the statute of limitations may only be raised as a defense to criminal proceedings after return to the demanding country have all arisen in connection with challenges to extradition based upon the statute of limitations of the demanding state. *E.g., Merino v. United States Marshal, supra; Hatfield v. Guay, supra*. Thus even where there is an express treaty provision, the person whose extradition is sought presumably has an ample opportunity to raise the limitation as a defense to the criminal proceedings. On the other hand, the question of whether the prosecution is time-barred according to the laws of the asylum state, is a consideration unique to the committing magistrate and is not subject to review upon return to the demanding state. *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir. 1976).[485]

Another position was taken in *Jhirad v. Ferrandina*,[486] where the Second Circuit held that the federal statute of limitation in 18 U.S.C. § 3282[487] applies instead of the state statute pertaining to the crime charged, as would have been the case in strict application of the principle of

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484 Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977). *See* Kamrin v. United States, 725 F.2d 1225 (9th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984). *See also* Murphy v. United States, 199 F.3d 599 (2d. Cir. 1999); *cf. In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999).

485 *Freedman,* 437 F. Supp. 1252 at 1263–1264. *See also* United States *ex rel.* Caputo v. Kelly, 96 F.2d 787 (2d Cir. 1938).

486 Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976). *See also In re* Kraiselburd, 786 F.2d 1395 (9th Cir. 1986), *cert. denied*, 479 U.S. 990 (1986); Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y. 1973), *modified,* 478 F.2d 894 (2d Cir.), *dismissed,* 414 U.S. 884 (1973).

487 This statute reads, in pertinent part, as follows:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

"double criminality."[488] It must be noted that in *Jhirad*,[489] though the court found the relator extraditable (because his flight from India tolled the statute of limitations), the secretary of state, in reliance on "executive discretion,"[490] refused to issue the certificate of surrender on the grounds that the fifteen-year time lapse since the commission of the alleged crime would render an adequate defense by the relator very difficult, and that this was precisely the type of a situation to which periods of limitation were intended to apply.[491]

The European Convention on Extradition states in article 10:

> Extradition shall not be granted when the person claimed has, according to the law of either the requesting or requested state, become immune by reason of lapse of time from prosecution or punishment.[492] In case of doubt over the applicability of the statute of limitation, extradition should be granted, since the matter is better resolved by the courts of the requesting state.[493]

United States courts, in determining the applicable statute of limitations, must first look to the treaty language to determine whether the statute of limitations of the requested or requesting state, or both, applies.[494] Once this determination is made, the U.S. court must then determine the appropriate source of law to apply, that is,. state or federal law if the extradition involves a country where a federal system is in place. Where the statute of limitations of both requesting

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488 *See* Ch. VII, Sec. 2. *But see* Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971); Vaccaro v. Collier, 38 F.2d 862 (D. Md. 1930), *modified*, 51 F.2d 17 (4th Cir. 1931); *cf.* United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991); *cert. denied*, 506 U.S. 835 (1992); Tang Yee-Chun v. Immundi, 686 F. Supp. 1004 (S.D.N.Y. 1987). *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000).

489 *Jhirad*, 536 F.2d 478.

490 *See* Ch. XI.

491 Extradition: Procedure: Standards for Evidence, 1976 Digest § 5, at 115–116.

492 *See* the position of Arab Convention on Extradition of 1953, article 6, quoted in Bedi, *supra* note 19, at 168.

493 *See* Lazzeri v. Schweizerische Bundesanwaltschaft, 34 I.L.R. 134 (Federal Tribunal 1961) (Switz.), where:

> [T]he appellant was sentenced *in absentia*, on May 13, 1956, to six months imprisonment for fraudulent bankruptcy and fraud. His extradition was requested by the Italian authorities. He was arrested on August 6, 1960, on arrival in Switzerland from Germany. He contested his extradition on a number of grounds. First, it was contended on his behalf that the proceedings which had led to his conviction were vitiated by procedural faults and could accordingly not be recognized. Secondly, it was argued that further proceedings must be assumed to be time-barred, since the date of the original offense was not known. Thirdly, it was claimed that on extradition, the appellant would run the risk of being prosecuted for a new offense, namely, bigamy.

Id. at 134–135. The court held that extradition should be granted; it examined the statutes of limitation applicable to the offenses charged in the two countries concerned and found that they did not prevent extradition. For one offense there was a doubt under Italian law, but extradition had to be granted so that the doubt, relating to the application of Italian law, could be resolved by the Italian courts. *Id.* at 137.

494 There are a variety of treaty provisions on this point. For treaties specifying that the law of the requested state is the applicable law, see Argentine Extradition Treaty, art. 7, *entered into force* June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866; French Extradition Treaty, art. 9(1), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-13. For treaties specifying that the law of the requesting state is the applicable law, see Austrian Extradition Treaty, art. 7, *entered into force* Jan. 1, 2000, S. TREATY DOC. 105-50, TIAS 12916; Indian Extradition Treaty, art. 7, *entered into force* July 21, 1999, S. TREATY DOC. 105-30, TIAS 12873; Extradition Treaty with the Bahamas, art. 6, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Hungarian Extradition Treaty, art. 6, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Italian Extradition Treaty, art. VII, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023. For treaties specifying the extradition is precluded by the running of either state's statute of limitations, see Extradition Treaty with Uruguay, art. 5, ¶ 2, *entered into force* Apr. 11, 1984, 35 U.S.T.

and requested states applies, the federal/state statute of limitations inquiry would theoretically apply in all instances as the U.S. federal system would be implicated in all such instances.

The Ninth Circuit is the leading federal circuit court of appeals on this issue. The Ninth Circuit has ruled that extraditions for murder are not barred by the statute of limitations as there is no statute of limitations in the United States regarding murder, and the court must focus on the statutes charged as opposed to the relator's conduct.[495] Two Ninth Circuit cases considered the proper determination of statutes of limitations regarding capital and noncapital crimes where Mexico was the requesting state and the United States was the requested state. In *Sainez v. Venables*, the relator challenged the denial of his habeas corpus petition, in part, on an improper calculation of the relevant statute of limitations regarding his homicide charge.[496] The court cited the relevant language of the United States–Mexico extradition treaty, which provides that:

> Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party.[497]

The court then conducted a detailed analysis of the relevant Mexican criminal code and the effect of the issuance of a Mexican arrest warrant in tolling the statute of limitation, concluding that:

> Crotte was charged with homicide. This charge falls under Article 213 of the State of Jalisco Criminal Code. The magistrate judge found that the most analogous United States offenses to the Mexican homicide charge were murder, as defined by 18 U.S.C. § 1111, and manslaughter, as defined by 18 U.S.C. § 1112. The magistrate judge then determined that the applicable statute of limitations for Crotte's crime was five years, as articulated in 18 U.S.C. § 3282. Crotte does not argue that § 3282 is inapplicable, but contends that the statute of limitations expired because he was arrested in December, 2006, more than five years after Sandoval died on June 26, 1999. He argues that the Mexican arrest warrant should not toll the statute of limitations in Mexico because it does not constitute an indictment or information under the laws of the United States.
>
> The *Restatement (Third) of Foreign Relations Law* provides:
>
> > For purposes of applying statutes of limitation to requests for extradition . . . the period is generally calculated from the time of the alleged commission of the offense to the time of the warrant, arrest, indictment, or similar step in the requesting state, or of the filing of the request for extradition, whichever occurs first
>
> . . .

3197. For treaties specifying that the passage of time is no bar to extradition, see Extradition Treaty with the United Kingdom, art. 6, *entered into force* Apr. 26, 2007, S. TREATY DOC. 108-23 ("The decision by the Requested State whether to grant the request for extradition shall be made without regard to any state of limitations in either State."); Jordanian Extradition Treaty, art. 6, *entered into force* July 29, 1995, S. TREATY DOC. 104-3 ("The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time"); Extradition Treaty with Belize, art. 8, *entered into force* Mar. 27, 2001, S. TREATY DOC. 106-38; Extradition Treaty with Cyprus, art. 7, *entered into force* Sept. 14, 1999, S. TREATY DOC.105-16. *See also* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, at 15–16, Congressional Research Service report for Congress 98-958, Mar. 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

495 Quinn v. Robinson, 783 F.2d 776, 816, 818 (9th Cir. 1986); *In re Extradition of* Kraiselburd, 786 F.2d 1395, 1398 (9th Cir. 1986); Clarey v. Gregg, 138 F.3d 764, 766–767 (9th Cir. 1998).

496 Sainez v. Venables, 588 F.3d 713, 714–715 (9th Cir. 2009). *See also In re Extradition of* Sainez, 2008 U.S. Dist. LEXIS 9573 (S.D. Cal. 2008) (Magistrate Judge Opinion); *In re Extradition of* Ortiz, 2011 U.S. Dist. LEXIS 87426, at*20–*21 (S.D. Cal. 2011) (applying *Sainez v. Venables)*.

497 *Sainez v. Venables,* 588 F.3d 713, 716 (Article 7 of the extradition treaty).

> *Restatement (Third) of Foreign Relations Law* § 476, cmt. e (1987).
>
> Consistent with the *Restatement of Foreign Relations Law,* in *Jhirad v. Ferrandina,* 536 F.2d 478, 480 (2d Cir. 1976), the Second Circuit recognized an Indian document as the "functional equivalent of [a United States] indictment." We agree that for the purpose of a civil proceeding such as an extradition, a Mexican arrest warrant is the equivalent of a United States indictment and may toll the United States statute of limitations.
>
> Crotte's argument that the Mexican arrest warrant did not toll the statute of limitations because it is in no way analogous to a United States indictment lacks merit. We do not reach this conclusion by attempting to analogize a Mexican arrest warrant to an American indictment. Rather, we reach this conclusion by adhering to our established approach of giving credence to foreign proceedings. Indeed, we have declined to rule on the procedural requirements of foreign law out of respect for other nations' sovereignty "and because we recognize the chance of erroneous interpretation is much greater when we try to construe the law of a country whose legal system is not based on common law principles." *Emami v. United States Dist. Court,* 834 F.2d 1444, 1449 (9th Cir. 1987) (citation omitted). *See also Theron v. United States Marshal,* 832 F.2d 492, 496, 499–500 (9th Cir. 1987), *abrogated on other grounds by United States v. Wells,* 519 U.S. 482 (1997) ("[I]t would be inappropriate to engage in such an inquiry into the formal procedure a country uses in instituting prosecution.") (citation omitted).
>
> Giving credence to the arrest warrant issued by Mexican authorities, the five-month period between the date the homicide occurred and the issuing date of the Mexican arrest warrant was well within the five-year limitations period of section 3282, rendering the extradition on the homicide charge timely. In short, Crotte's extradition was not barred by the applicable statute of limitations. [internal citations omitted][498]

The relator argued that his prosecution was barred by the U.S. statute of limitation.[499] The *Sainez* court applied the rule set forth in *Clarey v. Gregg*, writing that: "in determining what United States statute of limitations is applicable, this Court looks to the substantive offense under United States law which is most closely analogous to the charged offenses, and applies the statute of limitations applicable to that offense."[500]

The Ninth Circuit considered the calculations of the statute of limitations in a noncapital crime context in *Gullers v. Bejarano*.[501] The same extradition treaty and statute of limitations provision as in *Sainez* applied in this case. It is odd to note that although Article 7 of the United States–Mexico extradition treaty is written in the disjunctive regarding the laws of the requested and requesting state, the court stated, "for Causbie to be extraditable, the prosecution against her must fall within the statute of limitations according to the laws of both the 'requesting party,' i.e., Mexico, and the 'requested party,' i.e. the United States."[502] In this case, the relator argued that her extradition was barred by both U.S. and Mexican statutes of limitation.[503] The court found that the Mexican arrest warrant was sufficient to constitute a proper charge within the five-year U.S. statute of limitations, although the Mexican arrest warrant was not the same type of instrument that would be used in the United States.[504] The relator's argument that the action was barred by the Mexican statute of limitations was that the victim had

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498 *Id.* at 716–717.

499 *Id.*

500 *Id.*

501 293 Fed. Appx. 488 (9th Cir. 2008) (unpublished opinion) (criminal fraud extradition from United States to Mexico). For a discussion of the calculation of the statute of limitations in a noncapital case under the United States–Poland extradition treaty, which focuses on the requesting state's statute of limitations, *see In re Extradition of* Tuniewicz, 2007 U.S. Dist 25789 (E.D.N.Y. 2007).

502 *Id.* at 489.

503 *Id.* at 489–490.

504 *Id.* at 489.

not filed a complaint within six months as required for a fraud action.[505] The Mexican Jalisco Code states, in part:

> [T]he right of the victim to file a complaint for a crime, whether the crime be continuous or not, *that can only be prosecuted by the complaint of a party,* will terminate in six months, as of the day on which the victim has knowledge of the crime and the felon . . . (Emphasis added) [footnote omitted][506]

However, the court noted that under Mexican law, criminal action would be barred by the statute of limitations "in a term equal to the arithmetic average of the term of the incarceration penalty that corresponds to the crime, plus one fourth of such term."[507] A Mexican court calculated that the statute of limitations period for fraud under this calculus was eight years and nine months.[508] The issue then arose as to whether the relevant statute of limitations was six months or eight years and nine months. As the district court had not considered whether the fraud action at issue could only be prosecuted by the complaint of a party, it remanded the matter to the district court for this determination.[509] These cases are illustrative of the U.S. practice of looking to U.S. federal law in determining the statute of limitation.[510]

Under the 1984 Draft Extradition Reform Act, § 3194(d)(2), a relator may claim the defense of statute of limitations if such a defense is permissible under either the applicable treaty or the limitations of the law of the requesting state. Previous to the Act, the position of the United States was that in the absence of a specific treaty provision, the defense of lapse of time was governed by 18 U.S.C. § 3282, which required commencement of prosecution within five years from the alleged commission of the crime for a noncapital offense. Under either approach, the problem remains one of determining when the period begins and what causes it to toll.

On tolling a statute of limitations, the Tenth Circuit held in 1999, in *Ross v. U.S. Marshal for the Eastern District of Oklahoma*, the following:[511]

> We review the district court's interpretation of the tolling statute *de novo;* United States v. Morgan, 922 F.2d 1495, 1496 (10th Cir.), cert. denied, 501 U.S. 1207, 111 S.Ct. 2803, 115 L.Ed.2d. 976 (1991), and the court's determination Mr. Ross was fleeing from justice for clear error. United States v. Greever, 134 F.3d 777, 781 (6th Cir. 1998); United States v. Marshall, 856 F.2d 896, 900–01 (7th Cir. 1988).
>
> As a preliminary matter, we must first determine what constitutes "fleeing from justice" under the statute. The circuit courts are currently split on the issue. A small minority of circuits have held mere absence from the jurisdiction in which the crime was committed is enough to toll the statute. In re Assarsson, 687 F.2d 1157, 1162 (8th Cir. 1982); McGowen v. United States, 105 F.2d 791, 792 (D.C.Cir. 1939). The district court, on the other hand, adopted the majority view, which requires the prosecution to prove the accused had an intent to avoid arrest or prosecution. See Greever, 134 F.3d at 780; United States v. Rivera-Ventura, 72 F.3d 277, 283 (2d Cir. 1995); United States v. Fonseca-Machado, 53 F.3d 1242, 1244 (11th Cir.), cert. Denied, 516 U.S. 925, 116 S.Ct. 326, 133 L.Ed.2d 227 (1995); United States v. Marshall, 856 F.2d 896, 900

505 *Id.* at 490.

506 *Id.*

507 *Id.*

508 *Id.*

509 *Id.* at 490–491.

510 *See also* Roberto Iraola, *Statutes of Limitations and International Extradition*, 2010 Mich. St. L. Rev. 103, 117–118 (2010).

511 Ross v. U.S. Marshall for the E. Dist. of Oklahoma, 168 F. 3d. 1190 (10th Cir. 1999).

(7th Cir. 1988); United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir.), cert. denied, 459 U.S. 837, 103 S.Ct. 83, 74 L.Ed.2d 78 (1992); Donnell v. United States, 229 F.2d 560, 565 (5th Cir. 1956); Brouse v. United States, 68 F.2d 294, 295 (1st Cir. 1933). The Supreme Court has not squarely addressed the issue. However, in considering the predecessor to 18 U.S.C. § 3290, the Court in Streep v. United States, 160 U.S. 128, 16 S.Ct. 244, 40 L.Ed. 265 (1895) implicitly recognized intent as an element of fleeing from justice, id. at 133, 16 S.Ct. 244 ("In order to constitute a fleeing from justice . . . [I]t is sufficient that there is a flight with the intention of avoiding being prosecuted.") Consistent with Streep, we conclude "fleeing from justice" requires the government to prove, by a preponderance of the evidence, the accused acted with the intent to avoid arrest or prosecution.

It has to be understood that statutes of limitations are essentially designed to ensure due process and fundamental fairness. This is evident in the provisions of 18 U.S.C. § 3282, whereby most federal crimes are barred by a five year statute of limitations. However, there are many issues involving when the statute starts running and what tolls the statute.[512] The statute of limitations may also be tolled pursuant to 18 U.S.C. § 3290, which provides that the statute of limitations is tolled for fugitives from justice. The Ninth Circuit applied this provision in *Choe v. Torres*.[513] There is a split among the federal circuit courts of appeals regarding whether fugitive intent to avoid prosecution must be shown in addition to absence from the jurisdiction where the crime occurred in order to trigger the tolling provisions of Section 3290. The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits require a showing of intent, while the Eight Circuit and District of Columbia Circuit have not required a similar showing.[514]

It must be mentioned, however, that when extradition is sought for an international crime, there should be no statute of limitations bar to extradition. Although this principle is not yet universally accepted with respect to all international crimes, as discussed below, it is the subject of an International Convention on the Nonapplicability of Statutes of Limitations to War Crimes and Crimes Against Humanity.[515]

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512 *In re Extradition of* Harrison, 03 Crim. Misc. 01 Page 49 (HP), 2004 U.S. Dist. LEXIS 9183 (S.D.N.Y. 2004) at *4–*8 (relying on United States v. Mercedes, 1997 U.S. Dist. LEXIS 30007, 1997 WL 127785 (S.D.N.Y. 1997)).

513 Choe v. Torres, 525 F.3d 733 (9th Cir. 2008).

514 *See generally,* Roberto Iraola, *Statutes of Limitations and International Extradition*, 2010 Mich. St. L. Rev. 103, 115–117 (2010); Brouse v. United States, 68 F.2d 294, 295 (1st Cir. 1933); United States v. Florez, 447 F.3d 145, 151 (2d Cir. 2006); Ferebee v. United States, 295 F 850, 851 (4th Cir. 1924); Donnell v. United States, 229 F.2d 560,565 (5th Cir. 1956); United States v. Greever, 134 F.3d 777, 781 (6th Cir. 1998); United States v. Marshall, 856 F.2d 896, 900 (7th Cir. 1988); United States v. Wazney, 529 F.2d 1287, 1289 (9th Cir. 1976); United States v. Fonseca-Machado, 53 F.3d 1242, 1243–1244 (11th Cir. 1995); King v. United States, 144 F.2d 729, 731 (8th Cir. 1944); McGowen v. United States, 105 F.2d 791, 792 (D.C. Cir. 1939).

515 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) (forty-five state-parties). *See also* Bassiouni, Conventions, *supra* note 208, at 285; 39 Rev. Int'le de Droit Pénal, nos. 3, 4 (1968); Christine Van den Wijngaert, *War Crimes, Crimes against Humanity and Statutory Limitations*, *in* 3 International Criminal Law 89 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni 3 ICL]. *See also* M. Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application (2011).

4.5. Right to a Speedy Trial

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution,[516] and as such applies to all criminal cases. Extradition is *sui generis*, but partakes of a criminal nature and, therefore, the right should apply. But there is no decision explicitly stating that the Sixth Amendment right to a speedy trial applies to extradition hearings.[517] Furthermore, there is no federal statute equivalent to the Speedy Trial Act applicable to extradition.[518] Presumably that right should apply whenever there is unreasonable and unnecessary or purposeful delays which prejudice the rights of the defense. In other words, it can become subsumed in the Due Process Clause of the Fifth Amendment.

The importance of the right to a speedy trial was emphasized by the Second Circuit Court of Appeals in *United States v. Salzmann*,[519] which involved a U.S. citizen residing abroad in order to avoid the draft in the United States. The *Salzmann* court explained:

> The last decade has brought an increasing awareness of the vital importance to both society and the accused, of a speedy trial. The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. Where a defendant is not detained prior to trial, the mere pendency of the indictment for a substantial period can create great hardship. It may "disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends." *United States v. Marion,* 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L.Ed. 2d 468 (1971). Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on affording fair trials. In addition, the accelerating crime rate and emergence of procedures to make the criminal process more evenhanded have placed heavy burdens on court dockets. It is essential, therefore, that the courts rise to the challenge by avoiding the sort of fatal delay "that undermines the law's deterrent effect by demonstrating that justice is not swift and certain but slow and faltering." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 154 (1967).[520]

The court in *Salzmann* was faced with delay of trial due to the "unavailability" of the accused at trial as a result of his residence in a foreign country. The court determined that the government did not exercise due diligence to obtain the presence of the defendant as a result of the failure

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516 The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

517 Courts have affirmatively stated that "there is no Sixth Amendment right to a speedy trial in extradition." *See In re Extradition of* Ortiz, 2011 U.S. Dist. Lexis 87426, at *17 (S.D. Cal. 2011). *See also In re Extradition of* Sainez, 2008 U.S. Dist. LEXIS 9573, at *58 (S.D. Cal. 2008).

518 Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (2000).

519 United States v. Salzmann, 548 F.2d 395 (2d Cir. 1976); *cf.* United States v. Blanco, 861 F.2d 773, 780 (2d Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989). In *Blanco*, the court concluded that the government had fulfilled its duty to make a diligent good faith effort to bring the relator to trial. The court stated: "It is clear that the government has a constitutional duty to make a diligent, good faith effort to bring a defendant to trial promptly. *See* Smith v. Hooey, 393 U.S. 374, 383, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969); United States v. Diacolios, 387 F.2d 79, 82 (2d Cir.1988)." *Blanco,* 861 F.2d at 778. The government, however, did not have to use extraordinary means to do so. The court distinguished *Salzmann* as relied upon by the relator with respect to a footnote of that decision, 548 F.2d 395, 403 n.2 (2d Cir. 1976), regarding the meaning of a fugitive. 861 F.2d at 780.

520 *Salzmann*, *supra* note 519, at 399–400.

to respond to his claims of indigence by notifying him that funds would be made available for his return to the United States. Therefore, in light of the improper delay of six months and the defendant's assertion of his right due to possible prejudice, the court held that he was entitled to dismissal of the indictment.[521] In another case involving an accused in a foreign country, *United States v. Judge*,[522] the defendant challenged an indictment for mail fraud for denial of his right to a speedy trial. The court determined that the U.S. government was aware of the defendant's address in Ecuador, but inexcusably made no effort to inform him of the indictment until over four years later when he was arrested upon arriving in the United States. Because the defendant was ignorant of the indictment, and had suffered prejudice resulting from the delay, the federal district court dismissed the charges.[523]

The right to a speedy trial was also recognized where an accused was incarcerated in a foreign prison and was absent for trial. In *United States v. McConahy*,[524] the court held that the government's constitutional obligation to provide a speedy trial on pending charges is not relieved unless the defendant fails to demand that an effort be made to return him and the prosecuting authorities made a diligent, good faith effort to have him returned and are unsuccessful, or can show that such an effort would be futile. In this case, the defendant attempted to secure permission to return for trial from British officials and requested assistance from the U.S. government, but his request was ignored. Therefore, the court held that the five-year delay irremediably prejudiced the defendant by loss of testimony pertaining to his failure to appear.[525] In *United States v. Pomeroy*,[526] where Pomeroy was incarcerated in Canada, deported to Montana, and extradited to North Dakota, the court said that:

> Although the court discussed the possible applicability of the Speedy Trial Act, 18 U.S.C. § 3161, it based its decision on sixth amendment speedy trial grounds. The court found that, as applied to the facts of the case, the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530, 920 S. Ct. 2182, 2191, 33 L. Ed. 2d 101 (1969), weighed in favor of dismissing the indictment against Pomeroy.
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> Additionally, the court noted that various cases have placed an obligation on the Government to seek extradition of an accused incarcerated in a foreign state when a treaty exists under which the accused could be extradited. Because the treaty between Canada and the United States listed robbery as an extraditable offense, the court felt that the Government had an obligation to request Pomeroy's extradition despite the fact that Canadian officials had the option of deferring Pomeroy's surrender until he completed his sentence.
>
> The Government subsequently moved to reconsider based on the Supreme Court's intervening decision in *United States v. Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 88 L.Ed. 2d 640 (1986), where the Court reversed an order dismissing an indictment on sixth amendment speedy trial grounds. On May 16, 1986, having found that *Loud Hawk* was "factually and logically distinguishable" from the present case, the court affirmed its earlier order. This appeal followed.[527]

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521 *Id.* at 401. In *Barker v. Wingo*, the U.S. Supreme Court recognized four factors that are considered in determining whether the defendant has been deprived of his right of a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. 407 U.S. 514, 530–533 (1972). *See also* M. Cherif Bassiouni, Criminal Law and Its Processes: The Law of Public Order 476–479 (1969).

522 United States v. Judge, 425 F. Supp. 499 (D. Mass. 1976).

523 *Id.* at 503–504.

524 United States v. McConahy, 505 F.2d 770 (7th Cir. 1974); *cf.* United States v. Walton, 814 F.2d 376 (1987); United States v. Hooker, 607 F.2d 286 (9th Cir. 1979). *See also* United States v. McDonald, 172 F. Supp. 2d 941 (W.D. Mich. 2001) (granting defendant's motion to dismiss for delay).

525 *Id.*

526 United States v. Pomeroy, 822 F.2d 718, 720 (8th Cir. 1987).

527 *Id.*

The court then held that where a request by a government would not have been futile, the government has a:

> constitutional duty to make a diligent, good-faith effort to bring [the fugitive] before the [district] court for trial. *United States v. McConahy*, 505 F.2d 770, 773 (7th Cir. 1974) (citing *Smith v. Hooey*, 393 U.S. 374, 383, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969)); *accord United States v. Raffone*, 405 F. Supp. 549, 550 (S.D.Fla.1975); *see also United States v. Rowbotham*, 430 F. Supp. 1254, 1257 (D. Mass.1977) (duty to obtain fugitive was one factor court looked at in dismissing indictment under Fed. R. Crim. P. 48(b)); *compare United States v. Hooker*, 607 F.2d 286, 289 (9th Cir.1979) (no duty to obtain fugitive where offense was not extraditable under existing treaty), *cert. denied*, 455 U.S. 905, 100 S. Ct. 1083, 63 L. Ed. 2d 321 (1980). Under the facts of this case, we see no reason to depart from this rule.[528]

It must be noted, however, that the defense of a right to a speedy trial will not be effective where the delay is caused by the defendant's own acts. It is a well-established principle that where the defendant's unlawful flight or failing to appear is the reason for the delay in his trial, he is held to have waived his right to a speedy trial.[529] In *United States v. Steinberg*,[530] the delay in bringing the defendant to trial was caused by his flight from Illinois and continuing unavailability until he arranged for his return. The defendant claimed that the government could have requested his return so he could have speedily answered the charges against him. The court noted, however, that the U.S. government could not effectively request the defendant's expulsion or extradition from Rhodesia (now Zimbabwe) because the United States did not recognize the legal existence of that country in accordance with the principles of the U.N. Charter.[531] The court recognized that the U.N. Charter is a ratified U.S. treaty "which cannot run counter to the provisions of the Constitution," but held that State Department officials acted in good faith by making informal and indirect requests to Rhodesia to obtain the defendant's return. In their effort to obtain the defendant's return, "the government was not obligated to violate either the letter or spirit of the Charter of the United Nations."[532]

In a similar vein, in *United States v. Ocampo*,[533] the court considered whether a nine-year, seven-month period between the relator's indictment and arrest violated his right to a speedy trial.[534] The court found it significant that the government was unable to arrest the relator in Colombia, as the charges against him predated the effective date of the extradition treaty.[535] As such, the government lacked a legal basis to demand the relator's extradition. However, the

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528 *Id.* at 722.

529 *See* Dickey v. Florida, 398 U.S. 30, 48 (1970) (Brennan, J., concurring); United States v. Cartano, 420 F.2d 362, 364 (1st Cir. 1970), *cert. denied*, 397 U.S. 1054 (1970). *But see* United States v. Salzmann, 548 F.2d 395 (2d Cir. 1976) (Feinberg, J., concurring) (stating a court must exercise due diligence even where a fugitive is beyond the court's jurisdiction).

530 United States v. Steinberg, 478 F. Supp. 29 (N.D. Ill. 1979).

531 The court noted that there was no extradition treaty between the United States and Rhodesia, but that the United States was bound by Resolution 277 of March 18, 1970, in which the Security Council condemned as illegal the proclamation of republican status by Rhodesia. The court further noted that the Council decided "that Member States [of which the United States, of course, was one] shall refrain from recognizing this illegal regime [of Rhodesia] or from rendering any assistance to it," and that the Council had called "upon Member States to take appropriate measures, at the national level, to insure that any act performed by officials and institutions of illegal regime in Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice by the competent organs of their State." *Id.* at 31.

532 *Id.* at 33.

533 266 Fed. Appx. 63 (2d Cir. 2008) (unpublished opinion).

534 *Id.* at 64.

535 *Id.* at 65.

government's entry of the relator's criminal conviction and indictment in various databases showed due diligence.[536] Thus, the court held that there was no violation of the relator's right to a speedy trial.[537]

In *United States v. Corona-Verbera*,[538] the court considered whether the relator's speedy trial rights were violated by an eight-year delay between indictment and arrest.[539] Although the court found that an eight-year delay was presumptively prejudicial, triggering an inquiry into the other *Barker* factors—namely the length of delay, the reason for the delay, the defendant's responsibility to assert his right to a speedy trial, and the prejudice to the defendant, although as the Supreme Court explained, "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process"[540]—the court concluded that the government exercised due diligence by entering the relator's name in various criminal databases where the government had established the futility of an extradition request in the 1990s.[541] As the relator asserted his speedy trial right only after requesting numerous continuances, the court found that this factor weighed in favor of neither the relator nor the government.[542] Regarding the final factor, prejudice to the defendant, the burden was on the relator to show specific prejudice, which he failed to do.[543] Thus, the court held that the relator's Sixth Amendment speedy trial right was not violated.[544]

It is clear that unnecessary delays could occur between the time a complaint for extradition is filed and the hearing,[545] or an arrest with or without a subsequent release on bail and the extradition hearing. Such delays could be based upon the failure of the government to prosecute, which could be based upon the requesting government's failure to produce documents necessary to demonstrate probable cause.[546] In these and other certain instances, there is a basis for a petition for a writ of habeas corpus or for a motion to dismiss the complaint for denial of speedy trial. The government may also move to dismiss the complaint *sua sponte* for unnecessary delay in pursuing the case due to the foreign government's lack of cooperation or due to failure to produce documents. This would be analogous to the dismissal of a case on appeal if the grounds are frivolous or the legal basis unjustified.[547]

In the *Salzmann* case,[548] discussed above, the district court reviewed the status of whether the right to a speedy trial under the Sixth Amendment was applicable to a case involving the failure of a "fugitive"[549] to return to the United States to face prosecution for draft evasion.[550] The *Salzmann* court looked to *Smith v. Hooey*[551] for guidance. In *Smith*, the Supreme Court stated that the federal

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536 *Id.*

537 *Id.*

538 509 F.3d 1105 (9th Cir. 2007).

539 *Id.* at 1114.

540 Barker v. Wingo, 407 U.S. 514, 530–533 (1972).

541 United States v. Corona-Verbera, 509 F.3d 1105, 1114–1116 (9th Cir. 2007).

542 *Id.* at 1116.

543 *Id.*

544 *Id.*

545 *See* Ch. IX, Secs. 1 and 2.

546 *See* Ch. X.

547 *See* Anders v. California, 386 U.S. 738 (1967), *reh'g denied*, 388 U.S. 924 (1967); *cf.* Com. v. Turner, 544 A.2d 927 (Pa. 1988).

548 United States v. Salzmann, 417 F. Supp. 1139 (D.C.N.Y. 1976).

549 *See* Ch. IX, Sec. 8.

550 *See* David A. Tate, *Draft Evasion and the Problem of Extradition*, 32 Alb. L. Rev. 337 (1968) (reviewing draft evasion cases in the context of extradition).

551 Smith v. Hooey, 393 U.S. 374 (1969).

government has "a constitutional duty to make a diligent, good faith effort" to obtain a "fugitive," even though it has no legal right to demand the return of the fugitive.[552] Because *Smith* involved rendition between the federal government and a state, both of which are subject to the provisions of the Sixth Amendment, it did not resolve the issue of whether the Sixth Amendment applies to international extradition.

The *Salzmann* court turned to a review of appellate decisions in other federal jurisdictions. It noted that in *United States v. Estremera*,[553] the Second Circuit held that the federal government was required to exercise due diligence in seeking or granting extradition. In addition, the *Salzmann* court noted that in *United States v. McConahy*,[554] the Seventh Circuit held that there was no reason not to apply the rule of *Smith v. Hooey* when the defendant was incarcerated by a foreign government rather than the United States or one of its states.[555] Ultimately, the *Salzmann* court determined that the federal government's failure to request extradition was a failure to act with due diligence.[556] It noted that it was the defendant's burden to show that the government acted without due diligence.[557]

This line of precedent demonstrates that the Supreme Court's decision in *Smith v. Hooey* can be applied by analogy to extradition cases, such that it imposes upon the federal government a duty under the Sixth Amendment to exercise due diligence in obtaining the surrender of a person in a foreign state for the purposes of facing prosecution or punishment in the United States.[558]

It should be noted again that there is no case specifically holding that there is a right to a speedy extradition within the meaning of the right to a speedy trial. However, if there is gross negligence amounting to a violation of due process, such a right may be invoked.[559]

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552 *Id.* at 383.

553 United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976), *cert. denied*, 425 U.S. 979 (1976).

554 United States v. McConahy, 505 F.2d 770 (7th Cir. 1974).

555 *Id.* at 773.

556 *Salzmann*, 417 F. Supp. 1139, 1158 (E.D.N.Y. 1976).

557 *Id.* at 1161.

558 *See also Barrett v. United States*, 590 F.2d 624 (6th Cir. 1978), wherein the court, in reliance on 18 U.S.C. § 3188, found that a delay of a few days before the two-month period of limitations required for the issuance of the order of commitment from the date the extradition magistrate signed the certificate was not mandatory, and that the entire record was to be examined to determine whether there was prejudice in the nature of a violation of the right to a speedy trial. *See also In re Extradition of* Heilbronn, 773 F. Supp. 1576 (1991). *But see* Sabatier v. Dabrowski, 586 F.2d 866 (1st Cir. 1978) (holding the Sixth Amendment inapplicable because extradition proceedings cannot properly be characterized as "criminal prosecutions" within the meaning of the Sixth Amendment); Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976). *See generally* Jiminez v. U.S. Dist. Ct. S. Dist. Florida, 84 S. Ct. 14 (1963) (Goldberg, J., in chambers). *See also* Hababou v. Albright, 82 F. Supp. 2d 347 (D. N.J. 2000).

559 *In re Extradition of* Harrison, 2004 U.S. Dist. LEXIS 9183, at 22–23 (S.D.N.Y. 2004) (relying on United States v. Mercedes, 1997 U.S. Dist. LEXIS 30007):

> In addition, it is well established in this Circuit that there is no right to speedy extradition. "While delay in seeking extradition may be relevant to the Secretary of State's final determination as to whether a fugitive should be extradited, . . . 'delay may not . . . serve as a defense to judicial extradition proceedings.'" Murphy v. United States, 199 F.3d 599, 602 (2d Cir. 1999), citing Kamrin v. United States, 725 F.2d 1225, 1227 (9th Cir. 1984). "Nothing in the Constitution or in the applicable federal statute indicates that a fugitive has a right to a 'speedy extradition' or that there exists a statute of limitations for extradition." Strachan v. Colon, 941 F.2d 128, 132 (2d Cir. 1991), accord In re Extradition of Ribaudo, 2004 U.S. Dist. LEXIS 1456, No. 00 Crim. Misc. 1 Pg. (KNF), 2004 WL 213021 at *10 (S.D.N.Y. Feb. 3, 2004).

Harrison, 2004 U.S. Dist. LEXIS 9183, at 22–23.

The right to a speedy trial has not yet been interpreted by the various circuits to translate into a defense of laches, whereby a delay in seeking extradition can be grounds for denying it or into a constitutional right protected under the Sixth Amendment.[560]

4.5.1. Relationship between Statute of Limitations and Speedy Trial

There is occasional confusion between the statute of limitations and the constitutional right to a speedy trial.[561] Irrespective of the similarities between the concepts of statute of limitations and speedy trial, they are nonetheless different. A statute of limitations is embodied in a law that provides specificity as to the lapse of time between two events. These two events are usually the time between the commission of the crime or its discovery and the time at which prosecution is commenced or the trial completed. Laws in different countries vary as to the application of such statutory periods, as do provisions on this question in extradition treaties. The different periods of time can be between the discovery of a crime and indictment, between the indictment and the prosecution, between arrest or indictment and trial, or between the conviction and the execution of the sentence. Whatever these time frames may be, they are specified by law. The right to a speedy trial, however, whether under the U.S. Constitution[562] or international human rights law standards,[563] is not set in a normatively defined period of time. Instead, it is a mixed question of law and fact to determine the reasonableness of the period of time that lapsed between the commission of the crime or discovery of the crime, and the commencement of prosecution and its reasonably diligent continuation up to judgment.[564]

As a general rule, the right to a speedy trial under the Sixth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution is not applicable to extradition cases unless a treaty provides for it. If, however, a treaty does provide for a speedy trial, the language of the treaty controls. In a decision from the Eleventh Circuit, *Yapp v. Reno*,[565] the majority opinion confused the questions of statute of limitations and speedy trial, and their application under the treaty, even though the case in point dealt with the 1931 Extradition Treaty between the United States and the United Kingdom, which was then applicable to the Bahamas.[566] The *Yapp* court stated:

> Deciding this case, however, also requires us to interpret the meaning of the lapse of time provision of the 1931 Extradition Treaty. Treaty interpretation presents a question of law, subject to *de novo* review. *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir.1993); *United States*

560 *In Re* Ribaudo, No. 00 Crim. Misc. 1 Pg. KN, 2004 WL 213021, *5 (S.D.N.Y. 2004); *In re Extradition of* Ernst, N0. 97 Crim. Misc. 1, 1998 WL 395267, *22 (S.D.N.Y. 1998).; *In re Extradition of* Rabelbauer, 638 F. Supp. 1085, 1087 (S.D.N.Y. 1986); Lo Duca v. United States, No. 95 Civ. 713, 1995 WL 428636 (E.D.N.Y. 1995); Strachan v. Colon, 941 F.2d 128 (2d Cir. 1991); *In re Extradition of* Drayer, 190 F.2d 410 (6th Cir. 1999); Martin v. Warden, 993 F.2d 824 (11th Cir. 1993); McMaster v. United States, 9 F.3d 47 (8th Cir. 1993).

561 *See In re Extradition of* Salazar, 2010 U.S. Dist. Lexis 74370, at *13–*19 (S.D. Cal. July 23, 2010); United States v. Cruz Garfias, 2009 U.S. Dist. LEXIS 80763 (N.D. Cal. 2009).

562 U.S. Const. amend. VI; Doggett v. United States, 505 U.S. 647 (1992).

563 M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235 (1993). *See generally* Bassiouni Compendium, *supra* note 4.

564 Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994).

565 *Id.*

566 Extradition Treaty between the United States and the United Kingdom, 47 Stat. 2122 (*entered into force* June 24, 1935); Supplementary Treaty between the United States and the United Kingdom, T.I.A.S. 12050 (*entered into force* Dec. 23, 1986).

> *v. Merit*, 962 F.2d 917, 919 (9th Cir.), *cert. denied*, U.S. 113 S.Ct. 244, 121 L.Ed.2d 178 (1992). Determining whether a defendant's right to a speedy trial has been violated is a mixed question of law and fact; we review the law *de novo* and findings of fact for clear error. *United States v. Premises Located at Route 13*, 946 F.2d 749, 754 (11th Cir.1991); *United States v. Wragge*, 893 F.2d 1296, 1298 n.4 (11th Cir.1990).[567]

The dissenting opinion aptly noted this confusion. Clearly if a treaty provides for what is tantamount to a "speedy trial" right under the laws of the requested or the requesting state, it is that treaty provision that triggers the application of the constitutional or statutory right to a speedy trial even though the constitutional and statutory provisions of the subject would not otherwise accommodate that right.[568]

4.5.2. Non-applicability of Statutes of Limitations to Certain International Crimes

International crimes that are *erga omnes* are not subject to statutes of limitations. In addition to war crimes and crimes against humanity,[569] the crimes of genocide[570] and apartheid[571] are also not subject to statutes of limitations. Curiously, however, the 1984 Convention on Torture does not contain such a provision.[572] The United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity states that:

> Article I
>
> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
>
> (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurenberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;
>
> (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurenberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.
>
> Article II
>
> If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those

567 *Yapp*, 26 F.3d at 1565.

568 *Id.* at 1568–1573.

569 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 1, Nov. 26, 1968, 754 U.N.T.S. 73 (*entered into force* Nov. 11, 1970).

570 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

571 International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, 13 I.L.M. 50 (1974).

572 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/708, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984).

> crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.[573]

There is also a similar European convention, the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes.[574]

4.6. Immunity from Prosecution and Plea Bargain

Immunity from prosecution is a technique used primarily in the pursuit of criminal investigations; it has been widely employed in the United States since 1964.[575] It is a device whereby a person is granted immunity from prosecution in exchange for cooperation in a criminal investigation or trial. Immunity is the quid pro quo for waiver of the right to remain silent and is granted in exchange for testimonial cooperation. Whenever granted, immunity is a bar to prosecution. Similar to a statute of limitations, however, it does not extinguish the criminality of the actor, nor does it absolve him/her from responsibility for the criminal conduct; rather, it merely bars the state from prosecuting for such offenses as may have been disclosed under the grant of immunity. When immunity is granted as part of a plea bargain, the U.S. government, under *United States v. Galanis*,[576] is bound not to transmit the evidence obtained under immunity to a requesting state. Immunity does not bar extradition, however.

If the relator had negotiated a plea of guilty with respect to conduct that is the same or substantially the same as that giving rise to the criminal charge for which extradition is requested, the United States cannot grant extradition without vacating the plea and any judgment entered. Granting extradition in certain cases would violate the United States' treaty obligations, unless it could be argued that the guilty plea and resulting conviction can be the basis of a "double jeopardy" defense.[577] The court cannot, therefore, certify a relator as extraditable if he/she was granted specific immunity or entered a negotiated guilty plea without vacating the guilty plea or judgment.

This problem was addressed in *Geisser v. United States*,[578] in which the relator, a Swiss national who escaped from a Swiss prison, made a plea bargain that provided that the prosecution would use its "best efforts" to secure parole for the relator after she served three years of a seven-year sentence. In exchange for her testimony in a drug conspiracy trial, the plea deal was also designed to prevent her eventual extradition to France or Switzerland. The court held that the prosecution, in return for the relator's cooperation, at least had a duty to make a strong presentation to the State Department as to the nature of the promises and the dangers the relator

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573 *See supra* note 515, arts. 1, 2.

574 Jan. 25, 1974 (*entered into force* on June 7, 2003 with three ratifications), Europ. T.S. No. 82 (1974), *in* 2 European Inter-State Cooperation in Criminal Matters 1169 (Ekkehard Müller-Rappard & M. Cherif Bassiouni eds., 2d ed. 1991).

575 Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n N.Y. Harbor, 378 U.S. 52 (1964). The Supreme Court sanctioned the practice in *Kastigar v. United States*, 408 U.S. 931 (1972), and in *Santobello v. New York*, 404 U.S. 257 (1971). *See also* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); M. Cherif Bassiouni, *Recent Supreme Court Decisions Strengthen Illinois Law Enforcement*, 2 Ill. Cont. Leg. Ed. 111 (1964); Jack Pirozzolo, *The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity*, 59 U. Chi. L. Rev. 1617 (1992); Sumner J. Koch, Note, In re Flanagan: *Grand Jury Secrecy and Fear of Foreign Incrimination*, 17 Cornell Int'l L. J. 357, 360 (1984).

576 United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977).

577 *See supra* Sec. 4.3.

578 Geisser v. United States, 513 F.2d 862 (5th Cir. 1975), *on remand*, *In re Petition of* Geisser, 414 F. Supp. 49 (S.D. Fla. 1976), *vacated on other grounds,* 554 F.2d 698 (5th Cir. 1977), *appeal after remand*, 627 F.2d 745 (5th Cir. 1980), *cert. denied sub nom.*, Bauer v. United States, 450 U.S. 1031 (1981).

would be likely to encounter were she to be extradited to Switzerland. The court also ordered the government to advise the Parole Board of the bargain and of the important public interest to be served by honoring it. On remand the district court held the constitutional rights arising from a plea bargain superseded obligations under a treaty. The Second Circuit, which vacated on other grounds, held the government to its "best efforts" duty undertaken in the bargain.[579] The problem and its legal ramifications were stated by the court as follows:

> The agreement made by the United States with Bauer had several elements; the extradition issue remains to be resolved. The nature of the bargain with regard to extradition has been characterized in two ways. After the first hearing on Bauer's habeas corpus petition, Judge Mehrtens found that the Justice Department made a definite agreement with Bauer that she would not be deported to Switzerland or France upon her release from prison. On appeal the Government challenged that finding of fact, arguing that the obligation involved only the Government's promise to use its "best efforts" to prevent Bauer's extradition.
>
> In its first opinion this Court remanded the case to the district court for further hearings on the question of "just what has been done with the promise 'to use our best efforts'." *Geisser v. United States*, 513 F.2d 862 at 872. Thus the Court concluded that the agreement made by the Government could most accurately be characterized as a promise to use "best efforts" to prevent Bauer's extradition. In conformance with this conclusion Judge Mehrtens evaluated the Government's actions from a "best efforts" perspective and found them inadequate. We agree.
>
> In this Court's first opinion Chief Judge Brown suggested how the Government could comply with its "best efforts" promise to Bauer:
>
> The best effort would, at a minimum, be a strong presentation to the Department of State as to what had been promised and the likely dangers to the bargainee-defendant-witness. *Geisser v. United States*, 513 F.2d 862 at 869. The documentary evidence presented to the district court fails to reveal a "best efforts" performance by the United States Government through the Departments of State and Justice. The letter written by Deputy Attorney General Tyler only obliquely refers to the reason for the nonextradition agreement. In none of the documents is there a "strong presentation" of the likely dangers to Bauer suggested by this Court. Under the "best efforts" bargain the Government obligated itself to serve, in effect, as Bauer's personal advocate on the issue of her extradition. In contrast, the letters are written from the perspective of those concerned not so much about commitments to a client but about a damaging legal precedent. The reasons underlying the original bargain, Bauer's admirable performance in keeping her part of the agreement, her "intense fear of reprisals," and the conclusion of Government agents on the case that her fears were well-founded were never presented to the State Department by the Department of Justice nor by the former to the Swiss Confederation.
>
> The Department of Justice conceded at oral argument the Deputy Attorney General Tyler's letter to Secretary of State Kissinger did not contain a representation that Bauer feared for her life on extradition to Switzerland and that some Justice Department staff members had concluded at the time of the bargain that her fears were well-founded. The Department nevertheless contends that such an omission is irrelevant because the Swiss Embassy was aware of such concerns and concluded they were unrealistic. We do not agree. The "best efforts" bargain requires that the Government advocate Bauer's case for nonextradition to Switzerland and France in the most effective terms possible. Her intense fear for her life was the predicate for the bargain, and the Government's failure to explain fully and strongly this part of the agreement reduced its advocacy of her cause almost to an empty gesture.
>
> In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed. 427 (1971), the Supreme Court held that the petitioner's constitutional rights had been violated when the prosecutor

579 *In re Petition of* Geisser, 554 F.2d 698 (1977) (recognizing that a breached plea bargain may in some instances form the basis for an order enjoining extradition in reliance on *Santobello v. New York,* 404 U.S. 257 (1971)).

failed to keep its bargain to make no sentence recommendation. The Court reached this result even though the judge stated at sentencing that he was "not at all influenced" by the district attorney's recommendation.

We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration. 404 U.S. at 262–63, 92 S. Ct. at 499. The same reasoning applies here. The Government promised to use its "best efforts" to prevent Bauer's extradition, and this Court determined that the commitment at a minimum requires a "strong presentation" of what was promised and of the likely dangers to the bargainee. The Government failed to make such a presentation. That the Swiss may to some extent be aware of her fears does not relieve the Government of the obligation to make the strongest case possible for the non-extradition of Bauer to Switzerland and France. As the Supreme Court stated in *Santobello*: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S. Ct. at 499.

. . .

Here a promise remains unfulfilled, and the plea is therefore involuntary unless the breach is remedied. "It is axiomatic [under *Santobello*] that no guilty plea that has been induced by an unkept plea bargain can be permitted to stand." *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1973); *United States v. Pihakis*, 545 F.2d 973 (5th Cir. 1977); *Scrivens v. Henderson*, 525 F.2d 1263 (5th Cir. 1976), *cert. denied*, 429 U.S. 919, 97 S. Ct. 311, 50 L. Ed. 2d 285.

As the foregoing discussion suggests, the district court's finding that the Government failed to use its "best efforts" to forestall the petitioner's extradition is not clearly erroneous. Fed.R.Civ.P. 52(a). We reject the Department of Justice's contention that the clearly erroneous standard is inapplicable to review a record confined to documentary evidence. . .

The appellant's burden, under Fed.R.Civ.P. 52(a), of showing that the trial judge's findings of fact are "clearly erroneous" is not as heavy . . . as it would be if the case had turned on the credibility of witnesses appearing before the trial judge . . . . However, regardless of the documentary nature of the evidence and the process of drawing inferences from undisputed facts, the reviewing court must apply the "clearly erroneous" test. (Footnote omitted.) Sicula Oceanica v. Wilmar Marine Eng. & Sales Corp., 413 F.2d 1332, 1333-34 (5 Cir. 1969). *See Volkswagen of America, Inc. v. Jahre*, 472 F.2d 557, 559 (5 Cir. 1973); *Burston v. Caldwell*, 506 F.2d 24, 26–27 (5 Cir. 1975), *cert. denied*, 421 U.S. 990, 95 S. Ct. 1995, 44 L.Ed.2d 480.

. . .

Chief Judge Brown discussed the remedies available in this case in his opinion in the first appeal:

> [T]he avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement. Specific performance may well be the only way out to keep the bargain. *Geisser v. United States*, 513 F.2d at 871. The district court's remedy gives decisive weight to Bauer's fears for her life on extradition to Switzerland or France; it vacated the outstanding extradition order against Bauer. We decline to go that far at this juncture. We conclude that a narrowly drawn remedy specifically enforcing the Government's "best efforts" agreement is required. The Government must again try to prevent Bauer's extradition to Switzerland or France. We are not convinced that the vast powers of persuasion at the command of the Departments of Justice and State have been adequately applied to Bauer's cause. The bargain she made with the United States Government in entering her guilty pleas and waiving her constitutional rights requires no less.

> While retaining jurisdiction, we remand the case to the district court if, in the discretion of that court, further proceedings are necessary or appropriate. The Government has a reasonable time in which to use its "best efforts" to prevent the extradition of Bauer to Switzerland or France. Enforcement of the extradition order outstanding against Bauer must of course be held in abeyance until this case has been resolved.[580]

In 1992 the Fifth Circuit reexamined the issue of a plea bargain by virtue of which a defendant in a United States court entered a guilty plea on the basis of certain assumptions concerning sentencing. In *United States v. Schmeltzer*,[581] the court reviewed *Geisser*[582] and distinguished these decisions as follows:

> In *Geisser*, the government became obliged to use its best efforts to refrain from deporting Geisser to Switzerland, a country where she was under a sentence of imprisonment for patricide. However, the government's assurance—had it been literally realized—would have abrogated an international treaty. This court initially required the government to exercise diligence in satisfying its bargain with Geisser. After much diplomatic wrangling and numerous court proceedings, the government claimed that it had expended its "best efforts," but was unable to persuade the Swiss government to relent in its pursuit of Geisser. This court agreed and Geisser was extradited to Switzerland. The Second Circuit relied on the first *Geisser* decision to free a defendant who had received a prosecutor's assurance of a limited sentence when the prosecutor was powerless to fulfill such promise, beyond asserting influence on parole officials. *Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976), *cert. dism'd*, 431 U.S. 911 (1977).
>
> Neither of these cases rises to Schmeltzer's aid. The government ultimately fulfilled its bargain with Geisser—best efforts were extended. *Palermo* represents a more difficult case; Palermo received an "ultra vires" promise from the prosecutor, which the court ordered fulfilled. Similarly, the U.S. Attorney prosecuting Schmeltzer was wholly without authority to ignore the minimum mandatory sentence. While Schmeltzer's counsel was understandably anxious about the maximum penalty, the trial record suggests that both prosecution and defense counsel viewed the explicit minimum mandatory provision as being susceptible to negotiation. Notwithstanding, *Palermo* is factually distinguishable from the case at bar. The U.S. attorney fulfilled his promise to Schmeltzer: the government did not *seek* the enhanced penalty.
>
> Quite beyond the factual disparity between the instant case and those cited by Schmeltzer is the unequivocal language of the Sentencing Guidelines:
>
> > Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.[583]

The Eighth Circuit in *Ramanauskas v. United States*[584] considered whether the relator's plea bargain between with the U.S. Attorney barred his extradition under the United States–Lithuania extradition treaty's double jeopardy provision.[585] The relator was accused of smuggling counterfeit currency and drugs into the United States.[586] The relator served a U.S. prison sentence on counterfeiting charges, and was subsequently indicted in the United States for conspiracy to

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580 *Geisser*, 554 F.2d at 703–706.

581 United States v. Schmeltzer, 960 F.2d 405 (5th Cir. 1992), *cert. denied*, 506 U.S. 1003 (1992).

582 *See also* Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976) (using the first *Geisser* decision to free a defendant who had relied on prosecution's assurance of a limited sentence), *cert. dismissed*, 431 U.S. 911 (1977)).

583 *Schmeltzer*, 940 F.2d at 407–408.

584 Ramanauskas v. United States, 526 F.3d 1111 (8th Cir. 2008).

585 *Id.* at 1112–1113.

586 *Id.* at 1113.

deal in counterfeit currency, with no reference to drug charges.[587] While the U.S. charges were pending, Lithuanian authorities filed drug and counterfeiting criminal charges against the relator, and formally requested his extradition from the United States.[588] The relator entered into a plea agreement wherein the U.S. Attorney agreed "to not bring any additional charges against [Ramanauskas] based upon the information known to it . . . to wit [his] participation in distribution of Ecstacy. This commitment . . . does not apply to any other agency or department of the United States, or to any other proceeding such as deportation, extradition or the like."[589] Less than one month after the relator's sentencing on counterfeiting charges, the United States filed the extradition complaint on behalf of Lithuania, but requested the counterfeiting charges be dismissed as they fell within the United States–Lithuania extradition treaty's double jeopardy provision.[590] The relator defended the extradition request with the treaty provision, which he argued prevented extradition following an "agreed resolution approved by a court with final and binding effect," such as a plea agreement.[591] The court rejected this construction of the treaty and reasoned as follows:

> The contention is fatally flawed because it ignores the previous words in the second sentence, "under Lithuanian law." In our view, the plain import of these limiting words is that the second sentence was inserted because, under Lithuania's legal system, the words "convicted or acquitted" in the first sentence of Article 5.1 might not include dispositions of Lithuanian criminal proceedings to which the double jeopardy protection should apply. In other words, the second sentence only applies when Lithuania, rather than the United States, is the "Requested State." The Treaty's legislative history in the United States confirms this interpretation. In urging ratification, the Report of the Senate Committee on Foreign Relations explained:
>
> > ARTICLE 5(1)—PRIOR PROSECUTION
> >
> > The Lithuanian delegation expressed concern that the terms "convicted or acquitted" used in the first sentence are not broad enough to cover all matters under Lithuanian law. Therefore, the following sentence was added to provide a broader definition: "Conviction or acquittal also means, under Lithuanian law, an agreed resolution approved by a court with final and binding effect."
>
> S. EXEC. REP. No. 107-13, at 5 (2002).
>
> This interpretation of Article 5.1 is reinforced by the plain meaning of Article 5.2, which provides in relevant part that "[e]xtradition shall not be precluded by the fact that the competent authorities of the Requested State have decided . . . not to prosecute the person sought for the acts for which extradition is requested . . . " Here, as the district court concluded, the Minnesota United States Attorney's commitment in the plea agreement not to bring additional charges was a decision "not to prosecute" known but uncharged drug offenses for which Lithuania was seeking extradition. The plea agreement expressly stated that it did not apply "to any other proceeding such as . . . extradition," and Ramanauskas later asked the district court to remove any references to drug activity from the PSR "to preserve his rights, whatever those may be in Lithuania." Ramanauskas offers no support, textual or otherwise, for his assertion that Article 5.2 only applies when the Requested State's authorities make a "unilateral" decision not to prosecute, without court approval.
>
> Ramanauskas complains that, under the government's interpretation of Article 5.2, Lithuania may now prosecute him for the additional counterfeiting charges the United States dismissed pursuant to the plea agreement. This contention confuses distinct Treaty provisions. The

587 *Id.*

588 *Id.*

589 *Id.*

590 *Id.*

591 *Id.* at 1115.

> government dropped all Lithuanian counterfeiting charges from the extradition complaint. If he is extradited, Lithuania has agreed in Article 16.1(a) of the Treaty (titled the "Rule of Specialty") to prosecute him *only* for offenses "for which extradition was granted." On the other hand, had the United States not dropped the Lithuanian counterfeiting charges from the extradition complaint, the district court would have needed to decide before issuing a certificate of extradition whether those specific charges were barred by Article 5 of the Treaty. *Compare Elcock v. United States,* 80 F.Supp.2d 70 (E.D.N.Y.2000); *Matter of Montiel Garcia,* 802 F.Supp. 773 (E.D.N.Y.1992), *aff'd,* 987 F.2d 153 (2d Cir.), *cert. denied,* 509 U.S. 930, 113 S.Ct. 3056, 125 L.Ed.2d 740 (1993).[592]

Plea negotiations are often the subject of abuse and are not enforced in a manner that instills confidence in the good faith of U.S. prosecutors, or even the federal judiciary. The reason could be that U.S. prosecutors may tend to make representations designed to induce a "bargain" in a way that leaves them the opportunity of backing away from some of the representations they made or impressions they created. Surely, that should not be the case. United States prosecutors should act not only with the utmost integrity in every respect but should also avoid making representations that will not be carried out or creating false impressions to delude a relator-defendant into a plea bargain agreement. As U.S. federal and state criminal legislation has become significantly inflated with new statutes, which at times duplicate existing ones but sometimes are in the nature of aggravating factors, and because of the complexity of sentencing, particularly with the Sentencing Guidelines,[593] the opportunities for misrepresentation or erroneous representation or misperception or misapprehension are more markedly significant than in the past. This situation requires legislative clarification as to the type of plea negotiations that will be acceptable in the United States and incorporated in a "specialty" type statement in the extradition order so as to give the relator the opportunity to raise the issue abroad if need be with the assurance that the United States will "protest" any breach thereof.[594] Similarly, legislative guidelines should be established for negotiated arraignments with a relator sought by the United States prior to his/her surrender or subsequently (when the plea agreement bears upon the conditions of extradition). Until such time as this occurs, and considering the tendency of the courts as evidenced by the *Geisser*, *Palermo*, and *Schmeltzer* decisions, which seem to have favored the government's position over the defendant-relators, attorneys representing defendant-relators should remember the old contract law maxim: caveat emptor, or buyer beware.[595]

Plaster v. United States[596] raised the issue of the enforceability of an immunity plea bargain agreement between U.S. military officials and a relator who was in the military. The relator and another member of the U.S. armed forces were suspected of the murder of a West German taxi driver, which occurred while they were stationed in West Germany. The two deserted and traveled to Madison, Wisconsin, where both men were arrested in connection with another

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592 *Id.* at 1115.

593 It should be noted that the Federal Sentencing Guidelines were modified, so that finds not established beyond a reasonable doubt were in violation of the Sixth Amendment and could not factor in the sentence ultimately imposed. *See* United States v. Booker, 543 U.S. 220 (2005).

594 *See* Ch. VII, Sec. 6 (discussing the rule of specialty).

595 It should also be noted that it will likely be difficult for a relator to succeed on a motion to withdraw a guilty plea based on alleged coercion where the district court makes an adverse credibility finding. United States v. Muller, 305 Fed. Appx. 457, 458 (9th Cir. 2008) (unpublished opinion).

596 Plaster v. United States, 720 F.2d 340 (4th Cir. 1983). The case was vacated and remanded for a factual determination of the authority of the military officer who had entered into the immunity agreement. The district court again granted the relator a writ of habeas corpus. Plaster v. United States, 605 F. Supp. 1532 (W.D. Va. 1985), *aff'd*, 789 F.2d 289 (4th Cir. 1986).

murder. While in custody the two were questioned about and confessed to involvement in the West German murder.

Under the Status of Forces Agreement between the United States and West Germany, Germany automatically waived its jurisdiction over the relator in favor of the American military authorities. Germany chose not to recall its waiver, but asked to be kept informed of the efforts by the U.S. military to obtain custody of the relator and his companion in order to bring them to trial for the West German murder.

The U.S. military authorities chose not to pursue prosecution of the relator after the U.S. Supreme Court handed down its decision in *Miranda v. Arizona*,[597] concluding that the confessions of the relator and his companion would be inadmissible. Germany then attempted to regain jurisdiction. The U.S. military authorities chose instead to offer immunity to the relator in exchange for his testimony against his companion so that the companion could be prosecuted in the United States. The relator accepted the immunity agreement, but the military authorities never actually sought the relator's testimony. After the conclusion of a new extradition treaty between the United States and West Germany in 1978,[598] twelve years after the immunity agreement, Germany requested the extradition of both the relator and his companion. The relator was certified as extraditable and sought habeas corpus relief. The district court granted the relator a writ of habeas corpus, and the United States appealed.

On appeal the Fourth Circuit established two points regarding the immunity agreement between the relator and the U.S. military authorities: (1) high-ranking military officials who are in a position of apparent authority have the right to bind the United States and do indeed bind the United States; and (2) an immunity agreement or plea bargain agreement is binding upon the United States when entered into by persons in authority, and constitutes an enforceable agreement even against a foreign government.[599] The court stated that the grant of immunity was tantamount to a plea bargain agreement and that the government was therefore obligated to carry out its part of the agreement.

The court did not address the question of conflicting authority between an obligation assumed by the U.S. government, which is ratified by the U.S. Senate, and an agreement that may be entered into between a prosecutor and an individual in a particular case without the knowledge of the government. By extension, this position could lead to a situation in which an immunity agreement is entered into by any prosecuting authority in the United States with apparent official authority, and the agreement would not only bind the United States in all of its prosecutorial functions at the state and federal level, but would also bind the United States with respect to its international obligations and even supersede those obligations.

In *In re Burt*[600] the same facts arose as in the *Plaster* case. The issues in *Burt* related more to general due process, speedy trial, and various diplomatic and prosecutorial decisions involving a U.S. serviceman in Germany, his return to the United States, his prosecution, and his subsequent extradition to Germany. Among these issues was also the question of whether the NATO Status of Forces Treaty (NATO-SOFA) applied and to what extent there was an interplay of prosecutorial discretion used under NATO-SOFA,[601] the subsequent prosecution in the United States, and the subsequent extradition to Germany. A key point is whether the decision

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597 Miranda v. Arizona, 396 U.S. 868 (1969).

598 Extradition Treaty, *supra* note 19, 32 U.S.T. at 1485.

599 This situation is analogous to the extension of the applicability of the Fifth Amendment privilege against self-incrimination with respect to immunity agreements to state and federal courts alike. Murphy v. Waterfront Comm'n N.Y. Harbor, 378 U.S. 52 (1964). *See also* United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997); Koch, *supra* note 575.

600 *In re Burt*, 737 F.2d 1477 (7th Cir. 1984).

601 June 19, 1951, 4 U.S.T. 1792.

not to surrender him to Germany under NATO-SOFA at the time he was a serviceman on his return to the United States, where he was prosecuted, de jure or de facto constituted, inter alia, a specific or implied promise that he not be extradited to Germany. The facts do not disclose whether promises or representations were made to the relator at the time he was in Germany and the military authorities refused to surrender him to Germany. It would otherwise seem unusual that he would not be surrendered and would be returned to the United States for prosecution if it were not a substitute for his extradition, thus raising the question of whether some promises or representations were made. In *Burt*, the Seventh Circuit held:

> Generally, so long as the United States has not breached a specific promise to an accused regarding his or her extradition, *see Plaster*, 720 F.2d at 352; *Petition of Geisser*, 554 F.2d 698, 704-06 (5th Cir. 1977); *Petition of Geisser*, 627 F.2d 745, 750 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031, 101 S. Ct. 1741, 68 L.Ed.2d 226 (1981), and bases its extradition decisions on diplomatic considerations without regard to such constitutionally impermissible factors as race, color, sex, national origin, religion, or political beliefs, and in accordance with such other exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishments employed by the foreign jurisdiction, [Of course, in proceeding with an extradition, the United States must also comply with the terms of the extradition treaty and the procedures prescribed in 18 U.S.C. § 3184.] *cf. Rosado v. Civiletti*, 621 F.2d 1179, 1197–98 2d Cir.], *cert. denied*, 449 U.S. 856, 101 S. Ct. 153, 66 L.Ed.2d 70 (1980); *Gallina v. Fraser*, 278 F.2d 77,79 (2d Cir.), *cert. denied*, 364 U.S. 851, 81 S.Ct. 97, 5 L.Ed. 2d 74 (1960), those decisions will not be disturbed. Here, petitioner's due process argument has not pointed to any conduct by the United States that would run afoul of the constitutional limitations on extraditions we have suggested. Petitioner will have to make his arguments about prejudicial prosecutorial delay in the courts of the prosecuting party, West Germany.[602]

In *McKnight v. Torres*,[603] the court considered whether the United States violated the terms of an immunity agreement it entered into with the relator. The relator entered into a "direct use immunity" agreement with the U.S. Attorney in his drug importation case.[604] The relator agreed to cooperate with the U.S. Attorney "in exchange for the government's promise 'not to offer in evidence in its case-in-chief or for the purpose of any sentencing hearing, any statements made by [McKnight] at any meeting' in either 'the above-captioned case [or] in any other prosecution that may be brought against [McKnight] by this Office.' "[605] However, the United States transmitted the information obtained from McKnight under this immunity agreement, which formed part of the basis of the relator's in absentia judgment and sentence in France.[606] The relator challenged his subsequent finding of extraditability on the grounds that the government breached its immunity agreement.[607] The court rejected the relator's argument, reasoning as follows with regard to immunity agreements:

> We agree that the words of McKnight's immunity agreement were clear, explicit, and unambiguous. McKnight concedes as much. He acknowledges that "the [U.S. Attorney's] dissemination of the proffer was not expressly prohibited by the agreement," and that, at the time he signed the agreement, he recognized he "had to take the risk that his [statement might become] known and available to some other jurisdiction [that] could then use his statements to incriminate, and convict, him." He further admits that the U.S. Attorney's agreement not to use his statements "was limited to the pending prosecution and any other prosecution [the U.S. Attorney] might

602 *Burt*, 737 F.2d at 1487. *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999).

603 563 F.3d 890 (9th Cir. 2009).

604 *Id.* at 891.

605 *Id.*

606 *Id.*

607 *Id.* at 892.

> bring against [him]," and that it did not reflect any promise by the government either to disclose or not to disclose his statements "to other jurisdictions."
>
> The unambiguous words of the agreement are the end of the story. "As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit." *Brookwood v. Bank of Am.,* 45 Cal.App.4th 1667, 1670–71, 53 Cal.Rptr.2d 515 (1996) (quoting *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.,* 177 Cal.App.3d 726, 730, 223 Cal.Rptr. 175 (Cal.Ct.App.1986)); *see also Yount v. Acuff Rose-Opryland,* 103 F.3d 830, 835–36 (9th Cir.1996) ("[W]hen a contract has been reduced to writing, a court must ascertain the parties' intent from the writing alone."). Because the agreement here was clear, we must determine its meaning by reference to the parties' "objective intent, as evidenced by the words of the contract." *Cedars-Sinai Med. Ctr. v. Shewry,* 137 Cal.App.4th 964, 980, 41 Cal. Rptr.3d 48 (Cal.Ct.App.2006) (quoting *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.,* 109 Cal.App.4th 944, 956, 135 Cal.Rptr.2d 505 (Cal.Ct.App.2003)). Accordingly, the parties' "uncommunicated subjective intent is irrelevant." *Reigelsperger v. Siller,* 40 Cal.4th 574, 579, 53 Cal.Rptr.3d 887, 150 P.3d 764 (2007). Here, McKnight's unambiguous agreement with the government does not contain any limitation on the government's freedom to share his admissions with France. The U.S. Attorney's disclosure therefore did not violate the agreement.
>
> McKnight nevertheless argues that the implied duty of good faith and fair dealing "supplement[s]" the immunity agreement, incorporating his "reasonabl[e] expect[ation] that the [U.S. Attorney] would . . . not facilitate his proffer being used by another jurisdiction." In his view, the government's disclosure "frustrated" the "promise" of "protection" made to him by the U.S. Attorney. This argument fails because it presumes away the dispute—i.e., that the "protection" offered by the U.S. Attorney included protection from prosecution abroad. This broad construction of the "protection" offered simply is not reflected in the clear language of the agreement.
>
> Assuming arguendo that the implied duty of good faith and fair dealing applies here, it "is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." *Spinks v. Equity Residential Briarwood Apartments,* 171 Cal.App.4th 1004, 90 Cal.Rptr.3d 453, 476 (2009) (quoting *Pasadena Live v. City of Pasadena,* 114 Cal.App.4th 1089, 1094, 8 Cal.Rptr.3d 233 (Cal.Ct.App.2004)). The condition operates only to prevent a party from taking an action that " 'will injure the right of the other to receive the benefits of the agreement.' " *Major v. W. Home Ins. Co.,* 169 Cal.App.4th 1197, 1209, 87 Cal.Rptr.3d 556 (2009) (quoting *Gruenberg v. Aetna Ins. Co.,* 9 Cal.3d 566, 573, 108 Cal.Rptr.3d 480, 510 P.2d 1032 (1973)). It neither "alter[s] specific obligations set forth in the contract" nor "add[s] duties independent of the contractual relationship." *Shawmut Bank, N.A. v. Kress Assocs.,* 33 F.3d 1477, 1503 (9th Cir.1994) (applying California law).
>
> In this case, while McKnight may have hoped the U.S. Attorney would not disclose his statements to the French authorities, there is nothing in the plain words of the agreement that provided that protection, and the implied covenant of good faith simply cannot be employed to read it into the agreement. [footnote omitted][608]

In connection with cooperation agreements between the U.S. government and a person sought for extradition, it is clear that the courts have an obligation to enforce such agreements whether they are part of a plea bargain or not.[609] This obligation also extends to immunity agreements.[610] However, there is a question as to whether the United States should enforce a

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608 *Id.* at 892–894.

609 *In re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999), *citing* Santibello v. New York, 404 U.S. 257 (1971) (holding plea bargains are generally binding upon the government); United Staets v. Streebing, 987 F.2d 368, 372 (6th Cir. 1993); Plaster v. United States, 720 F.2d 340, 350 (4th Cir. 1983). See also Valenzuela v. United States, 286 F. 3d 1223 (11th Cir. 2002); *In re Extadition of* Burt, 737 F.2d 1477 (7th Cir. 1984).

610 United States v. Fitch, 964 F.2d 571, 574 (6th Cir. 1992) (binding government to agreement unless it can show a material breach by defendant).

cooperation agreement between the requesting state and the person sought for extradition. The Sixth Circuit held that the extradition judge in the United States, when it is the requested state, should not address the issue.[611]

It is not uncommon for extradition requests to be submitted by a requesting state many years after an arrest warrant or indictment has been issued, or a conviction obtained. This may be due to a variety of circumstances, including the fact that the person sought has been a fugitive or changed his identity, whereabouts unknown; was held in custody or serving a prison sentence; or simply because of some fortuitous reason on the part of the requesting state. Notwithstanding how long this period of time may be, the United States and most other countries of the world do not consider that to be grounds for denial of extradition.[612]

The problem here is essentially that the judiciary is not in a position to develop the practical alternatives that are required to resolve this dilemma; the problems should be legislated. The better solution in this case would be that federal and state authorities not be authorized to enter into an immunity agreement without referring to the Department of State for verification that such an agreement does not conflict with existing international obligations of the United States.

Under the 1984 Draft Extradition Reform Act, the questions of immunity from prosecution and plea bargain are not addressed. However, under § 3193, which provides for waiver of the hearing, its requirements, and withdrawal, the legislative history indicates that withdrawal of a waiver should be treated in the same manner as guilty pleas in criminal proceedings.[613] Thus it could be assumed by analogy that a plea bargain, which would operate as a waiver or have the same consequences as a waiver under § 3193, should also be subject to the same limitations as exist in other federal criminal cases.

4.7. Amnesty and Pardon

Amnesty and pardon are both a bar to prosecution and punishment. Save for specific legislative pronouncement, they do not extinguish the crime, but rather the criminal action against the person who is believed to have committed a crime or who has been found guilty. Amnesty and pardon, however, also apply to situations where a person has been legally found to have committed a crime and is subsequently given the benefit of a remission of sentence or a removal of the consequences of the criminal conviction. The difference in substance and application of these two legal modalities for arresting, prosecution, and punishment is significant in many respects.

Amnesty is usually granted before prosecution or conviction, and in that respect it resembles a statute of limitations,[614] whereas pardon is usually granted after a person is found guilty. In extradition, however, the common question is whether they both can serve as a bar.[615]

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611 *See In Re Extradition of* Drayer, 190 F.3d 410 (6th Cir. 1999) (holding that an agreement between Drayer and Canada was best adjudicated in Canada regarding its scope and validity, not in the context of extradition.)

612 *In re* Gambino, 2006 WL 709445 (D. Mass. 2006) (extradition request was made fifteen years after warrant issued); *Drayer*, 190 F.3d at 410 (where the request was made fourteen years after the issuance of the Canadian arrest warrant).

613 *See* H.R. Rep. No. 627, 97th Cong., 2d Sess., pt. 1, at 13 (1982).

614 *See supra* Sec. 4.4.

615 Certain national legislations, such as that of Germany, consider that a bar to prosecution or punishment (i.e., statute of limitation, amnesty, or pardon) is also a bar to extradition. *See* Heinrich Grutzner, *Rapports: Allemagne*, 39 Rev. Int'le de Droit Pénal 379 (1968). *See also* Lazzeri v. Schweizerische Bundesanwaltschaft, 34 I.L.R. 134 (Federal Tribunal 1961) (Switz.); *In re* Issel, 18 I.L.R. 331 (Eastern Provincial Court 1950) (Den.); *In re* Zanini, 8 Ann. Dig. 372 (Supreme Court of the Reich 1936) (Germany).

Pardon and clemency are executive privileges available to the president and governors. Pardon has been used essentially to erase criminal records and the civil disabilities that are imposed on persons convicted of crimes. It has also been used as a substitute for clemency. Unlike parole, which is an institutionalized and regulated procedure, pardon, with a few minor exceptions (e.g., Federal Board recommendations of pardon to the president), is almost wholly discretionary with the chief executive.[616] In some states, amnesty, when it is general, bars prosecution and extinguishes the offense as related to the category of offenders benefiting from it.

Amnesty and pardon can only be considered defenses to extradition when declared by the competent authority of the requesting state. In the United States, amnesty and pardon could be a procedural bar to extradition because they do not extinguish the crime committed in the requesting state, nor for that matter do they eliminate the crime for "double criminality" purposes. There are no U.S. cases on point.

There are several analogies among amnesty, pardon, and statutes of limitations, discussed above, but the major difference is that the latter derive from a legislative source, which can be said to run into the substantive requirement of double criminality. Therefore, it is possible for the requested state to rely on its laws on the subject to deny extradition, while the former two are discretionary executive prerogatives, and can only be asserted when they originate in the requesting state.

The 1984 Draft Extradition Reform Act does not deal with this question, although a treaty would control, of course, and it could be argued that under § 3194(d)(1)(C), amnesty or pardon extinguishes the crime, and it therefore is no longer punishable under the laws of the requested or requesting state, which is a requirement of double criminality.[617]

4.8. Conviction Based on Trial in Absentia

This defense is not recognized in those states whose legal systems permit such trials, while it may be a defense in those legal systems that do not permit such trials.[618] Although the issue has been raised unsuccessfully in the United States it resurfaces periodically.[619]

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616 Executive clemency is founded on Article II, Section 2 of the U.S. Constitution and is regulated by Title 28 of the United States Code and 28 C.F.R. § 1 (1992). In the United States, clemency and pardon are synonymous. *See* United States v. Wilson, 32 U.S. 150 (1833). For the pardon of former President Nixon by President Ford, see 10 Wkly. Comp. Pres. Doc. 1108 (Sept. 8, 1974). Though the proclamation was labeled "Granting Pardon to Richard Nixon," it is in fact in the nature of an amnesty, as it precludes prosecution.

Article II, section 2 of the Constitution grants the president "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const., art. II, § 2. *See, e.g.*, Edward S. Corwin, The President: Office and Powers (1984); Willard H. Humbert, The Pardoning Power of the President (1941). President Wilson resorted to pardon, and the case was tested in *Burdick v. United States*, 236 U.S. 79 (1915), *rev.'d*, *Curtin v. United States*, 236 U.S. 96 (1915), as did President Johnson before him in *Armstrong v. United States*, 80 U.S. 154 (1871). For a comparison of state statutes and authority, see Samuel P. Stafford, Clemency: Legal Authority, Procedure and Structure (1977).

617 *See also* Ch. VII, Sec. 2.

618 For example, in German practice, extradition requests based on judgments in absentia create difficult problems, especially for requested states the laws of which barely address absentia proceedings. Under case law and in the legal doctrine of the Federal Republic of Germany, the decisive factor regarding the admissibility of extradition based on an absentia judgment is whether and how in the proceedings prior to the judgment (especially those concerning summons, defense, and possible legal remedies following seizure of the person concerned) the court granted the minimum rights associated with fair proceedings of the kind guaranteed in both Article 6 of the European Convention on Human Rights and applicable case law of the European Court of Human Rights. Wilkitski, *supra* note 414, at 284. For a case involving this issue in South Africa, see *Judgment in Trevor Claud Robinson v. Minister of Justice and Constitutional Development, Director of Public Prosecutions*, 2006 (6) SA 214 (C) (S. Afr.); *Robinson v. S*, 2004 (3) SA 267 (CC) (S. Afr.).

619 *See* Germany v. United States, 2007 U.S. Dist. Lexis 6576 (E.D.N.Y. 2007) (denying argument by relator where U.S.–France extradition treaty had a provision regarding additional requirements for

One of the landmark cases in the United States is *Gallina v. Fraser*.[620] The court's decision indicates in obiter dictum that if the trial in absentia would be so fundamentally unfair by generally recognized standards of justice and not only by U.S. or common law standards, the outcome[621] would be different.

The court in this case, as well as others, granted extradition where a conviction in absentia had been rendered against a fugitive relator.[622] These decisions evaded the crux of the issue by asserting

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individuals convicted in absentia, indicating that the parties contemplated extradition of relators tried in absentia); *In re Extradition of* Bilanovic, 2008 U.S. Dist. LEXIS 97893 (W.D. Mich. 2008) (rejecting challenge to evidence presented at trial in absentia as failing to establish the required probable cause finding); United States v. Avdic, 2007 U.S. Dist. LEXIS 47096 (D.S.D.) (same probable cause challenge as in *Bilanovic*). This issue was present, though not raised, in the extradition of Manuel Noriega to France. *See* Bruce Zagaris, *U.S. Extradites Noriega to France on Money laundering Charges*, 26 Int'l Enforcement L. Rep. 279–280 (July 2010).

620 Gallina v. Fraser, 177 F. Supp. 856, 861–862, 867–868 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). Relator claimed that he committed the robberies to collect funds for the Sicilian separatist movement, and that he could not therefore be extradited because his offenses were of a political character. The Commissioner, however, apparently found that relator and his associates used the separatist movement to further their true objectives of personal gain. Following the arrest of his associates in 1946, the relator went into hiding. He was tried in absentia in 1949 and 1951. His whereabouts were apparently unknown until 1955 when he entered the United States, probably as a stowaway. *Id.* at 861–862. *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y., July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, 99 Cal. Daily Op. Serv. 200, (9th Cir. 1990) (NO. 98-55069). If a conviction is the result of a trial in absentia, the conviction is regarded as a charge, requiring independent proof of probable cause. Gallina v. Fraser, 278 F.2d 77, 78–-79 (2d Cir. 1960); Argento v. Horn, 241 F.2d 258, 264 n.1 (6th Cir. 1957); *In re Extradition of* D'Amico, 177 F. Supp. 648, 653 n.3 (S.D.N.Y. 1959), remanded, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed sub nom*. United States *ex rel.* D'Amico v. Bishop, 286 F.2d 320 (2d Cir. 1961); *Ex parte* La Mantia, 206 F. 330, 331 (D.C.S.D.N.Y. 1913); *Ex parte* Fudera, 162 F. 591 (D.C.S.D.N.Y. 1908), *appeal dismissed sub nom*. Italy v. Asaro, 219 U.S. 589, 31 S. Ct. 470, 55 L. Ed. 348 (1911). Thus, the extradition judge must make an independent finding of probable cause notwithstanding the existence of a conviction in absentia by a foreign court.

621 *See In re Extradition of* D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959). This case became moot, however, when the Italian consul represented to the court that D'Amico would be tried anew if extradited. The court of appeals in reviewing these decisions also considered *Wilson v. Girard,* 354 U.S. 524 (1957) and *Grin v. Shine*, 187 U.S. 181 (1902); *cf. In re Extradition of* Suarez-Mason, 694 F. Supp. 676, 687 (1988). *See also* Holmes v. Jennison, 39 U.S. 540 (1840). The court correctly noted that nothing in those cases supported relator's claim, with the exception of the dictum in *United States ex rel. Argento v. Jacobs*, 176 F. Supp. 877 (N.D. Ohio 1959); neither was there anything in them directly contrary to relator's claim. The inter-state extradition cases in particular were irrelevant, because a fugitive claiming his conviction violated due process would be told that he could test his claim in the courts of the state where he was convicted. *Cf.* Sweeney v. Woodall, 344 U.S. 86 (1952). In *Ex parte Fudera*, 162 F. 591 (C.C.N.Y. 1908), a habeas corpus proceeding, the very treaty now in question was asserted as the basis of a request for extradition of the petitioner. From a reading of the case it seems clear that the person who had committed the crime had been convicted *in contumacium* in his absence by the Italian government. Yet the court expressed not the slightest doubt that extradition would have been granted under these circumstances had sufficient evidence of the criminality of the petitioner been presented to it. The fact that petitioner was discharged from custody was due to the lack of competent evidence that the crime charged had been committed.

622 *See also* Arambasic v. Ashcroft, 403 F. Supp. 2d 951, 962 (D.S.D. 2005) stating:

> Also, the fact that Arambasic was convicted in absentia does not alone warrant a denial of extradition. See, M. Bassiouni, International Extradition: United States Law and Practice, Ch. VIII, § 4.8. However, where a conviction is the result of a trial in absentia, the conviction is regarded merely as a

that in order for extradition to be granted, it is not necessary to advance that the relator has been convicted, but only that a prima facie case of guilt had been proven.[623] Furthermore, the executive may at his/her discretion grant extradition subject to the condition that a new trial be granted the relator.[624] This solution rests on the extension of the "principle of specialty"[625] as a means of ensuring compliance with conditional extradition.[626]

The position of the United States is not clear as to whether the courts, in examining the request or in their review by habeas corpus, will consider the question of fundamental fairness of a relator's trial or punishment.[627] At present, however, it seems that a trial in absentia is not

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charge, requiring independent proof of probable cause. In re Ribaudo, 2004 WL 213021 (S.D.N.Y.) (not reported in F.Supp.2d); In re Ernst, 1998 WL 395267 (S.D.N.Y.1998) (not reported in F.Supp.2d); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960). *Id.*

623 In *Ex parte La Mantia*, 206 F. 330 (C.C.S.D.N.Y. 1913), again involving extradition under this same treaty, the court stated that it made no difference whether there was a conviction *in contumacium*; insofar as the hearing on the criminality of the accused was concerned, he was to be regarded as only charged with the crime. Although in that case the accused was discharged for lack of competent evidence of identity, there can be no doubt that had such evidence been produced, the court would have ordered the accused held for extradition despite the fact that he had already been tried for the offense and would, in all probability, be incarcerated immediately upon his return to Italy. *See also In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960) (involving extradition by Greece); *cf.* Koskotas v. Roche, 740 F. Supp. 904, 912 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991); *In re* Ribaudo, No. 00 Crim. Misc. 1 Pg. KN, 2004 WL 213021, *5 (S.D.N.Y. 2004), relying on Spatola v. United States, 920 F. 2d 615, 618 (2d Cir. 1991).

624 Despite the desirability of giving the executive maximum discretion in extradition matters, and despite the difficulty of finding an appropriate remedy, judicial intervention should be available to protect the rights of the requested person when the alternatives have been exhausted. *Cf.* Johnson v. Zerbst, 304 U.S. 458, 467 (1938); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd* 175 F.2d 250 (3d Cir. Pa. 1949), *rev'd per curiam*, 338 U.S. 864, 896 (1949) (holding that remedies in state courts had not been exhausted).

625 *See* Ch. VII, Sec. 6.

626 Italy's willingness to make such agreements is illustrated by *In re Extradition of D'Amico*, 177 F. Supp. 648 (S.D.N.Y. 1959). In that case the Italian consul, apparently without waiting for a request from the State Department, assured the court that the requested person would receive a new trial. *Id.* at 651 n.3.

627 In *Gallina v. Fraser*, the district court stated:

> [R]egardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.... For the present we hold that extradition of a person convicted (in absentia)...is not contrary to due process of law even where it appears that the extradition will not be followed by a new trial, but rather by immediate incarceration for the offense charged upon a sentence previously imposed...

177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960) (emphasis omitted). This statement could also be interpreted as holding that the test of due process in this context is whether the foreign procedure is lawful and in accord with the traditional processes of that country. If this latter interpretation of the holding is correct, then the district court decision is based upon a rejection of the relator's second argument. *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199, 99 Cal. Daily Op. Serv. 200 (9th Cir. 1990) (No. 98-55069). In *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957), *cert. denied*, 355 U.S. 818 (1957), no constitutional issue was raised. In *United States ex rel. Argento v. Jacobs*, 176 F. Supp. 877 (N.D. Ohio 1959), the court rejected in dictum a constitutional argument similar to that advanced in *Gallina*, saying that although a trial in absentia "does not comport with our ideas of justice or fairness, it must be remembered that petitioner is an Italian national and alleged to be a fugitive from that country. The offense was committed in Italy and is governed by

considered by the U.S. Supreme Court as a sufficiently extreme denial of fundamental fairness under principles of public policy to warrant denial of extradition.[628]

The issue involved in a trial in absentia is essentially one of fairness based on notions of due process. This has been the basis of all decisions in the United States on that subject. But this also poses a question as to the ability of the judiciary of one state to pass judgment on the fairness of the judicial process of another state. In the United States that process is limited. The Supreme Court held in *Wilson v. Girard*[629] that the surrender of a person for trial to another state that does not have the same procedural safeguards does not violate due process. In that respect, the U.S. judiciary is limited by the "rule of non-inquiry."[630]

In a European cause célèbre—the *Bozano* case decided by the French Court of Appeals of Limoges[631]—extradition was denied by France to Italy because the relator was found guilty in absentia by the Appellate Court of Assizes of Italy after having been acquitted by the trial court. In addition to the fact that France had no similar procedure (i.e., reciprocity),[632] the relator was precluded under Italian criminal procedure from appealing that decision even before the highest court (*Corte Supreme di Cassazione*). Had this extradition matter been in the United States, it is quite likely that on the basis of this country's jurisprudence (even though much of it is dicta) the same result would have obtained. Bozano was subsequently abducted into Switzerland and then extradited to Italy, where he is now in jail.

The 1984 Draft Extradition Reform Act does not deal with this issue, although presumably if the trial in absentia—as supported by the record presented in the extradition proceeding—supports the proposition that the trial was so fundamentally unfair as to violate minimum standards of criminal justice in the United States and that the return of the relator would be fundamentally unfair, the secretary of state could exercise his/her discretion under §§ 3194(e)(3)(A) and 3196.[633]

Italian law which permits the trial of a criminal case in absentia." *Id.* at 879. The requested person was discharged, however, for lack of sufficient evidence of guilt. The issue of fundamental fairness of a relator's trial or punishment is discussed in the section dealing with the rule of non-inquiry, *see* Ch. VII, Sec. 8, and the scope of habeas corpus, *see* Ch. XI, Sec. 1.

628 Note, *Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition*, 13 Stan. L. Rev. 370, 376 (1961). *See* U.N. Model Extradition Treaty, *supra* note 23, at 197. Article 3(g) states that the judgment of the requesting state rendered in absentia is a mandatory ground for refusal of extradition. *Id.*

629 Wilson v. Girard, 354 U.S. 524 (1957). In *United States v. Galanis*, the court held:

> An extradition proceeding is not a criminal prosecution, and the constitutional safeguards that accompany a criminal trial in this country do not shield an accused from extradition pursuant to a valid treaty. *Neely v. Henkel,* 180 U.S. 109 (1901); Ex parte *La Mantia,* 206 F. 330 (S.D.N.Y. 1913). As Judge Smith stated in *Gallina v. Fraser*:
>
> > Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction. The fact that the United States "participates" in the arguable denial of a constitutional protection by surrendering the defendant to the demanding nation does not implicate the United States in an unconstitutional action. *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972).
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> 429 F. Supp. 1215, 1224 (D. Conn. 1977).

630 *See* Ch. VII, Sec. 8 and Ch. XI, Sec. 1.

631 Judgment of May 15, 1979, Cour d'Appel de Limoges, No. 37. *See also* Opinion, Trib. gr. inst. Paris, Ordonnance de Référé, Jan. 14, 1980.

632 *See* Ch. VII, Sec. 1.

633 *See also* Ch. XI.

5. Torture: A Substantive Bar to Extradition

The extension of non-inquiry by U.S. courts into cases of torture courts is a violation of our public policy, as expressed in the Constitution's Eighth Amendment.[634] Moreover, the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States has ratified, provides in Article 3 that extradition is prohibited whenever there is a likelihood that the relator will be tortured in the requesting state. Under the CAT this is known as the *non-refoulement* principle.[635]

The procedure in connection with the determination of torture is as follows. Once the extradition court determines a person to be extraditable, the court defers to the secretary of state to exercise executive discretion on the basis of a petition that the relator would present to the secretary of state. The petitioner, in such a case, has an ulterior remedy if the secretary of state rejects the petition, namely, recourse pursuant to the Foreign Affairs Reform and Restructuring Act (FARR Act).[636] The secretary of state's prerogative is discretionary,[637] but that discretion is reviewable under the Administrative Procedure Act.[638] The FARR Act does not limit a petitioner's right of review by way of habeas corpus pursuant to 28 U.S.C. § 2241.[639] Thus, the extradition court, notwithstanding the jus cogens nature of torture,[640] does not have jurisdiction to review a petitioner's claim under the Torture Convention because the FARR Act does not authorize judicial enforcement of the Convention.[641] Presumably there is judicial review for abuse of discretion. Basically there have been few cases that have arisen in the extradition context involving potential torture in the requested state.

The treatment that the relator is likely to receive in the requesting state upon his/her return there has not been the object of specific provisions in extradition treaties whether they are bilateral or multilateral. The reason is that as between coequal authoritative decision-making processes there can be no inquiry by one state into the internal affairs of the other.[642]

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634 M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2006); Sean Murphy, 2 United States Practice in International Law 2002–2204 (2006).

635 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR 39th Sess., 93 plen. Mtg., at 395, U.N. Doc. A/64 at 63 (1984). *See* M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 Rev. Int'le de Droit Pénal 17 (1977). *See also* M.Cherif Bassiouni, I International Criminal Law 363 (2nd rev. ed. 1999); Torture Victims Protection Act, Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73.

636 Pub. L. No. 105-277 § 2242, 1999 U.S. C. C.A.N. (122 Stat. 2681) 872.

637 22 C.F.R. § 95.4 (2001).

638 5 U.S.C. § 704 (2001).

639 Felker v. Turfin, 518 U.S. 561, 1165 S. Ct. 2333 (1996).

640 *See* M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2006); M. Cherif Bassiouni, III International Criminal Law: Enforcement (2nd rev. ed. 1999); John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int'l L. 198 (1998).

641 Cornejo-Barretto v. Seifert, 218 F.3d 1004 (9th Cir. 2000). *See also* Chen v. U.S. Marshal (*In re* Chen), 1998 U.S. App. LEXIS 22125 (9th Cir., Sept. 4, 1998), which, however, cites Emami v. United States, 834 F.2d 1444 (9th Cir. 1987) and Arnbjornsdotti-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983), which recognized a "humanitarian exception" to the rule of non-inquiry. *See also* J. Semmelmen, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198 (1991).

642 *In re Extradition* of Atuar, 300 F. Supp. 2d 418, 431 (S.D. W. Va. 2003), 156 Fed. Appx. 555 (4th Cir. 2005), *cert. dismissed* 2006 U.S. LEXIS 5244 (2006). *See, e.g.*, Mironsecu v. Costner, 345 F. Supp.2d 538 (M.D.N.C. 2004) (reaffirming the rule of non-inquiry in connection with the issue of torture);

The Fourth Circuit Court of Appeals has refused to rule on claims raised by relators that their extradition would result in torture that would violate the United States' obligations under the CAT and domestic U.S. implementing legislation, despite finding such review not barred by the rule of non-inquiry.[643] The most prominent case on this point is *Mironescu v. Costner*.[644] Pursuant to the United States–Romania extradition treaty, the Romanian government submitted a formal extradition request for the relator, who had been prosecuted and convicted in absentia for various automobile crimes.[645] The relator filed a habeas corpus petition alleging that he faced torture upon his extradition, which triggered the secretary of state's mandatory duty under the CAT and its U.S. implementing legislation not to extradite him.[646] The issue presented on appeal for the Fourth Circuit's resolution was whether the "rule of non-inquiry," combined with the language of the FARR and Administrative Procedure Acts, barred judicial review of the secretary of state's extradition decision.[647]

The *Mironescu* court provided a succinct overview of the history of the CAT's domestic implementation in the United States through the FARR Act as follows:

> A central issue in this appeal is whether the Secretary's discretion in extradition matters has been constrained by Article 3 of the United Nations Convention Against Torture (CAT), *see* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 3, 23 I.L.M. 1027, 1028, 1465 U.N.T.S. 85, 114, and § 2242 of the Foreign Affairs Reform and Restructuring Act (the FARR Act) of 1998, *see* Pub.L. No. 105-277, div. G, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note). As is relevant here, Article 3 of the CAT provides:
>
> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003); Buell v. Mitchell, 274 F. 3d 337 (6th Cir. 2001); Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), *later proceeding at*, 379 F.3d 1075, *vacated, reh'g granted by*, 386 F.3d 938, *vacated by*, 389 F.3d 1307; Hoxha v. Levi, 371 F. Supp. 2d 651, 660 (E.D. Pa. 2005); *In re Extradition* of Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y., Aug. 19, 1996); Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997); Escobedo v. United States, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980), *cert. denied sub nom.*, Castillo v. Forsht, 450 U.S. 922, *reh'g denied*, 451 U.S. 934 (1981). *See also Linna v. INS*, 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986), *reh'g denied*, 479 U.S. 1070 (1987) (regarding an allegation that subject of deportation proceedings faced death sentence and absence of due process); Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990) (concerning the allegation that extraditee's conviction came under his confederates' coerced confessions and that he faced torture if returned to requesting state); Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *cf.* Esposito v. Adams, 700 F. Supp. 1470, 1481 (N.D. Ill. 1988).

643 *See generally* Russell Bikoff, *Extradition and the U.N. Convention against Torture: Mironescu v. Costner*, 23 Int'l Enforcement L. Rep. 256–262 (July 2007); Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, at 24 and accompanying footnotes, Congressional Research Service report for Congress 98-958, Mar. 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011) ("Thus far, most reviewing courts have found that CAT and its implementing legislation have carved a limited exception to the judicially created rule of non-inquiry. However, the circuits have split on the issue of whether judicial review of CAT-based claims in extradition proceedings has nonetheless been barred by statute").

644 480 F.3d 664 (4th Cir. 2007).

645 *Id.* at 667.

646 *Id.* at 668. Although the facts are not elaborated in the Fourth Circuit's opinion, Mironescu was alleged to have supervised a gang of car thieves who sold stolen cars in neighboring Moldova. He was a local Roma leader who had been physically abused by Romanian authorities in the past and claimed the car theft prosecution was a sham. *See* Bikoff, *supra* note 643.

647 *Id.* at 666, 668–669.

> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
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> 23 I.L.M. at 1028. President Reagan signed the CAT on April 18, 1988. The Senate adopted a resolution of advice and consent to the Convention in 1990 but conditioned that consent on its declaration that "the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01, S17492 (1990). And, the President ratified the CAT for the United States subject to this same declaration. *See Ogbudimkpa v. Ashcroft,* 342 F.3d 207, 211–12 & n. 11 (3d Cir.2003) (recounting ratification history of the CAT).
>
> In light of the Senate's determination that the CAT was not self-executing, Congress enacted the FARR Act to implement the treaty. The FARR Act provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Section 2242(a). It also directs heads of the appropriate agencies to "prescribe regulations to implement the obligations of the United States under Article 3." Section 2242(b).
>
> The applicable State Department regulations identify the Secretary as "the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition." 22 C.F.R. § 95.2(b) (2006). They provide that "to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be tortured in the State requesting extradition when appropriate in making this determination." *Id.* They further state that in each case in which there is an allegation relating to torture, "appropriate policy and legal offices [shall] review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." 22 C.F.R. § 95.3(a) (2006). And, they provide that "[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review." 22 C.F.R. § 95.4 (2006).[648]

The court began to analyze the rule of non-inquiry by noting that, historically, habeas corpus could not serve as a means of reviewing a commissioner's decision regarding the propriety of holding the accused.[649] The court went on to consider *Neely v. Henkel* and *Glucksman v. Henkel* before concluding that "the rule of non-inquiry does not warrant a finding that the district court lacked jurisdiction to review the Secretary's extradition decision on *habeas*."[650] In reaching this conclusion, the court found its prior decision in *Plaster v. United States* applicable where, as in *Mironescu*, evaluation of the executive's decision to extradite is subject to review where it is claimed to be unconstitutional.[651] This is because "although the Executive has unlimited discretion to *refuse* to extradite a fugitive, it lacks the discretion to extradite a fugitive when extradition would violate his constitutional rights."[652] Further, the court reasoned that no other cases had discussed habeas review involving the alleged violation of a federal statute.[653] In fact, the government in *Mironescu* case conceded that the FARR Act would have prevented the secretary of state from extraditing the relator were he likely to be tortured in Romania.[654] The court reasoned that the FARR Act also gave habeas petitioners a federal right to particular

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648 *Mironescu*, 480 F.3d 664, 666–667 (4th Cir. 2007) (footnotes omitted).

649 *Id.* at 669 (discussing Oteiza v. Jacobus, 136 U.S. 330, 334 (1890)).

650 *Id.* at 670.

651 *Id.* The relator in *Plaster* filed a writ of habeas corpus claiming that the extradition would violate his due process rights, specifically by violating the terms of an immunity agreement he had reached with the U.S. government.

652 *Id.* (citing *Plaster*).

653 *Id.* at 670–671.

654 *Id.* at 671.

treatment, which was not the case under the Supreme Court's decision in *Neely* where constitutional as opposed to federal statutory rights were at issue.[655] The court rejected the government's arguments regarding separation of powers and lack of institutional competence of the judiciary to review the executive's decision. The court reasoned that the limited review it would conduct under the CAT and FARR Act on the issue of torture would not require a court to consider "whether extradition would further our foreign policy interests or, if so, how much to weigh those interests. Rather, it would be required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country."[656]

However, this conclusion did not end the court's inquiry, and the court ultimately held that the plain language of the FARR Act precluded district court jurisdiction over the relator's claim.[657] The FARR Act provides in § 2242(d) as follows:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252).[658]

Thus, under the plain language of the FARR Act, courts may only consider or review CAT or FARR Act claims in the context of a final removal order in immigration proceedings.[659] This provision of the FARR Act was distinguishable both linguistically and factually from the cases cited by the district court in support of its position that it had jurisdiction to review the secretary of state's decision, particularly as those cases involved challenges to removal as opposed to extradition.[660] The Fourth Circuit indicated a reluctance to reach this decision by inviting Supreme Court review of whether the rule requiring Congress to explicitly mention habeas or § 2241 in order to bar habeas review should apply to the construction of the FARR Act in future cases such as Mironescu's.[661]

However, two subsequent district court cases considering the same issues raised in *Mironescu* dealt with the relator's habeas corpus petition. In *Prasoprat v. Benov*, the relator filed a habeas corpus petition challenging the secretary of state's decision to extradite the relator to Thailand where he claimed he would be tortured.[662] The court stated that there was no merit to the government's claim that the rule of non-inquiry and the CAT and FARR Act precluded judicial review, relying on the Ninth Circuit's reasoning in *Cornejo-Barreto I* to find habeas review appropriate.[663] However, the court denied the habeas petition because any claim of torture was based on outdated media reports, which did not render the secretary of state's determination "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[664]

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655 *Id.*

656 *Id.* at 672. The court also posited that judicial review and denial of extradition would not have as adverse an effect on foreign relations as if the secretary of state made the decision, and any confidentiality concerns could be resolved through in camera review of the evidence. *Id.* at 673.

657 *Id.* at 674, 676.

658 *Id.* at 674.

659 *Id.*

660 *Id.* at 674–677.

661 *Id.* at 676.

662 Prasoprat v. Benov, 622 F. Supp. 2d 980, 983 (C.D. Cal. 2009).

663 *Id.* at 984–985.

664 *Id.* at 987–988.

Similarly, in *Garcia v. Benov*,[665] the court held that it could review the secretary of state's decision to extradite the relator under the Administrative Procedure Act as the claim was ripe for review following the secretary of state's decision to extradite.[666] Although *Garcia v. Benov* mentions § 2242 of the FARR Act, the court did not reach the same conclusion as the one in *Mironescu* did.[667] In this case, because the government provided no administrative record for the court to review, the court concluded that the secretary of state's decision was per se arbitrary and not entitled to deference because the secretary of state could not present any rationale in support of the decision.[668]

In *Juarez-Saldana v. United States*, the district court followed the reasoning of *Mironescu* in denying the relator's habeas corpus petition, stating:

> Article 3 of the CAT gives rise to domestically-enforceable rights only to the extent provided by its implementing legislation, the FARR Act. Nothing in the FARR Act or its implementing regulations indicates that Congress intended to create judicial review and silently alter the existing statutory extradition scheme or the rule of non-inquiry. At the time the FARR Act was passed, Congress was certainly aware that the Secretary of State was responsible for determining whether to surrender a fugitive by means of extradition pursuant to statute, and that the rule of non-inquiry limited the scope of judicial review of this determination. Despite this awareness, the FARR Act and its implementing regulations do not contain any language which suggests that these statutory procedures and judicial restraint principles should be superseded for CAT claims. Even after enacting the FARR Act, Congress made no changes to the statutory extradition provisions for cases involving CAT claims. In light of these factors, the Court finds that the jurisdiction provisions of the FARR Act, *see* § 2242(d), and its implementing regulations, *see* 22 C.F.R. § 95.4, comport with and preserve the statutory division of labor pursuant to 18 U.S.C. §§ 3184 and 3186 and the rationale supporting the rule of non-inquiry, both of which limit the role of the judiciary in the extradition context.[669]

The Ninth Circuit, in *Cornejo-Barreto v. Seifert*,[670] dealt with a situation in which the relator expressed a fear that his extradition to Mexico would result in his torture at the hands of the Mexican police. This case, which was first decided in 2000, had an unusual procedural history.[671] A three-judge panel reviewed the obligations for the United States arising under the CAT, and then the national implementing legislation pursuant to the FARR and Administrative Procedure Acts.[672] The court reaffirmed the validity of the U.S. national implementing legislation, requiring the judiciary to defer to the executive branch, namely the secretary of state, for a determination of whether a person who has been certified for extradition may risk torture in that country and therefore should not be extradited. However, the Ninth Circuit seems to have been unclear as to its understanding of the respective roles of the judiciary and the executive branch in connection with the potential of torture of a person after extradition. Upon issuing its order granting extradition, the court would stay execution until the matter is referred to the secretary of state by the relator. Ordinarily, once an extradition court finds a

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665 2009 U.S. Dist. Lexis 115843 (C.D. Cal. 2009).

666 *Id.* at *10–*16.

667 *Id.* at *10–*11.

668 *Id.* at *19.

669 Juarez Saldana v. United States, 700 F. Supp. 2d 953, 960 (W.D. Tenn. 2010) (*citing* International Extradition: United States Law and Practice (5th ed. 2007)).

670 Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), *later proceeding at* 379 F.3d 1075, *vacated, reh'g granted by* 386 F.3d 938, *vacated by* 389 F.3d 1307. *But see* the discussion below on the case's complex history.

671 218 F.3d 1004 (9th Cir. 2000).

672 Administrative Procedure Act, 5 U.S.C. §701 (a), 704 (2000), 22 C.F.R. §95.2 (Supp.); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1921 § 42, 8 U.S.C.A. § 1231.

person to be extraditable, a petition would be filed by the relator to the secretary of state, who would then rule on the petition, subject to the petitioner's right to challenge the secretary of state's position in accordance with the Administrative Procedure Act. The basis for review is whether the secretary of state's decision is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[673] This means that the extradition court no longer has any say in respect to the issue of torture, and its jurisdiction is limited to maintaining or staying execution of its order, pending the course of the administrative process.

However, the abovementioned U.S. implementing legislation regarding the CAT does not suspend the Eighth Amendment, which prohibits cruel and unusual punishment, or the Fifth Amendment Right, which guarantees due process. Presumably such issues, which may arise in connection with torture in a foreign country, are still within the province of the U.S. judiciary in connection with extradition matters. It is in the context of an extradition hearing that the extradition judge considers a relator's claim under either or both the Eighth and Fifth Amendments, and in which the rule of non-inquiry arises.

Contrary to this, in *Cornejo-Barreto I*, the rule of non-inquiry did not arise in connection with the extradition judge deferring to the secretary of state on a claim by the relator arising under the CAT and the national implementing legislation as discussed above.[674] Thus *Cornejo-Barreto II*, which held that the rule of non-inquiry applied to the extradition judge in connection with the secretary of state's determination, is incorrect.[675] The rule of non-inquiry applies to the judiciary in connection with looking into the laws and practices of a requesting state. In *Cornejo-Barreto III*, the Ninth Circuit ordered the case to be reheard but also held that:

> Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the *en banc* court pursuant to Circuit Rule 35-3. The three judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the *en banc* court.[676]

Subsequently, an *en banc* court of the Ninth Circuit held:

> The government has filed an unopposed motion to dismiss the case as moot. It has also filed a motion for leave to supplement its motion papers, which we grant. We grant the motion to dismiss the appeal as moot.
>
> Given dismissal of the appeal, the parties' stipulated request for an order releasing Cornejo-Barreto pending determination of the motion to dismiss is moot. However, as there is no longer any basis upon which to hold Cornejo-Barreto in custody, the Attorney General and United States Marshall shall immediately release Cornejo-Barreto.
>
> We vacate the panel opinion filed August 16, 2004 and published at 379 F.3d 1075 (9th Cir. 2004) as moot. We deny the government's request to vacate other published opinions in this case. The judgment of the district court entered July 10, 2002, SACV 01-00662 AHS (C.D.Cal. July 10, 2002), is vacated as moot. We remand to the district court with instructions to dismiss the action.
>
> The mandate shall issue forthwith.[677]

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673 5 U.S.C. § 706, § 95.2 ed. 2d (2000).

674 Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000) ("*Cornejo-Barreto I*"). *See also* Abra Edwards, Cornejo-Barreto *Revisited: The Availability of a Writ of Habeas Corpus to Provide Relief from Extradition under the Torture Convention*, 43 Va. J. Int'l L. 889 (Spring 2003).

675 Cornejo-Barreto v. Siefert, 379 F.3d 1076 (9th Cir. 2004) ("*Cornejo-Barreto II*").

676 *Id.*

677 Cornejo-Barretto v. Siefert, 389 F.3d 1307 (9th Cir. 2004) ("*Cornejo-Barreto IV*"). *See also* Prasoprat v. Benov, 421 F.3d 1009, 1012 n.1 (9th Cir 2005) (holding that *Cornejo-Barreto I* is still good law).

In *Hoxha v. Levi*, the District Court of Pennsylvania held that the State Department has the discretion of review under the CAT. It stated:

> The State Department has enacted regulations, pursuant to the Foreign Affairs Reform and Restructuring Act, 8 U.S.C. § 1231 (2005), aimed at implementing the Convention Against Torture. The clear policy of the United States is "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subject to torture, regardless of whether the person is physically present in the United States." Act of Oct. 21, 1998, Pub.L. No. 105-277, 112 Stat. 2681. The regulations, however, mandate that "the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition." 22 C.F.R. § 95.2(b) (2005). In other words, while the judicial branch is charged with deciding whether an individual is extraditable, the decision to extradite the individual rests with the executive branch. *Quinn v. Robinson,* 783 F.2d 776, 789 (9th Cir.1986). It is within the sole discretion of the Secretary of State to refuse to extradite an individual on humanitarian grounds in light of the treatment and consequences that await that individual. *Singh,* 123 F.R.D. at 130 (*citing Quinn,* 783 F.2d at 789-90); *see also In re Extradition of Chan-Seong-I,* 346 F.Supp.2d at 1153-54 ("Whether humanitarian concerns should preclude extradition is an issue committed to the sole discretion of the executive branch, specifically the Secretary of State."). Indeed, regulations are in place for situations when allegations of torture are asserted. In such cases, "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." 22 C.F.R. § 95.3(a). Then, the Secretary is charged with surrendering the individual, denying surrender of the individual, or surrendering the individual subject to conditions. 22 C.F.R. § 95.3(b). The Secretary's decision, in this regard, is not subject to judicial review. 22 C.F.R. § 95.4 ("Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.").[678]

In *In re Atuar,* the Southern District of West Virginia acknowledged the existence of torture as defined in the CAT.[679] The court held that the CAT is not self-executing,[680] but is dependent in its application on U.S. legislation. It concluded that legislation applies in U.S. courts, namely the provisions of the FARR Act, which removes the determination of torture from the extradition court to the secretary of state.[681] Thus, the rule of non-inquiry is still not overcome even when the record establishes a basis for the existence of torture—a position with which this writer disagrees.[682] The reason is that torture is an international crime and the rule of non-inquiry cannot bar a court from inquiring into the commission of such an illegal act because it does not merit the deference given to states in the exercise of their sovereignty in connection with the administration of justice.[683] Accordingly, the extradition court should have the right to establish the facts, leaving it up to the secretary of state, in accordance with the FARR Act, to decide what to do, particularly as Article 15 of the CAT specifically prohibits extradition of a person to a state where he/she is likely to be tortured.

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678 Hoxha v. Levi, 371 F.Supp.2d 651, 660 (E.D. Pa. 2005).

679 *In re Extradition of* Atuar, 300 F. Supp. 2d 418, 431 (S.D.W. Va. 2003), 156 Fed. Appx. 555 (4th Cir. 2005), *cert. dismissed* 2006 U.S. LEXIS 5244 (2006).

680 Buell v. Mitchell, 274 F. 3d 337 (6th Cir. 2001).

681 Elzbieta Klimowicz, *Article 15 of the Torture Convention: Enforcement in U.S. Extradition Proceedings*, 15 Geo. Imm. Law. J. 183 (Fall 2000).

682 *See, e.g.,* Mironsecu v. Costner, 345 F. Supp. 2d 538 (M.D.N.C. 2004) (reaffirming the rule of non-inquiry in connection with the issue of torture).

683 *See* Ch. XI.

As can be seen from this discussion, there is a split in authority among the circuits regarding this issue, with the Fourth and Sixth[684] Circuit Courts of Appeals finding review barred by the FARR Act, and the Third[685] and Ninth Circuit Court of Appeals finding the ability to review the secretary of state's decision notwithstanding the FARR Act. As this split grows, Supreme Court review becomes more likely on this point.

It must be noted in this general context that if evidence is secured by the requesting state on the basis of torture or other grounds deemed in the United States as "cruel and unusual," U.S. courts will neither inquire into the source nor disallow it. In the case of *Escobedo v. United States*,[686] the Court of Appeals for the Fifth Circuit held in 1980 that evidence obtained in Mexico by means of torture would not be excluded in the consideration of "probable cause."[687] However, the "rule of non-inquiry"[688] may become subject to certain exceptions should a U.S. court find the appropriate case that clearly offends its public policy and notions of fairness and civilized justice. Such a case was *Rochin v. California*,[689] wherein the Court declared that such standards as "shock[] the conscience," "offend[] the sense of justice," "run[] counter to the decencies of civilized conduct," "offend[] the community's sense of fair play and decency in accordance with the traditions and conscience of our people," and are contrary to "the[] canons of decency and fairness which express the notions of English-speaking people." The general standards of fairness, decency, and humane treatment, although they lack formal exactitude and fixity of meaning, are clearly embodied in the Due Process Clause and have been expressed in numerous Supreme Court decisions over the last hundred years.[690] The Court has shifted from a substantive due process "shocks the conscience" standard to an objective Fourth Amendment analysis.[691] In what may be the best approach, an extradition court should take into account an issue of torture under Article 3 of the CAT, which as explained above has been ratified by the United States.

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684 Tennessee is in the Sixth Federal Circuit. *See* United States Court Locator, *available at* http://www.uscourts.gov/court_locator.aspx (last visited Sept. 19, 2011).

685 *See* Hoxha v. Levi, 465 F.3d 554, 565 (3d Cir. 2006) (finding that although the "APA provides for review of 'final agency action,' " such as extradition decisions, the secretary of state had not yet made a decision to extradite the relator).

686 Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980).

687 *See* Ch. X.

688 *See* Ch. VII, Sec. 8.

689 Rochin v. California, 342 U.S. 165 (1952).

690 *Id.*

691 The substantive due process "shocks the conscience" standard on which the *Gumz* criteria are based originated in *Rochin v. California,* 342 U.S. 165 (1952). In *Rochin*, the Supreme Court held that forcing an emetic down a suspect's throat to induce vomiting to obtain evidence from the suspect violated the suspect's right to due process of law. *Id.* at 166. The *Rochin* Court found that the police's conduct "shock[ed] the conscience and was 'bound to offend even hardened sensibilities." ' *Id.* at 172.

At the time the Court decided *Rochin*, the Court had not yet held that the Fourth Amendment's exclusionary rule applied to the states. *See* Wolf v. Colorado, 338 U.S. 25, 28–33 (1949) (holding that exclusionary rule did not apply to the states). *See also* Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. Chi. L. Rev. 1369, 1379 (1986). Thus, the *Rochin* Court used the "shocks the conscience" standard to exclude the evidence obtained by pumping the suspect's stomach. Subsequent to *Rochin*, the Supreme Court reversed itself, and applied the Fourth Amendment exclusionary rule to the states. Mapp v. Ohio, 367 U.S. 643 (1961). Consequently, the Court has not relied on the *Rochin* "shocks the conscience" standard but has instead applied a Fourth Amendment reasonableness analysis in cases that, like *Rochin*, involved highly intrusive searches or seizures. In *Schmerber v. California*, 384 U.S. 757, 766–772 (1966), the Court held that admitting evidence obtained from a warrantless blood test in a drunk driving trial did not violate the Fourth Amendment. In *Winston v. Lee*, 470 U.S. 753

The contemporary practice of torture and extraordinary rendition by the United States under the guise of the "war on terrorism" constitutes grounds for denial of extradition.[692] It is obvious that the George W. Bush administration was distrustful of the judiciary in allowing it to determine for extraditability purposes whether a person should not be extradited to another state pursuant to Article 3 of the CAT, preferring instead for the decision to be made by the secretary of state. Considering the record of past administrations in connection with "extraordinary rendition,"[693] it is obvious that the executive branch cannot be entrusted with carrying out the treaty obligations of the United States, in addition to which its decisions may violate the Fifth and Eighth Amendments to the U.S. Constitution. As the secretary of state's decision is only narrowly reviewable under the Administrative Procedure Act, it places a high burden of proof on the petitioner, and leaves him/her without judicial review. This situation is likely to continue to be the subject of further litigation. The basis for such litigation will be on the applicability of the Fifth and Eighth Amendments of the Constitution, whose protections cannot be circumvented by any legislative legerdemain in the context of an extradition proceeding, or for that matter, in any other context in which a person seeks judicial protection against being extradited, surrendered, or delivered by any means to a state likely to torture that person.

6. The Special Problems of Death Penalty Exclusion[694]

One of the most significant challenges to the international extradition regime is the growing division between states that have abolished the death penalty, which number approximately 140 as of 2012, and those states that maintain the punishment, which number approximately 58, although only approximately a third of retentionist states carried out an execution in 2012.[695] Increasingly abolitionist states are refusing to extradite individuals sought for capital offenses in retentionist states, which is adding a new element to the international practice of extradition, and potentially unsettling the practice for all capital offences.

The historic norm has been for requested states to refrain from analyzing the nature of the proceedings or the treatment and punishment of the individual in the requesting state, as per the

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(1985), the Court used a Fourth Amendment analysis to hold that a state could not compel a suspect to undergo surgery under a general anesthetic to remove a bullet that could provide evidence of the suspect's guilt or innocence. And in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), the Court used a Fourth Amendment analysis to uphold the lengthy detention of a drug smuggler so that officials could examine her feces for drugs.

The Court's shift from a substantive due process "shocks the conscience" standard to an objective Fourth Amendment analysis in these cases is most pronounced in *Lee* and *Montoya*. In *Lee,* the Court mentioned *Rochin* only in passing, in a footnote. *See Lee*, 470 U.S. at 762 n. 5. In *Montoya,* the Court did not even mention *Rochin. Schmerber*, *Lee*, and *Montoya* all suggest that the Supreme Court today would not employ a "shocks the conscience" test in *Rochin* but would decide the case on Fourth Amendment grounds. See Comment, *supra* at 1378–1379.

See Lester v. City of Chicago, 830 F.2d 706, 710–711 (7th Cir. 1987) (parallel citations omitted). *See also* Twining v. New Jersey, 211 U.S. 78, 102 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964); M. Cherif Bassiouni, Criminal Law and Its Processes 316–324 (1969); Edward S. Corwin, The "Higher Law" Background of American Constitutional Law (1965); Edward S. Corwin, The Constitution and What It Means Today (14th ed. 1948).

692 *See* Leila N. Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, Case W. Res. J. Int'l L. (2006). *See also* Ch. V.

693 *See* Ch. V.

694 *See also* Ch. VII, Sec. 6.11.

695 Of the abolitionist states, ninety-seven have abolished the death penalty for all crimes, eight for ordinary crimes, and thirty-five are "abolitionist in practice" meaning that they have not carried out an execution in the last ten years. Amnesty International, Death Sentences and Executions 2012, at 51 (2012).

doctrine of non-inquiry.[696] There have been some exceptions to this norm, in particular the political offense exception[697] and grounds relating to the charges themselves, namely fair trial rights.[698] More recently human rights issues such as the treatment and punishment of the relator have served to block extraditions,[699] and since the early 1980s the death penalty, especially by European states.

The lawfulness of the transfer of individuals from European states to the United States first came under scrutiny in the early 1980s, when the death penalty was scaled back on a European level after the adoption of Protocol 6[700] to the ECHR in 1982,[701] which abolished the practice in peacetime. Twenty years later Protocol 13 abolished the punishment at all times, whether in times of peace or war.[702] Given the expanding protections afforded individuals under Protocol 6, requesting states were required to give assurances to European states to the effect that the individual sought for extradition would not be exposed to the death penalty. The nature and form of assurances in death penalty cases needed to be fine-tuned, however, and a series of important cases were brought before the European Commission and European Court of Human Rights (ECtHR) to resolve the essential components of assurances, in particular with respect to the system of government in the requesting states—in particular U.S. federalism, and the powers reserved to state and local prosecutors and courts—and the effectiveness of the assurance in light of constitutional limitations on the authority of the government entity giving the assurance.

The first landmark case before the ECtHR was *Kirwood*, in which a U.S. citizen living in the United Kingdom was sought for prosecution in California for a double murder.[703] In that case the U.S. government provided assurances that Kirkwood would not be subjected to the death

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696 *See* Ch. VII, Sec. 8.

697 *See supra* Sec. 2.1.

698 *See supra* Sec. 4.

699 *See supra* Sec. 5.

700 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, June 28, 1983, E.T.S. 114. There are foty-six state-parties to Protocol 6, namely: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Russia has signed but not ratified the Protocol; however, Amnesty International considers Russia to be abolitionist in practice.

701 European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45) (*entered into force* Sept. 21, 1970), Protocol No. 5 (ETS No. 55) (*entered into force* on December 20, 1971), Protocol No. 8 (ETS No. 118) (*entered into force* Jan. 1. 1990), Protocol No. 2 (ETS No. 44) (Sept. 21, 1970), Protocol No. 11 (ETS No. 155) (*entered into force* Nov. 1, 1998). For the European Convention's provisions on cruel, inhuman, and degrading treatment or punishment, see European Convention, *supra* at Art. 3.

702 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, May 3, 2002, E.T.S. 187. There are forty-three state- parties to Protocol 13, namely: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Armenia and Poland have signed but not ratified the Protocol; however, Amnesty International considers both to be abolitionist in practice.

703 For a detailed analysis of the case, see Ch. VII, Secs. 6.11 and 7.

penalty. Kirkwood, however, challenged his extradition before the European Commission on the grounds that the long delays in carrying out the death penalty would result in his developing "death row syndrome," which in turn would constitute cruel, inhuman, and degrading treatment or punishment in violation of Article 3 of the ECHR.[704] Although the European Commission acknowledged the merits of the Kirkwood's argument about death row syndrome, it failed to find a violation of the ECHR, due to the assurances provided by the U.S. government. On that basis his extradition to the United States was approved.[705] The matter was complicated, however, by the fact that the U.S. government had failed to secure assurances from the District Attorney in San Francisco, who had the absolute authority under California law to determine whether to pursue the death penalty, and in fact had made the determination to do so under California's dual track prosecution system for capital punishment.[706] The failure of the U.S. government to secure assurances from the San Francisco District Attorney rendered the assurance a dead letter without any effect. Eventually the prosecution withdrew its pursuit of the death penalty for reasons other than the assurance, thus preserving the concerns of European states.

Due to the failure of the U.S. government's assurance in the *Kirkwood* case the issue inevitably arose again when the United States sought the extradition from the United Kingdom of Jens Soering, a German citizen who was accused of double murder in Virginia. This time the U.S. government secured an assurance from the Virginia prosecutor that the death penalty would not apply, but Soering argued before the U.K. courts that the assurances were insufficient to ensure his rights. Although the U.K. divisional court rejected his argument,[707] the ECtHR recognized that an extradition without sufficient assurances against the imposition of the death penalty would violate the ECHR.[708] In particular, the court concluded that:

> 69. Relations between the United Kingdom and the United States of America on matters concerning extradition are conducted by and with the Federal and not the State authorities. However, in respect of offences against State laws the Federal authorities have no legally binding power to provide, in an appropriate extradition case, an assurance that the death penalty will not be imposed or carried out. In such cases the power rests with the State. If a State does decide to give a promise in relation to the death penalty, the United States Government has the power to give an assurance to the extraditing Government that the State's promise will be honoured.
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> According to evidence from the Virginia authorities, Virginia's capital sentencing procedure and notably the provision on post-sentencing reports (see paragraph 47 above) would allow the sentencing judge to consider the representation to be made on behalf of the United Kingdom Government pursuant to the assurance given by the Attorney for Bedford County (see paragraph 20 above). In addition, it would be open to the Governor to take into account the wishes of the United Kingdom Government in any application for clemency (see paragraph 60 above).

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704 *Kirkwood v. United Kingdom*, App. No. 10479/83, 37 Eur. Comm'n H.R. Dec. & Rep. 158, 190 (1984) (holding that applicant failed to show that rights guaranteed by Article 3 would be grossly violated by requesting nation).

705 *See Regina v. Sec. of State for the Home Dept.* ex parte *Kirkwood*, [1984] EWHC (QB) 913, (1984) 1 W.L.R. 913 (Eng.).

706 People v. Kirkwood, San Francisco Superior Court, No. 115353 (1987).

707 *In re* Soering, 1988 Crim. L. Rev. 307. *See* also Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The* Soering Case, 11 Mich. J. Int'l L. 845 (1990); David L. Gappa, *European Court of Human Rights—Extradition—Inhuman or Degrading Treatment or Punishment,* Soering Case*, 161 Eur. Ct. H.R. (Ser. A) (1989)*, 20 Ga. J. Int'l & Comp. L. 463 (1990); James M. Lenihan, Soering's Case: *Waiting for Godot—Cruel and Unusual Punishment?*, 4 Pace Y.B. Int'l L. 157 (1992); Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases after* Soering, 17 Yale J. Int'l L. 85 (1992).

708 *Soering v. United Kingdom*, 161 EUR. CT. H.R. (ser.A) (1989).

The court ultimately determined that "*the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out.*[709](emphasis added by author)

Ten years later, in *Einhorn v. France*,[710] the ECtHR affirmed the extradition of Ira Einhorn, a U.S. citizen, from France to the United States, noting that

> it is clear from the affidavits sworn by the District Attorney, Ms Abraham, on 23 June 1997 and 10 June 1998 (see paragraph 12 above) that the prosecution will not seek the death penalty in respect of the applicant and that the trial court will be unable to impose the death penalty of its own motion. Ms Abraham states that the affidavit sworn by her in her capacity as District Attorney is binding on her, on all her successors in that post and on any other prosecutors who might deal with the case; that statement is confirmed by the diplomatic notes from the United States embassy. Secondly, the diplomatic note of 2 July 1998 from the United States embassy expressly states that "if the Government of France extradites Ira Einhorn to the United States to stand trial for murder in the Commonwealth of Pennsylvania, the death penalty will not be sought, imposed or executed against Ira Einhorn for this offense."
>
> Consequently, the Court notes that the circumstances of the case and *the assurances obtained by the Government are such as to remove the danger of the applicant's being sentenced to death in Pennsylvania*. Since, in addition, the decree of 24 July 2000 granting the applicant's extradition expressly provides that "the death penalty may not be sought, imposed or carried out in respect of Ira Samuel Einhorn," the Court considers that the applicant is not exposed to a serious risk of treatment or punishment prohibited under Article 3 of the Convention on account of his extradition to the United States.[711]

During the decade between the *Soering* and *Einhorn* judgments the ECtHR thus moved from requiring that assurances "significantly reduce" the risk of the application of the death penalty to requiring that they "remove the danger" of the penalty's application. The trend of the ECtHR is clearly toward the tighter enforcement of assurances. In some cases the Court has rejected them as being unable to guarantee the applicant's rights under the ECHR. In *Bader and Kanbor v. Sweden*, for instance, the ECtHR determined that as the applicant had been sentenced to death in absentia, his extradition to Syria would constitute a violation of the European Convention due to the "*real risk* of being executed and subjected to treatment contrary to Articles 2 and 3 if deported to his home country."[712] In *Shamayev and Others v. Georgia and Russia*, the Court ruled that if "there were *serious and well-founded reasons* for believing that extradition would expose the applicants to a real risk of extra-judicial execution" a violation of the ECHR would ensue.[713]

The tightening of guarantees in assurances has also been visible in domestic proceedings. In *Mohamed and Another v President of the Republic of South Africa and Others*, the South African Constitutional Court ruled that the South African government had violated its duties when deporting an individual to the United States for prosecution related to the 1998 bombing of the U.S. embassy in Dar es Salaam, holding that:

> In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's

709 *Soering v. United Kingdom*, at ¶ 93 (emphasis added).

710 *Case of Einhorn v. France*, Final Decision on Admissability, App. no. 71555/01 (Eur. Ct. H.R., Oct. 16, 2001).

711 *Id.* at ¶ 26 (emphasis added)

712 *Case of Bader and Kanbor v. Sweden*, App. no. 13284/04 (Eur. Ct. H.R., Feb. 8, 2006).

713 *Id.* at ¶¶ 371–372 (emphasis added).

> right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.[714]

In 2011 the South African Constitutional Court again took up the matter in *Minister of Home Affairs and Others v Tsebe and Others*, ruling that under the South African Constitution:

> the Government is under an obligation not to deport or extradite Mr Phale or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the Government deport or extradite Mr Phale without the requisite assurance, it would be acting in breach of its obligations in terms of section 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading. In my view no grounds exist upon which the judgment of the High Court can be faulted.[715]

The Constitutional Court also proposed that, if the requesting state, Botswana, was unable or unwilling to give the requisite assurance, the South African government could adopt laws with extraterritorial provisions in order to prosecute individuals where extradition is impossible. To this end, the Court noted that

> if South Africa could pass legislation to give its courts jurisdiction to try crimes which have been committed outside South Africa, there is no reason why similar legislation cannot or should not be put in place to ensure that persons in Mr Tsebe's and Mr Phale's position can be tried by the South African courts when countries in which they allegedly committed the crimes are not prepared to give the requisite assurance.[716]

In *United States v. Burns* the Supreme Court of Canada also reversed its earlier rulings on assurances, and also rejected extradition without assurances, holding that

> When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome.[717]

Perhaps the most important case in respect to assurances is the decision of the Italian Constitutional Court in *Venezia v. Ministero de Grazia e Giustizia*.[718] In *Venezia* the Italian Constitutional Court rejected an assurance, holding that they could not satisfy the protections afforded individuals by the Italian Constitution as the executive branch of the requesting state is unable in any circumstance to provide an assurance given the separation of powers and the independence of the judiciary in requesting states.

Given the increasing rigor with which domestic courts and the ECtHR are approaching the issue of assurances in death penalty cases it is not unforeseeable that the Italian Constitutional Court decision in *Venezia* will be followed by other jurisdictions. The trend is clearly in that

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714 *Mohamed and Another v President of the Republic of South Africa and Others*, 2001 SA 893 at para. 49 (S. Afr.).

715 *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others*, 2012 SA 467 at para. 74 (S. Afr.).

716 *Id.* at Para. 61.

717 United States v. Burns, [2001] 1 S.C.R. 283 at para. 144 (Can.).

718 *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., sentenza 223/96, June 27, 1996, n. 223, 79 Rivista di Diritto Internazionale 825 (1996). Venezia was subsequently tried in Italy for the crime for which he was requested in the United States and convicted thereof. Recently, a similar case involving a request by the United States of the state of Connecticut followed the same approach. *See* Giulaino Vassali, *Pena Di Morte E Richiesta Di Estradizione Quando Il Ministero Scavalca la Consulta*, 22 Diritto E Giustizia 76 (June 2006). *See also* William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581 (2003).

direction, and it is likely that in the future only those eighteen U.S. states,[719] as well as Puerto Rico and the District of Columbia, that have abolished the death penalty will be able to secure the extradition of individuals from foreign abolitionist states. Conversely, it seems likely the other thirty-two retentionist states may in the future find themselves unable to secure the extradition of individuals for trial from abolitionist states.

It should be noted that all of the recorded cases that have arisen in the United States, irrespective of whether the U.S. government is the requested or requesting state, have always been with counterpart states that have employed a form of the death penalty that has not been found to violate the "cruel and unusual punishment" clause of the Eighth Amendment. The same applies with respect to the modes relied upon by states within the United States in carrying out the death penalty. There has, however, been significant debate within the United States, as well as much state and federal litigation, on the issue of what type or mode of execution would constitute a violation of the "Cruel and Unusual" Punishment Clause of the Eighth Amendment.[720] There has also has been significant litigation over the conditions preceding the carrying out of the death penalty, particularly the long delays, referred to as "death penalty syndrome."[721]

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719 Alaska, Arizona, California, Colorado, Florida, Hawaii, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

720 The U.S. Supreme Court first dealt with the issue of the death penalty in *Wilkerson v. Utah*, in which the Court affirmed the use of a firing squad. Wilkerson v. Utah, 99 U.S. 130 (1878). In that case, the Supreme Court held that "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Id.* at 135–136. In arriving at this line the Court considered disapprovingly "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female." *Id.* at 135. In *In re Kemmler* the Supreme Court affirmed the use of the electric chair, noting that "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,- something more than the mere extinguishment of life." *In re* Kemmler, 136 U.S. 436, 447 (1890). In 1947 the Supreme Court held that it was not cruel and unusual when a prisoner was not killed be electrocution after the first attempt failed due to a mechanical failure. *See* Francis v. Resweber, 329 U.S. 459 (1947). A number of cases have affirmed the use of the electric chair since. *See* Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978); Williams v. Hopkins, 983 F. Supp. 891, 895 (D. Neb. 1997); Hamblen v. Dugger, 748 F. Supp. 1498, 1503 (M.D. Fla. 1990). The Nevada Supreme Court, however, found the punishment unconstitutional in *State v. Mata*, 745 N.W.2d 229 (2008).

The U.S. Supreme Court found the death penalty to constitute cruel and unusual punishment in *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later the Supreme Court reversed its finding and determined that the death penalty is permissible under the Eighth Amendment. *See* Gregg v. Georgia, 428 U.S. 153 (1976). The Supreme Court has, however, progressively limited the application of the death penalty for certain categories of crimes. In 1977 the Court rejected the punishment for rape, see *Coker v. Georgia*, 433 U.S. 584 (1977); in 2002 it struck down the punishment for the mentally handicapped, see *Atkins v. Virginia*, 536 U.S. 304 (2002); in 2005 it did the same for individuals who committed the crime while under the age of eighteen, see *Roper v. Simmons*, 543 U.S. 551 (2005); and finally in 2008 it struck down the punishment for the rape of a child, see *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

721 The Supreme Court addressed the "death row phenomenon" in *Solesbee v. Balcom*, where it recognized that inmates may go insane. *See* 339 U.S. 9 (1950).

United States courts and the U.S. government have so far not confronted issues involving certain usages of the death penalty by foreign states that could potentially request the extradition of individuals. This would include a number of states that apply various punishments in accordance with Islamic law, including stoning as a means of execution for adultery,[722] and beheading.[723] According to Professor Babcock, Iran also prescribes dropping an individual from an unknown height as a form of capital punishment. This form of punishment cannot be verified by this writer, but the punishment is clearly not provided for in Islamic law.[724] The other known forms of capital punishment are shooting by firing squad, shooting, lethal injection, gas chamber, and electrocution, all of which have been accepted by U.S. courts and are presumptively constitutional, notwithstanding particular limitations in state courts. It should be noted that under the *sharīʿā*, an individual may be punished in a number of ways beyond those identified above. The *sharīʿā* provides for a category of crimes known as *qiṣāṣ*, which can be roughly translated as equivalence, and provides for the punishment of an individual by the same means or ends by which he harmed the victim unless the victim or his/her heirs accept compensation.[725] For instance, in 2013 Saudi Arabia sentenced an individual to be paralyzed after he was convicted of having paralyzed his victim.[726] In Iran a well-publicized acid attack on a woman resulted in a sentence of blinding by acid, but an eleventh hour "pardon" by the victim resulted in the non-application of the punishment.[727] Other *qiṣāṣ* crimes may prompt any number of possible punishments, potentially including the dropping-from-height sentence imposed by Iran that Professor Babcock cited.

Should a state that preserves capital punishments such as stoning or beheading, or would inflict a punishment of paralyzation or blinding for *qiṣāṣ* crimes, request the extradition of any individual from the United States who would be subject to these punishments, the United States would clearly have the obligation to refuse extradition under both the Eighth Amendment's "cruel and unusual punishment" clause and the CAT, which also forbids "cruel, inhuman or degrading treatment or punishment."[728] The question would arise in these cases if the United States could obtain assurances from such a requesting state that another method of execution would be used instead of stoning or beheading. It is the opinion of this writer that in these cases, for principled and symbolic reasons, U.S. courts should follow the precedent established by the Italian Constitutional Court in the *Venezia* case and refuse extradition, irrespective of any assurances from the requesting state. There would also be a very pragmatic reason for this denial, namely that the United States would not be able to enforce diplomatic assurances where these punishments are mandatory under the requesting states' laws.

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722 Stoning is the sanctioned punishment for adultery in Indonesia, Iran, Mauritania, Nigeria, Pakistan, Saudi Arabia, Sudan, United Arab Emirates, and Yemen. *See Methods of Execution*, Death Penalty Worldwide, *available at* http://www.deathpenaltyworldwide.org/methods-of-execution.cfm (last visited August 17, 2013)

723 Beheading is a sanctioned form of execution in Benin, Republic of the Congo, Iran, Saudi Arabia, and Yemen. *Id.*

724 *Id.*

725 *See* M. Cherif Bassiouni, The *Sharīʿā* and Islamic Criminal Law in Time of Peace and War (forthcoming 2013). *See also* M. Cherif Bassiouni, *Death as a Penalty in the Shari'a*, *in* The Death Penalty: Condemned 65 (International Commission of Jurists, 2000).

726 Emily Alpert, *Saudi Arabia's Punishment by Paralysis Condemned as "Grotesque,"* L.A. Times, Apr. 4, 2013, *available at* http://www.latimes.com/news/world/worldnow/la-fg-wn-saudi-arabia-paralysis-sentence-20130404,0,2990292.story.

727 Saeed Kamali Dehghan, *Iranian Woman Blinded by Acid Attack Pardons Assailant as He Faces Same Fate*, Guardian, July 31, 2011, *available at* http://www.guardian.co.uk/world/2011/jul/31/iran-acid-woman-pardons-attacker.

728 Convention against Torture, *supra* note 8.

Chapter IX

Pretrial Proceedings

Contents

1. Sources and Content of Procedural Rules: Some Comparative Aspects

In almost all countries procedural rules in extradition proceedings emanate from one or a combination of the following three sources: (1) treaties, whether multilateral or bilateral;[1] (2) specific (extradition) legislation; or (3) general criminal law and procedure legislation. Multilateral and bilateral treaties are the most characteristic sources, as extradition is mostly regulated through such international agreements. However, treaties seldom prescribe domestic procedural rules. Consequently, many states have enacted specific legislation relating to extradition procedure. In the United States, where extradition treaties are deemed self-executing, the United States Code directs the judicial officer (either a U.S. magistrate or a federal district court judge) and the secretary of state to act according to the stipulations of the applicable treaty or convention.[2] By comparison, in the United Kingdom, where treaties are not self-executing but require implementing legislation (required in all cases where private rights may be created or affected), the provisions of the applicable treaty are incorporated into law. A legislative Act is then applied to each new treaty by means of an Order-in-Council, which recites the terms of the treaty and is subject to the limitations and qualifications contained in each new treaty.[3] In the United Kingdom, if the scope of the treaty is broader than national law, the latter prevails, while conversely in the United States treaty provisions supersede national law. The reason for this divergence in these two common law systems is that the U.S. Constitution provides for the supremacy of treaties, while the United Kingdom has no written constitution and such matters are regulated by the Parliament.

In countries where extradition is granted on the basis of reciprocity or comity, national extradition law applies. Such is the case under the French Law of 1927, which provides that "in the absence of a treaty, the conditions, the procedure and the effects of extradition are determined by the provisions of the present law. The present law applies as well to matters which are not regulated by treaties."[4]

The contemporary treaty practice of most states, including the United States, provides that national law sets forth the conditions under which extradition proceedings are to be conducted in the absence of a superseding treaty provision.[5]

Treaties and specific legislation supersede other laws.[6] Where they do not provide absolute clarity or guidance, courts resort to laws applicable to criminal proceedings to fill gaps and aid in judicial interpretation. This approach to judicial interpretation is more prevalent in common law countries than in other legal systems.

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1 *See* Ch. I for a discussion of multilateral and bilateral extradition treaties. *See* Ch. II for a discussion of U.S. treaty practice.

2 *See* 18 U.S.C. §§ 3181–3196 (2000); *infra* Sec. 2 (discussing U.S. procedure).

3 *See* for example the 2003 Extradition Act, *available at* http://www.opsi.gov.uk/acts/acts2003/20030041.html; Alun Jones, Jones on Extradition (1995); *Regina v. Wilson*, [1877] 3 Q.B. 42 (Eng.); V.E. Hartley-Booth, British Extradition Law and Procedure (1980).

4 Law of March 10, 1927, art. 1, *reprinted in Harvard Draft Research in International Law*, 29 Am. J. Int'l L. 117, 380 (1935) [hereinafter *Harvard Draft*]. *See also* Christopher Blakesley, *Extradition between France and the United States: An Exercise in Comparative and International Law*, 13 Vand. J. Transnat'l L. 653 (1980). For two early classics, see André Billot, Traité de L'Extradition (1874); John B. Moore, A Treatise on Extradition and Interstate Rendition (Boston, Boston Book Co., 1891) [hereinafter Moore, Extradition].

5 The European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24, 597 U.N.T.S. 338, states in Article 22 that "[e]xcept where this Convention provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party."

6 In the United States, the Federal Rules of Criminal Procedure on admissibility of evidence are inapplicable to extradition proceedings.

In the United States, international extradition proceedings (as opposed to interstate rendition)[7] are regulated by federal statute, namely 18 U.S.C. §§ 3181–3196. Treaties whose provisions differ prevail over the applicable statute.[8] It must be noted that in the United States, because treaties prevail over national legislation, whether these be specific or general, and because treaties vary with respect to procedural norms, federal jurisprudence is not uniform in extradition proceedings. Extradition judges may also resort to federal and state law with respect to certain specific issues such as ascertaining dual criminality.[9]

Treaties may designate the competent national authority, such as the Department of State or the Attorney General, to handle extradition matters. The requested state determines whether under its laws all questions concerned with extradition procedures should be dealt with at the executive level or whether they should be assigned exclusively or partially to the judiciary. A standard practice is to use diplomatic channels in the presentation of the request and the supporting documents and for other communications between the respective states. Increasingly, however, states communicate through their respective ministries of justice or equivalent agencies.

In most states the judiciary is entrusted with the legal determination of extraditability.[10] However, because extradition involves a state's foreign relations, the ultimate decision of surrender is left with the executive branch.[11] Until the nineteenth century extradition in most countries was entirely in the prerogative of the executive. France, for example, surrendered fugitive criminals under its treaties without any reference to the courts until 1875. Great Britain followed a similar practice by granting to the king the prerogative of expelling aliens regardless of any treaty requirements,[12] a process that was used until 1815.[13] In the United States, judicial review of executive discretion was developed through case law from 1799 until the enactment of the Extradition Act of 1848.[14] In 1842, Great Britain and the United States entered into the Webster–Ashburton Treaty, which committed them to provide a judicial hearing as part of the extradition process.[15] Belgium, in 1833, was the first state to introduce judicial control in extradition proceedings, requiring all extradition cases to be submitted to judicial consideration; it did not, however, make the judicial determination binding on the executive, as the executive could disregard the judiciary's determination.[16]

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7 The U.S. federal system is predicated on the sovereignty of the states comprising the Union. *See* U.S. Constitution. Therefore, each state and the federal government that seeks the surrender of a person must go through inter-state rendition procedures. *See* U.S. Constitution Art. 4, Sec. 2 and 18 U.S.C. § 3182.

8 Miner v. Atlass, 363 U.S. 641, 650 (1960).

9 *See* Ch. VII, Sec. 2.

10 *See infra* Sec. 4.

11 *See infra* Sec. 3. *See also* Ch. XI for a discussion of executive discretion in international extradition practice.

12 *See Mure v. Kaye*, 4 Taunt. 34 (1811); *East India Company v. Campbell*, 1 Ves. Sen. 246 (1749). *See also* Hartley-Booth, *supra* note 3; Paul O'Higgins, *The History of Extradition and Rendition in the United Kingdom*, 6 Brit. Dig. Int'l L. 643 (1965); Paul O'Higgins, *The History of Extradition in British Practice 1174–1794*, 13 Ind. Y.B. Int'l Aff. 80 (1964). *See generally* 1 William Blackstone, Commentaries 366.

13 Opinion of the Law Officers of the Crown, Oct. 4, 1815, *in* 2 Arnold McNair, International Law Opinions 44 (1956).

14 *See* Act of August 12, 1848, ch. 167, § 5, 9 Stat. 302, 303; Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840); *In re* Metzger, 17 F. Cas. 232 (C.C.S.D.N.Y. 1847) (No. 9,511); *In re* Sheazle, 29 F. Cas. 1214 (C.C.D. Mass. 1845) (No. 12,734); United States v. Davis, 25 F. Cas. 786 (C.C.D. Mass. 1837) (No. 14,932); *Ex parte* Dos Santos, 7 F. Cas. 949 (C.C.D. Va. 1835) (No. 4,016); United States v. Robbins, 27 F. Cas. 825 (C.C.D.S.C. 1799) (No. 16,175); Commonwealth *ex rel.* Short v. Deacon, 10 Serg. & Rawle 125 (Pa. 1823); *In re* Washburn, 4 Johns. Ch. 106 (N.Y. Ch. 1819). *See also* Ch. II, Sec. 1.

15 8 Stat. 572, T.S. No. 119, 12 Bevans 82.

16 *In re* Rozzoni, 24 I.L.R. 506 (Cass. 1957) (Belg.).

Judicial control assumed a different role in the Anglo-American system, though the executive retained the discretionary power to deny a judicially authorized extradition. This approach was first adopted by Great Britain in legislation implementing the treaties of 1842 and 1848,[17] and by the United States in its first extradition statute of 1848.[18]

France, which had adopted the Belgian judicial advisory systems in 1875, changed its position under its *Ordinance* of 1927 to judicial control somewhat similar to the Anglo-American patterns.[19] Other states adopted various formulas, some allowing the judiciary to impose conditions and limits on extradition. In the United States only the executive can impose specific conditions, but a judicial decision establishes the basis for the "principle of specialty,"[20] whereby the requesting state can prosecute the relator only for the specific offense for which he/she was extradited.

Since the 1950s Germany has stood at the opposite end of the spectrum by assigning exclusive competence in all extradition matters to its judicial authorities.[21] Although the fugitive is deprived of a last resort appeal to the executive—a feature of the Anglo-American systems—it is nonetheless true that German law since 1949 offers a wide scope of judicial inquiry.[22]

In civil law systems, extradition is a tool of judicial cooperation in penal matters such that the authorities do not even make a prima facie inquiry into the issue of guilt. In the common law systems, on the other hand, the use of judicial processes must meet certain judicial standards such as "probable cause." In the United States and for the United Kingdom and most Commonwealth countries that standard is "prima facie."[23]

The contrast between the two types of systems can be seen through the following two decisions of the United States and Switzerland. The Supreme Court of the United States held in *Benson v. McMahon* that the test as to whether such evidence of criminality has been presented is the same as that:

> of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[24]

This is in essence the same as the test of whether there is "probable cause" to believe that an offense has been committed, and that the relator is the person who committed it.[25]

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17 6 & 7 Vict., Chs. 75, 76. *See also* 33 and 34 Vict., Ch. 52.

18 Act of August 12, 1848. *See also In re* Stupp, 23 F. Cas. 281 (C.C.S.D.N.Y. 1873); 1 Moore Extradition, *supra* note 4, at 551–556.

19 *See* Jean Claude Lombois, Droit Pénal International 576 (2d ed. 1979).

20 *See* Ch. VII, Sec. 6.

21 *See* Extradition Law of December 23, 1929, Reichsgesetzblatt 1 Teil, 1, 1929, S. 239, *reprinted in Harvard Draft*, *supra* note 4, at 385–392.

22 *See* Constitution of the Federal Republic of Germany, 1949, art. 16(2); Extradition (Yugoslav Refugee in Germany) Case, 28 I.L.R. 347 (BGH 1959) (F.R.G.). For extradition and other modalities on interstate cooperation on penal matters, see Otto Lagodny, Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland (1998); Theo Vögler, Auslieferungsrecht und Grundgesetz (1970); Theo Vögler & Peter Wilkitzki, Gesetz Über die Internationale Rechtshilfe in Strafsachen (Irg) Kommentar (1992); Wolfgang Schomburg & Otto Lagodny, Internationale Rechtshilfe in Strafsachen (5d. ed. 2012).

23 *See* Ch. X, Sec. 4.

24 Benson v. McMahon, 127 U.S. 457, 462–463 (1888).

25 *See* Ch. X, Sec. 4.

Compare this with the extradition of an individual named Wyrobnik from Germany to France. In that case the Federal Republic of Germany sought the extradition from Switzerland of a Polish national charged with the crime of forgery; the accused contended that the offense fell within the exclusive jurisdiction of American occupation authorities and that Germany was not competent to seek extradition. The Swiss Federal Tribunal stated:

> It is for the Federal Council to decide whether a request for extradition complies in form with the requirements of treaty or law. The Federal Tribunal, therefore, does not have to deal with the question whether the present request has been made by the competent authority or whether the warrant attached to it was issued by a competent organ. Similarly, it is not for the Federal Tribunal to examine whether the court before which the person extradited is to be tried has jurisdiction under the law of the requesting State; the only argument which could be taken into consideration would be that the court was a tribunal with special powers (*Ausnahmegericht*) . . . [Extradition for trial by a special court being prohibited by Swiss law.] The Federal Tribunal is also not competent to decide the question of guilt. Extradition is granted on the basis of the facts alleged in the indictment attached to the request for extradition . . . .[26]

Civil law–inspired systems such as Switzerland do not inquire into the issue of "probable cause," and accept the formal requisitions as prima facie evidence sufficient to grant extradition without more than the fulfillment of those formal obligations embodied in the treaty. This is usually limited to:

1. Proof of identity of the relator; and
2. Conformity of the requisition to treaty requirements.

Proof of such requirements is found in the requisition and accompanying documents, such as the indictment or its counterpart charging document, or a court's validated judgment. The substantive content of these documents is not subject to review by the authorities of the requested state. But defenses, exclusions, and exemptions found in the treaty or national legislation apply.[27] Furthermore all member states of the Council of Europe are bound by the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as its fifteen Protocols for those states who have ratified some or all of them.[28]

The contemporary trend in Europe is to develop specialized legislation on extradition as part of an integrated approach for all forms of judicial assistance and mutual cooperation in penal matters. Switzerland, Austria, and the Federal Republic of Germany have enacted such integrated legislation covering all aspects of international cooperation in penal matters.[29]

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26 *In re* Wyrobnik, 19 I.L.R. 379 (Federal Tribunal 1952) (Switz.). For Swiss extradition law and practice, see Hans Schultz, Das Schweizerische Auslieferungrecht (1953).

27 *See* Ch. VIII.

28 *See* Ch. VII, Sec. 8.4.1 for a detailed discussion of the death penalty. Protocol 6 of the ECHR abolished the death penalty in times of peace after it came into effect in 1985. Protocol 13 of the ECHR abolished the death penalty in all circumstances after it came into effect in 2003. Of the members of the Council of Europe, only Russia has failed to ratify Protocol 6, but has not executed individuals since 1996 and is abolitionist in practice. With regard to Protocol 13, Armenia and Poland have signed the Protocol but failed to ratify it, while Azerbaijan and Russia have failed to sign or ratify the Protocol. Belarus is the only state in Europe that retains the death penalty.

29 There are a number of European Conventions on inter-state cooperation in penal matters, and the Council of Europe is considering their integration in a single test. For a complete list of Council of Europe treaties, *see* http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG. *See also* Schomburg & Lagodny, *supra note* 22; Gert Vermeulen, Tom Vander Beken, Laurens Van Puyenbroeck & Sara Van Malderen, Availability of Law Enforcement Information in the European Union: Between Mutual Recognition and Equivalent Right of Access (2005); Ekkehart Müller-Rappard & M. Cherif Bassiouni, The European Conventions on Inter-State

In addition to the multilateral treaty approach of the Council of Europe, the European Union has eschewed the cooperation model in favor of the judicial space model whereby on the basis of the Lisbon[30] and Schengen[31] agreements, the Commission has the power to adopt Directives and has done so in connection with the European Arrest Warrant,[32] which regulates not only substantive but procedural matters.[33]

It should also be noted that the Vienna Convention on Consular Relations,[34] although not specifically addressing extradition, has a provision requiring states to notify the embassy or consulate when one of that state's nationals has been arrested, which applies also to an arrest for extradition.[35]

In most other countries of the world, the extradition process involves the executive and judicial branches of government. At the executive level, it includes the ministries of foreign affairs, justice, and the interior, and at the judicial level it can also include those administrative functions of the ministry of justice. As a result, extradition goes through different official layers, which may cause confusion and delays. For example, in court proceedings in the United States, the Department of Justice may represent that the responsible person in the ministry of justice of the requesting state is the "appropriate legal authority" (as usually described in a treaty), but that person may only have this qualification with respect to sending or receiving communications to and from a foreign country, and lack the authority to grant substantive legal requests, which only the judicially competent court of the requesting state can do. If the court in the requested state does not inquire into such representations the relator's rights may be violated, particularly where there is collusion between the functionaries of the two ministries of justice who are seeking to expedite the process. The same problems arise in connection with certain representations.[36]

Cooperation in Penal Matters (2d rev. ed. 1993). *See also*, *e.g.*. M. Cherif Bassiouni, 2 International Criminal Law (2d rev. ed. 1999) [hereinafter Bassiouni 2 ICL].

30 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007/C 306/01.

31 Schengen Agreement of June 14, 1985.

32 Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between member states, July 18, 2002, 2002/584/JHA. *See* Ch. I, Sec. 5.1.

33 *See* Ch. I, Sec. 5.1.

34 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

35 The United States has violated Article 36 of the Vienna Convention on Consular Relations on several occasions. The same would apply if the United States incarcerates a person pending extradition without notifying the consular official of that person's nationality, something that seldom occurs in extradition cases. Although the U.S. government assumes that the detention of the person sought for extradition is known to his/her country of nationality, it is not the purpose of the provision. The real purpose is to ensure a foreign national who is incarcerated in a country other than that of his nationality will have the full benefits of fairness. This rationale would apply to extradition proceedings even if the requesting state is that state of nationality. Vienna Convention on Consular Relations (Par. v. USA), 1998 I.C.J. 426 (Nov. 10); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27). (Germany protested the pending execution of two German national brothers); Federal Republic of Germany v. United States, 526 U.S. 111 (1999); LaGrand v. Stewart, 170 F.3d 1158 (9th Cir. 1999).

36 It is quite common for an AUSA to represent to the extradition judge that the requesting state has made a certain assertion or declaration, or expressed a certain legal opinion, which turns out to be more self-serving than entirely accurate. The ACSA usually obtains such information from the OIA/DOJ, who in turn obtains it from its foreign counterpart. In these situations, expert witnesses will be asked to clarify the contested questions of foreign law or treaty law.

2. Procedure in the United States[37]

Title 18 U.S.C. §§ 3181–3196 regulates extradition proceedings in the United States. The legislation, which was first enacted in 1848 and last amended in 1965, was the subject of reform efforts between 1981 and 1984.[38] Regrettably, however, these legislative efforts did not produce the anticipated results.

The process of extradition when the United States is a requested state commences with a request of a foreign state, pursuant to a treaty, for a provisional arrest pending submission of a formal request or a formal request for extradition.[39] The requesting state can initiate its request in three ways: (1) by presenting the request to the Department of State (directly or through diplomatic channels), which transmits it to the Department of Justice, which in turn forwards the

37 18 U.S.C. § 3181–3196 (2000). *See also* U.S. Department of State Foreign Affairs Manual Volume 7, 7 FAM 1630 Extraditoin of Fugitives from the United States, (CT:CON-326; 05-04-2010) (Office of Origin: CA/OCS/PRI), *available at* http://www.state.gov/documents/organization/86815.pdf; Memorandum Relative to the Applications for the Extradition from Foreign Countries of Fugitives from Justice (Dep't of State 1969, and subsequent editions); Comment, *A Comparative Analysis of the U.S. Extradition Treaties with Mexico and South America*, 4 Cal. W. L. Rev. 315 (1968); Note, *The New Extradition Treaties of the United States*, 59 Am. J. Int'l L. 351 (1965); Note, *United States Extradition Procedures*, 16 N.Y.L.F. 420 (1970). *See also* Ch. II.

38 H.R. Rep. No. 3347, 98th Cong., 2d Sess. (1984). For examples of treaty provisions regarding provisional arrest, see Extradition Treaty with Thailand, art. 10(1)–(2), *entered into force* May 17, 1991, S. TREATY DOC. 98-16 ("In case of urgency, either Contracting Party may request the provisional arrest of any accused or convicted person. Application for provisional arrest shall be made through the diplomatic channel or directly between the Department of Justice…and the Ministry of Interior in Thailand…. (2) The application shall contain: a description of the person sought; the location of that person, if known; a brief statement of the facts of the case including, if possible, the timeand location of the offense; a statement of the existence of a warrant of arrest or a judgment of conviction against that person…and a statement that a request for extradition of the person will follow"); Extradition Treaty with Estonia, art. 12, entered into force Feb. 1, 2010, S. TREATY DOC. 109-16; Protocol Amending U.S.–Israel Extradition Treaty, art. 7, *entered into force* Jan. 10, 2007, S. TREATY DOC. 109-3 (replacing art. 11 of earlier treaty). Such provisions usually also call for the release of the fugitive upon the failure to submit a formal request within a designated period of time; Extradition Treaty with Thailand, *supra*, art. 10(4) (sixty days); Extradition Treaty with the United Kingdom, art. 12(4), entered into force Apr. 26, 2007, S. TREATY DOC. 108-23 (discretionary release after sixty days); Argentine Extradition Treaty, art. 11(4), *entered into force* June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866 (sixty days); Korean Extradition Treaty, art. 10(4), *entered into force* Dec. 20, 1999, S. TREATY DOC. 106-2, TIAS 12962 (two months); Hungarian Extradition Treaty, art. 11, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5 (sixty days); Extradition Treaty with the Bahamas, art. 10(4), *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17 (sixty days); Jordanian Extradition Treaty, art. 11(4), *entered into force* July 29, 1995, S. TREATY DOC. 104-3 (sixty days with a possible thirty-day extension); Bolivian Extradition Treaty, art. VIII(4), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22 (sixty days); Italian Extradition Treaty, art. XII(4), *entered into force* Sept. 24, 1984, 35 U.S.T. 3023 (forty-five days); Extradition Treaty with Uruguay, art. 11, ¶ 1, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197 (forty-five days). Costa Rican Extradition Treaty, art. 12, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17 ("A person detained pursuant to the Treaty shall not be released until the extradition request has been finally decided, unless such release is required under the extradition law of the Requested State or unless this Treaty provides for such release").

39 *See* Jones, *supra* note 3; Hartley-Booth, *supra* note 3; 4 Green Haywood Hackworth, Digest of International Law 77–78 (1944) [hereinafter Hackworth Digest]. For extradition procedures in the United Kingdom, see http://www.homeoffice.gov.uk/police/extradition-intro11/ (last visited Oct. 19, 2011). The United Kingdom has national legislation on extradition between the United Kingdom and the Commonwealth countries, and between the United Kingdom and non-Commonwealth countries. The United Kingdom is also bound by the European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24, 597 U.N.T.S. 338, and by other relevant European conventions, such as the

request to the appropriate United States Attorney in the district where the individual is believed to be located; (2) by presenting it to the Department of Justice's Office of International Affairs; or (3) by retaining private counsel to bring an action before the federal district court where the requested person may be located.[40] Extradition proceedings, however commenced, are recorded in the civil docket of the federal district court, even though it has many characteristics of criminal proceedings and the proceedings are deemed of a sui generis nature.

It must be remembered that extradition cases are not Article III judicial proceedings. Instead extradition courts derive their jurisdiction from Article II of the Constitution as an extension of the executive's authority.[41] Extradition proceedings are therefore conducted as judicial proceedings under Article II pursuant to the relevant extradition treaty.[42] In addition to a particular treaty, whether bilateral or multilateral,[43] the adjudicative part of extradition proceedings is conducted pursuant to §§ 3181–3196. Extradition proceedings are therefore conducted by a U.S. magistrate and do not provide for appeal, as that right is only guaranteed in Article III proceedings. However, review can achieved by means of a petition for a writ of habeas corpus, which allows for the de novo review of questions of law and fact by a federal district court.[44] A denial of the petition for a writ of habeas corpus by the district court can be appealed to the circuit court of appeals.

The purpose of an extradition hearing pursuant to § 3184 is not to determine guilt or innocence of the relator, but rather to ascertain: (1) whether there exists a valid treaty in force, (2) whether the person in question is the one sought in the extradition request,[45] (3) whether the request has been made in due form with the treaty and U.S. legislation, (4) whether the crime for which the person is requested is an extraditable offense in accordance with the treaty, (5) whether the underlying facts of the crimes charged are sufficient to be considered criminal under the laws of both states, (6) whether there is probable cause (which is determined in accordance with a standard similar to that of preliminary hearings in U.S. criminal cases),[46] (7) whether there are treaty or statutory grounds for denying the extradition request, and (8) whether the extradition order specifies the criminal charges for which extradition is requested in order to ensure the principle of specialty in the requesting state.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222. *See* Ch. I, Sec. 4.5 (Commonwealth Extradition Scheme).

40 *See Ex parte* Schorer, 197 F. 67, 69 (C.C.E.D. Wis. 1912). This forum has been practically nonexistent for the last thirty years.

41 *See* Ch. II, Secs. 1–5.

42 *See* Ch. II for extradition procedures in United States.

43 *See* Ch. II.

44 The standard of review is one of "clearly erroneous" on the facts and/or contrary to the law. *See* Hooker v. Klein, 573 F.2d 1360, 1364 (9th Cir. 1978); Mainero v. Gregg, 164 F.3d 1199, 1025 (9th Cir. 1999).

45 For example, the district court denied extradition to the Philippines when it was clearly demonstrated that this was a case of mistaken identity, even though one has to be surprised that the United States proceeded with that case without first ascertaining the person's identity. The same problem arose in *Demjanjuk,* where however, extradition was not denied to Israel. *In re Extradition of* Strunk, 293 F. Supp. 2d 1117 (E.D. Cal. 2003); *In re Extradition of* Chavez, 408 F. Supp. 2d 908 (N.D. Cal. 2005) (case of mistaken identity).

46 *See* Ornellas v. United States, 517 U.S. 690 (1996) (Supreme Court held that probable cause does not mean reasonable suspicion, and the two are not the same). *See also* United States v. Schaafsma, 318 F.3d 718, 722 (7th Cir. 2003) (on probable cause); United States v. Hayes, 236 F.3d 891, 894 (7th Cir. 2001); United States v. Gilliam, 167 F.3d 628, 633 (D.C. Cir. 1999); Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978); Quinn v. Robinson, 783 F.2d 776 (9th 1986). In summary all of these cases consider that probable cause means something similar to what is used in preliminary hearings in both federal and state courts as deriving from the Fourth Amendment as well as the due process clauses of the Fifth and Fourteenth Amendments. It is a practical, common sense, flexible standard, which is not based on any technical conceptions or yardstick, and it will derive from the totality of the circumstances

In short, these judicial proceedings, unlike the subsequent executive proceedings,[47] are limited and may not inquire into substantive issues involving the criminal charge, except insofar as they are necessary to determine probable cause and protect the integrity of U.S. judicial processes[48] by ensuring that it is used in a manner that is consistent with the U.S. Constitution and public policy, as well as the rights of any person who is subject to the coercive practices of the state in accordance with international human rights protections and in accordance with the U.S. Constitution. This does not mean, however, that a person is entitled to the same rights as he/she would enjoy in the course of criminal proceedings and consequently, the Federal Rules of Criminal Procedure and Federal Rules of Evidence are not applicable except insofar as they are necessary to ensure certain minimum standards of due process and whatever the extradition judge may, in his/her discretion, determine to be necessary and appropriate in a particular case.[49]

It should be noted that U.S. courts will examine different issues depending on whether the extradition is from or to the United States. For example, if the extradition is from the United States, in addition to the applicable treaty and legislation, the court will consider the application of the conventional and customary international law, including international human rights law issues. Issues concerning the extradition of a person to the United States are resolved in Article III criminal proceedings in which the individual is the defendant, and not in Article II extradition hearings. However, in such cases, the defendant enjoys only limited rights to raise issues pertaining to his/her extradition even though he/she enjoys all the constitutional rights and statutory rights afforded in any other criminal hearing, such as application of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. In short, although the forum for the challenge changes to the relevant criminal court hearing the case, the court does not have jurisdiction to rule on the manner in which the individual was surrendered unless it was "outrageous."[50] Thus while in a criminal case involving a defendant who was extradited to

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as applied in a reasonable and common sense manner by the extradition magistrate. However, the judge must determine that the evidence is sufficiently reliable, credible, and of sufficient weight to warrant a given conclusion, which is based on the facts presented by the government.

47 *See* Ch. XI.

48 This question has been raised most consistently with abductions abroad as an alternative to extradition. *See* Ch. V. It has also been raised in connection with confessions obtained under torture or coerced statements obtained abroad, and particularly when U.S. agents are involved in the process, whenever the evidence presented by or on behalf of the requesting state is forged, false, or constitutes a misrepresentation, and last, when representatives of the U.S. government acting on behalf of a requesting state act in a manner that is deemed as prosecutorial misconduct or in violation of the cannons of ethics of the legal profession. These issues are discussed throughout the book. In particular for prosecutorial abuse cases, see *Petrovsky v. United States,* 10 F.3d 338 (6th Cir. 1993); *In re Lightfoot*, 217 F.3d 914 (7th Cir. 2000); *In re Extradition of Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996); *United States v. Levy*, 905 F.2d 326 (10th Cir. 1990); *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995).

49 This position has been enunciated in *Glucksman v. Henkel*, 221 U.S. 508 (1919). *See,* inter alia, Collins v. Loisel, 259 U.S. 309 (1922); Charlton v. Kelly, 229 U.S. 447 (1913). For a consistent and well-articulated position in the Second Circuit, see also *Austin v. Healey*, 5 F.3d 598 (2d. Cir. 1993); *Simmons v. Braun*, 627 F.2d 635 (2d Cir. 1980); *Shapiro v. Ferrendina*, 478 F.2d 894 (2d. Cir. 1993); *Ahmed v. Wigen*, 910 F.2d 1063 (2d. Cir. 1990), *cert denied* 510 U.S. 1165 (1994). *See In re Extradition of* Orellana, 2001 U.S. Dist. LEXIS 3175 (S.D.N.Y. 2001) (holding that coerced confessions are not a bar to extradition because U.S. courts do not apply the same constitutional standards in extradition cases that they would in criminal cases); *but see* United States v. Escalante, No. 00-56787, 2001 U.S. App. LEXIS 23136 (9th Cir. 2001) (applying the Federal Rule of Appellate Procedure).

50 United States v. Anderson, 472 F.3d 662 (9th Cir. 2006) (In *United States v. Anderson* the relator was a anti-tax activist who assisted U.S. citizens avoiding paying their income taxes; he settled in Costa Rica and subsequently applied for citizenship, which was eventually granted. After the United States filed an extradition request the Costa Rican government annulled his naturalization and a court granted the

the United States, the criminal court judge will not inquire into the manner in which jurisdiction was obtained over the fugitive in the requested country.[51]

Jurisdictional defects or issues relating to jurisdiction are deemed waived whenever a surrendered person enters a guilty plea after his/her surrender and return to the United States.[52] Conversely, if the extradition is to the United States, a fugitive does not have standing to raise any issues substantive or procedural arguments so long as he/she is a fugitive.[53]

An extradition request, however presented, must follow the requirements of the treaty pursuant to which the request is made and is subject to the procedures set forth in 18 U.S.C. §§ 3181–3196. The treaty may contain certain provisions controlling procedural matters; otherwise the appropriate provisions of federal law apply. Upon filing the extradition request with the federal district court, the United States Attorney (or private counsel) will request that a warrant for the arrest of the relator be issued. Whenever a formal request has not yet been filed and the treaty permits "provisional arrest"[54] prior to the filing of the formal request, the United States Attorney may also request the issuance of an arrest warrant, which is deemed "provisional."[55] An arrest warrant is always issued by a U.S. magistrate or a federal judge upon a complaint made on oath or affirmation, stating the basis for the arrest and the facts supporting it. The investigation, search, and arrest of the relator are made by the FBI, as extradition is a matter subject to federal jurisdiction. Whether the arrest is made on the basis of a "provisional" warrant, or an arrest subsequent to the formal filing of the request, the relator is entitled to a bail hearing as soon as possible after the arrest, similar to what he/she is entitled to after arrests in criminal cases.[56]

Subsequent to the bail hearing, an extradition hearing will be held to establish "probable cause" under 18 U.S.C § 3184.[57] Evidentiary questions arising in bail hearings are regulated

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extradition request. While Anderson was appealing both decisions he was surrendered to the United States and subsequently convicted for defrauding the U.S. government. On appeal Anderson argued that his extradition was in violation of the extradition treaty or, in the alternative, an act of " 'misconduct' of the most shocking and outrageous kind." The Ninth Circuit rejected Anderson's claims, holding that the governmental conduct was not "outrageous" and therefore not subject to inquiry.).

51 This includes abductions. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992).*See* Ch. V. *See also* Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980); David v. Att'y General United States, 699 F.2d 411 (7th Cir. 1983). With respect to the use in the United States of a confession induced through torture or coercion, constitutional limitations apply. But they do not extend extraterritorially with respect to extradition proceedings to or from the United States, though an exception may exist with respect to egregious conduct with respect to the United States. Toscanino v. United States, 500 F.2d 267 (2d. Cir. 1975) (unlawful seizure case), *distinguished by* United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Wilson, 721 F.2d 967(4th Cir 1983)*; In re Extradition of* Singh, 123 F.R.D. 140 (D.N.J. July 29, 1988); Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000); United States v. Valeriano-Valles, 73 Fed. Appx. 78 (5th Cir. 2003); United States v. Herbert, 313 F. Supp. 2d 324 (S.D.N.Y. 2004*)*. Denial of the right to suppress evidence illegally obtained in criminal proceedings is permitted whenever the violation does not amount to a breach of an international legal obligation, whether it may be included in customary or conventional international law. This always applies to international protected human rights. *See* United States v. JIminez-Nava, 243 F.3d 192 (5th Cir. 2001).

52 *See* United States v. Cordero, 42 F.3d 697 (1st Cir. 1994).

53 *See* Ch. X.

54 *See generally* 4 Hackworth Digest, *supra* note 39, at 103; 6 Marjorie Whiteman, Digest of International Law 920 (1963) [hereinafter Whiteman Digest]. Most treaties provide for provisional arrest. *See, e.g.*, Treaty on Extradition between the United States and Spain, art. XI, 22 U.S.T. 738, T.I.A.S. No. 7136 (*entered into force* July 2, 1971); Treaty on Extradition between the United States and Italy, T.I.A.S. No. 10,837 (*entered into force* Sept. 24, 1984).

55 *See infra* Sec. 9.

56 *See infra* Sec. 12.

57 *See* Ch. X, Sec. 4.

by § 3190.[58] The "probable cause" hearing determines, among other things, if a treaty exists between the requesting state and the United States, if the offense is extraditable under the treaty, and if the offense constitutes a crime in the state in which the individual is found at the time of the arrest.[59] If the above requirements are satisfied, the relator is found to be extraditable, and the extradition magistrate enters such an order. In the event that the individual is found to be non-extraditable, the proceedings end.

If the individual is found to be extraditable, he/she may file a petition for a writ of habeas corpus[60] in the federal district court.[61] The petition will still be filed with the federal district court even if the extradition magistrate is a federal district court judge sitting as a U.S. magistrate for purposes of the "probable cause" extradition hearing. This procedure is anomalous in U.S. law, as it allows for a review of a finding by the same judge who originally made it. The only way to avoid that eventuality is to move for the judge's recusal, if such grounds exist, with all the attendant dangers of alienating the judge, or causing another judge to whom the case may be transferred (if the motion for recusal is granted) to be particularly attentive to the case so as not to appear to offend his/her brethren on the court. In the event the district court habeas petition is denied, the relator has the right of review in accordance with federal habeas corpus procedures[62] to the U.S. courts of appeals; thereafter, the relator has the right of review by means of a petition for a writ of certiorari to the U.S. Supreme Court.[63]

It must be noted that as there is no appeal of an extradition order, habeas corpus is the only means of review. But because habeas corpus can also be resorted to with respect to other aspects of the case (e.g., as a way of reviewing an order denying bail), it must be distinguished from the right of review by means of a habeas petition irrespective of other similar petitions that may have been filed for other reasons. If the habeas petition is granted by the district court or by the court of appeals, a new hearing may be ordered or the relator may be discharged. If the relator is discharged, the government or private counsel acting on behalf of the requesting state does not have the right to seek review of the order. However, nothing precludes the requesting state from presenting a new request for extradition, as the Fifth Amendment protection against double jeopardy does not apply to Article II cases.[64]

Whenever a relator is found extraditable, the court sends a certificate of extraditability to the Department of Justice, which in turn forwards it to the Department of State. The Department of State will then issue a final extradition order. However, the secretary of state has the right to invoke "executive discretion"[65] and to refuse to sign the order for the surrender of the relator.[66] If a surrender order is issued, the U.S. marshals take custody of the relator to be delivered to the authorities of the foreign state on the basis of a formal or an informal agreement between the two states. The delivery of the person may be accomplished either by U.S. marshals accompanying the relator to the requesting state or by agents of the requesting state authorized to enter the United States in order to take custody of the relator from the U.S. marshals or U.S. territory.

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58 *See* Ch. X, Sec. 5.

59 *See supra* notes 48–49 and related text. *See also* Ch. VII.

60 28 U.S.C. § 2241 (2000).

61 *See* Ch. XI.

62 28 U.S.C. § 2241 (2000). *See also* Ch. XI.

63 28 U.S.C. § 2101 (2000).

64 *See* Collins v. Loisel, 262 U.S. 426, 429 (1923); Caltagirone v. Grant, 629 F.2d 739, 748 n.19 (2d Cir. 1980) (holding that extradition request that results in release of accused does not bar requesting state from initiating a new request).

65 *See* Ch. XI.

66 *See* 4 Hackworth Digest, *supra* note 39, § 316 at 49–50.

In *Vo v. Benov*, the Ninth Circuit laid out the extradition process:

> An extradition court—in this case the magistrate judge—exercises very limited authority in the overall process of extradition. As we have explained, "[e]xtradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function." *Lopez-Smith v. Hood,* 121 F.3d 1322, 1326 (9th Cir.1997) (citing *In re Metzger,* 46 U.S. (5 How.) 176, 188, 12 L.Ed. 104 (1847)). Extradition from the United States is initiated when the nation seeking extradition makes a request directly to the State Department. *Blaxland v. Commonwealth Dir. of Pub. Prosecutions,* 323 F.3d 1198, 1207 (9th Cir.2003). "After the request has been evaluated by the State Department to determine whether it is within the scope of the relevant extradition treaty, a United States Attorney . . . files a complaint in federal district court seeking an arrest warrant for the person sought to be extradited." *Id.* Upon the filing of a complaint, a judicial officer (typically a magistrate judge) issues a warrant for an individual sought for extradition, provided that an extradition treaty exists between the United States and the country seeking extradition and the crime charged is covered by the treaty. 18 U.S.C. § 3184. After the warrant issues, the judicial officer conducts a hearing to determine whether there is "evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," *id.,* or, in other words, whether there is probable cause.
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> If the judicial officer determines that there is probable cause, he "*is required to certify* the individual as extraditable to the Secretary of State." *Blaxland,* 323 F.3d at 1208 (emphasis added) (citing *Lopez-Smith,* 121 F.3d at 1326). After an extradition magistrate certifies that an individual can be extradited, it is the Secretary of State, representing the executive branch, who ultimately decides whether to surrender the fugitive to the requesting country. *Id.; see Quinn v. Robinson,* 783 F.2d 776, 789 (9th Cir.1986).[1] The authority of a magistrate judge serving as an extradition judicial officer is thus limited to determining an individual's eligibility to be extradited, which he does by ascertaining whether a crime is an extraditable offense under the relevant treaty and whether probable cause exists to sustain the charge. *See Prasoprat v. Benov,* 421 F.3d 1009, 1014 (9th Cir.2005); *Blaxland,* 323 F.3d at 1208 (quoting *United States v. Lui Kin-Hong,* 110 F.3d 103, 110 (1st Cir.1997)). Part of determining whether the offense is extraditable is examining whether it falls within the political offense exception. If it does, the individual is not eligible for extradition. *Quinn,* 783 F.2d at 787.
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> [1] As we noted in *Blaxland*, "It is a generally established principle . . . that the Secretary of State, exercising executive discretion through delegation of this authority by the President, may refuse to extradite a relator despite a judicial determination that extradition would be compatible with the terms of the applicable treaty." *Id.* at 1208 (internal quotations and citations omitted).
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> [. . .]
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> The decision to certify an individual as extraditable cannot be challenged on direct appeal. Rather, a habeas petition is the only available avenue to challenge an extradition order. *Mainero v. Gregg,* 164 F.3d 1199, 1201–02 (9th Cir.1999). The district court's habeas review of an extradition order is limited to whether: (1) the extradition magistrate had jurisdiction over the individual sought, (2) the treaty was in force and the accused's alleged offense fell within the treaty's terms, and (3) there is "any competent evidence" supporting the probable cause determination of the magistrate. *Id.* at 1205; *Quinn,* 783 F.2d at 790. We have held that "the political offense question is reviewable on habeas corpus as part of the question of whether the offense charged is within the treaty." *Id.* at 791. This factor is a mixed question of law and fact. *Id.* Mixed questions are reviewed de novo, though we cautioned in *Quinn* that if "the determination is 'essentially factual' . . . it is reviewed under the clearly erroneous standard." *Id.* (citing *United States v. McConney,* 728 F.2d 1195, 1203 (9th Cir.1984) (en banc)).[67]

67 Vo v. Benov, 447 F.3d 1235, 1237–1238, 1240 (9th Cir. 2006).

3. The Initial Executive Process[68]

At the executive level the extradition request is made through a formal diplomatic request.[69] Even though there is no specific form for the request, it must be addressed to the secretary of state by the competent authorities of the requesting state.[70] The request can be made by the Ministry of Foreign Affairs or the Ministry of Justice of the requesting state, as its law determines, and is presented through diplomatic channels to the United States. Such diplomatic channels can be either to the U.S. embassy in the requesting state, or by the requesting state's embassy in the United States to the Department of State. Because of the length in diplomatic transmissions, several states allow their ministries of justice to present requests to their counterpart ministries of justice. Many states now have offices of international affairs or extradition sections in their ministries of justice that deal with these issues. For instance, the Department of Justice has an Office of International Affairs that deals with all questions of interstate cooperation in penal matters. Some U.S. embassies also have attachés from the Department of Justice to ensure more effective cooperation between the territorial state and the United States.

Treaties differ as to the substantive requirements of the requisition, but these questions are of limited significance because the diplomatic note embodying the requisition can always be amended or supplemented during the judicial hearing. Even substantive errors in the requisition are not fatal to the case of the requesting state, as it is possible to submit another requisition after the denial of the initial one; this is so even where one requisition is denied on the grounds of an adverse judicial finding.[71] The U.S. Supreme Court has held that double jeopardy does not attach in such cases.[72]

There is no time limit required for the submission of the requisition to the secretary of state. Therefore, it can be made before, during, or after the judicial proceedings. However, it must be submitted before the Department of State can certify the surrender of the relator.[73] This, of course, is subject to specific treaty stipulations, most of which require that the requisition be filed no later than two calendar months after the relator has been arrested and confined on the extradition warrant. After the specified time has lapsed, the relator must be released and the surrender warrant quashed, though not on the basis of a constitutional right.[74]

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68 *See* Ch. XI.

69 *See* 6 Whiteman Digest, *supra* note 55, at 906.

70 *See* 18 U.S.C. § 3184 (2000). *See also* United States v. Conicino-Perez, 151 F.R.D. 521, 525 (E.D.N.Y. 1993); *In re Extradition of* Neto, 1998 U.S. Dist. Lexis 19918 (S.D.N.Y. 1998).

71 *See Ex parte* Schorer, 197 F. 67 (C.C.E.D. Wis. 1912).

72 *Collins*, 262 U.S. *See also* Romeo v. Rache, 820 F.2d 540 (5th Cir. 1987) ("[E]xtradition proceedings, however, are generally not considered criminal prosecutions"); *In re Extradition of* Garcia, 802 F. Supp. 773 (E.D.N.Y. 1992) (stating that the United States–Mexico extradition treaty permits prosecutions for the same acts that constitute two separate crimes under each state's statutes); Artukovic v. Rison, 628 F. Supp. 1370 (C.D. Cal. 1986) (declaring political offense exception not available), *aff'd*, 784 F.2d 1354 (9th Cir. 1986); Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952) (holding 1902 treaty between United States and Kingdom of Serbia not in effect as basis of extradition request by Yugoslavia), *rev'd sub nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956) (holding extradition barred by political offense exception), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *on remand*, United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959) (holding lack of probable cause), *overruled by* Lopez-Smith v. Hood, 121 F. Supp. 383 (S.D. Cal. 1959) (ruling competence is not relevant or necessary in extradition proceedings).

73 Schorer, 197 F. 67. *See also* 6 Whiteman Digest, *supra* note 55, at 905.

74 Such decisions have been based on a statutory right to release under 18 U.S.C. § 3188 (1948), originally enacted as § 5 of the Act of August 3, 1882, ch. 378, 22 Stat. 216. *See* Jimenez v. U.S. Dist. Ct, 84 S. Ct. 14 (1963); Hababou v. Albright, 82 F. Supp. 2d 347 (D.N.J. 2000); Wright v. Henkel, 190

If multiple requests are received from more than one country, the treaties in question may specify that a number of factors be considered in determining the request to which priority will be given. These factors include the territory on which the offense was committed[75] and the seriousness of the crime.[76] Otherwise, the priority determination is discretionary and rests with the executive.

A good example of this is the 2005 case of Yevgeny Adamov, the former Russian Minister of Energy, who was sought for extradition from Switzerland by both the United States and Russia.[77] The charges against Adamov were connected to a program funded by the United States to improve safety at Russian nuclear facilities. The U.S. indictment charged Adamov and other Russian officials with stealing the funds provided by the United States.[78] After a ruling by the Swiss Supreme Court, Switzerland extradited Adamov to Russia, his country of nationality, which was also the country where the alleged acts took place.[79] In giving priority to Russia, Switzerland emphasized priority in concurrent jurisdiction requests to the country of nationality. In an unrelated aspect of the case, the United States did not request Adamov's extradition from Russia, but left the indictment pending in the Western District of Pennsylvania. In an astute procedural move, Adamov waived his appearance in the United States, so that the case against him could proceed while he was in custody in Russia. The goal was to make sure that Adamov would not appear before a U.S. court. Adamov was convicted and sentenced by a Russian court to five-and-a-half years' imprisonment for abuse of office and fraud, but was released two months later by a Russian court after his sentence was suspended.[80]

U.S. 40 (1903); Barrett v. United States, 590 F.2d 624 (6th Cir. 1978); *In re* Factor's Extradition, 75 F.2d 10 (7th Cir. 1934); *In re* Normano, 7 F. Supp. 329 (D.C. Mass. 1934); *Ex parte* Reed, 158 F. 891 (C.C.D.C.N.J. 1908); *In re* Dawson, 101 F. 253 (C.C.D.C.N.Y. 1900). On when commitment starts, *see Charlton v.* Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913); *In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir.), *cert. denied*, 414 U.S. 847 (1973). *See also In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 18 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

75 *See, e.g.*, (Montevideo) Convention on Extradition between the United States and Other American States, art. 7, 49 Stat. 3111, 3115, T.S. No. 882, 165 L.N.T.S. 47, which reads:

> When the extradition of a person is sought by several States for the same offense, preference will be given to the State in whose territory said offense was committed. If he is sought for several offenses, preference will be given to the State within whose bounds shall have been committed the offense which has the greatest penalty according to the law of the surrendering State. If the case is one of different acts which the State from which extradition is sought esteems of equal gravity, the preference will be determined by the priority of the request.

Id. at 53.

76 *See, e.g.*, Extradition Treaty between the United States and the United Kingdom and Northern Ireland, art. X, 28 U.S.T. 227, 232–233, T.I.A.S. No. 8468 (*entered into force* Jan. 21, 1977), which provides:

> If the extradition of a person is requested concurrently by one of the Contracting Parties and by another State or States, either for the same offense or for different offenses, the requested Party shall make its decision in so far as its law allows, having regard to all the circumstances, including the provisions in this regard in any Agreements in force between the requesting States, the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person sought and the possibility of subsequent extradition to another State.

77 United States v. Adamov, 2006 U.S. Dist. LEXIS 35408 (W.D. Penn. 2006).

78 *Id.*

79 *Id.*

80 Charles Digges, *Former Russian Atomic Minister Adamov Sentenced to 5 ½ Years in Penal Colony for Fraud and Abuse of Office*, Bellona, Feb. 20, 2008, *available at* http://www.bellona.org/articles/articles_2008/Adamov_sentenced (last visited Sept. 24, 2012); Aleksei Sokovnin, *Yevgeny Adamov's Sentence Suspended*, Kommersant, Apr. 18, 2008, *available at* http://dlib.eastview.com/browse/doc/20450033 (last visited Sept, 24, 2012).

The secretary of state, upon request by the requesting state, may present a preliminary note to the court. This is not the usual practice, however, and such a preliminary note is not a prerequisite for the initiation of the judicial proceedings. The practice is for the requesting state's appropriate authorities to initiate such proceedings on their own motion.[81] In the United States, it is the United States Attorney of the federal district wherein the relator is believed to be located, or if the relator's whereabouts are unknown, the proceedings shall be commenced by the United States Attorney for the Federal District of the District of Columbia.[82]

4. The Judicial Process[83]

Extradition proceedings are initiated by a request made by an authorized representative of the requesting government. In the United States, it is the Department of Justice. It is not necessary that the representative of the requesting state be a consular or diplomatic officer, though it is almost always the practice, provided that the person making the request to the United States is authorized to do so by the requesting state. In *United States ex rel. Caputo v. Kelly*,[84] the Second Circuit held that:

> Extradition proceedings must be prosecuted by the foreign government in the public interest and may not be used by a private party for private vengeance or personal purposes; but if in fact the foreign government initiates the proceedings, no reason is apparent why it may not authorize any person to make oath to the complaint on its behalf.[85]

An order for the provisional arrest of the relator may be made, but must be issued by a competent federal judicial officer subject to constitutional limitations. It must be recalled that the judicial process commences only after the executive initiates the process in accordance with the provisions of the applicable treaty.[86]

The court must have *in personam* jurisdiction before proceeding with the hearing.[87] Such jurisdiction vests in the federal district court before which the relator is brought after his/her initial

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81 *See* 4 Hackworth Digest, *supra* note 39, at 93; 6 Whiteman Digest, *supra* note 55, at 916. *See also* Grin v. Shine, 187 U.S. 181 (1902); *In re* LoDolce, 106 F. Supp. 455 (C.C.S.D.N.Y. 1952); *In re* Schlippenbach, 164 F. 783 (C.C.S.D.N.Y. 1908); *Ex parte* Van Hoven, 28 F. Cas. 1020 (C.C.D. Minn. 1876) (No. 16,858).

82 *See* Ch. XI.

83 *See* Ch. X.

84 United States *ex rel.* Caputo v. Kelly, 92 F.2d 603 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938).

85 *Id.* at 605. *See also In re K.A. Evans*, 52 I.L.R. 355 (Sup. Ct., Full Court 1963) (H.K.) (holding that the requesting state was not required to be represented at the extradition proceedings).

86 In *Valentine v. United States ex rel. Neidecker*, the Supreme Court stated:

> It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states . . . But, albeit a national power, it is not confided to the executive in the absence of treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executives to deliver them up. As stated by John Bassett Moore in his treatise on extradition—summarizing the precedents—the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power. Counsel for the petitioners do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.

Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8–9 (1936). *See also Ex parte* Charlton, 185 F. 880 (C.C.N.J. 1911), *aff'd*, 229 U.S. 447 (1913).

87 A judge of a U.S. district court has jurisdiction to hear extradition proceedings under 18 U.S.C. § 3184. Goldsmith v. M. Jackson & Sons, Inc., 327 F.2d 184 (10th Cir. 1964); Jimenez v. Aristeguieta, 311 F.2d

apprehension. That court should be the one having competence over the territory in which the relator was first apprehended, irrespective of where the arrest warrant was issued.

5. The Request

The extradition process begins with a complaint, which must be sworn to or affirmed.[88] The complaint is akin to an indictment or information,[89] and as such it must inform the relator of the charges brought against him/her in order to allow the relator to make a factual showing that the complaint fails to establish "probable cause"[90] and defend against the request according to the treaty and applicable law.

The complaint must satisfy the requirements of the applicable treaty and relevant legislation, and these require that it set forth the basic facts upon which it is founded. It is to that extent akin to any other federal criminal complaint, and it can be amended to comply with these requirements or with any other order by the court requiring more specificity. It is also possible for the government to amend the complaint after its filing if new charges are brought against the relator. The converse is also true. Whenever the United States is the requesting state, it can amend its original request to take into account a superseding indictment.

The following facts are usually included in a complaint:

1. The name of the relator;
2. The relevant treaty in force;[91]

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547 (5th Cir.), *cert. denied*, 373 U.S. 914 (1963); Bernstein v. Gross, 58 F.2d 154 (5th Cir. 1932) (interpreting previous § 651 now embodied in § 3184). A judge of a state court has jurisdiction under 18 U.S.C. § 3184 even though the accused is a federal official. *In re* Keene's Extradition, 6 F. Supp. 308 (S.D. Tex. 1934) (interpreting previous § 651, now embodied in § 3184). A U.S. commissioner (now a U.S. magistrate) has jurisdiction when authorized by a U.S. district court and the accused is within the commissioner's district. Vaccaro v. Collier, 38 F.2d 862 (D. Md. 1930), *rev'd on other grounds*, 51 F.2d 17 (4th Cir. 1931).

88 18 U.S.C. § 3184 (2000).

89 *See* Fed. R. Crim. P. 7. *See also* M. Cherif Bassiouni, Criminal Law and Its Processes 448–450 (1969).

90 In the case of *In re Wise*, 168 F. Supp. 366 (S.D. Tex. 1967), a district court held that the complaint must be sufficient to inform the accused of the charges against him. The court stated:

> Despite intimations to the contrary in some of the cases, a complaint seeking the issuance of a warrant for extradition to a foreign country must allege facts sufficient to apprise the defendant of the nature of the charge against him and to show that an extraditable offense has been committed. While it is not necessary to charge the offense with the particularity of an indictment, it should be sufficiently explicit to inform the accused of the nature of the charge. This principle is best set out in Ex parte Sternaman [citation omitted] . . . It is implicit in all of the cases announcing the rule that the complaint need not meet the requirements of an indictment.

Id. at 369. Similarly, the court in *Ex parte Sternaman*, 77 F. 595 (C.C.D.C.N.Y. 1896), stated:

> The complainant should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose law he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act.

Id. at 596.

91 Terlinden v. Ames, 184 U.S. 270 (1902); United States v. Rauscher, 119 U.S. 407 (1886); Argento v. Horn, 241 F.2d 258 (6th Cir.), *cert. denied*, 355 U.S. 818, *reh'g denied*, 355 U.S. 885 (1957);

3. The allegation that an extraditable offense under the treaty was committed;[92]

4. The allegation that the offense constitutes a crime under U.S. federal law or the laws of the state wherein the district court is located;[93]

5. Where applicable, the non-applicability of a treaty defense;[94]

6. A summary of the factual circumstances of the alleged offense; and

7. A showing that "probable cause" exists that the relator is the person charged or convicted, and has committed the crime charged or for which he/she was convicted.[95]

The following documents must be attached to the complaint:

1. A certified copy of the arrest warrant, charging instrument, or judgment of conviction in the requesting state issued by its competent authorities, showing the offense charged and any other documents on which the complaint is based;[96]

2. A sworn or verified statement by the appropriate foreign legal authority describing the facts and the relevant documents; and

3. Accompanying affidavits, documents, and evidence on the applicable foreign law and the facts alleged.[97]

Artukovic v. Boyle, 107 F. Supp. 11, 28 (S.D. Cal. 1952), *rev'd sub nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *on remand*, United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959) (holding lack of probable cause), *overruled by* Lopez-Smith v. Hood, 121 F. Supp. 383 (S.D. Cal. 1959) (ruling competence is not relevant or necessary in extradition proceedings). *See also* Ch. I.

92 Collins v. Loisel, 262 U.S. 426 (1923). *See also* Ch. VII, Sec. 3.

93 United States v. Stockinger, 269 F.2d 681 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959). *See also* Ch. VII, Sec. 2.

94 *See* Ch. VIII.

95 This requirement is illustrated in *In re Extradition of Mazur*, 2007 U.S. Dist. Lexis 52551 (N.D. Il. 2007). For a commentary on the probable cause issue in this case, see Bruce Zagaris, *U.S. Magistrate Finds Lack of Probable Cause, Declines to Extradite Accused Murderer to Poland*, 23 Int'l Enforcement L. Rep 345–346 (Sept. 2007). This point is discussed in *In re Extradition of Herrera*, 268 F. Supp. 2d 688 (W.D. Tex. 2003). *See also* Ch. X.

96 Any foreign documents presented either to the executive or judicial branch in an extradition proceeding must be authenticated by the principal diplomatic or consular officer of the United States in the requesting state. This officer must certify that the documents are entitled to be received for similar purposes, for example, as evidence of criminality in the requesting state. *See* 18 U.S.C. § 3190 (2000). *See also Collins*, 262 U.S. 426; O'Brien v. Rozman, 554 F.2d 780 (6th Cir. 1977); United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977).

97 In *Desmond v. Eggers*, 18 F.2d 503 (9th Cir. 1927), the court of appeals stated:

> The complaint filed before the judge or committing magistrate in this country was upon information and belief, but it set forth the source of information, by referring to certain affidavits and documents which were later received in evidence upon the hearing. Assuming for the present that such affidavits were properly authenticated, the sufficiency of the complaint is amply supported by authority....

Id. at 504. *See also* Glucksman v. Henkel, 221 U.S. U.S. 508, 514 (1919); Rice v. Ames, 180 U.S. 371, 375–376 (1901). *But see* United States *ex rel.* McNamara v. Henkel, 46 F.2d 84 (S.D.N.Y. 1912) (holding that a complaint based on information and belief made pursuant to a telegraphic request without supporting documents was sufficient, provided the request was made by a person whom the U.S. authorities were justified in believing). One of the most frequent objections to an extradition complaint based on information and belief is that the information, the certifications, the depositions, etc., are all hearsay. However, such testimony is admissible in the extradition hearing. In *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957), the court held that:

The foreign documents must be duly certified by the appropriate issuing authority and authenticated by the U.S. consul in whose diplomatic territory the issuing authority is located. The documents must also be translated, the translation subscribed or sworn to and authenticated by the appropriate U.S. consul.

Upon the filing of a complaint, the magistrate or judge may issue a warrant for the arrest of the relator. The warrant is valid anywhere in the United States, and any authorized judicial officer can hear the case even if he/she did not issue the warrant.[98]

6. The Complaint

A complaint is the basis for commencing extradition proceedings. As stated above, it is made by the Attorney General, through the U.S. Attorney for the federal district having jurisdiction, and that is where the person sought was found. The complaint must be made under oath or affirmation similar to verified complaints in civil matters[99] and an information in criminal matters.[100]

The complaint must be supported by authenticated documents, as described in Section 7 below. The attached documents must include:

1. A copy of the request of the foreign state for extradition;

2. A judicial document authorizing the arrest or detention of such person on account of accusation or conviction of a crime issued by the competent legal authority of the requesting state;

> The sworn statements were taken ex parte in Italy without the knowledge of the appellant or his counsel. They were obviously hearsay, and clearly would have been inadmissible in a criminal trial in the United States. [However], that is not the test. The only question to be answered under the statute is whether the statements were "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals" of Italy.... It was the unambiguous testimony of an expert in Italian law that they were.

Id. at 263.

98 In *In re Farez*, 8 F. Cas. 1007 (C.C.S.D.N.Y. 1870) (No. 4,645), the court held that if the warrant was issued by a commissioner, his authority to do so had to appear on the warrant. *See also In re* Henrich, 11 F. Cas. 1143, 1146 (C.C.S.D.N.Y. 1867) (No. 6,369). In *Pettit v. Walshe*, 194 U.S. 205 (1904), the appellee, Walshe, was arrested in Indiana by a U.S. marshal acting under the authority of a warrant issued by a commissioner in New York City. The warrant directed the marshal to return the accused to the New York commissioner to hear evidence of criminality. Petitioner challenged the validity of the requirement that the marshal return him to a New York commissioner. In affirming the grant of habeas corpus, the Supreme Court ruled that the petitioner had to be brought before the nearest authorized judicial officer in the place where he was found (i.e., Indiana). The Court stated that:

> The alleged criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where the fugitive person so charged is found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed. As applied to the present case, that stipulation means that the accused, Walshe, could not be extradited under the treaties in question, except upon such evidence of criminality as, under the laws of the state of Indiana—the place in which he was found—would justify his apprehension and commitment for trial, if the crime alleged had been there committed.
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> ...
>
> [I]t is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest Circuit Commissioner or the nearest judicial officer, having jurisdiction for a hearing, commitment or taking bail for trial in cases of extradition.

Id. at 217–219. In *Jimenez v. Aristiguieta*, 311 F.2d 547, 553 (5th Cir. 1962), the court held that the warrant was returnable before any justice, judge, or magistrate authorized to hear evidence of criminality in extradition cases under 18 U.S.C. § 3184 (2000).

99 *See* Fed. R. Civ. P. 23.1 (concerning secondary action by shareholders); Fed. R. Civ. P. 27(a) (regarding depositions to perpetuate testimony); Fed. R. Civ. P. 65 (covering injunctions); Fed. R. Civ. P. 66 (governing receivers). *See generally* 2 Moore's Federal Practice 11.03 (1982).

100 *See* Fed. R. Crim. P. 3. *See also* Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).

3. Documents required by the applicable treaty concerning the law of the requesting state;

4. Information sufficient to identify the person sought; and

5. The essential factual allegations of conduct constituting the offense that the person sought is believed to have committed.

All the foreign documents must be translated into English and the translation authenticated pursuant to § 3190.

7. Documentation

The requesting state must submit documentation in support of the extradition request.[101] These documents must be certified and authenticated by the U.S. consul in the requesting state and transmitted to the United States through diplomatic channels. The courts have held that such documents, once certified according to 18 U.S.C. § 3190, are conclusively admissible.[102]

Courts in various circuits have consistently held that § 3190 does not require that the evidence be admissible in the foreign tribunal—only that it meet the authentication requirement imposed by the foreign tribunal as a condition to admissibility in U.S. proceedings.[103]

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101 For examples of documentary evidence required by treaty, see generally, Jordanian Extradition Treaty, art. 8(2)–(4), *entered into force* July 29, 1995, S. TREATY DOC. 104-3 ("2. All requests shall contain: (a) documents, statements, photographs (if possible), or other types of information which describe the identity, nationality, and probable location of the person sought; (b) information describing the facts of the offense and the procedural history of the case; (c) the text of the law describing the essential elements of the offense for which extradition is requested; (d) the text of the law prescribing the punishment for the offense; and (e) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable. 3. A request for extradition of a person who is sought for prosecution shall also contain: (a) a copy of the warrant or order of arrest issued by a judge or other competent authority; (b) a copy of the charging documents; and (c) such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested. 4. A request for extradition relating to a person who has been found guilty of the offense for which extradition is sought shall also contain: (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that the person has been found guilty; (b) information establishing that the person sought is the person to whom the finding of guilt refers; (c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and (d) in the case of a person who has been found guilty in absentia, the documents required in paragraph 3."). *See also* South African Extradition Treaty, art. 9(2)–(4), *entered into force* June 25, 2001; S. TREATY DOC. 106-24; Extradition Treaty with Luxembourg, art. 8(2)–(4), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-10, TIAS 12804; Hungarian Extradition Treaty, art. 8(2)–(4), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Extradition Treaty with the Bahamas, art. 8(2)–(4), *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Bolivian Extradition Treaty, art. VI(2)–(6), *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22.

102 Collins v. Loisel, 259 U.S. 309, 66 L. Ed. 956, 42 S. Ct. 469 (1922). *See also In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. Jul. 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp.2d (S.D. Cal. 1998); Shapiro v. Ferrendina, 478 F.2d 894, 903 (2d. Cir. 1993); Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927); United States v. Galanis, 429 F. Supp. 1215, 1225–1229 (D. Conn. 1977), *rev'd on other grounds*, 568 F.2d 234, 240 (2d Cir. 1977); *In re* Edmondson, 352 F. Supp. 22, 24 (D. Minn. 1972); *In re* Benson, 34 F. 649 (C.C.S.D.N.Y. 1888); *In re* McPhun, 30 F. 57 (C.C.S.D.N.Y. 1887); *In re* Behrendt, 22 F. 699 (C.C.S.D.N.Y. 1884); *In re* Wadge, 16 F. 332 (C.C.S.D.N.Y. 1883); *In re* Fowler, 4 F. 303 (C.C.S.D.N.Y. 1880). *But see* United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991) (stating extradition request is not the only possible source of charges); United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988) (holding that ambiguity in extradition request requires interpretation in keeping with rule of specialty).

103 Esposito v. Adams, 700 F. Supp. 1370, 1475 n. 6. 1476 (N.D. Ill. 1988); *In re Extradition of* Tang Yee-Chun, 674 F. Supp. 1058, 1061–1062 (S.D.N.Y. 1987); United States v. Galanis, 429

The District Court of Delaware in *In re Lehming*[104] outlined the process, holding:

> The purpose of § 3190 is to afford the Government an efficient method of satisfying obligations under extradition treaties and supply a framework through which the Government can introduce evidence to efficiently extradite fugitives. *United States v. Taitz*, 134 F.R.D. 288, 291 (S.D. Cal. 1991), citing *Oteiza v. Jacobus*, 136 U.S. 330 10 S. Ct. 1031, 34 L.Ed. 464 (1890). Based upon the aforementioned statute, this Court may examine all the documents admitted into evidence, including the Warrant of Arrest, to make a probable cause determination.[105]

The court further stated:

> A fugitive is permitted to introduce evidence which rebuts the finding of probable cause, but this proffer is limited solely to evidence explaining the circumstances before a court. Explanatory evidence has been defined as "reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause . . . the extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits." *Matter of Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978). This Court shall exclude evidence which is proffered to contradict testimony, challenge the credibility of witnesses or establish a defense to the crimes alleged. *Id.* at 782, *also see Collins*, 259 U.S. 309, 315–16, 42 S. Ct. 469, 471–72 (admissible evidence is that which might explain ambiguities or doubtful elements of the prima facie case); *In re Okeke*, No. 96- 7019 P-01, 1996 WL 622213 (D.N.J. 1996) (fugitive is limited to explanatory evidence that offers a benign explanation for the evidence presented against them); *Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir.), *cert. denied* 439 U.S. 932, 99 S. Ct. 323, 58 L. Ed. 2d 327 (1978).[106]

8. The Meaning of "Fugitive"

The term "fugitive" as used in extradition treaties refers to any person who has left the state in which the alleged crime was committed for whatever reason and is physically within the territory and subject to the jurisdiction of the requested state. In *United States v. Steinberg*,[107] the district court defined the term in the context of dismissing the relator's argument that he did not receive a speedy trial. The relator in *Steinberg* was indicted for conspiracy, embezzlement, and fraud and had appeared before a grand jury before leaving the United States to establish a domicile in Salisbury, Rhodesia (now Harare, Zimbabwe), where he stayed for seven years. Although there was no extradition treaty between the two countries, government officials, in good faith, made informal approaches to obtain the defendant's return. The relator eventually returned to the United States of his own free will, at which time he was arraigned and pled not guilty to the two seven-year-old indictments against him. The relator moved to dismiss

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F. Supp. 1058, 1061–1062 (S.D.N.Y. 1987); Oen Yin`Choy v. Robinson, 858 F.2d 1400, 1406 (9th Cir. 1988); Emami v. U.S. Dist. Ct., 834 F.2d 1444, 1451 (9th Cir. 1987); O'Brien v. Rozman, 554 F.2d 780, 782–783 (6th Cir. 1977); United States v. Galanis, 429 F. Supp. 1215, 1226–1229 (D. Conn. 1977); Galanis v. Pallanck, 568 F.2d 234, 240 (2d Cir. 1977).

104 *In re* Lehming, 951 F. Supp. 505, 514–515 (D. Del. 1996).

105 In a footnote, the court stated:

> Lehming argues that this Court cannot utilize the Warrant of Arrest to reach a determination of probable cause. D.I. 32. However, § 3190 specifically allows the Court to do so. The statute provides "warrants . . . offered into evidence . . . shall be received and admitted . . . for all purposes of such hearing . . . " An unrefuted purpose of extradition hearing is to evaluate probable cause. Therefore, while the warrant of arrest in this case may not be the sole "document to which one looks to determine the issue of probable cause." (D.E. 43 at 1), this Court can and will consider it in conjunction with other properly admitted evidence.

Id. at 514.

106 *Id.* at 514.

107 United States v. Steinberg, 478 F. Supp. 29 (N.D. Ill. 1979).

the indictments, contending that his right to a speedy trial had been violated.[108] However, the court concluded that the relator was a fugitive from justice and that the Sixth Amendment had not been violated. The *Steinberg* court held:

> [I]f, after the commission of a crime within a state, the person who allegedly committed it leaves the state, no matter for what purpose, with what motive, or under what belief, he becomes, from the time of such leaving, within the Constitution and laws of the United States, a fugitive from justice.[109]

A person will therefore be deemed a fugitive from the moment that he/she is sought for extradition, irrespective of whether he/she knows that he/she is sought or seeks to evade legal proceedings. Thus the meaning of the term "fugitive" in U.S. extradition practice is curious.

In *United States v. Blanco*, the Second Circuit held that a defendant who attempted to conceal her true identity and acted in a manner suggesting that she would not return to the United States to face trial could be considered a fugitive for speedy trial purposes.[110] And that is an approach more consonant with traditional criminal law on the determination of the status of fugitive. The *Blanco* court noted that:

> Blanco argues that she was not a fugitive, relying on a footnote in Chief Judge Feinburg's concurrence in *United States v. Salzmann*, 548 F.2d 395, 403, n.2 (2nd Cir. 1976). In this footnote, Chief Judge Feinburg wrote that he doubted whether defendant Salzmann was a fugitive when his address in Israel was known, when he made no attempt to hide it, and when he was in communication with the United States Attorney. *Id.* at 403 n. 2. Salzmann also suggested to the government that he would return to the United States to face prosecution if the government would finance his trip. *Id.* at 401. Blanco's case is easily distinguished from Salzmann's. Although the government knew Blanco's address in Colombia, Blanco did not live openly. She travelled under a false name and carried a false passport. She was not in communication with the government, nor did she ever suggest that she would be willing to return to the United States to face prosecution.

Coming from a former fugitive, Blanco's claim that her right to a speedy trial was denied carries almost no weight. As Chief Judge Wilfred Feinburg wrote in *Salzmann*:

> A true fugitive, whose location is unknown, or who is successfully resisting government efforts to bring him into the jurisdiction, will not be able to obtain dismissal of an indictment. This is as it should be. Otherwise the courts would be sanctioning the playing of games by fugitives.[111]

As such, courts will look to the defendant's conduct to determine whether to consider the defendant a fugitive or the victim of undue delay by the government.[112]

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108 *Id.* at 32. Presence in the United States, even if fortuitous, is sufficient for jurisdiction to attach and for considering the relator a fugitive for purposes of extradition. Vardy v. United States, 529 F.2d 404 (5th Cir. 1976), *reh'g denied*, 533 F.2d 310 (5th Cir. 1976), *cert. denied*, 429 U.S. 978 (1976); *Ex parte* Hammond, 59 F.2d 683 (9th Cir. 1932); Jhirad v. Ferrandina, 355 F. Supp. 1155, 1162 (S.D.N.Y.), *aff'd*, 486 F.2d 442 (2d Cir. 1973). *Contra* Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981).

109 United States v. Steinberg, 478 F. Supp. 29, 32 (N.D. Ill. 1979). *See* Vardy v. United States, 529 F.2d 404, 407 (5th Cir. 1976), *reh'g denied*, 533 F.2d 310 (5th Cir. 1976), *cert. denied*, 429 U.S. 978 (1976); *In re* Chan Kam-Shu, 477 F.2d 333, 348 (5th Cir.), *cert. denied,* 414 U.S. 847 (1973); Hammond v. Sittel, 59 F.2d 683 (9th Cir. 1932), *cert. denied*, 287 U.S. 640 (1932); *In re* David, 390 F. Supp. 521, 523 (E.D. Ill. 1975); United States *ex rel.* Eatessami v. Marasco, 275 F. Supp. 492 (S.D.N.Y. 1967); *In re Extradition of* D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959); 6 Whiteman Digest, *supra* note 55, at 768. *See also* United States v. $45,940 in U.S. Currency, 739 F.2d 792, 796 (1984) (discussing definition of fugitive).

110 United States v. Blanco, 861 F.2d 774, 780 (2d Cir. 1988).

111 United States v. Salzmann, 548 F.2d 395, 404 (Feinburg, C.J., concurring) (footnote omitted).

112 *See, e.g.*, United States v. Diacolis, 837 F.2d 79 (2d Cir. 1988); Branion v. Gramly, 855 F.2d 1256, 1269 (7th Cir. 1988) (stating cause-and-prejudice rule does not apply when the prisoner flees the United

Similarly, in *In re Assarsson*,[113] the Eighth Circuit held that a fugitive is a person who leaves the jurisdiction, either with the intent to evade its criminal processes or with the intent to avoid arrest or prosecution.[114] The determination of whether a person is a fugitive is important for the purposes of the application of the statute of limitations,[115] as exemplified in the Ninth Circuit decision in *United States v. Fowlie*.[116]

In *Fowlie*, the defendant appealed his conviction[117] for drug-related offenses on the basis that the alleged acts had transpired more than five years prior to his indictment, and consequently outside the requisite statute of limitations as prescribed by 18 U.S.C. § 3282.[118] However, the court of appeals held that the defendant could be characterized as a fugitive "fleeing justice," thereby excluding the defendant from having the availability to use the applicable statute of limitations as prescribed by the exception within 18 U.S.C. § 3290.[119] The Ninth Circuit defined a fugitive "fleeing justice" as one who affirmatively and voluntarily acted with the corresponding intent to avoid prosecution.[120] The court of appeals saw three instances of affirmative action by Fowlie to avoid prosecution, thus making him a fugitive to whom the exception to the statute of limitations did apply: first, when Fowlie left his ranch in California prior to the investigation related to his indictment; second, when Fowlie did not return to his ranch although he was allegedly supposed to return; and third,

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States after a conviction); United States v. Pomeroy, 810 F.2d 184 (8th Cir. 1987), *superseded by* 822 F.2d 718 (1987). *See also* United States v. Eng, 951 F.2d 461 (2d Cir. 1991).

113 *In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982), *aff'g* 538 F. Supp. 1055 (D. Minn. 1982). *See also* United States v. Catino, 735 F.2d 718, 721 (2d Cir. 1984) (holding that flight from justice in one jurisdiction tolls statute of limitations in all jurisdictions within the United States).

114 *Assarsson*, 687 F.2d at 1161. *See also* Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); United States v. Ballesteros-Cordova, 586 F.2d 1321 (9th Cir. 1978) (per curiam); United States v. Wazney, 529 F.2d 1287 (9th Cir. 1976); Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir. 1973). Note that in *United States v. Walton*, the court explained that "a formal request for extradition must be made before due diligence can be found to have existed for purposes of the Speedy Trial Act." 814 F.2d 376, 379 (7th Cir. 1987).

115 *See Assarsson*, 687 F.2d 1157. *See also* United States v. Catino, 735 F.2d 718 (2d Cir. 1984); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981) (stating that the government's failure to prove that relator concealed himself with intent to avoid arrest and prosecution precluded finding that relator was a fugitive from justice and did not toll statute of limitations); King v. United States, 144 F.2d 729 (8th Cir. 1944) (holding absence from jurisdiction alone is enough to consider individual a fugitive); McGowen v. United States, 105 F.2d 791 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 552 (1939). In *Catino*, the court held that although Catino was imprisoned in France, and could not return to the United States, his failure to accommodate the U.S. Department of Justice constituted "constructive flight from justice." *Catino*, 735 F.2d at 722. The court stated:

> Although Catino's imprisonment prevented him from returning, we do not think he was relieved of a duty to do all he could to return. As it was, instead of consenting to return to the United States, he actively resisted the extradition proceedings. This fact, coupled with his letter expressing a desire to resist all future extradition requests, constituted a constructive flight from justice, thereby tolling the statute of limitations.

Id. at 722–723. For statute of limitations, see Ch. VIII, Sec. 4.4.

116 United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994).

117 *See id.*

118 *Id.* at 1071.

119 *Id.* "[N]o statute of limitations shall extend to any person fleeing from justice." 18 U.S.C. § 3290 (2000).

120 *Id. at* 1072. The court cited to its prior decision of *United States v. Wazney*, where the defendant, after learning of a warrant for his arrest, failed to return to his home. However, in *Wazney* the defendant concealed his whereabouts in Los Angeles, a large city, unlike Fowlie, who lived openly in a small Mexican town. *Id.*

when Fowlie remained in Mexico, where he lived and worked without any concealment of his whereabouts.[121]

Had the majority read the facts of *in Fowlie* as the dissent did[122] no affirmative act to flee done with the intent to evade prosecution would have been found. Fowlie's act of "fleeing" actually occurred prior to the government's search of Fowlie's ranch, and therefore could not have been, as the opinion suggested, the basis for finding an intent to avoid prosecution.[123] Also, as the dissent noted, "every case tolling the statute of limitations under § 3290 has relied on defendant's affirmative conduct of fleeing or concealing himself,"[124] and Fowlie's open conduct did not comport with either prerequisite for tolling the statute of limitations. Therefore, Fowlie's convictions should have been reversed for they would have been based on an indictment that fell outside of the applicable statute of limitations.

A 2006 Second Circuit decision[125] in *United States v. Florez* provides a thorough overview of the law regarding fugitive status relative to the statute of limitations. In *Florez* the Second Circuit stated:

> In construing the flight requirement of § 3290, we begin with *Streep v. United States,* 160 U.S. 128, 16 S.Ct. 244, 40 L.Ed. 365 (1895), in which the Supreme Court considered the meaning of the phrase "fleeing from justice" as used in an earlier statute creating an exception to the application of a limitations period. In *Streep,* the Court stated:
>
> It is unnecessary, for the purposes of the present case, to undertake to give an exhaustive definition of the[] words ["any person fleeing from justice"]; for it is quite clear that any person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offence, can have no benefit of the [statute of] limitation[s], at least when prosecuted for that offence in a court of the United States.
>
> *Id.* at 133, 16 S.Ct. 244.
>
> Drawing from this language, most courts, including our own, have concluded that a person's mere absence from a jurisdiction is insufficient, by itself, to demonstrate flight under § 3290 (or its statutory predecessor); there must be proof of the person's intent to avoid arrest or prosecution. As we observed in *Jhirad v. Ferrandina,* in the context of an extradition proceeding, "the phrase 'fleeing from justice' carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime *with the intent of escaping prosecution.*" 486 F.2d 442, 444–45 (2d Cir.1973) ("*Jhirad I*") (emphasis added); *accord United States v. Rivera-Ventura,* 72 F.3d 277, 283 (2d Cir.1995). Many of our sister circuits agree that such intent is a necessary component of flight. *See Ross v. United States Marshal,* 168 F.3d at 1194 (10th Cir.1999) (holding that "fleeing from justice" requires proof that "the accused acted with the intent to avoid arrest or prosecution"); *United States v. Greever,* 134 F.3d at 780 (6th Cir.) (holding that § 3290 requires proof "that the defendant concealed himself with the intent to avoid prosecution"); *United States v. Fonseca-Machado,* 53 F.3d 1242, 1244 (11th Cir.1995) (holding that "a fugitive from justice . . . must be found to have absented himself from the jurisdiction with the intent to avoid prosecution"); *United States*

121 *Id.* at 1071–1072.

122 The majority opinion stated the facts to be that "(1) Fowlie left Rancho Del Rio a few days prior to the search on March 1, 1985; (2) he was expected to return; [and] (3) defendant did not return to Rancho Del Rio, but went instead to Mexico." *Id.* at 1071. The dissent saw the same facts to state that "(1) Fowlie left his ranch prior to the search and went to Mexico, and (2) he was expected to return but did not." *Id.* at 1074 n.1 (Reinhardt, J., dissenting).

123 *Id.* at 1074–1045.

124 *Id.* at 1075 (citing United States v. Gonsalves, 675 F.2d 1050, 1052 (9th Cir.), *cert. denied*, 459 U.S. 837 (1982)).

125 United States v. Florez, 447 F.3d 145, 150–151 (2d Cir. 2006).

> *v. Marshall,* 856 F.2d at 900 (7th Cir.) (concluding that "defendant's intent to avoid arrest or prosecution must be proved in order to trigger the tolling provisions of Section 3290"); *United States v. Wazney,* 529 F.2d 1287, 1289 (9th Cir.1976) (holding that "intent to avoid prosecution is an essential element of 'fleeing from justice' "); *Brouse v. United States,* 68 F.2d 294, 295 (1st Cir.1933) (holding that "essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing one's self, with the intent to avoid punishment").
>
> Although decisions by the Eighth and D.C. Circuits suggest that the specific intent to avoid prosecution is not essential to toll a statute of limitations on account of flight, *see In re Assarsson,* 687 F.2d 1157, 1162 (8th Cir.1982); *McGowen v. United States,* 105 F.2d 791, 792 (D.C.Cir.1939), the latter court, at least, has tempered this view when the evidence of flight does not show actual departure from the jurisdiction, *see United States v. Singleton,* 702 F.2d 1159, 1169–70 (D.C.Cir.1983) (concluding that showing of intent to avoid prosecution is required for § 3290 tolling when accused does not leave jurisdiction where crime was committed). No matter. In this circuit, the rule in criminal prosecutions remains that stated in *Jhirad I* and *Rivera-Ventura:* a finding of flight under § 3290 requires proof that a defendant intended to avoid arrest or prosecution.[126]

Beyond the issue of a fugitive's status relative to the statute of limitations, a relator's status may support a probable cause determination on the underlying extraditable offense.[127] It should be noted, however, that there is no prerequisite that the relator be a fugitive in order to seek his/her extradition. Thus, a person may be sought for extradition who is not a fugitive, and who may not even know that he/she is being sought by a given requesting state.

A treaty may specifically allow for extradition from the United States if the person has been tried and convicted in absentia, provided that the person will be given the right to a new trial upon his/her return. In such cases, the court may deem probable cause to be satisfied by the foreign judgment; however, such a judgment in absentia is not conclusive proof of probable cause.[128] The converse situation presents a different problem insofar in that states do not provide for a trial de novo for a person who has been found guilty in absentia because that person has become a fugitive after jurisdiction has attached and the criminal proceedings have begun. Whenever the United States has sought extradition on that basis it has had to find ingenious ways to ensure that the surrendered person receives a new trial.

The determination that a person is a fugitive is foundational to a person's right to petition a court, as discussed in connection with standing in Chapter XI, Section 4.

9. Provisional Arrest

9.1. Introduction and General Considerations

Provisional arrest is a temporary arrest made prior to, and in contemplation of an extradition request pursuant to a treaty that authorizes it, for the limited period of time provided for in the treaty. The arrest is made pursuant to a warrant issued by a judge or magistrate.[129]

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126 *Id.*

127 *See, e.g.*, Esposito v. Adams, 700 F. Supp. 1470 (N.D. Ill. 1988) (holding that testimony of alleged accomplices, corroborated by petitioner's flight from Italy to the United States and change of identity, sufficient to support probable cause determination that petitioner committed the acts alleged in the extradition request). *See also In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998).

128 *See In re* Ribaudo, No. 00 Crim. Misc. 1 Pg. KN, 2004 WL 213021, *5 (S.D.N.Y. 2004) relying on Spatola v. United States, 920 F.2d 615, 618 (2d Cir. 1991); *In re Extradition of* Ernst, N0. 97 Crim. Misc. 1, 1998 WL 395267, *22 (S.D.N.Y. 1998).

129 6 Whiteman Digest, *supra* note 55, at 727.

Since the late 1960s, treaties usually have included a provision on "provisional arrest."[130] A representative example of the provisional arrest terminology in contemporary treaties is that of Article XIII in the 1983 treaty between the United States and the Republic of Italy:

> In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. This application may be made either through the diplomatic channel or directly between the Italian Ministry of Grace and Justice and the United States Department of Justice. The application shall contain a description of the person sought, and indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction, including convictions in absentia and in contumacy, against that person, and such further information, if any as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.
>
> On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.
>
> A person arrested upon such an application shall be set at liberty upon the expiration of forty-five days from the date of his arrest if a request of this extradition accompanied by the documents specified in Article XI shall not have been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.[131]

The Department of State requires the following information from the requesting state prior to making a request for provisional arrest through the Department of Justice: the fugitive's name; the offense charged, including the date and place that the arrest warrant or charging instrument was issued or the judgment of conviction; the circumstances of the crime; a description and identification of the accused; and the individual's whereabouts, if known.

In *In re Extradition of Orozco*, the court found that a magistrate judge has jurisdiction to consider releasing a person detained on a provisional arrest warrant and a complaint seeking extradition. The court held:

> The rationale for distinguishing pretrial release in extradition cases from domestic criminal cases in which pretrial liberty is the norm is that extradition proceedings involve the Government's overriding foreign relations interest in complying with treaty obligations and producing extradited persons. *United States v. Leitner, supra; United States v. Taitz, supra; United States v. Messina,* 566 F.Supp. 740, 742 (E.D.N.Y.1983). As the *Taitz* court explained, "[i]f the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United

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130 In the EU–US 2003 Extradition Treaty, Sen. Treaty Doc. No. 109-14 the language of Article 7 on provisional arrest reads:

> If the person whose extradition is sought is held under provisional arrest, the requesting State may satisfy its obligation to transmit its request for extradition and supporting documents through the diplomatic channel pursuant to Article 5(1), by submitting the request and documents to the Embassy of the requested State located in the requesting State. In that case, the date of receipt of such request by the Embassy shall be considered to be the time limit that must be met under the applicable extradition treaty to enable the person's continued detention.

For a case noting the informality of the request, see *Duran v. United States,* 36 F. Supp. 2d 622, 624 (S.D.N.Y. 1999).

131 Treaty on Extradition between the United States and Italy, art. XIII, 26 U.S.T. 493, 502, T.I.A.S. No. 8052 (*entered into force* Mar. 11, 1975). This treaty has been superseded by a new United States–Italy treaty, T.I.A.S. 10,837 (*entered into force*, Sept. 24, 1984). The new treaty was declared unconstitutional in July 1996 by the Constitutional Court of Italy because it allowed extradition from Italy for death penalty offenses, which is barred by the Italian Constitution.

> States to obtain extradition of its fugitives." *Taitz, supra,* 130 F.R.D. at 444; *United States v. Hills,* 765 F.Supp. 381, 385 (E.D.Mich.1991).
>
> This "special circumstances" requirement creates a different standard for extradition cases than for federal criminal cases, where bail is granted unless the judicial officer determines that release will not reasonably assure the appearance of the defendant as required. 18 U.S.C. § 3146(a). The additional showing required in extradition belies [the defendant's] claim that bail is one of the remedies and recourses of United States law to which an extraditee is entitled. *Kamrin v. United States,* 725 F.2d 1225, 1228 (9th Cir.1984), *cert. denied,* 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984); *Hu Yau-Leung v. Soscia,* 649 F.2d 914, 920 (2d Cir.1981), *cert. denied,* 454 U.S. 971, 102 S.Ct. 519, 70 L.Ed.2d 389 (1981) (citing, *Wright v. Henkel, supra,* 190 U.S. at 62, 23 S.Ct. at 786, *Beaulieu v. Hartigan,* supra, 554 F.2d at 2; *United States v. Williams,* 611 F.2d 914 (1st Cir.1979)).[132]

The court granted extradition on the ground that Orosco was not a flight risk and that the criminal charge in Mexico was also an available offense in that country. Obviously this does not constitute an exceptional circumstance, other than perhaps the personal needs of the relator who was about to take an examination for a state dental license.[133]

The policy of the U.S. government is to accommodate such requests "in the best possible way," even though presumably such requests will be granted only if the necessary documentation includes information that the fugitive is likely to flee before the formal extradition request is filed, or before there is an opportunity for the arrest warrant to be issued.[134]

The element of urgency, however, is seldom more than an allegation made by the requesting state, and no case exists where a U.S. court has rejected the request for a provisional arrest on that ground. This is true even when the treaty requires a showing of urgency. A person provisionally arrested is eligible for bail on the same basis as a person arrested on a warrant issued after a formal request has been filed,[135] but the likelihood of bail in these cases is rare if for no other reason than the fact that the relator does not know the nature of the forthcoming charges.

The specific elements needed to justify a provisional arrest are: (1) that there be a condition of emergency or urgency or some type of exigent circumstances; (2) that the provisional arrest warrant be based on effectively the same substantial ground as would authorize the issuance of a warrant by a U.S. court for the crime charged; and (3) that other conditions for issuance of arrest warrants pursuant to the treaty and extradition law be satisfied. There are therefore two substantive conditions required for "provisional arrest."

The first condition deals with the existence of "urgency," which is usually ignored, while the second deals with some type of "probable cause," which receives summary consideration by the magistrate or judge before whom the case is brought. There is nothing in existing treaties or U.S. legislation to explain the meaning of "urgency," but explanatory notes accompanying treaties may indicate what is meant by it. Reasonable standards of interpretation lead to the belief that "urgency" describes such conditions relating to the nature of the offense charged and the personality of the prospective relator, such as whether hearing of the impending request would make him/her susceptible of fleeing the jurisdiction or being likely to destroy the evidence, without which the request or eventual prosecution could not proceed. It is ultimately a question of fact that must be determined by the court on the basis of reasonably credible evidence, but this is not always the case.

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132 *In re Extradition of* Orozco, 268 F.Supp.2d 1115, 1116–1117 (D. Ariz. 2003).

133 *Id.*

134 Extradition: Provisional Arrest, 1975 Digest § 6 at 175–176.

135 *Id.* § 5 at 156.

The essential purpose of the provisional arrest is to detain an individual for fear that he/she may flee pending arrival of the formal documents of extradition. The practice and practicality of situations in which a "provisional arrest" is requested are that the requesting state rushes its request in the form of a telex, fax, or diplomatic cable that states a few facts, seldom sending with it sufficient evidence that would satisfy a U.S. judge that evidence of "probable cause" exists. This situation places the individual in question in the difficult position of having to prove a negative: that is to prove that he/she is not the person sought, that there is no "urgency," or that there is no "probable cause." It must be noted that neither existing treaties nor applicable federal legislation state the standard of proof required by the government or by the relator. Thus, cases have applied every possible standard, including no standard at all.

As a provisional arrest warrant is an ex parte warrant, there is very little that the issuing magistrate can rely on other than the representations of the requesting state as presented by the U.S. government. Nevertheless, the U.S. government can be selective in its representations and as to those made to it by the requesting state. This means, in effect, that the U.S. government will rely substantially, if not entirely, on the representations of a foreign government without, in most cases, proffering sufficient evidence of "probable cause." Such warrants are analogous to ex parte warrants issued on the basis of hearsay evidence. In that respect, under federal practice, the hearsay evidence must either be corroborated by external evidence or must be based on reliable sources of information that have in the past produced such similar information. Presumably the representations of a sovereign state are to be treated as reliable.

Most provisional arrest cases are instances in which the request is either communicated by facsimile, telex, or diplomatic channels, as in the instance of two landmark cases, *Abu* Eain[136] and Caltagirone.[137]. The magistrates in *Abu* Eain and the judge in Caltagirone had no basis to determine either the urgency or the conditions upon which urgency should be tested against, other than the assertions of the requesting state.

The second question that arises in the context of provisional arrest is whether there must be a standard of "probable cause" to detain the relator. This question raises the issue of the applicability of the Fourth Amendment[138] protection against unreasonable searches and seizures. The question thus arises as to whether a "provisional arrest" can be made without "probable cause" or can be based on a lesser standard. The government argued in the *Abu* Eain and Caltagirone cases, in which the treaties with Israel and Italy were respectively applicable, that only the applicable treaty provisions on the question applied and nothing else, including the U.S. Constitution.

Irrespective of whether "probable cause" under the treaty or the applicable law applies or not, the Fourth Amendment does apply. If the standard is to be less than "probable cause," would a treaty provision such as Article XIII of the 1973 Italian Extradition Treaty or others on provisional arrest effectively displace the guarantees of the Fourth Amendment? This would clearly present a constitutional question, and would appear on its face to be unconstitutional, unless one would broadly interpret the meaning of the Fourth Amendment to make an analogy between the provisional arrest and such other standards of reasonableness in the performance of an arrest as, for example, the reasonableness standard applied in the arrest of somebody in a

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136 Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

137 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

138 The Fourth Amendment states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [search] warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

motor vehicle for fear that the motor vehicle may be moving outside the jurisdiction.[139] That, however, leaves open the question of whether the standard of reasonableness is to be tested in any particular way by the magistrate who issues the warrant, or whether the magistrate is simply to take the representations of the requesting state at face value and as conclusive evidence. This raises again the question presented earlier regarding the issuance of a warrant based on hearsay.

Another issue is whether a person arrested on the basis of a provisional arrest warrant can be admitted to bail.[140] How does such a person meet the exacting requirements of proving "exceptional circumstances" to be admitted to bail when the person has nothing to go on except the naked assertion of the requesting state? This situation simply overturns the presumption of innocence, as it places the burden of proof on the arrested person. One of the most important cases in this area is Caltagirone,[141] where two Italian citizens were arrested in the United States pursuant to the Treaty on Extradition between the United States and Italy.[142] In the extradition proceedings, the Republic of Italy sought the surrender of the two Caltagirone brothers to face trial for fraudulent bankruptcy in contravention of Italian penal statutes. Pursuant to the issuance of a warrant for this provisional arrest, the Caltagirones were arrested in New York and denied bail. The U.S. government argued that it had no duty to show "probable cause" pursuant to § 3184, and no duty to prove "urgency," and that no other requirement existed outside Article XIII of the treaty. Subsequently, a warrant issued pursuant to a formal request was substituted for the provisional arrest warrant, and bail was also denied. Upon denial of bail and pending a rehearing on same, a petition was filed before the Second Circuit, which found that the issue was not moot, because of the pending rehearing on bail, and that Article XIII did require showing "some probable cause" such as would convince a U.S. judge under the same circumstances that the individual should be arrested. The case was thus reversed and remanded to the district court.[143] The district court granted bail.

In his appeal, Francesco Caltagirone's counsels, joined by this writer who was counsel for Gaetano Caltagirone, contended that the brothers' provisional arrest and detention were

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139 As a general rule, searches conducted without a warrant approved by a judge or magistrate are per se unreasonable. This rule, however, is subject to many exceptions based on special circumstances. *See, e.g.*, United States v. Ramsey, 431 U.S. 606 (1977) (holding border searches excepted from warrant requirement); Chimel v. California, 395 U.S. 752 (1969) (stating that search incident to lawful arrest does not require warrant); Warden v. Hayden, 387 U.S. 294 (1967) (holding exigent circumstances excuse warrant requirement); Carroll v. United States, 267 U.S. 132 (1925) (holding search of automobile permitted without warrant).

140 *See supra* Sec. 2.

141 *In re* Caltagirone, 622 F.2d 572 (2d Cir. 1980).

142 26 U.S.T. 493, T.I.A.S. No. 8052. Title 18 U.S.C. § 3187 (2000) deals with fugitives from foreign countries in the United States:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the jurisdiction of any such foreign government with any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the person so charged to the proper jail, there to remain until such surrender shall be made.

143 In *Caltagirone* the Second Circuit reasoned as follows:

> Article XIII of the Treaty provides that an application for provisional arrest must contain four elements: a description of the person sought; and indication of intent formally to request the extradition

unlawful even though at the time they were no longer in any way detained on account of the provisional arrest. This raised the question of mootness under Article III of the Constitution, which limits intervention by the federal judiciary to cases and controversies that exist at the time they are presented for review. The question was not academic after the provisional arrest was replaced by an arrest warrant, because the relator could have been rearrested under a new provisional arrest warrant if he/she had been released, or if the extradition request had been denied. Thus the Second Circuit agreed with counsel that the question was not moot, as the government contended, and the case was heard accordingly.

These cases and the problems they raise highlight the importance of establishing certain standards by which a U.S. judge may determine: (1) whether urgency exists, (2) whether there are grounds sufficient for a U.S. court to issue such a warrant for the arrest of an individual pending a determination of the case, (3) what bail standards to apply in such cases, and (4) what standards to apply for rearrest and bail under rearrest.

In comparison, the practice in other countries shows that provisional arrest is not a serious obstacle to extradition. In Europe, the Third Additional Protocol to the 1957 European

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of the person; and allegation that a warrant for the person's arrest has been issued by the requesting state; and finally, "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party." Since the "requested Party" in the instant case is the United States, the sufficiency of the information provided to support Caltagirone's arrest must necessarily be judged by American law. *Jhirad v. Ferrandina,* 536 F.2d 478, 485 (2d Cir.), cert. denied, 429 U.S. 833 (1976). The district court, however, simply noted that an Italian warrant of arrest was outstanding, and then refused to "second-guess" the Republic of Italy's determination that a warrant should issue. Apparently, the district court saw no need to determine whether a sufficient showing had been made to support an arrest under United States law.

Judge Cannella also deferred to Italian practice in rejecting Caltagirone's argument below that language in Article XIII—"In case of urgency"—requires the Government to show urgency before securing a warrant, and that no such urgency was shown here. Judge Cannella decided that the Government of Italy in applying for the warrant must have found present whatever urgency was required under Article XIII, and he refused to review its determination. While we have reservations concerning Judge Cannella's reluctance to review, we need not reach this question, because we reserve the district court on other grounds. The Treaty does not contemplate a review of the validity, under Italian law, of the Italian arrest warrants, but rather a simple factual determination whether a warrant has been issued. In this limited sense, deference to a foreign judicial determination is entirely proper. It is quite another matter, however, to assert that the Republic of Italy's decision to apply for provisional arrest will be taken as an unreviewable determination that the application conforms to all Treaty provisions. This is particularly true with respect to the "further information" requirement, since we cannot suppose that the drafters intended that an official of the requesting state would make a final determination of the law of the requested party. We proceed, therefore, to the application of United States standards for arrest and detention.

Had the offense of "fraudulent bankruptcy" been committed in the United States, a showing of probable cause would have been necessary to justify the issuance of an arrest warrant. See Fed. R. Crim. P. 4; *Whitely v. Warden*, 401 U.S. 560 (1971); *Giordenello v. United States*, 357 U.S. 480 (1958). Nonetheless, the Government concedes, and our examination of the record confirms, that no showing of probable cause was made prior to the issuance of the March 20 warrant commanding Caltagirone's provisional detention. Indeed, Italy's application for appellant's provisional arrest contained no "such further information" as would establish probable cause to believe that Caltagirone had committed an extraditable offense. Though the Senate report prepared in conjunction with the Treaty's ratification is short, it demonstrates clearly that our legislators contemplated all applications for provisional arrest to be "accompanied by appropriate supporting evidence." S. Rep. No. 93-19, 93rd Cong., 1st Sess., *reprinted in* 119 Cong. Rec. 32054 (1973). Here, however, none was provided.

Convention on Extradition simplified extradition proceedings to deal with the urgency question in cases where provisional arrest requests are made.[144] For example, in a West German case,[145] the court held that the West German–Austrian Extradition treaty did not limit the competence of German authorities under national law to make a provisional arrest on the basis of a note communicated to German police by Interpol stating only the relator's name and date of birth, and that a copy of the enclosed arrest warrant would be followed by the warrant itself and by a formal extradition request. Reciprocal treaty obligations existed only between the contracting parties and did not govern preparatory measures.

An unusual example of provisional arrest arose when Australia detained a naturalized Croatian Serb accused of having committed war crimes in Croatia. The individual, Dragan Vasiljković, was detained on a provisional Croatian extradition request from January 2006 until September 4, 2009, when he was released after a finding by an Australian court that he would be unable to secure a fair trial in Croatia.[146] On appeal Vasiljković's extradition was affirmed.[147]

9.2. Requirements and Procedure

The requirements for provisional arrest are as follows: (1) the arrest warrant must be issued by a judge or magistrate in the federal district where the person sought is believed to be located, or by the Federal District Court for the District of Columbia, if that person's whereabouts are unknown in the United States; (2) the legal basis for the issuance of the warrant is a treaty provision specifically authorizing it; (3) the duration of the warrant's validity is only for that period which the treaty specifies; (4) the issuance of the warrant must be pursuant to a requesting state's submission to the U.S. government that it wants a given person detained pending preparation and/or presentation of a formal extradition request pursuant to a valid treaty between the requesting state and the United States; and (5) the existence of some "probable cause" must be shown to satisfy the requirements of the Fourth Amendment.

The premise for including provisional arrest clauses in contemporary extradition treaties is that fugitives from justice are likely to continue their flight if they suspect that a formal extradition request is being prepared or is in the process of being filed in the country where they may be found. Thus, to detain such persons and prevent their flight pending the preparation and/or presentation of the formal extradition request, with all the necessary supporting evidence, authorities resort to provisional arrest. Provisional arrest is warranted by reason of necessity and justified by reason of the brevity of the provisional arrest period.

Most contemporary extradition provisions authorizing "provisional arrest" are discretionary and are for periods ranging from forty to sixty days.[148] Such periods, however, appear too long considering the rapid means of communications between governments. Why then is so much time needed for foreign governments to prepare and/or submit their formal requests? The reason is that prosecutors and judges in most countries are overburdened and their offices understaffed, as are those responsible officials in ministries of justice and foreign affairs who have to

144 *See* Michael Plachta, *Third Additional Protocol to the 1957 European Convention on Extradition*, 27 Int'l Enforcement L. Rep. 831–835 (Aug. 2011).

145 Provisional Arrest for Extradition Case, 45 I.L.R. 378 (BGH 1965) (F.R.G.).

146 *See* Bruce Zagaris, *Accused Croatian War Criminal Loses Effort to Block Australian Extradition Hearing*, 23 Int'l Enforcement L. Rep. 54–55 (Feb. 2007); Trevor Bormann, *Background: Captain Dragan's Legal Fight*, Australian Broadcasting Corporation News, May 27, 2011, *available at* http://www.abc.net.au/news/2011-05-27/background-captain-dragans-legal-fight/398996 (last visited Sept. 24, 2012). *See also Vasiljkovic v. Commonwealth* (2006) 228 A.L.R. 447 (Austl.).

147 *Accused Serb War Criminal Loses Australia Extradition Appeal*, Reuters, Sept. 30, 2011.

148 For the text of United States treaties, see Igor Kavass, A Guide to U.S. Treaties in Force (1982–Present, Supp. 2010).

forward the request and satisfy certain formal requirements such as translation and legalization of documents. Thus, governments agree on longer periods of "provisional arrest." There would be no substantial issue with "provisional arrest" periods of up to sixty days if such a detention would be subject to the constitutional standards of "probable cause," but that is not the case, as is discussed below. Furthermore, as "provisional arrests" are seldom accompanied by evidence presented by the requesting government, the relator, seldom if ever, has a chance to be released on bail. The right to be released on bail is not, as of yet, constitutionally or statutorily recognized, but is a judicially fashioned right that requires the relator to demonstrate that "special circumstances"[149] exist that would warrant such a release. In "provisional arrest" situations, the usual absence of evidence of "probable cause" presented by the requesting government leaves the relator with precious little to argue for in support of his/her release on bail. And that makes the period of up to sixty days appear excessive.

Most submissions for a "provisional arrest" warrant consist of an affidavit by an Assistant United States Attorney (AUSA) swearing to the fact that: (1) a telex, facsimile, or actual document was received from a requesting state with which the United States has an extradition treaty; (2) that the request is for the "provisional arrest" of a named or identified person, whose presence is believed to be in the United States; (3) that the request is based on a treaty offense that satisfies the requirements of "double criminality;" (4) that an arrest warrant was issued by a competent judicial authority in the requesting state for that offense; and (5) that the requesting state intends to submit a formal extradition request in accordance with the requirements of the applicable treaty within the period of time provided for in the treaty provision authorizing "provisional arrest."

For all practical purposes most "provisional arrest" documentation submitted by a requesting state is limited to: (1) an arrest warrant, and sometimes an Interpol communication asserting that such a warrant exists; and (2) an affidavit by an AUSA who usually has no other information than what the requesting state's or the Interpol's communication contains. There is, therefore, no way for the relator to test, question, or challenge the validity of the arrest warrant, except on constitutional grounds. Indeed, there is no requirement for the government to submit an authenticated copy of the arrest warrant in the provisional arrest context absent a treaty provision requiring it.[150] When hearing challenges to these limited requirements, the courts have not construed the law to the benefit of the relator. Thus, as stated above, the relator cannot effectively challenge the absence of "probable cause" if there is no evidentiary requirement that the requesting state has to meet. Furthermore, without specific evidence being presented in support of the "provisional arrest," the relator can seldom meet the high threshold judicially established for bail.[151]

In most cases, the principal supporting document that the government will present in such cases is a communication from the national Interpol office of the requesting state. That Interpol communication usually contains only scant information about the fact that an arrest warrant is outstanding and that the person named is sought by the judicial or police authority in the requesting state. Frequently this document is referred to as an Interpol warrant or an international arrest warrant. But neither of these two labels is correct. Arrest warrants are issued by the judicial authority of a given state on the basis of its national laws. Interpol merely communicates these warrants through its liaison office, which consists of national police officers assigned to work in that capacity.[152]

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149 Wright v. Henkel, 190 U.S. 40 (1903). *See also* Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999); *In re Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

150 *In re Extradition of* Washington, 2007 U.S. Dist. LEXIS 2722, at *19–*20 (W.D.N.Y. 2007).

151 *See infra* Sec. 12.

152 *See* Mary Jo Grotenroth, *Interpol's Role in International Law Enforcement*, *in* Legal Responses to International Terrorism: U.S. Procedural Aspects 375, 376 (M. Cherif Bassiouni ed., 1988).

Interpol uses two color codes to alert member police organizations about persons wanted by the police or judicial authorities of a given state: red and blue. These colors indicate the degree of interest that a given state has in the wanted individual. Accordingly, a "Red Notice" requests that the recipient state "seek the location and arrest of a person wanted by a judicial jurisdiction or an international tribunal with a view to his/her extradition."[153] The "Blue Notice," by contrast, requests that the recipient state "locate, identify or obtain information on a person of interest in a criminal investigation."[154] In addition, INTERPOL can issue a "Purple Notice," which requests that the recipient state "provide information on modi operandi, procedures, objects, devices or hiding places used by criminals."[155]

Computerized police, customs, and immigration systems make identification of wanted persons easier and more rapid. But the benefit of such technology can also result in judicially or legally uncontrolled law enforcement cooperation. For example, State A may believe a person to have committed a crime but is unable to identify him, and thus issues a "John Doe" arrest warrant (or the like), or issues a police alert notification with or without a complete identification. The police of State B, could, on the basis of certain facts known to it, notify State A's police of the possible identity of the heretofore unidentified person wanted in State A, and suggest to State B to issue a "provisional arrest" warrant for the individual whose identity was in fact supplied by State B. Upon being arrested in State B, the individual would have no way of knowing that his/her identification did not come from State A, which requested the "provisional arrest," but rather that it was in effect State B that had supplied the needed personal identification. At a judicial hearing, the judge would not know these facts either, and therefore police cooperation aided by advanced technology can circumvent the legal process for at least as long as the "provisional arrest" is in effect. During that period of time the law enforcement and prosecutorial officials of States A and B can cooperate in preparing their case.

There is also the problem of representations made by the AUSA to the court. These representations are unverifiable by the court, and the relator cannot rebut what remains unproven. For example, an AUSA may claim that a credible official of the requesting state, who has the authority to make such representations, advised the AUSA that even though the submission for "provisional arrest" is for an economic crime, the person sought is known for his/her violent tendencies and is believed to have also committed several violent crimes. On the strength of these representations the judge then issues the "provisional arrest" warrant and subsequently denies bail. Judges seldom question AUSAs as to the veracity, authenticity, credibility, and corroboration of such representations, and routinely reject the relator's requests to do so.

The same type of problem arises also when the only document that the AUSA presents to the court for issuance of a "provisional arrest" warrant is a facsimile from Interpol. Frequently, it is no more than a message from the national police of the foreign state communicated through their Interpol liaison office or a communication from the U.S. liaison office of Interpol on the basis of a foreign communication. Such a document could state only that it is believed that an arrest warrant was issued and that the named person should be arrested at once because of his/her believed dangerousness or the seriousness of his/her crimes. With respect to terrorism, organized crime, and drug cases, judges will readily accept such communications without verification.

Law enforcement and prosecutorial cooperation can, and does occasionally, take advantage of this situation, which can easily result in the detention of a person for the entire duration of the treaty-authorized period, sometimes up to sixty days. Should subsequent investigations result in the preparation of a legally sufficient extradition request, combined with "probable cause,"

153 Interpol, *Fact Sheet: International Notices System*, Doc. no. COM/FS/2012-01/GI-02.

154 *Id.*

155 *Id.*

the hearing under § 3184 will be successful and the relator will be extradited, thus mooting any issues of prior irregularities. Even if the issues in question are shown not to be constitutionally moot, most courts will not act in time for a decision to be handed down before the relator has been surrendered to the requesting state.

The government could also use the period of a "provisional arrest" to pressure the relator into cooperation, to bargain a "waiver" of the § 3184 Hearing,[156] or to enter a plea bargain with respect to any charges that may be pending in the United States. In any event, it is always the strategy of the government to keep relators detained so as to increase the pressure on them to cooperate or bargain, or to reduce delays in the legal process (by inducing the relator not to prolong the proceedings and review process).

The time period commences when the individual who is the subject of a "provisional arrest" warrant is detained thereunder, irrespective of whether he/she is also detained under another warrant for another cause. Thus a person may be incarcerated or detained on another criminal charge or on administrative grounds, such as an immigration detention, and be served with an extradition "provisional arrest" warrant or denied bail on another charge because of the existence of a "provisional arrest" warrant, and the period will commence running as of that day. At the end of that period, the individual is constitutionally entitled to unconditional release from detention under that "provisional arrest" because the legal validity of the warrant is extinguished with the lapse of time specified by the treaty under the authority of which the warrant was issued. The appropriate recourse in such cases is by means of a petition for a writ of habeas corpus before the federal district court wherein the relator is detained. Sometimes the petition will be assigned to the same judge to whom the case was assigned, and therefore may deny the relator the opportunity to appear before another judge. If the case was assigned to a U.S. magistrate, then the petition will be assigned to a federal district court judge. Appeals on negative rulings on such petitions can be taken to the circuit court of appeals.

In United States v. Wiebe,[157] the Eighth Circuit held that a filing at the U.S. embassy (in Madrid) before the forty-fifth day was valid and sufficient even though the U.S. government did not actually file the request with the federal district court until much later. But in this case, the court confused two issues: the period of "provisional arrest" and the foreign state's right to file an extradition request with the U.S. embassy in the requesting state. Thus, this case was an improper interpretation of the treaty's "provisional arrest" provision and a violation of the relator's Fourth Amendment right. It was a cover-up for an embarrassing situation, because the U.S. embassy in that case had lost or mislaid Spain's original request and all supporting documents, and Spain had to prepare a new request, assemble new documents, then authenticate and legalize them. Thus the court, at the government's behest, found that the relator was not entitled to be released after the treaty's forty-five days of "provisional arrest" had lapsed on the theory that Spain had filed its request with the U.S. embassy in Madrid before the forty-fifth day had lapsed, even though the court had no record of such a filing or actual knowledge or evidence of the filing in accordance with the treaty requirements.

At any time during the period of a person's arrest under "provisional arrest," the formal extradition request may be received by the U.S. government and filed with the court. In such cases, the "provisional arrest" warrant is withdrawn and a warrant is substituted for it that is issued pursuant to 18 U.S.C. § 3184, which requires "probable cause" even though such "probable cause" is usually tested only at the "hearing" on the merits of the extradition request, which may be heard only several months later. Nothing, of course, precludes the filing of a petition for a writ of habeas corpus to test the existence of "probable cause" for the arrest. But if the issues are similar to those that will be raised at the "extradition hearing" and the relator raises the same issues again in a second post-§ 3184 hearing petition, the court may hold the issues to have already been adjudicated

156 *See* Ch. X.

157 United States v. Wiebe, 733 F.2d 549 (8th Cir. 1984).

and dismiss the second petition. Thus, it forces the relator to appeal the denial and argue that the first petition was to test sufficiency of "probable cause" for the issuance of an arrest warrant, or for purposes of bail, and that the second petition was for purposes of reviewing the court's "probable cause" finding under § 3184.

Usually AUSAs do not seek to substitute an extradition warrant for the "provisional arrest" warrant. Some judges, however, consider the substitution an unnecessary formality.

The Fourth Amendment prohibits issuance of arrest warrants without "probable cause" and the Fifth Amendment requires "due process of law" in all legal proceedings, including extradition. The two constitutional provisions comport no exceptions for "provisional arrest" in extradition proceedings. But the Supreme Court has yet to rule on the constitutionality of "provisional arrest" without "probable cause." The Second Circuit in Caltagirone v. Grant,[158] discussed above, held that "probable cause" is required before a judge or magistrate can issue a warrant for "provisional arrest."[159] But that decision was based on the language of the then-applicable 1973 extradition treaty between the United States and Italy.[160] Thus the holding in Caltagirone was partly predicated on the existence of treaty language that required "probable cause" for the issuance of a warrant for "provisional arrest." This decision may, however, hold the Fourth Amendment "probable cause" requirement applicable to "provisional arrest" even in the absence of relevant treaty language requiring it.[161] As a result of this decision, the 1984 United States–Italy Treaty[162] does not contain language in Article XII on "provisional arrest"[163] similar to Article XIII of the 1973 Treaty[164] under which the Caltagirone case was decided.

The constitutionality of "provisional arrest" by means of a treaty, which is deemed to supersede the Fourth and Fifth Amendments, has yet to be directly ruled upon. Reasonable constitutional interpretation of the Fourth and Fifth Amendments does not comport any exceptions, and no treaty can supersede such fundamental constitutional rights. To hold otherwise would be to permit the executive branch, with the "advice and consent" of the Senate, to for the benefit of a foreign state thwart the most basic rights of the U.S. Constitution, while at the same time precluding the right of judicial review as to the substantive rights of a person detained in the United States. But such a situation has existed de facto for some time, and this may explain why it has been the practice of the Senate in recent years to give its "advice and consent" to certain treaties subject to the provision that the treaty is subject to the U.S. Constitution.

Caltagirone could financially afford to appeal the case to the Second Circuit, and his able counsels would have surely made a compelling argument before the Supreme Court had it

158 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

159 A New York District Court has ruled that judges making such a "probable cause" determination must "evaluate the totality of the circumstances presented," and may rely on hearsay in reaching the probable cause determination, and that "statements of a victim and eye-witness to an alleged crime constitute probable cause, absent reasons to doubt the veracity of such sources." *In re Extradition of* Washington, 2007 U.S. Dist. LEXIS 2722, at *11–*12 (W.D.N.Y. 2007). The complaint in this case was supported by eyewitness statements and communication from French officials, which supported the probable cause finding made in the case. *Id.* at *14–*16.

160 *Id.* at 744.

161 In 2007 a New York district court was presented with the issue of whether the probable cause requirement was met in the case of a U.S. citizen held under provisional arrest pending a French extradition request. Based on the language in *Caltagirone*, the court reasoned that "if the Complaint establishes probable cause for Washington's provisional arrest, pursuant to Article 13 [of the U.S.–France extradition treaty], it is unnecessary to decide whether probable cause is required under the Fourth Amendment or the Treaty." *Washington*, 2007 U.S. Dist. LEXIS 2722, at *10.

162 Treaty on Extradition, Sept. 24, 1984, U.S.–Italy, T.I.A.S. No. 10,837.

163 *Id.* at art. XII.

164 Treaty on Extradition, Jan. 18, 1973, U.S.–Italy, 26 U.S.T. 493.

proven to be necessary. But few relators are similarly situated. Most similar cases are simply folded in the subsequent proceedings of a § 3184 hearing on the merits. Very few relators have the resources and inclination to argue a question for its principle.

As treaties provide for a specific period of time for "provisional arrest," the relator presumably has only that period to challenge the constitutionality or legal validity of the arrest, but such is not the case. The government will usually try, as a matter of trial strategy, to delay any review or hearings on issues relating to "provisional arrest" until the formal extradition request has been received. The government will encourage an early bail hearing[165] when the relator has very little to argue with or advance his/her case, and is very likely to lose his/her motion for release on bail. Once the period of "provisional arrest" expires and the formal extradition request is filed, the bail motion may be renewed, but the next stage is a hearing under § 3184, which if scheduled within a relatively short period of time will add support for the government's opposition to bail. Once the extradition request is filed, the government may argue that all prior issues of legality or validity of the "provisional arrest" or its "probable cause" are moot. That argument is appealing on its face, but misleadingly erroneous. The constitutionality of someone's unlawful detention is never moot. In addition, as an extradition request may be refiled against the same individual, and for the same charge after an earlier one was denied,[166] the issue of that person's "provisional arrest" and its "probable cause" basis cannot be moot because the proceedings have gone beyond that stage.[167] It must nevertheless be said that such preliminary arrests are needed and are frequently based on sufficient facts from which to adduce urgency or risk of flight.[168] This is particularly so in cases involving drug traffickers.

10. Arrest Warrants

An arrest warrant for purposes of provisional arrest is issued by any U.S. magistrate or federal district court judge where the individual may reasonably believed to be found.[169] If this were not the rule, a person could frustrate any efforts to arrest him/her by moving from one federal district to another.[170] This rule has existed since the Act of April 30, 1790.[171] Such an arrest warrant is valid in that federal district and in any other federal district where the person may be found.[172] The validity of such a warrant in a district other than the one issuing it does not affect the relator's right to have a hearing in the district in which he/she was arrested. The relator cannot be transferred to the district in which the warrant was issued, because he/she is entitled to the application of the substantive laws of the state where he/she is found in accordance with the principle of "double criminality."[173] This does not apply, however, to transfers within a given district or in another district having jurisdiction in the same state. The same rule applies to intra-district transfers from one division to another. The substance of the question lies in the difference between jurisdiction and venue; jurisdictional transfers would violate the principle of "double criminality,"[174] whereas venue transfer would not. Nothing, however,

165 *See infra* Sec. 12.

166 Caltagirone v. Grant, 629 F.2d 739, 749 (2d Cir. 1980).

167 *Id*.

168 *In re Extradition of* Washington, 2007 U.S. Dist. LEXIS 2722, at *20–*27 (W.D.N.Y. 2007) (discussing urgency established by the relator's fleeing France, refusing requests to surrender to French authorities, and failing to advise French authorities of his whereabouts).

169 Pettit v. Walshe, 194 U.S. 205 (1904).

170 United States v. Provoo, 124 F. Supp. 185 (S.D.N.Y.), *rev'd on other grounds*, 215 F.2d 531 (2d Cir. 1954).

171 Ch. 9, § 5, 1 Stat. 112.

172 Shapiro v. Ferrendina, 478 F.2d 894 (2d. Cir. 1993).

173 *See* Ch. VII, Secs. 2 and 5.

174 *Id.*

precludes a different approach should there be legislation on point, as "double criminality" can also be found under federal law.

11. Timeliness of the Extradition Request and Complaint

An extradition request can be submitted by a requesting state at any time subject only to the limitation contained in the particular treaty. Some of these limitations pertain to a statutory period relating to the offense charged.[175] Others concern the period of time within which the request is to be filed, and presumably that term also means "served upon the relator" when the relator has been arrested subject to a provisional arrest.[176] Thus, if the applicable treaty provides for a period of forty-five days of provisional arrest pending receipt of the request by the U.S. government and a complaint based thereon filed with the court having jurisdiction, that period of time becomes jurisdictional with respect to the relator's arrest. If the complaint, based on the formal request of the requesting state made in accordance with the treaty, is not filed within that period of time, the relator must be released. Nothing, however, precludes the government from filing another complaint based on that same formal request at any subsequent time. With such a filing, the government may seek the rearrest of the relator. Because extradition requests are not deemed res judicata, and new requests can be filed for the same relator and based on the same facts,[177] there can be limitations of a timeless nature on the submission of the request or the filing of a complaint based thereon. However, the relator must be released after the date specified in the applicable treaty, whereupon the original provisional complaint and warrant are to be dismissed. All these proceedings may then start again ab initio.

There are occasions where the last day specified by the treaty (forty-five days) may fall on a holiday, and in such cases the court may apply by analogy Federal Rule of Criminal Procedure 45(a), which tolls the last day if it is a Saturday, a Sunday, or a legal holiday.[178]

The Eighth Circuit considered the issue of the release of the relator based on the expiration of the forty-five day period in *United States v. Wiebe*.[179] In that case, the court stated:

> Wiebe also claims that because the extradition documents were not delivered to the United States within forty-five days after Spain was notified of his arrest as required by article I of the Supplementary Treaty, he is entitled to be set at liberty. We disagree. Extradition treaties are to be construed liberally to effect their purpose, i.e., the surrender of fugitives to be tried for their alleged offenses. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1986). *See Factor v. Laubenheimer*, 290 U.S. 276, 293, 54 S. Ct. 191, 195, 78 L. Ed. 315 (1933). We agree with the reasoning set forth in United States v. Clark, 470 F. Supp. 976 (D.Vt. 1979), and adopted by the district court, to hold that Spain had complied with the forty-five day requirement for filing the extradition documents. As indicated, the American Embassy received the extradition documents well within the forty-five day period set forth in the treaties, but these documents were lost and not replaced until after the forty-five days had run. The Clark court construed a forty-five day provision in an extradition treaty similar to the one in the case at bar as follows:
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> We are satisfied, however, that the Treaty does not require receipt at the courts of the asylum country. If this were the case, the interests of the demanding country under the Treaty could

175 *See* Ch. VIII, Sec. 4.4.

176 *See supra* Sec. 9.

177 *See* Ch. XII, Sec. 3.

178 *See* Liberto v. Emery, 724 F.2d 23 (2d Cir. 1983) (tolling the forty-sixth day, which was a holiday). In this case, however, the court failed to distinguish between the relator's right to be released after the forty-fifth day and the government's right to initiate an action after that period. *See also* United States v. Guerro, 694 F.2d 898 (2d Cir. 1982).

179 United States v. Wiebe, 733 F.2d 549 (8th Cir. 1984). *See also* Duran v. United States, 36 F. Supp. 2d 622 (S.D.N.Y. 1999).

> consistently be undercut by bureaucratic sluggishness within the asylum country's executive agencies. The Treaty requires demands for extradition to be made through "the diplomatic channel" only, not directly to the courts of the asylum country. . . . We infer from this requirement and from the language quoted above that the purpose of the forty-five day provision is to protect the asylum country and respondents in its custody from custodial burdens and deprivations due to footdragging on the part of the demanding country. See In re Chan Kam-Shu, 477 F.2d 333, 339 (5th Cir. 1973). Whether subsequent delay within the government of the asylum country violates the rights of potential extraditees would at most be a question of the asylum country's national law, and is not a sufficient basis, standing alone, on which to deny an extradition demand under the Treaty. United States v. Clark, 470 F. Supp. at 979 (footnote omitted). In the present case, Spain, the demanding country, was not guilty of delay at any time. Indeed, the Spanish government fully complied with all treaty provisions within eleven days of Wiebe's arrest. Therefore, the district court did not err in denying the petition for habeas relief.[180]

The court in Wiebe confused the treaty rights of the relator to be released after the specified period of time for the provisional arrest, and whether the requesting state acted within that period of time. The two are separate and indeed severable issues. The period of forty-five days in this case is designed to protect the relator from lingering in jail for what is already a lengthy period of time to accommodate the requesting state in preparing the treaty and statutorily required documents. The period of limitation is therefore on the detention of the relator, and not on the right of the requesting state to present its request at any time so long as the treaty in force permits it.

Finally, in the context of timeliness, it should be noted that there are no limitations of time, save for statutory limitations if they apply under the treaty, as to a requesting state's initiation of the criminal action against the relator in its own national criminal justice system, or for that matter, of the timeliness between such national proceedings and the submission of an extradition request.[181] Indeed, it would be unconscionable for U.S. courts to inquire into the judicial systems of foreign sovereigns to determine the timeliness or speediness with which these processes function, and indeed the procedure is effectively barred under the non-inquiry rule.

12. Bail

12.1. The Constitutional and Legal Bases for Bail

Bail is usually an issue that arises before the commencement of the hearing,[182] but it can also be raised at any time during the course of the extradition proceedings.

The Eighth Amendment of the U.S. Constitution states that "[e]xcessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[183] Furthermore, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law."[184] Notwithstanding these constitutional rights, relators are denied the right to bail; the Due Process Clause of the Fifth Amendment,[185] the Eighth

180 *Id.* at 554.

181 United States v. Leitner, 784 F.2d 159 (2d Cir. 1986); *In re* Russell, 805 F.2d 1215 (5th Cir. 1986).

182 *See* Ch. X.

183 U.S. Const. amend. VIII.

184 U.S. Const. amend. V.

185 Upholding the meaning and purpose of the Due Process Clause of the Fifth Amendment, the U.S. Supreme Court, in *United States v. Salerno,* stated: "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception . . ." 481 U.S. 739, 746 (1987). In domestic criminal proceedings, the Supreme Court has created two exceptions to an individual's right to liberty: (1) the relator posses a serious danger to the community, and (2) the relator is a severe flight risk; however, it is important to note that these exceptions are not applied in extradition proceedings. *Id.*

Amendment, and the Bail Reform Act of 1984[186] encompass the law governing the right to bail in all criminal proceedings in the United States. Yet these are not applied in extradition cases because of the characterization of extradition as a sui generis procedure. This is particularly troublesome in the pre-extradition phase of provisional arrest where persons sought for extradition are faced with a presumption against bail, and can be detained, for all practical purposes, without any legal basis, for up to ninety days under the provisions of certain treaties.[187]

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186 The Bail Reform Act assumes a presumption for bail, and provides for bail in cases in which the person is not a danger to the community and not a flight risk. Interestingly, the Bail Reform Act of 1984 only applies to persons accused of committing crimes in violation of U.S. law; therefore, it does not apply to cases involving international extradition. For a recent case surveying the judicial approach to the Bail Reform Act in international extradition proceedings, and applying the Bail Reform Act factors to the case before it, see *In re Extradition of Garcia,* 761 F. Supp. 2d 468, 477–481 (S.D. Tex. 2010). *See* United States v. Ramnath, 533 F. Supp. 2d 662, 666–667 (E.D. Tex. 2008)*; In re Extradition of* Molnar, 182 F. Supp.2d 684 (N.D. Ill. 2002); *request denied* 202 F. Supp. 2d 782 (N.D. Ill. 2002); *In re Extradition of* Sutton, 898 F. Supp. 691 (E.D. Mo. 1995); United States v. Glantz, 1994 U.S. Dist. LEXIS 5448, at *1 (S.D.N.Y. Apr. 29, 1994*);* Kamrin v. United States, 725 F.2d 1225, 1227–1228 (9th Cir.), *cert. denied,* 469 U.S. 817 (1984) (finding that because extradition cases are not criminal in nature, the Bail Reform Act does not apply). *See also In re Extradition of* Bowey, 147 F. Supp. 2d 1365, 1367–1368 (D. Ga. 2001) (discussing the Bail Reform Act).

In *In re Extradition of Bowey*, the court held:

> The Supreme Court has held that while bail should not ordinarily be granted in extradition cases, release was not foreclosed where special circumstances exist. *See Wright v. Henkel,* 190 U.S. 40, 23 S.Ct. 781, 47 L.Ed. 948 (1903). The Eleventh Circuit has held that there is a presumption against bond, and that a defendant in an extradition case will be released on bail only if he can prove "special circumstances." *See Martin v. Warden, Atlanta, Pen,* 993 F.2d 824, 827 (1993). This presumption in extradition cases varies from the procedure under the Bail Reform Act of 1984, 18 U.S.C. § 3142, and its presumption in favor of release for persons awaiting trial in federal court for offenses against United States law, except in cases where there is a flight risk or threat of harm to the community or to any person. The reason for distinguishing granting release in extradition cases from federal criminal cases is that extradition cases involve an overriding interest in meeting treaty obligations. "If the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United States to obtain extradition of its fugitives." *United States v. Taitz,* 130 F.R.D. 442, 444 (S.D.Cal.1990) (citation omitted).
>
> [. . .] Even though Mr. Bowey would be entitled to bail under the Bail Reform Act, because he is facing extradition, the general presumption against bail in extradition cases requires that he also show that special circumstances exist. The first factor that shows special circumstances exist in this case is that releasing Mr. Bowey on bail would allow him to participate in the divorce proceedings in Cobb County Superior Court. Some courts have held that the accused's desire to participate in pending civil actions is not a special circumstance. *See Koskotas v. Roche,* 931 F.2d 169 (1st Cir.1991); *see also United States v. Hills,* 765 F.Supp. 381 (E.D.Mich.1991). However, in the instant case, the civil proceedings in Cobb County Superior Court are directly related to the reasons for his extradition and the resolution of the issues in that matter could directly affect the prosecution of the charges he faces in France. Accusations by Mr. Bowey's estranged wife and the French Government should not be allowed to limit his ability to attend the divorce and custody proceedings by entangling him in extradition proceedings, particularly when the divorce and custody issues are the underlying disputes from which *all* these proceedings arise.

Bowey 147 F. Supp. 2d at 1367–1368.

187 The difference in the standard applied between domestic bail cases and extradition proceedings is best illustrated in the case of *Duca v. United States*, in which the magistrate, after finding probable cause to support extradition, indicated that he would have granted the relator continued release on bail if the case were a domestic criminal proceeding; however, he could not find any exceptional circumstances that would warrant bail in the context of an extradition proceeding. 1995 WL 428636, at 4 (E.D.N.Y.

Detention of a person for periods of up to ninety days[188] without "probable cause" and without bail is of questionable constitutional validity, but it remains in practice.

The Northern District Court in Illinois held in *In re Extradition of Molnar*:

> Some ninety nine years ago in *Wright v. Henkel,* 190 U.S. 40, 23 S.Ct. 781, 47 L.Ed. 948 (1903), the Supreme Court held that while bail should not ordinarily be granted in extradition cases, release was not foreclosed where special circumstances exist. 190 U.S. at 63, 23 S.Ct. 781. The courts that have interpreted *Wright v. Henkel* generally agree that there is a presumption against bail in an extradition case and that a defendant facing an extradition hearing has the burden of establishing special circumstances in order for a court to order pre-hearing conditional release. *Salerno v. United States,* 878 F.2d 317 (9th Cir.1989); *United States v. Leitner,* 784 F.2d 159 (2d Cir.1986). The rationale for distinguishing pretrial release in extradition cases from federal criminal cases is that extradition cases involve an overriding national interest in complying with treaty obligations. If the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United States to obtain extradition of its fugitives. *U.S. v. Taitz,* 130 F.R.D. 442 (S.D. Cal.1990). Also *see generally,* Hall, *A Recommended Approach to Bail in International Extradition Cases.* 86 Mich.L.Rev. 599 (1987); Whiteman, 6 *Digest of International Law,* 1033–1044 (1968). Additionally, because an extradition proceeding is not a criminal case, the Bail Reform Act of 1984 does not govern, nor is its presumption in favor of bail a part of extradition proceedings. *Kamrin v. United States,* 725 F.2d 1225, 1227–1228 (9th Cir.), *cert. denied,* 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984).[189]

The Second Circuit in Caltagirone held that the relator was entitled to a hearing to establish the existence of "probable cause" justifying his detention, stating:

> Article XIII requires applications for provisional arrest to set forth "such further information as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party." Clearly, the parallelism was intended by the Treaty's draftsmen, and this suggests that in all cases where the United States is the "requested party," a showing of probable cause is required under both articles [Article XIII, which deals with provisional arrests, and Article XI, which governs formal requests for extradition].[190]

In Caltagirone the court concluded that even though Italy had issued warrants for the relator's arrest for fraudulent bankruptcy, the warrants were insufficient to satisfy the treaty requirements set forth in Article XIII.[191] As a result, the realtor was granted bail, and after pending for four years, the Italian Supreme Court reversed the lower court order on which the extradition request was based. Thus extradition was denied and the realtor was free to leave the United

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July 7, 1995). *See also In re Extradition of* Russell, 805 F.2d 1215, 1216 (5th Cir. 1986); *In re Extradition of* Sacirbegovic, 280 F. Supp. 2d 81 (S.D.N.Y. 2003) (granting bail.).

188 It is important to note that relators are often detained longer than the ninety days. *See In re Extradition of* Siegmund, 887 F. Supp. 1383, 1387 (D. Nev. 1995) (holding that "a ninety-day wait while extradition proceedings are in the works would not even come close to violating defendant's due process rights").

189 *In re Extradition of* Molnar, 182 F. Supp. 2d 684, 686–687 (N.D. Ill. 2002).

190 Caltagirone v. Grant, 629 F.2d 739, 744 (2d Cir. 1980).

191 The court stated:

> Article XIII of the Treaty provides that an application for provisional arrest must contain four elements: a description of the person sought; an indication of intent formally to request the extradition of the person; an allegation that a warrant for the person's arrest has been issued by the requesting state; and, finally, "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party."

Id.

States. Had the relator in this case not been released on bail he would have needlessly spent four years in jail.[192]

Because most treaty provisions do not specify what information must be sent along with the provisional arrest request, most requests are sent via a one-page fax; therefore, it is likely that the relator may be detained absent the knowledge of the bases for the charges pending against him. As discussed below, in order for the detainee-relator to avail himself/herself of bail, he/she must prove: (1) that he/she is subject to "special circumstances" warranting his/her bail, and (2) that he/she is not a risk of flight. However, it is very difficult to demonstrate "special circumstances" when the detainee-relator is unaware of the legal bases of the charges pending against him, and it is equally difficult for the relator to prove he/she is not a risk of flight as the facts relevant to such an inquiry usually corresponds with the type of crime he/she is charged with. Therefore, for all practical purposes, this process has given the government the right to detain people without due process of law on the sole representation of the requesting government and with no more than a fax containing a few lines regarding the applicable treaty provision, the person sought for extradition, and the charge.

Detention of a relator without bail has become the government's favorite tool to pressure a person into waiving his/her right to challenge the request in extradition proceedings, and thereby consent to extradition. It is also a way to reduce the relator's will to fight extradition. This is particularly effective in white collar crimes where the relator is unaccustomed to jail conditions. It is also an effective way of pressuring relators who do not have the economic capabilities to sustain an extended period of litigation while incarcerated and without the means to earn income to pay for their defense and support their families. In many cases, the government also combines its efforts to keep the relator detained with the freezing of his/her assets, thereby depriving him/her of the opportunity to secure representation. The fact that the relator is detained also makes it more difficult for him/her to fight the government's freezing of his/her assets. This is why the government in almost all extradition cases opposes bail and works constantly to encourage judges in the belief that there is no right to bail under the Eighth Amendment, and that there is a presumption against bail. This leaves the relator with the limited right of proving "special circumstances," and proving he/she is not a risk of flight, before being eligible for bail, as discussed below.[193]

The question of whether there exists a constitutional right to bail has been avoided by U.S. courts because it appeared moot insofar as a right to bail was available under the "special circumstances" standard that was espoused in 1903 by the U.S. Supreme Court in *Wright v. Henkel*.[194] Defining the role of lower courts in granting bail, the Supreme Court stated:

> We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute or that, while bail should not ordinarily be granted in

192 An example of a relator who was denied bail only to be released upon a finding that there was no probable cause to support the extradition request was Edward Mazur. Mr. Mazur spent about two-and-a-half months in jail on baseless charges. *See* Bruce Zagaris, *Delays Plague U.S. Extradition in Polish Contract Murder Case*, 23 Int'l Enforcement L. Rep. 263–264 (July 2007). The magistrate judge stated the only "special circumstance" in this case was "the heinous and high profile nature of the crime." *Id.* at 264. Mazur was released after the decision of July 20 in *In re Extradition of Mazur*, 2007 U.S. Dist. LEXIS 52551 (N.D. Il. 2007). This shows that the political nature of the proceedings can cloud the court's focus on the relator's rights.

193 *See United States v. Epstein*, in which the magistrate judge allowed bail, but the decision was reversed by the Eastern District court on the grounds that the defendant lacked ties with the United States but had extensive ties to Brazil with which the United States did not have an extradition treaty. Interestingly, both the decision to grant bail and to reverse it did not delve into the standard of "special circumstances." United States v. Epstein, 155 F. Supp. 2d 323 (E.D. Penn. 2001).

194 Wright v. Henkel, 190 U.S. 40 (1903).

> cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief.[195]

Even though the Wright case recognized lower courts' right to grant bail absent a specific statutory or treaty provision, it mandated that bail only be granted in "special circumstances."[196] Therefore, special circumstances became the constitutional standard for the granting of bail. Through the years, the "special circumstances" standard has been disconnected from the right to bail; as a result, "special circumstances" has been transformed into a presumptive anti-bail standard. On its face, the standard appears to be neutral; however, because the Wright court failed to define what would qualify as "special circumstances" and did not address the constitutional implications of its decision, the standard has been inconsistently applied.[197]

In 1997, the Ninth Circuit, in Parretti v. United States, which was vacated on other grounds, reopened the question of whether a constitutional right to bail exists by holding that "until such time as an individual is found to be extraditable, his or her Fifth Amendment interest trumps the government's treaty interest unless the government proves to the satisfaction of the district court that he or she is a flight risk."[198] Therefore, under Parretti, if it were to be in effect, the relator's right to bail would be subject to the same standards as applied to criminal cases, thereby recognizing the existence of a presumption for bail except in cases in which the government can prove that the relator is a flight risk or possibly a danger to the community. No other circuit so far has adopted the Parretti standard, and, therefore most courts continue to apply the "special circumstances" standard. For example, and in opposition to the Parretti decision, the District Court for the District of Connecticut stated: the special circumstances "standard was set by the United States Supreme Court and has been followed by every court, except the Ninth Circuit in Parretti, for the past 90 years; and this court will not now disregard it or brand it unconstitutional."[199]

The fact that the relator in *Parretti* fled from the United States to Italy raises the question of whether relators should be given bail in any circumstance.[200] This is a significant question,

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195 *Id.* at 63 (emphasis added).

196 *Id.* Interestingly, in *Wright*, the relator's petition for bail on the grounds that continued incarceration would be injurious to his health by precipitating pneumonia was rejected as failing to constitute "special circumstances." Traditionally, bail pending extradition is granted only under "special circumstances." Borodin v. Ashcroft, 136 F. Supp. 2d 125 (E.D.N.Y. 2001) ("special circumstances" are limited to situations in which the justification for release is "pressing as well as plain"); United States v. Leitner, 784 F.2d 159, 161 (2d Cir. 1986); Hu Yau-Leung v. Soscia, 649 F.2d 914, 920 (2d Cir. 1981), *cert. denied* 454 U.S. 971 (1981); Beaulieu v. Hartigan, 554 F.2d 1 (1st Cir. 1977); *In re* Mitchell, 171 F. 289 (S.D.N.Y. 1909) (defining the scope of "special circumstances" as those that are "the most pressing…and when the requirements of justice are absolutely peremptory.").

197 *See Wright*, 190 U.S. 40.

198 Parretti v. United States, 112 F.3d 1363, 1384 (9th Cir. 1997), *vacated by* 143 F.3d 508 (9th Cir. 1998), *cert. denied* 1998 U.S. LEXIS 5702 (1998). Parretti had been granted bail on the unprecedented basis that the Sixth Amendment applied, as opposed to "the special circumstances test" for bail provided for in *Wright*, 190 U.S. 40. The opinion of the Ninth Circuit in this case was probably the most far-reaching of any extradition case in any circuit in the United States with respect to issues of bail and probable cause, thus, making it more regrettable that the opinion had to be vacated after Parretti jumped bail and escaped to Italy where he was held non-extraditable because Italy's constitution prohibited the extradition of nationals. The United States could have asked Italy to prosecute him, as the Italian Criminal Code allows for prosecution of nationals. This was done with respect to the *Venezia* case, where Italy denied extradition because of the death penalty in the United States, but prosecuted him on the basis of the nationality principle. He was found guilty of murder on the same facts underlying the Florida indictment for murder for which his extradition was denied.

199 *In re Extradition of* Rovelli, 977 F. Supp. 566, 567 (D. Conn. 1997).

200 Joshua T. Fougere, *Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition*, 42 Colum. J.L. & Soc. Probs. 177 (2008) (arguing against bail pending extradition, in part, based on potential foreign relations embarrassment if the released relator flees again).

particularly as international extradition requests have increased in number over time, and the United States may seek to extradite terrorism suspects who are not subjected to abduction or unlawful seizure, including extraordinary rendition.[201] Rather than allow for bail, some have suggested that a relator only be allowed to challenge government delay in conducting an extradition hearing following provisional arrest or the filing of a formal extradition request, either through a writ of habeas corpus or a mandamus.[202] This suggestion is based on the claim that: (1) the "special circumstances" outlined in *Wright v. Henkel* was dicta; (2) legislative history shows that legislators were more concerned with compliance with treaty requirements than with providing bail to a relator; (3) bail is a function of an Article III court under the U.S. Constitution, and does not obtain in Article II proceedings concerning extradition; and (4) analogous immigration proceedings allow a challenge to unreasonable detention in the removal context, which could be applied to extradition.[203] The suggestion that, absent a legislative action by the U.S. Congress on the matter, the only ground for relief available to the relator should be a challenge to unreasonable government detention pending the extradition hearing is based on the premise that the government will expeditiously seek to institute proceedings against the relator in accord with strict deadlines.[204]

However, this altruistic view of the government's motivations and processes ignores the government's use of detention as a means to pressure the relator to waive extradition proceedings and consent to extradition. According to one proposed standard, the relator could theoretically be detained up to ninety days on a provisional arrest warrant, depending on the treaty involved, and then another six months after the filing of a formal extradition request, before an extradition hearing is set.[205] Spending nine months in a U.S. prison, even if the relator can expect to mount a successful defense to the extradition proceedings, is a harsh prospect to face and a weighty consideration in the decision of whether to waive the hearings altogether.

It is unsurprising that the history of extradition treaty negotiations and federal legislation regarding the extradition process do not confer a right to bail, as historically extradition treaties concerned the relation of sovereign states and the role of the individual in international law was subordinate to that of the state. Thus, the U.S. Supreme Court in *Wright*, when considering the bail question in the extradition case before it, looked to a British decision in *Queen v. Spilsbury* in which the court held that British courts had jurisdiction to admit to bail under the common law, independent of statutory provisions.[206] The British case presented the same problem that the U.S. case did: the applicable bail provisions differed as between domestic rendition in Britain and extradition pursuant to the British Extradition Acts.[207] Although the power was to be exercised sparingly, this common-law–based power reflects the practical reality that absent judicial intervention in certain circumstances, there would be no effective way to challenge abuse of detention by the government in the extradition context. This same policy concern remains relevant in the modern context and militates against removing the current bail analysis.

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201 *See* Ch. V. *See also* Fougere, *supra* note 201, at 180–181 (discussing the increase in international extradition requests over time).

202 Fougere, *supra* note 201, at 213–224.

203 *Id*. The case of *Zadvydas v. Davis* is discussed in this article for an analog to the immigration removal context, to suggest that a six-month delay could allow a relator, like an alien facting removal, to challenge the basis of his continued detention. *Id.* at 216.

204 *Id.* at 213–224.

205 *Id.* at 216.

206 Wright v. Henkel, 190 U.S. 40, 63 (1903).

207 *Id.*

12.2. Jurisprudential Applications of Bail: The Meaning of "Special Circumstances"[208]

Over the years, the reiteration of the "special circumstances" standard has been presented by the government as if it were a presumption against bail because of the likelihood that the relator might flee, which would thwart the United States' ability to fulfill its treaty obligations with the requesting state.[209] Therefore, the determination of whether to grant bail requires federal courts to balance the relator's liberty interest with that of the nation's foreign policy interests. While recognizing the importance of the United States' duty to uphold its treaty obligations, the court in United States v. Messina stated that "the broad authority of the executive in matters bearing on foreign affairs is not absolute when constitutional interests are implicated."[210] However, despite the court's holding, there remains a strong presumption against bail in extradition cases.

Moreover, the actual application of the "special circumstances" standard illustrates that the relator's ability to receive bail is wholly dependent on successfully proving the existence of "special circumstances." Thus, courts have established that the burden of proving "special circumstances" rests on the relator, and only once that is proven can the relator offer evidence that he/she is not a risk of flight. This establishes a double burden of proof on the relator to have access to bail. It should be noted that the "special circumstances" test has been applied to both pre- and post-certification stages of extradition.[211]

"Special circumstances" have come to represent factors that other relators would not normally experience; therefore, they must be extraordinary and unique to that individual. As a result, a realtor's discomfort in jail,[212] his/her minor health problems,[213] or his/her need to consult with counsel or to run an ongoing business have been deemed insufficient to constitute "special

208 For a thorough discussion of all the issues presented in this section, see *In re Extradition of Garcia*, 761 F. Supp. 2d 468 (S.D. Tex. 2010).

209 *See* Pavel Borodin v. Ashcroft, 136 F. Supp 2d 125, 128 (E.D.N.Y. 2001) (finding that a presumption against bail exists because of the important national interest in successfully fulfilling United States' obligations under extradition treaties with other countries); *In re* Mainero, 950 F. Supp. 290, 293 (S.D. Cal. 1996) (finding that a presumption against bail exists; the court quoted *Wright v. Henkel*, in which the Supreme Court stated that "the demanding government is entitled to delivery of the accused on the issue of proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted."); United States v. Taitz, 130 F.R.D. 442, 444 (S.D. Cal. 1990) (stating that "[i]f the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United States to obtain extradition of its fugitives."); United States v. Leitner, 784 F.2d 159 (2d Cir. 1986) (stating that "issues of comity, and the nation's concern for its relationship with other countries requires the court to apply standards in an extradition case far more strict than those applied in a domestic criminal cases."). *See also* Fougere, *supra* note 201 (arguing against bail pending extradition, in part, based on potential foreign relations embarrassment if the released relator flees again).

210 United States v. Messina, 566 F. Supp. 740 (E.D.N.Y. 1983).

211 Wroclawski v. United States, 634 F. Supp. 2d 1003, 1005 (D. Ariz. 2009).

212 United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979).

213 The court in *In re Extradition of Nacif-Borge* held that because the relator's condition was not debilitating and easy to control, his health condition did not warrant a finding of special circumstances. 829 F. Supp. 1210, 1216 (D. Nev. 1993) (citing United States v. Kidder, 869 F.2d 1328, 1330–1331 (9th Cir. 1989), in which the court stated that to avoid incarceration defendant "must show that no constitutionally acceptable treatment can be provided while he is imprisoned"); United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990) (holding that health problems must be unique or they cannot be dealt with while in custody so as to warrant a finding of special circumstances).

circumstances." For example, in United States v. Tang Yee-Chun, the court rejected granting bail because the relator, who was from Hong Kong and spoke a unique Chinese dialect, did not adequately demonstrate that it was more burdensome for him to defend his case while being detained.[214]

It should be emphasized that the "special circumstances" standard is a separate and independent issue from that of the risk-of-flight inquiry. A two-part test[215] best highlights the analysis that courts face when deciding whether the relator should be afforded the right to bail: (1) the court must ascertain whether any "special circumstances" exist;[216] and (2) if "special circumstances" do exist, the court must determine whether the relator presents a risk of flight.[217] The court in *In re* Extradition of Nacif-Borge stated that "given that special circumstances are absolutely required for bail, and that risk of flight is not determinative, the best approach first explores special circumstances, and then only after a finding of special circumstances examines risk of flight."[218] The fact that the relator is not a flight risk is not considered a "special circumstance;"[219] instead, "special circumstances" constitute a threshold that a person must reach in order to be considered for bail.

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214 United States v. Tang Yee-Chun, 657 F. Supp. 1270 (S.D.N.Y. 1987).

215 Currently, courts are split on whether the analysis should begin with "special circumstances" and then move to the risk of flight inquiry, or with the risk of flight inquiry and then analyze the existence of "special circumstances." For purposes of this book, the former analysis will be accepted as the test for deciding whether to grant bail. Courts that begin with the risk of flight inquiry reason that such point is the correct starting point because of the connection between the presumption against bail and the relator's flight risk. *See* Salerno v. United States, 878 F.2d 317, 318 (9th Cir. 1989) (espousing a two-part test to analyze whether the relator should be afforded the right to bail; the first part of the test requires the court to ascertain whether the relator is a flight risk, and if the relator is not a flight risk, then the court must consider whether any "special circumstances" exist. These cases are, however, cited as illustrations of what "special circumstances" have been considered and the standards used to establish "special circumstances.") *See* United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Cal. 1990) (found that the relator did not pose a flight risk, and then analyzed whether "special circumstances" existed warranting realtor's bail); *In re Extradition of* Russell, 647 F. Supp. 1044, 1049 (S.D. Tex.), *aff'd,* 805 F.2d 1215 (5th Cir. 1986); United States v. Smyth, 795 F. Supp. 973, 976 (N.D. Cal. 1992) (stating that "the court follows the analysis employed in Taitz which held that, under Salerno, the court must first determine whether there is a risk of flight. If there is no risk of flight, the court must then determine whether "special circumstances" exist which support granting release on bail.").

216 Courts will likely deny bond if no special circumstances are presented in support of a relator's request for release on bond, even if the relator raises a fear of torture if extradited. *See generally In re Extradition of* Stern, 2007 U.S. Dist. LEXIS 79486, at *14 (S.D. Fla. 2007).

217 The district court in *In the Matter of the Extradition of Mainero* found that in the absence of a finding of "special circumstances" it becomes unnecessary to assess the risk of flight. 950 F. Supp. 290, 295 (S.D. Cal. 1996) *See also In re Extradition of* Morales, 906 F. Supp 1368 (S.D. Cal. 1995) (finding that the "special circumstances" inquiry comes first, and if "special circumstances" are shown, then the person must demonstrate that he will not flee or pose a danger to the community). *See also In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054 (E.D.N.Y. 2011) (finding that the relator must first establish "special circumstances" exist and then show that the relator is "neither a risk of flight nor a danger to the community").

218 *In re Extradition of* Nacif-Borge, 829 F. Supp. 1210, 1216 (D. Nev. 1993).

219 United States v. Tang Yee-Chun, 657 F. Supp. 1270 (S.D.N.Y. 1987) (holding that "even if he could prove a low risk of flight, such a finding would not be a sufficient showing of 'special circumstances' in and of itself to justify bail"). *In re* Russell, 805 F.2d 1215, 1217 (5th Cir. 1986); United States v. Leitner, 784 F.2d 159, 161 (2d Cir. 1986); United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979) ("Applicant's arguable acceptability as a tolerable bail risk is not a special circumstance.") (citations omitted); *In re* Martinov, No. 06mj336, 2006 U.S. Dist. LEXIS 87389, at *2 (N.D. Iowa Dec. 1, 2006); *In re* Santos, 473 F. Supp. 2d 1030, 1035–1036 (C.D. Cal. 2006); *In re* Harrison, No. 03 CR.

Once deemed eligible for bail the relator must pass the risk-of-flight test, which involves an assessment of several factors, including: (1) the type of crime committed, (2) the possible danger the realtor may pose to the community, (3) the relator's past criminal conduct, (4) the realtor's past behavior with other court dates,[220] (5) the relator's ties to the community, (6) the relator's relationship with his/her place of origin, and (7) the relator's character.[221] However, it should be remembered again that the "special circumstances" assessment is also a factor, and that a finding that the relator is not a flight risk will not in and of itself justify bail in an extradition case.[222]

As is apparent, the factors identified above closely mirror those applied in bail hearings in Article III cases. Indeed, although the Bail Reform Act is not formally applicable to bail hearings in extradition proceedings, its factors have been used as a reference point for establishing flight risk.[223]

An example of the application of these factors came in In re Extradition of Ernst, where the federal district court for the Southern District of New York held that the relator was a low risk of flight based on the following factors:

1. Ernst had lived and worked in the community for approximately ten years;

2. The Pretrial Services Agency reported that Ernst had a stable family consisting of his wife and two sons;

3. Ernst was not accused of a violent crime;

MISC. 01, 2004 WL 1145831, at *9 (S.D.N.Y. May 21, 2004); *In re* Sacirbegovic, 280 F. Supp.2d 81, 88 (S.D.N.Y. 2003); *In re Extradition of* Molnar, 182 F. Supp. 2d 684, 687 (N.D. Ill. 2002); Borodin v. Ashcroft, 136 F. Supp. 2d 125, 130 (E.D.N.Y. 2001); Hababou v. Albright, 82 F. Supp. 2d 347, 352 (D.N.J. 2000); *In re* Gonzalez, 52 F. Supp. 2d 725, 735 (W.D. La. 1999); Duran v. United States, 36 F. Supp. 2d 622, 628 (S.D.N.Y. 1999); United States v. Bogue, No. CRIM.A. 98-572-M, 1998 WL 966070, at *4 (E.D. Pa. Oct. 13, 1998); *In re* Ernst, No. 97 CRIM.MISC.1PG.22, 1998 WL 51130, at *13 (S.D.N.Y. Feb. 5, 1998); *In re* Rovelli, 977 F. Supp. 566, 568 (D. Conn. 1997); *In re* Mainero, 950 F. Supp. 290, 295 (S.D. Cal. 1996); Duca v. United States, No. 95-713, 1995 WL 428636, at *16 (E.D.N.Y. July 7, 1995); *In re* Rouvier, 839 F. Supp. 537, 539 (N.D. Ill. 1993); United States. v. Smyth, 795 F. Supp. 973, 976 (N.D. Cal. 1992); United States v. Hills, 765 F. Supp. 381, 386 (E.D. Mich. 1991); United States v. Taitz, 130 F.R.D. 442, 445 (S.D. Cal. 1990); *cf.* Salerno v. United States, 878 F.2d 317, 318 (9th Cir. 1989) ("[Flight risk] is not the requirement for release in an extradition case.").

220 Where the relator has fought his removal in legal proceedings for years, this has supported a finding that the relator does not pose a flight risk. *See* United States v. Castaneda-Castillo, 739 F. Supp. 2d 49, 63–64 (D. Mass. 2010).

221 *In re Extradition of* Nacif-Borge, 829 F. Supp. 1210, 1222 (D. Nev. 1993). *See also In re Extradition of* Santos, 473 F. Supp. 2d 1030, 1041 (C.D. Cal. 2006), stating:

> Among other things, the court may consider the nature and circumstances of the charged offenses; the weight of evidence against the potential extraditee presented in the extradition complaint and supporting affidavits; the seriousness of the offense charged and the range of possible penalties; the potential extraditee's past conduct, including history of drug or alcohol abuse, any prior criminal convictions and association with known criminals and evidence of attempts to avoid arrest; the potential extraditee's use of or access to dangerous weapons; his or her family ties and ties to the community, employment, and financial resources; whether the potential extraditee's release poses a danger to any person or to the community; and the possibilities of posting security for an appropriate bond.

222 *In re Extradition of* Rovelli, 977 F. Supp. 566, 568 (D. Conn. 1997). Rovelli, who was held without bail, consented to his return to Italy where after nine months' detention "under investigation," he was released. *See also In re Extradition of* Ernst, 1998 U.S. Dist. LEXIS 710, at *39 (citing United States v. Letiner, 784 F.2d 159, 161 (2d Cir. 1986)).

223 United States v. Ramnath, 533 F. Supp.2d 662, 667–671 (E.D. Tex. 2008) (applying the Bail Reform Act factors and determining that the relator was not a flight risk).

4. Ernst had no criminal record in the United States; and

5. Ernst faced a relatively modest two-year sentence in Switzerland.[224]

However, even though Ernst was found to be a low flight risk, the court refused to grant bail because he had failed to prove "special circumstances," an inversion of the usual practice of assessing special circumstances before considering the specific factors enunciated above. This was not the case in *In re Extradition of Kapoor*, where the federal district court for the Eastern District of New York found that the relator did not pose a flight risk as he had established ties to the community in the United States, established a family in the United States, and agreed to strict conditions of release.[225]

In *In re Extradition of Garcia* the federal district court for the Southern District of Texas also inverted the order and considered whether the relator posed a flight risk before considering the existence of "special circumstances." In that case the relator, Garcia, was found to be a flight risk and a danger to the community for the following reasons:

1. He desired to avoid an inhumane death for being a government informant;

2. He was charged with a crime of violence facing a potential sentence of twenty to fifty years in prison;

3. He had virtually no ties to Mexico (the requesting state);

4. He had no ties to the Laredo (Texas) community (where he lived); and

5. He had a criminal history in the United States, including two felony drug convictions, two other drug arrests, and a misdemeanor driving offense.[226]

Accordingly, Garcia's bail request was denied.

The effects of the Wright decision and its progeny on the relator's ability to receive bail have made bail in extradition the exception. The courts have, however, recognized various factors as constituting "special circumstances." They include: (1) length of the proceedings and detention, (2) the relator's need to consult with counsel due to the complicated nature of the case, (3) health condition of the relator,[227] (4) age of the relator, (5) availability of bail to relator at home or abroad, (6) likelihood of the relator showing absence of probable cause or showing the applicability of a treaty defense, (7) deprivation of religious practices while incarcerated; (8) attendance at other legal proceedings, (9) the court's liberal application of the bail standard, (10) lack of any diplomatic necessity for detention, and (11) the relator's work with special groups.

The following situations have been deemed to constitute "Special Circumstances:"

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224 *Ernst*, 1998 U.S. Dist. LEXIS 710, at *39.

225 *In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054, at *14–*15 (E.D.N.Y. 2011).

226 *In re Extradition of* Garcia, 761 F. Supp.2d 468, 476–477 (S.D. Tex. 2010).

227 *But see In re* Kim, No. CV 04-3886-ABC (PLA), 2004 U.S. Dist. LEXIS 12244 (C.D. Cal. 2004) (holding that health condition of bad back did not require release on bail). *See also In re Extradition of* Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993); *In re Extradition of* Morales, 906 F. Supp. 1368 (S.D. Cal. 1995); *In re Extradition of* Molnar, 182 F. Supp. 2d 684 (N.D. Ill. 2002) (granting bail because it was warranted under the circumstances, even though they did not constitute special circumstances); *In re Extradition of* Rouvier, 839 F. Supp. 537 (N.D. Ill. 1993) (denying bail even though relator had heart condition, as it was treatable with medication); *In re Extradition of* Gonzalez, 52 F. Supp. 2d 725 (W.D. Louisiana) (granting bail where a court found that relator had a reasonable likelihood of succeeding on the merits of the extradition due to the unreliability of the principle witness in the case); *In re Extradition of* Mainero, 950 F. Supp. 290 (S.D. Cal. 1996) (looking at cumulative effect of several factors to constitute special circumstances); United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990) (allergic reactions to common food and substances in prisons was deemed special circumstances).

12.2.1. Length of the Proceedings and Detention

Courts have not established a bright-line rule defining when the length of the proceedings or detention is so excessive as to warrant a finding of "special circumstances." Instead, this determination is largely dependent on the facts of the case and the reasons for the delay. For example, the court in *In re* Gannon granted bail because the hearing was delayed for more than two months due to the difficulty in obtaining witnesses.[228] Similarly, in Vardy v. United States, the relator was granted bail because his case had already been pending for two years following his arrest.[229] In *In re Extradition of Santos*, the court reasoned that a seven-month delay constituted a special circumstance where evidence showed that the relator twice successfully challenged the underlying Mexican arrest warrant through an *amparo* action, showing that this was not an ordinary delay in extradition matters.[230] In In re Extradition of Morales the court held that: "the seven months which have already passed, together with the additional time the Court anticipated will be required before this matter is resolved, to be an undue delay and to constitute a special circumstance justifying Morales' release on bail."[231]

These cases can be distinguished from United States v. Leitner, in which the court found that a six-month delay in executing a provisional arrest warrant did not present a "special circumstance" because the relator was not detained during this period of time.[232] Similarly, in *United States v. Nolan*, the federal district court for the Northern District of Illinois reasoned that a seven-month delay by the government in filing charges was not sufficient to constitute "special circumstances."[233]

It has been held that "the normal passage of time inherent in the litigation process [does not] constitute[] a 'special circumstance.' "[234] Further, mere anticipation of delay is generally insufficient to constitute "special circumstances."[235] However, in certain circumstances, the "normal length of proceedings" can be extended beyond that which truly constitutes the normal length of a proceeding. For example, a court found that an eleven-year delay in seeking the relator's

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228 *In re* Gannon, 27 F.2d 362 (E.D. Pa. 1928). It should be noted that the court's decision was also influenced by the fact that the offense committed by the relator was bailable under both the laws of Pennsylvania and the laws of Canada, the country seeking extradition. *Id.*

229 United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979). *See also In re Extradition of* Nacif-Borge, 829 F. Supp. 1210, 1215 (D. Nev. 1993).

230 *In re Extradition of* Santos, 473 F. Supp. 2d 1030, 1036–1038 (C.D. Cal. 2006).

231 *In re Extradition of* Morales, 906 F. Supp. 1368, 1374–1375 (S.D. Cal. 1995).

232 United States v. Leitner, 784 F.2d 159 (1986).

233 United States v. Nolan, 2009 U.S. Dist. LEXIS 111299, at *5 (N.D. Ill. 2009).

234 United States v. Lui Kin-Hong, 83 F.3d 523, 525 (1st Cir. 1996). In *United States v. Lui Kin-Hong*, where an officer of the British American Tobacco Co. was accused of conspiracy to receive bribes in order to monopolize the export of cigarettes to China, the court held that protracted proceedings, because of Hong Kong's reversion, did not justify release on bail; however, the court noted that if an unusual delay was to transpire, the relator would be able to file a new motion for release on bail. *Id., on remand* 939 F. Supp. 934 (D. Mass 1996),*habeas corpus granted by* 957 F. Supp. 1280 (D. Mass 1997),*rev'd by* 110 F.3d 103 (1st Cir. 1997).*See also* United States v. Castaneda-Castillo, 739 F. Supp.2d 49, 57 (D. Mass. 2010). The relator was a lieutenant in the Peruvian military alleged to have been involved in a massacre of civilians. However, after legal proceedings, it was undisputed that neither the relator nor his troops engaged in the massacre. The relator had also applied for amnesty based on threats on his life by the Peruvian Communist Party, and had been in related proceedings since 1993. This protracted history supported the court's reasoning that the length of proceedings constituted "special circumstances." *See also* United States v. Ramnath, 533 F. Supp. 2d 662, 676 (E.D. Tex. 2008).

235 *In re Extradition of* Juarez-Saldana, 2009 U.S. Dist. LEXIS 58434, at *10 (W.D. Tenn. 2009). The court has also considered the record before it to determine whether proceedings are likely to be protracted. *In re Extradition of* Patel, 2008 U.S. Dist. LEXIS 28399, at *6 (D. Or. 2008).

extradition constituted "special circumstances," but the government attempted to justify the delay, purely on conjecture, by arguing that it resulted from an investigation in the requesting state.[236]

Where the anticipated length of delay was due to complex arguments that the relator intended to raise, one court combined this factor with another factor to support a finding of "special circumstances."[237] Another court held that anticipated delay did not constitute a "special circumstance" where the government was ready to hold the extradition hearing and the delay was caused by the relator's defense.[238]

12.2.2. Need to Consult with Counsel

On occasion courts will find a "special circumstance" where the relator can show the need to consult with his/her counsel. For the most part, however, courts have been reluctant to grant bail on the basis of the relator's need to consult and work with counsel. Instead, the relator must prove that it is almost impossible for him/her to defend his/her case while incarcerated irrespective of his/her constitutional right to the effectiveness of representation and due process requirements. This is surely an unfair standard.[239]

In *In re* Mitchell, the court held that the relator's need to consult with his counsel constituted a "special circumstance." In that case, the relator was charged with larceny by the requesting state, but the U.S. district court released him on bail on the grounds that his continued detention rendered him incapable of consulting with his counsel. The court was careful to emphasize that it was imperative for the relator to obtain the advice of counsel because his entire fortune depended upon doing so. This assertion was the main ground upon which the court rested its opinion:

> [I]t seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of civil suit upon which his whole fortune depends.

The decision in *Mitchell* has been attributed not only to the fact that the relator's whole fortune was dependent on the outcome of the case, but also the immediacy of the trial.

In United States v. Smyth the court also found that the relator's need to consult with his attorney warranted bail because his defense was particularly fact intensive, rather than legal in nature, which has been rejected as a "special circumstance" because it does not require the relator's participation to ensure a fair defense. The court in Smyth stated that:

> Smyth must be given the opportunity to aid his counsel in the difficult task of amassing evidence, from another part of the world, regarding events which occurred between eight and fifteen years ago. It is highly unlikely that Smyth's counsel will be able to locate key witnesses or evidence without his extensive aid.[240]

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236 Wroclawski v. United States, 634 F. Supp. 2d 1003, 1008 (D. Ariz. 2009).

237 *In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054, at *11–*12 (E.D.N.Y. 2011) (involving complex CAT claims).

238 United States v. Ramnath, 533 F. Supp. 2d 662, 676 (E.D. Tex. 2008).

239 United States v. Tang Yee-Chun, 657 F. Supp. 1270, (S.D.N.Y. 1987). *See also United States v. Messina*, 566 F. Supp. 740, 743 (E.D.N.Y. 1983), in which the relator contended that special circumstances existed because he needed to assist his attorney to prepare his substantive defenses to the extradition hearings; however, the court disagreed, holding that because the issues being dealt with were purely legal, the relator's personal participation was unnecessary.

240 United States v. Smyth, 795 F. Supp. 973, 977 (N.D. Cal. 1992). *See also* United States v. Hills, 765 F. Supp. 381, 385 n.5 (E.D. Mich. 1991) (denying bail, the court stated that "pending civil litigation" and "the defendant's asserted needs to consult with his attorney to assist in the preparation of defense of the extradition proceedings" were not independently sufficient to demonstrate "special circumstances").

By contrast, in In re Extradition of Russell the court rejected the relator's claim that his pending civil action was a "special circumstance" even though a large part of his economic stability was tied to the case. The court reasoned that the relator had sufficient time to consult with his attorney prior to the beginning of the case; as a result, his situation did not warrant a finding of "special circumstances." Courts have refused to find the existence of "special circumstances" when the relator's pending litigation has not reached the trial stage and his/her whole fortune is not dependent on the outcome of the case.[241]

12.2.3. Health Condition of the Relator

Most courts have been reluctant to find that a relator's health condition constitutes a "special circumstance," unless the relator can prove that his/her health problems are unique and cannot be dealt with while detained. For instance, in the landmark case Wright v. Henkel the Supreme Court acknowledged the lower federal courts' power to grant bail to persons facing extradition; however, bail was denied to the relator in that case who presented an affidavit showing that he suffered from bronchitis and the chills.[242] Instead, the Supreme Court upheld the district court's finding that the petitioner's health condition was not an "unusual circumstance" warranting bail.[243]

Similarly, in In re Nacif-Borge the court rejected the relator's argument that his health condition, which included the fact that he only had one kidney and required a special diet plus exercise, warranted a finding of special circumstances. The court stated that "because his condition is not debilitating and is easy to control, his health condition does not warrant a finding of special circumstances."[244] In *In re Extradition of Garcia* the court declined to find that the relator's back problems and growth on his neck, both requiring surgery, constituted "special circumstances" because the relator did not establish that "his condition is either life-threatening or so serious that his medical needs cannot be accommodated by the United States Marshal's Service while in custody."[245]

It is also imperative for the relator to show a deterioration in his/her health caused by the confinement.[246] However, courts have rejected relators' petitions for bail when they arise out

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241 *In re Extradition of* Koskotas, 127 F.R.D. 13(D. Mass. 1989) (finding that the fact that the relator is currently involved in a civil suit is not automatic grounds for bail; instead the relator's "whole fortune" must be involved in the civil suit); *In re Extradition of* Russell, 647 F. Supp. 1044 (S.D. Tex. 1986) (rejecting the granting of bail, the court distinguished this case from *In re Mitchell* by stating that the relator is not on the eve of a complex civil litigation that involves his whole fortune).

242 Wright v. Henkel, 190 U.S. 40, 43 (1903).

243 *Id.*

244 The court also took into consideration that since the realtor had been detained he had not taken affirmative steps to request a special diet, or to make use of the exercise equipment in the detention facility. See *In re Extradition of* Nacif-Borge (D. Nev. 1993) (citing United States v. Kidder, 869 F.2d 1328, 1330–1331 (9th Cir. 1989), in which the court stated that to avoid incarceration the relator "must show that no constitutionally acceptable treatment can be provided while he is imprisoned."). *See* Bolanos v. Mukasey, 2009 U.S. Dist. LEXIS 87991, at *11 (D.N.J. 2009) ("Bolanos's application for bail alleges that she can obtain better health care for her cancer in a private medical setting than she can obtain in prison. The mere availability of a better, private form of medical treatment is not sufficient to overcome the presumption against bail.")

245 *In re Extradition of* Garcia, 761 F. Supp. 2d 468, 481–482 (S.D. Tex. 2010).

246 *In re Extradition of* Rouvier, 839 F. Supp. 537, 541 n.9 (N.D. Ill. 1993) (holding that a realtor who has a heart condition that can be controlled with medication that can be administered in the detention facility does not constitute a "special circumstance" warranting bail). *But see In re* Kim, No. CV 04-3886-ABC (PLA), 2004 U.S. Dist. LEXIS 12244 (C.D. Cal. 2004) (holding that health condition of bad back did not require release on bail). *See also In re Extradition of* Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993); *In re Extradition of* Morales, 906 F. Supp. 1368 (S.D. Cal. 1995); *In re Extradition of* Molnar, 182

of a general discomfort with confinement or stress associated with such confinement.[247] In *United States v. Nolan* the federal district court for the Northern District of Illinois rejected the relator's application, holding that where the relator was receiving treatment for it, skin cancer leading to a deterioration of his health did not qualify as "special circumstances."[248]

However, in *United States v. Taitz* the court granted bail to the realtor who suffered from an allergic reaction to corn and corn sweeteners, which were common substances used in the food at the detention center, and an allergic reaction to the soap used to wash the inmates' clothing.[249] The court noted that because of the realtor's allergic reactions caused by certain substances within the detention center, the realtor's health had clearly deteriorated due to his confinement.

Courts have also refused to recognize the deteriorating health of a relator's family member as a "special circumstance" warranting bail. In the case of Lo Duca v. United States the relator argued that his wife's advanced Alzheimer's disease and his role as her primary caretaker constituted "special circumstances."[250] The court reasoned that because the realtor's wife was being cared for by other family members, the relator's justification for release was not "pressing as well as plain." Therefore, the court refused to grant bail, leaving the "special circumstances" standard as narrow and strict as it previously was.[251]

12.2.4. Age of the Relator

A relator's character or specific traits are not usually sufficient grounds to justify bail.[252] However, in Hu Yau-Leung v. Soscia the court found that because the relator was only sixteen years old when he allegedly committed a robbery in Hong Kong, and no suitable detention center could be found for him, bail was warranted.[253]

12.2.5. Availability of Bail to Relator at Home or Abroad

In 1928, a district court in Gannon laid the foundation for a relator to petition for bail based on the availability of bail in the requesting state and/or the state in which the relator was

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F. Supp. 2d 684 (N.D. Ill. 2002) (granting bail because it was warranted under the circumstances, even though they did not constitute special circumstances); *In re Extradition of* Rouvier, 839 F. Supp. 537 (N.D. Ill. 1993) (denying bail even though relator had heart condition as it was treatable with medication); *In re Extradition of* Gonzalez, 52 F. Supp. 2d 725 (W.D. Louisiana) (granting bail where a court found that relator had a reasonable likelihood of succeeding on the merits of the extradition due to the unreliability of the principle witness in the case); *In re Extradition of* Mainero, 950 F. Supp. 290 (S.D. Cal. 1996) (looking at cumulative effect of several factors to constitute special circumstances): United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990) (allergic reactions to common food and substances in prisons was deemed special circumstances). *In re Extradition of* Patel, 2008 U.S. Dist. LEXIS 28399, at *6 (D. Or. 2008) ("the court has not been made aware of any health or age problems arguing for respondent's release").

247 *In re* Klein, 46 F.2d 85 (S.D.N.Y. 1930); United States v. Nolan, 2009 U.S. Dist. LEXIS 111299, at *6–*7 (N.D. Ill. 2009) (placement in solitary confinement by itself not enough to justify "special circumstances.")

248 United States v. Nolan, 2009 U.S. Dist. LEXIS 111299, at *7 (N.D. Ill. 2009).

249 United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990).

250 Duca v. United States, 1995 WL 428636, at l (E.D.N.Y. 1995).

251 Financial and emotional hardship to a relator's family where relator was the primary wage earner did not constitute "special circumstances" where this was no different from the hardship experienced by other families in similar circumstances. *In re Extradition of* Juarez-Saldana, 2009 U.S. Dist. LEXIS 58434, at *8 (W.D. Tenn. 2009).

252 *Id.* at *9.

253 Hu Yau-Leung v. Soscia, 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981).

arrested.[254] Thereafter, the availability of bail has been considered a "special circumstance" warranting bail. For example, the court in Gannon granted bail to the relator because of the availability of bail for the underlying substantive offense in both Pennsylvania, where the extraditee was arrested, and the requesting state.[255] Building on the holding in *Gannon*, the district court in Nacif-Borge granted bail to the relator whose extradition was requested by Mexico for alleged offenses involving tax evasion, as he could prove by "clear and convincing" evidence that bail would be available to him in Mexico on the underlying substantive offense.[256] It is evident that in certain cases bail will be granted if the relator can prove by "clear and convincing" evidence that bail is commonly granted in the requesting state.[257] Bail may also be granted in situations in which the relator can demonstrate the possibility of being granted bail in the requesting state even if bail is not guaranteed.[258]

Some courts have rejected the availability of bail as a "special circumstance" because it "force[s] courts to make searching reviews of foreign laws to determine whether bail is appropriate for a given defendant in a given country for a given offense."[259] Such a review has been considered by some federal courts to be not only troublesome, but unnecessary. Some courts, in reconciling these two opposing views, have reasoned that the possibility of bail may be considered together with other factors to determine whether to grant bail.[260] However, in response, it can be argued that it is the role of the federal courts to ensure the appropriate application of the law, which, at times, may require the court to investigate the applicable laws derived from the extradition treaty.

Other courts consider the availability of bail in the country seeking extradition to be irrelevant to the consideration of whether bail will be available in the extraditing country.[261]

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254 *In re* Gannon, 27 F.2d 362 (E.D. Pa. 1928).

255 *Id.* It is important to note that the decision in *Gannon* was influenced by other factors, such as the likelihood that the relator might flee if not granted bail and the high probability of a delay in the proceedings because the witnesses were coming from some distance away.

256 *In re Extradition of* Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993). While excepting the realtor's petition for bail based on the availability of "special circumstances," the court rejected the relator's other "special circumstances" arguments, which included: (1) substantial claims with a high probability of success; (2) serious deterioration of health during incarceration; (3) unusual delay in the extradition hearing; (4) length and complexity of the extradition proceedings could each constitute a "special circumstance"; (5) the timing of the provisional arrest as indicative of ulterior motives of the government extradition; (6) the nature and seriousness of the underlying offense itself justifying release on bail; (7) character letters and assurances of individuals willing to post bond on the defendant's behalf; and (8) disparate treatment in the requested country. *Id. See also* Wroclawski v. United States, 634 F. Supp.2d 1003, 1008–1009 (D. Ariz. 2009) (following *Nacif-Borge* and *Gannon* on the issue of bail and finding "special circumstances.")

257 United States v. Ramnath, 533 F. Supp.2d 662, 675–676 (E.D. Tex. 2008) (unavailability of bail for manslaughter charges in the United Kingdom resulted in the court not finding relator's argument regarding availability of bail a "special circumstance").

258 United States v. Castaneda-Castillo, 739 F. Supp. 2d 49, 58–59 (D. Mass. 2010) (following the *Nacif-Borge* line of reasoning).

259 *In re Extradition of* Siegmund, 887 F. Supp. 1383 (D. Nev. 1995) (citing *In re Extradition of* Rouvier, 839 F. Supp. 537 (N.D. Ill 1993)). The court in *Siegmund* rejected the availability of bail as a "special circumstance" for a relator who was sought for extradition by Austria on charges of aiding and abetting fraudulent bankruptcy. *Id.*

260 *In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054, at *9–*10 (E.D.N.Y. 2011) (reasoning that availability of bail in the requesting state contributed to a finding of lack of diplomatic necessity for denying bail as a "special circumstance"); United States v. Castaneda-Castillo, 739 F. Supp. 2d 49, 58–59 (D. Mass. 2010).

261 Rouvier, 839 F. Supp. 537.

12.2.6. Likelihood of the Relator Being Found Not-Extraditable (on legal or factual grounds)

A "high probability of success" in winning the underlying charge was recognized as a "special circumstance" in Salerno v. United States.[262] However, the district court in *In re* Sidali denied bail after finding that the probability of success in avoiding extradition at the hearing was outweighed by the gravity of the relator's offense. Even though the relator argued that there was a high probability that he would not be extradited because he was acquitted twice by local courts in Turkey and was sent a document stating that his arrest had been rescinded, the court refused to recognize his probability of success as a "special circumstance" warranting bail.[263]

In contrast, the Western District of Louisiana in In re Extradition of Gonzalez found that the government's showing of evidence in which to support the relator's extradition was insufficient. The court stated:

> [T]he government of Mexico has an affirmative obligation to properly identify persons being sought for extradition. Article 10 P2(e) of the Treaty requires the government to furnish "facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location" So far, the government has failed to produce any description of the robbers resulting from its own investigation. The government's reliance upon identifications provided by the Lafayette Police Department is highly suspect under these circumstances.[264]

Because of the lack of evidence provided by Mexico, the court found that it would be likely for the relator to prevail in challenging his extradition, thereby warranting bail.

Where the evidence before the court is insufficient, a court will decline to find "special circumstances" or grant bail based on this factor alone.[265] However, where the relator can defeat probable cause, bail is likely to be granted.[266] Roberto Guillermo Bravo, the subject of an Argentine extradition request, was granted bail in a case where eyewitnesses had disappeared or died, he was tried and acquitted of the charges, and he was able to raise a viable political offense exception defense to his extradition.[267]

Where a relator has successfully had the underlying arrest warrant set aside, this has established a high probability of defeating extradition and constituted a "special circumstance" warranting release on bail.[268]

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262 Salerno v. United States, 878 F.2d 317 (9th Cir. 1989).

263 *In re* Sidali, 868 F. Supp. 656, 658–659 (D. N.J. 1994).

264 *In re Extradition of* Gonzalez, 52 F. Supp.2d. 725, 737 (W.D. La. 1999).

265 *In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054, at *12–*14 (E.D.N.Y. 2011). *See also* United States v. Castaneda-Castillo, 739 F. Supp. 2d 49, 61–63 (D. Mass. 2010) (challenging for lack of probable cause, double jeopardy, and the political offense exception); Wroclawski v. United States, 634 F. Supp. 2d 1003, 1008 (D. Ariz. 2009) (challenging for lack of probable cause and application of Polish statute of limitation, but inconsistent results regarding the statute of limitations were reached).

266 United States v. Ramnath, 533 F. Supp.2d 662, 679–682 (E.D. Tex. 2008) (distinguishing the low probable cause standard in the United States for the purposes of a finding of extraditability with the higher UK probable cause standard likely to be applied at the relator's trial in finding that the relator was not likely to succeed in obtaining a non-extraditability ruling in the United States).

267 *See* Bruce Zagaris, *U.S. Trial Court Denies Extradition Request on Murder Charges*, 27 Int'l Enforcement L. Rep. 512–514 (Jan. 2011).

268 *In re Extradition of* Santos, 473 F. Supp. 2d 1030, 1038–1040 (C.D. Cal. 2006) (relator succeeded twice in Mexican *amparo* challenge to the underlying arrest warrant).

12.2.7. Deprivation of Religious Practices while Incarcerated

Even though the deprivation of religious practices while incarcerated has not by itself justified a finding of "special circumstances," it has been held that such a deprivation should be considered in light of the remaining circumstances.[269] In United States v. Taitz the relator, an Orthodox Jew, was granted bail partly because of his inability to carry out the rituals of his religion due to the lack of materials and facilities in the detention center, while the court also took into consideration other "special circumstances."[270] Had the relator not proven the existence of other "special circumstances" warranting his bail, it is unlikely he would have been released based solely on the deprivation of religious practices. However, in *In re Extradition of Patel* the disctrict court refused to find "special circumstances" where the relator had difficulty obtaining a diet that comported with his religious practices where the problem was remedied and the relator received appropriate meals.[271]

12.2.8. Attendance at Other Legal Proceedings

In *In re Extradition of Bowey* the district court held that attendance at another legal proceeding constituted "special circumstances:"

> The Supreme Court has held that while bail should not ordinarily be granted in extradition cases, release was not foreclosed where special circumstances exist. *See* Wright v. Henkel, 190 U.S. 40, 23 S. Ct. 781, 47 L. Ed. 948 (1903). The Eleventh Circuit has held that there is a presumption against bond, and that a defendant in an extradition case will be released on bail only if he can prove "special circumstances." *See* Martin v. Warden. Atlanta, Pen, 993 F.2d 824, 827 (1993). This presumption in extradition cases varies from the procedure under the Bail Reform Act of 1984, 18 U.S.C. § 3142, and its presumption in favor of release for persons awaiting trial in federal court for offenses against United States law, except in cases where there is a flight risk or threat of harm to the community or to any person. The reason for distinguishing granting release in extradition cases from federal criminal cases is that extradition cases involve an overriding interest in meeting treaty obligations. "If the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United States to obtain extradition of its fugitives." United States v. Taitz, 130 F.R.D. 442, 444 (S.D.Cal. 1990) (citation omitted).
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> …
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> Even though Mr. Bowey would be entitled to bail under the Bail Reform Act, because he is facing extradition, the general presumption against bail in extradition cases requires that he also show that special circumstances exist. The first factor that shows special circumstances exist in this case is that releasing Mr. Bowey on bail would allow him to participate in the divorce proceedings in Cobb County Superior Court. Some courts have held that the accused's desire to participate in pending civil actions is not a special circumstance. *See* Koskotas v. Roche, 931 F.2d 169 (1st Cir. 1991); *see also* United States v. Hills, 765 F. Supp. 381 (E.D.Mich. 1991). However, in the instant case, the civil proceedings in Cobb County Superior Court are directly related to the reasons for his extradition and the resolution of the issues in that matter could directly affect the prosecution of the charges he faces in France. Accusations by Mr. Bowey's estranged wife and the French Government should not be allowed to limit his ability to attend the divorce and custody proceedings by entangling him in extradition proceedings, particularly when the divorce and custody issues are the underlying disputes from which *all* these proceedings arise.[272]

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269 United States v. Taitz, 130 F.R.D. 442, 443 (S.D. Cal. 1990). *See also In re Extradition of* Alfie-Cassab, No. 89-2493M (S.D. Cal. July 5, 1989), *affirmed as modified*, July 7, 1989 (Judge Brewster).

270 As previously noted, the court also took into consideration the probability of a lengthy hearing, the relator's severe allergies, the lack of a criminal record, and the lack of a diplomatic necessity for denying bail.

271 *In re Extradition of* Patel, 2008 U.S. Dist. LEXIS 28399 (D. Or. 2008).

272 *In re Extradition of* Bowey, 147 F. Supp. 2d 1365, 1367–1368 (D. Ga. 2001).

A court has also reasoned that the relator proceeding *pro se* in a workers' compensation matter who is the only one who could attend to pursue the claim does not constitute "special circumstances," because if extradited and incarcerated he would be ineligible to receive workmen's compensation benefits.[273] This appears to be another situation where a court has chosen to combine factors in determining "special circumstances," as the denial of special circumstances on this ground is implicitly based on a finding of lack of success on the merits of any challenge to extradition.

12.2.9. Liberal Application of the Special Circumstances Test

Bail has frequently been granted in international extradition cases without any reference to any deconstruction of the "special circumstances" standard. In United States v. Clark the relator, a U.S. citizen, was sought for extradition by Canada for the crime of importing cannabis resin oil into Canada and with possession of cannabis resin oil for the purpose of trafficking. The court in Clark granted bail following the apprehension of the relator on a provisional arrest warrant without any reference to the "special circumstances" test.[274]

Similarly, in Sindona and in *Molnar*[275] the court granted bail prior to the extradition hearing without any showing of "special circumstances."[276]

In dicta, the district court in *United States v. Ramnath* discussed *sua sponte* how courts could use the Bail Reform Act factors to find "special circumstances" in a case,[277] stating:

> . . . after almost a quarter century of deciding on a daily basis whether a person is entitled to bail, the undersigned should know an appropriate case when he sees it.
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> This is such a case. Nothing beyond the naked presumption for detention counsels the court to keep Dr. Ramnath confined with the customary contingent of "crackheads," crazies, and miscreants who usually inhabit dank county jails. On the other hand, every rational concern augurs for her release. Her husband and minor children need their wife and mother. Critically ill patients could benefit were she available. She is not a risk of flight. This matter, therefore reflects "most pressing circumstances" where "requirements of justice are absolutely peremptory."[278]

Although the court did state that these factors "weigh[ed] in favor of the court finding a special circumstance relevant to bail" in the case before it, it is unclear to what extent this *sua sponte* analysis is to be given weight.

In *In re Extradition of Kapoor* the district court held that a lack of diplomatic necessity for denying bail constituted "special circumstances," stating

> The most compelling argument in favor of release is the Indian government's "significant delay" in bringing its request for extradition. (Transcript of Oral Argument, dated May 26, 2011 ("Tr."), at 5.) The records submitted with the extradition request indicate that the Indian government has had reason to believe that Kapoor was living in Queens, New York, since at least 2002, if not earlier. In addition, the original warrant for Kapoor's arrest was issued in 2003. Unlike in In re Extradition of Garcia, 615 F. Supp. 2d 162, 172 (S.D.N.Y. 2009), in which the court failed to find a lack of diplomatic necessity because numerous hearings had been ongoing

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273 *In re Extradition of* Garcia, 761 F. Supp. 2d 468, 482–483 (S.D. Tex. 2010).

274 United States v. Clark, 470 F. Supp. 976 (D. Vt. 1979).

275 *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978) (following the extradition hearing the court granted Italy's extradition request and issued a warrant for the arrest of Sindona so he could be held prior to his extradition).

276 *In re Extradition of* Molnar, 182 F. Supp. 2d 684 (N.D. Ill. 2002) (granting bail because it was warranted under the circumstances, even though they did not constitute special circumstances).

277 United States v. Ramnath, 533 F. Supp. 2d 662, 682–683 (E.D. Tex. 2008).

278 *Id.* at 685.

> in the Philippines, there is no indication in the record of any legal proceedings occurring in India between 2006 and 2010. This long delay signals that the Indian government has "not made prosecution of this offense a priority." Chapman, 459 F. Supp. 2d at 1027. In Chapman, the court found special circumstances and granted bail in part because Mexico had waited three years after an incident and arrest before bringing extradition proceedings, displaying a "lack of any diplomatic necessity for denying bail." Id. In this case, the delay is even more glaring. [footnote omitted].[279]

Two unusual claims of "special circumstances" were raised in *Wroclawski v. United States*, namely the relator's work with Olympic athletes and with military and law enforcement personnel. The district court reasoned as follows:

> Magistrate Judge Burns found that Petitioner's work in preparation for the Beijing Olympics constituted a special circumstance. (Magistrate Case Dkt. # 60 at 8.) Petitioner contends that although the next summer Olympics will not take place for nearly three years, he will likely participate in the training of future athletes and will likely attend the Olympic trials. Petitioner presents letters of support from numerous athletes and individuals who request that Petitioner be released to continue with his efforts to assist them in their training. (Dkt. # 24, Exs. 4–5.) But Petitioner presents no evidence that he is currently training any athlete and the Court finds that the 2012 Olympics are too far in advance to necessitate Petitioner's involvement at this time. Consequently, the Court does not find Petitioner's speculative participation in the 2012 Olympics to constitute a special circumstance.
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> …
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> Petitioner's focus has now changed from working with Olympic athletes to working with members of the armed forces and law-enforcement. Petitioner's expertise in the area of Greco-Roman wrestling is unique and undisputed. It is in this area that his training of military and law-enforcement personnel is particularly useful. And the affidavits of David Toledo, Alfredo Jimenez, and Joshuah Landspurg present compelling testimony that Petitioner is offering specific and unequaled assistance in their work in the military or law enforcement. Specifically, Petitioner has taught the affiants about hand-to-hand combat techniques, which present themselves at war and, at times, in the course of normal police activity. (Dkt. # 24, Exs. 1 and 3, Toledo Aff. ¶¶ 2–3, Jimenez Aff. ¶¶ 2–4, Doc. # 32, Landspurg Aff. ¶¶ 2–4.)
>
> In response, the Government does not dispute Petitioner's unique talents or his sincerity in providing his services in support of the military or other law-enforcement personnel. Rather, the Government seemingly contends that the war effort is not meaningfully affected by Petitioner's efforts and, therefore, do not constitute a special circumstance. (Dkt. # 27 at 13). Obviously the Court cannot find that the success of U.S. military efforts or the safety of local law-enforcement depends upon Petitioner's continued ability to train military or law-enforcement personnel in the art of Greco-Roman wrestling techniques, and Petitioner concedes as much. But a factor of that magnitude is not required to constitute a special circumstance. Rather, a special circumstance is something that is unique and not faced by all individuals facing extradition. See U.S. v. Hills, 765 F.Supp. 381, 387 (E.D.Mich.1991) (factors faced by nearly all potential extraditees are not special circumstances). And the Court finds Petitioner's selfless and useful help to our military and law-enforcement to be compelling and fully justified to be considered a special circumstance.[280]

Although this case is unique in the jurisprudence of the United States, it shows how unreliable the "special circumstances" test is.

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279 *In re Extradition of* Kapoor, 2011 U.S. Dist. LEXIS 65054, at *7–*8 (E.D.N.Y. 2011). *See also* United States v. Castaneda-Castillo, 739 F. Supp. 2d 49, 57–58 (D. Mass. 2010).

280 Wroclawski v. United States, 634 F. Supp. 2d 1003 (D. Ariz. 2009).

12.3. The Artificial Legal Notion of "Special Circumstances"

As is obvious from the above, the "special circumstances" test is indeed peculiar, if not to say anachronistic, in a country where a constitutional provision specifically exists with respect to the right to bail. The peculiarity of the "special circumstances" test was evident from the moment of its creation in that there is no constitutional or statutory exception that justifies the Supreme Court decision in *Henkel v. Wright* and allows the Court to override the Constitution by requiring this test.[281]

Surprisingly, no subsequent case has caused the Supreme Court to reexamine what in any other context would be deemed a questionable ruling that overrides a specific constitutional provision without offering a compelling legal justification.

Since *Henkel*, circuit and district courts have dealt with the "special circumstances" test in an inconsistent manner, taking into consideration circumstances that are lacking in consistency. Moreover, circuit and district court cases tend to confuse factors relating to risk of flight, which are inherent in any bail consideration, with "special circumstances." This is unsurprising given the ubiquity of the risk-of-flight assessment in criminal proceedings and the tendency of judges to rely on what they know best.

Courts have also considered the length of time it took for the requesting state to file an extradition request as "special circumstances," which by its very nature has nothing to do with the circumstances connected to the relator's status in the United States. The same is true with respect to the likelihood of success of a petitioner seeking bail in the requesting state, which relates more to the likelihood that the petitioner is not a flight risk than any "special circumstance." Such factors, which relate to risk of flight and likelihood that the petitioner will appear in court, are unrelated to "special circumstances."

It must be remembered that "special circumstances" have to do exclusively with factors existing at the time of the person's arrest, and that relate to the circumstances of the petitioner, including his/her health[282] and age,[283] access to counsel and preparation of defense,[284] nature of the relator's work in the United States,[285] and likelihood that the extradition request may be denied on the merits.[286]

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281 Wright v. Henkel, 190 U.S. 40 (1903).

282 This evaluation entails an assessment of the relator's need for health treatment and access to medical services or other health-related special requirements. It also applies to disabled or special needs individuals, and individuals with psychiatric or psychological needs.

283 The age assessment applies to individuals who are of advanced age or are minors with age-specific needs who cannot be housed with adults or with conditions imposed on adults. (With respect to advanced age there is an overlap between this factor and the health factor.)

284 This applies to those situations where, given the complex nature of the case, the relator requires significant access to lawyers, paralegals, accountants, or other consultants in order to present his/her case. This is particularly so in extradition cases for alleged financial crimes such as bank fraud, securities violations, and complex bankruptcies.

285 This includes someone who may be in the armed forces on active duty and living on a military base, or a scientist undertaking particular research whose medical and scientific value is deemed significant enough to warrant continuation of the work. A medical practitioner providing services that are required by the community, or anyone who fulfills a needed role in the community and who has demonstrated a particular commitment to the fulfillment of this role.

286 This includes situations involving a relator who has received political asylum or who has a pending petition for political asylum that is likely to be granted, or who has a treaty argument that is likely to bar his/her extradition, such as the possibility of being tortured in the requesting state, which is a circumstance barring his/her extradition under the CAT.

All of the above indicates that it is difficult to distinguish between factors taken into account in ordinary criminal cases for purposes of bail, and factors taken into account with respect to bail in extradition cases. Given these difficulties and the problems with Henkel, "special circumstances" and circumstances relating to the flight risk of the relator should really be examined contextually and concurrently. Precisely because courts have to grapple with this artificial standard of "special circumstances," a diversity in jurisprudence has evolved between the circuits. In short, judicial decisions are all over the map with respect to bail,[287] frequently tending to deny bail when the government requests it, and that is usually to bring about greater pressure on the relator to consent to extradition or at least not to prolong the judicial proceedings.

13. Discovery

13.1. Policy Considerations

Extradition is a process designed to determine whether a person is to be surrendered to a requesting state in order to answer criminal charges or to carry out the execution of a criminal sentence. It is not, therefore, a process by which the requested state determines whether the person sought is guilty of the crime charged.

Section 3184 describes a probable cause hearing[288] to be conducted by the extradition judge as determining the extraditability of the relator based on a finding of sufficient evidence "to sustain the charge under the provision of the proper treaty or convention."[289] Thus, extradition is not a process by which the guilt or innocence of a person is determined.[290] Rather, its purpose is simply to ascertain whether there is sufficient evidence of probable cause to surrender a person to a requesting state in order to stand trial on the charges for which the person was requested.[291] This is why discovery is limited and in the discretion of the extradition judge.

13.2. Constitutional Dimensions

Within the scope of a limited probable cause determination of extradition hearings, it is important for the court to ensure "due process" as required by the Fifth Amendment to the Constitution. It is within this context that a constitutional issue arises, namely, whether the

287 For a case that conflates many of these factors, see *Wraclowski v. United States*, 634 F. Supp. 2d 1003 (D. Ariz. 2009).

288 *See* Ch. X for a detailed discussion on the requirement of probable cause in extradition hearings. *See also* Escobedo v. United States, 623 F.2d 1098, 1102 (5th Cir. 1980) (the court lays out the test for probable cause in extradition hearings, holding that the test is "the existence of probable cause to sustain the charges against [the extraditee] or, in other words, the existence of a reasonable ground to believe the accused guilty.").

289 18 U.S.C. § 3184 (2000).

290 *See* First Nat'l City Bank of New York v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960); Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir.), *cert. denied*, 428 U.S. 833 (1976); *In re* Singh, 123 F.R.D. 108, 116 (D.N.J. 1987); Collins v. Loisel, 259 U.S. 309, 316 (1922); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993).

291 The courts' view of the limited nature of an extradition hearing is also due to the courts' determination that extradition is neither a criminal nor a civil proceeding, and therefore the Federal Rules of Criminal Procedure that are based on the Fourth, Fifth, and Sixth Amendments do not apply; that is, the accused has no right to a speedy trial or to cross examine witnesses presented by the government. *See* Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993). *See also* Chewning v. Rogerson, 29 F.3d 418 (8th Cir. 1994).

relator is entitled to obtain from the government exculpatory evidence in accordance with the constitutional standards set forth in *Brady v. Maryland*[292] and *United States v. Giglio*.[293]

In *Demjanjuk v. Petrovsky*[294] the Sixth Circuit held that Supreme Court holdings in Brady[295] and Giglio[296] apply, as a matter of right, in extradition proceedings. In Brady the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[297]

In Demjanjuk the relator was denaturalized of his U.S. citizenship and extradited to Israel to stand trial for crimes he allegedly committed as a Nazi war criminal.[298] It was determined by the Israeli Supreme Court that Demjanjuk had been mistakenly identified, and that someone else had committed the crimes with which the relator was charged. After Demjanjuk's return to the United States the Sixth Circuit reheard the case and found that the prosecution acted with "reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly."[299] The prosecution had in its possession exculpatory evidence that showed it was someone else who committed the war crimes. The court held that discovery of any Brady material should be granted in "extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against."[300] The Sixth Circuit further held that the lower court erred in not holding that the U.S. government officials failed to "observe their obligation to produce exculpatory materials,"[301] and that by "recklessly assuming"[302] the relator's guilt, they thereby committed misrepresentation and engaged in an abuse of prosecutorial power. Notwithstanding this blatant abuse, the Department of Justice officials were not disciplined.[303] However, further the court stated that prosecutors had a "constitutional duty"[304] to produce any Brady materials that the relator had requested.

Reaffirming its holding in Demjanjuk, the Sixth Circuit cited United States v. Giglio.[305] In Giglio the Court held that "the prosecutor's office is an entity and as such it is the spokesman for the government,"[306] and it has the responsibility as a corporate entity for the disclosure of exculpatory materials.

Demjanjuk was precedence-setting because of the peculiar nature of its facts, the result of which was that the relator was subjected to years of incarceration, a criminal trial in Israel followed by an appeal, and ultimately the reversal of the conviction based on error in the identification of

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292 Brady v. Maryland, 373 U.S. 83 (1963).

293 United States v. Giglio, 405 U.S. 150 (1972).

294 Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

295 *Brady*, 373 U.S. 83.

296 *Giglio*, 405 U.S. 150.

297 *Brady*, 373 U.S. at 87 (emphasis added).

298 For a more detailed discussion of the *Demjanjuk* case, *see* Ch. IV, Sec. 3.2.3.

299 Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir. 1993) (emphasis added). *See also In re Extradition of* Chavez, 408 F. Supp. 2d 908 (N.D. Cal. 2005).

300 *Id.*

301 *Id.*

302 *Id.*

303 The four men working for the Office of Special Investigations and the Department of Justice were Allan Ryan, Norman Moscovitz, George Parker, and John Horrigan. *Id.*

304 *Id.*

305 United States v. Giglio, 405 U.S. 150 (1972).

306 *Id.* at 154.

the relator. The government of Israel assumed the costs of these trials, as well as the difficulty of having its Supreme Court reverse a criminal conviction in such a high-visibility case. In short, this was an egregious violation by those responsible in the U.S. Department of Justice, whom the Sixth Circuit condemned in very clear terms. Because of the judicial fallout of the case, it is doubtful that there will be other similar cases of misconduct. Consequently, when the same circuit confronted the same issue in *In re* Extradition of Drayer,[307] it distinguished Demjanjuk as being based an "unusual set of circumstances."[308] The court explained that in Demjanjuk, "the United States ha[d] conducted its own investigation of the offense underlying the request for extradition and uncovered exculpatory material in the course of that effort."[309] In Drayer the government did not conduct such investigation; rather, the court explained, "the involvement of the United States can only be characterized as ministerial."[310] Therefore, under *Drayer*, the rule of non-inquiry deprives the relator of the ability to assert his/her due process rights as the United States Attorney can reasonably claim that he/she does not have any discoverable material, and the U.S. magistrate or judge is barred from ordering the production of evidence by the requesting state.

Other courts dealt differently with the constitutionality of discovery in extradition. In *In re* Singh[311] the District Court of New Jersey held that the Due Process Clause only guarantees the relator the right to a statutorily required hearing, and the court's denial of any request of discovery would not be denial of due process.[312] The court in Singh further held that the holding in Brady is not applicable to extradition cases, because discovery would convert the extradition hearing into a trial where the guilt or innocence of the relator is determined.[313] The court also reaffirmed the widely held view that extradition proceedings are not analogous to criminal prosecutions, and therefore the constitutional protections afforded in the latter are not available to relators seeking to challenge their extradition.[314]

U.S. courts have given great deference to the rule of non-inquiry during discovery proceedings, and limited discovery while at the same time making it discretionary and leaving matters to the secretary of state.[315]

Frequently, during a discovery request, an exception to the rule of non-inquiry will arise. Extradition proceedings are limited and do not involve the adjudication of the guilt or innocence of the relator.[316] Discovery is appropriate in cases such as *Demjanjuk*, but, it differs from seeking discovery in order to determine whether in the requesting state the person sought will

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307 *In re Extradition of Drayer*, 190 F.3d 410 (6th Cir. 1999).

308 *Id.* at 414.

309 *Id.* (emphasis added).

310 *Id.* (emphasis added).

311 *In re* Singh, 123 F.R.D. 108, 116 (D.N.J. 1987).

312 *Id.* at 116.

313 *Id.*

314 *Id.*

315 *See also* Prasoprat v. Benov, 421 F.3d 1009, 1014 (9th Cir. 2005), *aff'g* 294 F. Supp.2d 1165 (C.D. Cal. 2003); Lopez-Smith v. Hood, 121 F.3d 1322, 1326 (9th Cir. 1997); United States v. Kraiselburd, 786 F.2d 1395, 1399 (9th Cir. 1986); Koskotas v. Roche 931 F.2d 169, 175 (1st Cir. 1991) (discovery is not only discretionary with the court, it is narrow in scope); Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1407 (9th Cri. 1988); (P. 1014). *See also* Emami v. U.S. Dist. Ct., 834 F.2d 1444, 1452 (9th Cir. 1987) (in deciding discovery issues in extradition hearings, one consideration is " 'whether the resolution of the contested issue would be appreciably advanced by the requested discovery' "), *quoting* Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986); *In re Extradition of* Drayer, 190 F.3d 410, 415 (6th Cir. 1999), *citing* Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

316 *See* Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993).

be denied procedural fundamental fairness and/or will be treated in a manner that violates the CAT and other cruel, inhuman or degrading treatment (the humanitarian exception).[317]

13.3. Jurisprudential Developments

As there is no statutory provision dealing with discovery in extradition proceedings, judicial interpretations of the requirements of "due process" determine the availability and the scope of discovery.

Although most courts are reluctant to recognize a relator's right to discovery, the common practice is for judges to provide discovery other than with respect to Brady and Giglio material, which is required. Even though some circuits have been more explicit than others, thus creating a disparity within the circuits, it was seen as consistent with the requirement of due process that Brady and Giglio material is discoverable as a matter of right. With respect to additional discovery, the jurisprudence shows that discovery has been left to the discretion of the extradition judge, and only in a few cases have the circuit courts found that the extradition judge abused his/her discretion.

The cases in which discovery has been more generously granted have usually involved extradition requests for economic crimes where the material requested under discovery is related to the determination of probable cause.[318]

The law of discovery in extradition was first articulated by the Second Circuit in *First National City Bank of New York v. Aristeguieta*.[319] In Aristeguieta the court held that discovery should only be granted if it is warranted by an exceptional situation. In making such a holding, the court reversed the lower court's decision, which permitted discovery to the government of Venezuela of U.S. banks' records, to be later used during the relator's trial of embezzlement in Venezuela. The court stated that Venezuela had failed to show any exceptional circumstances that would justify granting the discovery request. The court reasoned that the threshold of evidence to satisfy the probable cause required to extradite had already been reached by evidence introduced to the court, and therefore no further discovery was needed. This suggests that if Venezuela's request of further discovery was to uncover evidence necessary to establish probable cause, then the court would have probably allowed discovery. Although not clearly stated by this court, discovery of evidence pertinent to probable cause was how the Second Circuit measured the "exceptional situation" test.

Another landmark case on the subject of discovery in extradition came years later. The Southern District of New York, in *Jhirad v. Ferrandina*,[320] determined the limits of the "exceptional situation" test, stating "[U]nder the traditional extradition standards discovery is limited and discretionary. . . ."[321] The Second Circuit, on appeal, reaffirmed this statement, explaining the "limited but discretionary" standard by stating that the court shall order discovery "as law and

317 *See, e.g.,* Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (inquiring into discovery reflected the same issue argued at the hearing that the United Kingdom had suspended fundamental fairness rights in connection with IRA investigations and prosecutions by subjecting individuals who were related to IRA terrorism to torture and cruel, inhuman, or degrading treatment or punishment).

318 *See* Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980). This case dealt with fraudulent bankruptcy (in Italy) of a very large proportion. To establish probable cause required going through an enormous volume of documents. Discovery was quite liberal with the cooperation of the government. The actual extradition phase took over four years, and the case was ultimately dismissed after the holding of the bankruptcy court that issued a judgment on fraudulent bankruptcy was reversed by the Italian Supreme Court.

319 First Nat'l City Bank of New York v. Aristeguieta, 287 F.2d 219 (2d Cir. 1960).

320 Jhirad v. Ferrandina, 362 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd*, 536 F.2d 478 (2d Cir. 1976), *cert. denied,* 428 U.S. 833 (1976).

321 *Id.* at 1060.

justice require"[322] while keeping in mind "the well-established rule that extradition proceedings are not to be converted into a dress rehearsal trial."[323] The language used in Jhirad has been used by other Circuits and lower courts as a basic statement of the law of discovery in extradition cases.[324]

The Ninth Circuit, in *Oen Yin-Choy v. Robinson*,[325] stated that before granting discovery the court should keep in mind "whether the resolution of the contested issue would be appreciably advanced by the requested discovery."[326] This test was explained by the Southern District Court of California in *In re* Extradition of Powell,[327] which held that if the discovery will appreciably advance the negation or explanation of the government's showing of probable cause, then justice requires courts to exercise their inherent authority and to order discovery.[328] This test harkens back to a "due process" basis for discovery.

In *United States v. Seguy*, the discovery magistrate provided extensive discovery:

> Montemayor has complained that he was given insufficient opportunity to discover the records of Pemex and the prosecutor. The court, however, has allowed extensive production of documents over the last six months. This discovery was especially generous when one considers the preliminary nature of this proceeding. Also, much of the requested material relates only to whether the prosecutor in Mexico is factually and legally correct in his positions before the court *there.* None has to do with the propriety of extradition under the American Constitution, American statutes, or the Mexican–American treaty. If this were an extradition between two American states, the record would have been much more constrained than it has been here. Discovery beyond the extensive applications by the governments was allowed by this court out of caution, not doubt.[329]

13.4. Conclusion

Clearly, the limits of discovery are determined by the admissibility of evidence. As the scope of discovery in extradition proceedings is limited to the determination of probable cause, then so will the type of discoverable material.

However, there should be no question, in the opinion of this writer, about discovery of information arising under Brady and Giglio, as well as information involving the identity of the person requested, which is necessary in order to avoid the type of denial of justice that occurred in Demjanjuk.[330] If this information is in the possession, control, and custody of the U.S. government, then it must be provided to the relator.[331] However, when the question deals with the discovery of Brady materials that are within the possession of the requesting state, the result

322 *Jhirad*, 536 F.2d 478.

323 *Id.*

324 *See* Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996); *aff'd,* 121 F.2d 1332 (9th Cir. 1997); *In re Extradition of* Powell; 4 F. Supp. 2d 945 (S.D. Cal. 1998); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); *Jhirad*, 536 F.2d at 485.

325 Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988).

326 *Id.* at 1407.

327 *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998).

328 *Id.* at 960.

329 United States v. Seguy, 329 F. Supp. 2d 871, 879 (S.D. Tex. 2004). The same matter was brought before the Southern District of Texas on two separate actions. *See Seguy*, 329 F. Supp. 2d 880, *habeas corpus denied*, 329 F. Supp. 883 (S.D. Tex. 2004).

330 Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

331 *Id. See also* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Giglio, 405 U.S. 150 (1972); United States v. Aggurs, 427 U.S. 97 (1976); *In re Extradition of* Drayer, 190 F.3d 410, 414 (6th Cir. 1999); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995).

might differ under the rule of non-inquiry. Therefore, requesting the government to seek evidence or additional material from the requesting state should be limited to information about the identity of the requested person. This may include evidence or information concerning any treaty defenses that would, as a matter of law under that treaty, preclude extradition.[332] The policy supporting this proposition is to spare the respective governments and the relator him/herself the costs, hardship, and embarrassment of extraditing a person who should not be extradited under the applicable treaty and the laws of the requested state.

A line of cases held that in extradition proceedings the extradition judge has the "inherent power to order discovery as law and justice requires."[333] It is important, however, to emphasize the limited function of the extradition magistrate, which is to perform the task of determining the extraditability of the relator, and not his/her guilt or innocence.[334]

The extradition magistrate would have to be guided by the policies and purposes of extradition, keeping in mind considerations for the proof or negation of "probable cause," in order to determine in each and every case whether discovery should be granted and to what extent. In this context, the magistrate can make an initial determination as to whether the discovery material is available to the government or is known by the government to exist. This is the "ease of access" test that this author would propose, as it would not be cumbersome to the government to produce such evidence. If the government contends that such materials are prejudicial to its case, then it should reinforce the court's conviction that such materials are discoverable because they would necessarily tend to be exculpatory under Brady or Giglio, or of a nature that undermines the government's finding of probable cause, as required by § 3184 of the extradition statute.[335]

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332 *See In re Extradition of* Smyth, 826 F. Supp. 316 (N.D. Cal. 1993) (Smyth was an Irish Catholic national who was the subject of an extradition request by the United Kingdom. He sought discovery to provide support to the claim that he would be "punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion," as provided by the United States–United Kingdom extradition treaty. The Northern District of California ordered the material discoverable, as it deemed it relevant to the subject matter of the extradition proceeding). *See also In re Requested Extradition of* McMullen, 989 F.2d 603 (2d Cir. 1993). The discoverable material may also include information dealing with facts relevant to the statute of limitations or a prior conviction or acquittal that maybe relevant to double jeopardy.

333 *See In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Martin v. Warden, 993 F.2d 824, 828 (11th Cir. 1993).

334 *Martin*, 993 F.2d at 828.

335 8 U.S.C. § 3184 (2000).

Chapter X

The Extradition Hearing

Contents

1. Introduction

This chapter describes the processes of the Extradition Hearing (hereinafter referred to as "Hearing") held pursuant to § 3184.[1] It is, as described below, in the nature of a "preliminary hearing" in criminal cases, though it is more formal and there are a greater number of legal issues at stake. However, it is not a mini-trial of the person sought for extradition, and the Hearing is limited to the nine issues identified below. It is therefore something in-between a bare-bones "preliminary hearing" in criminal cases and a summary trial of certain legal and factual issues.

Some of the questions presented at the Hearing pertain to substantive legal issues arising from the applicable treaty and U.S. law, as discussed in Chapters VII and VIII; consequently this chapter has to be read in connection with them. However, to assist the reader, some of the

1 *See In re Extradition of* Joseph, 2007 U.S. Dist. Lexis 41848 (S.D. Cal. June 6, 2007) for an illustrative overview of the extradition process in which each of the steps recruired under § 3184 is considered. *See also In re Extradition of* Morales, 2011 U.S. Dist. LEXIS 48954 (E.D. Cal. Apr. 29, 2011); *In re Extradition of* Hart, 2010 U.S. Dist. LEXIS 138358 (M.D. Fla. Dec. 22, 2010); *In re Extradition of* Siddique, 2009 U.S. Dist. LEXIS 14436 (D. Kan. Feb. 24, 2009); Parretti v. United States, 122 F.3d 758, 772 (9th Cir. 1997); Parretti v. United States, 112 F.3d 1363, 1376 (9th Cir. 1997).

substantive legal issues that are likely to be addressed at the Hearing are addressed in this chapter. But this is only intended to explain how the procedural aspects of the Hearing evolve and how these issues arise and are addressed. The full coverage of these substantive legal issues is, as stated above, found elsewhere in this book. Appropriate cross references will guide the reader.

Because of the primary importance of the Hearing it is useful to summarize its salient characteristics first:

1. The Hearing, though sui generis in nature, is similar to a probable cause hearing in federal criminal cases, but is more complex because of all of the treaty and legislative issues involved.

2. Though not criminal in nature, and not subject to the Federal Rules of Procedure and Evidence, the Hearing nonetheless partakes of them by reason of analogy based on the judge's discretion.

3. The Hearing is not a mini-trial on the merits of the relator's guilt or innocence. Exculpatory evidence is not allowed per se, but only explanatory evidence is admissible. The judge's discretion applies in making this determination.

4. Evidence is not subject to statutory and other common law limitations such as hearsay.

5. The scope of the Hearing is limited to nine issues, which are intended to determine whether:[2]

a. There exists a valid extradition treaty between the United States and the requesting state;

b. The relator is the person sought;

c. The offense charged is extraditable;[3]

d. The offense charged satisfies the requirement of double criminality;[4]

e. There is probable cause to believe the relator committed the offense charged;

f. The evidence is sufficient and credible to support probable cause;

g. The documents required are presented in accordance with U.S. law, subject to any specific treaty requirements, translated, and duly authenticated by a U.S. Consul in the requesting state;[5]

h. There are no treaty or statutory bars to extradition; and

i. Treaty requirements and statutory procedures are observed.

The Hearing commences after the filing of a "complaint"[6] by the U.S. government on behalf of a foreign state and receipt by the court of the documentary evidence presented. This is frequently the sole evidence that the government will produce. In some cases witnesses are presented, usually officials of the requesting state. Conventionally a bail hearing and preliminary motions will have taken place by then. It is at the Hearing stage that the relator can first argue any question regarding the "certification" of documents[7] and the sufficiency of the complaint.

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2 For cases citing this list, see *In re Extradition of Valdez-Mainero*, 3 F. Supp. 2d 1112, 1115 (S.D. Cal. 1998); *In re the Extradition of* Sindona, 584 F. Supp. 1437, 1446 (E.D.N.Y. 1984).

3 *See* Ch. I.

4 *See* Ch. VII, Sec. 2.

5 *See* Ch. IX.

6 *See* Ch. IX, Sec. 6.

7 *See* Ch. IX, Sec. 7.

The sufficiency of the complaint does not hinge on whether the United States has knowledge of the sufficiency of the relevant facts.[8] If the complaint fails to state specific details, there is no prejudice to the defendant provided that the defense counsel is sufficiently appraised of the facts.[9] In addition, technical variances between the complaint and the evidence are not fatal,[10] and extradition will not be denied because of technicalities that are either remedied or deemed harmless.[11]

During the Hearing the extradition magistrate or judge hears and considers the evidence of criminality and commits the accused for surrender if he/she deems the evidence sufficient to constitute probable cause to sustain the charge under the provisions of the treaty and the applicable legislation. As indicated above, the Hearing is not in the nature of a criminal trial, as it is a sui generis proceeding.

The extradition order is not a final order, and thus not appealable.[12] The Supreme Court addressed this issue in *Benson v. McMahon*, stating:

> We are of the opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.[13]

Concerning the distinction between criminal trials and Hearings, Justice Oliver Wendell Holmes stated in *Glucksman v. Henkel*:

> It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin v. Shine*, 187 U.S. 181, 184. See *Pierce v. Creecy*, 210 U.S. 337, 465. We are bound by the existence of an extradition treaty to assume that the trial will be fair.[14]

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8 Fernandez v. Phillips, 268 U.S. 311 (1925); United States *ex rel.* Petrushansky v. Marasco, 325 F.2d 562 (2d Cir. 1963). See also *In re* Burt, 737 F.2d 1477, 1482 (7th Cir. 1984); Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); Liberto v. Emery, 724 F.2d 23, 25 (2d Cir. 1983).

9 *Petrushansky*, 325 F.2d at 564; *Ex parte* Sternaman, 77 F. 595 (C.C.N.D.N.Y. 1896), *aff'd sub nom.* Sternaman v. Peck, 83 F. 690 (2d Cir. 1897).

10 Factor v. Laubenheimer, 290 U.S. 276 (1933); Glucksman v. Henkel, 221 U.S. 508 (1910). *See* also Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); United States *ex rel.* Rauch v. Stockinger, 269 F.2d 681 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959); *In re* Edmondson, 352 F. Supp. 22, 25 (D. Minn. 1972).

11 *Factor*, 290 U.S. 276. *See also* Collins v. Loisel, 259 U.S. 309 (1922); Bingham v. Bradley, 241 U.S. 511 (1916); Grin v. Shine, 187 U.S. 181 (1902); Rice v. Ames, 180 U.S. 371 (1901); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998).

12 *See* Ch. XI.

13 Benson v. McMahon, 127 U.S. 457, 462–463 (1888).

14 Glucksman v. Henkel, 221 U.S. 508, 512 (1910). *See also* Cleugh v. Strakosch, 109 F.2d 330 (9th Cir. 1940); United States *ex rel.* Argento v. Jacobs, 176 F. Supp. 877 (N.D. Ohio 1959). The court in *Argento* held:

> Recognizing fully the right of the Republic of Italy, under the treaty, to extradite its subjects to make them answer to a criminal charge, it is something else where the extradition, in effect, seeks to

The position of the United States on this point is unchanged:

> The United States as the requested state may ask the requesting state to furnish additional evidence or information. The United States Attorney relies on his prosecutorial discretion to request such additional information or evidence and may also in reliance on said discretion not introduce into evidence documents, exhibits or other evidence which the requesting state may present. The U.S. Attorney may also, if he deems it appropriate, file a petition with the court requesting dismissal of the request if he feels that the evidence presented does not constitute "probable cause."[15]

Marjorie Whiteman, synthesizing U.S. policy and practice, described the documents the requesting state must produce as follows:

> The requirements regarding what documents must be submitted by a requesting State in support of its extradition request vary depending on whether the person sought has already been tried and convicted in the courts of the requesting State and then escaped or whether he is merely charged with an offense but has not yet been brought to trial. Further, in the case of one merely charged with an offense, the documentation required varies depending on whether the requesting State must, under the laws of the requested State or the applicable treaty, establish a *prima facie* case of the guilt of the accused in order to obtain his extradition. Under the laws and treaties of many countries, it is sufficient merely to show that the person sought is charged in the requesting State, and a warrant of arrest or similar document issued by the authorities of that State is sufficient evidence, insofar as possible guilt is concerned, to warrant extradition. In the case of other countries, notably the United States, Canada and Great Britain, it is necessary to submit some further evidence of the person's guilt.[16]

Though this official position was stated in 1968, it has been consistently followed since then.

The government may always seek to dismiss a pending case on its own motion if it determines that there is lack of probable cause, insufficient evidence, or the availability of a valid defense under the treaty or legislation.[17]

> execute on an in absentia conviction. In such a case the Court must scrutinize the evidence carefully to determine at least a reasonable probability that the petitioner was guilty of the crime.
>
> In my judgment, there was not sufficient evidence to warrant a reasonable belief that petitioner was guilty of the crime of murder, and the Commissioner's finding to the contrary is not supported by the evidence.

176 F. Supp. at 883. As can be seen in the case of *Taylor v. Jackson*, 470 F. Supp. 1290 (S.D.N.Y. 1979), the relator in U.S. proceedings has only limited rights at the hearing. In *Taylor*, the relator, convicted of various serious offenses in New York, escaped state custody and was later apprehended in Canada. Petitioner was returned to the state of New York upon an extradition request. Petitioner contended that the extradition hearing afforded him was in violation of the extradition laws of the United States, 18 U.S.C. §§ 3181–3195 and the Treaty on Extradition between the United States and Canada, 27 U.S.T. 983, T.I.A.S. No. 8237 (*entered into force* Mar. 22, 1976), in that inter alia the court declined to appoint an attorney to represent petitioner. The court ruled that petitioner had no right to appointed counsel at his extradition hearing, as the rights guaranteed to an accused by the Sixth Amendment apply only to "criminal prosecutions," and international extradition hearings are not within the scope of the amendment. 470 F. Supp. at 1292. *See also* Jhirad v. Ferrandina, 486 F.2d 442, 485 n.9 (2d Cir. 1973), *cert. denied*, 429 U.S. 833 (1976); United States v. Galanis, 429 F. Supp. 1215, 1224–1225 (D. Conn. 1977); Hystad v. Rhay, 533 P.2d 409 (Wash. App. 1975).

15 *See* Yale Kamisar et al., Cases, Comments and Questions on Modern Criminal Procedure 905–960 (1974) (discussing prosecutorial discretion). *See also* Anders v. California, 386 U.S. 738 (1967); Charles Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427 (1960); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U. L. Rev. 174 (1965).

16 6 Marjorie Whiteman, Digest of International Law 954 (1963) [hereinafter Whiteman Digest].

17 This is analogous to the holding in *Anders v. California*, 386 U.S. 738 (1967). *See also* Evitts v. Lucey, 469 U.S. 387, 394 (1992); Kaplan, *supra* note 15.

It should be noted that international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) cannot be used to challenge extradition at the Hearing, as those treaties are not self-executing and Congress has not enacted any implementing legislation allowing for their judicial enforcement.[18] Accordingly, a relator cannot challenge his/her extradition by resorting to rights contained in these treaties. Reliance on non–self-executing international treaty rights are therefore based on national implementing legislation and on interpretation by U.S. courts.[19]

2. Standing of the Relator in Extradition Hearings

The issue of standing arises during the course of a Hearing, including the question of standing to object to the charge on the basis of the rule of specialty.[20] More commonly, however, standing arises with respect to a person who is not present before the court and would therefore be considered a fugitive. Under the doctrine of fugitive disentitlement, a person cannot contest an extradition request from the United States or to the United States while he/she is a fugitive.[21] In the United States a person lacks standing to object or raise any defenses otherwise available under U.S. law and the applicable treaty unless he/she is both before the court and subject to its jurisdiction.[22] In this respect the relator is not afforded the opportunity to have counsel present a special and limited appearance to challenge the jurisdiction of the court.

There is, however, a limited opportunity for challenging the jurisdiction of the court in extradition matters if the relator is not within the territory of the United States, and counsel representing him seeks to dismiss the charges on the grounds that because he is not within the territory of the United States, he/she therefore cannot legally be subject to the court's jurisdiction.[23]

A 2009 example of this came in *In re Hijazi*, in which the relator, a Lebanese citizen domiciled in Kuwait, filed a motion to dismiss charges against him in the United States after Kuwait refused to grant a U.S. extradition request.[24] The magistrate refused to rule on Hijazi's motion, holding that he lacked standing and needed to appear in order to challenge the applicability of the statute in question.

Both the district and circuit courts rejected the magistrate's holding that the fugitive disentitlement doctrine barred Hijazi's claim, as Hijazi "did not flee from the jurisdiction or from any restraints placed upon him," and in fact had turned himself in to the Kuwaiti authorities upon learning of the indictment.[25] The fugitive disentitlement doctrine only applies in situations where the relator willfully leaves the jurisdiction in order to evade the court's jurisdiction and then seeks to use his procedural rights while safely beyond the reach of the court.

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18 *In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757, at *9 (S.D. Cal. Oct. 14, 2008).

19 *See* Ch. II, Sec. 5.4.

20 *See* Ch. VII, Sec. 6.

21 *See* Ch. XI, Sec. 3 (concerning the standing). *See also* Weiss v. Yates, 375 Fed. Appx. 915 (11th Cir. 2010) (unpublished opinion), *cert. denied*, 2010 U.S. LEXIS 3062 (U.S. Apr. 18, 2011); United States v. Mann, 2003 U.S. Dist. LEXIS 3891 (S.D.N.Y. 2003). This situation also arose with regard to Roman Polanski's extradition, although he was ultimately not extradited to the United States. *See* Bruce Zagaris, *Swiss Court Orders Bail for Polanski during His Fight against U.S. Extradition Request*, 26 Int'l Enforcement L. Rep. 49–50 (Feb. 2010).

22 *See* United States v. Mann, 829 F.2d 849, 852 (9th Cir. 1987) ("A treaty may create standing if it indicates the intention to 'establish direct, affirmative, and judicially enforceable rights.' "). This issue arises in "Next Friend" cases such as that of Anwar al-Aulaki. *See* Ch. XI, Sec. 3 on the doctrine of standing and the firewall that exists between the U.S. and foreign legal proceedings.

23 *See* Ch. XI, Sec. 3.

24 *In re* Hijazi, 589 F.3d 401, 403–405 (7th Cir. 2009).

25 *Id.* at 412.

The Seventh Circuit, however, also rejected the district court's ruling that Hajizai must appear due to the "the desire for mutuality in litigation . . . [that] if he wants the United States to be bound by a decision dismissing the indictment, he should be similarly willing to bear the consequences of a decision upholding it."[26] Rather, the Seventh Circuit held that this qualification similarly violated the proscription against disentitlement, noting that "Outside of the core fugitive disentitlement context, the Supreme Court has indicated that disentitlement is 'too blunt an instrument' to redress the indignity of a defendant's absence. *Degen v. United States*, 517 U.S. 820, 828 (1996)."[27] Given the adverse consequences of denying Hijazi's motion, including his inability to travel or conduct business due to the outstanding INTERPOL Red Notice, as well as the possibility of his extradition from Kuwait in the future, the court ruled that Hijazi had standing to contest the applicability of the statute even though he was still in Kuwait.

In certain circumstances the relator may be in custody in another jurisdiction and cannot appear before the court. There are two scenarios under which this could arise, namely: (1) where the relator is not within the actual custody of the court but is within the "constructive custody" of the court, and (2) where the relator is neither within the custody of the court nor within the "constructive custody" of the court. There are a few circumstances in which the relator would be neither within the custody of the court nor within the "constructive custody" of the court. These include situations where the relator is a fugitive, situations where the relator is detained by a foreign country without the United States requesting the relator's detention or otherwise involved in the relator's detention, and situations such as the one that presented itself in *In re Hijazi*.[28]

Under the provisions of 28 U.S.C. § 2241 courts may issue a writ of habeas corpus when the petitioner is "in custody under or by color of the authority of the United States or is committed for trial before some court thereof."[29] Given the ability of the U.S. executive to have individuals seized or detained by third parties outside the jurisdiction of the courts, "actual physical custody of an individual . . . is unnecessary for habeas jurisdiction to exist."[30] However, in order for constructive custody to obtain, the petitioner must show that "the respondent was responsible for significant restraints on the petitioner's liberty."[31] The rationale for "constructive custody" standing is rooted in the obligation of the judiciary to limit the government's ability to improperly restrain the liberty of individuals, which is a recognized basis for judicial oversight in extradition proceedings.[32]

In *Abu Ali v. Ashcroft* the plaintiff, a U.S. citizen, was held in custody by Saudi Arabia at the behest of the United States.[33] Although the court in *Abu Ali* did not rule on the merits of the petitioners "constructive custody" claim, the district court firmly rejected the U.S. government's

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26 *Id.* at 413.

27 *Id.* at 413–414.

28 *See* Ch. IX for a discussion of the definition and effect of a relator being a "fugitive."

29 28 U.S.C. § 2241(c).

30 Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 47 (D.D.C. 2004).

31 *Id.* at 48.

32 *See for instance* Fernandez v. Phillips, 268 U.S. 311 (1925); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936) (requiring that the relator be charged with an offense in accordance with the terms of the treaty). *See also* Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty."); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir.1996). (Habeas jurisdiction exists not only in cases of physical custody by the executive, but in all circumstances in which "federal adjudication is necessary to guard against governmental abuse in the imposition of severe restraints on individual liberty.").

33 *Id.* at 32.

argument "for nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him."[34] As the court stated, "the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen."[35] However, the instances where the United States is correctly deemed to be operating through a foreign ally as an intermediary for purposes of habeas jurisdiction will be exceptional, and a federal court's inquiry in such cases will be substantially circumscribed by the separation of powers. Nonetheless, the executive's authority over foreign relations has never in our nation's history been deemed to override entirely the most fundamental rights of a U.S. citizen—the right to challenge as arbitrary and unlawful his/her detention allegedly at the will of the executive.[36]

A similar situation arose in *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, where a number of former Guantanamo Bay detainees sought standing before the district court for the District of Colombia.[37] The petitioners, however, had been transferred to the custody of a foreign state or released and subsequently taken into custody by another state, and on that basis the court ruled that the U.S. government did not exert the same "level of control over Petitioners" as in *Abu Ali*.

A prominent example of constructive custody involves the attempted extradition of former Guatemalan [resident Alfonso Portillo on money laundering charges. On the basis of a U.S. extradition request Portillo was taken into custody in Guatemala. Although Portillo challenges the legality of the extradition request, he cannot do so because neither Guatemalan nor U.S. courts will hear his claim. Guatemalan courts have refused to address the issue because it is a question of U.S. law, and this would violate the rule against non-inquiry.[38] United States courts have ruled that Portillo is not in U.S. custody and therefore lacks standing. Portillo's U.S. lawyers, including this writer, have argued that Portillo is in the "constructive custody" of the United States, but this argument was rejected by the district court judge.[39]

The *Portillo* holding conflicts with the "significant restraint" standard adopted by the district court in *Abu Ali*, which was itself based on Supreme Court precedent.[40] Other than the political nature of the indictment and the fact that Portillo is not a U.S. citizen, it is unclear how his confinement in Guatemala does not meet that standard. Having been denied standing, Portillo is effectively unable to address an essential right that goes to the heart of his detention, and leaves him caught in a legal black hole.

The issue of standing also arises with respect to the relator's objection to evidence presented at the Hearing by the U.S. government on behalf of the requesting state. The court will usually deny such objections without referring to the issue of standing, simply because the government has significant leeway in introducing evidence because the Hearing is not a trial on the merits of a criminal charge.

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34 *Id.* at 40.

35 *Id.* at 41

36 *Id.*

37 *In re* Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay, 700 F. Supp. 2d 119 (D.D.C. 2010).

38 *See* Ch. VII, Sec. 8.

39 Portillo v. Bharara, 2012 U.S. Dist. LEXIS 67224 (May 10, 2012). This issue is dealt with in Ch. XI, Sec. 3, concerning the firewall between domestic and foreign legal proceedings. This firewall effectively acts as a barrier to prevent individuals from accessing the courts despite their being in custody.

40 Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 48 (D.D.C. 2004), citing Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir. 1996).

An issue of standing, however, arises with respect to a relator challenging evidence which may not pertain to his/her case, and to others who are not a party to the proceedings but who seek to challenge evidence presented by or on behalf of a requested state.[41] The Ninth Circuit addressed this issue in *United States v. Antonakeas*, reasoning that:

> The United States argues that Appellant has no standing to raise noncompliance with procedural provisions of the Treaty as a bar to jurisdiction in the district court. We agree. An early Supreme Court case, *United States v. Rauscher*, 119 U.S. 407, 409-10, 430, 433 (1886), recognized the right of a person extradited to enforce what has become known as a "specialty" provision in a treaty—a requirement that the receiving country may proceed against the person extradited only for offenses that are enumerated in the treaty and upon which extradition actually rested. In Rauscher, the treaty enumerated murder as an eligible offense, and extradition rested on that offense, but the defendant was tried and convicted for the then-existing lesser offense of "cruel and unusual punishment." *Id*. at 409–10. The Supreme Court reversed. Id. at 433. A more recent Supreme Court case, *United States v. Alvarez-Machain*, 504 U.S. 655, 659–60 (1992), expressed agreement that a defendant may not be prosecuted in violation of the terms of an extradition treaty, citing *Rauscher*. But there the Court held that a treaty could not be violated where it was not invoked (because the defendant had in fact been kidnapped, not extradited). *Id*. at 669–70. In *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (per curiam), another specialty case, this court made the broad statement that "the person extradited may raise whatever objections the rendering country might have." Despite this broad pronouncement, however, we conclude that, unlike the substantive right of specialty, procedural violations do not give rise to individually enforceable rights.
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> "Whether or not treaty violations can provide the basis for particular claims or defenses . . . depend[s] upon the particular treaty and claim involved." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 481 (2000). Unlike specialty, which is a substantive requirement that goes to the heart of the requested country's decision to allow extradition, a deadline is a procedural requirement without similar import. If a dead-line is missed during the extradition process, the requested country can simply refuse extradition on that ground. By contrast, once the person sought has been turned over to the requesting country for specified offenses, the requested country has no recourse if the offenses ultimately charged are different from the offenses upon which extradition was allowed. For this reason, it is necessary to allow the person extradited to raise this type of treaty violation in the requesting country because the requested country has no opportunity to enforce the specialty provision on its own behalf. If the authorities in Germany believed that there was a treaty violation, they could have refused extradition. There is no policy reason to accord Appellant standing to raise in this court an alleged missed extradition deadline after Germany has determined that the treaty provisions were fulfilled and extradition was proper.[42]

3. The Requirement of a Charge or Accusation

Treaties usually require that the relator be "charged" with a crime in the requesting state before the request is presented or the extradition is granted. If a treaty states that the request can be founded on an accusation, then an arrest warrant will suffice. If the treaty, however, uses the term "charge" or "charged" (with an offense), then the question arises as to whether this requires a formal criminal charge in the nature of a complaint, information, or indictment in U.S. law, or whether it is synonymous with "accused," whereby an arrest warrant without a formal accusation will suffice. Whether a person is "charged" or not should be determined on the basis of the law of the requesting state, and not on that of the requested state. This is, however, a question of treaty interpretation,[43] and with respect to this issue it is about the intent of the

41 *See* Peltier v. Henman, 997 F.2d 461 (1993).

42 United States v. Antonakeas, 255 F.3d 714, 719–720 (9th Cir. 2001) (citations omitted).

43 *See* Ch. II, Sec. 5.4.

treaties. In any event, the court will have to ascertain the existence in fact of a valid warrant or criminal charge in accordance with the laws of the requesting state. If the term "charge" is meant to require formal accusation its validity is to be established in accordance with the laws of the requesting state. To some extent, such a finding by the U.S. extradition judge should have the same characteristics as a charging instrument under U.S. law. The offense charged must be criminal under the laws in force within the jurisdiction of the requesting state, the formal charge must be valid and in effect in that state, and both must satisfy the requirements of "double criminality"[44] in its substantive as well as its procedural aspects.[45]

These requirements are significant and relevant to the showing of probable cause related to the offenses charged.[46] In *In re Assarsson*,[47] which concerned the extradition treaty between the United States and Sweden, it was found that there is no substantive requirement that a formal "charge" be filed. This does not, however, preclude a finding of probable cause that the relator committed the crime of which he has been accused.

In *Assarsson*, the relator Jan Assarsson was ordered to be extradited to Sweden for trial on charges of arson, fraud, and attempted fraud.[48] At the Hearing, Assarsson, through his counsels including this writer, contended that extradition was inappropriate because no "charges" were pending against him under Swedish law.[49] The relator contended that although ordered arrested by the Swedish courts, a formal document, called a "charge" in the Swedish criminal code, had not been filed against him. The relator argued that the extradition treaty, which used the term "charged," required the existence of a formal charge and not an arrest warrant.[50] However, the extradition court found that because the filing of a formal charge is not required as a prerequisite to extradition,[51] no substantive requirement existed that the "charge" be filed. In addition, the court found that when an individual is named in an arrest warrant as having committed a crime, he is "charged" within the meaning of an extradition treaty. The court effectively equated "charged" with "accused."

The use of the term "charged" in the United States–Sweden Extradition Treaty, however, as argued by this writer and other counsel, could be interpreted as meaning a formal charge in the nature of a complaint, information, or indictment under Swedish law, whose counterpart should be found in U.S. law, because if it were as the Seventh Circuit held, the treaty would have used the term "accused" instead of "charged." This is the case in the Israel–Sweden

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44 *See* Ch. VII, Sec. 2.

45 *See* Factor v. Laubenheimer, 290 U.S. 276, 298 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *But see In re Extradition of* Ylipelkonen, 768 F. Supp. 347 (S.D. Fla. 1991) (refusing to allow counsel from Finland to testify to the likelihood of the relator receiving probation upon his return to Finland).

46 *See* e.g., Fernandez v. Phillips, 268 U.S. 311 (1925); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); Hill v. United States, 737 F.2d 950 (11th Cir. 1984); Mainero v. Gregg, 164 F.3d 1199, (9th Cir. 1990); *Fernandez-Morris*, 99 F. Supp. 2d 1358; United States v. Bogue, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998); Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996).

47 *In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). *See also In re* Burt, 737 F.2d 1477, 1483 (7th Cir. 1984); *In re* Assarsson, 687 F.2d 1157, 1159–1160 (8th Cir. 1982) (presenting the same issues concerning another relator by the same name and for the same facts considered in the Seventh Circuit decision, in which the Eighth Circuit took the same position as the Seventh Circuit), *aff'g* 538 F. Supp. 1055 (D. Minn. 1982). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999).

48 *Assarsson*, 635 F.2d 1237 at 1238.

49 *Id.* at 1239.

50 *Id.* at 1241.

51 *Id.* at 1242.

Extradition Treaty,[52] which states that the relator must be "*accused* or convicted" (emphasis added) of an enumerated offense. Similarly, the language of the United Kingdom–Sweden Extradition Treaty[53] is virtually identical, that is, that the relator must be "*accused* or convicted" (emphasis added) of an enumerated offense. Thus, the language of these treaties suggests that extradition can be achieved by means of an arrest warrant, and that a formal charge need not be made. Thus, if the term "accused" is used in some treaties but not in others, it is obviously intended to relay different meanings, as in the case of the United States–Sweden Treaty. The Seventh Circuit, however, held otherwise.

The importance of the term "charged" appears in relationship to the rule of specialty,[54] which holds that the requesting state may prosecute or punish the relator only for the crime for which extradition is granted. This rule recognizes the right of the requested state, once extradition is granted, to limit the prosecution of the relator in the requesting state solely to those crimes found to be extraditable offenses under the law of the requested state, and for which that state's standard of probable cause is applied to determine if the evidence presented provides reasonable grounds to believe that the relator committed crimes for which extradition is granted.[55] The rule of specialty is thus the bridge between the requirement that the relator be formally charged in the requesting state and the requirement that the requested state find that he/she has been charged with an extraditable offense binding the requesting state to prosecution limited to those crimes. If this right of the requested state were not recognized in international law, the requesting state could prosecute or punish the relator for an offense other than the one for which extradition is granted and thereby abuse the processes of the requested state.

To grant extradition to Assarsson without requiring that he be formally charged with a specific crime for which he would be prosecuted could have opened the way for the Swedish government to attempt to punish him for any offense it may elect, including one that may not be deemed extraditable and for which extradition would not have been granted had the U.S. government been fully informed. The fact that Sweden affirmed seeking Assarsson for a certain number of offenses for which he had not yet been formally charged would not bind it to prosecute him only for those offenses. That is precisely why a substantive criminal charge upon which prosecution commences should be required.

It must be added, however, that if the treaty specifies that the relator be "accused," then the requesting state, which relies only on an arrest warrant, must specify the crime, meet the test of probable cause, and be thereafter legally bound to prosecute the relator for that offense or lesser-included offenses, and not for any other without first obtaining the consent of the requested state.[56]

An extradition request must charge a person with a crime. However, the term "charge" does not necessarily imply that a person has been formally charged in the requesting state in a manner that is similar to charges on which prosecution can be initiated in the United States. An accusation of a crime supported by an arrest warrant is sufficient.[57] A criminal accusation showing intent to prosecute is enough.[58] Similarly, an accusation issued for the purposes of conducting an investigation is sufficient where the requesting state has an inquisitorial criminal

52 516 U.N.T.S. 3.

53 390 U.N.T.S. 118.

54 *See* Ch. VII, Sec. 6.

55 *See* Freedman v. United States, 437 F. Supp. 1252, 1259 (N.D. Ga. 1977).

56 *See* Ch. VII, Sec. 7.

57 *In re* Assarsson, 687 F.2d 1157, 1162 (8th Cir. 1982), *aff'g* 538 F. Supp. 1055 (D. Minn. 1982).

58 Emami v. U.S. Dist. Ct. for N. Dist., 834 F.2d 1444, 1449 (9th Cir. 1987). *See also* Kaiser v. Rutherford, 827 F. Supp. 832 (D.D.C. 1993); *cf. In re* Lehming, 951 F. Supp. 505 (D. Del. 1996).

system under which "investigative purposes" is considered a "charge."[59] The question in these cases arises when the requesting state's laws permit arrest for the sole purpose of a criminal investigation.[60]

Whether an extradition request is deemed sufficient with respect to an investigation may involve political considerations, especially where there may be collusion between the requesting, the requested state, and potentially third-party states. In other words, the request for investigation may be a subterfuge to achieve an individual's re-extradition to a heretofore unannounced state using the requesting state's expressed wish to conduct as "investigation."

This may be the case with Julian Assange, the founder of the Wikileaks organization, whose extradition is sought by Sweden from the United Kingdom for an alleged investigation into sexual misconduct claims by two women. It is believed that the United States is seeking to obtain custody of Assange, whom the U.S. Department of Defense has allegedly declared an "enemy,"[61] in order to prosecute him for violations, possibly including the Espionage Act of 1917 and trafficking in stolen property, for his connection with the release of classified documents.[62] The hypothesis is that the United States cannot obtain the extradition of Assange from the United Kingdom, as UK laws and jurisprudence would preclude his extradition either on the basis of freedom of expression or as a political offense.[63] Rather, it is hypothesized that he could be extradited by the United Kingdom to Sweden, and that Sweden may be more amenable to extraditing him to the United States thereafter. Therefore, Assange's extradition to Sweden may indicate that Sweden is in collusion with the United States and the United Kingdom, and that Sweden will re-extradite him to the United States to face trial.[64]

Issues can also arise where the initial charge has expired due to the running of the statute of limitations[65] or to fundamental changes in the legal system of the requesting state. A number of cases involving crimes committed in Bosnia and Herzegovina illustrate this problem. A prominent example of this arose in *Sacirbey v. Guccione*.[66] In that case, the Second Circuit held that an individual was no longer "charged" within the meaning of the treaty when a Bosnian court

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59 *In re Extradition of* Lam, 2009 U.S. Dist. LEXIS 43075, at *8–*10 (E.D. Cal. 2009) (discussing Belgian criminal system and "charging" for purposes of investigation).

60 This is the case in Germany. *See* Emami v. U.S. Dist. Ct. N. Dist. Cal., 834 F.2d 1444, 1451 (9th Cir. 1987) and *In re Extradition of* Lehming, 951 F. Supp. 505 (D. Del. 1996). It also applies in Italy. *See In re Extradition of* Rovelli, 977 F. Supp. 566 (D. Conn. 1997).

61 Philip Dorling, *US Calls Assange "Enemy of State,"* Sydney Morning Herald, Sept. 27, 2012, *available at* http://www.smh.com.au/opinion/political-news/us-calls-assange-enemy-of-state-20120927-26m7s.html.

62 Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, NY Times, Dec. 7, 2010,*available at* http://www.nytimes.com/2010/12/08/world/08leak.html.

63 *See* Ch. VIII, Sec. 2.1.

64 *See* Ch. VII.

65 *In re Extradition of* Chapman, 2007 U.S. Dist. LEXIS 81944 (D. Haw. 2007). This case involved the issue of whether the Mexican statute of limitations ran in regard to arrest warrants issued for U.S. bounty hunters accused of "unlawful deprivation of liberty" for capturing a fugitive U.S. citizen in Mexico. The Mexican court that issued the original arrest warrant subsequently granted the defendant's motion to dismiss the pending criminal action, finding that the limitations period under Mexican law was not tolled during the defendant's arrest in the United States. The issue in this case was "whether, under the laws of the state of Jalisco, this ruling of the trial court has been stayed during the pendency of the prosecutor's appeal." *Id.* at *6. The court reasoned that the Mexican court's clarifying order stating that the arrest warrant was "cancelled" despite the Mexican prosecutor's appeal, especially as no contrary evidence was provided, meant that the statute of limitations had run and there was no "charge" against the defendants in Mexico or valid arrest warrant for their arrest. *Id.* at *6, *10–*11. Thus, the extradition proceedings were dismissed.

66 Sacirbey v. Guccione, 589 F.3d 52 (2d Cir. 2009).

lost jurisdiction over the crime due to judicial reforms.[67] Sacirbey, the relator, was a naturalized U.S. citizen[68] who served as Bosnia's ambassador to the United Nations from 1992 until 2000,[69] when he resigned due to political changes in Bosnia. The new Bosnian foreign minister subsequently opened an investigation into financial irregularities at the U.N. Mission to the United Nations, which resulted in the issuance of an international arrest warrant for Sacirbey by a Cantonal Court in Bosnia.[70]

After issuing the arrest warrant, the Bosnian judicial system was reorganized and the Cantonal Court that issued the warrant lost jurisdiction over the financial crimes alleged in the warrant. No new arrest warrant was issued after the reorganization,[71] although the Counselor to the Bosnian Embassy in Washington, DC, affirmed her country's intent to prosecute Sacirbey, and the Assistant United States Attorney affirmed that the National Court in Bosnia intended to proceed against Sacirbey upon his surrender.[72]

Sacirbey was found extraditable by the U.S. magistrate judge, and he subsequently filed a habeas corpus petition to the district court. In the habeas petition Sacirbey argued that the dissolution of the Bosnian Cantonal Court negated its jurisdiction and voided the indictment, and therefore that he was not "charged" within the meaning of the treaty.[73] The district court rejected this argument, reasoning that the requirement of a "charge" was satisfied if the relator was "accused" or the requesting state showed its intent to prosecute.

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67 The court framed the issue in a more outcome determinative manner, namely "whether an arrest warrant issued by a foreign court that no longer has jurisdiction over the accused, nor the power to enforce the warrant, can provide an adequate basis for the extradition of a United States citizen." *Id.* at 54.

68 *Id.* at 54.

69 *Id.* at 55–56.

70 *Id.* The new Bosnian foreign minister was a perceived political adversary of Sacirbey. This political aspect of the investigation may have played a role in the Second Circuit's decision.

71 *Id*. at 59.

72 More particularly, the letters presented by the government were as follows:

> Kosovic's first letter, dated October 11, 2005, stated that "[the National Court] will proceed in the matter of [Sacirbey] if the request for extradition would be approved by the appropriate authorities of [the] United States." J.A. 960 (Oct. 11, 2005 Letter of Amra Kosovic). A second letter, dated November 10, 2005, was more equivocal on the question of whether the National Court had jurisdiction over the case. Kosovic's letter stated in relevant part:
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> > The Cantonal Court . . . exists and hears all cases that are within its jurisdiction. During the period of justice system reforms, the [National Court] was established and the [National] Court *can, on request of the parties in a case, decide to hear this case* of extradition or any other case if the necessary requirements according to the [Bosnian Criminal Procedure Code are met]. As you were informed, [the] Prosecutor's Office of Bosnia . . . has sent notice that [it] took the investigation which was previous[ly] held by [the] Prosecutor's Office of Canton Sarajevo.
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> J.A. 961 (Nov. 10, 2005 Letter of Amra Kosovic) (emphasis added). Recognizing that these letters "do not elaborate on the relationship between the Cantonal Court, which originally issued the arrest warrant and demand for investigation against Mr. Sacirbey, and the [National Court], which now appears to be . . . seized of jurisdiction over Mr. Sacirbey's case," the government argued that these letters nevertheless demonstrated that "a Bosnian court . . . would handle Mr. Sacirbey's proceeding upon his extradition." J.A. 958 (Nov. 22, 2005 Letter of Assistant United States Attorney Anjan Sahni).
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> *Id.* at 60–61.

73 *Id.* at 59. This author suggested in a telephonic conference before the magistrate judge that the implications of the change in Bosnia from a civil law system to a common law system were unclear, and that Bosnia should be requested to submit some official judicial document confirming the ongoing validity of the arrest warrant issued by the Cantonal prosecutors. No such submission was made by Bosnia in this matter.

The Second Circuit reversed the district court's findings, ruling that Sacirbey was no longer "charged" within the meaning of the treaty after the reforms.[74] The court reasoned that the United States–Serbia extradition treaty, upon which the request was based, required the submission of a valid arrest warrant and evidence that the individual was "charged" within the meaning of the treaty,[75] and noted that the subsequent declarations supplied by Bosnia were ambiguous as to whether Sacirbey would be prosecuted or merely investigated.[76] Relying on this interpretation of the plain language of the treaty, the court concluded that the arrest warrant was a "dead letter" after the Cantonal Court lost jurisdiction, and that it therefore no longer constituted a valid arrest warrant.[77]

The Second Circuit did, however, reject Sacirbey's argument that a relator must also be subject to ongoing judicial proceedings before a judicial body to which the relator may petition for relief, holding that it was for the executive to negotiate such provisions into a treaty.[78]

The *Sacirbey* court's ruling has been criticized for its narrow reading of the meaning of "charge," especially in light of the Supreme Court's ruling in *Factor v. Laubenheimer* favoring the liberal construction of treaties, as well as the customary international law principle of good faith interpretation of treaties in light of their object and purpose, as expressed in the Vienna Convention on the Law of Treaties.[79] The *Sacirbey* opinion has also come under criticism for failing to address whether the extradition treaty's procedural requirements were superseded by the extradition statute under the later-in-time rule.[80] In two previous cases the Supreme Court had denied the accused standing to demand compliance with procedural requirements contained in the treaties at issue.[81] Perhaps the central criticism of the *Sacirbey* ruling is its failure to consider whether the substance of the reforms in the Bosnian judicial system vested the new Bosnian National Court with jurisdiction by virtue of the judicial reorganization that transferred cases from the Cantonal Court. This critique is aptly made in Judge Amalya Kearse's dissent.[82]

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74 *Id.* at 69–70.

75 *Id.* at 66–67. Article III states that when "[a] fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime has been committed, and of the depositions or other evidence upon which such warrant was issued, shall be produced."

76 *Id.*

77 *Id.* at 67.

78 *Id.* at 65–66, 69.

79 *See* Jacques Semmelman, *International Decision: Sacirbey v. Guccione: International Extradition—Treaty Interpretation—Requirement in Extradition Treaty That Accused Be Charged—Judicial Reorganization Affecting Validity of Extradition Request*, 104 A.J.I.L. 641, 644–645 (2010).

80 *Id.* at 645.

81 *Id.* at 645–646. Semmelman discusses *Grin v. Shine*, where the Supreme Court reasoned that the requirement in the United States–Russia treaty that an authenticated copy of an arrest warrant or equivalent judicial document must be submitted where the relator was merely charged with an extraditable crime was superseded by congressional legislation making no reference to this requirement in extradition proceedings. Further, in *Charlton v. Kelly*, the Supreme Court denied the relator the ability to demand enforcement of the United States–Italy treaty requirement that the formal demand for extradition be filed within forty days of arrest, as such requirement was not found in the extradition statute that applied to all extradition treaties. Thus, Semmelman argues that as the current extradition statute does not require submission of a foreign arrest warrant, the government could have argued that Sacirbey lacked standing to demand enforcement of this procedural requirement, and *Sacirbey* presented an opportunity to revisit these earlier cases to clarify the application of the latter-in-time rule and interplay of the extradition statute and extradition treaties.

82 *Sacirbey*, 589 F.3d at 72–75 (2d Cir. 2009) (Kearse, J., dissenting). Contrary to the majority, Judge Kearse concluded that:

> The Bosnian court reforms automatically divested the Sarajevo Cantonal Court of jurisdiction to entertain a prosecution of Sacirbey and assumes that a loss of jurisdiction in the Cantonal Court

In *Zelenovic v. O'Malley* the district court for the Northern District of Illinois considered whether the judicial reforms in Serbia, including the dissolution of the court that issued the relator's arrest warrant, defeated the basis of the extradition request, for the same reasons raised in *Sacirbey*.[83] The *Zelenovic* court distinguished the case from *Sacirbey* because "the evidence submitted by the Government here demonstrates that Zelenovic's arrest warrant was ratified by a Serbian court with jurisdiction over the matter," which was not the case in *Sacirbey*.[84] The question remains, however, whether the same result would remain in *Zelenovic* if there had been the same political undertones as in the *Sacirbey* case.

The *Zelenovic* and *Sacirbey* cases highlight a particular difficulty in extradition law. States in transition after conflicts often reform their judicial systems, sometimes multiple times. Consequently, arrest warrants and charging instruments may be issued by courts whose jurisdiction is subsequently removed, or the court itself is abolished or merged with others. The question of the validity of orders issued by such courts has to be determined in accordance with the laws of that state. A better practice is for a requesting state to reissue the order or to have it certified as legally valid, as in *Zelenovic*. Failure to do so, as in the *Sacirbey* case, may well be due to the fact that the extradition request is politically motivated. This was the case with respect to Muhamed Sacirbey, particularly because the originally investigated financial situation arose during a politically turbulent and contentious time in Bosnia.

4. The Requirement of "Probable Cause"[85]

The finding of probable cause is specifically required by legislation in 18 U.S.C. § 3184, and is also embodied in U.S. treaties. But inexplicably, it has not yet been interpreted as emanating from the Fourth and Fifth Amendments to the U.S. Constitution. Thus, its meaning, content, and application have acquired a dimension that is separate and distinct from the constitutional probable cause standard applicable to arrests, and to searches and seizures in the United States or under U.S. law if carried out extraterritorially. Nevertheless, because probable cause applies to a finding under the law of the requesting state for an offense whose existence and meaning is to be found under the law of the requesting state by virtue of the principle of double criminality,[86] which is also required by legislation and treaty, it is difficult to separate probable

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> means that no court has jurisdiction. In my view, neither assumption is correct. Although I agree that the Sarajevo Cantonal Court no longer has jurisdiction, it appears to me, given the provisions of the Bosnia CPC, that the divesture of jurisdiction was not automatic but instead results from the decision of the Bosnian National Court to take the case. I see no reason—and the majority does not explain—why a nation's court reforms cannot entail the transfer of cases from one court to another; and it appears that the Bosnia reforms envision the retention of jurisdiction by the Cantonal Courts in some cases and the transfer to the National Court of other cases of which the National Court wishes to take jurisdiction.
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> …
>
> Thus, while I agree with the majority that the Sarajevo Cantonal Court no longer has the power to proceed in the matter of Sacirbey, I reach that conclusion because the Bosnia National Court has decided to take the case. I do not agree with the majority that extradition should be denied on the theory that rather than having been transferred to the National Court, the original warrant for Sacirbey's arrest has become a "dead letter," Majority Opinion ante at 23 (internal quotation marks omitted).

83 Zelenovic v. O'Malley, 2010 U.S. Dist. LEXIS 92632, at *7–*10 (N.D. Ill. Sept. 7, 2010).

84 *Id.* at *10–*11.

85 S*ee* Hermanowski v. United States of America, 2006 149 F.C.R 93 (Austl.); United States v. Andrade, 2006 U.S. Dist. LEXIS 89870 (D. Or. 2006); United States v. Andrade, 2006 U.S. Dist. LEXIS 70040 (D. Or. 2006); *In re Extradition of* Waters, 2003 U.S. Dist. LEXIS 24399 (E.D.N.Y. 2003).

86 *See* Ch. VII, Sec. 2.

cause for extradition from probable cause for an arrest, most obviously because the Hearing on extradition would not be held if the relator had not been arrested.

The "probable cause" standard applied in the process of extradition originated as one of the grounds upon which the relator could challenge both the order for his/her extradition and the lawfulness of his/her detention during a habeas corpus review.[87] The U.S. Supreme Court has defined this standard as requiring that competent legal evidence be presented in order to warrant the reasonable conclusion that the relator committed the offense for which he/she is sought,[88] and not simply that he/she is suspected of having done so.

The requesting state need not, however, adduce evidence sufficient to justify a conviction.[89] Moreover, it is accepted practice that the probable cause standard must be satisfied in accordance

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87 *See* Fernandez v. Phillips, 268 U.S. 311 (1925); Wright v. Henkel, 190 U.S. 40 (1903); Ornelas v. Ruiz, 161 U.S. 502 (1896); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); United States v. Bogue, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998); Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). *See also* Elias v. Ramirez, 215 U.S. 398 (1910); Grin v. Shine, 187 U.S. 181 (1902); Terlinden v. Ames, 184 U.S. 270 (1902); Tucker v. Alexandroff, 183 U.S. 424 (1902); *Ex parte* Bryant, 167 U.S. 104 (1897); Benson v. McMahon, 127 U.S. 457 (1888); Bovio v. United States, 989 F.2d 255 (7th Cir. 1993) (reviewing probable cause determination to decide whether there is any competent evidence supporting the determination); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); United States v. Alvarez-Moreno, 874 F.2d 1402, 1414 (11th Cir. 1989) ("When a grand jury indicts a defendant, and the defendant is tried for the precise offense contained in the extradition order, the doctrine of specialty does not purport to regulate the scope of proof admissible in the judicial forum of the requesting state"); United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir. 1961); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Hoi-Pong v. Noriega, 677 F. Supp. 1153 (S.D. Fla. 1988); Na-Yuet v. Hueston, 690 F. Supp. 1008 (S.D. Fla. 1988); *In re Extradition of* Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988); *In re Extradition of* Pazienza, 619 F. Supp. 611 (D.C.N.Y. 1985); *In re Application of* D'Amico, 185 F. Supp. 925 (D. Conn. 1960), *appeal dismissed sub nom.*; *In re* Cortes, 42 F. 47 (1890).

88 In *Collins v. Loisel*, 259 U.S. 309 (1922), the Court stated that:

> The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction.

Id. at 316. This standard was similarly adopted in earlier decisions.

See also Bingham v. Bradley, 241 U.S. 511, 517 (1916) (discussing "competent and adequate evidence"); McNamara v. Henkel, 226 U.S. 520, 524 (1913) (stating that there must be "competent evidence that the crime . . . had been committed"); Correll v. Stewart, 941 F.2d 1209 (6th Cir. 1991); Peters v. Egnor, 888 F.2d 713 (10th Cir. 1989). *See also In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. Jul. 26, 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. Jul. 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); Valencia v. Scott, 1992 WL 75036 (E.D.N.Y. Mar. 24, 1992); Carr v. United States, 782 F. Supp. 945 (D. Ver. 1991); *In re Extradition of* Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989).

89 *Collins*, 259 U.S. at 316. See also Fernandez v. Phillips, 268 U.S. 311, 312 (1925); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997); United States *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726, 730–731 (9th Cir. 1975); Merino v. U.S. Marshal, 326 F.2d 5, 11 (9th Cir. 1963), *cert. denied*, 377 U.S. 997 (1964); Jimenez v. Aristeguieta, 311 F.2d 547, 562 (5th Cir. 1962); United States v. Bogue, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998); *In re* Ryan, 360 F. Supp. 270, 273 (D.C.N.Y. 1973), *aff'd*, 478 F.2d 1397 (2d Cir. 1973). Note that in this context, hearsay is sufficient for a probable cause determination, even though it would not be admissible at trial. *See* Emami v. U.S. Dist. Ct. N. Dist. Cal., 834 F.2d 1444, 1451 (9th Cir. 1987). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. Dec. 10, 1997); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re Extradition of* Lehming, 951 F. Supp. 505 (D. Del. 1996); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998).

with the law of the requested state; in the United States, it must meet the federal standards set forth in 18 U.S.C. § 3184, and as defined and applied by the Supreme Court.[90]

Reliance on the probable cause standard reflects the universal disinclination of the courts to transform the limited inquiry of the Hearing into a trial on the merits. Consequently, certain evidentiary showings inadmissible at trial will be admitted, because the courts are not required to reach a decision respecting the guilt or innocence of the accused but only whether he/she should be brought to trial in the requesting state.[91] It also has been held that because the Hearing is not a trial on the merits, it lacks res judicata effect on the issue of guilt or innocence, as well as on the basic question of the relator's extraditability.[92] Nevertheless, it could be validly argued that the court's findings of facts and conclusions of law should bar readjudication of the same or substantially same facts and legal issues if the request is denied and a new request submitted, although the government may repeatedly request an individual's extradition if it fails the first time.

The probable cause standard is akin to a prima facie standard. Whatever else may be implied, probable cause effectively means that sufficient evidence has been presented to the court of the requested state to warrant bringing the relator to trial in accordance with the laws of the requesting state, and not simply that the individual is suspected of criminality with no basis in fact to support the allegation. If indeed no evidence of probable cause exists, then the assertions presented by the requesting state constitute nothing more than mere suspicion, and the request must be denied.[93]

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90 *Collins*, 259 U.S. at 317. *See also* Koskotas v. Roche, 931 F.2d 169 (1st Cir. 1991) (applying Greek law on forgery to determine whether evidence supported probable cause determination); Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976); Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980). In *Greci*, had the more demanding state standard of probable cause (requiring sufficient evidence to convict) been adopted, the relator would not have been certified for extradition. 527 F.2d at 958; *But see* Merino v. U.S. Marshal, 326 F.2d 5, 12 (9th Cir. 1963) (applying the California probable cause standard, which was equivalent to the federal standard, which was satisfied). *See also In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

91 *See* Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. 1997); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978); Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971); Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969); Jhirad v. Ferrandina, 355 F. Supp.1155, 1063 (S.D.N.Y. 1973). *See also* Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996) and United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

92 Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978).

93 *In re* Gonzalez, 305 F. Supp. 2d 682 (S.D.Tex. 2004) (holding that probable cause is evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain reasonable belief that a person has committed the crime, even though the rules of evidence do not limit the type of evidence that can be presented, while at the same time, the relator is limited to only evidence explaining that which the government presents.) How far the court will entertain contradictory evidence varies from case to case as is appropriate, because what constitutes reasonable grounds to believe will vary depending upon the facts. It should be noted that the largest volume of extradition cases are between the United States and Mexico, most of which raise the issues of double criminality and probable cause. *See also* Escobedo v. United States, 623 F. (5th Cir. 1980); *In re Extradition of* Kuri, No. 04-6049M-DKD, 2006 U.S. Dist. LEXIS 31905 (D. Ariz. 2006); *In re* Chavez, 408 F. Supp. 2d 908 (N.D. Cal. 2005); *In re Extradition of* Solis, 402 F. Supp. 2d 1128 (C.D. Cal. 2005); *Extradition of* Valles, 268 F. Supp.2d 758 (S.D. Tex 2003); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003); *In re Extradition of* Herrera, 268 F Supp. 2d 688 (W.D. Tex. 2003); *In re Extradition of* Medina, 210 F. Supp. 813 (N.D. Tex. 2002); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1341–1343 (S.D. Fla. 1998); *In re Extradition of* Massieu, 897F. Supp. 176 (D.N.J. 1995); *In re Extradition of* Garcia, 890 F. Supp. 914

United States courts apply the "clearly erroneous" standard in evaluating a challenge to a probable cause determination by a magistrate or judge, and will uphold a magistrate or judge's finding of probable cause if there is any competent evidence in the record to support it.[94] In *Pliego* the court denied extradition for lack of probable cause based on the testimony of a forensic documents expert who revealed that the documents presented by the U.S. government on behalf of the government of Mexico were forgeries. The government objected to the analysis even though one would assume that the U.S. government has an interest in protecting the integrity of the judicial process during extradition proceedings. It is noteworthy that this testimony was accepted as explanatory of the evidence presented.[95]

In *Lukes*[96] the relator's extradition to the Czech Republic was denied due to the lack of probable cause. In that case, the court examined the voluminous material presented by the Czech Republic and concluded that the only extraditable charge was for embezzlement, but that it was not sufficient to constitute probable cause.[97] This case is indicative of similar white collar crime matters in which the requesting state may introduce a significant volume of evidence in support of the application for extradition. For example, in the *Extradition of Caltagirone*,[98] which was ultimately dismissed, the documents presented were so voluminous as to fill a ten-by-ten foot space.

In *Rablebauer*,[99] for instance, there were twelve six-inch binders full of documents. Extradition judges are understandably reluctant to go through such voluminous material if for no other reason than the amount of time that it would take. But there is also the assumption that the requesting state, and surely the U.S. government, would not have presented such a voluminous amount of material if they were not convinced of its relevance to the charges that underlie the extradition request. However, it is not uncommon in extradition, as in other types of litigation in the United States, for one side to drown the other with documentation. In the *Rablebauer* case over 1,000 pages of documents were presented, of which only three related to the extraditable offense itself. Had the extradition judge been deterred by the volume of documents presented by the government it would have not been apparent to him that there was very little relevant documentation pertaining to the extraditable offense. When the extradition judge was done with reviewing those three pages he concluded that there was no probable cause for extradition.

Similarly, in *In re Extradition of Mazur*[100] the State Department submitted five volumes of original documents containing evidence in support of the extradition request. The relator was a wealthy businessman who could afford representation by a large law firm, which was able to parse through the voluminous submissions to find the many inconsistencies and lack of corroboration within the submitted evidence. This analysis ultimately showed that the "evidence"

(S.D. Cal. 1994); *In re Extraditon of* Nacif Borge, 829 F. Supp. 1210 (D. Nev. 1993); *In re Extradition of* Contraras, 800 F. Supp. 1462 (S.D. Tex 1992).

94 Fernandez v. Phillips, 268 U.S. 311, 318 (1925); Quinn v. Robison, 783 F.2d. (1986); Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971) (evidence is deemed competent in extradition proceedings if it is probably authenticated); 18 U.S.C. § 3190 (1948). *See also* Barapind v. Enomoto (9th Circ. 2004); *In re Extradition of* Garcia, 188 F. Supp. 2d 921 (N.D. Ill. 2002) (standard of probable cause is to determine whether there is competent legal evidence that justifies apprehension and commitment for trial).

95 *In re* Pliego, 320 F. Supp. 2d 947 (D. Ariz. 2004).

96 *In re* Lukes, No. 2:02-MC-23-FTM, 2003 U.S. Dist. LEXIS 26094 (M.D. Fla 2003).

97 *Id.*. *See also* United States v. Peterka, 307 F. Supp. 2d 1344 (M.D. Fla 2003) (denying extradition because insufficient evidence to determine probable cause and to meet dual criminality).

98 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

99 *In re* Rabelbauer, 638 F. Supp. 1085 (S.D.N.Y. 1986).

100 *In re Extradition of* Mazur, 2007 U.S. Dist. LEXIS 52551 (N.D. Ill. July 20, 2007).

presented was speculative, and Mazur was able to call relevant witnesses at the Hearing to rebut the government's submissions.[101] In its analysis of the evidence presented regarding probable cause, the district court aptly summarized the situation, stating:

> if probable cause turned on sheer volume, the record in this case would likely be enough to satisfy any standard… But probable cause is not established merely with quantity; the determination turns on the nature of the specific evidence presented.[102]

Probable cause is a constitutional, statutory, and treaty requirement. When courts look at it as a treaty requirement they tend to construe it liberally so as to give effect to the intention of the contracting parties.[103] That could also result in an interpretation that is less exacting than its counterpart under U.S. criminal law, though it should not be construed as such if the requirement is deemed part of the requirement of double criminality.[104] However, probable cause is also a statutory requirement and should be interpreted accordingly.

4.1. Probable Cause as a Constitutional Requirement

There are no treaties that derogate from the probable cause requirements of 18 U.S.C. § 3184. A question would arise, however, in the event that a treaty required less than probable cause, and thus came in conflict with the legislation. In this case the issue of whether the treaty or the statute controls would depend on the Supreme Court's determination that the probable cause standard in § 3184 embodies the Fourth Amendment to the Constitution, which requires probable cause in all cases involving searches and seizures. Nevertheless, irrespective of whether the Supreme Court would reach such a determination, extradition proceedings are subject to the requirement of the Fifth Amendment Due Process Clause, which incorporates the Fourth Amendment with respect to the requirement of probable cause as the basis for any lawful search and seizure.[105] Could a treaty

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101 Mazur was represented by Jenner & Block, LLP. For a description of the extradition hearing proceedings, *see id.* at *40–*51.

102 *Id.* at *61.

103 *See* Factor v. Laubenheimer, 290 U.S. 276, 298 (1933); Bingham v. Bradley, 241 U.S. 511, 517 (1916). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). Note that determining whether a valid extradition treaty exists is a mixed question of law and fact. *See* Hoi-Pong v. Noreiga, 677 F. Supp. 1153, 1155 (S.D. Fla. 1988). *See also* DeSilva v. DeLeonardi, 181 F. 3d 865, 866 (7th Cir. 1999); Bovio v. United States, 989 F.2d 255 (7th Cir. 1993); Jenkins v. Bowling, 649 F.2d 1225 (7th Cir. 1982); *In re Extradition of* Salas, 161 F. Supp. 2d 915 (N.D. Ill. 2001).

104 *See* Ch. VII, Sec. 2. *See infra* Sec. 5.2.2 for the evidentiary standard of probable cause and the sufficiency of evidence. Burden of proof in defenses rests with the relator, though no clear legal standard emerges from the cases. Ahmad v. Wigen, 726 F. Supp. 389, 408 (E.D. N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990); Abu Eain v. Adams, 529 F. Supp. 685, 694 (N.D. Ill. 1980), *aff'd sub nom.* Abu Eain v. Wilkes, 641 F.2d 504, 520 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996); *cf. In re* Sindona, 450 F. Supp. 672, 693–694 (S.D.N.Y. 1978).

105 It is uncertain where a relator could make this kind of argument to effectively defeat a probable cause finding based on allegedly illegally obtained evidence. The federal district court for the Southern District of New York reasoned that the protection afforded by the Fifth Amendment to a foreign national prosecuted in the United States was not absolute, and did not allow the relator to raise a Fourth Amendment argument against illegal wiretap evidence under the guise of a Fifth Amendment substantive due process claim. *See* United States v. Coke, 2011 U.S. Dist. LEXIS 94012 at *14–*15 (S.D.N.Y. Aug. 22, 2011). The court went on to note that in order to succeed on a Fifth Amendment substantive due process claim, the relator would have to show that the government's conduct was " 'so outrageous' that common notions of fairness and decency would be offended." *Id.* at *17. This is a high standard, which would be very difficult for realtors to meet, and indeed the relator did not meet that threshold in *Coke* where the

consequently derogate from the principle of probable cause as a constitutional requirement? No answer to this question has yet been provided by the Supreme Court, as the issue has not arisen so far.

The question did exist at one time as to whether probable cause was required in provisional arrests, which began appearing in U.S. extradition treaties in 1970. Among these, for example, is the Treaty of Extradition between the United States and Italy, which provides in Article XIII:

> In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. . . . The application shall contain a description of the person sought, and indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest . . . against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested Party.[106]

The problem did not arise before a circuit court until *Caltagirone v. Grant*,[107] where the court stated:

> *The overwhelming evidence that Article XIII itself prohibits provisional arrest without probable cause relieves us of the need to examine the constitutional propriety of a treaty that purports to permit such arrests*. But one factual aspect of the Government's claimed practice under Article XIII leads us to comment. According to the Government, the United States may detain Caltagirone for forty-five days with no showing of probable cause. Caltagirone, however, enjoys no guarantee that his detention will end even then.
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> In *Collins v. Loisel*, 262 U.S. 426 (1923), the Supreme Court held that an extradition proceeding which ends in the relator's release from custody does not bar a subsequent extradition demand by the requesting state on the same charge. Should Italy's current extradition attempt fail, Article XIV of the Treaty specifically provides that a second may be initiated. Thus, if the Government fails to establish probable cause in the proceeding now pending in the district court, it may nonetheless seek the immediate rearrest of Caltagirone on the same charge. Indeed, counsel for the Government readily conceded at argument that he would seek Caltagirone's rearrest should the present extradition request be denied.[108]

Concerning the due process rights of a relator under provisional arrest procedures, the *Caltagirone* court stated:

> [I]n the Government's view, a foreign state could apply for, and the Government could effect, the unlimited detention of Caltagirone by stringing together an infinite strand of forty-five day provisional arrests, all without a judicial determination of probable cause, or a formal extradition request. This elaboration of the Government's view raises grave questions concerning the constitutional propriety of any interpretation of Article XIII which does not require a showing of probable cause. *United States v. Williams*, 480 F. Supp. 482, 486 (D. Mass.) (expressing reservations as to the constitutionality of thirty-day provisional arrest detention without showing of probable cause), *reversed on other grounds*, 611 F.2d 914 (1st Cir. 1979) (per curiam); *Ex parte La Mantia*, 206 F. 330, 331 (S.D.N.Y. 1913) (reserving the issue since probable cause was present). *See also Rosado v. Civiletti*, Nos. 80-2001/3, slip op. at 2525, 2557 (2d Cir. Apr. 23,

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only questionable actions were DEA–Jamaican memoranda of understanding concerning the gathering and sharing of wiretap evidence.

106 Treaty on Extradition between United States and Italy, art. XIII, 26 U.S.T. 493, 502, T.I.A.S. No. 8052 (*entered into force* Mar. 11, 1975). A new United States–Italy treaty entered into force on September 24, 1984, T.I.A.S. No. 10,837.

107 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

108 *Id.* at 747 (emphasis added).

> 1980) (dictum) ("to the extent that the United States itself acts to detain a relator pending extradition, it is bound to accord him due process"), *citing Grin v. Shine*, 187 U.S. 181, 184 (1902).
>
> Moreover, since the Treaty by its terms applies both to aliens and to Americans, the arguably lesser rights accorded aliens, *see*, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976), cannot provide a complete answer. Indeed, the Government, if its view were accepted, could arrest and indefinitely detain American citizens upon no more than an allegation by a foreign government that a warrant for the citizen was outstanding. We doubt that the tenuous relationship between an application for provisional arrest and a subsequent request for extradition implicates a sufficiently strong foreign policy interest in the executive to justify such a departure from usual Fourth Amendment protections. *See Reid v. Covert,* 354 U.S. 1 (1957). Under our historic mandate to construe ambiguous enactments in a manner that comports with the Constitution, *Kent v. Dulles,* 357 U.S. 116, 128–30 (1958), we would be loathe to permit any construction of the Treaty that could be read to support the purported practice to which we have just alluded. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In our view, the language of Article XIII so clearly demands a showing of probable cause before any warrant for provisional arrest may issue, that we need not reach the constitutional question. *Nunquam decurritur ad extraordinarium sed ubi deficit ordinarium*. (We must not resort to the extraordinary until the ordinary fails.)[109]

The court held on the basis of the treaty language that some type of probable cause is also required for provisional arrests,[110] though it is clear from the *Caltagirone* opinion, as well as the practice before U.S. magistrates and federal district court judges, that § 3184 does not apply to provisional arrests, but only to the actual Hearing. One of the reasons that issues surrounding provisional arrests been not heard by circuit courts is that usually the provisional arrest is limited to forty-five days or sixty days by the terms of the treaty. Thus, by the time the issue is raised on appeal, it may already be moot because the time has lapsed or because the relator has been released on bail. However, in the *Caltagirone* case, the court held that the issue is not moot because a relator may be released or the extradition request denied, and the subsequent request could be brought again and the individual rearrested and the issue readjudicated.[111] A denial of extradition is therefore not a bar to a new request, and double jeopardy does not apply as a defense.[112]

Finally, it should be noted that the application of ex post facto laws in the requesting state does not necessarily negate a probable cause finding by the extradition magistrate or judge despite the prohibition against the practice in the U.S. Constitution. For instance, in *In re Extradition of Tawakkal*, the federal district court for the Eastern District of Virginia concluded that the relator did "not sufficiently challenge the competency of the evidence before the Court because they exceed the bounds of issues that properly can be contemplated during an extradition hearing."[113] That said, the U.S. Supreme Court has yet to express its views on these constitutional questions.[114]

4.2. The Peculiarity of in Absentia Convictions

A number of legal systems, including Italy and France, allow for trials in absentia. A person can therefore be convicted in absentia. If an extradition request is based in an in absentia

109 *Id.* at 748 (emphasis added).

110 *Id.* at 747–748.

111 *Id.*

112 *See* Ch. VIII, Sec. 4.3.

113 *In re Extradition of* Tawakkal, 2008 U.S. Dist. LEXIS 65059, at *39–*40 (E.D. Va. 2008).

114 *See infra* Sec. 5.2.1, which addresses some of these issues of evidentiary exclusions on constitutional grounds.

conviction the question arises as to whether the evidence presented during the in absentia proceedings may be enough to satisfy the requirement of probable cause.

An in absentia conviction would not be considered in the United States as satisfying the requirements of due process, and the conviction in that legal system would not be deemed to be a conviction in the United States. But the evidence presented at such a trail may be deemed sufficient for purposes of issuance of an arrest warrant, because it would be considered to be the equivalent of a hearing before a judge. A probable cause hearing in the United States is not conducted in the presence of the accused, and consequentially the evidence presented in foreign criminal proceedings conducted in absentia could be considered to be sufficient for purposes of probable cause if the U.S. magistrate so deems it.

The difficulties with in absentia criminal proceedings is that a person may have been tried and be found innocent, and yet subject to an appeal of that conviction before the appellate court. As is the case in Italy, the appeals courts in these countries can retry the accused in absentia and find such a person guilty, even though the person was acquitted at the trial level. For purposes of extradition, two questions arise out of this procedure. The first is whether a retrial on appeal resulting in a conviction after the person has been acquitted at the trial level satisfies due process requirements and is sufficient for extradition, or whether such a procedure is so fundamentally contrary to public policy that extradition will not be granted. To date U.S. courts have not taken a position on this issue, and that leaves open the question of whether the evidence submitted either at the trial court or at the appellate court, particularly in absentia, is sufficient to satisfy probable cause.

This issue arose in *Haxhiaj v. Hackman*,[115] where the court looked at the evidence presented during the in absentia proceedings, as reflected in the opinion of the Italian Court of Appeals that convicted the relator, as well as other evidence in the record supporting probable cause. In support of this process the cited *Prushinowski v. Samples*,[116] *Kastnerova v. United States*,[117] and *Fernandez v. Phillips*.[118] The court specifically rejected the petitioner's contention that probable cause needed "actual evidence" as being something of a different nature than what is required under Title 18 U.S.C. § 3184, and in U.S. jurisprudence relating to the interpretation of the probable cause requirement contained in bilateral extradition treaties.[119] The court further cited *Ordinola v. Hackman*[120] for the proposition that "the applicable extradition treaty often bares upon the scope of probable cause by establishing what constitutes an evidentiary hearing."[121] The *Haxhiaj* court continued,

> Finally, Article X specifically addresses requests to extradite those who were convicted of an extraditable offense *in absentia:*
>
> > "If the person sought has been convicted in absentia or in contumacy, all issues relating to this aspect of the request shall be decided by the Executive Authority of the United States or the competent authorities of Italy. In such cases, the Requesting Party shall submit such documents as are described in paragraphs 2, 3 and 4 of this Article and a statement regarding the procedures, if any, that would be available to the person sought if he or she were extradited."

115 Haxhiaj v. Hackman, 528 F.3 282 (4th Cir. 2008).

116 Prushinowski v. Samples, 734 F.2d 1016 (4th Cir. 1984).

117 Kastnerova v. United States, 365 F.3d 980, 984 (11th Cir. 2004).

118 Fernandez v. Phillips, 45 U.S. 541 (1925).

119 *Haxhiaj*, 528 F.3 at 288.

120 Ordinola v. Hackman, 478 F.3d 588, 608 (4th Cir. 2007).

121 *Haxhiaj*, 528 F.3 at 288.

> *Id.,* art. X, ¶ 5. By incorporating the requirements of paragraph three into paragraph five, the Treaty requires more proof than just the fact of an in absentia conviction, and directs that a summary of the facts and evidence be supplied to establish "a reasonable basis to believe that the person sought committed the offense for which extradition is requested," *id.,* art. X, ¶¶ 3(b), i.e., probable cause under § 3184.
>
> Therefore, for an extradition request based upon a conviction *in absentia,* the Treaty requires more detail than mere proof of the *fact* of conviction to establish probable cause, *i.e.,* "a reasonable basis to believe that the person sought committed the offense," *id.,* art. X, ¶ 3(b), but it clearly does not require the kind of actual evidence suggested by Haxhiaj, such as trial testimony or transcripts of the wiretap evidence. Instead, the Extradition Treaty requires merely a summary of the facts and relevant evidence sufficient to provide a reasonable basis to believe the relator committed the offense. We conclude that the certified copy of the appellate opinion of the Court of Appeal of Milan satisfies the showing required by the Treaty and clearly affords a reasonable basis upon which to find probable cause. The opinion is remarkable for its detailed description of the evidence developed during the investigation of Haxhiaj's drug trafficking ring, including this key wiretap describing Haxhiaj's role . . . [122]

5. Evidentiary Matters

5.1. Admissibility of Evidence

Extradition proceedings are deemed sui generis, and partake of both civil and criminal procedure. The Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure do not apply to them, however.[123] Furthermore, because a Hearing is not a full-fledged criminal proceeding, and is not a trial on the merits, the relator is not entitled to all the rights guaranteed in a federal criminal trial.[124]

The Federal Rules of Evidence are inapplicable to extradition proceedings.[125] The basic evidentiary normative provision is set forth in 18 U.S.C. § 3190.[126] Rather, the admissibility of evidence is within the discretionary power of the extradition judge, and the exercise of such discretion is not a violation of due process unless it is clear error. In *Vo v. Benov*, the Ninth Circuit held:

> We have repeatedly held that an extradition court's decision not to consider evidence, or not to make findings relevant to a discretionary exception, does not violate due process. In

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122 *Id*. at 289.

123 For example, Fed. R. Crim. P. 54(b)(5). Hearsay evidence is admissible. United States v. De Loera, 2:06-MJ-98-PRC, 2006 U.S. Dist. LEXIS 35653 (Federal Rules of Civil Procedure and Criminal Procedure do not apply to extradition cases). *See also* Bovio v. United States, 989 F.2d 255 (7th Cir. 1993); Zanazanian v. United States, 729 F.2d 624 (9th Cir. 1984). *See also* Afanasjev v. Hurlburt, 418 F.3d 1159 (11th Cir. 2005) (unsworn statements may be admissible, it becomes a question of credibility, hearsay permissible, only thing required is the proper authentication of documents).

124 Glucksman v. Henkel, 221 U.S. 508 (1911). *See also* Neely v. Henkel, 180 U.S. 109 (1901); Benson v. McMahon, 127 U.S. 457 (1888); United States v. Stockinger, 269 F.2d 681 (2d Cir. 1959), *cert. denied*, 361 U.S. 913 (1959); *In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757, at *21 (S.D. Cal. Oct. 14, 2008); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). For example, the relator does not have the right to confront and cross examine witnesses against him. *Ex parte* La Mantia, 206 F. 330 (C.C.S.D.N.Y. 1913); Neely v. Henkel, 103 F. 631 (C.C.S.D.N.Y. 1900), *aff'd*, 180 U.S. 109 (1901).

125 *See* Merino v. U.S. Marshal, 326 F.2d 5 (9th Cir. 1963); Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976); F.R.E. 1101(d)(3).

126 Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir. 1986). *See also* Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); *In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. 1997); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); Cucuzzella v. Keliikoa, 638 F.2d 105 (9th Cir. 1981); Caplan v. Vokes, 649 F.2d 1336, 1342 (9th Cir. 1981).

> *Lopez-Smith,* for instance, the petitioner sought a writ of habeas corpus on the ground that the extradition magistrate had violated the petitioner's due process rights by refusing to consider evidence regarding whether the Secretary ought to exercise the discretion provided by the terms of the extradition treaty not to extradite him to Mexico. We rejected this claim on the ground that extradition is "entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function." *Lopez-Smith,* 121 F.3d at 1326. We stated that the statutorily imposed judicial functions encompass the entirety of a court's obligations in the extradition process, emphasizing that "[t]he magistrate judge has no discretionary decision to make." *Id.* Because discretionary decisions are within the province of the Secretary of State and not the extradition magistrate, we held that "it is . . . for the Secretary to decide what evidence might have a bearing upon" a discretionary decision. Thus, an extradition court's failure to consider evidence that might aid the Secretary does not deprive an individual of due process. *Id.* Similarly, in *Prasoprat,* we rejected a petitioner's claim that a magistrate judge deprived him of due process by denying a discovery motion seeking evidence related to a discretionary exception in the applicable extradition treaty because "the evidence that Prasoprat sought in his motion for discovery was not relevant to the extradition judge's limited inquiry." *Prasoprat,* 421 F.3d at 1015.[127]

The question of admissibility of evidence goes to the issue of determining what type of evidence can be presented at a Hearing. It does not go to the weight or sufficiency of the evidence presented. It is established in case law that an extradition proceeding is not a criminal trial in which the guilt or innocence of the relator is adjudicated.[128] As the purpose of the Hearing is to determine simply whether the evidence of the relator's criminal conduct is sufficient to justify his/her extradition under an appropriate treaty, the Federal Rules of Criminal Procedure are not entirely applicable. The standard is whether the statements in question are truthful or whether they are unreliable, self-contradictory, coerced, uncorroborated by other evidence, or the result of torture.[129] As the defenses available to a relator in an extradition proceeding are sharply limited,[130] the courts will restrict the relator's evidence rebutting probable cause to evidence that "clarifies" that which the government presented.[131]

However, in *Hunte v. United States* the magistrate allowed contradictory evidence:

> Evidence submitted in support of an extradition request is deemed truthful and its credibility generally may not be challenged at an extradition hearing. *Vukcevic,* 1995 WL 675493, at *7; *Ahmad,* 726 F.Supp. at 399–400. The function of a magistrate judge reviewing an extradition request "is to determine if there is 'any' evidence sufficient to establish . . . probable cause." *Shapiro*

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127 Vo v. Benov, 447 F.3d 1235, 1247 (9th Cir. 2006).

128 *See, e.g.,* Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976). *See also* Simmons v. Braun, 627 F.2d 635, 637 (2d Cir. 1980) (holding that in the extradition hearing, the exclusionary rule is inapplicable); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000).

129 *In re Extradition of* Atuar, 300 F. Supp. 2d 418 (S.D. W. Va. 2003), 156 Fed. Appx. 555 (4th Cir. 2005), *cert. dismissed* 2006 U.S. LEXIS 5244 (2006) (finding the relator extraditable and the confession of an accomplice obtained under torture to be truthful). *See also Extradition of* Mainero, 990 F. Supp. 1208 (S.D. Cal. 1997); *Extradition of* Garcia, 890 F. Supp. 914 (S.D. Cal. 1994); *Extradition of* Contreras, 800 F. Supp 1462 (S.D. Tex 1992*);* Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990); *Extradition of* Atta, 706 F. Supp 1032 (E.D.N.Y. 1989); Rep. of France v. Moghadam, 617 F. Supp. 777 (N.D. Cal. 1985).

130 *See In re* Shapiro, 352 F. Supp. 641 (S.D.N.Y. 1973).

131 *See In re Extradition of* Manzi, 888 F.2d 204 (1st Cir. 1989) (holding that defendant needed to produce evidence supporting the materiality of alleged Italian appellate decisions that purportedly reversed the Italian convictions).

> *v. Ferrandina,* 478 F.2d 894, 905 (2d Cir.1973). Thus, a defendant challenging extradition is limited to evidence which explains or obliterates, rather than contradicts, the government's proof. *Id.* Moreover, "[t]he extent of such explanatory evidence to be received is largely in the discretion of the judge ruling on the extradition request." *Sindona,* 450 F.Supp. at 685. Evidence which raises questions of credibility "should properly await trial." *Shapiro,* 478 F.2d at 905; *see also Sindona,* 450 F.Supp. at 687.[132]

The *Hunte* court also noted that:

> Probable cause is determined by examining the "totality-of-the-circumstances." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Generally, an accomplice's incriminating statements, if corroborated, are sufficient to establish probable cause. *United States v. Ceballos,* 812 F.2d 42, 50 (2d Cir.1987). In extradition proceedings in particular, "courts have consistently held that accomplice testimony, whether corroborated or not, is competent evidence to support a finding of probable cause." *In re Extradition of Vukcevic,* 1995 WL 675493, at *7 (S.D.N.Y. Nov.14, 1995) (citations omitted). *See also, Eain v. Wilkes,* 641 F.2d 504, 510 (7th Cir.1981); *Ahmad v. Wigen,* 726 F.Supp. 389, 400 (E.D.N.Y.1989); *In re Extradition of Atta,* 1988 WL 66866, at *5 (E.D.N.Y. June 17, 1988); *In re Extradition of Tang Yee-Chun,* 674 F.Supp. 1058, 1062 (S.D.N.Y.1987).[133]

Thus, evidence of alibi[134] or of defenses such as insanity,[135] have been held inadmissible, as has newly discovered evidence that someone other than the relator committed the offense.[136] Similarly, the courts will bar evidence that merely contradicts probable cause or that presents a different version of the events than alleged by the requesting state.[137] The relator cannot introduce any evidence that would be admissible at trial as to the issue of guilt, as this "would defeat the whole object of extradition if a complete trial were necessary prior to extradition."[138] Similarly, the relator may not attack the evidence submitted solely on the grounds that it consisted of summaries of other

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132 United States v. Hunte, 2006 WL 20773, at *6 (E.D.N.Y. 2006).

133 *Id.* Corroborated accomplice evidence was also used to establish probable cause in *In re Extradition of* Medina, 2009 U.S. Dist. LEXIS 11546 (E.D.N.Y. 2009). *See also In re Extradition of* Atta, 1988 WL 66866 (E.D.N.Y. June 17, 1988).

134 *See* Charlton v. Kelly, 229 U.S. 447 (1913); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973), *cert. dismissed by agreement of the parties*, 414 U.S. 884 (1973); *In re* Shapiro, 352 F. Supp. 641 (S.D.N.Y. 1973). *See also In re Extradition of* Santos, 2011 U.S. Dist. LEXIS 62672, at *51–*53 (C.D. Cal. June 13, 2011); Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); *In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. 1998), *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998).

135 Charlton v. Kelly, 229 U.S. 447 (1913); Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973), *cert. dismissed by agreement of the parties*, 414 U.S. 884 (1973). *See also Elcock*, 80 F. Supp. 2d 70; Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Lara, 1998 U.S. Dist. LEXIS 1777 (S.D.N.Y. Feb. 18, 1998), *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998).

136 *See* Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977).

137 Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed by agreement of the parties*, 414 U.S. 884 (1973); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977); *In re* Shapiro, 352 F. Supp. 641 (S.D.N.Y. 1973); *In re Extradition of* Santos, 2011 U.S. Dist. LEXIS 62672 at *46–*48 (C.D. Cal. June 13, 2011); *In re Extradition of* Sainez, 2008 U.S. Dist. LEXIS 9573 (S.D. Cal. Feb. 8, 2008). *See also* United States v. Cardoso, 2005 WL 1228826 (M.D. Fla. 2005).

138 Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

evidence by the requesting state's prosecutor, where the other evidence would have been admissible in and of itself.[139]

The limited scope of admissibility of evidence in extradition proceedings was concisely stated in the case of *In re Shapiro*,[140] in which the relator's extradition was sought by Israel, where he was wanted on charges of fraud, conspiracy to defraud, use of fraudulent documents, forgery, deceit, theft, and false entry. The court considered the question of whether the evidence submitted by the requesting state evinced probable cause to suppose that the specified extraditable offenses, or any of them, were committed by Shapiro. However, the court first set forth what evidence would be considered, stating:

> An extradition hearing is not to be equated with a trial of the merits. The actual guilt of the fugitive does not have to be established. The demanding country's evidence need show only such reasonable ground to suppose that the fugitive is guilty as to make it proper that he should be tried.
>
> The defenses available to the fugitive in an extradition proceeding are sharply limited. For example, alibi evidence and evidence contradicting the demanding country's proof, and evidence in the nature of a defense, such as insanity, are inappropriate to such a hearing. The fugitive's right is limited to adducing evidence which explains rather than contradicts the supporting proof.[141]

Similar to the issue of the sufficiency of evidence presented in extradition proceedings with regard to establishing probable cause, is the question as to whether state or federal law is to be applied. On the issue of admissibility of evidence, case law shows that it could be governed by federal law[142] or state law according to the court's interpretation of treaty requirements.

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139 *In re Extradition of* Jarosz, 2011 U.S. Dist. LEXIS 82957 (N.D. Ill. July 28, 2011).

140 *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973).

141 *Id.* at 644–645. *See also* Escobedo v. United States, 623 F.2d 1098, 1102 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

142 *See, e.g., Escobedo*, 623 F.2d at 1102; O'Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977). Also, in *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), the court considered the question of the law to be applied to determine the introduction of evidence:

> Moving beyond his interrelated political claims, Sindona next urges two Treaty-based arguments of a more technical nature. The first derives from Article V of the Treaty, which provides in relevant part:
>
> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, to justify [the requested person's] committal for trial if the offense of which he is accused had been committed in its territory.
>
> Sindona contends that the test under the Treaty is United States national procedural law and not the procedural law of New York, a proposition with which we agree, *Greci v. Birknes,* 527 F.2d 956 (1st Cir. 1976), that by virtue of the Fifth Amendment committal of Sindona for a federal trial on charges as grave as those made in Italy, would have to be indictment; and that an indictment requires a prima facie case and not merely probable cause.
>
> We are not at all sure of the validity of this last link, *see United States v. Mackey*, 474 F.2d 55, 56–57 (4th Cir. 1973), *cert. denied*, 412 U.S. 941 (1973); 8 Moore's Federal Practice, paragraph 6.83[2] (1972). Although federal prosecutors generally go considerably beyond proving probable cause before a grand jury, this is doubtless due to the desire to obtain an indictment rather than because of any legal requirement. *Costello v. United States,* 350 U.S. 359, 363, (1956), and *United States v. Calandra,* 414 U.S. 338, 344 (1974), indicate that indictments will not be examined for adequacy of evidence. However, we need not decide the question since the whole line of argument runs afoul, among other cases, of *Benson v. McMahon,* 127 U.S. 457 (1888). There under a treaty with Mexico which also referred to national law, id. at 463, 8 S. Ct. at 1243, the Court held the proper standard of sufficiency to be similar to those applicable in:
>
> > those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

The concomitant of "evidence of guilt" is "evidence in defense," and clearly, if the former is grounded in a "probable cause" standard, then the latter as its corollary cannot be excluded from the context of the required standard. As stated in *Jimenez v. Aristeguieta*:

> The accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence to explain elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence but is of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal.[143]

Summarizing what is basically the historic position of the United States, and which is still followed in practice today, Marjorie Whiteman stated in 1968 that:

> Inasmuch as the actual trial of the accused (assuming he is merely charged with an offense) is to take place in the requesting state if and when he is extradited, the extradition hearing which the requested State may accord the accused normally limits the scope of its inquiry to whether a proper case for extradition has been made out under the applicable law and/or treaty on the basis of the evidence furnished by the requesting State in support of its extradition request. While the accused may introduce evidence to show that the case comes within a prohibition against extradition contained in the applicable treaty and/or law (e.g., political offense, national or asylum State, prosecution barred by lapse of time) or to show that he is not, in actuality, the person sought by the requesting State, he may not, generally, introduce evidence in defense to the merits of the charge or merely to contradict the evidence of guilt submitted by the requesting State.[144]

> *Id. See* Fed. R. Crim. Pro. 5.1(b). This was the clear holding in *Greci, supra*, 527 F.2d at 959. While that opinion did not discuss the possibility that a federal standard higher than probable cause might have been intended, it would have been remarkable indeed that when, as appears from the Greci opinion, the Treaty drafters opted for federal law rather than the law of the state of the crime, they meant anything other than the probable cause standard that had been regularly employed in extradition cases in the past. See, e. g., Benson v. McMahon, supra, 127 U.S. 457, 8 S.Ct. 1240; Ornelas v. Ruiz, 161 U.S. 502, 512, 16 S.Ct. 689, 692, 40 L.Ed. 787 (1896); Collins v. Loisel, 259 U.S. 309, 315-, 42 S.Ct. 469, 471-72, 66 L.Ed. 956 (1922) (Brandeis, J.); Shapiro v. Ferrandina, supra, 478 F.2d at 901 (2 Cir.); Peroff v. Hylton, supra, 542 F.2d at 1249; Jhirad v. Ferrandina, supra, 536 F.2d at 485; Garcia-Guillern v. United States, supra, 450 F.2d at 1191–92.
>
> 619. F. 2d at 175.

143 Jimenez v. Aristeguieta, 311 F.2d 547, 556 (1962). *See also* Collins v. Loisel, 259 U.S. 309 (1922); Charlton v. Kelly, 229 U.S. 447 (1913); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998).

144 6 Whiteman Digest, *supra* note 16, at 998–999. *See also* Ch. VII. The identity of the relator is usually established from photographs. Glucksman v. Henkel, 221 U.S. 508 (1910); Bagley v. Starvich, 8 F.2d 42 (9th Cir. 1925); *In re* Edmondson, 352 F. Supp. 22 (D. Minn. 1972); United States *ex rel.* Argento v. Jacobs, 176 F. Supp. 877 (N.D. Ohio 1959). United States' practice does not differ from the practice of virtually any other state. *See, e.g., In re* Janssens, 17 I.L.R. 266 (Sup. Ct. 1950) (Venez.). In seeking to prevent his extradition from Venezuela to Belgium where he stood convicted of "abuse of confidence" for having converted certain sums entrusted to him, Frederick J.J.A. Janssens contended that his conviction was improper, as the alleged abuse of confidence was a civil matter that had been settled by gradual payment. The Supreme Court of Venezuela held that extradition should be granted stating: "It is settled law in this Court that issues raised by the interested party on the merits are beyond its power to decide since final judgment on these matters should properly be rendered by the courts of the demanding country." *Id.* at 267. The U.S. district court held that in an extradition proceeding, evidence in defense of the charge for which the fugitive's surrender is sought is not admissible, even if the evidence can be characterized as an affirmative defense such as justification, *In re Ezeta,* 62 F. 972, 986 (C.C.N.D. Cal. 1894). The same is true for insanity, *Charlton v. Kelly,* 229 U.S. 447 (1913). The defense of insanity

There is some confusion in judicial decisions concerning exculpatory evidence in extradition proceedings. When the issue arises as part of discovery, courts tend to look at *Brady v. Maryland* and determine the issue on that basis. On occasion, the issue will arise in the context of the evidence presented by the requesting state and whether that state has the obligation to come forth with exculpatory evidence.[145] If there is nothing in the treaty requiring the production of exculpatory evidence, it will not be required of the requesting state. There are no cases known to this writer where a court has compelled the U.S. government to secure exculpatory evidence on behalf of the relator from the requesting state. The only exception to that may be where there is an issue of identity or mistaken identity.[146]

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was also rejected by the Supreme Federal Tribunal of Brazil in *In re Santucci Lazaro,* 5 Ann. Dig. 288 (STF 1929) (Braz). Alibi was likewise rejected in *Desmond v. Eggers,* 18 F.2d 503, 506 (9th Cir. 1927), *motion for stay of execution denied*, 274 U.S. 722 (1927). In *In re Wadge*, 15 F. 864 (C.C.S.D.N.Y. 1883), *aff'd*, 16 F. 332 (C.C.S.D.N.Y. 1883), the court held that evidence in defense of the charge for which extradition is sought amounts only to a denial of the demanding government's charges through evidence contradicting or impugning its witnesses. *See also* Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927); *In re* Ezeta, 62 F. 972 (N.D. Cal. 1894). Under *Collins v. Loisel*, 259 U.S. 309 (1922), the leading Supreme Court case on the subject, the defendant is permitted to explain, through his/her testimony and that of others, any ambiguities there may be in the evidence offered by the demanding government. *See also In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); *In re Application of* D'Amico, 185 F. Supp. 925, 930 (D. Conn. 1960), *appeal dismissed sub nom.* United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir. 1961). The defense of superior orders was rejected in *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963). *But see In re* Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984). The "Act of State" defense was rejected in *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

145 Montemayor v. United States, 329 F. Supp. 2d 883, 888 (S.D. Tex. 2004).

146 In *Montemayor v. United States*, the court stated:

> Montemayor mentions the extradition of John Demjanjuk who was an immigrant to America who was accused of being the infamous Nazi officer "Ivan the Terrible." He says that the Constitution requires the United States to give the accused all of its exculpatory evidence before the hearing. *See Demjanjuk,* 10 F.3d at 353. To put it mildly, the facts and process of the case are exceptional.
>
> At the initial hearing or on habeas review, the district judge did not ascertain that the government had not disclosed all the documents as he had ordered. Independent habeas review by the court of appeals also failed to catch the government's failure. Demjanjuk was extradited, and then he was acquitted through the competence of the foreign tribunal. Strangely, after it was all over, that court of appeals reopened the case on its own motion, appointed a special master, took evidence, and decided to vacate the extradition because the American prosecutors had defrauded the court by not disclosing exculpatory evidence.
>
> That case is meaningless. It decided nothing; it had no parties and no justiciable issue. Demjanjuk had been extradited, tried, and acquitted.
>
> Even if it had been a genuine "case or controversy," the situations of the defendants and prosecutors was entirely distinct. The exculpatory evidence for Demjanjuk was discovered by the United States from its own investigation. The government promised to give Demjanjuk all of its evidence, and it dishonestly did not. Also, the after-the-fact decision about Demjanjuk is not parallel because Montemayor specifically disclaimed any corrupt activity by the American prosecuting attorney. The United States did not lie in this case. *Seguy v. U.S.*, 329 F.Supp. 2d 883, 889 (S.D. Tex. 2004).

In *Montemayor*, which had been ruled upon previously in 329 F. Supp. 2d 871 (S.D.Tex. 2004), the relator raised the issue of forged documents. If there had been evidence of forgery, the court would have disregarded the forged document from its consideration for purposes of probable cause, as proof of probable cause requires that the evidence be truthful, reliable, and credible. *See also In re Extradition of* Chavez, 408 F. Supp. 2d 908 (N.D. Cal. 2005) (finding insufficient evidence of relator's identity); *but see* Garza v. United States, No. 05-40112, 2006 U.S. App. LEXIS 12006 (5th Cir. 2006) (refusing

It is well-established that extradition proceedings are not a trial of the guilt or innocence of the relator, but rather an inquiry into whether he/she should be delivered to the requesting state to stand trial. What is at issue, therefore, is not punishability but prosecutability. In this respect, a unique case in the annals of extradition is the *Insull* case, in which a Greek court examined the guilt of the relator.[147] The United States opposed this ruling as inconsistent with its treaty with Greece. Subsequently, however, it had to add a protocol to that treaty that in Article I prohibits inquiry into the ultimate guilt or innocence of the relator.[148]

5.2. Documentary Evidence

As discussed in Section 5.1, the magistrate has a great deal of latitude in admitting or denying admission of evidence. An exception to this latitude is where extradition law and treaty requirements compel otherwise, such as with respect to authentication of documents and exclusion of evidence not subscribed and sworn to as duly authenticated by a U.S. consular officer. Subscribed or sworn to written statements are deemed competent evidence, and the relator may not cross examine their authors.

The court must, however, determine whether documents in support of probable cause have been properly authenticated in accordance with 18 U.S.C. § 3190 and will therefore admit evidence relevant to this question.[149] 18 U.S.C. § 3190 states that:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Deposition evidence is admissible.[150] Also admissible is hearsay evidence.[151] An authenticated copy of a foreign verdict with a certified translation is admissible, and sufficient to establish

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evidence showing that the eyewitness of the relator's crime was unable to identify him, because evidence was contradictory as opposed to explanatory).

147 7 Ann. Dig. 344 (Ct. App. Athens 1933) (Greece). *See* Charles C. Hyde, *The Extradition Case of Samuel Insull*, 28 Am. J. Int'l L. 307 (1934).

148 51 Stat. 357, E.A.S. No. 114, 8 Bevans 366 (*entered into force* Sept. 2, 1937).

149 *See* Shapiro v. Ferrandina, 478 F.2d 894 (2d. Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973). *See also* Spatola v. United States, 925 F.2d 615 (2d Cir. 1991) (stating a certified copy of Italian appellate convictions sufficient for probable cause determination); Merino v. U.S. Marshal, 326 F.2d 5 (9th Cir. 1963); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); Restatement (Third) of the Foreign Relations Law of the United States § 476 cmt. b (1987).

150 Wacker v. Bisson, 370 F.2d 552, 553 (5th Cir.), *cert. denied*, 387 U.S. 936 (1967); Manta v. Chertoff, 518 F.3d 1134, 1146–1147 (9th Cir. 2008) (stating that the only requirement for evidence was that it be authenticated, and noting that depositions were not required in all cases under the treaty).

151 Harshbarger v. Regan, 599 F.3d 290, 292–294 (3d Cir. 2010); Escobedo v. United States, 623 F.2d 1098, 1099 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980); Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973); *In re Extradition of* Salazar, 2010 U.S. Dist. LEXIS 74370, at *22 (S.D. Cal. Jul. 23, 2010); *In re Extradition of* Cifuentes, 2010 U.S. Dist. LEXIS 142064, at *10–*11 (S.D. Fla. Mar. 29, 2010); United States v. Samuels, 2009 U.S. Dist. LEXIS 9616 (E.D.N.Y. Feb. 10, 2009); *In re Extradition of* Avdic, 2007 U.S. Dist. LEXIS 47096, at *22 (D.S.D. June 28, 2007). *See also In re* Ryan, 360 F. Supp. 270, 273 (D.C.N.Y. 1973), *aff'd without opinion*, 478 F.2d 1397 (2d Cir. 1973); *See also* United States v. Taitz, 134 F.R.D. 288, 290 (S.D. Cal. 1991).

probable cause even if it was a trial in absentia.[152] Because the relator can only introduce evidence to clarify the requesting state's evidence, the magistrate has ample latitude to decide on its admissibility.[153] Nothing precludes the U.S. government from acting on behalf of the requesting state and requesting further evidence or taking depositions from witnesses in the United States or in any foreign state in accordance with federal rules on the subject, in particular those of consular practices. It is also possible for defense counsel to secure depositions abroad, wherever possible, in accordance with consular practices and to introduce them in evidence. Such practice is, however, almost impossible in most countries, and thus the defense is at a disadvantage. Admissibility will depend on whether the depositions are explicative of the government's evidence. As stated before, any such depositions or other documents sought to be introduced in evidence must also be "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped…."[154] The validity of authentication can be established by expert testimony in accordance with the legal requirements and practices of that state.[155] Further, arrest warrants need not be sworn to be admissible as long as they are otherwise properly authenticated.[156]

Where the treaty requires the production of documents such as an arrest warrant, the magistrate or judge has broad discretion in finding this to be satisfied absent specification in the treaty of a certain form of the order or warrant.[157] In *In Re Trinidad* the district court for the Northern District of California rejected the relator's argument that Latvia's submission of an arrest "order" did not comply with the extradition treaty's requirement that there be an arrest warrant, noting that:

> There is nothing in the Treaty that prescribes the specific form of order, or that the order or arrest warrant must be issued with the original charges. Latvia has produced an order which requires Trinidad's arrest, and this satisfies its obligation to produce "a copy of the warrant or order of arrest issued by a judge, court, or other authority competent for this purpose." Treaty, Art. 4.[158]

It should also be noted that the U.S. government can obtain evidence abroad either by asking the requesting state to procure it, or by relying on Mutual Legal Assistance Treaties (MLATs).

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152 *In re Extradition of* Bilanovic, 2008 U.S. Dist. LEXIS 97893, at *23–*24 (W.D. Mich. Dec. 3, 2008); *In re Extradition of* Avdic, 2007 U.S. Dist. LEXIS 47096, at *21–*22 (D.S.D. June 28, 2007). *See* Ch VIII Sec. 4.8 for a discussion of the use of evidence based on a trial in absentia.

153 *In re Extradition of* Ye Gon, 2011 U.S. Dist. Lexis 12559, at *46–*54 (D.D.C. Feb. 9, 2011) (refusing to consider relator's argument regarding reliability of the witness statements as they were properly certified under § 3190, which was enough to render them admissible).

154 18 U.S.C. § 3190 (2000).

155 Argento v. Horn, 241 F.2d 258, 260 (6th Cir. 1957), *cert. denied*, 355 U.S. 818 (1957). *See also* 6 Whiteman Digest, *supra* note 16, at 968. Trial evidence made available by a foreign government to the United States has been held admissible. *See* United States v. Tierney, 448 F.2d 37 (9th Cir. 1971); United States v. Shea, 436 F.2d 740 (9th Cir. 1970); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1968); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967), *cert. denied*, 389 U.S. 986 (1967); United States v. Marzano, 388 F. Supp. 906 (N.D. Ill. 1975); *In re* Henrich, 11 F. Cas. 1143 (C.C.S.D.N.Y. 1867); United States v. Verdugo-Urquidez, No. 86-0107-JLI-Crim. (S.D. Cal. Feb. 18, 1987) (unpublished memorandum decision).

156 *In re Extradition of* Pelletier, 2010 U.S. Dist. LEXIS 44979, at *17 (S.D. Fla. Apr. 12, 2010) ("Binding Eleventh Circuit precedent demonstrates that properly authenticated documents submitted by a requesting state may be considered by a magistrate judge regardless of whether the statements they contain are sworn or unsworn. See Afanasjev v. Hurlbut, 418 F.3d 1159, 1165 (11th Cir. 2005); Escobedo v. United States, 623 F.2d 1098, 1102, n.10 (5th Cir. 1980).").

157 *In re Extradition of* Trinidad, 754 F.Supp. 2d 1075 (N.D. Cal. 2010).

158 *Id*. at 1080.

The United States has MLATs with fifty-six states as of January 2011.[159] But under all such treaties only the U.S. government can make such a request. Individuals can neither benefit from MLATs nor can they counsel the U.S. government to resort to an MLAT procedure to produce evidence needed for the defense. However, it is the contention of this writer that if the U.S. government knows of the existence abroad of evidence that is clearly exculpatory, the integrity of the legal process under the Fifth Amendment Due Process Clause requires the government to secure the evidence and present it to the court.

5.2.1. Exclusion of Evidence on Constitutional Grounds[160]

As probable cause has so far been held to be a treaty and statutory requirement but not specifically a constitutional one, although this writer asserts that it is, the question arises as to whether constitutional limitations arising out of the Fourth, Fifth, and Sixth Amendments are applicable and could exclude otherwise admissible evidence. If violations of the Fourth, Fifth, and Sixth Amendments are committed in the production of evidence sought to be admitted by the government, and are committed in the United States, constitutional exclusions should apply, although there is no Supreme Court decision stating so explicitly. A reasonable construction of the Fifth and Fourteenth Amendment Due Process Clauses, and their incorporation of the Fourth, Fifth, and Sixth Amendment standards, leads to this conclusion.

Conversely, however, if the violation occurred outside the United States and was not committed by U.S. agents, the court would not exclude the evidence.[161] Such has been the explicit ruling in *Escobedo v. United States*,[162] and by implication in *Rosado v. Civiletti*.[163] This position however is subject to the spirit of *United States v. Toscanino*.[164]

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159 *See* United States Department of State, *Treaties in Force*, January 2011, *available at* http://www.state.gov/s/l/treaty/tif/index.htm (last visited Oct. 20, 2012).

160 *See also supra* Sec. 4, which addresses the question of the Constitution's applicability to "probable cause."

161 *See, e.g.,* United States v. Peterson, 812 F.2d 486 (9th Cir. 1987); United States v. Coke, 2011 U.S. Dist. LEXIS 94012, at *14–*15 (S.D.N.Y. Aug. 22, 2011) (rejecting a Fifth Amendment substantive due process challenge to the admissibility of allegedly illegally obtained wiretap evidence by Jamaican officials). Jonathan F. Cheatwood, Recent Development: Constitutional Law—"Good Faith" Exception to the Exclusionary Rule for Warrantless Searches Made by United States Agents Who Reasonably Rely on Assertions by Foreign Police That a Search Is Valid, 21 VAND. J. TRANSNAT'L L. 631 (1988).

162 Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980). The exclusionary rule does not apply to illegal searches and seizures when conducted by state officers, and their "fruits" may be presented at a federal hearing on extradition. *See* Romeo v. Roache, 820 F.2d 540 (1st Cir. 1987). The court in *Romeo*, however, held that if the conduct was "more egregious," it would warrant judicial intervention. *Id.* at 545. *See also* Ch. V, Sec. 5 (discussing the extraterritorial application of the Fourth Amendment). *See also* Simmons v. Braun, 627 F.2d 635 (2d Cir. 1980) (holding that a motion to suppress defendant's identification as to the fruit of an illegal stop and search would not be granted in extradition hearings); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000). *See also In re Extradition of* Atuar, 300 F. Supp. 2d 418 (S.D.W. Va. 2003), 156 Fed. Appx. 555 (4th Cir. 2005), *cert. dismissed* 2006 U.S. LEXIS 5244 (2006); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003).

163 Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980). In *Rosado*, however, the court dealt with the Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.–Mex., T.I.A.S. No. 8718, *reprinted in* S. Exec. Doc. D., 95th Cong., 1st Sess. (1977). *See In re* Singh, 123 F.R.D. 127 (D. N.J. 1987) (stating treaties and statutes, not the Constitution, confer procedural rights on defendants in foreign arrests). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *See also* United States v. Hashmi, 2009 U.S. Dist. LEXIS 71859 (S.D.N.Y. Aug. 7, 2009) (discussing *Miranda* rights abroad and referencing *Rosado*).

164 United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (stating that the government should be denied the right to exploit its own illegal conduct when, as in *Toscanino*, a person was illegally seized in a foreign country by U.S. agents in violation of the Fourth Amendment). Here the question is different, but the principle is the same: whether the integrity of the judicial process and of the judicial system of the United States does not preclude reliance on any evidence or process that is so contrary to due process of

A Fourth Amendment challenge to unsworn witness testimony was rejected by the Ninth Circuit in *Manta v. Chertoff*.[165] Relators attempted to rely on the Equal Protection Clause of the Fourteenth Amendment but the Court found this argument to be "without merit."[166]

5.2.2. Evidentiary Standard for Probable Cause and Sufficiency of the Evidence

The standard of probable cause in international extradition is the same as the one used in preliminary hearings in federal criminal proceedings.[167] The sufficiency of the evidence, however, has invariably been a difficult one, as it relates not only to the nature of "probable cause" in U.S. law but also because it depends on the offense charged and its elements under the

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law so as to fall within the meaning of what the U.S. Supreme Court expressed in *Rochin v. California*, 342 U.S. 165 (1952), namely whether the conduct "offend[ed] those canons of decency and fairness which express the notions of justice of English-speaking peoples" so as to "shock the conscience," and "offend a sense of justice." 342 U.S. at 172–175; *cf.* Matta-Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir. 1990) ("This court has previously expressed skepticism about whether the government would ever by outrageous conduct surrender its authority to prosecute as a matter of due process. But we have never foreclosed the possibility for entrapment cases, excessive force cases . . . ") (Will, J., concurring). *See also* Ch. V.

165 518 F.3d 1134 (9th Cir. 2008), noting that

> Manta's final argument is that the use of unsworn testimony to support extradition violates the Fourth Amendment. Under 18 U.S.C. § 3184, a magistrate judge is authorized to issue a provisional warrant, to bring the accused before the court to hear evidence against him, and a final warrant, and to commit the accused to prison until the foreign government requests surrender of the accused. Manta is correct that the Fourth Amendment's protections extend to those arrested pursuant to treaties. *See Reid v. Covert,* 354 U.S. 1, 15, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution."); *see also* U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . "). But Manta's attempt to expand the Fourth Amendment's oath requirement to all evidence offered in an extradition proceeding is unfounded.
>
> Manta cites no case to support the contention that the Fourth Amendment requires every piece of evidence relied on in an extradition proceeding be sworn. Moreover, such a requirement would run contrary to our well-established case law that evidence offered for extradition purposes need not be made under oath. *Zanazanian,* 729 F.2d at 627 ("Neither the applicable treaty nor United States law requires evidence offered for extradition purposes be made under oath."). We therefore hold that Manta has not established that the Fourth Amendment entitles her to relief.

Id. at 1147.

166 Harshbarger v. Regan, 599 F.3d 290, 294 (3d Cir. 2010), noting that the relator's

> equal protection challenge is curious and unique. She argues that because the individual was "unextraditable in *Sylvester* . . . , the extradition order in place against her violates her constitutional right to equal protection." Appellant's Br. at 7. The equal protection afforded by the Fifth Amendment (and, by incorporation, the Fourteenth Amendment) is for federal or state action. Ms. Harshbarger cites no legal authority to support her argument that a mere conflict in legal interpretation by judges in the same court supports an equal protection challenge, and we have found none. Ms. Harshbarger also cites no authority to support her void-for-vagueness challenge to the Canadian statute. In any event, the challenge amounts to a defense that should be heard in the Canadian court, not here. *See Charlton v. Kelly,* 229 U.S. 447, 462, 33 S.Ct. 945, 57 L.Ed. 1274 (1913).

167 Collins v. Loisel, 259 U.S. 309 (1922). For a more recent case, see Austin v. Healey, 5 F.3d 598 (2d Cir. 1993). *See also* Sidali v. INS, 107 F.3d 191 (3rd Cir. 1997); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Neto, 1999 WL 627426 (S.D.N.Y. Aug. 17, 1999).

substantive law being applied.[168] Furthermore, federal courts have been inconsistent in their enunciation and application of evidentiary standards. In the landmark case of *Collins v. Loisel*, the Supreme Court stated:

> The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. *Grin v. Shine*, 187 U.S. 181, 197 (1902); *Benson v. McMahon*, 127 U.S. 457, 461 (1888); *Ex parte Glaser*, 176 F. 702, 704 (2d Cir. 1910). In *In re Wadge*, 15 F. 864, 866, cited with approval in *Charlton v. Kelly, supra*, 461, the right to introduce evidence in defense was claimed; but Judge Brown said: "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties." The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in *Charlton v. Kelly, supra*, between evidence rebutting probable cause, and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government." And in that case evidence of insanity was declared inadmissible as going to defense and not to probable cause. Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the Hearing prescribed by law.
>
> The phrase "such evidence of criminality" as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction. It does not refer to the character or specific instruments of evidence or to the rules governing admissibility. Thus, unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination. *Elias v. Ramirez*, 215 U.S. 398 (1910); *Rice v. Ames*, 180 U.S. 371 (1901). And whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State. *Glucksman v. Henkel*, 221 U.S. 508, 513 (1913). Here the evidence introduced was clearly sufficient to block out those elements essential to a conviction under the laws of Louisiana of the crime of obtaining property by false pretenses. The law of Louisiana could not and does not attempt to require more. It is true that the procedure to be followed in hearings on commitment is determined by the law of the State in which they are held. *In re Farez*, 7 Blatchf., 345, Fed. Cas. No. 4645; *In re Wadge, supra*; *In re Kelley*, 25 Fed. 268; *In re Ezeta*, 62 Fed. 972, 981. But no procedural rule of State could give to the prisoner a right to introduce evidence made irrelevant by a treaty.[169]

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168 *See, e.g., In re Extradition of* Savage, 819 F. Supp. 896 (S.D. Cal. 1993); Carr v. United States, 782 F. Supp. 945 (D. Vt. 1991); Esposito v. Adams, 700 F. Supp. 1470 (N.D. Ill. 1988). *See also In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Barr, 619 F. Supp. 1068 (D. Pa. 1985); *In re Extradition of* Demjanjuk, 612 F. Supp. 544 (D. Ohio 1985).

169 Collins v. Loisel, 259 U.S. 309, 316–317 (1922). *See also In re Extradition of* Szepietowski, 2009 U.S. Dist. LEXIS 4658, at *26–*32 (E.D.N.Y. Jan. 23, 2009); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998).

In *Application of D'Amico* the relator raised the question of sufficiency of the evidence, and the district court, after reviewing the evidence presented by the requesting government at the Hearing, remanded the case to the extradition magistrate for further proceedings, including the taking of further evidence, stating:

> It is plain that the evidence presented against D'Amico was unsatisfactory to say the least. There is at the least grave doubt on the present record as to whether there was any evidence warranting a finding that there were reasonable grounds to believe D'Amico guilty of the crime charged.
>
> In this state of the record it becomes of significance that there is real doubt as to whether the Commissioner actually made a finding that there was probable cause to believe that D'Amico committed these crimes. A careful reading of his findings indicates that he passed directly only upon the two questions raised by the relator at the hearing—whether the crime charged was extraditable under the treaty and whether relator was in fact *the* Vito D'Amico "mentioned in the judgment filed in Italy." The Commissioner found against the relator on both of these points but his findings go on to say "*accordingly*" there is probable cause to believe that the offense charged was committed by the respondent.
>
> This does not seem to me, in the light of the circumstances here, to be an independent finding that there was probable cause to believe that the offense was committed by the relator. The explanation or the omission of any independent finding on this point may well be that the sole question of fact raised by relator's previous counsel on the hearing was the question of identity. Nevertheless, the Commissioner was required under the statute and the treaty to make a specific finding as to the sufficiency of the evidence to establish probable cause that relator had committed the offense. See *Benson v. McMahon*, 127 U.S. at page 463, 8 S. Ct. at page 1243, 32 L. Ed. 234. . . . [I]n the light of this record and the circumstances of this case, such an ambiguity in the findings cannot be viewed as merely a harmless technicality. The relator is entitled to evaluation of the evidence on the issue of whether it establishes that there is probable cause to believe that relator committed the offenses charged and to an independent finding on that issue.[170]

A more lenient standard is used to review a magistrate's determination that the evidence submitted is sufficient to find probable cause. The Supreme Court stated in *Fernandez v. Phillips* that the magistrate's determination as to probable cause will be affirmed if there is "*any* evidence warranting the finding that there was reasonable ground to believe the accused guilty."[171] In *Valencia v. Limbs*, the Ninth Circuit stated:

> Before extradition may be ordered, the Magistrate must determine that:
>
> > there is "competent legal evidence which . . . would justify . . . apprehension and commitment for trial if the crime had been committed in [the forum] state."
>
> *Hooker v. Klein,* 573 F.2d 1360, 1367 (9th Cir. 1978), quoting, *Collins v. Loisel,* 259 U.S. 309, 315 (1921). The necessary finding was made in this case and commitment pending extradition was ordered. No appeal lies; review is possible only by writ of habeas corpus. *See, e.g., Collins v. Miller*, 252 U.S. 364, 369, 40 S. Ct. 347, 349, 64 L.Ed. 616 (1920); *Hooker v. Klein, supra,* 573 F.2d at 1364.
>
> The scope of habeas review of a Magistrate's extradition order is traditionally limited to an examination of the following factors: (1) the jurisdiction of the extradition judge to conduct extradition proceedings; (2) the jurisdiction of the extradition court over the fugitive; (3) the force and effect of the extradition treaty; (4) the character of the crime charged and whether it falls within the terms of the treaty; (5) whether there was competent legal evidence to support a finding of extraditability. *See, e.g., Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 542, 69 L. Ed. 970 (1925); *Caplan v. Vokes,* 649 F.2d 1336 at 1340 (9th Cir. 1981); *Hooker v. Klein,*

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170 *In re Application of* D'Amico, 185 F. Supp. 925, 930–931 (S.D.N.Y. 1960), *appeal dismissed sub nom.* United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir. 1961).

171 Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (emphasis added).

573 F.2d at 1368. It is generally for the Magistrate to determine if the evidence establishes probable cause to believe that the fugitive committed the crime for which he stands accused. Review of the evidence before the Magistrate has been limited to a determination that there was competent evidence supporting the finding of extraditability. *Fernandez v. Phillips*, 268 U.S. at 312, 45 S. Ct. at 542; *United States ex rel. Sakaguchi v. Kaulukukui,* 520 F.2d 726, 730 (9th Cir. 1975). Appellant suggests that this standard has recently and radically been changed by the decision in *Jackson v. Virginia*, 443 U.S. 307 (1979).

In *Jackson*, the Supreme Court held that a federal court has power by writ of habeas corpus to review a state prisoner's criminal conviction and determine whether any rational factfinder could have found the prisoner guilty beyond a reasonable doubt. 443 U.S. at 318–19, 99 S. Ct. at 2789. This decision altered the perception of many courts of appeal that they could not inquire into the sufficiency of the evidence in a habeas review of a state criminal conviction. 443 U.S. at 316, 99 S. Ct. 2788. This circuit had often held before Jackson that "allegations of insufficient evidence in a state court trial [were not] reviewable by writ of habeas corpus." *Freeman v. Stone*, 444 F.2d 113,114 (9th Cir. 1971) (per curiam).

Appellant suggests a parallel between this scope of review in extradition and state criminal cases. His theory is that extradition courts did not review the sufficiency of the evidence of probable cause because they erroneously applied the pre-Jackson scope of habeas corpus review. He suggests a broader scrutiny in the light of the Supreme Court decision. We do not agree that Jackson has changed the standard of evidentiary review appropriate in extradition cases and we affirm.

We do not believe that Jackson, which itself says nothing about extradition, applies to extradition cases. Under these circumstances, we are institutionally bound by well-settled principles requiring a limited review of the evidence supporting a request for international extradition. Appellant's fundamental misconception is that an extradition proceeding is enough like habeas review of a state criminal conviction to call for similar standards. The courts have consistently rejected efforts to invoke such an equation and we do so now.

When a state prisoner petitions a federal court on habeas corpus alleging insufficient evidence existed for conviction, his guilt has already been adjudged. The Fourteenth Amendment requires that the evidence has been sufficient to persuade the factfinder beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Jackson* holds that the writ of habeas corpus is available to assure state compliance with this fundamental constitutional requirement. 443 U.S. at 319–20, 99 S. Ct. 2789–90.

The extradition proceeding, however, makes no determination of guilt or innocence. *See, e.g., Collins v. Loisel, supra*, 259 U.S. at 315, 42 S. Ct. at 471, 66 L. Ed. 956; *United States ex rel. Sakaguchi v. Kaulukukui, supra,* 520 F.2d at 730–31. It is designed only to trigger the start of criminal proceedings against an accused; guilt remains to be determined in the courts of the demanding country. *See Merino v. United States Marshal*, 326 F.2d 5, 11 (9th Cir. 1963), *cert. denied*, 377 U.S. 997, 84 S. Ct. 1922, 12 L. Ed. 2d 1046 (1964); *accord, Jhirad v. Ferrandina,* 536 F.2d 478, 484 (2d Cir. 1976) (culpability is to be determined in the demanding country's courts). Thus, the evidence necessary for extradition is of a wholly different character from that mandated by the Fourteenth Amendment to test due process in a state criminal conviction. "Competent evidence to establish reasonable grounds is not necessarily evidence competent to convict." *Fernandez v. Phillips, supra, 268* U.S. at 312, 45 S. Ct. at 542. The Jackson standard is simply inappropriate when the purpose is to demonstrate probable cause to commit the appellant to stand trial.

Nothing in Jackson abridges the distinctions between extradition orders and state criminal trials. We affirm the well-established principle that the two are different, and Jackson therefore does not alter nearly a century of case law that requires we determine only whether "any evidence warrant[s] the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips, supra,* 268 U.S. at 312, 45 S. Ct. at 542. Applying that standard, appellant does not

> seriously contend that the evidence is insufficient to support a finding and order of extradition. The judgment of the district court denying habeas corpus relief is therefore affirmed."[172]

For probable cause to be established on the basis of an in absentia conviction, it is sufficient to have a certified copy of the court decision. Probable cause in such cases does not require additional "actual evidence." For instance, in *Haxhiaj v. Hackman* the Fourth Circuit upheld the probable cause finding despite the lack of "actual evidence" such as "trial testimony, documents created by investigators, transcripts of wiretapped conversations or affidavits from law enforcement officials with personal knowledge of the evidence against [the relator]."[173] The court reasoned that although

> an extradition request based upon a conviction *in absentia*… requires more detail than mere proof of the *fact* of conviction to establish probable cause, *i.e.,* "a reasonable basis to believe that the person sought committed the offense,"...it clearly does not require the kind of actual evidence suggested by Haxhiaj, such as trial testimony or transcripts of the wiretap evidence. Instead, the Extradition Treaty requires merely a summary of the facts and relevant evidence sufficient to provide a reasonable basis to believe the relator committed the offense. We conclude that the certified copy of the appellate opinion of the Court of Appeal of Milan satisfies the showing required by the Treaty and clearly affords a reasonable basis upon which to find probable cause. The opinion is remarkable for its detailed description of the evidence developed during the investigation of Haxhiaj's drug trafficking ring, including key wiretap describing Haxhiaj's role.[174]

The *Haxhiaj* court rooted this threshold for probable cause in comity between nations, noting that "a requirement that the requesting government present 'actual evidence' that it intended to submit, or already had submitted, at trial is antithetical to the comity basis that underlies extradition."[175]

The application of a low evidentiary threshold by some lower federal courts[176] has greatly facilitated the task of requesting states, while correspondingly posing a difficult challenge to

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172 *See Valencia v. Limbs*, 655 F.2d 195, 197–198 (9th Cir. 1981). *See also* Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971). For a more recent case referring to the "competent evidence" standard, see Polikarpovas v. Stolic, 256 Fed. Appx. 127 (9th Cir. 2007) (unpublished opinion).

173 Haxhiaj v. Hackman, 528 F.3d 282, 287–288, (4th Cir. 2008).

174 *Id.* at 288–289 (footnotes omitted).

175 *Id*.

176 The lower courts have seldom departed from the formulation of the probable cause standard in *Fernandez.* For example, the circuit court in *Hooker v. Klein,* 573 F.2d 1360 (9th Cir. 1978), stated "the duty of the extraditing court is to determine only whether there exists competent evidence which justifies the apprehension and commitment of the fugitive." *Id.* at 1368. Similarly, the circuit court in *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969) stated "The magistrate does not inquire into the guilt or innocence of the accused; he looks only to see if there is evidence sufficient to show reasonable ground to believe the accused guilty." *Id.* at 689. *Cf.* Jhirad v. Ferrandina, 362 F. Supp. 1057, 1063 (S.D.N.Y. 1973) (formulating the probable cause standard in two parts: first, "reasonable cause to believe that a crime was committed" and second, "reasonable grounds to believe that the petitioner was guilty of that crime."). *See also* Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y. 1973) (requiring evidence to be both competent and sufficient). *See also In re Extradition* of Trinidad, 754 F. Supp. 2d 1075, 1080 (N.D. Cal. 2010) (applying a "competent evidence" standard and refusing to consider the relator's contradictory construction of supplemental government evidentiary submissions); *In re Extradition* of Salazar, 2010 U.S. Dist. LEXIS 74370, at *19 (S.D. Cal. July 23, 2010) (applying an "any evidence" standard). A small minority of courts have discussed probable cause in a manner suggesting that the requesting state make a prima facie showing, thereby imposing a somewhat higher standard. *See* Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976); *In re* Shapiro, 352 F. Supp. 641 (S.D.N.Y. 1973). Neither of these courts, however, regarded the extradition hearing as akin to a trial, nor the habeas corpus proceeding as a full appeal.

individuals seeking to avoid extradition, for they must demonstrate that *no* competent evidence has been presented to justify the charges against them.[177] The quantum of evidence required has varied considerably,[178] but courts have, with few exceptions,[179] been traditionally persuaded that sufficient evidence exists.

It is important to make the distinctions between the admissibility of evidence, the sufficiency of evidence, and the weight of evidence.[180] The case of *In re Assarsson*[181] is unique in that it addressed each of these issues. In this case the relator, Jan Alf Assarsson, was ordered extradited to Sweden for trial on charges of arson, fraud, and attempted fraud. On the question of admissibility of evidence, the court pointed out that in an extradition case 18 U.S.C. § 3190 governs.[182] However, on the issue of allowing the admissibility of documents, the court noted that where the weight of evidence is at issue, it is a question for the extradition judge to assess based on the law and practice of the requested state. The court stated:

> Assarsson does not contest the authentication of the documents. We agree that, once certified under 18 U.S.C. Section 3190, the statement was properly received into evidence. *See Galanis v. Pallanck*, 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro v. Ferrandina*, 478 F.2d at 903 (certification of United States diplomatic officials is conclusive proof that the document is "properly and legally" authenticated and thus admissible).
>
> The objection to the evidence goes to its weight, not its admissibility. *See Shapiro v. Ferrandina*, 478 F.2d 894, 902 (2d Cir.), *cert. dismissed*, 414 U.S. 884, (1973). As the court said in *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, (1977), another

177 *See* Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y. 1973); *In re Extradition of* Santos, 2011 U.S. Dist. LEXIS 62672, at *9–*13 (C.D. Cal. June 13, 2011); *In re Extradition of* Morales, 2011 U.S. Dist. LEXIS 48954 (E.D. Cal. Apr. 29, 2011). This can be particularly difficult in situations where courts are presented with a vast amount of evidence against the relator that would be difficult to explain. *See In re Extradition of* Redman, 2011 U.S. Dist. LEXIS 81231 (C.D. Cal. July 25, 2011); *In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757 (S.D. Cal. Oct. 14, 2008).

178 *See, e.g.,* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962) (stating that "voluminous" documentary evidence failed to establish probable cause that relator committed murder but successfully established probable cause with respect to financial crimes); Republic of France v. Moghadam, 617 F. Supp. 777 (N.D. Cal. 1985) (failing to establish probable cause where principal accuser had recanted testimony); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) (establishing probable cause through documentary evidence and testimony of one witness that relator violated Canadian securities laws); United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977) (finding probable cause that relator guilty of fraud, shown by means of "voluminous deposition evidence and attached documents"); *In re* Edmondson, 352 F. Supp. 22 (D. Minn. 1972) (finding certified copies of Canadian convictions established probable cause that relator engaged in criminal conduct). *But see In re* Singh, 123 F.R.D. 140 (D.N.J. 1987) (holding governmental misconduct is not sufficient grounds for denying existence of probable cause); *In re Extradition of* Santos, 2011 U.S. Dist. LEXIS 62672, at *57–*67 (C.D. Cal. June 13, 2011) (holding recantation of evidence allegedly obtained by torture inadmissible in the extradition hearing); *In re Extradition of* Morales, 2011 U.S. Dist. LEXIS 48954 (E.D. Cal. Apr. 29, 2011) (holding that credibility arguments regarding testimony of co-conspirators cannot be used to challenge the finding of probable cause).

179 *See* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962). *See also* Mirchandani v. United States, 836 F.2d 1223 (9th Cir. 1988) (affirming the district court's consideration of additional evidence on remand as dispositive of the extradition determination).

180 For cases where the relator raised challenges to the weight of the evidence, see *United States v. Hidalgo*, 2011 U.S. Dist. LEXIS 18299 (D. Utah Feb. 24, 2011) (rejecting relator's arguments regarding weight of evidence).

181 *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999).

182 *Assarsson*, 635 F. 2d at 1238.

> case involving Sweden "[i]t may be that on the full trial Peroff may be able to submit substantial proof that another rather than he was the perpetrator of the fraud, but that is a matter for exploration during the trial in Sweden and not for extensive evidentiary inquiry during the extradition hearing."[183]

The relator in *Assarsson* also contested the sufficiency of the evidence adduced against him. The court did not address this issue completely, noting that although its decision did not constitute a final judgment on the guilt or innocence of the accused, a determination of the sufficiency of evidence needed to establish probable cause did fall within the scope of habeas corpus review. The court turned to state law, stating:

> Reference to state law in cases dealing with extradition proceedings for the definition of substantive crimes results from the historical association of criminal prosecution with the states. Long before the criminal provisions of the United States Code reached their present detail, the Supreme Court considered the dependency on state criminal law for international extradition. *Wright v. Henkel*, 190 U.S. 40, 58–51, 23 S. Ct. 781, 785–786, 47 L. Ed. 948 (1903).[184]

As stated above, the mere fact that evidence is summarized or based on unsigned depositions is irrelevant. In *Manta v. Chertoff*, the Ninth Circuit concluded that a Greek extradition request was not insufficient because the prosecutor's investigation report summarized witness statements or did not include signed depositions from several witnesses.[185]

It is important to remember that the evidentiary standard in a Hearing is not the same as in a regular trial, and that almost all evidence is admissible in order to establish probable cause. Hearsay statements made by the relator to his/her family, the relator's admissions during transport by law enforcement officials, or statements by other witnesses have all been used to establish the relator's identity.[186] Immigration documents, including visa applications, have been used to support a finding of probable cause of the relator's identity.[187] In *In re Extradition of Pelletier* the court used the relator's drivers license and passport to establish his identity by comparing the passport photograph against the relator who was present in court,[188] and the mailing address in the documents against the one given in his prior sworn statements.[189] In other circumstances, a relator was identified based on numerous photographic identification documents and witness identifications even though no witnesses were able to identify the relator in a photographic lineup.[190] However, the documents submitted to establish identity need not include a photograph of the relator, fingerprints, DNA, or other physical evidence.[191] In one case, closed circuit television footage was used

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183 *Id.* at 1249.

184 *Id.*

185 Manta v. Chertoff, 518 F.3d 1134, 1146–1147 (9th Cir. 2008) (footnote omitted).

186 *In re Extradition of* Lingad, 2007 U.S. Dist. LEXIS 27224, at *11–*12 (S.D. Cal. Apr. 11, 2007); *In re Extradition of* Szepietowski, 2009 U.S. Dist. LEXIS 4658, at *33–*37 (E.D.N.Y. Jan. 23, 2009).

187 *In re Extradition of* Lingad, 2007 U.S. Dist. Lexis 27224, at *4–*6 (S.D. Cal. Apr. 11, 2007).

188 *In re Extradition of* Pelletier, 2010 U.S. Dist. LEXIS 44979, at *4 (S.D. Fla. Apr. 12, 2010).

189 *Id.* at *5–*7. *See also In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757, at *14–*18 (S.D. Cal. Oct. 14, 2008); *In re Extradition of* Szepietowski, 2009 U.S. Dist. LEXIS 4658, at *32–*33 (E.D.N.Y. Jan. 23, 2009).

190 *In re* Medina, 2009 U.S. Dist. LEXIS 11546, at *10–*14 (E.D.N.Y. 2009).

191 *In re Extradition of* Bilanovic, 2008 U.S. Dist. LEXIS 97893, at *25–*27 (W.D. Mich. Dec. 3, 2008) (finding probable cause regarding relator's identity based on an authenticated foreign verdict, foreign birth certificate, foreign certificate of citizenship, and Interpol arrest warrant). Although fingerprints are not necessary, they have been submitted along with expert testimony and successfully resulted in a relator's extradition. *See In re Extradition of* Lingad, 2007 U.S. Dist. LEXIS 27224, at *7–*8 (S.D. Cal. Apr. 11, 2007). *See also In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757, at *17 (S.D. Cal. Oct. 14, 2008) (relying, in part, on the complaint against the relator, the sworn testimony of a U.S. marshal, and an extradition packet to establish proof of the relator's identity).

to establish the relator's identity, even though the relator's identity was not at issue in the particular case.[192] In one case videotaped witness statements were used to support a finding of probable cause, as the relator wore a distinctive necklace, and the court reasoned that " 'there is no *per se* rule that specifies which identification procedures are "competent" for probable cause purposes.' "[193] In other circumstances, visas stamped into passports have been used as proof of the relator's presence in a given location at the time of the alleged offense.[194]

However, where there are clearly prejudicial aspects to the identification, the court will consider the admissibility of the evidence. For instance, in *In re Extradition of Mazur* a photographic lineup was determined to prejudice the relator as he was purposefully made to stand out from the other individuals, and therefore the court ruled that the identification undermined the government's attempt to show probable cause.[195]

5.2.3. Jurisprudential Approaches to the Sufficiency of Evidence

As was pointed out in Section 4, federal decisions lack uniformity on whether to apply state or federal evidentiary standards of probable cause or what precisely these standards are.

In *Fernandez v. Phillips*[196] the Supreme Court required that competent legal evidence be presented so as to reasonably warrant the conclusion that the relator (here petitioner) committed the offense for which he is sought and not simply that he is accused or suspected of doing so.[197] Uncertainty and conflict exist, however, among the circuits and districts concerning precise standards. For example, in *Greci v. Birknes*[198] *Sindona v. Grant*,[199] and *Gusikoff v. United States*[200] the courts stated that the probable cause standard must be satisfied in accordance with the law of the requested state, which in these cases were federal standards as defined by federal legislation. Some federal courts, however, have construed this standard as requiring that the evidence be sufficient to show reasonable grounds to believe the accused guilty.[201] In those cases the weight and credibility of the evidence was apparently to be considered as a matter wholly within the court's discretion. Other courts have, however, required that the evidence be "competent,"[202] or even that the evidence be

192 *In re Extradition of* Joseph, 2007 U.S. Dist. LEXIS 41848 (S.D. Cal. June 6, 2007).

193 *In re Extradition of* Bradshaw to Canada, 2010 U.S. Dist. LEXIS 4663, at *4–*9 (E.D.N.Y. Jan. 21, 2010).

194 *In re Extradition of* Cifuentes, 2010 U.S. Dist. LEXIS 142064, at *10–*11 (S.D. Fla. Mar. 29, 2010).

195 *In re Extradition of* Mazur, 2007 U.S. Dist. LEXIS 52551, at *74–*76 (N.D. Il. July 20, 2007) (the other men in the lineup bore little resemblance to the relator, and the Polish authorities asked the relator to wear a red jacket over his business shirt to make him appear less formal as opposed to the other individuals in the lineup who were dressed in dark colors.)

196 Fernandez v. Phillips, 268 U.S. 311 (1925). See also United States v. Bogue, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997).

197 *See* Collins v. Loisel, 259 U.S. 309 (1922); Bingham v. Bradley, 241 U.S. 511, 517 (1916); McNamara v. Henkel, 226 U.S. 520, 524 (1913); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. July 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998).

198 Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976).

199 Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978).

200 Gusikoff v. United States, 620 F.2d 459 (5th Cir. 1980).

201 Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980). *See also* Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971); Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003).

202 Hooker v. Klein, 573 F.2d 1360, 1368 (9th Cir. 1978). *See also* Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

both "competent and sufficient."[203] Finally, some courts have interpreted probable cause in a manner suggesting that the requested state make a "*prima facie* showing."[204] None of the major cases permitted the relator to confront the witnesses against him/her.[205]

Notwithstanding the higher evidentiary standard enunciated in some cases, the underlying policy that extradition treaties are to be liberally construed so as to give effect to the intention of the contracting parties has been upheld consistently.[206] It is clear that the showing of proof amounting to a prima facie case does not entail the additional requirement of making other forms of evidence admissible. Thus, the admissibility of evidence of an alibi, or of a defense such as insanity, or of newly discovered exonerating evidence, continues to remain discretionary, though it is usually excluded.[207] Likewise, the right of courts to bar evidence that merely contradicts probable cause or that presents a different version of events remains discretionary, though it is usually excluded.[208] Finally, the requirement that explanatory evidence tending to rebut or obliterate probable cause be admissible remains valid.[209]

The disparity among the circuits and districts concerning the proper interpretation and application of probable cause evidentiary standards means that contradictory and inequitable results are obtained in substantially similar circumstances. For instance, in *United States v. Advic* the federal district court for South Dakota noted that "There is a split of authority regarding the admissibility of recantations. In some instances, evidence of torture and/or recantation is a relevant inquiry. That is because 'what tends to obliterate probable cause may be considered by the extradition court but not what merely contradicts it.' "[210] Nevertheless, the *Advic* court determined that "the torture/recantation evidence presented by Mr. Avdic does not obliterate probable cause. The evidence he presented merely contradicts the evidence contained in the Verdict . . . "[211] Ultimately, relators accused in some jurisdictions will be afforded the opportunity to challenge the weight and credibility of the evidence, while relators in other jurisdictions will not.

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203 Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y. 1973).

204 Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976); *In re* Shapiro, 352 F. Supp. 641 (S.D.N.Y. 1973).

205 *See* Bingham v. Bradley, 241 U.S. 511, 517 (1916).

206 Factor v. Laubenheimer, 290 U.S. 276, 298 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

207 *See, e.g.,* Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977).

208 *See* Freedman v. United States, 437 F. Supp. 1252, 1259 (N.D. Ga. 1977); *In re Extradition of* Morales, 2011 U.S. Dist. LEXIS 48954 (E.D. Cal. Apr. 29, 2011) (holding that credibility arguments regarding testimony of co-conspirators cannot be used to challenge the finding of probable cause).

209 *See* Collins v. Loisel, 259 U.S. 309 (1922). *See also* United States v. Samuels, 2009 U.S. Dist. LEXIS 9616 (E.D.N.Y. Feb. 10, 2009); *In re Extradition of* Berri, 2008 U.S. Dist. LEXIS 77857 (E.D.N.Y. Sept. 11, 2008); *In re Extradition of* Ben-Dak, 2008 U.S. Dist. LEXIS 29460 (S.D.N.Y. Apr. 11, 2008); *In re Extradition of* Hernandez, 2008 U.S. Dist. LEXIS 88757, at *26 (S.D. Cal. Oct. 14, 2008); *In re Extradition of* Avdic, 2007 U.S. Dist. Lexis 47096, at *22–*24 (D. S. Dakota Jun. 28, 2007); *In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. Jul. 26, 2000); *In re* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); Sabatier v. Dambrowski, 453 F. Supp. 1250 (D.R.I. 1978).

210 *See In re Extradition of* Avdic, 2007 U.S. Dist. LEXIS 47096, at *23–*24 (D.S.D. June 28, 2007).

211 *Id.*

5.2.3.1. The Application of State or Federal Evidentiary Standards regarding a Probable Cause Determination

More recent case law displays some confusion in determining what evidentiary standards to apply. In the 1973 case of *In re Shapiro*[212] the federal district court for the Southern District of New York found that a state's own evidentiary standards are to be applied to determine the sufficiency of probable cause. In *Shapiro* all of the formal requirements for the admission of evidence were satisfied because it was taken in a manner acceptable under New York standards and under the treaty's requirements[213] with respect to the question of whether the evidence makes a prima facie case for probable cause.[214]

In *Shapiro* the relator, an alleged fugitive from the State of Israel, had been charged with the crimes of conspiracy to defraud, fraud, use of fraudulent documents, forgery, deceit, theft, and false entry.[215] Article V of the United States and Israel extradition treaty requires that evidence be found sufficient according to the laws of the place where the fugitive shall be found to justify committal for trial.[216] The court applied state standards, stating:

> Clearly in framing the treaty the United States Government was unwilling to commit any State to the proposition that the kind of evidence acceptable in a demanding country to invoke a request for extradition might be any kind acceptable to the foreign country. To the contrary the requirement of the treaty is that a State's own evidentiary standards must ground the foreign proceedings in order to be recognized as sufficient for an extradition response. That protection would avoid demands based on notions of evidence inconsistent with a State's due process standards.[217]

The *Shapiro* court also noted that:

> In an international extradition proceeding, the United States acting in behalf of the demanding country was not required by a treaty provision adopting local standards of sufficiency to present necessary evidence in the same manner in which a hearing on a felony complaint would be conducted in a state court.[218]

In the 1977 case of *O'Brien v. Rozman*,[219] applying the same approach used in *Shapiro*, the Sixth Circuit Court of Appeals held that the sufficiency of evidence necessary to sustain a charge was to be determined by the relevant provision of the treaty for extradition. The relevant treaty in *O'Brien*, the Webster-Ashburton Treaty of 1842,[220] provided in Article X:

> It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, *according to the laws of the place where the fugitive or person so charged shall be found*, would justify his apprehension and commitment for trial if the crime or offense had there been committed.[221]

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212 *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973).

213 Convention of Extradition between the United States and Israel, art. V, 14 U.S.T. 1707, 1709, T.I.A.S. No. 5476 (*entered into force* Dec. 5, 1963).

214 *In re* Shapiro, 352 F. Supp. at 644.

215 *Id.* at 642.

216 *Id.* at 647.

217 *Id.*

218 *Id.* at 641.

219 O'Brien v. Rozman, 554 F.2d 780 (6th Cir. 1977). *See also* Freedman v. United States, 437 F. Supp. 1252, 1256–1257 (N.D. Ga. 1977).

220 8 Stat. 572, T.S. No. 119, 12 Bevans 82.

221 *Id.* at art. X (emphasis added).

This provision served to establish that the quantum of evidence of criminality sufficient to satisfy apprehension and retention of the relator for trial was to be determined not by Canadian law,[222] as the relator contended, but by laws of the state within which the relator was found.[223] The court ruled against the relator, stating:

> [B]y the very terms of the Treaty, it is apparent that the quantum of evidence of criminality sufficient to justify apprehension and retention of the appellant for trial is to be determined not by Canadian law, *In re McPhun*, 30 F. 57, 58 (S.D.N.Y. 1887); *In re Herskovitz*, 136 F. 713 (N.D. Ohio 1901), but by the laws of the state within the United States where the appellant was found. *Pettit v. Walshe*, 194 U.S. 205, 217, 24 S. Ct. 657, 48 L. Ed. 938 (1904); *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973).[224]

Contrary to *Shapiro* and *O'Brien*, the Ninth Circuit Court of Appeals in *Sakaguchi v. Kaulukukui*[225] applied national standards.[226] The court also pointed out that the relator could not rely on the theory that state law sets the standard by which the sufficiency of competent evidence can be determined.[227] The court approved this holding in *Shapiro v. Ferrandina*.[228]

In 1976, the Fifth Circuit in *Greci v. Birknes*[229] interpreted the relevant treaty to find that, as in the *Sakaguchi* case, the sufficiency of evidence was to be determined by national or federal standards. The relator in *Greci*, a naturalized citizen of the United States, was charged by the Italian prosecutor of Siracusa, Italy, and a formal request for her extradition was made under the 1868 Convention between the United States and Italy,[230] but no action was taken until further documentation was submitted by the Italian authorities two years later. A warrant was then issued, based not on the 1868 Convention but on a new Treaty of Extradition between the United States and Italy (the 1973 treaty), which was signed on January 18, 1973. At the Hearing the magistrate determined that there was sufficient evidence to establish probable cause.[231] The Fifth Circuit Court of Appeals addressed the issue of whether the 1973 treaty imposed higher standards of evidentiary competence than did 18 U.S.C. § 3190, and subsequently whether state or federal law governs the standard of proof in extradition proceedings under the treaty. Article V of the 1973 treaty provided:

> Extradition shall be granted only if the evidence can be found sufficient, according to the laws of the requested Party…to justify his committal for trial if the offense of which he is accused had been committed in its territory.…[232]

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222 The relator was accused of murder in Canada. The Canadian government formerly requested his return to Canada for trial by warrant pursuant to 18 U.S.C. § 3184. *O'Brien*, 554 F.2d at 781.

223 *O'Brien*, 554 F.2d at 782.

224 *Id.* at 783. *See also* Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974) (cited in United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974), as authority for holding that the law of the place where a fugitive is found is the state law).

225 Sakaguchi v. Kaulukukui, 520 F.2d 726 (9th Cir. 1975).

226 *See* 18 U.S.C. §§ 3184, 3190 (1994 & Supp. 1999); Extradition Treaty between the United States and Japan, arts. II, V, T.I.A.S. No. 9625 (*entered into force* Mar. 26, 1980).

227 *Sakaguchi*, 520 F.2d at 728.

228 Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973).

229 Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976).

230 15 Stat. 629, *as amended by* 16 Stat. 767, 24 Stat. 1001, 61 Stat. 3687 (*entered into force* Apr. 14, 1946).

231 *Greci*, 527 F.2d at 957. *But see* Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). *See also In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. Sept. 4, 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990).

232 26 U.S.T. 493, 496, T.I.A.S. No. 8052.

The *Greci* court interpreted the article to find that federal standards would apply, stating:

> Treaties on extradition have commonly been interpreted as adopting state standards governing the sufficiency of the evidence to justify committal for trial, on the ground that most extraditable offenses were known only to state law. *See, e.g., Pettit v. Walshe*, 194 U.S. 205, 217, 24 S. Ct. 657, 48 L. Ed. 938 (1904). However, the cases to this effect were not decided under the treaty language now before us and the circumstances surrounding adopting of the present language indicate that it was adopted in order to replace the traditional state standard with a federal one.
>
> The original version of Article V of the 1973 treaty provided that sufficiency would be determined according to the "laws of the place where the person sought shall be found," language similar to that in the 1868 Convention. In the 1970 negotiating session, the Italian delegation insisted that this be changed to "laws of the requesting Party." Both delegations appear to have been aware of cases construing the discarded language to refer to state law, *e.g., Pettit v. Walshe, supra; Shapiro v. Ferrandina, supra*; both appear to have contemplated that the change would ensure that this construction not be carried forward and that uniform federal law be applied. Both this history and the import of the language itself lead us to conclude that the magistrate was right to have invoked the federal probable cause standard in deciding whether the evidence was sufficient to warrant extradition.[233]

A similar result occurred in the Seventh Circuit in 1981 in *Abu-Eain v. Wilkes*.[234] In *Abu-Eain* the relator was accused by the State of Israel of setting off a bomb in the Israeli City of Tiberias on May 14, 1979, killing two boys and injuring more than thirty people. Israel formally requested the relator's extradition from the United States. Subsequently, the relator was found extraditable by the magistrate in the Northern District of Illinois. The relator sought a writ of habeas corpus, contending, inter alia, that the evidence failed to establish probable cause to believe that he committed the crime charged. The court held that the applicable treaty provision required a finding of probable cause pursuant to federal laws, stating:

> The Extradition Treaty between the United States and Israel became effective in 1963. 14 U.S.T. 1707. Article II of that Treaty provides, *inter alia*, for extradition of persons accused of murder and infliction of grievous bodily harm, as well as attempts to commit those crimes. Article V of the Treaty provides that a person may be extradited only if the evidence is "found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in that place . . . " This form of treaty provision has been held to require a finding of probable cause under federal law. *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).[235]

In a 2010 the Third Circuit, in *Harshbarger v. Regan*, concluded that under the United States–Canada extradition treaty the proper standard for establishing probable cause is federal statute and not state law.[236]

Thus, although recent federal cases are split as to what standard is to be applied to determine the sufficiency of evidence needed to show probable cause, all cases have found that probable cause is required under federal law. The question about evidentiary standards remains, however.

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233 *Greci*, 527 F.2d at 998–999.

234 Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996). Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). *See also* Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000); *In re Extradition of* Chen, 1998 U.S. App. LEXIS 22125 (9th Cir. Sept. 4, 1998); Crudo v. Ramon, 106 F.3d 407 (9th Cir. 1997); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1990); *In re* Contrearas, 800 F. Supp. 1462 (S.D. Tex. 1992); Gill v. Imundi, 747 F. Supp. 1028 (S.D.N.Y. 1990).

235 *Abu-Eain*, 641 F.2d at 507.

236 Harshbarger v. Regan, 599 F.3d 290, 293–294 (3d Cir. 2010). A similar result was reached with regard to the United States–Mexico extradition treaty, where the court reasoned that federal law applied. *See In re Extradition of* Hernandez, 2008 U.S. Dist. Lexis 88757, at *18–20 (S.D. Cal. Oct. 14, 2008).

In *In re Sindona*,[237] the court framed the distinction between contradictory evidence and explanatory evidence, and cited the established authority for the proposition that a Hearing should not be transformed into a full trial on the merits:

> The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting "explanatory evidence," the intention is to afford an accused person the opportunity to present reasonable clear-cut proof which would be of limited scope and having some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to a Hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the Hearing into a full trial on the merits. The Supreme Court has twice cited with approval a district court case which aptly summarizes the relevant considerations. The Supreme Court decisions are *Collins v. Loisel*, 259 U.S. 309, 316, 42 S. Ct. 469, 66 L. Ed. 956 (1922), and *Charlton v. Kelly*, 229 U.S. 447, 462, 33 S. Ct. 945, 57 L. Ed. 1274 (1913). The district court opinion is *In re Wadge*, 15 F. 864, 866 (S.D.N.Y 1883), in which the court dealt with the argument of an extraditee that he should be given an extensive Hearing in the extradition proceedings:
>
> > If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full Hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.[238]

It remains, however, within the discretion of the court to determine the extent that the respondent may offer explanatory proof.[239]

5.2.3.2. Finding of Lack of Probable Cause

As is described above, the jurisprudence of U.S. courts tends to be restrictive of relators' claims that probable cause is lacking or that evidence is insufficient. United States courts are mindful of the fact that Hearings should not be turned into mini-trials of the person sought, and that procedures and technicalities should not prevent the fulfillment of extradition treaty obligations so long as the treaty and statutory requirements are satisfied. This includes some judicial discretion with respect to probable cause and evidence. United States courts have also been mindful of potential abuses, excesses, and questionable conduct, whether by the requesting state or the U.S. government, and have on many occasions denied extradition, including on evidentiary grounds. A few of these recent cases are described below. Most are, however, discussed contextually under other headings in this chapter.

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237 *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd sub nom.* Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

238 *Sindona*, 450 F. Supp. at 685.

239 Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978); United States *ex rel.* Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). *See also* Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999). *See also* Garza v. United States,No. 05-40112, 2006 U.S. App. LEXIS 12006 (5th Cir. 2006) (refusing evidence showing that the eyewitness of the relator's crime was unable to identify him, holding that the evidence was contradictory). *See also* Rios v. United States, 2011 U.S. Dist. LEXIS 26699 (D. Minn. Feb. 24, 2011) (refusing to allow relator to introduce recantation evidence as it attacked the reliability of the government's evidence in an attempt to contradict it, and such evidence was more appropriate for a trial court to resolve).

In *United States v. Ramiro Fernandez-Morris and Regina Fernandez-Morris*[240] the district court denied extradition, inter alia, for lack of probable cause and held:

> The court must now determine pursuant to 18 U.S.C. § 3184 whether the evidence provided by the Bolivian government in support of its application for extradition is "sufficient to sustain the charge under the provisions of the proper treaty or convention." In order for an extradition to be proper, there must be: (1) criminal charges pending in another state; (2) the charges must be included in the treaty as extraditable offenses; and (3) there must be probable cause to believe that a crime was committed and that the persons before the Court committed it. See *United States v. Barr,* 619 F. Supp. 1968, 1070 (E.D. Pa 1985). In making these determinations, the credibility and weight of the evidence are exclusively within the discretion of the Magistrate Judge. *Noel v. United States,* 12 F. Supp. 2d 1300, 1303 (M.D. Fla. 1998) (citing *United States v. Wiebe,* 733 F.2d 549, 553 (8th Cir. 1984); *Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972)), aff'd, 180 F.3d 274 (11th Cir. Apr. 28, 1999) (Table, No. 98-3551). "The extradition hearing is not a trial on the merits to determine guilt or innocence, but serves as a means of ensuring that probable cause exists to believe the person whose surrender is sought has committed the crime for which his extradition is requested." *Castro Bobadilla v. Reno,* 826 F. Supp. 1428 (S.D. Fla. 1993), *aff'd*, 28 F.3d 116 (11th Cir. 1994). [The purpose [of the extradition hearing] is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws.][241]

In *In re Lehming*,[242] the district court of Delaware found no probable cause because the crime charged by the requested state did not show the existence of intent, and characterized the issue as falling within double criminality.[243] The court relied on *Giordenello v. United States*,[244] a Supreme Court case applicable to U.S. criminal cases. The court in *Lehming,* however, erred in holding that when an extradition request contains multiple criminal charges, each of the crimes charged need not necessarily meet the probable cause requirement of § 3184. The court took this position on the untenable basis that the extradition treaty in question did not specify the probable cause requirements.[245] This position is contradictory to the requirement of § 3184 and to the purpose of the treaty's probable cause requirement. Clearly, a treaty does not have to specify such detail. More significant, however, if probable cause is lacking as to one of the charges it cannot be introduced in the extradition order, and the requesting state is based on the principle of specialty barred from prosecuting the relator on this charge, as discussed in Chapter VII, Section 6.

The problem of probable cause in financial crimes frequently turns on the question of intent—namely, fraudulent intent. This is particularly significant because certain unethical business practices do not necessarily rise to the level of criminal intent.[246] This was the case in *In re Extradition of Huerta*, where the court denied extradition because "The United States [had] not produced any evidence of deceit or misrepresentation . . . "[247] In that case, the federal district

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240 United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

241 *Id.* at 1361–1362.

242 *In re* Lehming, 951 F. Supp. 505 (D. Del., 1996).

243 United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994).

244 Giordenello v. United States, 357 U.S. 480, 78 S. Ct. 1245 (1958).

245 *Lehming*, 951 F. Supp. at 513.

246 *Fernandez-Morris*, 99 F. Supp. 2d 1358, *citing* United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996). *See also* United States v. Kreimer, 609 F.2d. 126, 128 (5th Cir. 1980); United States v. D'Amato, 39 F.3d 1249, 1261 (2d Cir. 1994).

247 *In re Extradition of* Huerta, 2010 U.S. Dist. LEXIS 135423 (S.D. Tex. Dec. 22, 2010).

court for the Southern District of Texas held that the evidence could "at most" establish a breach of contract, which was insufficient to establish "any evidence of deceit or misrepresentation" as would be required.[248] Similarly, in *In re Extradition of Stern* the district court concluded on one of the two fraud allegations that the evidence "though compelling at a civil trial for breach of contract, hardly gives rise to probable cause for a criminal fraud charge."[249] It is also the case that in financial crimes, a number of distinct crimes are alleged. In such circumstances, the extradition magistrate hearing the case may properly find probable cause in one of the alleged instances but not in another.[250]

It should be noted, however, that as the Ninth Circuit has held that "accusations are not evidence."[251] Therefore, courts have denied probable cause where all of the evidence submitted by the requesting state constituted accusations without any source materials in support.[252] Similarly, where the evidence only suggests suspicious activities, a finding of probable cause may be not be made.[253]

Mere affiliation or association with "some rather shady characters," as in criminal cases, is in itself insufficient to establish probable cause, especially where the evidence is "riddled with admitted lies and is so inconsistent as to be rendered wholly unreliable."[254]

Finally, it should be noted that the requesting state may supplement the record with evidence in support of probable cause if it is allowed to do so by the relevant treaty.[255]

5.2.3.3. The Explanatory/Exculpatory Evidence Dichotomy and the Rule of Non-Contradiction

Evidence presented by a relator is, as stated above, limited to explanatory evidence[256] and does not include exculpatory or contradictory evidence, except insofar as it reveals the fabricated or false nature of the evidence and the absence of probable cause. But the distinguishing line between explanatory and exculpatory evidence is not always clear, nor is it easy to establish. The extent to which explanatory evidence is allowed is largely within the discretion of the court. The extradition magistrate must make such a determination on the basis of the evidence presented by the government in order to reach a decision that meets the requirements of § 3184. Otherwise, the magistrate would simply be rubber-stamping what the government presents.[257]

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248 *Id*.

249 *In re Extradition of* Stern, 2007 U.S. Dist. LEXIS 79486, at *10–*11 (S.D. Fla. Oct. 25, 2007).

250 *Id.* at *3-*4, *8-*11 (S.D. Fla. Oct. 25, 2007).

251 Man-Seok Choe v. Torres, 525 F.3d 733, 738 (9th Cir. Cal. 2008).

252 *In re Extradition of* Lanzani, 2010 U.S. Dist. LEXIS 14044 at *16, *20–*28 (C.D. Cal. Feb. 18, 2011).

253 *In re Extradition of* Ben-Dak, 2008 U.S. Dist. LEXIS 29460, at *16–*20, *38–*46 (S.D.N.Y. Apr. 11, 2008).

254 *In re Extradition of* Mazur, 2007 U.S. Dist. LEXIS 52551, at *83–85 (N.D. Ill. July 20, 2007).

255 *In re Extradition of* Berri, 2008 U.S. Dist. LEXIS 77857, at *13–*14 (E.D.N.Y. Sept. 11, 2008).

256 *See inter alia,* Hooker v. Klein, 573 F.2d. 1369 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); Cheng Na-Yuet v. Hueston, 734 F. Supp. 988 (S.D. Fla. 1990), *aff'd*, 932 F.2d 977 (11th Cir. 1991); United States v. Hidalgo, 2011 U.S. Dist. LEXIS 18299 (D. Utah Feb. 24, 2011); *In re Extradition of* Salazar, 2010 U.S. Dist. LEXIS 74370 (S.D. Cal. July 23, 2010); *In re Extradition of* Pelletier, 2010 U.S. Dist. LEXIS 44979 (S.D. Fla. Apr. 12, 2010); United States v. Samuels, 2009 U.S. Dist. LEXIS 9616 (E.D.N.Y. Feb. 10, 2009); Bolanos v. Mukasey, 2009 U.S. Dist. LEXIS 87991 (D.N.J. Sept. 24, 2009).

257 *In re* Lehming, 951 F. Supp. 505, 517 (D. Del., 1996) *citing* Wellington v. South Dakota, 413 F. Supp. 151, 154 (D.S.D. 1976).

Probable cause requires proof sufficient to allow the extradition magistrate to justify the holding of the requested person to answer for a criminal charge in the requested state.[258] The Third Circuit has held that "the probable cause standard applicable in extradition proceedings is identical to that used by courts in federal preliminary hearings."[259] In *United States v. Linson*,[260] the District Court of Guam held:

> Normally, during a Hearing a magistrate need only "determine whether there is 'any' evidence sufficient to establish probable cause" that the fugitive committed the offense charged. *United States ex rel: Sakaguchi v. Kaulukukui,* 510 F.2d 726, 730–731 (9th Cir. 1975) (citing *Fernandez v. Phillips,* 268 U.S. 311, 312, 45 S. Ct. 541, 542, 69 L. Ed. 970 (1925)). This limited standard has been held to be analogous to a magistrate's role, under United States Law, in determining whether or not to hold a defendant to answer to a charged offense. *Emami v. United States District Court for the Northern District of California,* 834 F.2d 1444, 1447 (9th Cir. 1978).
>
> And a fugitive's grounds for opposition to an extradition request are severely circumscribed. *Hooker v. Klein,* 573 F.2d 1360, 1368 (9th Cir.), *cert. denied,* 439 U.S. 932, 58 L. Ed. 2d 327, 99 S. Ct. 323 (1978). He may not introduce evidence which conflicts with the evidence submitted on behalf of the demanding state, *Collins v. Loisel,* 259 U.S. 309, 315–17, 66 L. Ed. 956, 42 S.Ct. 469 (1922); establishes an alibi, *Abu Eain v. Adams,* 529 F.Supp. 685 (N.D. Ill.); sets up an insanity defense, *Hooker v. Klein;* or impeaches the credibility of the demanding country's witnesses, *In re Locatelli,* 468 F.Supp. 568 (S.D.N.Y. 1979). He is limited to introducing explanatory evidence.
>
> But, the Ninth Circuit in *Mainero v. Gregg,* 164 F.3d 1199, 2207, n. 7 stated that "We have never determined the issue of whether recantation evidence is admissible in an extradition hearing." In *Mainero,* the Magistrate judge considered the proffered recantation evidence. Generally, evidence that explains away or *completely obliterates probable cause* (emphasis added) is the only evidence admissible at a Hearing, whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible. See *Charlton v. Kelly,* 229 U.S. 447, 457-58, 33 S. Ct. 945, 57 L. Ed. 1274 (1913). Courts are split on whether recantation evidence is admissible under this rule. Compare [*Abu*] *Eain v. Wilkes,* 641 F.2d 504, 511–12 (7th Cir. 1981), holding that the magistrate judge did not err in refusing to admit recanting statements because they constituted contradictory evidence, with *In the Matter of Extradition of Contreras,* 800 F. Supp. 1462, 1464, 1469 (S.D. Texas 1992), admitting recantation testimony, reasoning that if the only evidence of probable cause were confessions that were sufficiently recanted, the existence of probable cause would be negated. Following the lead of *Mainero* and *Contreras,* this Court holds that the recantations in the case at bar will be considered. This Court finds that the recantations are not just contradictory evidence but evidence that completely obliterates probable cause. Limiting the Court's consideration merely to a determination whether the *Sakaguchi, supra* standard is met would be a grave injustice in this case.
>
> The Court believes the evidence presented was insufficient to satisfy the standard for probable cause for the following reasons: .. .
>
> *The District Court's function in a Hearing is not to act as a rubber stamp to an extradition request but to ensure that our judicial standard of probable cause is met by the Requesting Nation. Moreover, it is quite clear that the Philippine Government has a responsibility under the Extradition Treaty to*

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258 Charlton v. Kelly, 229 U.S. 447 (1913). *See also* Sayne v. Shipley, 418 F.2d. 679 (5th Cir. 1969), *cert. denied* 398 U.S 903 (1970); Republic of France v. Moghadam, 617 F. Supp. 777 (N.D. Cal. 1985).

259 Sidali v. INS, 107 F.3d 191, 199 (3d Cir. 1997) (relying on Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980), which also holds that federal and not state standards are controlling). *See also* United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir. 1997); Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976). *See also In re Extradition of* Bolanos, 594 F. Supp. 2d 515, 519 (D.N.J. 2009); *In re Extradition of* Bilanovic, 2008 U.S. Dist. LEXIS 97893, at *25 (W.D. Mich. Dec. 3, 2008).

260 United States v. Linson, 88 F. Supp. 2d 1123 (D.C. Guam 2000).

> *supply evidence of probable cause to this Court prior to this Court approving the extradition request. Extradition Treaty with the Philippines, Nov. 13, 1994, U.S.–Philippines, art. VII para. 3, U.S. Treaty Doc. 104-16. Based on the information available to this Court, it appears that the Philippine Government had these recantations prior to seeking a warrant but did not include the recanted statements along with the original witness statements.*
>
> *After careful review of the evidence, the Court DENIES the Philippine government's request. Considering the probable cause threshold that needs to be satisfied and the totality of the evidence presented, the Court holds that the Philippine government failed to provide the United States and the Court with sufficient evidence which would establish probable cause to charge Valentin Linson with the crime of murder.*[261]

The limited ability of a relator to introduce evidence may serve the interest of preventing a Hearing from becoming a mini-trial with exculpatory evidence being presented to defeat guilt as much as to defeat extradition. However, the limited ability of a relator to introduce evidence can have unjust results, particularly in cases involving the application of the political offense exception.[262]

In *Barapind v. Entomoto*[263] the relator was a Sikh separatist who was tortured for his activities in advocating for a separate homeland for the Sikh people[264] before fleeing to the United States. The relator was eventually extradited to India based on unsigned and undated affidavits and photographs.[265] The court determined that the information that was subsequently supplied by Barapind "did not obliterate India's showing of probable cause" and "constituted conflicting evidence, the credibility of which could not be assessed without a trial."[266]

The distinction between "conflicting evidence" and that which "obliterates" the government's evidence becomes blurred where the factual background is highly politicized and the actors are not engaged in common criminal activity. The existence of self-interest on the part of the relator in contradicting the government in a common criminal activity is greater than it is in the context of a political dissident, particularly where there is a history of government repression. Where such repression has been shown to exist, the presumption of fairness usually accorded to the foreign government is not as easily maintained, particularly where the government has been biased against an unpopular social group for purely political reasons.[267]

It has been suggested that in such cases the extradition court engage in a "Franks hearing"[268] to test the veracity of affidavits used to establish probable cause. In effect, this would allow the relator to show that the affiant "knowingly and intentionally, or with reckless disregard for the truth" included false statements in the affidavit used to obtain the arrest warrant, and that false statement was necessary to find probable cause.[269] If the relator could show by the

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261 *Id.* at 1126, 1128 (emphasis added). *See also* Orellana v. United States, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. Jul. 26, 2000), *related proceeding at* 2001 U.S. Dist. LEXIS 751 (S.D.N.Y. Jan. 29, 2001); United States v. Artt, 158 F.3d 462 (9th Cir. 1999); *In re Extradition of* Neto, 1999 WL 627426 (S.D.N.Y. 1999); Powell v. United States, 4 F. Supp. 2d 945 (S.D. Cal. 1998); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337 (S.D. Fla. 1998).

262 *See* Hansdeep Singh, *Bringing Fairness to Extradition Hearings: Proposing a Revised Evidentiary Bar for Political Dissidents*, 38 Cal. W. Int'l J. 177 (2007). *See also* Ch. VIII, Sec. 2.1.

263 Barapind v. Entomoto, 400 F.3d 744 (9th Cir. 2005).

264 Singh, *supra* note 262, at 178 (2007).

265 *Id.* at 189.

266 *Barapind*, 400 F.3d at 749–750.

267 *Id.* at 202–203.

268 Franks v. Delaware, 438 U.S. 154 (1978).

269 *Id.* at 211.

"preponderance of the evidence" that the materials were false, they would be set aside, and absent other evidence, probable cause would fail to support the charge.[270] Thus, the relator would have to specify which portions of a given affidavit were false, provide reliable witness statements in support of the relator's claim, and show that the false statements were not the result of negligence or good faith mistakes.[271]

The advantage of a Franks hearing is that it would only go to the question of probable cause, as opposed to guilt or innocence of the relator, and thus not entangle the extradition court in the merits of the relator's case.[272] It should be noted that the Franks case arose in the context of a Fourth Amendment violation, so applying it to a Hearing would come into conflict with the non-application of constitutional protections to Hearings, as discussed above. However, as a magistrate is given the task of determining whether there is competent evidence in support of probable cause, the relator should be afforded an opportunity to challenge the competence of the evidence where the relator can show a real likelihood of falsification or duress regarding the evidence submitted. Allowing a relator to be extradited while turning a blind eye to abuses on the part of the foreign government threatens the integrity of the judicial system in the United States as well as the international systems through which extradition occurs.

5.2.4. Evidence on Remand

The remand of cases from the circuit to the district court allows the district court to reexamine the evidence and also consider new evidence. Consideration of new evidence within the scope of the original charge is permissible. Furthermore, doing so does not violate double jeopardy.[273]

5.2.5. Waiver of Extradition Hearing

A relator may decide to waive his/her right to a Hearing for a variety of reasons. These may include: (1) a desire to avoid imprisonment in the United States, especially as bail is unlikely for many relators; (2) a belief that the requesting government cannot prove its case and therefore that it is desirable to reach trial as soon as possible and dispose of the matter; (3) the practical need to have funds unfrozen so that the relator may provide for his/her family; or (4) any other number of reasons specific to a given situation. Some extradition treaties contain explicit provisions for the waiver of Hearings.[274]

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270 *Id.* at 212.

271 *Id.*

272 *Id.* at 212.

273 *See* Mirchandani v. United States, 836 F.2d 1223 (9th Cir. 1988).

274 *See* Extradition Treaty with Thailand, art. 15, *entered into force* May 17, 1991, S. TREATY DOC. 98-16 ("If the person sought irrevocably agrees in writing to extradition after personally being advised by the competent authority of his right to formal extradition proceedings and the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings"). *See also* Extradition Agreement with the European Union, art. 11, *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (applying in absence of a germane provision in an applicable bilateral treaty between the United States and an EU member state); Extradition Treaty with the United Kingdom, art. 17, *entered into force* Apr. 26, 2007, S. TREATY DOC. 108-23; Extradition Treaty with Cyprus, art. 17, *entered into force* Sept. 14, 1999, S. TREATY DOC. 105-16; Austrian Extradition Treaty, art. 20, *entered into force* Jan. 1, 2000, S. TREATY DOC. 105-50, TIAS 12916; Costa Rican Extradition Treaty, art. 17, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Jordanian Extradition Treaty, art. 17, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Hungarian Extradition Treaty, art. 18, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Extradition Treaty with the Bahamas, art. 15, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Bolivian Extradition Treaty, art. XIII, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Italian Extradition Treaty, art. XVII, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023; Jamaican Extradition Treaty, art. XV, *entered into force* July 7, 1991, S. TREATY DOC. 98-18.

However, where a relator waives his/her right to a Hearing, the relator may also waive the right to subsequently challenge the existence of probable cause.[275] This can be difficult for a relator seeking to have his/her record of the U.S. arrest expunged following an acquittal in the requesting state. This situation arose in *In re Extradition of Gordon*,[276] where the relator waived his right to a Hearing and was subsequently acquitted of the charges in the United Kingdom. His petition for expungement of the U.S. proceedings was denied because the court could only exercise jurisdiction over a petition for expungement where "the 'predicate for the expunction is a challenge to the validity of either the arrest or the conviction.' "[277] Because the relator was not convicted, he could only challenge his arrest. However, his waiver of the Hearing included a waiver to challenge probable cause for his arrest, and therefore the court lacked jurisdiction to hear the relator's later petition for expungement.[278]

6. Conclusion

The jurisprudence of U.S. courts has been consistent since 1848 when the first Extradition Act was passed.[279] The reason may well be that "probable cause" hearings in extradition are similar to those in criminal cases. Magistrate and federal district court judges deal with such hearings in criminal cases on a daily basis. They certainly know how to determine probable cause, evaluate evidence, and apply the standard of the "ordinary reasonable person in like circumstances." The fact that they are not constrained by rules of evidence in Hearings is balanced by their ability to enquire into "probable cause" in Hearings. The evidence must be sufficient and credible, and when it is documentary, the documents must be duly authenticated. Because § 3184 requires a showing of probable cause, the courts have never had to adjudicate whether the Fourth Amendment applies in its own right to Hearings. But surely there is nothing in the history of the Fourth Amendment that limits its application of this or any other form or process in which a person's freedom in the United States or at the hands of U.S. agents outside the United States is at stake.[280] The extradition judge has discretion, and short of an abuse of discretion, the habeas judge will not reverse.[281] But a habeas judge and the circuit court can remand a case to the extradition judge for a new "probable cause" hearing, or for reconsideration of some evidentiary aspects or for consideration of new evidentiary matters not deemed waived or otherwise pertinent to due process under the Fifth Amendment.[282]

275 *See In re Extradition of* Gordon, 2010 U.S. Dist. LEXIS 123040, at *9 (E.D. Pa. Nov. 19, 2010).

276 *Id.* at *1, *5–*9.

277 *Id.* at *5.

278 *Id.* at *9.

279 *See* Ch. II.

280 The latter issue arises in the context of extraterritorial application of the Constitution. *See* United States v. Verdugo-Urquidez, 494 U.S. 529 (1990).

281 *See* Ch. XI.

282 *Id.*

Chapter XI

The Review Process and Executive Discretion

Contents

1. The Review Process

1.1. Introduction

An extradition order is not a final order within the meaning of Title 28 U.S.C. § 1291. Thus, there is no direct appeal from the decision of the judicial officer conducting the extradition proceedings.[1] There is, however, a limited form of review available by means of habeas corpus.[2]

The petition for a writ of habeas corpus is presented to the federal district court following a grant of extradition. However, the decision of the judge or magistrate in extradition proceedings need not be final before the accused can seek such extraordinary relief. Habeas corpus may be sought at any stage of the extradition proceedings.[3] The relator can also seek review before the circuit court of appeals from a denial of habeas corpus by the district court, and if that is denied, he/she can petition the U.S. Supreme Court for a writ of certiorari.

During a habeas corpus proceeding, the federal district court will only consider matters relating to jurisdiction, the existence of a valid treaty of extradition, whether the accused is actually the person whose extradition is sought, whether there is "probable cause"—both to believe he/she is the person sought and that the evidence presented is sufficient to convince a reasonable person that there are reasonable grounds to believe that he/she should be brought to trial, and finally that there are no grounds under the treaty or U.S. law that would preclude his/her extradition.[4] Violations of "due process" can always be raised as grounds for habeas corpus relief.[5] A petition for review, whether before the district, circuit, or Supreme Court, is limited to these areas of review.

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1 *See* Kastnerova v. United States, 365 F.3d 980, 984 (11th Cir. 2004); Joseph v. Hoover, 254 F. Supp. 2d 595 (D. Virgin Islands 2003). *See also* Afanasjev v. Hurlburt, 418 F.3d 1159 (11th Cir. 2005) (review is not meant to be a rehearing of the magistrate's finding, but it limited to determining whether there was a treaty, probable cause). *See also* Cohen v. Benov, 374 F. Supp. 2d 850 (C.D. Cal. 2005); Haxhiaj v. Hackman, 528 F.3d 282, 285 (4th Cir. 2008) (holding that "the extradition statute does not allow the fugitive to seek direct review of an extradition certification"); Germany v. United States, 2007 U.S. Dist. LEXIS 65676 (E.D.N.Y. Sept. 5, 2007) ("An order certifying a request for extradition cannot be reviewed on direct appeal because '[e]xtradition order do not . . . constitute "final decisions of a district court" appealable as of right . . . '" Id. at *11.); Diaz-Medina v. United States, No. 4:02-CV-665-Y, 2003 U.S. Dist. LEXIS 2154 (N.D. Tex. 2003); United States v. Allen, 613 F.2d 1248 (3d Cir. 1980).

2 *See generally* Hoxha v. Levi, 371 F. Supp. 2d 651 (E.D. Pa. 2005); Zelenovic v. O'Malley, 2010 U.S. Dist. LEXIS 92632, at *6 (N.D. Ill. Sept. 7, 2010) ("Extradition rulings are not directly appealable and may only be reviewed by way of petition for a write of habeas corpus.")

3 *Cf.* Terlinden v. Ames, 184 U.S. 270, 289 (1902); *In re* Kelley, 25 F. 268 (C.C.D. Minn. 1885).

4 *Hoxha*, 371 F. Supp. 2d. 651. *See* Oen Yin-Choy v. Robinson, 858 F.2d 1400 (9th Cir. 1988) ("Because a certification of extraditability is not a final order, no direct appeal from the decision will lie and review is available only by way of a petition of habeas corpus."); Gallina v. Fraser, 177 F. Supp. 856, 867 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F. 3d 1199 (9th Cir. 1990). *But see* Gill v. Imundi, 747 F. Supp. 1028, 1049 (S.D.N.Y 1990).

5 *See In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Kin-Hong, 110 F. 3d 103 (1st Cir. 1997); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d 1112 (S.D. Cal. 1998); McMaster v. United States, 9 F. 3d 47 (8th Cir. 1993); *In re Extradition of* Manzi, 888 F.2d 204 (1st Cir. 1989). In *Manzi*, the court noted that "serious due process" violations could justify habeas corpus relief beyond the usual scope: "[i]n considering Manzi's claims, this court recognizes that serious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings." 888 F.2d at 206.

United States federal district courts may screen a habeas petition to determine if the relator is entitled to relief on the face of the document.[6] A habeas action can be rejected if it appears that the relator is using the procedure as a means of circumventing the restrictions set out in § 2255.[7]

It is interesting to note that even though extradition processes are docketed under civil matters, they are deemed sui generis for evidentiary purposes, and the rules of criminal evidence are not applicable to them per se, review by habeas corpus is very much the same as in criminal cases.

Case law and statutes clearly define the narrow scope of habeas corpus review, including the validity of provisional arrest, denial of bail, double jeopardy, and specialty, which have been raised by interlocutory appeal as well as by means of a petition for a writ of habeas corpus.[8] Constitutional issues can always be raised.

The relator may also choose to institute an action for declaratory judgment to contest extradition. The Fifth Circuit ruled in *Wacker v. Bisson* that such a review was permissible, but that the scope of review would be the same as that in a habeas corpus proceeding.[9] A relator may also choose to file a writ of mandamus to challenge a court's jurisdiction in certain circumstances, such as where the relator contests the court's personal jurisdiction where there is no extradition treaty between the United States and the requested state.[10]

The issue of whether an extradition order can be appealed is well settled, yet occasionally it is raised again in one form or another. In *Sidali v. INS*[11] the court reaffirmed this well established rule:

> Extradition orders do not constitute final decisions of a district court which are appealable as of right under 28 U.S.C. § 1291. A person who is to be extradited, however, may obtain review of an order of extradition by seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. *Collins v. Miller,* 252 U.S. 364, 369, 40 S. Ct. 347, 349, 64 L.Ed. 616 (1920); *Bozilov v. Seifert,* 983 F.2d 140, 142 (9th Cir. 1993); *Spatola v. United States,* 925 F.2d 615, 617 (2d Cir. 1991). The scope of habeas corpus review of a magistrate judge's order of extradition is quite narrow, however-narrower, in fact, than in the habeas proceedings traditionally provided for American convictions. *Escobedo v. United States,* 623 F.2d 1098, 1101 (5th Cir. 1980); *Shapiro*

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6 Cuevas v. Grondolsky, 2011 U.S. Dist. LEXIS 3239, at *6–*8 (D. Mass. Jan. 11, 2011) ("Under Rule 4(b) of the Rules Governing § 2254 Proceedings, the Court is required to examine a petition, and if it 'plainly appears from the face of the motion . . . that the movant is not entitled to relief in the district court,' the court 'shall make an order for its summary dismissal.' ").

7 *Id.* at *8–*11.

8 *See* Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980) (seeking release through a habeas corpus proceeding from a federal penitentiary, where relator was serving the remainder of a sentence imposed originally by Mexican officials in a Mexican court for a Mexican crime); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) (grounding jurisdiction upon the federal habeas corpus statute, 28 U.S.C. § 2241). The court in *Pfeifer* found the relator was not entitled to habeas corpus relief as "the United States may constitutionally take custody of Americans tried and convicted in foreign countries under procedures that do not comport with the Bill of Rights." 615 F.2d at 297, *citing* 28 U.S.C. § 2256 (Supp. 1978). *See also* United States v. Saccoccia, 18 F.3d 795 (9th Cir. 1994) (raising issues on interlocutory appeal of double jeopardy and specialty that were denied on the grounds that these issues can be raised in the course of the appellate process after trial of the defendant who was extradited from Switzerland).

9 Wacker v. Bisson, 370 F.2d 552, 604–606 (5th Cir. 1967). *See also* United States v. Williams, 480 F. Supp. 482 (D. Mass. 1979). *See also infra* Sec. 1.4.

10 *In re* Hijazi, 589 F.3d 401 (7th Cir. 2009). For a discussion of the case, see Ch. X, Sec. 2.

11 Sidali v. INS, 914 F. Supp. 1104 (D.C.N.Y. 1996), *reversed on other grounds* 107 F.3d 191 (3d Cir. 1997) (basic principles stated above remain).

> *v. Ferrandina,* 378 F.2d 894, 901 (2d Cir. 1973); *Spatola v. United States,* 741 F. Supp. 362, 369. The district court's review is limited to whether: (1) the magistrate judge had jurisdiction; (2) the offense charged is within the treaty; and (3) probable cause exists to find the accused guilty. *Yapp v. Reno,* 26 F.3d 1562, 1465 (11th Cir. 1994); *Bozilov,* 983 F.2d at 142; *Spatola,* 925 F.2d at 617.[12]

This case was unique because Sidali had been tried twice in Turkey and found innocent of the charges. Nevertheless, Turkey sought his surrender, first by extradition, then by disguised extradition through deportation.[13]

Bail decisions are, however, final decisions within the meaning of Title 28 U.S.C. § 1291. This right to appeal applies to the petitioner and to the government. In *United States v. Kirby, Brennan and Artt*[14] the Ninth Circuit held:

> Generally, when the United States appeals to a circuit court from a grant of bail by a magistrate or district court to a potential extraditee, the circuit court simply exercises jurisdiction without explicitly discussing its authority to do so. For example, this circuit in *Matter of Extradition of Smyth,* 976 F.2d 1535 (9th Cir. 1992), reversed the district court's grant of bail to Smyth, also an escapee from a Northern Ireland prison, without discussing its jurisdiction. Similarly, the First Circuit, in both *United States v. Kin-Hong,* 83 F.3d 523 (1st Cir. 1996), and *United States v. Williams,* 611 F.2d 914 (1st Cir. 1979), reversed a district court's grant of bail pending extradition without discussing its jurisdiction. The Second Circuit, in a habeas case where the government appealed from a district court judgment, affirmed a grant of bail by the district court, following a magistrate's issuance of a certificate of extraditability. *Hu Yau-Leung v. Soscia,* 649 F.2d 914, 920 (2d Cir. 1981), cert. denied, 454 U.W. 971, 102 S. Ct. 519, 70 L. Ed. 2d 389 (1981). The Second Circuit, like the other circuits, did not explicitly discuss its jurisdiction. We recognize the circuit court's authority to hear such appeals, and have supplied a reasoned basis in support of jurisdiction.
>
> Appellees cite two cases in which courts have ruled that they lacked jurisdiction to hear an appeal from a bail ruling in an extradition case. *In re Extradition of Ghandtchi,* 697 F.2d 1037 (11th Cir. 1983), vacated as moot, 705 F.2d 1315 (11th Cir. 1983); *In the Matter of the Requested Extradition of Krickemeyer,* 518 F. Supp. 388 (S.D. Fla. 1981). Neither case is controlling precedent in this circuit. Moreover, both cases are readily distinguishable from the cases before us, because they held only that a district court lacks jurisdiction to hear an appeal from a magistrate's bail ruling in an extradition case; neither case decided whether a circuit court has jurisdiction to hear an appeal from a district court's bail ruling in an extradition case.[15]

A review by means of habeas corpus before the federal district court can be made irrespective of whether the judicial decision to grant extradition was made by a U.S. magistrate or a federal district judge. It is to be noted, however, that if it is the latter who made the extradition decision, the habeas corpus review could be before the same judge, an anomalous and questionable principle, or before another federal district judge, which in fact places one judge of the same rank and judicial power in the position of a reviewing judge. As discussed below, the scope of review is limited.[16]

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12 *Id.* at 1109.

13 *See* Ch. IV.

14 United States v. Kirby, 106 F.3d 855 (9th Cir. 1997).

15 *Id.* at 861 (footnotes omitted).

16 Fernandez v. Phillips, 268 U.S. 311 (1925); United States v. Bogue, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998); United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997) (regarding the secretary of state's discretion under § 3186); *In re Extradition of* Howard, 791 F. Supp. 31, 34 (D. Mass. 1992); *In re Extradition of* McMullen, 769 F. Supp. 1278, 1281–1282 (S.D.N.Y. 1991); Hoi-Pong v. Noreiga, 677 F. Supp. 1153 (S.D. Fla. 1988). In *Howard* the court noted that the possibility of racial bias in a trial upon extradition to Great Britain would not provide valid grounds for habeas corpus relief from

1.2. Scope of Habeas Corpus Review

No appeal lies from a grant of extradition. However, the relator may challenge the lawfulness of the order and the legality of his/her detention by means of applying for a writ of habeas corpus. The U.S. Supreme Court, as early as 1896, declared:

> By repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus.... Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and *the judgment of the magistrate, rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of the evidence, and is final for the purposes of the preliminary examination, unless palpably erroneous in law*.[17]

Further defining the limits of habeas corpus, Justice Oliver Wendell Holmes in *Fernandez v. Phillips* stated:

> That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.[18]

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extradition. The district court would only review the magistrate's decision on a clearly erroneous standard when determining whether extradition would violate the terms of the United States–Great Britain extradition treaty. As such, habeas corpus relief was denied. *See infra* Sec. 1.2.

17 Ornelas v. Ruiz, 161 U.S. 502, 508–509 (1896) (emphasis added). *See also* Wright v. Henkel, 190 U.S. 40 (1903), where the Court stated:

> The writ of habeas corpus cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings, *Ornelas v. Ruiz*, 181 U.S. 502; *Terlinden v. Ames*, 184 U.S. 270; and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.
>
> The contention is that the complaint and warrant did not charge an extraditable offense within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offense was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the states.
>
> Treaties must receive a fair interpretation according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin v. Shine*, 187 U.S. 181; *Tucker v. Alexandroff*, 183 U.S. 424.

Id. at 57. An extradition hearing is not a full trial. Its purposes are to determine probable cause that there has been a violation of one of the criminal laws of the requesting state and that the alleged conduct also constitutes a crime in the United States and is listed in the extradition treaty. Peroff v. Hylton, 563 F.2d 1099, 1249 (4th Cir. 1977). *See also* Greci v. Birknes, 527 F.2d 956, 958 (1st Cir. 1976); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 889 (1973).

18 Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

Justification for the requirement that the relator be charged with an offense in accordance with the terms of the treaty can be found in *Valentine v. United States ex rel. Neidecker*.[19] There the Court stated:

> It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states. . . . But, albeit a national power, it is not confided to the executive in the absence of a treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their executives to deliver them up." As stated by John Bassett Moore in his treatise on extradition—summarizing the precedents—"the general opinion has been, and practice has been in accord with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Counsel for the petitioner do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law.[20]

This ruling sets forth the principle that no obligation to extradite exists apart from what is specified by treaty. It follows that such an obligation does not arise unless the relator is charged with an offense in accordance with the terms of the treaty.

The requirement that the relator be charged with an offense in accordance with the terms of the treaty is also expressed in other contexts relating to extradition. In *Collins v. Loisel*[21] the U.S. Supreme Court stated that:

> It is immaterial that the acts in question constitute the crime of theft and fraud in Canada and the crime of larceny in New York State. It is enough if the particular acts charged are criminal in both jurisdictions.[22]

In *Factor v. Laubenheimer*[23] the Supreme Court implicitly adopted the same principle:

> The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no

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19 Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

20 *Valentine*, 299 U.S. at 8–9. *See also In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980), where the court points out that:

> Courts have frequently addressed claims that the offense charged is not within the treaty because of some condition imposed by the treaty. *E.g. Brauch v. Raiche*, 618 F.2d at 847 (dual criminality); *see also Abu Eain v. Wilkes*, 641 F.3d 504 (7th Cir. 1981) (whether "political offense" limitation is reviewable on habeas corpus).

Assarsson, 635 F.2d at 1243. For habeas review of the sufficiency of evidence, see *Simmons v. Braun*, 627 F.2d 635 (2d Cir. 1980); *In re Extradition of Orellana*, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. Jul. 26, 2000). *See In re* Factor's Extradition, 75 F.2d 10 (7th Cir. 1934). *See also* Gusikoff v. United States, 620 F.2d 459 (5th Cir. 1980); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977).

21 Collins v. Loisel, 259 U.S. 309 (1922). *See also In re* Howard, 791 F. Supp. 31, 33 (D. Mass. 1992), *aff'd*, 996 F.2d 1320 (1st Cir. 1993).

22 *Collins*, 259 U.S. at 312. *See also In re Extradition of* Orellana, 2000 U.S. Dist. LEXIS 10380 (S.D.N.Y. Jul. 26, 2000); *In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Powell, 4 F. Supp. 2d 945 (S.D. Cal. 1998); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); *In re Extradition of* Valdez-Mainero, 3 F. Supp. 2d (S.D. Cal. 1998); Bozilov v. Seifert, 967 F.2d 353 (9th Cir. 1992).

23 Factor v. Laubenheimer, 290 U.S. 276 (1933). *See also* Elcock v. United States, 80 F. Supp. 2d 70 (E.D.N.Y. 2000); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

> impairment of any legitimate public or private interest. . . . It has been the policy of our own government, as of others in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory.[24]

The *Factor* case also stands for the principle that U.S. law is the applicable law in determining whether the relator has been properly charged. In the *Collins* case the Supreme Court applied the law of the United States, the requested state, to determine whether there was "competent legal evidence" to "justify his apprehension and commitment for trial if the crime had been committed in the forum state."[25]

Similarly, questions of competency of a person to stand trial are determined primarily by the substantive law of the requesting state.[26]

The unarticulated premise of the requirement that the relator be charged with an offense under the treaty is that he/she has in fact been so charged by the requesting state. Whether this has occurred is determined by the law of the requesting state by reference to that of the requested state.

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24 *Factor*, 290 U.S. at 298–301.

25 Collins v. Loisel, 259 U.S. 309, 315 (1922). In the case of *Valencia v. Limbs*, 655 F.2d 195 (9th Cir. 1981), the circuit court, in examining what is "competent legal evidence," held as it did in *Hooker v. Klein*, 573 F.2d 1360 (9th Cir. 1978), and in keeping with *Collins,* that the matter of determining the competency of the legal evidence was to be left to the trial judge and is not reviewable on habeas corpus. The court relied on *Collins v. Miller*, 252 U.S. 364 (1920), and on 28 U.S.C. § 2241, as well as other Supreme Court cases dealing with the scope of habeas corpus review. Nevertheless, the U.S. Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), held that the sufficiency of the evidence in a state criminal conviction was reviewable by habeas corpus. The court in *Valencia* refused to extend the *Jackson* ruling to extradition cases, stating:

> The scope of habeas review of a Magistrate's extradition order is traditionally limited to an examination of the following factors: (1) the jurisdiction of the extradition judge to conduct extradition proceedings; (2) the jurisdiction of the extradition court over the fugitive; (3) the force and effect of the extradition treaty; (4) the character of the crime charged and whether it falls within the terms of the treaty; (5) whether there was competent legal evidence to support a finding of extraditability. *See, e.g., Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 542, 69 L. Ed. 970 (1925); *Caplan v. Vokes*, 649 F.2d 1336 at 1340 (9th Cir. 1981); *Hooker v. Klein, supra*, 573 F.2d at 1368. It is generally for the Magistrate to determine if the evidence establishes probable cause to believe that the fugitive committed the crime for which he stands accused. Review of the evidence before the Magistrate has been limited to a determination that there was competent evidence supporting the finding of extraditability. *Fernandez v. Phillips, supra*, 268 U.S. at 312, 45 S. Ct. at 542; *United States ex rel. Sakaguchi v. Kaulukukui,* 520 F.2d 726, 730 (9th Cir. 1975). Appellant suggests that this has recently and radically been changed by the decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Valencia, 655 F.2d at 197. *But see Fernandez v. Phillips*, in which the court states:

> Habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and . . . whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Fernandez, 268 U.S. at 312, 45 S. Ct. at 542. *See also In re Extradition of* Manzi, 888 F.2d 204, 205 (1st Cir. 1989); Romeo v. Roache, 820 F.2d 540, 542–543 (1st Cir. 1987); Cheng v. Hueston, 690 F. Supp. 1008, 1010–1011 (S.D. Fla. 1988); 931 F.2d 169, 171 (1st Cir. 1991).

26 *See Romeo*, 820 F.2d at 544 (citing *Charlton v. Kelly* for the proposition that "competency was a matter to be determined by the jurisdiction trying the offense and not by the extraditing jurisdiction." Yet, the court left the door open to critical analysis of the competency of the witness in some situations by noting that a "more severe condition" might warrant such a review. *Id.*).

The scope of an appellate review of the district court's denial of a petition for a writ of habeas corpus is de novo.[27] The First Circuit stated in *United States v. Baez* that:

> A district court's interpretation of an extradition agreement and application of the principle of speciality involve questions of law, and we therefore review them de novo. United States v. Saccoccia, 58 F.3d 754, 767 (1st Cir.1995).[28]

In *Lui-Kin Hong*, the First Circuit similarly held:

> While it is true that, as a general matter, federal courts of appeals do not rule on issues not decided in the district court . . . we do have discretion to address issues not reached by the district court when the question is essentially legal and the record is complete.[29]

It is well-established in the United States that the scope of a habeas corpus petition to review a magistrate's extradition order (or that of a judge sitting as a magistrate in an extradition hearing pursuant to Title 18 § 3184 or similar hearing) under a given treaty includes:

1. Whether the court had jurisdiction;
2. Whether there is a treaty in effect;
3. Whether the person sought is the person before the court;[30]
4. Whether the offense charged is extraditable under the treaty;
5. Whether the offense charged satisfies the requirement of double criminality;[31]
6. Whether there is sufficient probable cause to believe the relator has committed the offense for which he/she is sought;[32]
7. Whether the evidence presented was competent and sufficient to show probable cause;[33]

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27 Norton v. Spencer, 351 F.3d 1, 4 (1st Cir. 2003).

28 United States v. Baez, 349 F.3d 90, 92 (1st Cir. 2003), *per curiam*, *citing* United States v. Saccocia, 54 F.3d 754 (1st Cir. 1995), *cert. denied* (1996). *See also* United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir. 1997).

29 *Lui Kin-Hong*, 110 F.3d at 116.

30 Manta v. Chertoff, 518 F.3d 1134 (9th Cir. 2008) ("At an extradition hearing, the court is required to determine whether the party before the court is the party names in the extradition complaint. Whether the person before the court is the accused is part of the magistrate judge's probable cause analysis. On habeas, we uphold a magistrate judge's finding that there is probable cause to believe the accused committed the crime charged if there is any competent evidence in the record to support it." at 1143.); Zelenovic v. O'Malley, 2010 U.S. Dist. LEXIS 92632 (N.D. Ill. Sept. 7, 2010) (The district court went through an extensive analysis of the facts to establish that there was probable cause to believe that Zelenovic had indeed committed the murder in question. *Id.* at *12–15.).

31 *Manta*, 518 F.3d 1134 ("Dual criminality exists if the 'essential character' of the acts criminalized by the laws of each country are the same and the laws are 'substantially analogous.' " *Id.* at 1141.); Blakeney v. United States, 2011 U.S. Dist. LEXIS 9513 (E.D.N.Y. Jan. 31, 2011) ("Under United States law, for a charged offense to be extraditable, it must be 'an offense that is either listed or defined as such by the applicable treaty' and the alleged conduct underlying the charges must satisfy 'dual criminality,' i.e. it must be criminal in both jurisdictions." *Blakeney*, 2011 U.S. Dist. LEXIS 9513, at *17).

32 *Manta*, 518 F.3d at 1145–1146; *Blakeney*, 2011 U.S. Dist. LEXIS 9513; Zelenovic v. O'Malley, 2010 U.S. Dist. LEXIS 92632 (N.D. Ill. Sept. 7, 2010); Rios v. United States, 2011 U.S. Dist. LEXIS 26699 (D. Minn. Feb. 24, 2011) ("While an extradition hearing is not a trial on the merits, it serves 'as a means of ensuring that probable cause exists to believe the person whose surrender is sought has committed the crime for which his extradition is requested.' " *Rios*, 2011 U.S. Dist. LEXIS 26699 at *2.).

33 *Rios*, 2011 U.S. Dist. Lexis 26699 ("The Court finds that competent legal evidence before [the] Magistrate Judge . . . warranted the conclusion that 'there was reasonable ground to believe the accused guilty' and supported the finding of Petitioner's extraditability." *Id.* at *7.); Bolanos v. Mukasey, 2009 U.S.

8. Whether any treaty rights inuring to the benefit of the relator bar his/her extradition;

9. Whether all the procedural requirements of the treaty and the applicable statute are satisfied;[34] and

10. Whether any constitutional right of the relator has been infringed.

The jurisprudence of the United States has been consistent as to the recognition of these grounds as being within the scope of the review.[35] For instance, the Ninth Circuit has rejected

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Dist. LEXIS 87991 (D.N.J. Sept. 24, 2009) ("The standard for finding probable cause in an extradition hearing is the same as in federal criminal preliminary hearings: whether there is 'evidence that would support a reasonable belief that [the defendant] was guilty of the crime charged.' " *Bolanos*, 2009 U.S. Dist. LEXIS 87991 at *6.); Aquino v. Plousis, 2010 U.S. Dist. LEXIS 109381 (D.N.J. Oct. 14, 2010) (opinion not for publication); Smith v. Regan, 2009 U.S. Dist. LEXIS 98108 (M.D. Pa. Oct. 22, 2009) (also discussing sufficiency of authentication under §3190) ("The Court reiterates that the evidence, at this stage, need not prove guilt beyond a reasonable doubt . . . Here, the magistrate judge properly found sufficient evidence to make a probable cause determination that Smith was guilty of the offense charged." *Smith*, 2009 U.S. Dist. LEXIS 98108, at *8–11.); Germany v. United States, 2007 U.S. Dist. LEXIS 65676 (E.D.N.Y. Sept. 5, 2007) ("Where a defendant was convicted *in absentia*, the conviction is merely a charge and an independent determination of probable cause in order to extradite must be made." *Germany*, 2007 U.S. Dist. LEXIS 65676, at *20–21).

34 *See* Salazar v. Venables, 2010 U.S. Dist. LEXIS 91956 (S.D. Cal. Sept. 3, 2010) (grant of *amparo* in Mexico defeated requirement of arrest warrant and probable cause).

35 Fernandez v. Phillips, 268 U.S. 311 (1925); Grin v. Shine, 187 U.S. 181 (1902); Neely v. Henkel, 180 U.S. 109 (1901); Austin v. Healey, 5 F.3d 598 (2d Cir. 1993); Ahmad v. Wigen, 726 F. Supp. 389, *aff'd* 910 F.2d 1063 (2d Cir. 1990); *In re* Burt, 737 F.2d 1477 (7th Cir. 1984). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); Plaster v. United States, 720 F.2d 340 (4th Cir. 1983); *In re* Mackin, 668 F.2d 122 (2d Cir. 1981); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856, *reh'g denied*, 449 U.S. 1027 (1980); *In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980); Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir. 1973), *cert. denied*, 429 U.S. 833 (1976); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973); Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965); Gill v. Imundi, 747 F. Supp. 1028, 1049 (S.D.N.Y 1990); *In re Extradition of* Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988). *See also In re Application of* D'Amico, 185 F. Supp. 925 (D. Conn. 1960), *appeal dismissed sub nom.*; United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir. 1961); Escobedo v. United States, 623 F.2d 1098, 1102 (5th Cir. 1980); Gusikoff v. United States, 620 F.2d 459, 461 (5th Cir. 1980); Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980); Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). The district court stated in *D'Amico* that:

> Habeas corpus in extradition proceedings is limited in scope. It does not afford a rehearing of what the Commissioner has already decided. The alleged fugitive has had his hearing before the Commissioner and "habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 542, 69 L. Ed. 970. *See also Benson v. McMahon*, 127 U.S. 457, 8 S. Ct. 1240, 32 L. Ed. 234; *Re Luis Oreiza y Cortes*, 136 U.S. 330, 10 S. Ct. 1031, 34 L. Ed. 464; *Bryant v. United States*, 167 U.S. 104, 105, 17 S. Ct. 744, 42 L. Ed. 94; *Elias v. Ramirez*, 215 U.S. 398, 406, 30 S. Ct. 131, 4 L. Ed. 253.

D'Amico, 185 F. Supp. at 927. The court of appeals affirmed the action of the district court stating *"habeas corpus* is not a rigid and inflexible proceeding in which the court must either order release of the prisoner outright or direct his return to custody." The appellate court in *D'Amico* concluded that:

> [T]he district court, after a careful study of the record, has determined that an essential finding has not been made and that the case should be remanded to the Commissioner to supply the defect. Such action is entirely within the power given the court by 28 U.S.C. § 2243, and we think *Collins v. Miller*, . . . 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616, requires us to hold such orders nonappealable.

a procedural challenge to an extradition order where the relator claimed that she was entitled to an expectation of finality with respect to the extradition complaint in her case.[36]

Although habeas corpus review is fairly liberal, failure to raise an argument before the extradition judge, for example insufficiency of probable cause, when the argument was known to the relator, constitutes a waiver of the issue, and the relator is estopped from raising a waived issue after the extradition hearing.[37]

In a recent case, *Andersen v. Smith*, the relator attempted to challenge his continued detention following the expiration of the period of time within which the United States was required to present the requesting state's formal extradition request following the relator's provisional arrest. In that case the relator was taken into custody on June 15, 2011, pursuant to a request for his arrest by Danish authorities.[38] Under the United States–Denmark treaty, the government was

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D'Amico, 286 F.2d at 323. *See also* Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir.), *cert. denied*, 398 U.S. 903 (1969) (stating that a hearing held pursuant to a statute requiring an automatic hearing in most U.S. extraditions to foreign countries is in the nature of a preliminary hearing).

When the issues are not among these points, the extradition judge can find them outside of the scope of review. *See* Castaneda v. United States, No. 04-1332 ADM/JSM, 2005 U.S. Dist. LEXIS 103 (D. Minn. 2005); McMaster v. United States, 9 F.3d 47 (8th Cir. 1993) (noting that failure to immediately extradite a defendant to Canada to face three murder charges did not constitute a breach of the government's duty to follow through on an extradition request or constitute civil rights violations; accordingly, habeas corpus was not valid grounds for relief).

In *Cheng v. Hueston*, 690 F. Supp. 1008 (S.D. Fla. 1988), the district court clarified the test for reconsideration of a probable cause determination based on new evidence:

> The court in D'Amico was extremely persuaded by the proffered evidence because it created a "grave doubt" as to the sufficiency of the underlying facts which formed the basis of the finding of probable cause. In contrast, the court in Peroff found substantial evidence to support extradition even after considering the newly discovered evidence. Central to the court's inquiry in each case was the type of evidence presented and its impact on the probable cause determination. Hence, a workable rule can be gleaned from those cases and used to evaluate newly discovered evidence in the context of extradition proceedings. Thus, a habeas petitioner must be afforded the opportunity of a rehearing when he proffers specific newly discovered explanatory evidence, previously unavailable through the exercise of reasonable diligence, and that evidence casts substantial doubt on the determination of probable cause.

Cheng, 690 F. Supp. at 1011. *See also Harshbarger v. Regan*, 599 F.3d 290, 293–294 (3d Cir. 2010) (holding that hearsay evidence is admissible in establishing probable cause for the purposes of extradition); Lingad v. Napolitano, 313 Fed. Appx. 72 (9th Cir. 2009) (unpublished opinion); Haxhiaj v. Hackman, 528 F.3d 282 (4th Cir. 2008); Polikarpovas v. Stolic, 256 Fed. Appx. 127 (9th Cir. 2007) (unpublished opinion); Medelius-Rodriguez v. United States, 2007 U.S. App. LEXIS 24137 (4th Cir. Oct. 15, 2007); *In re* Pena-Bencosme, 341 Fed. Appx. 681 (2d Cir. 2009) (unpublished opinion), stating:

> Review of a decision in an extradition hearing by means of a petition from a writ of habeas corpus "is limited and should not be converted into a de novo review of the evidence." Instead, a court adjudicating such a petition may consider only "whether the [judge conducting the extradition hearing] had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Given the limited nature of this review as well as the underlying requirement that a requesting country establish only probable cause, the existence of evidence contradicting or calling into question the requesting state's primary evidence ordinarily has no import as it does not vitiate or obliterate probable cause but merely "pose[s] a conflict of credibility" that generally "should properly await trial in [the requesting country]."

Pena-Bencosme, 341 Fed. Appx. at 683 (internal quotations omitted).

36 *Lingad*, 313 Fed. Appx. 72 (because the relator's petition "does not challenge the extradition on any of [the recognized grounds] . . . the district court did not err in denying her habeas petition." *Id.* at 72.).

37 DeSilva v. DiLeonardi,181 F.3d 865 (7th Cir. 1999); Peretz v. United States, 501 U.S. 923 (1991).

38 Andersen v. Smith, 2011 U.S. Dist. LEXIS 83398, at *2 (S.D. Tex. Jul. 29, 2011).

required to make a formal request for the relator's extradition within thirty days of his arrest, but the treaty allows for an extension in Article 12 as follows:

> A person arrested upon such an application may be set at liberty upon the expiration of thirty days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article 11 shall not have been received. *The requesting State may request, specifying the reasons therefor, an extension of the period of detention for a period not to exceed thirty days, and the appropriate judicial authority of the requested State shall have the authority to extend the period of detention*. The release from custody pursuant to this provision shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.[39]

The magistrate judge granted the United States one extension until July 27, 2011, and then another extension to August 14, 2011, after the United States failed to present a formal extradition request by the first extension deadline.[40] The relator argued that the magistrate's second extension of time was unauthorized, as the treaty only contemplated "an extension" meaning one extension, and as such he was entitled to release from custody.[41] The court rejected this argument, reasoning that treaties are to be interpreted liberally to give effect to the parties' intent to promote extradition, and that because the total amount of time granted by the extensions was less than thirty days, the relator had not shown a violation of the treaty provision.[42] Furthermore, as Article 12 allowed for up to sixty days, and the relator was unable to show that he was being detained for more than sixty days following his arrest, he failed to show a violation of a treaty or law of the United States, and was therefore not entitled to habeas relief.[43]

Almost all cases dealing with the subject find a way to excuse the government's failure to comply with statutory or treaty requirements. It is as if the courts view these time limits as ministerial guidelines that the government can overlook with relative impunity. Yet nothing in treaty or statutory interpretation allows such elasticity.

1.3. Characteristics of Habeas Corpus Review

Habeas corpus is a de novo proceeding, and evidence can be presented by the government or the relator in writing or by open-court testimony. The habeas judge can reconsider old evidence or hear new evidence, or remand to the magistrate for an evidentiary hearing. On rare occasions, the judge who rules on the extradition pursuant to a § 3184 hearing also presides over the habeas proceedings. Because habeas is an extraordinary legal remedy to challenge the detention of a person, the government, usually the party detaining the relator, cannot present such a petition. However, because the habeas proceedings involve questions of law and facts, the government can seek an appellate review of the order granting the petition. Once the order is entered the relator must be released and cannot be held pending any review remedy pursued by the government. The relator can file for a review with the court of appeals of the order denying the petition and obtain an order to stay extradition pending the appellate review. Habeas proceedings do not foreclose others such as mandamus.[44]

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39 Treaty of Extradition Between the United States of America and the Kingdom of Denmark, U.S.–Den., art. 12, June 22, 1972, 25 U.S.T. 1293.

40 *Andersen*, 2011 U.S. Dist. Lexis 83398, at *3.

41 *Id.* at *4, *12.

42 *Id.* at *12.

43 *Id.*

44 *See* Ch. XI, Sec. 1.6.

1.4. Habeas Corpus and the Rule of Non-Inquiry[45]

Habeas corpus proceedings have been held not to be a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state. This is generally known as the rule of non-inquiry.[46]

In *Neely v. Henkel*[47] the relator contended that amendments to the extradition statutes were unconstitutional as they did not assure the accused's rights, privileges, and immunities guaranteed by the U.S. Constitution upon surrender to the requesting state. In his petition, Neely specifically identified the constitutional prohibitions against bills of attainder, ex post facto laws, and the Due Process Clause of the Fifth Amendment. The Supreme Court held that:

> These provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country. In connection with the above proposition we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.[48]

Accordingly, the Supreme Court held that a U.S. citizen who "commits a crime in a foreign country . . . cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people."[49]

The "rule of non-inquiry" is brought into sharp focus in the line of cases dealing with convictions in absentia. In these cases, the United States followed the general practice of international law that convictions in absentia are not conclusive of the individual's guilt, but are regarded as equivalent to indictments or formal charges against the individual sought to be extradited.[50] A careful reading of the decisions applying the rule of non-inquiry in such cases reveals that although the courts prefer not to inquire into the treatment to be received by the relator upon surrender or the quality of justice he/she is expected to receive, there is nonetheless in some instances a finding of non-extraditability on "other grounds." Three such cases are particularly revealing.

The first case, *Ex parte Fudera*,[51] involved a conviction in absentia of a fugitive who had been found guilty and sentenced for the crime of murder by the Italian courts. The district court, on a writ of habeas corpus, chose to pass over the question of the propriety of the in absentia criminal prosecution and sentencing. The court instead rejected the Italian government's evidence of guilt on the grounds that it was based on "pure hearsay," and released the relator on the grounds of insufficient evidence.

The second case, *Ex parte LaMantia*,[52] similarly involved a murder conviction by an Italian tribunal. This time the fugitive alleged that the Sixth Amendment to the U.S. Constitution had been violated as he had been denied the right of confrontation and cross examination. The federal district court held that these protections "did not apply to persons extradited for trial

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45 *See* Ch. VII, Sec. 8.

46 *See also* Munaf v. Geren, 553 U.S. 674 (2008) ("Petitioners contend that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture. . . . Such allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." at 700.).

47 Neely v. Henkel, 180 U.S. 109 (1901). *See also* United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999).

48 *Neely*, 180 U.S. at 122–123.

49 *Id.* at 123.

50 *See generally* Ch. VIII.

51 *Ex parte Fudera*, 162 F. 591 (C.C.S.D.N.Y. 1908).

52 *Ex parte LaMantia*, 206 F. 330 (C.C.S.D.N.Y. 1913).

under treaties with foreign countries whose laws may be entirely different."[53] However, again the fugitive was ordered released and extradition refused for insufficiency of evidence presented by the Italian government.

In the third case, the federal district court in *In re Mylonas*,[54] consistent with prior authority, ruled that the relator's conviction in absentia did not preclude extradition, even though the fugitive, who had been convicted of embezzlement, was not represented by counsel and had no one appear for him. Again, however, the court found grounds upon which it ordered the accused discharged from custody, namely, that under Article V of the 1931 Treaty of Extradition with Greece, the Greek government's long-delayed effort to take the accused into custody exempted Mylonas from extradition "due to lapse of time or other lawful cause."[55]

Thus, in the above cases, U.S. courts recognized the limited nature of habeas corpus and the rule of non-inquiry, and yet freed the relators and denied extradition upon other grounds. Notwithstanding these cases, U.S. law and recognized practice allows extradition based on in absentia convictions.

Two opinions, however, voiced disenchantment with the established rule of non-inquiry. The first instance arose in *Argento v. Horn*,[56] where the Sixth Circuit felt constrained to submit to precedent on this question but expressed its doubts. Argento, the relator, had been convicted in absentia by Italian courts for the crime of murder. The murder occurred in 1921 and Argento was convicted in 1931. It was not until the 1950s, however, that the Italian government initiated proceedings for his extradition. The circuit court stated:

> The appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court, sensible of the great Constitutional immunities. . . . [H]owever, we conceive it our obligation to do so.[57]

Despite the general rule of non-inquiry, courts may inquire into conditions in the requesting state in cases where the relator is likely to encounter such treatment in the requesting state that is deemed significantly offensive to the minimum standards of justice, treatment of the individual, and preservation of basic human rights as perceived by the requested state.[58]

In the second of these cases, *Gallina v. Fraser*,[59] the Second Circuit bowed to precedent and followed the rule of non-inquiry, but indicated that the rule might be rejected in certain circumstances. In that case, Gallina had been tried and convicted in absentia by the Italian courts for the crime of robbery. Gallina petitioned the federal district court for a writ of habeas corpus, contending that if extradited to Italy, he would be imprisoned without retrial and without an opportunity to face his accusers or conduct any defense. Judge Sterry Waterman stated:

> We have discovered no case authorizing a federal court in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await

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53 *Id.* at 332.

54 *In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960).

55 *Id.* at 716.

56 Argento v. Horn, 241 F.2d 258 (6th Cir. 1957).

57 *Id.* at 263–264.

58 *See* Ch. VII, Sec. 8 and Ch. VIII, Sec. 6.

59 Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960). *See also In re Extradition of* Ernst, 1998 WL 395267 (S.D.N.Y. July 14, 1998); *In re Extradition of* Sandhu, 1996 WL 469290 (S.D.N.Y. Aug. 19, 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Mainero v. Gregg, 164 F.3d 1199 (9th Cir. 1999).

> the relator upon extradition . . . '*Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment too antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above.*'[60]

These concerns were mitigated in this case, however, as Gallina had been represented by counsel at his trial, and was tried along with his alleged associates who were present before the Italian court and were also convicted.

United States courts have so far refused to undertake a factual inquiry into the individual's prospective treatment by the requesting state, but should Judge Waterman's views prevail in the future courts might refuse to surrender the fugitive to a state with an oppressive or arbitrary judicial system. In such a case, the alternative must be to prosecute the relator in the United States. In some ways a contrasting position is taken by the courts in refusing to examine or review a foreign extradition decision whereby surrender to the United States is secured.[61]

In *Sindona v. Grant*[62] the circuit court was faced with the contention that the relator would be subjected to risk of murder or injury at the hands of political factions should he be returned to the requesting state. In its ruling, the court did not explicitly apply the rule of non-inquiry, but found that the issue fell within the purview of the executive branch:

> Appellant also argues that apart from the protections of the Treaty and the U.N. Convention, his extradition should be denied because return to Italy would subject him to risk of murder or injury at the hands of political enemies on the left. The undated photographs incorporated in the Sindona main brief indicate that a slogan "a morte Sindona" may have commanded a considerable following among Italian demonstrators. However, the degree of risk to Sindona's life from extradition is an issue that properly falls within the exclusive purview of the executive branch. See *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S. Ct. 787, 50 L. Ed. 2d 778 (1977) (executive may deny extradition request but requesting country has primary responsibility for protecting against assassination). As Judge Wisdom has observed:
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> > Review by habeas corpus . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide.
>
> *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965). Sindona counters that our decision in *Gallina v. Fraser*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851, 81 S. Ct. 97, 5 L. Ed. 2d 74 (1960), requires the extraditing magistrate to consider whether the circumstances awaiting a fugitive upon extradition would be so egregious as to offend the court's "sense of decency." We find no such rule in *Gallina*. That decision denied *habeas corpus* on the strength of established authority holding that the federal courts may not "inquire into the procedures which await the relator upon extradition," 278 F.2d at 78. The fact that *Gallina* also added the caveat that some situations were imaginable in which a federal court might wish to reexamine the principle of exclusive executive discretion, *Id*. at 79, falls well short of a command to so do here. In any event, it is apparent that Judge Griesa thoroughly examined the affidavits and exhibits relevant to Sindona's claim. If *Gallina* alone may not have required this much, it follows *a fortiori* that there was no obligation to hold an evidentiary hearing.[63]

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60 *Gallina,* 278 F. 2d at 78–79 (emphasis added) (internal citations omitted).

61 McGann v. U.S. Board of Parole, 488 F.2d 39, 40 (3d Cir. 1973) (following *Johnson v. Browne*, 205 U.S. 309 (1907)).

62 Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980). See also *In re* Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979) (holding that the political offense exception was determined by the motives of the actor and the nature of the act, not by reference to the motives of those who would handle the prosecution of the common crime after its occurrence).

63 *Sindona*, 619 F.2d at 174–175. *See also* Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973); 6 Marjorie Whiteman, Digest of International Law 1046 (1963).

After his extradition to Italy, Sindona was killed in his prison cell, allegedly by members of organized crime who feared what he might say to the authorities. Ironically, his claims were valid, and the court's lofty words, far removed from reality.

The district court in *Pfeifer v. United States Bureau of Prisons*[64] also remained firm in its refusal to consider the constitutionality of Mexican proceedings that took place prior to the relator's transfer to the United States to serve out the balance of a sentence imposed by a Mexican court. Although the relator's transfer in *Pfeifer* was not made pursuant to a treaty of extradition,[65] the case affirmed the stance of U.S. courts concerning non-inquiry into matters taking place outside of the jurisdiction of the deciding court, especially where there has been no involvement of any American court in the relevant foreign proceedings. But in these transfer-of-prisoners cases, the policy is different from other cases where the relator is being removed from the United States, as opposed to being brought back to the United States.

The Eleventh Circuit has also refused to apply a "humanitarian exception" because of the rule of non-inquiry.[66] Several circuits have slightly opened the door for judicial consideration of evidence relating to a relator's treatment in the requesting state, though no circuit has yet denied extradition on humanitarian grounds.[67]

The U.S. Constitution, however, does not impose on foreign governments the obligation to act pursuant to U.S. standards of speedy trial, and violation of U.S. standards of speedy trial are not grounds for habeas relief unless they violate international human rights law treaty provisions.[68]

In conclusion:

1. There is no appeal from an extradition order;
2. Review is by habeas corpus;
3. Habeas proceedings are de novo, and include issues of law and fact;
4. Issues deemed waived at the extradition hearing cannot be raised on habeas;
5. The habeas court will consider only certain grounds;[69]
6. Due process violations can always be raised;
7. The habeas petitioner whose petition was denied can appeal by right to the circuit court;

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64 Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980). *See also* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), *cert. denied*, 449 U.S. 856, *reh'g denied*, 449 U.S. 1027 (1980).

65 Transfer was made pursuant to the Treaty with Mexico on the Execution of Penal Sentences of 1976, 28 U.S.T. 7399, T.I.A.S. No. 8718. *See* Ch. VIII, Sec. 8 on the Rule of Non-Inquiry. *But see also infra* Sec. 2 on "prosecutorial misconduct."

66 Hurtado v. United States, 401 Fed. Appx. 453, 456–457 (11th Cir. 2010) (unpublished opinion) (noting that the Eleventh and Second Circuits have distanced themselves from the possibility suggested in *Gallina* that the rule of non-inquiry should be displaced under certain circumstances where the relator's potential treatment would be "antipathetic to a federal court's sense of decency.").

67 *See* Ch. VII, Sec. 7.

68 Kamrin v. United States, 725 F.2d 1225 (9th Cir. 1984), *cert. denied*, 469 U.S. 817, 105 S. Ct. 85 (1984); United States v. Bogue, 1998 U.S. Dist. LEXIS 20133 (E.D. Pa. Dec. 11, 1998). The *Bogue* case involved a conviction in absentia in France where the court found that there was sufficient evidence of probable cause. Consequently, the constitutional rights of the relator were not violated on the petition for a writ of habeas corpus filed subsequent to the determination of extraditability. *Bogue*, 1998 U.S. Dist. LEXIS 16784, *citing* Gonveia v. Voker, 800 F. Supp. 241 (E.D. Pa. 1992); Sidali v. INS, 107 F.3d 191 (3d Cir. 1997).

69 *See infra* Sec. 2.

8. A petitioner whose appeal to the circuit was denied can file for a rehearing *en banc*, and ultimately file a petition for a writ of certiorari before the U.S. Supreme Court;[70]

9. A petition for habeas before the district or circuit court does not stay the extradition order. A stay order is necessary at each stage; and

10. The government can only appeal a habeas order on questions of law.[71]

1.5. Appeal by the Government

It should be stated at the outset that there is no right of appeal by the government in extradition hearings. In ruling against the government's right of appeal, the Second Circuit in *In re Mackin*[72] stated:

> Discussion of the appealability of orders granting or denying requests for extradition must go back as far as *In re Metzger*, 46 U.S. (5 How.) 176, 12 L. Ed. 104 (1847)—a case decided just prior to enactment of the predecessor of the present extradition statute and which doubtless led to that statute's adoption, see notes 6 & 8, *infra*. Although the extradition treaty with France there at issue, 8 Stat. 580 (1848), unlike the Webster–Ashburton Treaty of the previous year with Great Britain, made no provision that the person whose extradition had been requested should be brought before a judge or magistrate "to the end that the evidence of criminality may be heard and considered," President Polk and Secretary of State Buchanan elected to submit the French Government's extradition request to Judge Betts of the District Court for the Southern District of New York, who, after a hearing, committed Metzger to custody to await the order of the President, see *In re Metzger*, 17 Fed. Cas. 232 (D.C.S.D.N.Y. 1847). Although the Supreme Court thought that in seeking a hearing before a judicial officer the executive had acted "very properly, as we suppose," 46 U.S. (5 How.) at 188–89, it concluded that the case "was heard and decided by the district judge at his chambers, and not in court," *id*. at 191. In that role the district judge was exercising "a special authority, and the law has made no provision for revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court." *Id*. at 191–92. Since the Supreme Court thus had no appellate jurisdiction, under the most famous of constitutional decisions it likewise could not issue a writ of *habeas corpus* on Metzger's behalf. Thus the doctrine of unappealability of extradition decisions by judges and magistrates was born.
>
> The prime purpose of the 1848 statute, 9 Stat. 302, which followed immediately on the *Metzger* decision, was to provide additional judicial officers to handle extradition requests. Nothing on the face of the statute or in its legislative history shows an intention to alter the Supreme Court's ruling with request to appealability.
>
> That question arose in *In re Kaine*, 55 U.S. (14 How.) 103, 120, 14 L. Ed. 345 (1852). Kaine was charged by the British Government with a murder in Ireland, apparently in a case having political overtones. *Id*. at 114–15. The request for extradition was made by the British Consul in New York and heard by a United States commissioner who ordered Kaine to be committed. The Circuit Court declined to issue *habeas corpus*, and Kaine sought to bring these rulings before the Supreme Court in a number of ways. Justice Curtis, concurring in a careful opinion, concluded that the Commissioner's action was unreviewable on appeal for the reason that, like the judge

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70 Such a petition can be made pursuant to 28 U.S.C. § 2101, and is the same as for any petition for writ of certiorari applied for by reason of a denial of the writ of habeas corpus by the circuit court of appeals in any federal matter. Because a petition for writ of certiorari is not a matter of right, petitioner should, after the decisions of the court of appeals affirming the extraditability of the relator, file for a stay of execution in accordance with Federal Rule of Criminal Procedure 38(a). *In re Mackin*, 668 F.2d 122 (2d Cir. 1981).

71 *See supra* Sec. 1.4.

72 *Mackin*, 668 F.2d 122.

in *Metzger* and despite the 1848 statute, he was not exercising "any part of the judicial power of the United States," *id*. at 119; that the refusal of the Circuit Judge to issue a writ of *habeas corpus* could not be reviewed since it was not the cause of Kaine's commitment; and that the Supreme Court could not issue the writ on its own account since this would be a prohibited exercise of original jurisdiction.

The decision in *Kaine* that the Act of August 12, 1848, was not intended to alter the holding in *Metzger* regarding the nonappealability of decisions granting extradition was recognized in a 1853 opinion of Attorney General Cushing to Secretary of State Marcy. The Attorney General stated, "Nor can appeal be taken from the decision of Mr. Justice Edmonds to any other court, so as to revise that decision. The judge or magistrate in the case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States." 6 Op. Atty. Gen. 91, 96 (1853). Not longer thereafter, the common understanding with respect to the appealability of orders denying extradition requests was reflected in another opinion rendered by the Office of the Attorney General to Secretary of State Seward in 1863, 10 Op. Atty. Gen. 501, 506. This stated unequivocally, in response to an objection by a foreign government to a district judge's denial of extradition:

> In cases of this kind, the judge or magistrate acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States. No appeal from his decision is given by the law under which he acts, and therefore no right of appeal exists. *Ex parte Metzger*, 46 U.S. (5 How.), 176 [12 L. Ed. 104]; *U.S. v. Ferreira,* 54 U.S. (13 How.), 40–48 [14 L. Ed. 42; *In re* Kane [sic], 55 U.S. (14 How.)], 103, 119 [14 L. Ed. 345,] (Curtis, J.) The decision of Judge Leavitt is thus beyond the reach of correction either by executive or judicial power and suggested that the foreign government submit a new request. Further evidence of the nonappealability of orders granting extradition can be found in a Report of the Senate Judiciary Committee on the nation's extradition laws. S. Rep. No. 82, 47th Cong., 1st Sess. (1882).
>
> The Government suggests that the basis for the nonappealability of extradition orders was altered by the creation of the courts of appeals by the Act of March 3, 1891, 26 Stat. 826, since these courts are not subject to the constitutional limitations confining them to appellate jurisdiction which played a part in the *Metzger* decision and in Justice Curtis' opinion in *Kaine*. This, however, relates to the ability of the courts of appeals to exercise original jurisdiction over petitions for writs of *habeas corpus*, and not to the appealability of decisions under Section 3184. It is thus not surprising that courts at every level have continued to state that decisions, even when made by district courts, denying or granting requests for extradition are not appealable under 28 U.S.C. Section 1291.[73]…To quote from the most notable example, Justice Brandeis said in *Collins v. Miller, supra*, 252 U.S. at 369, 40 S. Ct. at 349, that "the proceeding before a committing magistrate in international extradition is

73 Collins v. Miller, 252 U.S. 364, 369, 40 S. Ct. 347, 349, 64 L. Ed. 616 (1920); Caplan v. Vokes, 649 F.2d 1336, 1340 (9th Cir. 1981); Abu Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981), *cert. denied*, [454] U.S. [894], 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981); Antunes v. Vance, 640 F.2d 3, 4 n.3 (4 Cir. 1981); *In re* Assarsson, 635 F.2d 1237, 1240 (7th Cir. 1980), *cert. denied*, [451] U.S. [938], 101 S. Ct. 2017, 68 L. Ed. 2d 325 (1981); Gusikoff v. United States, 620 F.2d 459, 461 (5th Cir. 1980); Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980); *Hooker v. Klein*, 573 F.2d 1360, 1364 (9th Cir.), *cert, denied*, 439 U.S. 932 (1978); Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976); Greci v. Birknes, 527 F.2d 956, 958 (1st Cir. 1976); United States *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726, 729–730 (9th Cir. 1975); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969); Wacker v. Bisson, 348 F.2d 602, 607 (5th Cir. 1965); Jimenez v. Aristeguieta, 290 F.2d 106, 107 (5th Cir. 1961).

> not subject to correction by appeal." Although none of the cases cited above squarely holds that an order denying a request for extradition is not appealable, these statements are not merely dicta, as the Government argues. Along with their statements as to the nonappealability of orders granting or denying extradition requests, courts have made clear that the extraditee in cases of grant and the requesting party in cases of denial have alternative, albeit less effective, avenues of relief. The extraditee may seek a writ of *habeas corpus*, the denial or grant of which is appealable, see note 8, *supra*, and the requesting party may refile the extradition request. *Collins v. Loisel*, 262 U.S. 426, 43 S. Ct. 618, 67 L. Ed. 1062 (1923); *Hooker v. Klein, supra*, 573 F.2d at 1365–66; *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Ex parte Schorer*, 195 F. 334 (E.D. Wis. 1912). Both these remedies are inconsistent with the notion that the original orders were appealable. If the grant of a request were appealable, *habeas corpus* would not lie since that writ cannot be used as a substitute for an appeal. *Stone v. Powell*, 428 U.S. 465, 477, 96 S. Ct. 3037, 3044, 49 L. Ed. 2d 1067 n.10 (1976); *Sunal v. Large*, 332 U.S. 174, 178–79, 67 S. Ct. 1588, 1590–91, 91 L. Ed. 1982 (1947). If denial of a request were appealable, a second request would ordinarily be defeated by the principle of *res judicata*. See *Hooker v. Klein, supra*, 573 F.2d at 1367–68.

Despite the Government's argument in this case, the general belief with respect to the unappealability of extradition orders has been very recently shared by the Department of Justice and the Department of State. On September 19, 1981, Senator Thurmond, along with several colleagues, introduced "a bill developed over the past 2 years in close cooperation with the Department of Justice and the Department of State to modernize the extradition laws of the United States." 127 Cong. Rec. S9952. Among many other features, the proposed Extradition Act of 1981 confines to the Attorney General the right to file a complaint charging that a person is extraditable to a foreign country, Section 3192(a), provides that this may be done only in a United States district court, *id.*, directs that the court certify to the Secretary of State its findings with respect to extraditability, Section 3194(e), provides for appeals of such findings to the appropriate United States court of appeals, Section 3195(a), and limits the extraditee's rights to seek review by other means, Section 3195(c). Secretary of State Haig expressed the particular pleasure of the Department over several provisions of the bill, including one which for the first time permit[s] appeal from a district court's decision on an extradition request (section 3195), 127 Cong. Rec. S9953. A legal memorandum accompanying the proposed Bill stated in unequivocal terms, 127 Cong. Rec. S9957:

> Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious. [footnotes omitted]

At a hearing held on October 14, 1981, before the Senate Judiciary Committee, Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice, praised the bill because, among other things:

> It permits both a fugitive and the United States, on behalf of the requesting country, to directly appeal adverse decisions by a extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus, and the only option available to the United States on behalf of a requesting country, is to refile the extradition complaint.

Daniel W. McGovern, Deputy Legal Adviser of the Department of State, said:

> Under the present law there is no direct appeal from a judicial officer's finding in an extradition proceeding. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense and complication

> to a process which should be simple and expeditious. Section 3195 [of the proposed bill] remedies this defect in current procedure by permitting either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision.

It is true, of course, that efforts by the Government to resolve an ambiguity, in legislation in its favor should not preclude it from arguing, if the efforts have not yet succeeded, that the legislation should be construed in the manner which it asked Congress to make clear. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 S. Ct. 445, 452, 94 L. Ed. 616 (1950); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169–70, 88 S. Ct. 1994, 2000–2001, 20 L. Ed. 2d 1001 (1968); Sands, 2A Sutherland Statutory Construction section 49.10 at 261 (1973). But here the executive branch did not tell Congress that the law was uncertain and would benefit from clarification; it said flatly that the law was the exact opposite from what it contends in this case and that the law needed to be changed. Beyond this, and apart from the massive authority we have cited, what the Government told Congress was right and what it argues to us is wrong.

The only conceivable basis for appellate jurisdiction over orders granting or denying extradition is section 1291 to Title 28 which authorizes appeals to the courts of appeals from "final decisions of the district *courts* of the United States." In contrast, § 3184 proceedings are to be conducted by "any *justice* or *judge* of the United States, or any *magistrate* authorized to do so by courts of the United States or any *judge* of a court of record of general jurisdiction of any State." Decisions have noted the difference between Section 3184's references to "judges," "justices," and "magistrates" and Section 1291's reference to "district courts." *Jimenez v. Aristeguieta*, 290 F.2d 106, 107 (5th Cir. 1961); *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S. Ct. 204, 38 L. Ed. 2d 133 (1973). Even when the decision to grant or deny is by a district judge, this still is not a decision of a district court within 28 U.S.C. Section 1291. See *Jimenez v. Aristeguieta, supra*, 290 F.2d at 107. Although the distinction was criticized by the dissenting judge in that case, it goes back to the Supreme Court's 1847 decision in *In re Metzger, supra*, and we approved of it in *Shapiro v. Ferrandina, supra*, 478 F.2d at 901 & n.3. It is even clearer that the decision of a magistrate is not a final decision of a district court; when Congress has desired to permit an appeal from a decision of a magistrate directly to a court of appeals, it has said so. 28 U.S.C. Section 636(c)(3). There is still greater difficulty in considering the decision of a state judge to be a final decision of a district court. Yet it would be curious if such decisions were nonappealable whereas the decision of a United States judge or magistrate was.

There are similar problems in reading 28 U.S.C. Section 1291 to include the decision of a judge of a court of appeals or a justice of the Supreme Court. It is instructive, in this regard, to examine the statutory provisions applicable to writs of *habeas corpus*, 28 U.S.C. §§ 2241–55. Section 2241 provides, *inter alia*, that writs of *habeas corpus* may be granted by "any circuit *judge*." Evidently fearing that, without more, the action of a circuit judge would not be reviewable, Congress provided in Section 2253 for an appeal from the decision of a circuit judge pursuant to Section 2241: "In a *habeas corpus* proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." Congress' failure to adopt a similar statutory provision with respect to an extradition order of a circuit judge under 18 U.S.C. § 3184 is evidence that it did not intend such a decision to be appealable to a court of appeals. Yet the Government has suggested no rational basis for a state of the law wherein an extradition decision of a United States district judge or magistrate would be appealable but that of a United States circuit judge would not be. When we add these considerations to the historical background of 18 U.S.C. § 3184 and the many decisions we have cited, we think it clear that no appeal lies under 28 U.S.C. § 1291 from the Magistrate's decision here.[74]

It should also be noted that the government cannot use indirect methods to achieve what it cannot do directly. Thus, it cannot seek a declaratory judgment or mandamus as a means of

74 *Jimenez*, 290 F.2d at 125–130 (citations omitted).

appeal.[75] So long as extradition orders are deemed non-final orders they shall not be appealable unless a statutory provision provides for appeal.[76] However, the government may seek a motion for reconsideration in certain prescribed situations, but the grounds for relief are generally limited to the presentation of controlling precedent or for information overlooked by the court. The motion for reconsideration cannot be used to reargue the issues presented at the time the original motion was resolved.[77] The motion may not act as a substitute for an appeal.[78]

1.6. Injunctive Relief: Declaratory Judgment, and Mandamus, and Stay of Extradition

Injunctive relief can be applied for at any stage of extradition proceedings, but it has also been resorted to following the conclusion of the extradition hearing.[79] Thus, it can be sought at the pre-hearing stage as well.[80] Both declaratory judgments and mandamus are not generally considered appropriate in extradition proceedings, though it is not clear why this should be so.[81] In *Wacker v. Bisson*,[82] however, the court found that the relator may become a plaintiff in a declaratory judgment action and also seek a coercive decree.[83] In *Wacker* the court also found that the same limitations that apply to review of extradition proceedings by means of a petition for a writ of habeas corpus apply to actions for declaratory judgments reviewing extradition.[84] The Second Circuit, in *United States v. Doherty*,[85] reiterated its position in

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75 *See* United States v. Doherty, 786 F.2d 491 (2d Cir. 1986). *See also infra* Sec. 1.6.

76 Collins v. Miller, 252 U.S. 364 (1920); United States v. Bishopp, 286 F.2d 320 (2d Cir 1961). *But see Bishopp*, 286 F.2d at 323–324 (Medina, J., concurring). The 1985 United States–United Kingdom Supplemental Extradition is the only exception to the non-applicability of extradition orders. Article 3(a) provides for a right to appeal within the meaning of 28 U.S.C. § 1291. *See Extradition of* Howard, 996 F. 2d 1320 (5th Cir. 1993).

77 Skaftourous v. United States, 759 F. Supp. 2d 354 (S.D.N.Y. 2011) (denying government's motion for reconsideration after the relator's successful challenge regarding improper service of the arrest warrant and running of the statute of limitations).

78 *Id.* at 362.

79 *See* Ch. X.

80 *See* Ch. IX.

81 For a related discussion of the right to an interlocutory appeal, see Ch. IX.

82 Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965).

83 28 U.S.C. § 2201 (1988); Fed. R. Civ. P. 57. *See also In re* Calmar, Inc., 854 F.2d 461 (Fed. Cir. 1988) ("Mandamus may be employed in exceptional circumstances to correct a clear abuse of discretion or usurpation of power by a trial court. Gulfstream Aerospace Corp. v. Mayacamus Corp., 485 U.S. 271, 108 S. Ct. 1133, 1143, 99 L. Ed. 2d 296 (1988); Mississippi Chem. Corp. v. Swift Agricultural Chem. Corp., 717 F.2d 1374, 1379 (Fed. Cir. 1983).") Mandamus is also appropriate to vacate a judgment. *See* United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 858 F.2d 534 (9th Cir. 1988). *See also* All Writs Act, 28 U.S.C. § 1651 (2000).

84 *Wacker*, 348 F.2d at 606 n.8 (citing Fernandez v. Phillips, 268 U.S. 311 (1925); Collins v. Miller, 252 U.S. 364 (1920); Charlton v. Kelly, 229 U.S. 447 (1913); Terlinden v. Ames, 184 U.S. 270 (1902)). In *Casey v. Dep't of State*, 980 F.2d 1472 (D.C. Cir. 1992), the court entertained an appeal from the U.S.District Court for the District of Columbia, which dismissed an action in the nature of a declaratory judgment challenging the Department of State's attempt to extradite one Lionel James Casey. The circuit court affirmed the district court's decision "on the alternative ground that it lacked subject matter jurisdiction over the dispute." *Id.* at 1472. There is nothing to indicate that the circuit court found the bases of the action inappropriate.

85 United States v. Doherty, 786 F.2d 491 (2d Cir. 1986).

Mackin[86] by holding that the government cannot use declaratory judgments as a means of appeal on a question of fact. However, the court appropriately found that the government (or the relator) may seek a declaratory judgment on a question of law in the course of the proceedings.[87]

Similarly, a writ of mandamus cannot be used as a means of review, or as a substitute or supplement to habeas corpus. However, it is an appropriate remedy in extradition cases where there has been a clear usurpation of power or abuse of discretion.[88] Thus, both special remedies can be used, as well as interlocutory appeals during any stage of the processing. These are appealable orders.

Because extradition proceedings are a judicial determination with a narrow scope, and because extradition is part of the power of the president to conduct foreign affairs—subject to the advice and consent of the Senate on the ratification of extradition treaties—there is no injunctive judicial remedy for the relator against the executive.[89] Thus a relator cannot seek a mandamus or injunction ordering the government to act or to refrain from acting within the scope of its direction.[90] There are no decisions concerning abuse of such discretion.

In 1981 the Second Circuit ruled in *Mackin*[91] that the government did not have a right to mandamus, stating:

> The Government's alternative petition for mandamus under 28 U.S.C. Section 1651 encounters, as an initial obstacle, the argument that issuance of the writ is not "necessary or appropriate in aid" of our jurisdiction since the Magistrate's decision is unappealable and we thus have no jurisdiction to aid. The Government replies in part that if we were to issue the writ and require the Magistrate to grant extradition, such a grant would almost certainly become the subject of a *habeas corpus* proceeding in the district court and its order in such a proceeding would be reviewable here under 28 U.S.C. Section 2253. Compare *Ex parte United States*, 287 U.S. 241, 53 S. Ct. 129, 77 L. Ed. 283 (1932) (Supreme Court has power to grant mandamus requiring a district court to issue a bench warrant for the arrest of an indicted defendant since a conviction would be reviewable by a court of appeals and, on *certiorari*, by the Supreme Court.)
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> We have considered somewhat similar questions in *United States v. Dooling*, 2d Cir., 406 F.2d 192, 197, *cert. denied*, 395 U.S. 911, 89 S. Ct. 1744, 23 L. Ed. 2d 224 (1969) and *United States v. Weinstein*, 2d Cir., 452 F.2d 704, 708–13 (1971), *cert. denied*, 406 U.S. 917, 92 S. Ct. 1766, 32 L. Ed. 2d 116 (1972). In *Dooling* we issued a writ to compel a district judge to sentence convicted defendants rather than to pursue a course, indicated by him, of dismissing the indictment upon grounds which were in part considered and rejected without leave to renew before

86 *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

87 *Doherty*, 786 F.2d at 499–500.

88 *See* Allen v. Schultz, 713 F.2d 105 (5th Cir. 1983); *In re Extradition of* Ghandtchi, 697 F.2d 1037 (11th Cir. 1983). *See also In re Requested Extradition* of Kirby, 106 F.3d 855 (9th Cir. 1996).

89 *See* Shapiro v. Secretary of State, 499 F.2d 527 (D.C. Cir. 1974); Wacker v. Bisson, 370 F.2d 552 (5th Cir.), *cert. denied*, 387 U.S. 936 (1967). *But see* United States v. Doherty, 615 F. Supp. 755, 760 (S.D.N.Y. 1985).

90 *Shapiro*, 499 F.2d 527. *See In re* Calmar, Inc., 854 F.2d 461 (Fed. Cir. 1988) (stating district court's abuse of discretion or usurpation of judicial power warranted writ of mandamus). The Ninth Circuit has recognized five factors as determinative of its decision to grant a writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she so desires, (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal, . . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

United States v. U.S. Dist. Ct. for the Cent. Dist. Cal., 858 F.2d 534, 537 (9th Cir. 1988).

91 *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

> trial by another district judge. We considered it not to be a fatal obstacle to issuance of the writ that the Government might not have been able to appeal if the judge had proceeded as he had intended, 406 F.2d at 198. In *Weinstein* we issued mandamus requiring a district judge to vacate an order dismissing an indictment after having entered a judgment of conviction although the Government could not have appealed under then existing law and the defendant obviously would not. We concluded "that the phrase 'in aid of their respective jurisdictions' should not be read so as to prohibit [courts of appeals] . . . from vacating orders, in actions generally subject to their supervision, that were beyond the power of the lower court to make, even though in the particular case there was no frustration of an appeal." 452 F.2d at 711. Quite recently the Third Circuit has upheld its power to issue a writ of mandamus to consider whether the District Court of the Virgin Islands lacked, as it thought, legal authority to convene an investigatory grand jury although no case arising from action of the putative grand jury was or, in the nature of things, could be before the court. *United States v. Christian*, 3rd Cir., 660 F.2d 892. We thus assume, at least *arguendo*, that mandamus could issue here if other tests with respect to that extraordinary remedy were met.
>
> We have discussed the standards governing issuance of the writ in a number of recent cases, e.g., *American Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 280–82 (2d Cir. 1967); *Investment Properties International, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 707 (2d Cir. 1972); *Kaufman v. Edelstein*, 539 F.2d 811, 816–19 (2d Cir. 1976); *National Super Spuds, Inc., v. New York Mercantile Exchange*, 591 F.2d 174, 181 (2d Cir. 1979); and *In re Attorney General of the United States*, 596 F.2d 58 (2d Cir. 1979). While some of these cases granted the writ and others denied it, all the opinions agree that mandamus is reserved for "exceptional cases," whatever that may mean, and, more informatively, that "the touchstones are usurpation of power, clear abuse of discretion and the presence of an issue of first impression." *American Express Warehousing, supra*, 380 F.2d at 283.
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> The only issue here raised by the government which might qualify under these standards is its claim that the Magistrate exceeded her jurisdiction by deciding whether the offenses for which Mackin's extradition was sought came within Article V(1)(c)(i) of the Treaty rather than deferring that decision to the executive branch. If she was correct in rejecting that contention, the case would not be appropriate for mandamus since there was nothing any more "extraordinary" in her decisions as to conditions in Northern Ireland in 1978 or as to the nexus between the offenses and what she found those conditions to be than there would be in any extradition case where the political offense exception was advanced and, whether right or wrong, she clearly did not abuse her discretion in deciding as she did.[92]

In *In re Extradition of Logan* the relator, who had been sought for extradition to Switzerland, sought a writ of mandamus. The original extradition request was withdrawn, but Logan wanted to be extradited even though Switzerland was no longer interested in his surrender from the United States. One can only assume that Logan's eagerness to be surrendered to Switzerland was an attempt to seek prosecution in a more favorable venue, as he was already imprisoned in the United States. However, the issue of mandamus raised the question of whether the decision to extradite is one that can be compelled by mandamus, because it is ultimately a discretionary decision with the executive branch of government.[93]

Injunctive relief may, however, be an appropriate remedy in some cases, such as when an extradition warrant fails to conform in its substance to the findings of a court otherwise authorizing extradition. Such relief may be had, as it would be necessary to enforce the rule of specialty, which requires conformity of the warrant to the findings of the court. There is, however, no decision on point; but the government cannot be enjoined from seeking extradition.[94]

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92 *Id.* at 130–132 (citations omitted).

93 *In re Extradition of* Logan, 97 Misc. No. 1, page 14 (RLE), 2001 U.S. Dist. LEXIS 183 (2001); Lo Duca v. United States, 943 F.3d 1100 (2d. Cir. 1996).

94 Casey v. Dep't of State, 299 U.S. App. D.C. 29, 980 F.2d 1472 (D.C. Cir. 1992).

Relators have filed various motions seeking a stay of their extradition. In *In re Extradition of Wepplo* the court granted the relator's motion to refrain from ruling on a Mexican extradition request pending outcome of his *amparo* action in Mexico.[95] This appears to be a case of first impression in U.S. federal courts, in which a stay was requested pending resolution of legal action in the requesting state.[96] The court considered the following factors:

1. whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

2. whether the applicant will be irreparably injured absent a stay;

3. whether issuance of the stay will substantially injure the other parties interested in the proceedings; and

4. where the public interest lies.[97]

The government objected to the stay but not to the above-mentioned factors, and did not directly address any of them.[98]

In its analysis the court reasoned that the first two factors weighed in favor of the relator, who argued that he would succeed on the *amparo* and be irreparably harmed as his extradition would moot his *amparo* action and subject him to trial based on an allegedly unconstitutional arrest warrant.[99] The court reasoned that issuance of the stay would not prejudice either the United States or Mexico, as a delay of 180 days pending resolution of the *amparo* was slight compared to the nearly three-year delay in the Mexican government's making the extradition request.[100] Last, the court reasoned that the public interest lay in staying the extradition pending the resolution of the *amparo* action, as the relator was also a U.S. citizen who should not have to remain in a Mexican prison when the charges could be resolved through the *amparo* action.[101]

Although the rule of non-inquiry remains present in the background of such an action, the court indirectly dealt with this issue by stating that the relator "is challenging the adequacy of his arrest warrant in Mexico, and is not asking the Court to review the city of Veracruz's compliance with its own criminal procedure or Mexican constitutional law, as was the issue in the case cited by the government."[102]

However, in a similar situation, a Peruvian relator's writ of prohibition, seeking a stay of the extradition process pending resolution of his habeas petition was denied where the court summarily affirmed the district court and magistrate judge's certification of extraditability.[103]

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95 *In re Extradition of* Wepplo, 2010 U.S. Dist. LEXIS 34493 (N.D. Ohio Apr. 7, 2010).

96 *Id.* at *3.

97 *Id.* at *3–*4.

98 *Id.* at *4, *6.

99 *Id.* at *7–*8.

100 *Id.* at *8.

101 *Id.* at *9.

102 *Id.* at *9–*10.

103 Medelius-Rodriguez v. Strickland, 2007 U.S. App. LEXIS 24173 (4th Cir. Oct. 15, 2007). The court upheld the district court and magistrate judge's findings that probable cause existed, that the offenses charged fell within the treaty, that the political offense exception did not apply, and that the extradition would not violate the relator's constitutional rights. *Id.* at *3–*4.

1.6.1. The Declaratory Relief Judgment Act's Application to Extradition

As stated above, declaratory judgments are seldom resorted to in extradition proceedings. Some exceptional cases may, however, warrant them. The primary purpose of such a judgment under 28 U.S.C. § 2201 *et seq.* is to determine or declare a right not already declared or established in law, whether with respect to treaty interpretation, statutory law, or judicial interpretation of a statute. It is also the means by which to establish or have declared rights that have been improperly adjudicated. A declaratory judgment may also grant relief when the court has jurisdiction.

As most of these legal issues can be determined consensually in the course of extradition proceedings, whether at the extradition hearing or by means of a petition for a writ of habeas corpus, there is seldom the need to resort to the more extraordinary means of seeking a declaratory judgment. The government, in the case of *United States v. Doherty*,[104] sought review by means of a declaratory judgment of a district court's denial of extradition. In *Doherty* the Second Circuit held:

> The Government does not suggest that in adopting the DJA [Declaratory Judgment Act] Congress had even remotely in mind the small corner of the law governing procedures in extradition—a recondite subject with which only a handful of members could have been familiar and about which even that handful were surely not thinking at the time. It is true enough that, as the Government urges, words used by Congress have been properly held to cover situations that its members had not considered. But it does not follow that because the words of a statute have sufficient generality to include a particular subject, courts must jump to the conclusion that Congress meant to cover it. What we must decide is whether Congress, had it reflected in 1934 on the problem here presented, would have wished the DJA to upset the remedial balance with respect to acts of extradition magistrates that had been achieved over more than seventy-five years and was to continue for fifty more.
>
> We find no sufficient reason to think that it would have and, as we shall see, many reasons to think that it would not. The existing law on extradition procedure had been quite recently restated by the Supreme Court in *Collins v. Loisel*, 262 U.S. 426, 43 S. Ct. 618, 67 L. Ed. 1062 (1923), and we have been pointed to no contemporaneous congressional expression of dissatisfaction with it. Of course, we cannot know, but it seems much more likely to us that if Congress had thought about the matter in 1934 it would have decided to leave extradition procedures as they were and would have wished, if events should later prove a change to be desirable, to have this take the form of a comprehensive revision of the kind we have seen introduced in Congress in the past five years. In a brief filed only a week before the present case was argued, the Government urged in support of an extradition request before a magistrate in the Eastern District of Virginia that "[i]nternational extradition proceedings conducted pursuant to Title 18, United States Code, Section 3181, *et seq.* and the applicable treaty. . .are *sui generis,* and are controlled by a self-contained body of law. The uniqueness of the body of law dealing with international extradition can not be overemphasized." Government's Brief at 2, *In re Gordon*, Magistrate's Docket No. 85-46-S (E.D. Va. Nov. 27, 1985).[9] So it was when the DJA was adopted and so, we think, Congress would have desired it to remain thereafter unless and until Congress spoke directly to the point.

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[9] The proposition that extradition proceedings are *sui generis* finds ample support in the case law. *See, e.g., Eain v. Wilkes*, 641 F.2d 504, 508-09 (7 Cir.), *cert. denied*, 454 U.S. 894, 102 S. Ct. 390, 70 L. Ed.2d 208 (1981); *Hooker v. Klein*, 573 F.2d 1360, 1367–68 (9 Cir.), *cert. denied*, 439 U.S. 932, 99 S.Ct. 323, 58 L. Ed. 2d 327 (1978); *Jhirad v. Ferrandina,* 536

104 United States v. Doherty, 786 F.2d 491 (2d Cir. 1986).

F.2d 478, 482 (2d Cir.), *cert. denied*, 429 U.S. 833, 97 S. Ct. 997, 50 L. Ed. 2d 98 (1976); *First Nat'l City Bank v. Aristeguieta*, 287 F.2d 219, 223 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49, 84 S. Ct. 144, 11 L. Ed. 2d 106 (1963); *In re Vandervelpen*, 14 Blatch. 137, 139 (S.D.N.Y. 1877). To take only two examples, the Federal Rules of Evidence and of Criminal Procedure do not apply in extradition hearings, F.E.D. 1101(d)(3); F.R.Cr.P. 54(b)(5), and the extraditee's grounds for opposing the request for extradition are severely limited, *see, e.g., Collins v. Loisel*, 259 U.S. 309, 315–17, 42 S. Ct. 469, 471–72, 66 L. Ed. 2d 956 (1922); *Hooker*, 573 F.2d at 1368. The Government contends that simply because extradition proceedings are *sui generis* is not a sufficient reason to hold Judge Sprizzo's decision unreviewable under the DJA. This is to miss the point. That extradition law is and always has been considered *sui generis* merely suggests that Congress would not have wished a broad, all-purpose remedial statute like the DJA to work the radical changes in extradition procedures that the Government here purposes.

The use to which the Government would put the DJA does not fit comfortably within its purpose or within the language of § 3184. The purpose of the DJA has been expressed a variety of ways: "Essentially, a declaratory relief action brings an issue before the court that otherwise might need to await a coercive action brought by the declaratory relief defendant," *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 539 (9th Cir. 1985); the fundamental purpose of the DJA is to " 'avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued'," *Luckenbach Steamship Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963) (quoting *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854 (7th Cir.), *cert. denied,* 300 U.S. 680, 57 S. Ct. 673, 81 L. Ed. 884 (1937)); the primary purpose of the DJA is to have a declaration of rights not already determined, not to determine whether rights already adjudicated were adjudicated properly, *Hurley v. Lindsay*, 207 F.2d 410, 411 (4th Cir. 1953); the declaratory judgment procedure "creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it," Wright, *The Law of Federal Courts* § 100 at 671 (4th Ed. 1983); the declaratory judgment procedure "enable[s] a party who is challenged, threatened or endangered in the enjoyment of what he claims to be his rights, to initiate the proceedings against his tormentor and remove the cloud by an authoritative determination of the plaintiff's legal right, privilege and immunity and the defendant's absence of right, and disability," Borchard, *Declaratory Judgments* 280 (2d ed. 1941). *See generally id.* at 277–92 (listing purposes of declaratory judgments).

None of these formulations fits what the Government is seeking here. To be sure, the Government has sought to veil the true nature of the present action by characterizing it as an attempt to secure a "review" of Judge Sprizzo's decision and asking that the declaratory judgment court, if it reads the political offense exception more narrowly than Judge Sprizzo did, should *itself* issue the certificate that §3184 makes a necessary precondition to extradition. However, since the plain language of § 3184 forbids the latter, the utmost that the declaratory judgment court could do would be to define the political offense exception in a manner that would have preclusive effect when the Government went before another extradition magistrate. It is that later proceeding, not Judge Sprizzo's ruling, at which the present action is truly aimed.

None of the formulations cited above suggest that the DJA was intended to enable the Government, here acting as the prosecution in proceedings that the Supreme Court and we have referred to as being of a criminal nature, *see Grin v. Shine*, 187 U.S. 181, 187, 23 S. Ct. 98, 101, 47 L. Ed. 130 (1902); *Rice v. Ames*, 180 U.S. 371, 374, 21 S. Ct. 406, 407, 45 L. Ed. 577 (1901); *First National City Bank v. Aristeguieta*, 287 F.2d 219, 226 n.7 (1960), *vacated at moot*, 375 U.S. 49, 84 S. Ct. 144, 11 L. Ed. 2d 106 (1963), to arm itself with a favorable ruling on the law before starting a new proceeding. The Government has no need of declaratory relief to head off a threatened suit by Doherty that would impose a detriment on it; on the contrary, it is the Government that wants to impose the detriment on Doherty. It seeks to use declaratory

judgment as a sword rather than a shield. Having tried and failed to obtain a certificate for Judge Sprizzo, it fears that it may lose when it tries again before another extradition magistrate and seeks insurance in the form of a declaration of law by a district court and ultimately by this court or even the Supreme Court. As Justice Jackson remarked, "the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review." *Public Service Commission v. Wycoff Co.,* 344 U.S. 237, 246, 73 S. Ct. 236, 241, 97 L. Ed. 291 (1952). The Government has not cited, and we have not been able to find, a single case in which a declaratory judgment was used in a manner resembling that which the Government proposes here.

Against all these considerations, the Government relies on *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965), in which a divided court of appeals held that an extraditee could secure review of the grant of certificate by an action for a declaratory judgment. The Government argues that what is sauce for the goose is sauce for the gander. It also relies on cases in which the courts have sustained use of the DJA for attacks on administrative action.

Wacker, awaiting extradition to Canada for violations of its securities laws, had already brought two unsuccessful petitions for *habeas corpus*, from the results of which he had not appealed. He then brought what Judge Wisdom called an "off-beat declaratory judgment action attacking the validity of an unappealable extradition order." 348 F.2d at 604. Judge Wisdom added that "[s]ince Wacker is in custody," as extraditees inevitably are since § 3184 Proceedings begin with an arrest, "he might just as well have cast the action in the form of an application for habeas corpus." *Id.* But evidently tired of *habeas*, Wacker sued the Consul General of Canada in New Orleans under the DJA, advancing "all possible, and some impossible, reasons for the invalidity of the extradition." *Id.* If Wacker thought that by doing this he would achieve a broader scope of review than in *habeas*, he failed; the majority held that "the scope of review of an extradition hearing should be the same whether the extraditee chooses habeas corpus or declaratory judgment." *Id.* (footnote omitted). Nevertheless, the majority held that the action for a declaratory judgment would lie. Judge Rives dissented, making the commonsensical observation:

> The majority holds that the scope of review in a declaratory judgment action is the same as in a habeas corpus proceeding. The point of holding that the Declaratory Judgment Act has opened a backdoor to review of an extradition order escapes me when the front door provided by the Great Writ grants access to the same court of justice and provides the same scope of relief.

Id.

As Judge Haight noted below, "Ultimately Wacker's procedural victory availed him nothing." 615 F. Supp. at 759 n. 4. The *Wacker* majority also recognized this, remarking that "[u]nfortunately for Wacker, he is no better off in a declaratory judgment action than in his habeas corpus proceedings. . . Indeed, he may be worse off." 348 F.2d at 610. The court directed that

> [i]f the district court should conclude that Wacker has had a full and fair hearing in the two habeas proceedings on those issues in this case which are serious, there is no necessity for holding any additional evidentiary hearing.

Id. at 611.[105]

. . .

Fn. 14. In *Sayne v. Shipley,* 418 F.2d 679 (5th Cir. 1969), *cert. denied*, 398 U.S. 903, 90 S. Ct. 1688, 26 L. Ed. 2d 61 (1970), where the challenge to extradition was by *habeas corpus*, the court mentioned in a footnote, citing *Wacker,* that review could also have been had by declaratory judgement. *Id.* at 685 n. 17.[106]

105 *Id.* at 497–501. (citations omitted, except n.9.).

106 *Id.* at 501.

In rejecting the government's claim, the Second Circuit did not foreclose resorting to the Declaratory Judgment Act (DJA) where appropriate. For example, such a case could arise when prosecution in the federal or state courts violates the principle of "specialty"[107] and the relator is denied the right to argue the issue, or to have the charges conform to the extradition order issued by the original requested state. One can imagine a situation where state prosecution is to commence on charges not included in the extradition order. Another situation could arise when the original requested state places a condition on extradition (such as non-applicability of the death penalty) and the U.S. government accepts the limitation, but the prosecuting state proceeds along a track used only for death penalty cases. One can also imagine a situation where a "protest" is filed by the original requested state after the extradition order has been issued because the state discovers that it was induced by the U.S. government to believe certain facts that it later discovers not to be true. Whether such a "protest" after the fact can be viewed as a limiting condition that would have the same effect as if it had been issued ab initio is still a question of first impression that has not yet been adjudicated before a U.S. court. Last, there may be questions of law that may have been improperly or insufficiently raised by the relator at the hearing or habeas levels, and that may best be decided as questions of law under the DJA, even though habeas can always be resorted to but obviously with much greater limitations. One such case could well be the *United States v. Badalamenti*,[108] the highly publicized "Pizza Connection" case, where "specialty" was at issue with respect to Gaetano Badalamenti, who was extradited from Spain, and received short shrift treatment at the trial and on habeas review.

Resort to the DJA presents the danger that the government or the relator can use it as an alternative means to adjudicate legal issues contextually within the extradition proceedings as the court in *Doherty* held. Sometimes, however, the interests of justice and judicial economy may be better served by resorting to these means. Exceptional situations may sometimes need extraordinary means to redress or prevent a wrong.

2. Prosecutorial Misconduct as Grounds for Review of the Proceedings

Prosecutorial misconduct is treated the same way in extradition proceedings as it is in criminal cases, even though extradition is deemed sui generis.[109] When a prosecutor engages in misconduct that results in an unfair result, trial reversal of a conviction may be warranted.[110] In *In re Singh* a district court found that "[a]bsent some showing of personal bias or prejudice against the defendants, recusal was unwarranted,"[111] based on the clear evidence that the prosecutor had "manufactured threats to herself and the Court."[112] Accordingly, the misconduct of the prosecutor afforded the defendants expanded discovery rights of the affidavits used by the prosecutor to establish probable cause.[113]

Note that, as in the context of general criminal law, the right of a defendant to the reversal of a conviction on the grounds of prosecutorial misconduct is circumscribed by the general requirement that a showing is made of serious prejudice that calls into question the validity of the verdict. It seems clear that if the probable cause determination in extradition proceedings can be proven independently of the tainted evidence, the determination will be deemed valid.

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107 *See* Ch. VII, Sec. 6.

108 United States v. Badalamenti, 614 F. Supp 194 (S.D.N.Y. 1985).

109 *See, e.g.*, *In re* Singh, 123 F.R.D. 140, 147 (D. N.J. 1988) (focusing on the severity of any constitutional violations to determine whether the misconduct had biased the judicial officer).

110 United States v. Hasting, 461 U.S. 499, 505–506 (1983).

111 Singh, 123 F.R.D. at 140.

112 *Id.* at 142.

113 *Id.* at 165.

The range of possible prosecutorial misconduct varies significantly. It includes misrepresentations or concealment of certain facts, suppression of exculpatory evidence, nondisclosure of questions of law and fact that may inure to the benefit of the relator, or the presentation of prejudicial and inflammatory material designed to unduly influence the court.

In *United States v. Abello-Silva*[114] two issues of prosecutorial misconduct arose. The first related to the prosecution's suppression of evidence that was favorable to the relator, and that had to be disclosed as required by *Brady v. Maryland*.[115] The disclosure of exculpatory evidence must, however, be determined on the basis of its materiality as well.[116] In such cases, the circuit court may review de novo the trial court's decision as to both the exculpatory nature of the evidence that was concealed and its materiality.[117] The court in *Abello-Silva*, in reliance upon *United States v. Bagley*,[118] found that the exculpatory evidence was material only if there is reasonable probability that had the evidence been disclosed to the defense the result in the proceedings would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The second issue of prosecutorial misconduct in *United States v. Abello-Silva* involved inflammatory and prejudicial statements, which were alleged to have denied the accused the right to a fair trial.[119] The court in *Abello-Silva*, in reliance upon other cases, evaluated the record to determine whether improper references of an inflammatory and prejudicial nature were "harmless beyond a reasonable doubt."[120] The court denied the claim. It should be noted, however, that extradition hearings are before a judge, and unlike criminal cases before a jury the level of impropriety must be very serious with respect to prejudicial statements, as the perceived risk of tainting a judge is lower than with a jury.

This is not the case with concealment of evidence or misrepresentation of facts, as the Sixth Circuit held in *Demjanjuk v. Petrovsky*.[121] During the course of years of litigation in *Demjanjuk*, the relator was denaturalized and extradited to Israel on the basis of an erroneous identification about which the U.S. government apparently knew. The court held:

> If Moscowitz did not read the reports, knowing he planned to introduce the video deposition at the trial, this failure constituted "reckless disregard for the truth."
>
> . . . OSI was not a large office. We can find no excuse for such casual treatment of information that could cast doubt on the validity of important testimony. Moscowitz was present at the first session with Horn, but testified that he looked away during the actual identification, leaving that to the investigator and historian. He did this, he said, in order to avoid the possibility

114 United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991).

115 Brady v. Maryland, 373 U.S. 83 (1963).

116 *See* United States v. Bagley, 473 U.S. 682 (1984). *See also* United States v. Siriprechapong, 181 F.R.D. 416 (N.D. Cal. 1998); United States v. Agurs, 427 U.S. 97 (1976); United States v. Buchannan, 891 F.2d 1436 (10th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990).

117 *Abello-Silva*, 948 F.2d at 1180. *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000).

118 United States v. Bagley, 473 U.S. 682 (1984); United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987); United States v. Peltier, 609 F. Supp. 1143 (D. N.D. 1985). *See also In re* Singh, 123 F.R.D. 108 (D. N.J. 1988). In the supplemental opinion of September 11, 1987 in *Singh*, the court seemed to raise the question about the applicability of *Brady v. United States* and relied on *Merino v. United States Marshal*, 362 F.2d 5 (9th Cir. 1963), *cert. denied*, 377 U.S. 997 (1964); however, the district court's decision is not persuasive as to the *Brady* right in light of *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

119 *See* Fed. R. Crim. P. 52(b); United States v. Young, 470 U.S. 1 (1985).

120 *Abello-Silva*, 948 F.2d at 1182. *See also* Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000).

121 Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

> of being called as a witness at the denaturalization trial when the deposition to be taken a few months later would be introduced. Not having witnessed the identification himself, we can find no reasonable explanation in this immense record for his failure to read and acknowledge the importance of the contemporaneous reports of the trained investigator and historian, nor can we understand how Sinai determined that two reports addressed to him should be routed to Moscowitz without even reading them.[122]

It should be noted that the Supreme Court of Israel acquitted Demjanjuk of the charges for which he was extradited and allowed his return to the United States. Had he not been acquitted or had the requested state refused to allow him to return to the United States, the basis of the prosecutorial misconduct would have had to have been enforced by the executive branch. Whether such a decision invalidating the extradition order would have been sufficient to compel the executive branch to seek and obtain the return of the former relator has never been determined in the United States.

Another case of prosecutorial misconduct was decided by the Seventh Circuit in *Lindstrom v. Graber*,[123] where U.S. marshals, at the direction of an Assistant United States Attorney (AUSA), surrendered the relator to Norwegian agents at Chicago's O'Hare Airport even though a judge of the Seventh Circuit had issued a stay of execution of the extradition order. This shocking behavior by an AUSA led the Seventh Circuit to issue a formal notice of disciplinary proceeding pursuant to Federal Rule of Appellate Practice 46(c). Petitioner's appeal and stay were, however, deemed as being moot as the petitioner had already been removed to Norway. This decision was followed by another learned opinion of Chief Judge Richard Posner, joined by Circuit Judges Richard Cudahy and Diane Wood in *In re Attorney Lori E. Lightfoot*,[124] wherein the Court held:

> Defined by the Supreme Court as "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice," *In re Snyder,* 472 U.S. 634, 645, 86 L. Ed. 2d 504, 105 S. Ct. 2873 (1985), conduct unbecoming within the meaning of Rule 46(c) has generally been understood to involve significant elements of aggravation, such as deliberately misleading the court or displaying egregious misjudgment. *Cleveland Hair Clinic v. Puig,* 200 F.3d, 1063, 1069–70 (7th Cir. 2000); *Mays v. Chicago Sun-Times,* 865 F.2d 134, 140 (7th Cir. 1989); *In re Jafree,* 759 F.2d 604 (7th Cir. 1984) (*per curiam*); *Braley v. Campbell,* 832 F.2d 1504, 1508–10 and n. 5 (10th

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122 *Id.* at 352. In *Wang v. Reno*, 81 F.3d. 808 (9th Cir.1995) the circuit court recalled the following prosecutorial misconduct cases:

> *Demjanjuk v. Petrovsky,* 10 F.3d 338, 355 (6th Cir.1993), *cert. denied,* 513 U.S. 914, 115 S. Ct. 295, 130 L. Ed. 2d 205 (1994) (prosecuting attorneys engaged in prosecutorial misconduct when they recklessly disregarded their obligation to provide information specifically requested by detainee, thereby endangering detainee's defense). See also *United States v. Kojayan,* 8 F.3d 1315, 1324 (9th Cir.1993) ("It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.") (citing instances of prosecutorial misconduct). In so doing, the government failed in its duty to "win fairly, staying well within the rules" and, more importantly, to "serve truth and justice first." *Kojaya*n, 8 F.3d at 1323. The district court found that the government, in this case, strayed from its responsibility "to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

Id. Thus,

> [i]n a situation like this, the judiciary—especially the court before which the primary misbehavior took place—may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events. *Kojayan*, 8 F. 3d at 1325.

Wang, 81 F.3d. at 821.

123 Lindstrom v. Graber, 203 F.3d 470 (7th Cir. 2000).

124 *In re* Lightfoot, 217 F.3d 914 (7th Cir. 2000).

Cir. 1987) (*en banc*); *In re Bithoney,* 486 F.2d 319, 322-34, 325 (1st Cir. 1973). Granted, negligence has been deemed sufficient in a number of cases. *E.g., In re Hendrix,* 986 F.2d 195, 201 (7th Cir. 1993); *DCD Programs, Ltd. v. Leighton,* 846 F. 2d 526 (9th Cir. 1988) (*per curiam*). But these are cases involving misrepresentations, omissions, or failures of inquiry, rather than poor judgment in applying legal principles to facts; and without circumstances of aggravation, poor judgment is not professional misconduct. We didn't find circumstances of aggravation in Safford and Toledo's advice, and so we didn't institute disciplinary proceedings against either of those lawyers.

The motion filed by attorney Lightfoot, a motion that she prepared (albeit with advice from Safford) and signed, presents a more troublesome issue. The trouble lies in the fact that the motion was misleading. It is one thing for a lawyer to advocate an unreasonable position to a court; usually the court can prevent any serious harm to anyone just by rejecting the position. It is another thing for a lawyer to defeat an opposing party's claims by misleading the court, whether by a misrepresentation or by a pregnant omission. That is misconduct, *In re Cook,* 49 F.3d 263 (7th Cir. 1995); *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999); *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 453–61 (4th Cir. 1993); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1540–41, 1544–46 (11th Cir. 1993), and that is what happened here. To the extent, unilluminated by the record, that Safford was (as Lightfoot argues) complicit in Lightfoot's violation of the duty of candor, the fact that Safford is Lightfoot's superior would not get Lightfoot off the hook. Reliance on a superior's orders is a defense to a charge of misconduct only when reasonable, *In re Howes,* 1997 NMSC 24, 940 P.2d 159, 164–65, 123 N.M. 311 (N. Mex. 1997) (*per curiam*); ABA Model Rule of Professional Conduct 5.2, comment [2] (1995), and it is not reasonable to believe that one is authorized to mislead a court. *People v. Casey,* 948 P.2d 1014, 1016–17 (Colo. 1997) (*per curiam*).[125]

Anyone reading this motion would suppose that the government understood the stay to be a prohibition against Lindstrom's being removed from the United States. Otherwise there would be no reason to offer his imminent departure as a reason not for vacating the stay as moot, but for lifting it so that he could be removed on schedule. The implication was that unless the stay was lifted the Norwegians could not carry off Lindstrom on the 5:00 p.m. flight. If the stay did not have that effect and thus was going to become moot in 20 minutes (if it wasn't moot already), there would be no reason to request time for a further response should the motion be denied. Yet the motion made that request. The motion thus created a thoroughly false impression of the government's position, an impression that could not but cause Judge Rovner to believe that unless she vacated the stay Lindstrom would remain in the United States until the merits of his appeal could be considered. The impression was false because we know that the Justice Department was proceeding on the premise that the stay which Judge Rovner had issued did not stay the removal of Lindstrom from the United States—the stay had no effect, was moot, would not prevent the 5:00 p.m. departure. Had Judge Rovner received timely notice that her stay was being so interpreted by the officials to whom it was directed, she would no doubt have issued a further order making clear that the stay was a stay of removal and not merely of some metaphysical act of "extradition" that had occurred hours before in the basement of the federal courthouse. Had Lightfoot's motion informed the court that unless it took further action Lindstrom would be on his way to Norway within minutes, Judge Rovner might have issued an order directly to the airline, and the order might have been timely; for the motion was filed at 4:40, and the plane didn't take off until 5:45. Of course, it would have been much better had Lightfoot informed the court of the Justice Department's interpretation of the stat [sic] much earlier; for remember that she learned before 3:00 p.m. that the stay had been issued.

For a government lawyer to file with a court a misleading statement the effect of which is to moot a petition for habeas corpus is professional misconduct. Lightfoot's motion was bound to

125 *Id.* at 916–917.

> lull Judge Rovner into thinking that the stay had had the intended effect of preventing Lindstrom's appeal from becoming moot.[126]
>
> We are troubled, finally, by the U.S. Attorney's request that we "depublish" our previous decision. Even if we agreed with him, as we do not, that attorney Lightfoot should not be disciplined, he has presented no reasons for supposing that our decision contained any error. We did not say that Lightfoot had engaged in conduct unbecoming a member of the bar, but only that there was a sufficient likelihood of this to require a disciplinary proceeding; and nothing in the U.S. Attorney's submission suggests that this "probable cause" finding was erroneous. The request to vacate our decision, which we of course deny, suggests to us that the U.S. Attorney still does not appreciate the gravity of the situation demonstrated by the uncontested facts, which reveal that the Justice Department's failure to equip its attorneys with the necessary expertise to opine on difficult issues relating to extradition precipitated the filing of a misleading motion by the Department that caused this court to lose jurisdiction over an appeal by a person who claims that he had been ordered extradited in violation of law.[127]

The Ninth Circuit recently dealt with the issue of misrepresentations by U.S. officials to foreign officials in *United States v. Struckman*.[128] Struckman was a U.S. citizen who fled to Panama to avoid charges of tax evasion and conspiracy to defraud the United States.[129] United States and Panamanian authorities chose to remove Struckman from Panama via a process of disguised extradition through visa revocations and denials rather than formal extradition proceedings.[130] The regional security officer at the U.S. embassy in Panama City, without a factual basis for the claims, told Panamanian officials that Struckman was attempting to perpetrate the same fraud in Panama he successfully perpetrated in the United States.[131] When notified by Panamanian National Police that they had captured someone matching Struckman's description, the same regional security officer told the police that Struckman had been sentenced in the United States, even though Struckman had never been tried on the charges.[132]

The court entertained a challenge to personal jurisdiction under the exception to the *Ker-Frisbie* doctrine for the U.S. engaging in " 'misconduct of the most shocking and outrageous kind' to obtain his presence."[133] In its analysis under the *Ker-Frisbie* doctrine, the Ninth Circuit stated:

> We are not prepared to say that blatant lies to a foreign government that induce the foreign government to transfer a defendant to the United States when it otherwise would not could never amount to conduct so shocking and outrageous as to violate due process and require dismissal of pending criminal proceedings in the United States.[134]

Nevertheless, the Ninth Circuit declined to apply the government misconduct exception, reasoning that the Panamanian government did not rely on the embassy official's misrepresentations to remove Struckman, and accordingly Struckman was unable to show prejudice from the misstatements.[135] The court did find the "lies told . . . to Panamanian officials . . . troubling," but reviewed the facts in the light most favorable to the government and found no violation of the *Ker-Frisbie* doctrine.[136]

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126 *Id.* at 917–918.

127 *Id.* at 919.

128 United States v. Struckman, 611 F.3d 560 (9th Cir. 2010).

129 *Id.* at 564.

130 *Id.* at 565–566.

131 *Id.* at 566.

132 *Id.*

133 *Id.* at 571, 573.

134 *Id.* at 574.

135 *Id.*

136 *Id.*

It is unclear what relief may be available to a relator subject to an extradition based on prosecutorial misconduct. The Fourth Circuit considered whether a relator could pursue a *Bivens* action for malicious prosecution under the Fourth Amendment based on an alleged "wrongful extradition."[137] In *Snider v. Lee*, the relator was extradited to South Korea based on the relator's confessions that the relator alleged were coerced.[138] The relator confessed to having murdered a fellow American exchange student in South Korea after meeting with FBI agents who told her, among other things, that there were cases where foreign nationals who killed Korean citizens received light sentences, and that the investigation showed that she murdered the American exchange student.[139] The relator signed a written statement specifically noting that she had not been promised anything or threatened by the FBI agents.[140] The relator first claimed that her confession was coerced at the extradition hearing, and stated that she had not retracted it because she was unaware that retraction was an option.[141] The relator was ultimately extradited to South Korea, in large part, based on her confession.[142]

The relator was ultimately acquitted and released from Korean custody approximately four years after the extradition hearing, after which she commenced her *Bivens* action.[143] At issue on appeal was whether the FBI agent accused of coercing her confession was protected from the civil damage action by qualified immunity. Under *Bivens* a government official has qualified immunity where either "the facts do not make out a violation of a constitutional right or if the right was not clearly established at the time."[144] Of all the relator's claims in her *Bivens* action, only the claim for malicious prosecution was not time barred.[145] Although the court expressed reservation as to the existence of a constitutional right to be free from "malicious prosecution," it posited that "if there is such a right, the plaintiff must demonstrate both an unreasonable seizure and a favorable termination of the criminal proceeding flowing from the seizure."[146] The court reasoned that the relevant criminal proceeding was the extradition hearing rather than the criminal proceedings in Korea, as the Supreme Court stated in *United States v. Balsys* that, "criminal prosecution *by a foreign government* was nonetheless not subject to U.S. constitutional guarantees."[147] As the extradition hearing resulted in the relator's extradition, she could not establish malicious prosecution because the prosecution was vindicated, and the FBI agent was entitled to qualified immunity as the facts did not make out a constitutional right.[148]

The concurring opinion by Judge Frederick Stamp illustrates some of the questionable conclusions reached by the majority opinion. Judge Stamp reasoned that:

> the majority opinion states that Snider was seized by United States law enforcement officials pursuant to an arrest warrant issued on the basis of the Korean government's extradition request. In the majority's view, the sole purpose of the arrest was to hold an extradition hearing. This

137 Snider v. Seung Lee, 584 F.3d 193 (4th Cir. 2009).

138 *Id.* at 195.

139 *Id.* at 196–197.

140 *Id.* at 197.

141 *Id.*

142 *Id.*

143 *Id.* at 198.

144 *Id.*

145 The relator attempted to argue that the government's conduct "violated her rights under the Fourth and Fifth Amendments to be free from unreasonable seizures (including false arrest and false imprisonment), coercion leading to her confessions, the failure of government officials to intervene in the face of wrongful conduct, denial of counsel, and malicious prosecution (alleged as 'wrongful extradition')." *Id.* at 198.

146 *Id.* at 199.

147 *Id.* at 199–201.

148 *Id.* at 201.

seems to me an overly narrow characterization of the reasons underlying Snider's seizure. Certainly, Snider was arrested and ordered to appear before a magistrate judge for an extradition hearing, but the extradition hearing was merely a means of prosecuting the broader criminal action against Snider. Thus, I believe the purpose of Snider's seizure was to determine whether the criminal prosecution should proceed by ascertaining whether Snider was extraditable. In other words, the purpose of the arrest was to advance the prosecution toward its termination (be it favorable or unfavorable). At the conclusion of the extradition hearing, the proceedings against Snider did not end. She was detained, extradited to Korea, tried, and ultimately acquitted. Therefore, it seems to me that the extradition hearing was simply one aspect of the broader purpose of Snider's arrest—that is, the prosecution of the murder charge against her.

Where a criminal prosecution terminates in favor of a defendant who, as a result of the criminal proceedings, has suffered a deprivation of liberty without probable cause, a Fourth Amendment "malicious prosecution" cause of action will lie. As noted above, a favorable termination can occur in one of many ways. For example, had the magistrate judge concluded that Snider was not extraditable for lack of probable cause, the proceedings would have terminated in her favor. However, acquittal is also a favorable termination. Snider was acquitted. That her acquittal was effected under the authority of the Korean government is not as significant as the fact that the criminal proceedings terminated in her favor.

Also, the majority's opinion does not seem to me to acknowledge the circumscribed purpose of an extradition hearing and the limited ability of a defendant to challenge the evidence presented against him or her in such a proceeding. The following excerpt from a concurring opinion in *Ordinola v. Hackman,* 478 F.3d 588, 608–609 (4th Cir. 2007), is instructive:

> The extradition hearing, of course, "is not . . . in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him." *LoDuca* [*v. United States,* 93 F.3d 1110, 1104 (2d Cir. 1996)] (quoting *Benson v. McMahon,* 127 U.S. 457, 463 (1888)). Stated differently, the hearing is "not designed as a full trial" but as a means of "inquir[ing] into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country." *Per-off v. Hylton,* 542 F.2d 1247, 1249 (4th Cir.1976); see *Eain* [*v. Wilkes,* 641 F.2d 504, 508 (7th Cir. 1981)] ("It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing . . . . That is the task of the . . . courts of the other country.").
>
> Although the extradition statute does not mention "probable cause" and instead directs the extradition court to determine whether there is "evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," 18 U.S.C.A. § 3184, courts have uniformly interpreted the statutory language to require a finding of "probable cause." *See Vo* [*v. Benov,* 447 F.3d 1235, 1237 (9th Cir. 2006)]; *Sidali* [*v. INS,* 107 F.3d 191, 195 (3d Cir. 1997)]. Thus, "[t]he probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings," meaning that *the magistrate judge's role is merely "to determine whether there is competent evidence to justify holding the accused to await trial." Hoxha* [*v. Levi,* 465 F.3d 554, 561 (3d Cir. 2006)] (internal quotation marks omitted). In that vein, the evidence considered by the magistrate as part of an extradition hearing "need not meet the standards for admissibility at trial" and "may be based upon hearsay in whole or in part." [*United States v.*] *Kin-Hong,* 110 F.3d [103,] 120 [(1st Cir. 1997)] (internal quotation marks omitted).
>
> Not only are the admissibility standards relaxed, but the alleged fugitive's ability to challenge the government's evidence or to submit evidence of his own at the extradition hearing is also significantly limited. For example, the fugitive has no right to crossexamine witnesses, *see Oen Yin-Choy v. Robinson,* 858 F.2d 1400, 1406-07 (9th Cir. 1988), or to introduce "contradictory evidence" that conflicts with the government's probable cause evidence, *see Hoxha,* 465 F.3d at 561. By contrast, "explanatory evidence" relating to the underlying charges is admissible. *See Koskotas v. Roche,* 931 F.2d 169, 175 (1st Cir. 1991).

> If the extradition judge concludes that there is, in fact, probable cause, he "is required to certify the individual as extraditable to the Secretary of State." *Vo,* 447 F.3d at 1237 (internal quotation marks omitted).

Ordinola v. Hackman, 478 F.3d 588, 608–609 (4th Cir. 2007) (Traxler, J., concurring) (emphasis added; footnote omitted). As the concurring opinion in *Ordinola* observes, the purpose of an extradition hearing is merely to make a probable cause determination, not to conduct a trial on the merits of the criminal charges. Accordingly, the procedural safeguards attending a criminal trial are absent from an extradition hearing. Consequently, evidence which might be excluded at trial, including hearsay evidence, is admissible at the extradition hearing; the accused is prohibited from challenging the government's evidence and from submitting evidence on his or her own behalf; and the accused has no right to cross-examine witnesses. These conditions set a high bar for obtaining a favorable termination at the extradition stage of proceedings. In a case such as this one, where the evidence supporting probable cause was obtained in the United States by United States federal officials, it seems unreasonable to limit the favorable termination element of a malicious prosecution claim to a favorable result in the extradition hearing, particularly in light of the narrow purpose of such a hearing and the limited ability of the accused to challenge the evidence presented against him or her at that proceeding.

I would also note that, for purposes of a malicious prosecution claim, the prosecution was arguably initiated in the United States. Although formal charges were brought in Korea, the interrogation yielding the allegedly false confession to establish probable cause may properly be considered to have initiated prosecution because it resulted in the issuance of an arrest warrant and, consequently, Snider's arrest in this country. *See Reed v. City of Chicago,* 77 F.3d 1049, 1053 (7th Cir. 1996) (finding that a wrongful arrest could conceivably constitute the first step towards a malicious prosecution claim). Because the criminal proceedings could be deemed to have been initiated in the United States, I believe that it should be recognized that Snider's acquittal was a favorable termination of the criminal proceedings against her, even though the termination occurred in Korea.

Finally, the majority opinion contends that the protections afforded to criminal defendants by the United States Constitution do not apply to prosecutions in foreign jurisdictions. As support, the majority opinion cites *United States v. Balsys,* 524 U.S. 666, 672–74 (1998). There, Aloyzas Balsys ("Balsys"), a resident alien in deportation proceedings, refused to answer questions about his activities in certain foreign countries during World War II because his answers could potentially subject him to criminal prosecutions by those foreign governments. As grounds for his refusal to answer, Balsys invoked the Fifth Amendment privilege against self-incrimination. On appeal, the United States Supreme Court framed the issue as "whether a criminal prosecution by a foreign government not subject to our constitutional guarantees presents a 'criminal case' *for purposes of the privilege against self-incrimination.*" *Id.* at 672 (emphasis added). The answer, in short, was that it did not. The Court held that a person who fears criminal prosecution only by a foreign government may not invoke the Fifth Amendment privilege against self-incrimination because the sovereign seeking to compel the self-incriminating statements is not the same sovereign that may use the self-incriminating statements in a subsequent criminal prosecution. *Id.* at 673–74.

The circumstances in *Balsys,* I believe, are inapposite to Snider's case, but the majority's statement of the proposition of law for which *Balsys* stands also extends more broadly than that case holds. First, the constitutional privilege that Balsys sought to invoke—the Fifth Amendment right against self-incrimination—was not designed to provide protection in the civil proceedings in which Balsys was then involved, but rather as protection in a possible subsequent criminal action. Here, the constitutional guarantee at issue—the Fourth Amendment right to be free from unreasonable seizure—was designed to provide protection in the very proceedings in which that right was allegedly violated. Moreover, although the Korean government is the sovereign that brought the criminal charges against Snider, it is a United States federal agent who initiated the prosecution in the United States by obtaining the allegedly coerced confession which served

> as the basis of probable cause for the Korean government's criminal action against Snider to proceed. It is difficult for me to conclude that *Balsys* means that the Fourth Amendment protection to be free from unreasonable seizure without probable cause does not extend to a United States citizen whose seizure resulted from a coerced confession obtained by a United States federal agent on United States soil merely because a foreign sovereign, not the United States, pursued the criminal action.[149]

Despite engaging in a more thorough analysis of the constitutional dimension of the case and nature of a malicious prosecution action, Judge Stamp nevertheless concluded that the FBI agent was protected by qualified immunity because he did not conceal or misrepresent the facts presented, or bring undue pressure on the intermediary to overbear its judgment.[150] According to Judge Stamp, the FBI agent was entitled to qualified immunity as there was no allegation that he "made false or misleading statements to the prosecutors or the magistrate judge or that [the FBI agent] other-wise brought undue influence to bear on their independent judgment."[151]

Although the Fourth Circuit is not inclined to entertain *Bivens* actions related to the coercion of confessions resulting in a foreign prosecution and acquittal, it is unclear whether such an action would be sustainable if the relator was not found extraditable at the extradition hearing, in effect had the relator not been extradited to South Korea. Further, neither the majority nor the concurrence focused on the purpose of a *Bivens* action, namely preventing government officials from engaging in constitutional violations. The majority opinion focused its ruling on the question of a cognizable constitutional violation, and strained not to find one. The concurrence noted the strained nature of the majority's decision, but then ignored the majority's standard for qualified immunity based on the nonexistence of a constitutional violation, focusing instead on the closed circle of government agents interacting with each other. It is hard to claim that the FBI agent's introduction of a potentially coerced statement did not violate the relator's constitutional rights. This is something that would have been appropriate to determine at a trial on the merits as opposed to being placed beyond review by a finding of qualified immunity.

3. Standing and the Firewall between U.S. Judicial Proceedings and Foreign Legal Proceedings

An extension of the rule of non-inquiry[152] precludes a relator from raising before a U.S. court anything pertaining to administrative or legal proceedings occurring in the courts of another state where a U.S. extradition request is pending. The converse is equally true in that the rule of non-inquiry, as applied by a requested a state, would bar its judiciary from examining any claims pertaining to, for example, the validity of an extradition request made by the United States when it is a requesting state. As a result there is a legal firewall between the administrative proceedings of a requesting state and the judicial proceedings of a requested state. Thus, for example, if a

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149 *Id.* at 202–206 (Stamp, J. concurring) (footnotes omitted).

150 Judge Frederick Stamp applied the following rule regarding qualified immunity:

> A law enforcement officer who presents all relevant probable cause evidence to a prosecutor, a magistrate, or other intermediary is insulated from a malicious prosecution claim where such intermediary makes an independent decision to pursue prosecution or issue a warrant, thereby breaking the causal chain between the officer's conduct and the prosecution unless the officer concealed or misrepresented facts or brought such undue pressure to bear on the intermediary that the intermediary's independent judgment was overborne. *See Rhodes v. Smithers,* 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995) (collecting cases), *aff'd,* 91 F.3d 132 (4th Cir. 1996); *see also Taylor v. Meacham,* 82 F.3d 1556, 1564 (10th Cir. 1996); *Reed v. City of Chicago,* 77 F.3d 1049, 1053 (7th Cir. 1996).

Id. at 206.

151 *Id.*

152 *See supra* Sec. 1.4.

requesting state seeks the extradition of a person on a certain legal basis that is not permissible under the laws of that state, that claim may be barred by the judiciary of the requested state, much as it would be if the situation was reversed and the United States was the requested state.

This situation arose in the extradition request by the United States to Guatemala for its former president, Alfonso Portillo, who was indicted by the Southern District of New York for a number of crimes relating to money laundering. The U.S. request was based on the U.N. Convention against Corruption,[153] which contains provisions in Articles 23 and 44 that permit state-parties to extradite individuals on the basis of the Convention instead of bilateral treaties. In addition, the Convention provides that the bilateral treaties of state-parties are to be automatically amended to include the crimes contained in the Convention as of its entry into effect in the respective states. The United States relied on the Convention's extradition provisions as a basis for its extradition request to Guatemala, even though the United States and Guatemala did not include the crime of corruption and related crimes, such as money laundering, in their bilateral extradition treaties. The United States ratified the Convention with the reservation that Articles 23 and 44 would not apply. Article 23 of the convention concerns the criminalization of the laundering of the proceeds of crimes, while Article 44 calls for the agreement of extradition treaties.

The United States–Guatemala extradition treaty of 1903, as amended by the bilateral extradition treaty of 1940, does not contain money laundering as an extraditable offense, and therefore the question arose as to whether this was an extraditable offense in accordance with the indictment and subsequent issuance of a warrant for Portillo's arrest. The U.S. extradition request relied on the Convention as if it were applicable under U.S. law, and presumably as if the Convention were a self-executing treaty and applicable not only under U.S. law, but also automatically amending the 1940 bilateral treaty.[154] Portillo's counsel claimed it was not, but that issue could not be adjudicated before Guatemalan courts as the issue had to do with U.S. law. At the same time, Portillo did not have access to a judicial remedy before U.S. courts other than by filing a habeas petition before the court that had issued the arrest warrant on the basis of which the United States filed its extradition request with Guatemala.[155] Portillo was at the time in custody in Guatemala pursuant to the extradition request filed by the United States.

Concerning the issue of standing, Judge Patterson, in an unpublished opinion filed on May 10, 2012, held that Portillo had "not met his burden to establish that the United States is exercising constructive custody over him. Thus, this Court does not have jurisdiction to hear Petitioner's writ of habeas corpus pursuant to 28 U.S.C. § 2241."[156] With respect to Portillo's claim that the U.S. extradition request was misrepresented to the government of Guatemala, Judge Patterson stated that, contrary to Portillo's petition that the U.S. government had falsely sought extradition from Guatemala despite the non-applicability of the provisions of the Corruption Convention due to a U.S. reservation, the United States' "request accurately summarized the applicable treaties and laws authorizing extradition." In holding so, Judge Patterson rejected Portillo's argument that the reservation of the United States to the provision of the Corruption Convention concerning extradition nullified the extradition obligations arising out of Articles 23 and 44 of the Convention.[157]

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153 United Nations Convention against Corruption, Oct. 31, 2003, 2349 UNTS 41.

154 *See* Ch. II on self-executing treaties.

155 Portillo then filed such a petition, which though denied on the basis of lack of standing, went into the merits of the argument. The case is on appeal before the Second Circuit as of January 2013.

156 Portillo v. Bharara, 2012 U.S. Dist. LEXIS 67224, *17 (S.D.N.Y. May 10, 2012).

157 Opinion pages 10–14.

As stated above, Judge Patterson, having found that petitioner Portillo had no standing, nevertheless addressed the substantive issues raised and disposed of them without giving Portillo the opportunity to present evidence or to be afforded the right to have a hearing on the matter. This approach is probably unique in that it holds the petitioner does not have standing, while at the same time addressing the substantive issue raised by the petitioner without an evidentiary hearing. Presumably, however, Judge Patterson's unarticulated premise for ruling on the merits of the issue may have been his reliance on the fact that Portillo's claim raised questions about the integrity of the legal process (the claim of governmental misconduct) on which Portillo's extradition was also based.[158]

The Portillo case is in part about standing, but also in part about how U.S. courts address issues that are usually circumscribed to being raised in the requesting state or the requested state exclusively but not by means of having either one of the two states consider legal issues pertaining to the other state's jurisdiction. In the Portillo case it would be difficult for the Guatemalan courts to consider the legal issues pertaining to U.S. law as they relate to the applicability of national laws, and treaty requirements and their application, as Guatemalan courts do not have the legal qualifications to rule on the laws of another state. Furthermore, such a ruling would violate the sovereign prerogatives of the United States. The same would also apply to U.S. courts, if they were to be presented with issues pertaining to the legal validity of an extradition request under the law of the requested state. States must defer to one another when it comes to the application of their respective laws under the rule of non-inquiry, except where they violate international laws. This is precisely what the rule or non-inquiry is designed to do. Thus, for all practical purposes a legal firewall exists between U.S. legal proceedings and those taking place in a requested state, and vice-versa, except for extraordinary issues that violate international law and the public policy of each of the respective states.

4. Issues of Standing

Even though habeas corpus is the only remedy available in extradition proceedings, it is also only available to those inside the United States who are sought by a foreign government, unless they are constructively held elsewhere pursuant to U.S. authority. A person sought by the United States, and whose extradition proceedings are pending in another state, may not avail him-/herself of judicial remedies in the United States, whether they are in the nature of a habeas corpus or a writ of mandamus. The principle bar to accessing this extraordinary judicial remedy is the petitioner's lack of standing because the petitioner is outside the United States, and therefore outside the jurisdiction of the court before which the petition is presented. The standing argument is well-established in the jurisprudence of the United States, and is on its face justifiable in that a person who is not before the court because he/she is a fugitive cannot avail him-/herself of the court's remedial powers. However, if a person is held outside the jurisdiction of the court pursuant to an order of that court (such as when the court has issued an arrest warrant that is the basis for the detention of that person in another jurisdiction) the person may have standing on the basis of the court's constructive custody. Under that theory, if a person is held in a jurisdiction other than the one that issued a court order for his/her detention, he/she may be deemed to be in the constructive custody of the court or its officers provided that the officers of the court have access to the person and/or the court itself has the ability to issue orders pertaining to his/her custody or his/her movements. This would include, for example, access to such a person held abroad by federal agents or U.S. prosecutors. Another reason could well be to insure against a person being held outside the jurisdiction of a given court precisely for the purpose of denying the person in question access to a judicial remedy before the said court.

158 The matter is presently on appeal before the Second Circuit as of September 2012.

The standing question has been deemed jurisdictional by U.S. courts even though it is by nature procedural because the substance of the question is whether the individual should be physically within the territorial boundaries of the judicial district in which a given court is sitting. If a person is physically held outside the jurisdictional boundaries of the court pursuant to an order issued by the said court, that person is constructively within the court's jurisdiction. Thus, if U.S. agents hold a person, particularly a U.S. citizen, outside the court's jurisdiction, including on foreign territory, for example individuals held by U.S. armed forces in places such as Afghanistan, Iraq, Somalia, Colombia, or others where U.S. forces operate, the individual is within the jurisdiction of the court.[159]

This problem arose in *Munaf v. Geren*,[160] where two dual citizens (United States and Iraq) were held at separate times and kept in custody in separate military bases in Iraq by the U.S. military.[161] On the military base in question, as well as on other bases in Iraq, the United States enjoyed exclusive jurisdiction.[162] A habeas petition was filed in the U.S. District Court of the District of Colombia, and the case eventually went to the Supreme Court, which held that, notwithstanding the existence of an extradition treaty between the United States and Iraq, the United States had no obligation to adhere to the conditions of the treaty when the persons in question were on Iraqi territory even though they were held by U.S. forces in an area exclusively under U.S. military jurisdiction.[163]

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159 Irrespective of the international legality and form of these military detentions, unless there is a SOFA agreement regulating the custody and surrender of persons by and from U.S. forces, the U.S. court should have jurisdiction. *See* Ch. II, Sec. 4.6.1 for an analysis of SOFA agreements.

160 Munaf v. Geren, 553 U.S. 674, 684 (2008).

161 *Id.*

162 M. Cherif Bassiouni, *Legal Status of U.S. Forces in Iraq from 2003–2008*, 11 Chi. J. Int'l L. 1 (2011).

163 In *Muaf* the court concluded that:

> The Executive Branch may, of course, decline to surrender a detainee for many reasons, including humanitarian ones. Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway. Indeed, the Solicitor General states that it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result. In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over Munaf and Omar—as well as its prison and detention facilities have " 'generally met internationally accepted standards for basic prisoner needs.' " The Solicitor General explains that such determinations are based on "the Executive's assessment of the foreign country's legal system and . . . the Executive['s] . . . ability to obtain foreign assurances it considers reliable."
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> The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks."

Munaf, 553 U.S. at 702 (internal citations omitted). Chief Justice John Roberts, writing for the court, continued:

> this is not an extradition case, but one involving the transfer to a sovereign's authority of an individual captured and already detained in that sovereign's territory. In the extradition context, when a "fugitive criminal" is found within the United States, " 'there is no authority vested in any department of the governmentto seize [him] and surrender him to a foreign power,' " in the absence of a pertinent constitutional or legislative provision. But Omar and Munaf voluntarily traveled to Iraq

The question of challenging government conduct is a persistent problem for targets of executive action, whether in the context of extradition or in criminal matters. Conventionally, in order for an individual to petition the courts, he/she must appear before the court. That option is not available, however, in cases such as *Portillo*, where the relator could neither petition Guatemalan courts to challenge the U.S. indictment due to the rule of non-inquiry or challenge the charges in the United States as he was in custody in Guatemala and effectively unavailable to appear in court without being extradited and brought before a U.S. court, the exact action he was trying to resist.

More recent cases arise out of the "war on terror." One particularly egregious example is where individuals cannot appear before a court because they are the subjects of extraordinary rendition, and possibly kept in secret detention for extended periods without the protection of the law. In other cases, detainees are denied access to justice on the basis of their designation by the executive as an enemy combatant, as with the detainees at Guantanamo Bay. In others, because of the nature of the conduct threatened by the executive, namely killing the individual, it would be impossible for the targeted individual to actually appear in court without risking exposure to the threatened harm.

In order to understand the difficulties with litigating to preserve fundamental rights it is necessary to step back and consider the legal issues that continually bar litigants from asserting their rights and challenge unlawful conduct by the government. Although the circumstances of each case identified above give rise to particular defenses, the most common response by the government is to challenge the standing of the petitioner to challenge the governmental policy.

Standing is the recognition conferred upon an individual to litigate an issue. It is, as such, a procedural threshold the petitioner needs to overcome and does not require an analysis of the merits of the issue itself.[164] As the Supreme Court enunciated in *Warth v. Seldin*, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[165] The question of standing serves as a powerful counterpoint to the review functions of the judiciary when sitting in judgment of a coequal branch of government, and accordingly the Supreme Court has successively limited the courts' jurisdiction to those cases that directly and immediately impact the petitioner's fundamental rights and where judicial action would suitably redress the alleged violation.[166] Where the target of government action is unavailable for various reasons, there is limited recourse through the next-friend doctrine, discussed below, which only provides very limited rights to third parties to vindicate the rights of the unavailable person.

The classic early formulation of the doctrine of standing was articulated in the 1923 case of *Frothingham v. Mellon*, when the U.S. Supreme Court ruled that the judiciary could not entertain challenges to certain government policies, namely federal taxation, because of the separation-of-powers doctrine.[167] In *Frothingham* the Supreme Court reasoned that:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive, the duty of executing them; and

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> and are being held there. They are therefore subject to the territorial jurisdiction of that sovereign, not of the United States. Moreover, as we have explained, the petitioners are being held by the United States, acting as part of MNF–I, at the request of and on behalf of the Iraqi Government. It would be more than odd if the Government had no authority to transfer them to the very sovereign on whose behalf, and within whose territory, they are being detained.

Munaf, 553 U.S. at 704 (internal citations omitted).

164 Frothingham v. Mellon, 262 U.S. 447, 480 (1923).

165 Warth v. Seldin, 422 U.S. 490, 498 (1975).

166 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992).

167 *Frothingham*, 262 U.S. 447.

> to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here, the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional, and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.[168]

Accordingly, the Supreme Court held that "We have reached the conclusion that the case must be disposed of for want of jurisdiction *without considering the merits of the constitutional questions*."[169] While *Frothingham* dealt with a challenge to the Congress's authority to levy taxes, the principle of judicial deference to the legislative and executive branches was forcefully delineated in the decision, laying the groundwork for modern standing jurisprudence.

It is clear that the jurisdiction of the judiciary is limited by the Constitution to "cases and controversies" and the Supreme Court on the basis of the *Frothingham* decision has slowly shaped "the doctrine of standing . . . to identify those disputes which are appropriately resolved through the judicial process."[170] The unfortunate consequences of this increasingly restrictive interpretation are evident in the *Lujan* decision considered below, and the eventual treatment of Portillo and "enemy combatants."

In *Lujan v. Defenders of Wildlife*, a three-part test was outlined by the Supreme Court to determine "the irreducible constitutional minimum of standing," namely:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[171]

These three requirements fit together to form a complex and interlocking barrier against the intrusion of litigants on governmental interests, irrespective of and sometimes in opposition to the merits. This is because it is difficult for a plaintiff to assert a claim that meets the requirements in more complex cases, which are paradoxically also the cases in greatest need of resolution because of the fundamental issues at stake.

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168 *Id.* at 488–489 (internal citation omitted).

169 *Frothingham*, 262 U.S. at 480 (emphasis added).

170 Whitmore v. Arkansas, 495 U.S. 149, 154–155 (1990).

171 *Defenders of Wildlife*, 504 U.S. at 560–561.

The difficulty faced by litigants is heightened by the requirement in the first prong of the *Lujan* factors that the alleged harm be "concrete and particularized." Although the requirement serves to ensure that the plaintiff has suffered personal harm—both to make certain that judicial decisions remain cases in controversy and not advisory opinions arising out of "generalized grievances," but also in order to ensure that only those best placed to litigate important social issues do so[172]—it has the clear effect of weeding out other possible plaintiffs with a significant interest in addressing a particular issue and the capacity to effectively litigate the case. As a practical matter, standing doctrine has limited litigation in complex cases to a small set of cases where individuals can come before the court and prove a very personal and significant deleterious effect.

Standing is also, because of the nature of the claims at stake—whether criminal, international, social, or environmental—prone to political manipulation by the courts. It is worth noting that the progressive limitation of standing has occurred under conservative courts. Justice John Marshall Harlan II, hardly a liberal, commented that "[C]onstitutional standing [is] . . . a word game played by secret rules."[173] These secret rules function in the modern context to shield the government from litigation that would expose its unlawful conduct, and equally protect the judiciary from having to take a principled position in opposition to the executive and legislative branches.

As mentioned above, there is a limited exception to the orthodox standing requirement, namely the doctrine of the "next friend." The next friend doctrine arose out of habeas corpus cases in which the petitioner was unavailable; the doctrine allowed " 'next friends' to appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."[174] The next friend does not him-/herself replace the person whose interests are at stake, but rather "pursues the cause on behalf of the detained person, who remains the real party in interest."[175] Next friend standing is, as the Supreme Court explained in *Whitmore*, not automatic, but rather requires a showing of a "significant relationship with the real party in interest" and bears the burden of "clearly . . . establishing the propriety of his status, and thereby justify the jurisdiction of the court."[176] Accordingly, the Supreme Court in *Whitmore* laid out a two-part test for next friend standing, writing that

> First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . .[177]

These requirements have become the "firmly rooted prerequisites" to standing for a next friend and constitute a significant barrier to standing. As a practical matter, the courts actively guard

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172 Warth v. Seldin, 422 U.S. 490, 499 (1975). In *Warth* the Supreme Court clearly detailed two requirements for standing:

> First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

173 Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing majority opinion), *cited in* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L.R. 1371, 1372 (1988).

174 *Whitmore*, 495 U.S. at 162.

175 *Id.* at 163.

176 *Id.* at 164.

177 *Id.* at 163.

against standing for next friends, especially in controversial issues. Since 2001, however, there have been a number of prominent cases allowing for "next friend" standing.

In the case of *Rumsfeld v. Padilla*, a U.S. citizen, Jose Padilla, was arrested after returning to the United States from abroad on a warrant for being a material witness in connection with the attacks of September 11, 2001. On the basis of an executive order Padilla was declared an "enemy combatant" and removed from a federal prison to a military facility.[178] The Second Circuit granted Padilla's lawyer standing as his next friend, as Padilla had been denied contact with anyone except for military personnel for eighteen months and was denied effective access to the courts, thereafter proceeding to the merits of the case.[179] The Supreme Court did not reverse the Second Circuit finding that Padilla's lawyer qualified as a next friend, but in a dubious decision vacated the lower court's decision on the basis that Padilla's lawyers had improperly identified Donald Rumsfeld, the Secretary of Defense, as the respondent in the habeas corpus petition rather than the commander of the military brig in which Padilla was being held, and that the Southern District of New York, where the petition was filed, did not have jurisdiction over the matter because the brig in question was located in South Carolina.[180] Although the Supreme Court's decision did not affect the next-friend finding, it is significant insofar as it provides a startling example of the lengths to which the judiciary will go to avoid an analysis of the merits that do not favor the government in a particularly difficult case involving the illegal detention of a U.S. citizen in violation of his constitutionally protected rights. One year after the Supreme Court ruling, Padilla was indicted in a civilian court and eventually found guilty and sentenced to sixteen years' imprisonment.

In another, somewhat similar case, the government detained Yaser Hamdi, a U.S. citizen captured in Afghanistan, where he is alleged to have fought against U.S. forces. Hamdi was subsequently removed to Guantanamo Bay before being moved to a military brig in South Carolina. After Hamdi was captured he was held without access to his attorneys and family for several months, during which time his father filed a habeas corpus petition as his son's next friend. Hamdi's father was granted standing as next friend by the district court, a decision that was reversed on appeal. The Supreme Court did not consider the next-friend doctrine significantly before considering the merits, with a plurality eventually holding that the indefinite detention of a U.S. citizen without due process protections violated Hamdi's constitutionally protected rights.[181]

Perhaps the most difficult recent case involved a U.S. citizen named Anwar Al-Aulaqi, who was alleged to have been a Yemen-based member of Al-Qaeda. While in Yemen Al-Aulaqi made numerous inflammatory and strident critiques of the United States, some of which gave justification to violence against U.S. civilians. These comments soon landed him on a target list for killing by U.S. drones operating in the area. It should be noted that Al-Aulaqi was never charged with a crime and no judicial authorization was given for his killing. Indeed, it is unclear that his statements, no matter how inflammatory, could constitute criminal conduct or fall afoul of the First Amendment protection of free speech.

After the determination was made to kill Al-Aulaqi, his father filed suit in the U.S. District Court of the District of Colombia seeking to enjoin the federal government from targeting and killing his son. Al-Aulaqi's father made three arguments,

> First . . . that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including his son, outside of armed conflict, and "in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means

178 Padilla v. Rumsfeld, 542 U.S. 426 (2004).

179 Padilla v. Rumsfeld, 352 F.3d 695, 700–703 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004).

180 *Padilla*, 542 U.S. 426.

181 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

> other than lethal force that could reasonably be employed to neutralize any such threat," violates Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures. Second, plaintiff argues that this targeted killing policy violates Anwar Al-Aulaqi's Fifth Amendment right not to be deprived of life without due process of law. Third, plaintiff alleges that the failure to disclose the criteria by which U.S. citizens like Anwar Al-Aulaqi are selected for targeted killing violates those citizens' rights to notice under the Fifth Amendment Due Process Clause.[182]

Al-Aulaqi's father sought to gain standing to litigate these issues as "next friend" on the basis that Al-Aulaqi himself was absent and unable to represent himself in court precisely because of the decision made by President Obama to kill him as an enemy combatant. As the petitioner noted, in order for Al-Aulaqi to litigate the issue he would be forced to "surrender" to U.S. forces, thereby affirming the underlying charge that he is an enemy combatant, which goes precisely to the merits of the case.[183] The *Al-Aulaqi* case presents a conundrum: he could not fight President Obama's decision without surrendering himself and potentially being disappeared for some period of time, during which time he could still be killed, thereby raising a host of other questions about his due process rights. As is clear from the *Padilla* case, even if U.S. citizens are eventually tried before civilian courts, they can be disappeared for some period.

It should also be noted that Al-Aulaqi's father could not litigate the issue himself as, in the words of the district court, he had "no constitutionally protected interest in maintaining a relationship with his adult child."[184] Accordingly,

> no court has held that a parent possesses a constitutionally protected liberty interest in maintaining a relationship with his adult child free from indirect government interference. Rather, all circuits to address the issue "have expressly declined to find a violation of the familial liberty interest" where state action has only an incidental effect on the parent's relationship with his adult child, and "was not aimed specifically at interfering with the relationship."[185]

Although the district court in *Al-Aulaqi* admitted that the case was complex and posed serious questions, including the legal inconsistency of requiring warrants to wiretap U.S. citizens abroad but not for killing U.S. citizens due to an executive decision, it held that "Before reaching the merits of plaintiff's claims, then, this Court must decide whether plaintiff is the proper person to bring the constitutional and statutory challenges he asserts, and whether plaintiff's challenges, as framed, state claims within the ambit of the Judiciary to resolve."[186]

The court's decision turned largely on the question of whether Al-Aulaqi was truly unavailable. Turning first to the petitioner's claim that requiring Al-Aulaqi to surrender goes to the merits, the court held that:

> Anwar Al-Aulaqi can access the U.S. judicial system by presenting himself in a peaceful manner implies no judgment as to Anwar Al-Aulaqi's status as a potential terrorist. All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities. Anwar Al-Aulaqi is thus faced with the same choice presented to all U.S. citizens.[187]

The crucial distinction that the court failed to make in this case is that Al-Aulaqi was not a being sought by "law enforcement authorities" but rather by silent aerial drones commanded

182 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 14–15 (D.D.C. 2012).

183 *Id.* at 18.

184 *Id.* at 33.

185 *Id.*

186 *Id. at* 33.

187 *Id.* at 18–19

by the military, which intend to kill him, and not effectuate arrest as might a police force. The court's suggestion that he could petition U.S. courts telephonically[188] seems equally unlikely, as communicating at length with the United States would likely lead the U.S. military to discover his location.

The court went to great lengths to prove that Al-Aulaqi was available, arguing that it cannot be said that he "is he being held incommunicado against his will," and further that "To the extent that Anwar Al-Aulaqi is currently incommunicado, that is the result of his own choice."[189] The court concluded that Al-Aulaqi's statements and conduct precluded a finding of unavailability, thus fundamentally damaging his father's next-friend claim, and ultimately that even potential future detention, *a la* Hamdi and Padilla, is not enough to trigger unavailability at present. The court continued:

> Because Anwar Al-Aulaqi has not yet been detained, it is impossible to determine whether the nature of any such hypothetical detention would be more similar to that in Padilla and Hamdi, or to the Guantanamo Bay cases in which detainees have been found capable of bringing suit on their own behalf. Regardless, the mere prospect of future detention is insufficient to warrant a finding that Anwar Al-Aulaqi currently lacks access to the courts.[190]

The court also concluded that it was impossible to determine whether Al-Aulaqi's father was, indeed, acting in his son's best interests on the basis that Al-Aulaqi himself had not availed himself of the protection of the courts and that he had not expressed any interest in doing so, moreover expressing the desire for the government to "come look for me."[191] Ultimately, the court determined that:

> Anwar Al-Aulaqi has neither filed suit on his own behalf nor expressed any desire to do so. Moreover, all available evidence as to Anwar Al-Aulaqi's "intentions and preferences" suggests that if consulted, he would have no desire to use the U.S. judicial system as a means of preventing his alleged targeting by the United States. To allow plaintiff to sue as his son's "next friend" under these circumstances would risk "allow[ing] the adjudication of rights which parties not before the Court may not wish to assert." Because plaintiff cannot show that Anwar Al-Aulaqi lacks access to the courts and that he is acting in Anwar Al-Aulaqi's best interests, plaintiff lacks standing to bring constitutional claims as his son's "next friend."[192]

Eventually Al-Aulaqi was killed in a U.S. drone strike in September 2011.[193]

5. Excessive Delays in Judicial Review

It is beyond doubt that an extradition Hearing is not a mini-trial on the guilt or innocence of the person being sought for surrender. However, as a matter of concern for the rights of a person sought for extradition, as well as to ensure the integrity of the judicial processes of the requesting state, a number of judicial procedures and guarantees have been established by states in accordance with their laws and constitutional requirements. As discussed in Chapter X, the United States requires a number of such formalities, as well as a Hearing during which "probable cause" must be established by the government, all of which is subject to a habeas corpus review at the district court level and petition for review for the denial of the habeas corpus claim, as discussed above.

188 *Id.* at 19, n.4.

189 *Id.* at 20–21

190 *Id.* at 22

191 *Id.* at 6.

192 *Id.* at 27–28.

193 Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. Times, Sept. 30, 2011, *available at* http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all.

Assuming that proper procedures have been followed and substantive rights properly addressed by the judiciary, it is understandably unconscionable that extradition processes can go on for years. This is sometimes due to the fact that the requesting state does not sufficiently cooperate with the United States, by failing to produce the required evidence to make the probable cause finding, by failing to respond to certain administrative and judicial queries, or because of delays or weaknesses in the assurances from the requesting state.[194] That, combined with the relator's ability to secure high caliber counsel who have the ability to raise technical legal issues, can result in substantial delays, especially when the government finds it difficult to address such issues without additional preparation time.

Two prominent examples of such delays are *In re Assarsson*[195] (decided in the Seventh Circuit, as distinguished from the same case in the Eighth Circuit[196]), and *Caltagirone v. Grant*,[197] both of which required more than four years before they were finally resolved. In *Assarsson* the litigation resulted in the relator's extradition to Sweden, and in *Caltagirone* it resulted in the dismissal of Italy's request due to the subsequent dismissal of the original court ruling for fraudulent bankruptcy.

Delays can also be extensive in extradition cases from European countries to the United States. Extradition from European countries, which are bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its additional protocols, often result in delays as relators can proceed before the European Court of Human Rights (ECtHR) after having exhausted state remedies in the requested state. Frequently, petitions filed before the ECtHR are based on Articles 3 and 6 of the ECHR, which deal with the treatment of offenders. Increasingly cases dealing with extradition to the United States go to the ECtHR due to the potential application of the death penalty, excessive periods of imprisonment, or inhuman conditions of imprisonment.[198] In particular, the latter of these involves extensive periods of solitary confinement and other physical abuses.

On occasion the question arises as to whether assurances offered by the United States to the requested state are sufficient to satisfy that state's obligations under Articles 3 and 6, particularly because experience with the enforcement of these assurances has not always been satisfactory.[199] But never before have there been extradition cases that have involved periods of time ranging from eight to fourteen years, as was recently the case concerning the extradition of five individuals from the United Kingdom to the United States to face various terror-related charges, including most notably an Egyptian-born cleric named Abu Hamza, whose final extradition order was issued by the Queen's Bench Division on May 10, 2012.[200] The five had fought the extradition request by the United States on the basis that the request lacked a sufficient basis to satisfy the requirement of prima facie probable cause, which was required by the Extradition Act of 1989,[201] which was subsequently superseded by the Extradition Act of 2003.[202] The five also argued that the United States would place them in solitary confinement for years, in violation of Articles 3 and 6 of the ECHR, and in 2008 the five petitioned the ECtHR after the

194 *See* Ch. VII, Sec. 7.

195 *In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980). *See also* Ch. II, Sec. 5.4.3.

196 *In re* Assarsson, 687 F.2d 1157 (8th Cir. 1982).

197 Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

198 *See* Ch. II, Sec. 6.3. Ch. VII, Sec. 6.11 and Ch. VIII, Sec. 6.

199 *See* Ch. VII, Sec. 7.

200 Abu Hamza et al v. Secretary of State for the Home Department, [2012] EWHC 2736 (admin).

201 Extradition Act, 1989, c. 33 (U.K.).

202 Extradition Act, 2001, c. 41 (U.K.).

case took its full course in the United Kingdom,[203] but the Court rejected their claims in April 2012.[204] Abu Hamza was ultimately extradited on October 6, 2012.[205]

With regards to the concerns of the petitioners, the United States gave assurances that it would neither seek nor apply the death penalty and made representations about U.S. federal prison facilities and programs, all to relieve the concerns of both the United Kingdom and the ECtHR. Irrespective of the merits of these claims and any issues that were raised by the five relators, it is clear that the time involved in reaching a final extradition determination of between eight and fourteen years was unconscionable.

Delays of this sort make extradition unworkable and lead governments to bypass valid judicial processes by following questionable and sometimes illegal methods, including abduction.[206] It is therefore essential to ensure that proper judicial processes are followed, both with respect to their duration and their scope, in order to prevent some countries from resorting to these procedures.

6. Executive Discretion[207]

6.1. General Considerations

Executive discretion is practiced in three different ways. The first is when the government chooses not to proceed with an extradition request, whether for a valid technical reason, such as when it concludes that the information supplied by the requesting state is insufficient, the evidence fails to rise to the level of probable cause, or the request does not satisfy some treaty or statutory requirement, or alternatively for undisclosed political reasons. The second is when the government refuses to carry out the surrender of an individual found extraditable by a judicial determination. The third is when the United States refrains from making an extradition request to another state, or when it unilaterally suspends its extradition practices with another state with which it has an extradition treaty. All three categories may involve valid legal concerns, but also on occasion involve political considerations. These decisions are not judicially reviewable because, pursuant to the Constitution, Article II issues are exclusively within the province of the president.

It should be noted that extradition requests received by the United States can be presented by the requesting state's diplomatic representative to the United States, usually the ambassador, to the Department of State or to the Department of Justice's Office of International Affairs, if the bilateral treaty permits it. It can also be made by the ministry of foreign affairs of the requesting state to the U.S. ambassador in the requesting state, who then transmits the request to the Department of State. A request received by the Department of State is then transmitted to the Department of Justice, which further transmits it to the United States Attorney in whose district the request person is believed to be located.[208] Notwithstanding the ways in which an extradition request is submitted to the United States, executive discretion as described herein is exercised by the secretary of state on behalf of the president.

The power of the president, which is delegated to the secretary of state in matters of extradition, is derived from the Constitution, which authorizes the president to conduct foreign

203 Abu Hamza et al. v. Secretary of State for the Home Department, [2012] EWHC 2736 (admin), ¶ 124.

204 Case of Babar Ahmad and Others v. The United Kingdom (app. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), Apr. 10, 2012.

205 *Abu Hamza Among Five Terror Suspects Extradited to US*, BBC, Oct. 6, 2012, *available at* http://www.bbc.co.uk/news/uk-19853903.

206 *See* Ch. V.

207 *See also* Ch. IX, Secs. 1 and 3.

208 *See* Ch. IV, Sec. 1.

affairs. Thus, a decision to grant extradition after a judicial determination has certified that the relator is extraditable, but subject to certain conditions established by the executive, is entirely within the president's discretion and is not reviewable. Similarly, a decision not to extradite when a judicial determination has certified a person as extraditable is also within the president's unreviewable discretion. The files pertaining to the exercise of such executive discretion are covered by presidential executive privilege,[209] and are neither judicially reviewable nor available to anyone unless the president waives this privilege. No other branch of government can compel the president to exercise executive discretion or to enforce any conditions placed on the extradition.

The executive thus operates at both ends of the extradition process. Initially, it is at the requisition stage; then, after an extradition order is made by the judiciary, the executive can refuse to surrender a relator. Prior to 1871 the function of the secretary of state upon receiving the magistrate's certification was considered purely ministerial. Once the secretary satisfied himself as to the regularity of the proceedings before the magistrate, his duty was to issue the warrant. Thus, in effect, the sole power to commit for extradition or to discharge was vested in the extradition magistrate.[210]

Executive discretion was first exercised in 1871, when the secretary of state surrendered only four out of seven persons awaiting extradition to Great Britain on charges of piracy and assault with intent to commit murder. No reason for the refusal to surrender the other three prisoners was given.[211] The first judicial recognition of this discretion came in *In re Stupp*,[212] where it was found that the secretary of state had the power to refuse the surrender of the relator. Stupp's extradition to Prussia had been certified to the secretary by the magistrate, although Prussia's jurisdiction over the offense was not territorial but was based on Stupp's Prussian nationality. The secretary refused to issue the warrant on the advice of the Attorney General that the extradition treaty applied only when the alleged offense had occurred within the territory of the requesting country.

On March 19, 1970, the president issued Executive Order No. 11517, whereby the president, pursuant to 3 U.S.C. § 301, designated the secretary of state to issue and sign extradition warrants and to return persons deemed extraditable by the United States. The extent of the secretary of state's discretion is not clear, as both statutes and court judgments are silent as to its limits. Usually, the treaty obligation to extradite is absolute, but the extradition statute might

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209 *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997); Archibal Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1395–1405 (1974). *See generally* Raoul Berger, Executive Privilege: A Constitutional Myth (1974); Adam C. Breckenridge, The Executive Privilege: Presidential Control over Information (1974); Daniel H. Hoffman, Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls (1981); Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability (1994).

210 In *Lobue v. Christopher*, 893 F. Supp. 65 (D. D.C. 1995) a declaratory judgment was sought in the D.C. district court concerning a case where jurisdiction was in the Northern District of Illinois. The D.C. Circuit vacated the district court's judgment and remanded the case. Lobue v. Christopher, 82 F.3d 1081 (D.C. Cir. 1996). *See also In re Requested Extradition of* Kirby, 106 F.3d 855 (9th Cir. 1996); Barapind v. Reno, 225 F.3d 1100 (9th Cir. 2000). The circuit court reviewed several cases on declaratory judgments and the jurisdictional boundaries between such relief and habeas corpus relief in extradition and immigration cases. *See* Shaughnessey v. Pedriero, 349 U.S. 48 (1955); Brownell v. We Shung, 352 U.S. 180 (1956); Fernandez-Rogue v. Smith, 734 F.2d 576 (11th Cir. 1984); United States v. Doherty, 786 F.2d 491 (2d Cir. 1988); *cf.* Wacker v. Bisson, 348 F.2d 606 (5th Cir. 1965).

211 John B. Moore, A Treatise on Extradition and Interstate Rendition 363 (Boston, Boston Book Co., 1891).

212 *In re* Stupp, 23 F. Cas. 296 (C.C.S.D.N.Y. 1875).

be interpreted to grant the secretary discretion to refuse surrender based on his/her interpretation of the treaty obligation.[213]

Although extradition treaties are considered self-executing, it could be argued that the extradition statute supersedes inconsistent procedural requirements of prior treaties under the rule that procedural treaty provisions and statutes are both equivalent legislation having equal authority.[214] The debate from "the early days of the Republic" centered on this constitutional question.[215] The president conducts foreign affairs, and because the delivery or receipt of a request is to or from another sovereign, it is within the constitutional province of the executive branch. Similarly, the actual delivery of the relator and the conditions of his/her delivery to a foreign sovereign are also within the province of the executive branch as a matter of "foreign affairs" as defined in the Constitution. The executive branch has discretion in surrendering a relator found extraditable, the conditions of his/her surrender, and, to some extent, subsequent treatment.[216] In *Koskotas v. Roche* the district court outlined the secretary of state's authority, stating that:

> It is not the business of courts to inquire into the motives of a requesting country—a matter which is in the executive's realm of foreign affairs. "[I]t is clear that the Secretary of State has sole discretion to determine whether a request for extradition should be denied because it is a subterfuge made for the purpose of punishing the accused for a political crime." Quinn, 783 F.2d at 789.... *Thus, although Koskotas is free to raise Greece's allegedly illicit motives and the physical threat to his life with the Secretary of State, the courts are not the proper forum for consideration of those matters.*[217]

United States extradition treaties generally provide that the requesting state must present to the magistrate sufficient evidence of the accused's guilt as would justify the apprehension and commitment of the accused for trial according to the laws of the requested state. It is on this question that the secretary of state's discretion can rely. Even if the extradition magistrate determines that the evidence is sufficient, the secretary can reach a contrary conclusion for different reasons, usually political or humanitarian, and accordingly refuse to extradite the individual. The secretary may also exercise his/her discretion in the refusal to extradite U.S. citizens to a requesting state that refuses to extradite its nationals at the request of the United States.[218] Other grounds of executive discretion include the refusal to extradite for crimes deemed "political offenses" by the secretary, or the deferment of extradition while the relator is undergoing prosecution or is imprisoned in the United States.[219] Finally, because of the rule of non-inquiry, the secretary may use discretion for humanitarian purposes that the judiciary can not.

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213 *See* Ch. II.

214 Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313, 1316 (1962) [hereinafter Note, *Executive Discretion*]. *See also* Tracey Hughes, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. Int'l & Comp. L. Rev. 293, 298–299 (1986).

215 Wacker v. Bisson, 370 F.2d 552 (5th Cir. 1965).

216 *See* Fong Yue v. United States, 149 U.S. 698 (1893) (relying on a speech made by Chief Justice John Marshall in Congress before his appointment to the Supreme Court). *See also* Terlinden v. Ames, 184 U.S. 270 (1902); Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd* 910 F.2d 1063 (2d Cir. 1990). In *Ahmad*, the court noted that human rights concerns for the treatment of the relator-defendant can justify the executive's denial of an extradition request. *Id. See also* S. Treaty Doc. No. 100-20, 100th Cong., 2d Sess. 7 (1988) (stating risk of torture justifies denial of extradition request). *See also* Koskotas v. Roche, 740 F. Supp. 904, 920 n.29 (D. Mass. 1990).

217 *Koskotas*, 740 F. Supp. at 916 (emphasis added).

218 *See* 1976 Digest, Ch. 3, § 85 at 118.

219 *Id. See also In re* United States (Allen v. Schultz), 713 F.2d 105 (5th Cir. 1983); Moore, *supra* note 213, at 366.

Despite its discretionary power, the executive has seldom refused to surrender U.S. citizens, and only then when discretion to refuse surrender of nationals was expressly granted by the applicable treaty.[220]

The secretary of state may exercise executive discretion based on technical, humanitarian, or political grounds. Technical grounds can be invoked, for example, as in the case of *Abu Eain v. Wilkes*,[221] where the almost exclusive basis for probable cause was a confession by a young Palestinian in prison in Israel who subsequently recanted his confession and claimed he had made it under coercion. The confession was also in Hebrew, and it was established before an Israeli court that the prisoner spoke no Hebrew. But because of the wide latitude of judges to admit or deny evidence,[222] the affidavit in which the relator recanted the confession was held inadmissible. In addition, a number of affidavits were presented on behalf of the relator showing that at the time of the crime he was three hours' distance by car away from the scene of the alleged crime—an alibi defense. But that evidence was not admissible, on the grounds that it was exculpatory and not clarifying.[223] Thus, the finding of "probable cause"[224] was predicated on a very questionable confession made under questionable circumstances, and the evidence rebutting the confession was held inadmissible.[225] In this case, the secretary of state had every reason to use executive discretion on the basis of the record and refuse to extradite the nineteen–year-old. However, because the case was so politicized, the secretary decided otherwise and effectuated the extradition.[226]

Political grounds are those most obvious,[227] as are humanitarian considerations.[228] The latter could be based on the same grounds stated in Articles 32 and 33 of the 1967 Protocol relating to the Status of Refugees (amending the 1951 Refugee Convention),[229] the text of which has been embodied in the Immigration and Nationality Act (INA)[230] through the enactment of the 1980 Refugee Act.[231] The reason executive discretion is properly applicable in this context is that the issue of political asylum cannot be raised in the context of extradition proceedings, as it is deemed within the province of the executive branch, whereas processes under the INA are deemed administrative matters. The executive can also examine the possible motives behind a request for extradition and consider the fairness of the process awaiting the relator upon his/her return to the requesting state.

The secretary of state can also consider other factors. For example, in *Geisser v. United States*[232] the Department of Justice made a plea bargain agreement with the relator in order to obtain

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220 *See* Note, *Executive Discretion*, *supra* note 216, at 1328.

221 Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

222 S*ee* Ch. X, Sec. 5.

223 See Ch. X, Sec. 5 on admissibility of evidence.

224 *Abu Eain*, 641 F.2d at 511.

225 *Id. See* 18 U.S.C. §§ 3181–3196 (2000); Fed. R. Evid. 1101(d)(3); Fed. R. Crim. P. 54(b).

226 A petition was filed, but the secretary of state did not exercise "executive discretion." However, he attached as a condition to the extradition warrant that a U.S. legal observer sit in on all proceedings to ensure that the relator would have a fair trial. *See infra* Sec. 3.2.

227 *See* Ch. VIII, Sec. 2.1 on the political offense exception.

228 The Fourth Circuit Court of Appeals in *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1977) stated that: "A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." *Id.* at 1249. *See also* Ch. VII, Sec. 8.

229 19 U.S.T. 6223, T.I.A.S. No. 6577.

230 8 U.S.C. §§ 1101–1537 (2011). *See* Ch. III, Secs. 2 and 5.

231 Pub. L. No. 96-212, 94 Stat. 103 (1981). *See also* Ch. III, Sec. 5.

232 Geisser v. United States, 513 F.2d 862 (5th Cir. 1975).

vital evidence leading to the conviction of major figures in an international heroin importing conspiracy. In exchange for the information, which the relator could supply, the Department of Justice assured the relator that she would not be deported to Switzerland where she was wanted on a charge of fratricide. At the same time, there was an outstanding warrant and a certificate to the secretary of state for the relator's deportation to Switzerland. Ancillary extradition procedures were brought against the relator by the Swiss government, and an order certifying to the secretary of state her extraditability was granted without the court having any apparent awareness that the relator was involved in a plea bargain with the government. The relator kept her end of the bargain and supplied important information to the government, then began serving her considerably shortened sentence in the United States. Within two years the Swiss inquired into the situation, and the relator was told by the U.S. government that its promise could not be kept and that she would be deported to Switzerland. Much agitated, the relator escaped from the West Virginia prison where she was being held but was eventually recaptured. The court of appeals invoked principles akin to primary jurisdiction as a means to find out what the secretary of state proposed to do.[233] The court vacated and remanded the district court's decision granting extraditability on a technical ground.[234]

Geisser clearly shows that it is necessary for the two branches of government to be aware of what the other is doing in order to avoid such conflicts. But the failings in these cases, rare as they are, rest with the executive branch. In this case, Switzerland may have become the aggrieved party due to a possible executive–political resolution, leading to the embarrassment of the United States.[235]

Purely political decisions involving executive discretion are few and far between. They also go unreported and unnoticed. One case, which is still classified in State Department files, arose in 1968 when executive discretion was granted for a Canadian fugitive who was held extraditable. The relator was reported as the former treasurer of a labor union who had embezzled significant funds from the organization. He was also reported by the media to have contributed $100,000 to the Humphrey for President Campaign; Humphrey was vice-president at the time. The secretary of state exercised executive discretion and refused to extradite the individual, although no reason for the decision was disclosed. Because the file is still classified the full facts are not known, and the information stated above may not be accurate, though surely the classification of this file after exercise of executive discretion is at the least very suspicious.

A question arises as to whether "executive discretion" is a political judgment to be made by the executive branch within the exclusive scope of presidential powers, separate and apart from a judicial determination made with respect to extraditability, or whether it infringes upon judicial determination. Section 3184 uses the term "review" in reference to the secretary of state's post-judicial determination of whether to surrender a person found judicially extraditable. In *Ornelas v. Ruiz*[236] the Supreme Court held that "the magistrate is to certify his findings on the testimony to the Secretary of State, that the case may be *reviewed* by the executive department of the government."[237] Quite clearly, such a role by the executive branch violates the constitutional doctrine of separation of powers insofar as it appears to allow the secretary of state to "review" judicial decisions.[238] There is no presidential power that can subject decisions of

233 *Id.* at 869.

234 *Id.* at 893.

235 In another matter where the government determined that the defense of "double jeopardy" applied, it denied France's request before going to a hearing. Marian L. Nash, *Extradition: U.S –France*, 1978 Digest, Ch. 3, § 5, at 410–411; United States Dep't of State File No. P78 0080-1043.

236 Ornelas v. Ruiz, 161 U.S. 502 (1896).

237 *Id.* at 508 (emphasis added).

238 *See In re* Heilbronn, 11 F. Cas 1025, 1031 (S.D.N.Y. 1854) (No. 6, 323) and *In re* Stupp, 23 F. Cas. 281 (C.C.S.D.N.Y. 1873) (No. 13, 562).

Article III Courts to the executive branch. As the Supreme Court held in *Plant v. Spendthrift Farm Inc.*, "Congress cannot vest review of the decisions of Article III Courts in officials of the Executive Branch."[239]

In *Lobue v. Christopher* the U.S. District Court for the District of Columbia held the extradition statute to be unconstitutional.[240] The issue in *Lobue* was not whether the president or his designee, the secretary of state, can exercise executive discretion within the bounds of the treaty and applicable U.S. law, but whether the president or his/her designee, the secretary of state, has the power to "review" a judicial finding that conclusively interprets the law with respect to a given extradition case.

The powers of the president to conduct foreign affairs are separate and apart from the power of the judiciary to determine the extraditability of the requested person. The president, or whomever he/she may delegate in the executive branch, may exercise executive discretion in denying or conditioning a person's surrender so long as the exercise of that power remains within the confines of treaty obligations and relevant U.S. law. It would logically follow from District Court Judge Royce Lamberth's opinion in *Lobue* that an Article III judge's determination, subject to habeas corpus review, should be considered final and conclusive, and thus presumably binding on the government, but he does not go that far. At present the U.S. government, on behalf of a requesting state, can continuously present new requests for extradition. Judge Lamberth, in *Lobue*, found the practice of allowing the government to bring multiple extradition requests after the judiciary ruled against extradition to be particularly troublesome. He held:

> The government's contention that extradition judges decisions are final and binding upon the parties is insupportable… [Since] There appears to be no legal limit on the number of times extradition proceedings may be brought against the same individual on the same charges. See *Collins,* 262 U.S. at 429–430. ("Protection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not constituitional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection.") Certainly a prisoner who found himself facing trial in a foreign country following multiple extradition proceedings in this country would dispute the government's contention that the original magistrate's determination of non-extraditability was "binding."[241] The Circuit Court vacated the district Court's judgment on grounds of lack of jurisdiction.[242]

It is clear that the secretary of state's decision is a final decision.[243] Nevertheless, under the Foreign Affairs Reform and Restructuring Act (FARR Act), the secretary of state's decision

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239 Plant v. Spendthrift Farm Inc., 115 S. Ct. 1147, 1453 (1995).

240 Lobue v. Christopher, 893 F. Supp. 65 (D.D.C. 1995). The order holding that section unconstitutional was vacated by the D.C. Circuit, April 30, 1996; 82 F. 3d 1081 (D.C. Cir. 1996) Cherry v. Warden, 1995 U.S. Dist. LEXIS 14828 (S.D.N.Y. Oct. 11, 1995); Carreno v. Johnson, 1995 U.S. Dist. LEXIS 14167 (S.D. Fla. Sep. 22, 1995); *In re Extradition of* Sutton, 905 F. Supp. 631 (E.D. Mo. Oct. 30, 1995).

241 *Lobue*, 893 F. Supp at 71. On the non-applicability of res judicata, see inter alia,*United States v. Doherty*, 186 F. 2d 91 (2d Cir. 1986) and Hooker v. Klein, 573 F. 2d 1360 (9th Cir. 1978). *See also In re Extradition of* Massieu, 897 F. Supp. 176 (D. N.J. 1995); Massieu v. Reno, 915 F. Supp. 681 (D. N.J. 1996), *rev'd & remanded* 91 F.3d 416 (3d Cir. 1996). *See also* Lopez-Smith v. Hood, 951 F. Supp. 908 (D. Ariz. 1996); United States v. Fernandez-Morris, 99 F. Supp. 2d 1358 (S.D. Fla. 1999); Seguy v. United States, 329 F. Supp.2d 871 (S.D. Tex. 2004), 329 F. Supp. 2d 880 (S.D. Tex. 2004), *habeas corpus denied* 329 F. Supp. 883, 889 (S.D. Tex. 2004).

242 Lobue v. Christopher, 82 F. 3d 1081 (D.C. Cir 1996).

243 Lopez Smith v. Hood, 1121 F.3d 1323 (9th Cir. 1997). *See also* Demjunjuk v. Petrovsky, 776 F.2d. 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Emami v. U.S. Dist. Ct., 834 F.2d. 1444 (9th Cir. 1987); Sindona v. Grant, 619 F.2d 167, 176 (2d Cir. 1980).

in enforcing the Convention against Torture is subject to review under the Administrative Procedure Act.[244]

A recent example of the complications attaching to executive discretion in extradition cases arises out of a Bolivian extradition request for its former president, Gonzalo Sánchez de Lozada, who stands accused of genocide and crimes against humanity for the killing of 67 and injuring of 400 indigenous peoples during confrontations between Bolivian forces and indigenous communities during the so-called "Gas Wars."[245] President Sánchez de Lozada resigned during the conflict and moved to the United States, where he has lived since.[246]

Criminal charges were brought against President Sánchez de Lozada in 2007 and confirmed by the Bolivian Supreme Court in 2007, setting the way for the extradition request.[247] In November 2008, a full five years after the incidents, and nearly two years after the indictment, Bolivia sought the extradition of President Sánchez de Lozada along with Carlos Sánchez Berzaín and Jorge Berindoague, his ministers of defense and energy, from the United States.[248] The Bolivian extradition request was made on the basis of the 1995 treaty between the two countries.[249] It should be noted that in the intervening years Bolivia has prosecuted a number of government and military officials over the killings,[250] marking a significant change in policy after the election of Evo Morales in 2006, especially after the new government was able to force the disclosure of evidence from the Bolivian military.[251]

The United States did not respond to the Bolivian extradition request until September 2012, when U.S. officials communicated to their Bolivian counterparts that the extradition request for President Sánchez de Lozada had been denied. Although it is unclear from the public materials on the matter, there is no evidence that the matter was submitted to a U.S. Attorney, and it appears that the Department of State did not submit the request to the DOJ, on the basis of executive discretion.[252] Although the extradition cases are not forthcoming, civil suits are proceeding against President Sánchez de Lozada under the Alien Tort Statute and the Torture Victim Protection Act.[253]

As stated above, it is understandable that the U.S. government may, and even should, exercise some level of discretion before forwarding the request to the U.S. Attorney who would ultimately have the responsibility of proceeding with the case at the judicial level. But it is clear that this type of discretion can also be used for political purposes. With respect to a former head of state such as Sánchez de Lozada, who was known to have been very closely allied with the United States, it is not unreasonable to conclude that the Office of Legal Advisor in the Department of State found the request to be insufficient and that it failed to meet U.S. standards on

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244 See discussion of this issue in Ch. VII, Sec. 8 on the Rule of Non-Inquiry.

245 Larry Rohter, *Bolivian President Remains Defiant as Protests Intensify*, N.Y. Times, Oct. 14, 2003; Larry Rohter, *Bolivia's Poor Proclaim Abiding Distrust of Globalization*, N.Y. Times, Oct. 17, 2003.

246 Larry Rohter, *Bolivian Leader Resigns and His Vice President Steps In,* N.Y. Times, Oct. 18, 2003.

247 Jean Friedman-Rudovsky, *Bolivia Calls Ex-President to Court*, Time, Feb. 6, 2007.

248 Safiya Boucaud, *Bolivia Officials Request Extradition of Ex-president from US*, Jurist, Nov. 12, 2008, at http://jurist.org/paperchase/2008/11/bolivia-officials-request-extradition.php; Human Rights Watch, World Report 2012: Bolivia, at http://www.hrw.org/world-report-2012/bolivia (last visited Aug. 23, 2013).

249 Extradition Treaty with Bolivia, June 27, 1995, U.S.–Bol., KAV 4192, SDoc 104-22.

250 Carlos Quiroga,*Bolivia Says Washington Won't Extradite Former Leader*, Reuters, Sept. 7, 2012.

251 Amnesty International, *Bolivia: Former Officials Convicted over Massacre*, Aug. 31, 2008, at https://www.amnesty.org/en/for-media/press-releases/bolivia-former-officials-convicted-over-massacre-2011-08-31.

252 Quiroga,*supra note* 252.

253 For an overview of the case, *see* Center for Constitutional Rights, *Mamani,* et al.*v. Sánchez de Lozada/Mamani,* et al.*v. Sánchez Berzain*, http://ccrjustice.org/ourcases/current-cases/mamani-v-sanchez (last visited Aug. 23, 2013).

what is likely to be political grounds. It is also possible that an objective review of the documentation supporting the request, including the charges, could have justified the exercise of discretion in rejecting the Bolivian request, but it seems likely that the United States did not wish to extradite President Sánchez de Lozada and seized upon any basis to avoid having to do so.

What is important to note is that the requesting state does not have any formal recourse when the executive discretion is invoked, leaving it without any formal channels of appeal. The requesting state can retain private counsel and file an extradition request as if it were a private action directly to the relevant court.[254] The requesting state can also attempt to cure the alleged deficiencies with the extradition request, which is not a violation of double jeopardy, but the unwillingness of the U.S. government to agree to the request in the first instance renders it unlikely that the requesting state will do so even after the defects have been remedied.

The converse to the above policy is also true, as the Department of State can exercise its gatekeeper function by electing not to initiate an extradition request transmitted to it by a given state. It can do so either for valid legal or technical reasons, or simply based on its political judgment.

Foreign states have also exercised their executive discretion in refusing to surrender individuals sought for prosecution on political and humanitarian grounds. Perhaps the most important recent example of this is the *Pinochet* case in the United Kingdom. Augusto Pinochet, the former military dictator of Chile, was arrested in London in October 1998 after a Spanish investigating judge issued an indictment for torture, murder, and enforced disappearances.[255] After a lengthy judicial process, Pinochet was deemed extraditable by the House of Lords for acts of torture that were carried out in Chile during his rule.[256] Despite this ruling, the British Home Secretary, Jack Straw, exercised his discretion and denied the extradition on humanitarian grounds, arguing that Pinochet's declining health rendered him unfit for trial. The decision by Straw to deny Pinochet's extradition was controversial, however, as the findings of the British medical doctors was not as unequivocal as Straw had indicated,[257] and there were doubts by observers over the legitimacy of Straw's determination and over the lack of transparency surrounding the issue.[258] Several groups filed claims before the British High Court,[259] and the Belgian government threatened to take the matter before the International Court of Justice.[260] Ultimately, Pinochet returned to Chile, apparently in good health,[261] where he was eventually deemed fit for trial and indicted on several occasions[262] but died before he could ultimately face trial.

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254 *See* Ch. IX, Sec. 1.

255 *Pinochet Arrested in London*, BBC, Oct. 17, 1998, *available at* http://news.bbc.co.uk/2/hi/europe/195413.stm.

256 *See* Ch. VI, Sec. 7.3.7.

257 Antony Barnett, *Pinochet: Straw May Have Misled MPs*, Guardian, Jan. 15, 2000, *available at* http://www.guardian.co.uk/world/2000/jan/16/pinochet.chile.

258 *U.K. Ruling on Pinochet Praised: Straw Urged to Forego Appeal*, Human Rights Watch (Feb. 16, 2000), http://www.hrw.org/news/2000/02/15/uk-ruling-pinochet-praised.

259 Jamie Wilson & Ian Black, *Amnesty Goes to Court on Pinochet,* Guardian, Jan. 25, 2000, *available at* http://www.guardian.co.uk/world/2000/jan/25/pinochet.chile.

260 *Belgium Begins Pinochet Challenge*, BBC, Jan. 25, 2000, *available at* http://news.bbc.co.uk/2/hi/uk_news/politics/618166.stm.

261 Alex Bellos & Jonathan Franklin, *Pinochet Receives a Hero's Welcome on His Return*, Guardian, Mar. 3, 2000, *available at* http://www.guardian.co.uk/world/2000/mar/04/pinochet.chile1. *See also* GonzaloCNI, Llegada del General Pinochet (EN VIVO) (XV), YouTube (Feb. 19, 2007), http://www.youtube.com/watch?v=gHReUalWqDw.

262 *Pinochet "Fit Enough" for Trial*, BBC, Jan. 16, 2001, *available at* http://news.bbc.co.uk/2/hi/americas/1120357.stm; *Pinochet Arrest Ordered*, BBC, Jan. 30, 2001, *available at* http://news.bbc.co.uk/2/hi/

More recently, the Biritsh Home Secretary Theresa May exercised her discretion and refused on humanitarian grounds to extradite Gary McKinnon to the United States.[263] McKinnon had hacked into Department of Defense and NASA computers looking for evidence of UFOs.[264] McKinnon, however, suffered from Asperger's syndrome and serious depression, and was considered a suicide risk, which prompted the Home Secretary's decision to deny the extradition on humanitarian grounds.[265] Home Secretary May explained that:

> Mr. McKinnon is accused of serious crimes . . . But there is also no doubt that he is seriously ill. He has Asperger syndrome, and suffers from depressive illness. The legal question before me is now whether the extent of that illness is sufficient to preclude extradition . . . . After careful consideration of all of the relevant material, I have concluded that Mr. McKinnon's extradition would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr. McKinnon's human rights.[266]

The United States registered its "disappointment" with the decision to deny McKinnon's extradition.[267]

Executive discretion is obviously controversial when it is invoked in certain circumstances and not others. The United Kingdom invoked executive discretion in the Pinochet and McKinnon cases. However, in other situations it has not. For instance, much has been made of the extradition of several Muslims to the United States for computer crimes related to the hosting of Islamicist websites that were hosted on U.S.-based servers. One of the deported individuals also suffers from Asperger's syndrome, as does McKinnon, but no real justification was given for the disparate handling of the situation.[268]

The exercise of executive discretion has also come under criticism by the Ecuadoran government, which accuses the United Kingdom of a double standard for ordering the extradition of Julian Assange, the Wikileaks founder, while simultaneously having denied the extradition of Pinochet. Although Assange was not physically ill as Pinochet was alleged to have been, the selective exercise of discretion is problematic.[269]

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americas/1142887.stm; Larry Rohter, *Chilean Judge Says Pinochet Is Fit for Trial*, N.Y. Times, Dec. 14, 2004, *available at* http://www.nytimes.com/2004/12/14/international/americas/14chile.html; Pascale Bonnefoy, *Pinochet Suffers Severe Heart Attack—Americas—International Herald Tribune*, N.Y. Times, Nov. 3, 2006, *available at* http://www.nytimes.com/2006/12/03/world/americas/03iht-pinochet.3763061.html.

263 Alan Travis & Owen Bowcott, *Gary McKinnon Will Not Be Extradited to US, Theresa May Announces*, Guardian, Oct. 16, 2012, *available at* http://www.guardian.co.uk/world/2012/oct/16/gary-mckinnon-not-extradited-may.

264 *Id.*

265 *Id.*

266 Alan Cowell & John F. Burns, *Britain Refuses to Extradite Computer Hacker Sought in U.S.*, N.Y. Times, Oct. 16, 2012, *available at* http://www.nytimes.com/2012/10/17/world/europe/britain-refuses-to-extradite-computer-hacker-sought-in-us.html?_r=0.

267 *Id.*

268 *Gary McKinnon: A Case of Double Standards?*, Guardian, Oct. 17, 2012, *available at* http://www.guardian.co.uk/world/blog/2012/oct/17/gary-mckinnon-case-double-standards; Victoria Brittain, *Condemned by the Abu Hamza Stereotype*, Guardian, Oct. 4, 2012, *available at* http://www.guardian.co.uk/commentisfree/2012/oct/04/condemned-abu-hamza-stereotype; Jerome Taylor, *Talha Ahsan: Behind Bars for Six Years without Charge and a Family Losing Faith in the Rule of Law*, Independent, Sept. 6, 2012, *available at* http://www.independent.co.uk/news/uk/home-news/talha-ahsan-behind-bars-for-six-years-without-charge-and-a-family-losing-faith-in-the-rule-of-law-8113730.html.

269 Phil Vinter, *Ecuador President Says UK Has No Right to Lecture over Assange . . . after Its Failure to Extradite Pinochet a Decade Ago*, Daily Mail, Aug. 23, 2012, *available at* http://www.dailymail.co.uk/news/article-2192566/Ecuador-president-says-UK-right-lecture-Julian-Assange.html.

6.2. Conditional Extradition: A Corollary of Executive Discretion

As a corollary to executive discretion, the secretary of state can impose conditions on the surrender of the relator. Such conditions could specifically relate to the principle of specialty,[270] or constitute an extension thereof. An example could be the requirement that the relator be tried before an ordinary tribunal and not by a special or exceptional jurisdiction (e.g., a military tribunal or such tribunals that a state may establish in connection with national security). Other conditions could refer to the return of the relator upon termination of the legal proceedings against him/her in the requesting state, or conditions on the execution of sentences (such as his/her return to the United States for such purposes under the provisions of a treaty on the execution of sentences), or limitations on the type of penalty to be imposed (in some requested states that do not permit the death penalty, the requesting state may be asked to commit itself not to apply that sanction). The relator may petition the secretary of state to place certain conditions on his/her surrender to ensure a fair trial and due process.[271]

Probably the most detailed conditional extradition in contemporary practice is the case of *Abu Eain v. Wilkes*, which is discussed above.[272] On December 12, 1981 the Department of State issued a "memorandum of decision" in the case of the request by the State of Israel for the extradition of Abu Eain, which it attached to the Department of State's commitment form of the same date. The secretary of state, responding to the concerns raised by the relator, obtained assurances from the government of Israel and stated in the above-mentioned memorandum:

> Concern has been expressed by Abu Eain that he would not receive a fair trial if extradited to Israel. That concern appears to be based in large part on an assumption that he would be tried in a military court for security reasons.
>
> We are now satisfied that this assumption is without basis. We have been formally assured by the Government of Israel that the crimes charged against Abu Eain—murder, attempted murder and causing bodily harm with aggravated intent—are common criminal charges which will be tried in an ordinary civilian court; that the conditions of Abu Eain's confinement pending trial and the place of his detention will be the same as in the case of any other civilian detainee accused of similar crimes; that he will be entitled to a speedy, public trial and to counsel of his choice; that he will be entitled to confidential interviews with his attorney on any workday during regular hours; that he will be entitled to weekly visits with family members and other persons; that normal rules of criminal procedure and evidence will prevail; and that the burden will be on the prosecution to establish guilt beyond a reasonable doubt. If convicted, Abu Eain would have the right to appeal the decision to the Israeli Supreme Court. Finally, the charges against Abu Eain do not subject him to the possibility of the death penalty. Abu Eain has stated that if he "could be assured of a just trial in an open system, he would have nothing to fear." I believe he has those assurances.[273]

The United States has seldom attached conditions to extradition. One would assume that because of the United States' professed attachment to the Rule of Law that it would attach conditions to extradition with respect to a number of foreign states. But unlike states that do not extradite for the death penalty and that attach such conditions to extradition toward the United States, the converse is not true as the United States retains the death penalty.[274] The

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270 *See* Ch. VII, Sec. 6.

271 *See supra* Secs. 1 and 2.

272 Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). *See also* Lindstrom v. Gilkey, 1999 WL 342320 (N.D. Ill. May 14, 1999); *In re Extradition of* Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996).

273 *Abu Eain*, 641 F. 2d at 504.

274 Although the United States would presumably not oppose the extradition of individuals to states retaining the death penalty, it could do so if it deems the manner in which the execution is applied to constitute torture and other forms of inhuman or degrading treatment and punishment, or a form of cruel

same is true for extensive periods of incarceration, which the United States also maintains. Consequently there is not very much jurisprudence in the United States on conditional surrender, nor is there much of a diplomatic practice by the Department of State in that area.[275]

One is tempted to conclude, particularly in light of the unlawful and questionable practices of the United States, as evidenced by the practices of kidnapping to secure jurisdiction,[276] "extraordinary rendition,"[277] the failure to respect assurances,[278] and the failure to adhere to the Rule of Specialty[279] that the United States has no interest in the fate of persons it surrenders to other countries. This also explains why the United States has little patience with states that do impose conditions on extradition or request assurances and insist on the application of specialty. In fact, when compared to all European Union states as well as all Latin American states, the United States is unique in the number of cases involving its avoidance or evasion of enforcing conditions attached to extradition from a foreign surrendering state.

and unusual punishment in violation of the Eighth Amendment. If that were the case it could attach a condition concerning the non-applicability of the death penalty if it considers other factors relating to the criminal charges, particularly when the crime for which extradition was granted does not carry the death penalty in the United States.

275 The United States does not even attach conditions with respect to countries that are known or believed to engage in torture, even though the United States is a party to the Convention against Torture.

276 *See* Ch. V, Sec. 1.

277 See Ch. V, Sec. 4. Also considering that the United States practiced under the Bush administration what it euphemistically called "extraordinary rendition," which entails the kidnapping of persons in foreign countries and their surrender outside any legal process to states that will torture them.

278 *See* Ch. VII, Sec. 7.

279 *See* Ch. VII, Sec. 6.

Chapter XII

Surrender and Miscellaneous Matters

Contents

1. Surrender of a Person Held Extraditable to a Requesting State[1]

As stated in Chapter I, rendition refers to the process of surrendering a person from one state to another or to an international tribunal, provided it is done in accordance with the legal and

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1 For examples of treaty provisions on surrender, see Extradition Treaty with Thailand, art. 11(3), *entered into force* May 17, 1991, S. TREATY DOC. 98-16 ("If the extradition has been granted, surrender of the person sought shall take place within such time as may be prescribed by the laws of the Requested State. The competent authorities of the Contracting Parties shall agree on the time and place of the surrender of the person sought. If, however, that person is not removed from the territory of the Requested State within the prescribed time, that person may be set at liberty and the Requested State may subsequently refuse extradition for the same offense"); Bulgarian Extradition Treaty, art. 12, *entered into force* May 21, 2009, S. TREATY DOC. 110-12; Argentine Extradition Treaty, art. 12, *entered into force* June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866; Austrian Extradition Treaty, art. 14(2) –(4), *entered into force* Jan.1, 2000, S. TREATY DOC. 105-50, TIAS 12916; Hungarian Extradition Treaty, art. 13, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Costa Rican Extradition Treaty, art. 13, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Jamaican Extradition Treaty, art. XI, *entered into force* July 7, 1991, S. TREATY DOC. 98-18; Extradition Treaty with the Bahamas, art. 11, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Bolivian Extradition Treaty, art. IX, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Jordanian Extradition Treaty, art. 12, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Italian Extradition Treaty, art. XIII, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023.

Some treaties also provide for the return of a relator to the requested state upon conclusion of criminal proceedings where the relator faces charges or is serving a criminal sentence in the requested state. *See*

administrative requirements of the surrendering state. Rendition is therefore a synonym for extradition. If the rendition bypasses extradition or other legal processes, it is legally questionable although practiced by some states. This form of rendition is still subject to international and regional human rights law norms, however. "Extraordinary rendition" is a term used since 2001 to describe the kidnapping and transfer of individuals by the United States for purposes of interrogation and torture, which is illegal under both international and U.S. law.[2] What this chapter addresses are the modalities by which a state physically or materially transfers a person held in custody to another state that sought and obtained the person's extradition. Some treaties provide for all or some of the modalities of transferring custody or surrendering a person; others provide for it in their national laws.

Title 18 U.S.C. § 3196 provides for the manner in which the secretary of state shall effectuate the surrender of an individual found extraditable after such a judicial determination has been made under § 3194 and appeal under § 3195, or other review proceedings have been completed. The secretary of state has the discretionary power not to surrender an individual otherwise found extraditable or to place conditions on his/her extradition. These conditions may relate to what the relator can be tried for,[3] limits on the penalty, or guarantees at the trial. Section 3196 also clearly states that a U.S. citizen may be surrendered even though the treaty does not specifically authorize such surrender.

Surrender is by the secretary of state through his/her designated agents, who are usually U.S. marshals. The relator is surrendered to an agent of the foreign government in accordance with modalities that the secretary of state determines. However, the surrendering process is not as formal as it appears. In some cases, the U.S. agents will accompany the surrendered person to the surrendering state and transfer custody of the relator in that country. In most cases federal agents, usually U.S. marshals, simply take the relator from the federal detention facility to an airport where he/she is delivered to awaiting foreign law enforcement agents. The relator is then handed off and taken aboard a commercial airliner in the custody of government agents from the requesting state, while the U.S. marshals wait for the airplane's door to be closed and the plane to push off from the gate. As the relator is handed over to foreign law enforcement agents while still on U.S. territory, the question arises as to whether such handing over of a person on U.S. territory is constitutional. Even if the handover is constitutionally valid, U.S. courts continue to have jurisdiction over the relator while he/she is on U.S. territory even if he/she is in the effective custody of foreign agents with the consent of the government.

Because of the informality of this process, it is not uncommon for Assistant United States Attorneys (AUSAs) to urge U.S. marshals to carry out the transfer of a relator within a matter of hours from the time the extradition order was entered. This is done to avoid giving the relator's counsel the time to seek a stay or other judicial orders that would prevent the relator's surrender. Relators are particularly vulnerable to such rapid transfers when defense counsel files a petition for a writ of habeas corpus,[4] but fails to get a stay of execution of the extradition order. As the extradition order is unappealable, it can be carried out at any time after issuance of the

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Extradition Agreement with the European Union, art. 9, *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (when preexisting agreement between EU member state and United States lacks similar provision, allowing requested state to surrender the relator with the understanding that he/she will be kept in custody and returned under circumstances and conditions agreed upon by the two states); Peruvian Extradition Treaty, art. X(2), *entered into force* Aug. 25, 2003, S. TREATY DOC. 107-6; Second Protocol Amending Extradition Treaty with Canada, art. 1, *entered into force* Apr. 30, 2003, S. TREATY DOC. 107-11 (adding art. 7 *bis* to earlier treaty); Protocol Amending Extradition Treaty with Mexico, art. 1, *entered into force* May 25, 2001, S. TREATY DOC. 105-46, TIAS 12897 (adding art. 15(2)–(3) to earlier treaty).

2 *See* Ch. V. *See also* M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (2010).

3 *See* Ch. VII, Sec. 6.

4 *See* Ch. XI.

order. Habeas corpus is an extraordinary remedy,[5] but the filing of a petition is not equivalent to the issuance of the writ.

For instance, in one case the denial of the petition was handed down by a district court judge of the Southern District of New York a few minutes before 5:00 p.m. on a Friday. At 6:20 p.m., the notice of review of the denial was filed with the Second Circuit, along with a motion for stay of execution. By about 9:00 p.m. when a judge was available to grant the motion for stay, the relator had been taken from New York's Metropolitan Detention Center to Kennedy Airport and was on his way to the requested state. The government acted within the letter of the law, though not within its spirit.

Sometimes, however, as it once occurred in Chicago, an AUSA purposefully evaded a judicial stay. In that case, a U.S. circuit judge issued a stay, which the AUSA evaded by claiming lack of knowledge while ordering U.S. marshals to deliver the relator to foreign agents awaiting at O'Hare airport.[6] The AUSA was later ordered by a panel of three circuit judges to be disciplined.[7] This is the first instance, to the best of this writer's knowledge, in which an AUSA was disciplined for improper conduct in extradition proceedings.[8]

Disciplinary proceedings against offending government lawyers and law enforcement agents are both necessary and proper means to insure that the law is respected. But it does not provide a remedy to the relator who has been delivered to a requested state while his/her habeas corpus petition in the United States is dismissed as moot.

1.1. Concurrent Extradition Requests[9]

The extradition statute does not address the question of how the United States will deal with multiple extradition requests, also referred to as concurrent requests. Concurrent requests are those that are received from two or more states for the same person. Such requests may or may not be related to the same set of facts or crimes. Very likely concurrent requests would be for the same set of facts or crimes, and that is the reason for having more than one state make a request for the same person. This is usually the case with respect to major drug traffickers or persons who engage in ongoing criminal activity of a financial or economic nature that spans

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5 *See* Ch. XI.

6 Lindstrom v. Graber, 203 F.3d 470 (7th Cir. 2000).

7 *In re* Lightfoot, 217 F.3d 914 (7th Cir. 2000).

8 Not even the egregious conduct of the Department of Justice Special Investigations office lawyers in the *Demjanjuk* case resulted in disciplinary proceedings. But they did resign their posts. *See* Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

9 For examples of treaty provisions regarding concurrent extradition requests, see Extradition Agreement with the European Union, art. 10, *entered into force* Feb. 1, 2010, S. TREATY DOC. 109- 14 (when the United States or an EU member state receives competing extradition request from the other state and a third country, the requested state shall consider "all relevant factors" when determining which request to honor, including but not limited to "(a) whether the requests were made pursuant to treaty; (b) the places where each of the offenses were committed; (c) the respective interests of the requesting States; (d) the seriousness of the offenses; (e) the nationality of the victim; (f) the possibility of any subsequent extradition between the requesting States; and (g) the chronological order in which the requests were received from the requesting States"); Extradition Treaty with Trinidad and Tobago, art. 12, *entered into force* Nov. 29, 1999, S. TREATY DOC. 105-21; Extradition Treaty with Thailand, art. 13, *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Costa Rican Extradition Treaty, art. 15, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Jamaican Extradition Treaty, art. XIII, *entered into force* July 7, 1991, S. TREATY DOC. 98-18; Extradition Treaty with the Uruguay, art. 14, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197; Bolivian Extradition Treaty, art. X, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Jordanian Extradition Treaty, art. 14, *entered into force* July 29, 1995, S. TREATY DOC. 104-3.

multiple states. Alternatively, it could involve a single event that produces multiple victims, thus prompting different states to seek the extradition of the perpetrator.[10]

A number of bilateral treaties contain specific provisions on the subject of concurrent requests, but most do not. Where a situation arises and the applicable bilateral treaty does not have a provision, the court will resort to customary international law, which will determine priority usually of the basis of jurisdictional theory underlying the competing requests.[11] Customary international law gives precedence to the territorial jurisdiction theory, though the nationality theory may prevail, depending on the nature of the harm done to the victims, or the policy interests of the state of nationality in prosecuting its own nationals.

It is also not unusual for competing extradition claims to be made, particularly by the state of nationality of the person sought by another state whenever political considerations are at stake.[12]

In *United States v. Adamov*[13] both the United States and Russia, Adamov's country of nationality, requested his extradition from Switzerland. Switzerland eventually granted Adamov's extradition to Russia by a decision of the Swiss Supreme Court on December 22, 2005. The judgement emphasized the priority of the country of nationality in concurrent jurisdiction requests, which in this case was also where the acts sustaining the crimes charged by the United States took place. Unrelated to the issue of concurrent jurisdiction, which had been decided by the Swiss Supreme Court, the United States did not, however, request his extradition from Russia, but an indictment against him was pending in the Western District of Pennsylvania. In an astute procedural move, Adamov waived his appearance in Pennsylvania, thereby allowing the case against him to proceed while he was in custody in Russia. Adamov's goal was to make sure that he would not appear before a U.S. court in connection with a program funded by the United States to improve safety at Russian nuclear facilities. The U.S. indictment charged Adamov, the former Russian Minister of Energy, and other Russian officials with embezzling funds provided by the United States for improvements to nuclear safety.[14] Adamov was tried by a Russian court and sentenced to five-and-a-half years in a penal colony for abuse of office and fraud, but released two months later when a Russian court suspended his sentence.[15]

2. Dissolution of the Extradition Order and Release of the Relator for Failure to Surrender

Section 3188 provides that if the relator has not been surrendered "within two calendar months" from the date of receipt by the secretary of state of the certified copy of the transcript of the

10 For example, in the Pan-Am 103 explosion over Lockerbie, Scotland, both the United States and the United Kingdom sought the extradition of two Libyan citizens from Libya for the commission of the said crime. The matter ultimately went before the International Court of Justice because of the lack of clarity as to whether the duty to prosecute, in this case by the country of origin, Libya, or the duty to extradite, in this case to the United States or United Kingdom. *See* Ch. I, Sec. 3 (duty to extradite or prosecute).

11 *See* Ch. VI.

12 Thus, for a period of time between the 1960s and 1980s, the government of Colombia would frequently make a competing extradition request to that of the United States with respect to Colombian nationals who were highly placed in that country's drug cartel.

13 United States v. Adamov, 2006 U.S. Dist. LEXIS 35408 (W.D. Penn. 2006).

14 *Id.*

15 Charles Digges, *Former Russian Atomic Minister Adamov Sentenced tTo 5 ½ Years in Penal Colony for Fraud and Abuse of Office*, Bellona, Feb. 20, 2008, *available at* http://www.bellona.org/articles/articles_2008/Adamov_sentenced (last visited Sept. 24, 2012); Aleksei Sokovnin, *Yevgeny Adamov's Sentence Suspended*, Kommersant, Apr. 18, 2008, *available at* http://dlib.eastview.com/browse/doc/20450033 (last visited Sept. 24, 2012).

proceedings, he/she is entitled to be released by order of a U.S. judge. This statutory time limit does not begin to run until there has been final adjudication of the extradition request.[16] In *Duran v. United States* the court held that the two–calendar-months' limit laid down in § 3188 begins to run after the final adjudication and certification of extradition.[17]

The language of § 3188 is surprisingly imprecise, even though similar time-marking provisions in the U.S. Code state the exact number of days that constitute the statutory limitation. As a consequence of the "two calendar months" statutory language, courts have calculated the period differently and frequently stretch the number of days beyond the sixty days' benchmark in order to accommodate the government. This practice is permitted under the statutory language, which states that "unless sufficient cause is shown to such judge why such discharge ought not to be ordered." The government, therefore, can show cause why the two– calendar-months' period should be extended.

In *In re Barrett*[18] the Sixth Circuit considered, first, when the two–calendar-month statutory limitation began to run, and second, whether the relator's filing of a petition for writ of habeas corpus tolled the running of the two calendar months.[19] On the first issue, the court held that the limitation began to run when the magistrate signed the certificate of extradition and order of commitment on January 11, 1978, not on December 15, 1977, as the relator argued, when the relator was first arrested at the request of Canadian authorities. On the second issue, the Sixth Circuit held that the statutory language of "two calendar months" is not "of a mandatory nature," but rather, allows for judicial discretion.[20] Thus, the court held that the district judge did not abuse her statutory discretion by refusing to release the relator from custody, even though the Canadian authorities did not actually take custody of the relator until March 13, 1978, which was two days beyond the two–calendar-months' statutory limitation.[21] In doing so, the Sixth Circuit reasoned that: (1) the delay had not prejudiced the relator; (2) the record did not contain a demand by the relator for a speedy trial; (3) the charge against the relator was serious: "attempted murder and wounding"; (4) the statute did not terminate the requesting state's indictment or bar subsequent refiling of the extradition request; and (5) the relator himself occasioned much of the delay by his petition for writ of habeas corpus.[22]

The statute's "sufficient cause" exception is frequently based on logistical difficulties or material problems in effectuating the transfer of custody from the United States to the requesting state.

Another basis, namely prosecution for criminal charges in the United States, may be sufficient cause for the United States to delay surrender of the relator to the requesting state.[23] In

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16 *See* Liberto v. Emery, 724 F.2d 23 (2d Cir. 1983) (holding that the two calendar months under § 3188 begins to run after the final adjudication).

17 Duran v. United States, 36 F. Supp. 2d 622, 627 (S.D.N.Y. 1999).

18 *In re Barrett*, 590 F.2d 624, 625 (6th Cir. 1978).

19 *Id.*

20 *Id.* at 626.

21 *Id.*

22 *Id.*

23 Hababou v. Albright, 82 F. Supp. 2d 347, 350 (D.N.J. 2000). For treaty provisions allowing surrender to be delayed for completion of a trial or service of a criminal sentence, see Jamaican Extradition Treaty, art. XII, *entered into force* July 7, 1991, S. TREATY DOC. 98-18 ("If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the territory of the Requested State for a different offence, the Requesting State shall, unless its laws otherwise provide, defer the surrender of the person sought until the conclusion of the proceedings against that person or the full execution of any punishment that may be or may have been imposed"); Extradition Treaty with Sri Lanka, art. 13(2), *entered into force* Jan. 12, 2001, S. TREATY DOC. 106-34; French Extradition Treaty, art. 16(2), *entered into force* Feb. 1, 2002, S. TREATY DOC. 105-13; Hungarian Extradition Treaty, art. 14, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Extradition Treaty with Thailand, art.

Hababou v. Albright the relator's extradition was certified on April 1, 1999, but on June 18, 1999 he was indicted on twenty-three counts of securities fraud.[24] In response to the relator's August 5, 1999 petition for writ of habeas corpus, the District Court of New Jersey stated that the "United States has demonstrated sufficient cause to delay surrender of petitioner to France for the reason that the United States has a strong interest in prosecuting the complex domestic charges pending against the petitioner."[25]

Similarly, in *United States v. Nolan* the government deferred the relator's surrender to Costa Rica until the conclusion of U.S. proceedings or full execution of the U.S. sentence imposed at the conclusion of proceedings.[26] The relator's extradition was certified on August 31, 2009, but on October 20, 2009 he was indicted on five counts related to his making and possessing prohibited objects designed to facilitate his escape from the facility where he was detained.[27] The relator argued in his petition for writ of habeas corpus that he faced indefinite custody, in violation of his due process rights.[28] The court reasoned that "the Government's decision to defer Nolan's surrender is allowed under the Extradition Treaty with Costa Rica" and accordingly "does not fault the Government's election to defer surrender as contemplated under the Treaty."[29]

"Sufficient cause" also encompasses delays attributable to pendency of action by the relator. In *Jimenez v. United States District Court* the relator was committed to government custody on June 16, 1961.[30] After pursuing numerous legal remedies over the next two years, the relator's § 3188 claim came before Supreme Court Justice Arthur Goldberg, in chambers, who held that:

> [T]he delays resulted from petitioner's pursuit of legal remedies, not from the dilatory actions of either party to the extradition treaty. The common sense reading of §3188 is that where . . . the accused has instituted and pursued review of his extradition order, the two-month period runs from the time his claims are finally adjudicated, not from the time of the original commitment order he has been challenging.[31]

Thus, the relator cannot him-/herself create delay to defeat the extradition.

Delay in certification does not automatically toll the statute. For example, the Fifth Circuit held in *In re United States (Allen v. Schultz*[32] that the government's delay in surrendering the

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12, *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Costa Rican Extradition Treaty, art. 14, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Bolivian Extradition Treaty, art. XI, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Jordanian Extradition Treaty, art. 13, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Italian Extradition Treaty, art. XIV, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023.

24 *Hababou*, 82 F. Supp. at 348–349.

25 *Id.* at 350.

26 United States v. Nolan, 2009 U.S. Dist. LEXIS 111299 (N.D. Ill. Dec. 1, 2009).

27 *Id.* at *1, *4

28 *Id.* at *4.

29 *Id.* at *4–*5. The court also referred to *Hababou* where that court found "sufficient cause to delay surrender where the governing treaty permitted a delay in surrendering until final adjudication of domestic matters." *Id.* at *5.

30 Jimenez v. U.S. Dist. Ct., 84 S. Ct. 14, 15 (1963) (Goldberg, J., in chambers).

31 *Id.* at 18. *See* Beukes v. Pizzi, 888 F. Supp. 465, 469–470 (D.N.Y. 1995). The relator claimed he had been "held in custody pending extradition for 108 days, in excess of the 60 days (or extensions for good cause)" as permitted by § 3188. *Id.* at 469. Relying on *Jimenez*, the court held that "any delay in effecting extradition that is attributable to proceedings commenced [by the relator] are (sic) plainly 'sufficient cause' within the meaning of § 3188," and denied the relator's petition for a writ of habeas corpus. *Id.* at 469–470.

32 *In re* United States (Allen v. Schultz), 713 F.2d 105, 110 (5th Cir. 1983).

relator to Canadian custody was not the result of government inaction.[33] Rather, the district court "applied its discretion on the basis of misapprehension about the law," because it mistakenly thought it was the government's responsibility to compile the record and send it to the secretary of state for certification.[34] In fact, this duty fell upon the extraditing magistrate.[35] Hence, the delay in certification did not result from government inaction; the government could not deliver the relator to Canadian custody without certification from the secretary of state, who could not certify the relator's extradition without action by the district court.[36] However, the court seemed to have mistakenly understood that the delay in certification was not sufficient cause under § 3188, whereas "sufficient cause" tolls the "two calendar months" period.[37]

At times the ambiguity in the statutory provisions serves a political purpose, such as in the *Abu Marzook* case.[38] In *Abu Marzook* the government of Israel failed to take custody within sixty days of the date of the extradition order, and the U.S. government delayed the relator's release for four days under the guise of conducting a deportation hearing, as he was a permanent resident of the United States.[39]

Whenever the delay in surrender is occasioned by reluctance of the requesting state to take custody of the relator, bad faith, or the desire to punish the relator either by the requesting or the requested state, or if it causes harm to the relator, the release should be ordered after the passage of "two calendar months," or sixty days from the date of certification.[40] It should be noted that whether or not the "two calendar months" or the period during which the relator was held in custody during the extradition proceedings qualifies for credit toward a sentence depends on the law of the requesting state.

3. Renewability of Extradition Request[41]

An extradition request that has been denied can be renewed even if there is no new evidence presented in support of the second request. There is no double jeopardy prohibition against such a renewed request, nor is a finding of non-extraditability res judicata as to a second proceeding.[42]

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33 *Id.* at 109.

34 *Id.*

35 *Id.*

36 *Id.* at 109–110.

37 In reaching this conclusion, the Fifth Circuit also noted a key requirement of § 3188, which charges the relator with notifying the secretary of state of the intent to file a petition for writ of habeas corpus under § 3188. *Id.* at 110. In the instant case, affidavits submitted to the Fifth Circuit indicated that the secretary of state did not receive first notice of the relator's intent until more than one week after the district court granted the writ. *Id.*

38 Marzook v. Christopher, Case No. 96-2841 (2d Cir. 1996).

39 Abu Marzook eventually relinquished his permanent resident status in order to have the right to voluntary departure to Jordan, which had accepted him. Nonetheless, the United States pushed through a deportation order and instead of allowing him to fly a Jordanian commercial aircraft out of New York, flew him to Jordan on an FBI plane, in shackles and cuffs and wearing prison garb, as a form of punishment. *Id.*

40 *See In re* Dawson, 101 F. 253 (C.C.N.Y. 1900) (holding that there was not sufficient cause for delayed arrival of officer for requesting state and stating that relator "[had] been imprisoned long enough, awaiting the leisurely movements" of the requesting authorities"). *See also* McElvy v. Civiletti, 523 F. Supp. 42 (S.D. Fla. 1981) (stating that "where the delay is caused by the requesting nation, a petitioner ought not wallow in jail. He is entitled to immediate release at the conclusion of the two-calendar month period.").

41 *See also* Ch. VIII, Sec. 4.3.

42 *See* Hooker v. Klein, 573 F.2d 1360 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978). *See also* Collins v. Loisel, 262 U.S. 426 (1923); Artukovic v. Rison, 628 F. Supp. 1370 (C.D. Cal. 1986), *aff'd*, 784

Nevertheless, findings of fact made by one judge cannot be overturned by another judge of the same jurisdiction without the submission of new facts to support a different finding. Were this otherwise federal judges of the same level would be able to sit as appellate judges when reviewing each others' decisions under the guise of renewability.

The rationale for the non-applicability of double jeopardy or res judicata does not derive from statutory authority, but from the determination that extradition is not criminal or civil, but a sui generis judicial category. Presumably this should not authorize the government, acting on behalf of a requesting state, from re-presenting extradition requests for the same person on the basis of the same evidence after a judicial determination of non-extraditability has been made at a hearing under § 3184.[43] But that would imply that the government should have only a single bite at the apple. However, in the absence of a right to appeal, that would be unduly restrictive. A particular prohibition should, however, exist against the government's vexatious acts in bringing multiple requests without new grounds or new evidence, as this violates the integrity of the judicial process that is protected by the Fifth Amendment's Due Process Clause. As stated in Chapter XI, Judge Royce Lamberth of the Federal District for the D.C. District held in *Lobue v. Christopher*:

> The government's contention that extradition judges decisions are final and binding upon the parties is insupportable. . . . [Since] There appears to be no legal limit on the number of times extradition proceedings may be brought against the same individual on the same charges. See *Collins*, 262 U.S. at 429–430. ("Protection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection.") Certainly a prisoner who found himself facing trial in a foreign country following multiple extradition proceedings in this country would dispute the government's contention that the original magistrate's determination of non-extraditability was "binding."[44]

There are many cases that raise the subject of renewed complaints brought by the government, but they have usually been on the basis of new evidence presented by the requested state or on new circumstances. Only one case stands out in the annals of extradition as the most egregious abuse of the questionable practice, namely that of Mario Ruiz Massieu, who was requested by Mexico for alleged intimidation and obstruction of justice.

In *Massieu* the government presented four complaints in succession, and each one was rejected by the District Court of New Jersey. Four separate judicial proceedings were held before two separate magistrates, and each resulted in a ruling of non-extraditability on the grounds that

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F.2d 1354 (9th Cir. 1986) (stating prior holding of applicability of political offense exception not bar to subsequent extradition based on separate request), *aff'd*, 784 F.2d 1354 (9th Cir. 1986); *In re* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963); *Ex parte* Schorer, 197 F. 67 (C.C.E.D. Wis. 1912); *In re* Kelly, 26 F. 852 (C.C.D. Minn. 1886).

43 *See Artukovic*, 628 F. Supp. 1370; United States v. Doherty, 186 F.2d 91 (2d Cir. 1986). In this case, Artukovic, who was sought by Yugoslavia in 1950, was found non-extraditable in 1954 on grounds that the crimes he committed were of a "political character." Yet Artukovic, as Minister of Interior of the *Ustashi* Croation government, working with Nazi Germany and its occupation forces, had been alleged in an indictment to have committed the murder of 250,600 civilians. Artukovic v. Boyle, 140 F. Supp. 245, 247 (S.D. Cal. 1956), *on remand from* 211 F.2d. 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954), *appealed from* 107 F. Supp. 11 (S.D. Cal. 1952); *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *on remand*, United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959) (holding lack of probable cause), *overruled by* Lopez-Smith v. Hood, 121 F. Supp. 383 (S.D. Cal. 1959)(ruling competence is not relevant or necessary in extradition proceedings). *See also* Hooker v. Klein, 473 F.2d 1360 (9th Cir. 1978).

44 *See* Ch. XI.

the complaints failed to establish "probable cause" as required by § 3184. The government, through the Attorney General and the secretary of state, also tried to influence the judicial determination in a blatantly obvious manner. When these attempts were noted in one of the judicial determinations,[45] the government resorted to an abuse of power and abuse of discretion in trying to get Massieu deported, even though he had a valid visa to the United States. The Immigration and Naturalization Service, which was at the time under the Department of Justice,[46] seemed to have already been instructed by Attorney General Janet Reno to deport Massieu to Mexico, irrespective of the requirements of the law. It was indeed a shocking abuse of power by the country's chief law enforcement official. Massieu was, as a result, unlawfully held deportable, and he appealed to the federal district court.[47] At that hearing, the government alleged the untenable proposition that the relevant deportation statute, Title 8, § 241(a)(4)(C)(i), granted the secretary of state "unfettered" discretion in deciding whether an alien whose presence or activities in the United States has seriously adverse consequences on the foreign policy of the United States. Yet, that section of the statute does not give the secretary of state such claimed "unfettered discretion," nor is it constitutionally possible for Congress to fully and completely delegate its legislative powers to the executive branch. As a result, the federal district court held that section of the statute unconstitutional.[48]

Because of the most unusual nature of the case, the federal district court's Opinion and Statement of Facts are quoted extensively:

> Plaintiff, Mario Ruiz Massieu, seeks a permanent injunction enjoining the deportation proceeding instituted against him pursuant to 8 U.S.C. § 1251(a)(4)(C)(i) and a declaration that the statute, which has not previously been construed in any reported judicial opinion, is unconstitutional. That statute, by its express terms, confers upon a single individual, the Secretary of State, the unfettered and unreviewable discretion to deport any alien lawfully within the United States, not for identified reasons relating to his or her conduct in the United States or elsewhere but, rather, because that person's mere presence here would impact in some unexplained way on the foreign policy interests of the United States. Thus, the statute represents a breathtaking departure both from well established legislative precedent which commands deportation based on adjudications of defined impermissible conduct by the alien in the United States, and from well established precedent with respect to extradition which commands extradition based on

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45 *See In re Extradition of* Massieu, 897 F. Supp. 176 (D.N.J. 1995) and Massieu v. Reno, No. Civ. A. 96-104 (MTB), 915 F. Supp. 681 (D.N.J. 1996). It should be noted that after the second hearing the United States Attorney of the District of New Jersey displayed commendable integrity and ethics by withdrawing from the case, which was then taken over by attorneys from the Department of Justice.

46 In 2003 the Immigration and Naturalization Service was renamed United States Citizenship and Immigrations Enforcement, and brought under the umbrella of the Department of Homeland Security.

47 *See* Chs. III and IV.

48 *See Massieu v. Reno*, where district Court Judge Maryanne Barry held:

> "Foreign policy" cannot serve as the talisman behind which Congress may abdicate its responsibility to pass only sufficiently clear and definite laws when those laws may be enforced against the individual. See *Shahla v INS*, 749 U.S. 561, 563 n.2 (9th Cir. 1984) ("the judicial branch may examine whether the political branches have used a foreign policy crisis as an excuse for treating aliens arbitrarily"). Although the executive's discretionary authority over foreign affairs is well established, Congress cannot empower the executive to employ that authority against the individual except through constitutional means. See *Valentine v. United States ex rel. Neidecker,* 299 U.S. 5, 9 ("the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is governed by law"). If the Constitution was adopted to protect individuals against anything, it was the abuses made possible through just this type of unbounded executive authority.
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> *Massieu*, 915 F. Supp. at 702 (footnote omitted).

adjudications of probable cause to believe that the alien has engaged in defined impermissible conduct elsewhere.

Make no mistake about it. This case is about the Constitution of the United States and the panoply of protections that document provides to the citizens of this country and those non-citizens who are here legally and, thus, here as our guests. And make no mistake about this: Mr. Ruiz Massieu entered this country legally and is not alleged to have committed any act within this country which requires his deportation. Nor, on the state of this record, can it be said that there exists probable cause to believe that Mr. Ruiz Massieu has committed any act outside of this country which warrants his extradition, for the government has failed in four separate proceedings before two Magistrate Judges to establish probable cause. Deportation of Mr. Ruiz Massieu is sought merely because he is here and the Secretary of State and Mexico have decided that he should go back.

The issue before the court is not whether plaintiff has the right to remain in this country beyond the period for which he was lawfully admitted; indeed, as a "non-immigrant visitor" he had only a limited right to remain here but the right to then go on his way to wherever he wished to go. The issue, rather, is whether an alien who is in this country legally can, merely because he is here, have his liberty restrained and be forcibly removed to a specific country in the unfettered discretion of the Secretary of State and without any meaningful opportunity to be heard. The answer is a ringing "no."

The facts of this case read more like a best-selling novel than a typical deportation proceeding. Mario Ruiz Massieu, a citizen of Mexico, is a member of one of Mexico's most influential and politically active families, and, in recent years, has occupied several positions at the upper-most echelons of the Mexican government. For much of the past twenty years, Mr. Ruiz Massieu lived an academic life both as a professor and director of the National University of Mexico. During that time, he authored a number of books on topics such as education, history, law and politics. In 1993, however, Mr. Ruiz Massieu was thrust into the vanguard of Mexican politics as a member of the Institutional Revolutionary Party ("the PRI"), Mexico's only established ruling party. He was appointed Deputy Attorney General in 1993, Under Secretary for the Department of Government in 1994, and Deputy Attorney General, again, in May of 1994.

On September 28, 1994, Mr. Ruiz Massieu's brother, Jose Francisco Ruiz Massieu-Secretary General of the PRI and an outspoken critic of the Mexican political system—was assassinated. Within hours, Mario Ruiz Massieu, as Deputy Attorney General, began an investigation into his brother's murder. In the ensuing weeks, fourteen people were apprehended and indicted as part of a conspiracy uncovered through Mr. Ruiz Massieu's investigatory efforts. Many of the arrested conspirators named Manual Munoz Rocha, a PRI official, as the architect of the conspiracy. Mr. Munoz Rocha, however, was shielded by official immunity, and could not be interviewed by the Attorney General's office in connection with the case. Mr. Ruiz Massieu requested that President Carlos Salinas de Gortari waive Rocha's immunity, a request that the PRI vigorously opposed. Eventually, the immunity was waived, but not before Mr. Munoz Rocha had disappeared. He was never interviewed or arrested, and remains unaccounted for to this day.

Fifty-seven days after his brother's assassination, Mr. Ruiz Massieu resigned as Deputy Attorney General and withdrew his membership in the PRI. In a dramatic and widely publicized speech on November 23, 1994, Mr. Ruiz Massieu announced that he was resigning from both his office and his party because of the PRI's continuous efforts to frustrate his investigation into his brother's murder. Specifically, he alleged that the PRI was obstructing his search for the persons who might have ordered former Deputy Munoz Rocha to act—persons whom Mr. Ruiz Massieu alleged to be very high-ranking members of the PRI.

In February of 1995, Mr. Ruiz Massieu published a book elaborating on the themes of his resignation address entitled Accuse: Denuncia De Un Crimen Politico ("I Accuse: Denunciation of a Political Crime"). Immediately, Mexican authorities alleged that Mr. Ruiz Massieu committed the crimes of intimidation, concealment and "against the administration of justice" (a crime

analogous to obstruction of justice in this country) in connection with the investigation of his brother's assassination. Contemporaneously, Mr. Ruiz Massieu claimed that he and his family began to receive both death and kidnapping threats. On March 2, 1995, he appeared for an official interrogation before Mexican authorities concerning the allegations of his criminal activity committed while in office. (See 1/11/96 Bond Memorandum, Fleming Aff. Exh. K.)

Later that same day, Mr. Ruiz Massieu and his family lawfully entered the United States as non-immigrant visitors at Houston, Texas, where they have owned a home since October of 1994. After remaining at their Houston home for the night, the family boarded a plane en route to Spain. When the plane touched down at Newark Airport on March 3, 1995, Mr. Ruiz Massieu was arrested by United States Customs officials, pursuant to 31 U.S.C. § 5316, on a charge of reporting only approximately $18,000 of the $44,322 in his possession. The charge was never pursued and was subsequently dismissed at the government's request.

On March 5, 1995, two days after his arrest in Newark, a Mexican court issued an arrest warrant for Mr. Ruiz Massieu charging him with intimidation, concealment, and "against the administration of justice." The following day, at Mexico's request, the United States presented a complaint for Mr. Ruiz Massieu's provisional arrest and sought his extradition to face the charges set forth in the Mexican arrest warrant. On June 9, 1995, a Mexican court consolidated the allegations into a single charge of "against the administration of Justice."

On June 13, 1995, the first extradition proceeding began before Magistrate Judge Ronald J. Hedges. After lengthy hearings at which both the government and Mr. Ruiz Massieu presented documentary evidence and oral testimony, Magistrate Judge Hedges declined to issue a certificate of extraditability. In so doing, he determined that the government had failed to demonstrate even probable cause to believe that Mr. Ruiz Massieu committed the crimes charged. (Tr. of 6/22/95 at 79, Fleming Aff. Exh. A).

Significantly, Magistrate Judge Hedges also found that many of the statements submitted by the government were "incredible and unreliable," *id.* and might have been altered to remove certain recantations and exculpatory statements. In addition, he found, and the government did not deny, that multiple statements were procured by torture inflicted by the Mexican authorities, including the inculpatory testimony of one of the government's primary affiants. *Id.* at 73, 79.

The government had lost its case, but not its will. On June 20, 1995, two days before Magistrate Judge Hedges issued his initial opinion, Mexico filed its second request for extradition based on newly filed charges of embezzlement. (Complaint # 6082G-01 filed June 20, 1995). The charges focused on the $9,000,000 in the Houston bank account and 2,500,000 pesos allegedly disbursed without adequate documentation while Mr. Ruiz Massieu was in office. (Opinion of 9/25/95, Fleming Aff. Exh. B.) In an opinion filed September 25, 1995, Magistrate Judge Hedges again declined to issue a certificate of extraditability on the ground that the government had failed to demonstrate probable cause, or present any evidence whatsoever, that the funds had been illegally obtained or disbursed. *Id.*

Undeterred, on August 31, 1995, the government refiled its initial request for extradition based on the charge of "against the administration of Justice." (Complaint 195-0612G-01 filed August 31, 1995.) Although the government produced nine new statements allegedly incriminating Mr. Ruiz Massieu, Magistrate Judge Hedges remained unpersuaded. By letter opinion dated November 13, 1995, the court again ruled that there was no probable cause to believe that Mr. Ruiz Massieu committed the acts alleged, and dismissed the complaint. (Fleming Aff. Exh. C)

On October 10, 1995, the government instituted yet a fourth extradition proceeding by refiling its prior application based on the previously rejected embezzlement charges. This time, the application was heard before Magistrate Judge Stanley R. Chesler. Both Mr. Massieu and the government admitted new documentary evidence and presented live testimony. Near the end of the hearings, the government produced evidence which "clearly establish(ed)" that 800,000 of the alleged 2.5 million pesos embezzled were not, in fact, proceeds of the alleged embezzlement.

(Transcript of 12/22/95 at 13, Fleming Aff. Exh. D.) Thereafter, the United States Attorney's Office for the District of New Jersey withdrew from further representation of the Mexican government.

With the United States Attorney's Office out of the case, the United States Department of Justice stepped in and continued to press for Mr. Ruiz Massieu's extradition on the embezzlement charges. Like Magistrate Judge Hedges before him, Magistrate Judge Chesler issued a lengthy opinion denying the certification of extraditability. (Transcript of 12/22/95 at 22, Fleming Aff. Exh. D.) Focusing on the government's paucity of evidence, Magistrate Judge Chesler state that "the bottom line is that the government's efforts to establish an inference of criminality on the basis of unexplained wealth fails because it does not rise to the level where any nexus between those funds and the funds which Mr. Massieu is alleged to have embezzled has been established." *Id*. at 13–14. On January 11, 1996, a Mexican court dismissed the embezzlement charges.

With that, the government seemingly accepted defeat as to Mr. Ruiz Massieu's extraditability. It was then, however, that this case took a turn toward the truly Kafkaesque. On December 22, 1995, immediately after Magistrate Judge Chesler issued his opinion, Mr. Ruiz Massieu was taken into custody by the Immigration and Naturalization Service (the "INS") pursuant to a previously unserved and unannounced detainer dated September 29, 1995. In addition, he was served with an INS Order to Show Cause and Notice of Hearing. The notice advised Mr. Ruiz Massieu that he was ordered to show cause as to why he should not be deported because, [t]he Secretary of State has made a determination that, pursuant to Section 241(a)(4)(C) of the Immigration and Nationality [sic] Act, 8 U.S.C. § 1251(a)(4)(C), there is reasonable ground to believe your presence or activities in United States would have potentially seriously adverse foreign policy consequences for the United States, (Fleming Aff. Exh. H.) No further explanation of the ground for Mr. Ruiz Massieu's alleged deportability was tendered.

Sometime after notice was served on Mr. Ruiz Massieu, the INS produced on October 2, 1995 letter addressed to Attorney General Janet Reno from Secretary of State Warren Christopher. (Fleming Aff. Exh. I.) The letter urged the Attorney General to effect Mr. Ruiz Massieu's "expeditious deportation" "to Mexico" based on the Secretary's conclusion that Mr. Ruiz Massieu's presence in the United States will have potentially serious adverse foreign policy consequences for the United States. *Id*. The letter referenced the "serious allegations" that are pending in Mexico against Mr. Ruiz Massieu and the recent strides that both governments have taken in "our ability to cooperate and confront criminality on both sides of the border." *Id.* At bottom, the Secretary's request was premised on the proposition that "[o]ur inability to return to Mexico Mr. Ruiz Massieu—a case the Mexican Presidency has told us is of the highest importance—would jeopardize our ability to work with Mexico on law enforcement matters. It might also cause a potentially chilling effect on other issues our two governments are addressing." *Id.*

The relevant deportation statute, § 241(a)(4)(C)(i) of the Immigration and Naturalization Act ("INA"), provides simply that "[a]n alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable." 8 U.S.C. § 1251(a)(4)(C)(i). Because an indication of the Secretary of State's belief is all that the statute by its terms requires, the October 2, 1995 letter, alone, comprised (and remains) the universe of evidence that the INS has offered to support its charge of Mr. Ruiz Massieu's deportability. A master calendar proceeding, the first stage of deportation hearings held pursuant to section 242 of the INA, was scheduled to begin on January 19, 1996. On January 17, 1996, however, Mr. Ruiz Massieu filed a complaint in this court requested that the deportation proceedings be preliminarily and permanently enjoined, and that section 241(a)(4)(C) of the INA be declared unconstitutional.

The complaint contains three core constitutional claims: (1) the deportation proceeding evidences selective enforcement in retaliation for Mr. Ruiz Massieu's exercise of his First Amendment right to criticize the Mexican political system; (2) the deportation proceeding represents a "de facto" extradition and is an attempt to overrule, albeit indirectly, four federal court decisions, in violation of the

> separation of powers; and (3) section 241(a)(4)(C)(i) of the INA is unconstitutionally vague, in violation of the due process clause of the Fifth Amendment. The United States Department of Justice, on behalf of all defendants, has responded that section 241(a)(4)(C)(i) withstands constitutional attack both facially and as applied to Mr. Ruiz Massieu. In addition, it has taken the position that this court lacks jurisdiction to hear the case on the grounds that (1) what is at issue is a nonjusticiable political question; (2) Mr. Ruiz Massieu has failed to exhaust his administrative remedies under the INA; and (3) the doctrine of constitutional avoidance counsels against this court reaching the ultimate issues presented in Mr. Ruiz Massieu's complaint.
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> On January 18, 1996, this court held a hearing on Mr. Ruiz Massieu's motion for a temporary restraining order. At that hearing, this court stayed the deportation proceedings—a stay that remains in force—so that the parties could have adequate time to brief the complex issues raised, and so that this court could consider the issue of its jurisdiction as well as the issues the parties had raised. Having carefully reviewed the parties' submissions, and having held a further hearing, it is clear that the court has jurisdiction and has jurisdiction to decide, as it now does, that § 241(a)(4)(C)(i) of the INA, 8 U.S.C. § 1251(a)(4)(C)(i), is void for vagueness; deprives Mr. Ruiz Massieu, and any other alien similarly situated, of the due process right to a meaningful opportunity to be heard; and is an unconstitutional delegation of legislative power. The remainder of this opinion will be limited strictly to a discussion of jurisdiction and to these three bases for concluding that the statute cannot pass constitutional muster.[49]

In other words, the U.S. government, acting on behalf of a foreign government, can take multiple bites at the apple, and in each case have the same requested person held in custody without bail, save for "exceptional circumstances."[50] In the end, this process of attrition is likely to result in the relator's waiver of extradition, as he/she will often give in and submit voluntarily to surrender, thereby allowing the government to achieve indirectly what it could not achieve otherwise through judicial proceedings.

4. Transit Extradition

The United States does not have transit extradition treaties or specific legislation on point, but on occasion transit extradition provisions are included in extradition treaties.[51] The situation exists whenever a person is on U.S. territory while being transferred from one country to another. In this context, the United States is neither a requesting nor a requested state, and has no involvement in the proceedings. However, if the individual held in custody by foreign agents transits through the United States, there must be some legal authority under which he/she is being detained while on U.S. territory. If this legal authority is absent, the individual in question is detained without legal authority and can file a petition for a writ of habeas corpus requesting his/her release. The government can enter into an ad hoc executive agreement with a foreign state to allow for the transit of detained individuals, and pursuant thereto obtain a warrant from a federal district court. The warrant would be akin to a temporary detention order, but it would have to commit the detainee to the custody of U.S. marshals, as no foreign agent could be given such authority. An analogy can be drawn to interstate rendition where agents of one state are authorized to have custody of a fugitive between the requisitioned state and the requisitioning state. Among the requirements for transit extradition under some of the

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49 *Id.* at 686–690.

50 *See* Ch. IX, Sec. 13.

51 *See generally,* Extradition Treaty with the Bahamas, art. 17, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17 ("(1) Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be made through the diplomatic channel and shall contain a description of the person being transported and a brief statement

extradition treaties is that of "double criminality,"[52] but it does not appear to be a *conditio sine qua non*.[53]

5. Costs

Costs pertaining to extradition are usually borne by the requesting state, but treaties regulate this issue. Section 3195 provides that transportation costs, presumably those of the relator and witnesses, subsistence expenses of the same, and translation costs incurred by the U.S. government with respect to an extradition request shall be borne by the requesting government unless the secretary of state, who has unreviewable discretion, directs otherwise, in which case costs are borne by the United States.

All other costs, such as witnesses and documentation requested by the relator, are borne by him/her.

6. Receipt by the United States of a Person from a Foreign State

Section 3193 provides for the authority of the Attorney General to appoint an agent to receive custody from a foreign government of a person accused of a federal, state, or local offense. Although it would appear that this provision relates to the receipt of a person held extraditable to the United States pursuant to a treaty of extradition and a formal process, it is not so specified. Consequently this provision may appear simply to allow the Attorney General to receive custody of an individual, irrespective of whether it is within or outside the framework of extradition. Presumably the courts, in interpreting this provision, will be guided by the title of the Act and interpret it as meaning that it is receipt of custody of a person held extraditable to the United States. In addition, however, the provision specifically authorizes receipt of custody of a person accused of a federal, state, or local offense on condition that the person shall be returned to the foreign state upon determination of the criminal proceedings held against him/her in the United States, a procedure long advocated by this writer.[54] The purpose here is

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of the facts of the case. (2) No authorization is required where air transportation is used and no landing is scheduled on the territory of the Contracting State. If an unscheduled landing occurs on the territory of the other Contracting State, transit shall be subject to paragraph (1) of this Article. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing"). *See also* Extradition Agreement with the European Union, art. 12(1)–(2), *entered into force* Feb. 1, 2010, S. TREATY DOC. 109-14 (authorizing transit of fugitive through territory of EU member state or United States in the absence of governing provision in an existing bilateral agreement between an EU member state and the United States); Extradition Treaty with the United Kingdom, art. 19, *entered into force* Apr. 26, 2007, S. TREATY DOC. 108-23; Argentine Extradition Treaty, art. 18, *entered into force* June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866; Korean Extradition Treaty, art. 17, *entered into force* Dec. 20, 1999, S. TREATY DOC. 106-2, TIAS 12962; Costa Rican Extradition Treaty, art. 19, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17; Jordanian Extradition Treaty, art. 18, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Hungarian Extradition Treaty, art. 19, *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Bolivian Extradition Treaty, art. XV, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Extradition Treaty with Thailand, art. 17, *entered into force* May 17, 1991, S. TREATY DOC. 98-16; Extradition Treaty with Uruguay, art. 17, *entered into force* Apr. 11, 1984, 35 U.S.T. 3197; Italian Extradition Treaty, art. XIX, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023.

52 *See* Ch. VII, Secs. 2.

53 *See* Treaty between the United States and Great Britain Concerning Reciprocal Rights for United States and Canada in the Conveyance of Prisoners and Wrecking and Salvage, 35 Stat. 2035, t.s. No. 502 (1908); 6 Marjorie Whiteman, Digest of International Law 1078–1080 (1963). Article I of the treaty provides that an officer conveying a prisoner through the United States has the right to "keep such person in his custody, and in case of escape [may] recapture him" provided the offense is authorized by extradition treaty.

54 *See* M. Cherif Bassiouni, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 74 Proc. Am. Soc'y Int'l L. 277 (1980).

clearly to allow a person who is in the custody of a foreign government to be brought to the United States for trial and to be returned to the foreign government for his/her detention there, thereby avoiding the need to await his/her release from detention by that government before commencing criminal proceedings against him/her in the United States. This will assist prosecutions in the United States that might otherwise become stale if the individual is permitted to await determination of his/her sentence in the foreign state before his/her return to the United States to face criminal charges. Regrettably, there is no reverse provision that permits the extradition of a person from the United States to a foreign government for the same purpose, though nothing under § 3193 precludes the conditional surrender of a person to a requesting state after an order of extraditability for purposes limited to his/her trial in that country and for his/her return thereafter to the United States for the execution of his/her sentence.

Although not falling under § 3193, a case arose where a relator was extradited to Italy where he was tried and sentenced. In *Venetucci v. United States Department of State* the relator was transferred to the United States eleven years later at his request after he agreed that "any legal proceeding challenging his conviction or sentence by the Italian sovereign would be brought in Italy."[55] Instead of challenging his sentence directly, the relator challenged the Department of State's ability to consent to his Italian trial on additional charges without first conducting an extradition hearing on those additional charges.[56] The relator requested an order canceling the consent and voiding his life sentence, thereby requiring his release from prison.[57] The district court concluded that under U.S. law, it was divested of subject matter jurisdiction over this suit and dismissed the complaint.[58]

Finally, it should be noted that there are some treaty provisions that permit the transfer of evidence even if the fugitive becomes unavailable for extradition.[59]

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55 Venetucci v. U.S. Dep't of State, 593 F.Supp. 2d 12 (D.D.C. 2008).

56 *Id.* at 12–13.

57 *Id.* at 13.

58 *Id.* at 14. The relevant U.S. statute, 18 U.S.C. § 3244, states as follows:

> When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders—(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country.

59 *See generally* clauses providing that:

> All articles, instruments, objects of value, documents, and other evidence relating to the offense may be seized and, upon granting of extradition, surrendered to the requesting State. The property mentioned in this Article may be surrendered even when extradition cannot be granted or effected due to the death, disappearance, or escape of the person sought. The rights of third parties in such property shall be duly respected.

Costa Rican Extradition Treaty, art. 18, *entered into force* Oct. 11, 1991, S. TREATY DOC. 98-17. *See also* Bulgarian Extradition Treaty, art. 15, *entered into force* May 21, 2009, S. TREATY DOC. 110-12; South African Extradition Treaty, art.16, *entered into force* June 25, 2001, S. TREATY DOC. 106-24; Extradition Treaty with Trinidad and Tobago, art. 13, *entered into force* Nov. 29, 1999, S. TREATY DOC. 105-21; Jordanian Extradition Treaty, art. 15, *entered into force* July 29, 1995, S. TREATY DOC. 104-3; Hungarian Extradition Treaty, art. 16(1), *entered into force* Mar. 18, 1997, S. TREATY DOC. 104-5; Extradition Treaty with the Bahamas, art. 16, *entered into force* Sept. 22, 1994, S. TREATY DOC. 102-17; Bolivian Extradition Treaty, art. XIV, *entered into force* Nov. 21, 1996, S. TREATY DOC. 104-22; Extradition Treaty with Uruguay, art. 16, *entered into force* April 11, 1984, 35 U.S.T. 3197; Italian Extradition Treaty, art. XVIII, *entered into force* Sept. 24, 1984, 35 U.S.T. 3023; Jamaican Extradition Treaty, art. XVI, *entered into force* July 7, 1991, S. TREATY DOC. 98-18; Extradition Treaty with Thailand, art. 16, *entered into force* May 17, 1991, S. TREATY DOC. 98-16. *See also* Michael John Garcia & Charles Doyle, *Extradition to and from the United States: Overview of the Law and Recent Treaties*, at 17, Congressional Research Service report for Congress 98-958, Mar. 17, 2010, *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf (last visited Sept. 16, 2011).

Appendix I

Multilateral Conventions Containing Provisions on Extradition

A. Prohibition against War

1. Treaty of Peace Between the Allied and Associated Powers and Germany [Treaty of Versailles], June 28, 1919, T.S. No. 4, 11 Martens Nouveau Recueil (ser. 3d) 323, *entered into force* January 10, 1920.

Article 227	(duty to prosecute and hand over Kaiser)
Article 228	(duty to prosecute and hand over alleged war criminals)

2. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis [London Charter], August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, *entered into force* August 8, 1945; (with respect to the United States) August 8, 1945.

Article 6, 14, 15	(right to prosecute war criminals)
Article 3 (agreement)	(duty to cooperate in investigation and prosecution of alleged war criminals)

3. Charter of the International Military Tribunal: Far East, January 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

Article 1	(duty to prosecute major war criminals in the Far East)

B. Prohibition of Certain Means and Methods in the Conduct of War (Humanitarian Law of Armed Conflict)

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Second Red Cross Convention), July 6, 1906, 35 Stat. 1885, T.S. No. 464, 2 Martens Nouveau Recueil (ser. 3d) 620.

Articles 27, 28	(duty to criminalize)

2. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, (Hague, X), October 18, 1907, 36 Stat. 2371, T.S. No. 543, 3 Martens Nouveau Recueil (ser. 3d) 630.

Article 21	(duty to criminalize)

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27,1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303

Articles 29, 30	(duty to criminalize)

4. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [Geneva Convention I]

Article 49 (duty to search for and prosecute)

5. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [Geneva Convention II]

Article 50 (duty to search for and prosecute)

6. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [Geneva Convention III]

Article 129 (duty to search for and prosecute)

7. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [Geneva Convention IV]

Article 146 (duty to search for and prosecute)

8. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 [1977 Protocol I], *opened for signature* December 12, 1977, U.N. Doc. A/32/144 (1977) Annex I, *referenced in* 16 I.L.M. 1391, *entered into force* December 17, 1978.

Article 88 (duty to cooperate with other states in prosecution and extradition)

9. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [1977 Protocol II], *opened for signature* December 12, 1977, U.N. Doc. A/32/144 (1977) Annex II, *referenced in* 16 I.L.M. 1391, *entered into force* December 17, 1978.

Article 6 (prosecution and punishment of criminal offenses related to the armed conflict)

10. Convention for the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, 11 I.L.M. 309, *entered into force* March 26, 1975; (with respect to the United States) March 26, 1975

Articles IV, IX (duty to prohibit and prevent)

C. Prohibition of Emplacement of Weapons in Certain Areas

1. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, August 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43, 2 I.L.M. 883, *entered into force* October 10, 1963.

Article I (duty to prevent and prohibit)

D. Prohibition against Genocide

1. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 763, *entered into force* January 12, 1951; (with respect to the United States) February 23, 1989.

Article I	(recognition as international crime; duty to prevent and punish)
Article IV	(duty to criminalize)
Article IV	(duty to punish)
Article VII	(duty to extradite; duty not to apply political offense exception)

2. Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159.

Article 29	(state cooperation in surrendering or transferring an accused individual to the tribunal)

3. Statute of the International Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598.

Article 28	(state cooperation in surrendering or transferring an accused individual to the tribunal)

4. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (*entered into force* July 1, 2002).

Article 89	(surrender of persons to the Court)
Article 90	(competing requests for surrender of persons)

E. Prohibition against Apartheid

1. International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* November 30, 1973, U.N.G.A. Res. 3068 (WWVIII), U.N. GAOR 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973), 13 I.L.M. 50, 1015 U.N.T.S. 243, *entered into force* July 18, 1976; (with respect to the United States) October 21, 1994.

Article IV	(duty to suppress and criminalize)
Article IV	(duty to prosecute)
Article XI	(duty to extradite; duty not to apply political offense exception)

F. Prohibition against Torture

1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 7, 1984, G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984)

Article VII	(duty to prosecute)
Article VIII	(duty to extradite)

2. Inter-American Convention to Prevent and Punish Torture, December 9, 1985, AG/Res. 783 (XV-0/85), O.A.S. General Assembly, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. Treaty Series, No. 67, 25 I.L.M. 519, *entered into force* February 28, 1987.

Article I	(duty to prevent and punish)
Article XI	(duty to extradite)

G. Prohibition against Slavery and Slave-Related Practices

1. Treaty for the Suppression of the African Slave Trade [Treaty of London], December 20, 1841, 2 Martens Nouveau Recueil (ser. 1) 392, *entered into force* December 20, 1841.

Article X	(duty to prosecute and punish)

2. Treaty between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, for the Suppression of the African Slave Trade, April 7, 1862, U.S.–U.K., 12 Stat. 1225 [Treaty of Washington]; *Supplemented by* Additional Article, February 27, 1863, 13 Stat. 645. *Modified by* Additional Convention, June 3, 1870, 16 Stat. 777

Article II	(duty to prosecute)
Article IX	(duty to "transfer")

3. Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors [General Act of Brussels], July 2, 1890, 27 Stat. 886, 17 Martens Nouveau Recueil (ser. 2d) 345, *entered into force* August 31, 1891; (with respect to the United States) April 2, 1892.

Article V	(duty to punish, prosecute, and return)

4. International Convention for the Suppression of White Slave Traffic, May 4, 1910, 7 Martens Nouveau Recueil (ser. 3d) 252, *entered into force* August 8, 1912.

Articles 1, 2	(duty to punish)
Article 3	(duty to criminalize)
Article 5	(duty to extradite)
Articles 4, 6	(duty to cooperate in prosecution)

5. Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on May 4, 1910, May 4, 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23, protocol *entered into force* May 4, 1949, annex in respect of agreement of 1904 *entered into force* June 21, 1951, annex in respect of agreement of 1910 *entered into force* August 14, 1951; protocol *entered into force* (with respect to the United States) August 14, 1950, annex in respect of agreement of 1904 *entered into force* (with respect to the United States) June 21, 1951, annex in respect of agreement of 1910 *entered into force* (with respect to the United States) August 14, 1951.

(Regarding the United Nations continuing duties and functions of the League of Nations)

6. Annex to the Protocol Amending the Agreement for the Suppression of the White Slave Traffic, May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, May 4, 1949.

(Regarding the United Nations continuing duties and functions of the League of Nations)

7. International Convention for the Suppression of Traffic in Women and Children, September 30, 1921, 9 L.N.T.S. 415, 1 Hudson 609, *entered into force* March 9, 1927; (with respect to the United States) March 21, 1929.

Article 2	(duty to prosecute)
Article 3	(duty to punish)
Article 4	(duty to extradite)

8. Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on September 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva on October 11, 1933, November 12, 1947, 53 U.N.T.S. 13, *entered into force* November 12, 1947.

(Regarding the United Nations continuing duties and functions of the League of Nations)

9. Annex to the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on September 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva on October 11, 1933.

(Regarding the United Nations continuing duties and functions of the League of Nations)

10. Slavery Convention, September 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, 19 Martens Nouveau Recueil (ser. 3) 303, *entered into force* March 9, 1927; (with respect to the United States) March 21, 1929.

Article 2	(duty to prevent and suppress)
Article 4	(duty to criminalize)
Article 6	(duty to punish)

11. Protocol Amending the Slavery Convention, September 25, 1926, December 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51, *entered into force* December 7, 1953; *entered into force* (with respect to the United States) March 16, 1956.

(Regarding the United Nations continuing duties and functions of the League of Nations)

12. Annex to the Protocol Amending the Slavery Convention, September 25, 1926.

(Regarding the United Nations continuing duties and functions of the League of Nations)

13. Convention Concerning Forced or Compulsory Labour [Forced Labour Convention, 1930], June 28, 1930, 39 L.N.T.S. 55, 5 Hudson 609, *entered into force* May 1, 1932.

Article 1	(duty to suppress)
Article 25	(duty to prosecute and punish)

14. International Convention for the Suppression of the Traffic in Women of Full Age, October 11, 1933, 150 L.N.T.S. 431, 6 Hudson 469, *entered into force* August 24, 1934.

Article 1	(duty to punish)
Article 2	(duty to criminalize)
Article 3	(duty to cooperate in suppression)

15. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* March 21, 1950, 96 U.N.T.S. 271, *entered into force* July 25, 1951.

Articles 1, 2, 3, 4	(duty to punish)
Article 6	(duty to criminalize)
Article 8	(duty to extradite)
Article 9	(duty to prosecute if not extradited)

16. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, September 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3, *entered into force* April 10, 1957; (with respect to the United States) December 6, 1967.

Article 1	(duty to abolish)
Articles 3, 5, 6	(duty to criminalize and punish)
Article 8	(duty to cooperate in prosecution)

17. Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291, *entered into force* January 17, 1959.

Article 1	(duty to suppress)

18. Convention on the High Seas [Geneva Convention on the Law of the Sea], April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, *entered into force* September 30, 1962.

Article 13	(duty to prevent and punish)

19. Convention on the Law of the Sea [Montego Bay Convention], *opened for signature* December 10, 1982, 516 U.N.T.S. 205, 21 I.L.M. 1261, *entered into force* November 16, 1994.

Article 99	(duty to prevent and punish)

20. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, January 8, 2001, G.A. Res. 55/25, U.N. Doc. A/RES/55/25. (See also listing for Organized Crime.)

Article 5	(duty to criminalize)

H. Prohibition against Piracy

1. The Nyon Arrangement, September 14, 1937, 181 L.N.T.S. 135, 34 Martens Nouveau Recueil (ser. 3) 666, *entered into force* September 14, 1937.

Article 1	(duty to extradite)
Article 2	(exceptions to the obligation to extradite)
Articles 3, 4	(refusal of extradition)
Article 9	(request for extradition by more than one state)

2. Agreement Supplementary to the Nyon Arrangement, September 17, 1937, 181 L.N.T.S. 149, 34 Martens Nouveau Recueil (ser. 3) 676, *entered into force* September 17, 1937.

3. Convention on the High Seas [Geneva Convention on the Law of the Sea], April 29, 1958, 1 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, *entered into force* September 30, 1962.

Article 13	(duty to punish)

4. Convention on the Law of the Sea [Montego Bay Convention], *opened for signature* December 10, 1982, 516 U.N.T.S. 205, 21 I.L.M. 1261, *entered into force* November 16, 1994.

Article 100	(duty to cooperate to repress piracy)

I. Prohibition against Aircraft Hijacking and Unlawful Acts against International Air Safety

1. Convention for the Suppression of Unlawful Seizure of Aircraft [Hague Hijacking Convention], December 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, 10 I.L.M. 133, *entered into force* October 14, 1971.

Article II	(duty to punish)
Article VII	(duty to prosecute if not extradited)
Article VIII	(duty to extradite)
Article X	(duty to cooperate in prosecution)

2. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Montreal Hijacking Convention], September 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177, 10 I.L.M. 1151, *entered into force* January 26, 1973.

Article 3	(duty to punish)
Article 7	(duty to prosecute if not extradited)
Article 8	(duty to extradite)
Article 11	(duty to cooperate in prosecution)

3. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, adopted by the International Civil Aviation Organization, February 24, 1988, S. Treaty Documents 100-19, 27 I.L.M. 627 (1988).

Article 3	(duty to punish if not extradited)

J. Protection of the Safety of Persons

1. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (Inter-American), *signed* February 2, 1971, O.A.S. Doc. A6/Doc.88 rev.1, corr.1, 27 U.S.T. 3949, T.I.A.S. No. 8413, 10 I.L.M. 255, *entered into force* (with respect to the United States) October 20, 1976.

Article 1	(duty to prevent and punish)
Articles 3, 7	(duty to extradite)
Article 5	(duty to prosecute if not extradite)
Article 8	(duty to criminalize)

2. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents [New York Convention], *opened for signature* December 14, 1973, U.N.G.A. Res. 3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30), at 146, U.N. Doc. A/9030 (1974), 28 U.S.T. 1975, 1035 U.N.T.S. 167, T.I.A.S. 8532, 13 I.L.M. 41, *entered into force* February 20, 1977.

Article 4	(duty to prevent)
Article 6	(duty to prosecute or extradite)
Article 7	(duty to prosecute if not extradited)
Article 8	(duty to extradite)

3. International Convention Against the Taking of Hostages, December 17, 1979, U.N.G.A. Res. 34/146 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N.Doc. A/34/46 (1979), TIAS No. 11081, 18 I.L.M. 1456, *entered into force* June 3, 1983; *entered into force* with respect to the United States January 6, 1985.

Article 2	(duty to punish)
Article 7	(duty to prosecute)
Article 8	(duty to prosecute if not extradited)
Articles 9, 10	(duty to extradite)

K. Prohibition against the Unlawful Use of the Mails and Internet

1. Treaty on the Creation of a Universal Postal Union, October 9, 1874, 1 Martens Nouveau Recueil (ser. 2d) 651.

Article 11	(duty to prohibit)

2. Universal Postal Union Convention, May 26, 1906, 35 Stat. 1639, 1 Martens Nouveau Recueil (ser. 3d) 355

Article XVI	(duty to prohibit)
Article XVIII	(duty to criminalize)

3. Universal Postal Union Convention (Berne Convention), July 11, 1952, 4 U.S.T. 1118, T.I.A.S. No. 2800, 169 U.N.T.S. 3.

Article 59	(duty to prohibit)

4. Agreement Concerning Insured Letters and Boxes, July 11, 1952, 170 U.N.T.S. 3.

Article 5	(duty to prohibit)

5. Council of Europe, Convention on Cybercrime, ETS No. 185, November 23, 2001, United States signed on November 23, 2001.

Article 24	(duty to extradite)

6. Council of Europe, Protocol on the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, ETS No. 189, signed January 28, 2003 [Protocol to Cybercrime Convention].

L. General Conventions against Terrorism

1. Convention for the Prevention and Punishment of Terrorism, November 16, 1937, 19 League of Nations O.J. 23 (1938).

Articles 2, 3	(duty to criminalize)
Article 8	(duty to extradite)
Articles 9, 10, 11	(duty to prosecute if not extradited)

2. Organization of American States, Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, February 2, 1971, O.A.S. Doc. A/6/Doc. 88 rev.1, corr.1, 27 U.S.T. 3949, 10 I.L.M. 255.

Articles 3, 7	(duty to extradite)

Article 5	(duty to prosecute)

3. Council of Europe, European Convention on the Suppression of Terrorism, January 27, 1977, E.T.S. No. 90, 15 I.L.M. 1272, *entered into force* August 4, 1978.

Articles 1, 2	(duty not to apply political offense exception)
Articles 3, 4	(duty to extradite)
Article 5	(no duty to extradite if based on discrimination)
Article 6	(duty to establish jurisdiction)
Article 7	(duty to prosecute)

4. The South Asian Association for Regional Cooperation: Convention on Suppression of Terrorism, November 4, 1987, *reprinted in* U.N. Doc. A/51/136.

Articles 1, 2	(duty not to apply political offense exception)
Article 3	(duty to extradite)
Article 4	(duty to prosecute)
Article 6	(duty to ensure presence for purposes of extradition or prosecution)

5. The League of Arab States, The Council of Arab Interior and Justice Ministers, The Arab Convention on the Suppression of Terrorism, Issued by the Councils of Arab Ministers of Interior Justice, April 22, 1998

Articles 3, 5, 8	(duty to extradite)
Articles 6, 7	(exceptions to extradition)
Articles 13, 14, 15, 16	(duty to prosecute)

6. The Commonwealth of Independent States, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999.

7. Organization of African Unity, Convention on the Prevention and Combating of Terrorism, OAU Doc. AHG/Dec. 132 (XXXV), July 14, 1999.

Articles 8, 9	(duty to extradite)

8. Organization of the Islamic Conference, Convention of the Organization of the Islamic Conference on Combating International Terrorism, October 11, 2000, reprinted in U.N.Doc. A/54/637.

Article 5	(duty to extradite)
Articles 6, 7	(exceptions to extradition)
Article 15	(duty to prosecute)

9. Inter-American Convention Against Terrorism, June 3, 2002, AG/Res. 1840 (XXXII-O/02), O.A.S. No. A-66, *entered into force* July 10, 2003, U.S. ratification on November 15, 2005.

Article 1	(duty to prevent, punish, and eliminate)
Articles 7, 8	(duty to cooperate)
Article 9	(mutual legal assistance)

10. Draft Comprehensive Convention on International Terrorism, October 14, 2005, A/C.6/60/L.6; *see also* Report of the Ad Hoc Committee, U.N. Doc No. 37 A/57/37, 6th session January 28–February 1, 2002.

Articles 8	(duty to prohibit)
Article 10, 11	(duty to prosecute or extradite)
Articles 13, 14, 15	(extradition and mutual legal assistance)

M. Protection of Civil and Commercial Maritime Navigation and Non-Military Sea-Based Platforms

1. Convention on the High Seas, April 29, 1958, U.N. Doc. A/Conf/13/L.52-55 & 56 & 58; 450 U.N.T.S. 11; 13 U.S.T. 2312.

Articles 13, 14	(duty to prevent and punish)

2. Convention on Law of the Sea, December 10, 1982, U.N. Doc. A/Conf.62-121 & Corr.1-8; 1833 U.N.T.S. 3; 21 I.L.M. 1261.

Article 107	(duty to prevent and punish)

3. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), March 10, 1988, IMO. Doc. Sua/Con/15, 27 I.L.M. 668.

Article 11	(duty to extradite)
Article 12	(mutual legal assistance)

4. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Protocol), March 10, 1988, IMO. Doc. Sua/Con/16/Rev.1; 27 I.L.M. 685.

Article 11	(duty to extradite)
Article 12	(mutual legal assistance)

5. International Convention for the Suppression of Terrorist Bombings, Doc. ONU A/Res/52/164, December 15, 1997.

Articles 6, 8	(duty to prosecute or extradite)
Article 7	(duty to extradite)
Articles 10–12	(assistance in extradition)

6. Amended Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol), adopted October 14, 2005.

Article 11bis	(duty to extradite and mutual legal assistance)
Article 12bis	(duty to assist in criminal proceedings)

N. Protection of Civil Aviation and Safety of Aircrafts

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft, September 14, 1963, U.N. Doc. A/C.6/418/Corr.1, Annex II; 704 U.N.T.S. 219; 20 U.S.T. 2941; 2 I.L.M. 1042 [Tokyo Hijacking Convention].

Article 15	(duty to extradite)
Article 16	(duty to prosecute)

2. Convention for the Suppression of Unlawful Seizure of Aircrafts, December 16, 1970, U.N. Doc. A/C.6/418/Corr. 1, Annex II, 860 U.N.T.S. 105, 22 U.S.T. 1641, 10 I.L.M. 133 [Hague Hijacking Convention].

Articles 6, 7	(duty to prosecute or extradite)
Article 8	(extradition)

3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, U.N. Doc. A/C.6/418/Corr.2, Annex III, 974 U.N.T.S. 177, 24 U.S.T. 564, 10 I.L.M. 1151 [Montreal Hijacking Convention].

Articles 6, 7	(duty to prosecute or extradite)
Article 8	(extradition)

4. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, February 24, 1988, ICAO Doc. 9518; 27 I.L.M. 627 [Montreal Protocol].

O. Protection of the Safety of Persons

1. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973, U.N. Doc. A/Res/3166; 1035 U.N.T.S. 167; 28 U.S.T. 1975; 13 I.L.M. 41 [Diplomat Convention], *entered into force* February 20, 1977; (with respect to the United States) February 20, 1977.

Article 7	(duty to prosecute or extradite)
Articles 6, 8	(extradition)

2. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (Inter-American), *signed* February 2, 1971, O.A.S. Doc. A6/Doc. 88 rev.1, corr. 1, 10 I.L.M. 255, *entered into force* with respect to each State Party to the Convention on the date of deposit of its ratification or act of accession; (with respect to the United States) October 20, 1976.

Article 3	(extradition)
Article 5	(duty to prosecute if not extradited)
Article 8	(duty to extradite)

3. Convention Against the Taking of Hostages, December 17, 1979, U.N. Doc. A/Res/34/146; 1316 U.N.T.S. 205; 18 I.L.M. 1456 [Hostage-Taking Convention].

Article 8	(duty to prosecute or extradite)
Articles 6, 9	(extradition)

4. Convention on the Safety of United Nations and Associated Personnel, *opened for signature* December 15, 1994, February 17, 1995, U.N. Doc. A/Res/49/59.

Article 13	(duty to extradite or prosecute)
Article 14	(duty to prosecute)
Article 15	(duty to extradite)

5. Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M.1429 (1994), *entered into force* March 28, 1996.

Articles 4, 6	(duty to prosecute or extradite)
Article 5	(duty to extradite)

P. Protection against the Use and Manufacture of Explosives and Bombs

1. Convention on the Marking of Plastic Explosives for the Purpose of Detection, March 1, 1991, U.N. Doc. S/22393/Corr. 1, 30 I.L.M. 721.

Article 3	(duty to prohibit and prevent)

2. Convention for the Suppression of Terrorist Bombings, January 9, 1998, U.N. Doc. A/Res/52/164.

Articles 7, 8	(duty to prosecute or extradite)
Articles 6, 9, 11, 12	(extradition)
Article 10	(mutual legal assistance)

3. Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, *entered into force* July 1, 1998, O.A.S. Doc. A-63, United States signed November 14, 1997.

Article 19	(duty to extradite)

Q. Preventing the Use of Weapons of Mass Destruction

1. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, U.N. Doc. A/Res/2826, 1015 U.N.T.S. 163, 26 U.S.T. 583, 11 I.L.M. 309 [BWC Convention].

Article 3	(duty to prohibit and prevent)

2. Convention on the Physical Protection of Nuclear Material, March 3, 1980, IAEA Doc. C/225; 1456 U.N.T.S.101; 18 I.L.M. 1419.

Articles 9, 10	(duty to prosecute or extradite)
Articles 8, 11	(extradition)

3. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, U.N. Doc. A/Res/47/39; 1974 U.N.T.S. 3; 32 I.L.M. 800 [CWC Convention].

Articles 1	(duty to assist)

4. International Convention on the Suppression of Acts of Nuclear Terrorism, *signed* April 13, 2005, U.N. Doc. A/Res/59/290.

Article 5	(duty to punish)
Article 7	(duty to prosecute)
Articles 9, 11	(duty to prosecute or extradite)

R. Preventing Means of Financing Certain Forms of Terrorism

1. Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/54/109, *entered into force* April 10, 2002.

Article 10	(duty to prosecute or extradite)
Article 11	(duty to extradite)
Article 15	(no duty to extradite if based on discrimination)

S. Prohibition against Counterfeiting

1. International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 371.

Article 3 (duty to punish)

Articles 8, 9 (duty to prosecute if not extradited)

2. Protocol to the International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 389, *entered into force* February 22, 1931.

3. Optional Protocol to the International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 395.

Article 1 (duty to extradite)

T. Protection of National and Archaeological Treasures

1. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

Article 28 (duty to prosecute)

2. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, November 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [UNESCO Cultural Property Convention].

Article 8 (duty to penalize)

3. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature March 26, 1999, [hereinafter Protocol II to the 1954 Hague Convention], *entered into force* March 9, 2004.

Article 17 (duty to prosecute)

Article 18 (duty to extradite)

Article 19 (duty to give mutual legal assistance)

4. Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, O.A.S.T.S. No. 47, June 16, 1976, [Convention of San Salvador]

Article 14 (duty to extradite)

U. Protection of International Means of Communication

1. Convention for the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, T.S. No. 380, 11 Martens Nouveau Recueil (ser. 2d) 281.

Article II (duty to punish)

Article XII (duty to criminalize)

2. Convention on the High Seas [Geneva Convention on the Law of the Sea], April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 52 Am. J. Int'l L. 842 (1958), *entered into force* September 30, 1962; (with respect to the United States) September 30, 1962.

Article 27 (duty to punish)

3. Convention on the Law of the Sea [Montego Bay Convention], *opened for signature* December 10, 1982, 516 U.N.T.S. 205, 21 I.L.M. 1261, *entered into force* November 16, 1994.

Article 113 (duty to criminalize)

V. Prohibition of International Traffic in Obscene Publications

1. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, September 12, 1923, 27 L.N.T.S. 213, 7 Martens Nouveau Recueil (ser. 3d) 266, *amended by* Protocol, November 12, 1947, 46 U.N.T.S. 169.

Article 1	(duty to prosecute and punish)
Article 4	(duty to criminalize)
Article 6	(duty to cooperate in suppression)

2. Protocol to Amend the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, concluded at Geneva on September 12, 1923, November 12, 1947, 46 U.N.T.S. 169, protocol *entered into force* November 12, 1947, amendments in annex *entered into force* February 2, 1950.

(Regarding the United Nations continuing duties and functions of the League of Nations)

3. Annex to the Protocol to Amend the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, concluded at Geneva, September 12, 1923.

(Regarding the United Nations continuing duties and functions of the League of Nations)

W. Prohibition against Bribery and Corruption

1. Draft International Agreement on Illicit Payments, U.N. Doc. E/1979/104 (May 25, 1979), *reprinted in* 18 I.L.M. 1025 (1979).

Article III.1(i)	(duty to criminalize)
Article III.1(ii)	(duty to prohibit)
Article III.1(iii)	(duty to prosecute)
Article III.1(iv)	(duty to punish)
Article III.5	(duty to prosecute)
Article III.11	(duty to extradite)

2. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1, *entered into force* February 15, 1999.

Article 9	(mutual legal assistance)
Article 10	(duty to extradite)

3. United Nations Convention Against Corruption, U.N. Doc. A/58/422, *entered into force* December 14, 2005; (United States signed December 9, 2005).

Article 43	(international cooperation)
Article 44	(duty to extradite)
Article 46	(mutual legal assistance)
Article 48	(law enforcement cooperation)

4. Inter-American Convention Against Corruption, O.A.S. Doc. B-58, *entered into force* March 29, 1996, Sen. Treaty Doc. 105-39.

Article 13	(duty to extradite)

5. Criminal Law Convention on the European Council on Corruption and Additional Protocol, *entered into force* July 1, 2006, CETS No. 173, 191.

Articles 2-15	(duty to criminalize)
Article 27	(duty to extradite or prosecute)

X. Mercenarism

1. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1989, 29 I.L.M. 91 (1990), *opened for signature* until December 31, 1990, U.N. G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (1989), 29 I.L.M. 89 (*entered into force* October 20, 2001).

Article 12	(duty to prosecute)
Article 15	(duty to extradite)

Y. Prohibition against Narcotic Drugs

1. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (*entered into force* December 13, 1964); (with respect to the United States June. 24, 1967)

Article 36	(duty to punish, prosecute, extradite)

2. Protocol Amending the Single Convention on Narcotic Drugs, March 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 (*entered into force* August 8, 1975).

3. Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, reprinted in 10 I.L.M. 261 (*entered into force* August 16, 1976); (with respect to the United States July 15, 1980).

Article 22	(extradition, duty to punish)

4. United Nations Convention Against Illicit Traffic in Narcotic Drugs and *Psychotropic Substances, opened for signature December 20, 1988, 28 I.L.M. 493 (1989) (entered into force* November 11, 1990).

Article 6	(duty to extradite)
Article 7	(duty to give mutual legal assistance)

Z. Prohibition against Organized Crime

1. United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* September 29, 2003; United States Senate Doc. 108-16, signed by the United States on December 13, 2000.

Article 11	(duty to prosecute)
Article 13	(duty to give international cooperation)
Article 16	(duty to extradite)
Article 18	(duty to give mutual legal assistance)

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* September 9, 2003.

Article 9	(duty to prevent and combat)

3. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* January 28, 2004.

Articles 10, 11, 15 (duty to prevent)

4. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, annex, U.N. Doc. A/RES/55/255 (May 31, 2001), *entered into force* July 3, 2005.

Article 5 (duty to criminalize)

AA. Other

1. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3, *entered into force* July 1, 2002.

BB. General Assembly Resolutions

1. Question of the punishment of war criminals and of persons who have committed crimes against humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., U.N. Doc. A/RES/26/2840 (1971).

2. Principles of International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, G.A.Res. 3074, U.N.GAOR, 28th Sess., U.N.Doc. A/RES/28/3074 (1973).

3. Model Treaty on Extradition, G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990).

4. Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, G.A. Res. 62/145, at ¶ 10, U.N. Doc. 62/145 (March 4, 2008).

5. Torture and other cruel, inhuman or degrading treatment or punishment, G.A. Res. 62/148, at ¶¶ 7, 12, U.N. Doc. A/RES/62/148 (March 4, 2008).

6. Technical Assistance for implementing the international conventions and protocols related to terrorism, G.A. Res. 62/172, at ¶3, U.N. Doc. A/RES/62/172 (March 20, 2008).

7. Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity, G.A. Res. 62/175, at ¶3, U.N. Doc. A/RES/62/175 (March 20, 2008).

8. International cooperation against the world drug problem, G.A. Res. 62/176, at ¶ 28, U.N. Doc. A/RES/62/176 (March 17, 2008).

9. Criminal Accountability of United Nations officials and experts on mission, G.A. Res. 63/119, at ¶5, U.N. Doc. A/RES/63/119 (January 15, 2009).

10. Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, G.A. Res. 63/164, at ¶ 10, U.N. Doc. 63/164 (February 13, 2009).

11. Torture and other cruel, inhuman or degrading treatment or punishment, G.A. Res. 63/166, at ¶¶ 15, 17, U.N. Doc. A/RES/63/166 (February 19, 2009).

12. International cooperation against the world drug problem, G.A. Res. 63/197, at ¶ 29, U.N. Doc. A/RES/63/197 (March 6, 2009).

13. Return or restitution of cultural property to the countries of origin, G.A. Res. 64/78, at ¶21, U.N. Doc. A/RES/64/78 (February 11, 2010).

14. Criminal Accountability of United Nations officials and experts on mission, G.A. Res. 64/110, at ¶5, U.N. Doc. A/RES/64/110 (January 15, 2010).

15. Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, G.A. Res. 64/175, at ¶ 10, U.N. Doc. 64/151 (March 26, 2010).

16. Technical Assistance for implementing the international conventions and protocols related to terrorism, G.A. Res. 64/177, at ¶3, U.N. Doc. A/RES/64/177 (March 24, 2010).

17. Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity, G.A. Res. 64/179, at preamble, U.N. Doc. A/RES/64/179 (March 26, 2010).

18. United Nations Global Plan of Action to Combat Trafficking in Persons, G.A. Res. 64/293, at ¶52, U.N. Doc. A/RES/64/293 (August 12, 2010).

19. Criminal Accountability of United Nations officials and experts on mission, G.A. Res. 65/20, at ¶5, U.N. Doc. A/RES/65/20 (January 10, 2011).

CC. Security Council Resolutions

1. Security Council Resolution 1373, U.N. Doc. S/Res/1373, September 28, 2001 [international cooperation to combat threats to international peace and security caused by terrorist acts].

2. Security Council Resolution 1540, U.N. Doc. S/Res/1540, April 28, 2004 [proliferation and delivery of nuclear, chemical and biological weapons].

3. Security Council Resolution 1624, U.N. Doc. S/Res/1624, September 14, 2005 [Threats to international peace and security (Security Council Summit 2005)].

4. Security Council Resolution 1887, U.N. Doc. S/Res/1887, September 24, 2009 [Maintenance of international peace and security: nuclear non-proliferation and nuclear disarmament].

5. Security Council Resolution 1963, U.N. Doc. S/Res/1963, December 20, 2010 [Threats to international peace and security caused by terrorist acts].

** Note—The United States–European Union Extradition Agreement is not included here, but in Appendix II, because it is a bilateral agreement.

Appendix II

Regional Multilateral Conventions

African Union[1]

Convention on the Prevention and Combating of Terrorism, July 14, 1999[2]

Convention on Preventing and Combating Corruption, July 11, 2003[3]

Association of South East Asian Nations[4]

ASEAN Convention on Counter Terrorism, Jan. 13, 2007[5]

Benelux Countries[6]

Treaty Between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands Concerning Extradition and Mutual Assistance in Criminal Matters, June 27, 1962, 616 U.N.T.S. 120[7]

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1 The African Union was formerly known as the Organisation of African unity. It is made up of fifty-three states, namely: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, The Central African Republic, Chad, the Comoros, the Republic of the Congo, the Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea Biassau, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Western Sahara, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, the Sudan, Swaziland, Tanzania, Togo, Tunesia, Uganda, Zambia, and Zimbabwe.

2 The Convention on the Prevention and Combating of Terrorism is *available at* http://treaties.un.org/doc/db/Terrorism/OAU-english.pdf.

3 The Convention on Preventing and Combating Corruption is *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

4 The Association of Southeast Asian Nations is made up of ten states, namely: Brunei Darussalam, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.

5 The ASEAN Convention on Counter Terrorism is *available at* http://www.asean.org/news/item/asean-convention-on-counter-terrorism. It was signed by Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

6 The Benelux countries are Belgium, Luxembourg, and The Netherlands.

7 All three Benelux members have signed and ratified the Treaty.

Commonwealth of Nations[8]

Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, 1966[9]

Commonwealth Scheme for Rendition of Fugitive Offenders, *as amended* in 1990[10]

Scheme for Transfer of Convicted Offenders within the Commonwealth, Aug. 1986[11]

Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, Apr. 1990, *as amended* Nov. 2002 and Oct. 2005[12]

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, Nov. 1999[13]

The London Scheme for Extradition within the Commonwealth, Nov. 2002[14]

8 The Commonwealth of Nations is made of up fifty-four states, overwhelmingly former British colonies, namely: Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Cyprus, Dominica, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malasia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, the United Kingdom, Vanuatu, and Zambia. The Commonwealth does not maintain a treaty series; the treaties are stored on the Commonwealth's website, with links provided below.

9 The Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf.

10 The Commonwealth Scheme for Rendition of Fugitive Offenders is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf.

11 The Scheme for Transfer of Convicted Offenders within the Commonwealth is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{BF5E0493-DE14-43D6-A5E8-7641447B2CB1}_convicted_criminals.pdf.

12 The Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf.

13 The Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/{C628DA6C-4D83-4C5B-B6E8-FBA05F1188C6}_framework1.pdf.

14 The London Scheme for Extradition within the Commonwealth is *available at* http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf

Council of Europe[15]

European Convention on Extradition, Dec. 12, 1957, E.T.S. 24[16]

Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, E.T.S. 86[17]

Second Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, E.T.S. 98[18]

15 The Council of Europe was established in 1949 by ten states to promote "common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals." At present it is composed of forty-seven states, namely: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Lacedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. The Council of Europe adopted the European Convention on Human Rights (ECHR) in 1950. The European Court of Human Rights was first established in 1959 and assumed sole responsibility for the enforcement of the ECHR in 1998. The Council of Europe should not be confused with the European Union or its constituent bodies, including the European Council, the European Commission, the European Parliament, or the European Court of Justice. The twenty-seven member states of the European Union are members of the Council of Europe. Iceland, Norway, and Switzerland are members of the Council of Europe but not the European Union. Belarus is the only European state not to be a member of either the Council of Europe or the European Union.

Council of Europe treaties are open to members of the Council of Europe and select invited states who are determined on an ad hoc basis. In addition, a number of states have official observer status with the Council of Europe, namely Canada, the Holy See, Israel, Japan, Mexico, and the United States. Council of Europe treaties are found either in the European Treaty Series or the Council of Europe Treaty Series. All treaties since 2004 are found in the Council of Europe Treaty Series (i.e., C.E.T.S.), while treaties from 1949 to 2003 are found in the European Treaty Series (i.e., E.T.S.). The Council of Europe Treaty Series can be found at: http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.

16 The European Convention on Extradition has been ratified by all forty-seven member states of the Council of Europe, as well as Israel, South Korea, and South Africa.

17 The Additional Protocol has been ratified or acceded to by thirty-nine states, namely: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Georgia, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, and the Ukraine.

Greece has signed but not ratified the Additional Protocol. Nine states have not signed or acceded to the Additional Protocol, namely: Austria, Finland, France, Germany, Ireland, Italy, San Marino, Turkey, and the United Kingdom.

18 The Second Additional Protocol has been ratified or acceded to by forty-two states, namely: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Iceland, Italy, Latvia, Lithuania, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey Ukraine, and the United Kingdom, as well as South Korea and South Africa.

Greece has signed but not ratified the Second Additional Protocol. Five states have not signed or acceded to the Second Additional Protocol, namely: Andorra, France, Ireland, Liechtenstein, Luxembourg, and Serbia.

Third Additional Protocol to the European Convention on Extradition, Nov. 10, 2010, C.E.T.S. 209[19]

Fourth Additional Protocol to the European Convention on Extradition, Sept. 20, 2012, C.E.T.S. 212 (not yet in force)[20]

European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 090[21]

Economic Community of West African States (ECOWAS)[22]

Economic Community of West African States Convention on Extradition, Aug. 6, 1994, A/P.1/8/94[23]

European Union[24]

Convention on Simplified Extradition Procedure between the Member States of the European Union, Mar. 30, 1995, OJ C 078

Convention Relating to Extradition between Member States of the European Union, June 23, 1996, OJ C 313

Convention Implementing the Schengen Agreement, Sept. 22, 2000, OJ L 239

19 The Third Additional Protocol has been ratified or acceded to by nine states, namely: Albania, the Czech Republic, Latvia, the Netherlands, and Serbia. Nineteen states have signed, but not ratified the Third Additional Protocol, namely: Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Finland, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Sweden, and The former Yugoslav Republic of Macedonia.

20 The Fourth Additional Protocol has been signed by nine states, namely: Albania, Armenia, Austria, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Serbia, Slovenia, Sweden, and Ukraine. None of these states have ratified the Fourth Additional Protocol.

21 The European Convention on the Suppression of Terrorism has been ratified by or acceded to forty-six states, namely: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Andorra has signed but not ratified the Convention.

22 The Economic Community of West African States is composed of fifteen states, namely: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. The Community does not keep a published treaty series on its website.

23 The Economic Community of West African States Convention on Extradition was signed by sixteen states, namely: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. The treaty is not published on the Community's website and no ratification information is available.

24 The European Union is made up of twenty-seven states, namely: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherland, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, June 13, 2002, 2002/584/JHA, OJ L190/1[25]

Latin American Countries

Montevideo Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111[26]

League of Arab States[27]

Arab League Extradition Agreement, League of Arab States Treaty Series 27-32, *reprinted in* 8 Rev. Egyptienne de Droit Int'l 328-32 (1952)[28]

Arab Convention for the Suppression of Terrorism, Apr. 22, 1998[29]

Nordic States

The Nordic Arrest Warrant, Jan. 24, 2006, Council of Europe Doc. 5573/06[30]

Organisation of Islamic Cooperation

Convention of the Organization of the Islamic Conference on Combating International Terrorism, Sept. 25, 1999, Annex to Resolution no. 59/26-P[31]

25 The Framework Decision on European arrest warrant and the surrender procedures between Member States was adopted by the European Council on June 13, 2002. Under Article 34(2)(b) of the Treaty on European Union, the Council shall "adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect." Framework Decisions deal with matters of criminal law.

26 The Montevideo Convention on Extradition was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

27 The League of Arab States is made up of twenty-two member states, namely: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Palestine, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. Syria's membership was supended in November 2011, but its seat was taken by the Syrian National Coalition in April 2013.

28 The Arab League Extradition Agreement was originally singed by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, and Syria.

29 The Arab Convention for the Suppression of Terrorism is *available at* http://www.refworld.org/docid/3de5e4984.html.

30 The Nordic Arrest Warrant was Adopted by the Council of the European Union based on the negotiations of Denmark, Finland, Iceland, Norway, and Sweden. It is *available at* http://www.asser.nl/upload/eurowarrant-webroot/documents/cms_eaw_id1056_1_CouncilDoc.5573.06.pdf.

31 The Organisation of Islamic Cooperation was formerly known as the Organization of the Islamic Conference. It is made up of fifty-seven member states, namely: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei-Darussalam, Burkina-Faso, Cameroon, Chad, The Comoros, Côte D'Ivoire, Egypt, Gabon, The Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, The Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, The Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, The United Arab Emirates, Uzbekistan, and Yemen.

Organization of American States[32]

Inter-American Convention on Extradition, Feb. 25, 1981, O.A.S. Doc. B-47[33]

Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S. Doc. B-58[34]

Inter-American Convention Against Terrorism, June 3, 2003, AG/Res. 1840 (XXXII-O/02), O.A.S. No. A-66.[35]

South Asian Association for Regional Cooperation (SAARC)[36]

Regional Convention on the Suppression of Terrorism, Nov. 4, 1987[37]

Southern African Development Community (SADC)[38]

Southern African Development Community Protocol on Extradition, Oct. 3, 2002[39]

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32 The Organization of American States is made up of thirty-five states, namely: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rice, Cuba, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela. The Inter-American Treaty Series is available at http://www.oas.org/DIL/treaties.htm.

33 The Inter-American Convention on Extradition has been ratified or acceded to by six states, namely: Antigua and Barbuda, Costa Rica, Ecuador, Panama, St. Lucia, and Venezuala. The Convention has been signed, but not ratified, by ten states, namely: Argentina, Bolivia, Chile, the Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, and Uruguay.

34 The Inter-American Convention Against Corruption has been ratified or acceded to by thirty-three states, namely: Antigua & Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela. Barbados has signed, but not ratified, the Convention.

35 The Inter-American Convention Against Corruption has been ratified or acceded to by twenty-four states, namely: Antigua & Barbuda, Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad & Tobago, United States, Uruguay, and Venezuela. Ten countries have signed, but not ratified, the Convention, namely: Bahamas, Barbados, Belize, Bolivia, Haiti, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, and Suriname.

36 The South Asian Association for Regional Cooperation is made up of Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka.

37 The Regional Convention on the Suppression of Terrorism is *available at* http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf. It was signed by Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka.

38 The Southern African Development Community is made up of fifteen states, namely Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Madagascar's membership has been suspended since a 2009 *coup d'état*. The Community does not maintain a treaty series, but its treaties can be found at: http://www.sadc.int/documents-publications/protocols/.

39 The Southern African Development Community Protocol on Extradition was signed by Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Madagascar did not sign the treaty. The treaty is available on the Community's website at: http://www.sadc.int/files/3513/5292/8371/Protocol_on_Extradiction.pdf.

Appendix III

Bilateral Extradition Treaties of the United States[1]

Abbreviations

EU Bilateral	Bilateral treaty between the United States of America and European Union member states, pursuant to Article 3(2) of the Agreement on extradition between the European Union and the United States of America, signed June 25, 2003.
KAV	Treaties entered into by the United States since 1950 that have not yet been published in Treaties and other International Agreements Series (TIAS); *Current Treaty Index, Supplement to United States Treaty Index 1776–1990 Consolidation,* ed. Igor I. Kavass (2005); *A Guide to the United States Treaties in Force*, ed. Igor I. Kavass, 2005.
LNTS	*League of Nations Treaty Series* containing treaties agreed to between 1920 and 1946.
SDoc	Senate Treaty Document Number.
St. Dept.	State Department Document Number.
Stat.	United States Statutes at Large.
TIAS	Treaties and other International Agreements Series, issued singly in pamphlets issued by the Department of State beginning in 1946.
UNTS	*United Nations Treaty Series* containing treaties agreed to after 1946.
UST	*United States Treaties and Other International Agreements* (volumes published on a calendar-year basis beginning January 1, 1950).
*	Signifies Ratification of the Rome Statute of the ICC.
[a]	Signifies "Article 98" agreement precluding extradition to the ICC.
Pending	Awaiting advice and consent of the U.S. Senate.

1 Treaties are collected in 18 U.S.C. § 3181. In addition, the Department of State collects treaties to which the Unites States is a state party in Treaties in Force, which was last released in January 2012. *See* http://www.state.gov/s/l/treaty/tif/index.htm. Treaties are also collected in Treaties and other International Acts Series (TIAS), which is *available at* http://www.state.gov/s/l/treaty/tias/index.htm. Finally, before being collected in the Treaties in Force or TIAS, treaties are individually noted in monthly "Treaty Actions," which are *available at* http://www.state.gov/s/l/treaty/c3428.htm.

The United States currently has bilateral extradition treaties with the following countries:

Country	Date signed	Entered into Force	Citation
Albania*[a]	March 1, 1933	November 14, 1935	49 Stat. 3313, TS 902, 5 Bevans 22, 16 LNTS 195
Antigua and Barbuda* [a]	June 3, 1996	July 1, 1999	KAV 6898; SDoc 105-19
Argentina*	June 10, 1997	June 15, 2000	KAV 5018, SDoc 105-18, TIAS 12866, 2159 UNTS 129
Australia* *Protocol*	May 14, 1974 September 4, 1990	May 8, 1976 December 21, 1992	27UST 957, TIAS 8234 SDoc 105-27; 1736 UNTS 344
Austria* *EU Bilateral*	January 8, 1998 July 20, 2005	January 1, 2000 February 1, 2010	KAV 5244, SDoc 105-50, TIAS 12916 KAV 7088, SDoc 109-14
Bahamas	March 9, 1990	September 22, 1994	KAV 3171, SDoc 105-20
Barbados*	February 28, 1996	March 3, 2000	KAV 5019, SDoc 105-20
Belgium* *EU Bilateral*	April 27, 1987 December 16, 2004	September 1, 1997 February 1, 2010	KAV 106, SDoc 104-7, 2093 UNTS 263 KAV 7088, SDoc 109-14
Belize*[a]	March 30, 2000	March 27, 2001	KAV 5974, SDoc 106-38 TIAS 13089
Bolivia*	June 27, 1995	November 21, 1996	KAV 4192, SDoc 104-22
Brazil* *Additional Protocol*	January 13, 1961 June 18, 1962	December 17, 1964 December 17, 1964	15UST 2093, TIAS 5691, 532 UNTS 177 15UST 2112, TIAS 5691, 532 UNTS 198
Bulgaria*	September 19, 2007	May 21, 2009	KAV 8082, SDoc 110-12
Burma	December 22, 1931[2]	November 1, 1941	47Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Canada* *Ex. of Notes* *Supplementary* *Supplementary*	December 3, 1971 June 28 and July 9, 1974 January 11, 1988 January 12, 2001	March 22, 1976 March 22, 1976 November 26, 1991 April 30, 2003	27UST 983, TIAS 8237 27 UST 1017, TIAS 8237, KAV 237, SDoc 101-17, 27 UST 983 KAV 6252, SDoc 107-11 1853 UNTS 407

2 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Burma after independence.

Country	Date signed	Entered into Force	Citation
Chile*	April 17, 1900	June 26, 1902	32 Stat. 1850, TS 407, 6 Bevans 543
Colombia*[a][3]	September 14, 1979	March 4, 1982	KAV 338, SDoc 97-8
Congo, Republic of*[a] *Supplementary* *Supplementary*	January 6, 1909[4] January 15, 1929[5] April 23, 1936[6]	July 27, 1911 May 19, 1929 September 24, 1936	37 Stat. 1526 46 Stat. 2276 50 Stat. 1117
Costa Rica*	December 4, 1982	October 11, 1991	KAV 363, SDoc 98-17
Cuba *Supplementary* *Additional* *Treaty*	April 6, 1904 December 6, 1904 January 14, 1926	March 2, 1905 March 2, 1905 June 18, 1926	33 Stat. 2265 33 Stat. 2273 44 Stat. 2392, TS 737, 6 Bevans 1136, 61 LNTS 363
Cyprus* *EU Bilateral*	June 17, 1996 January 20, 2006	September 14, 1999 February 1, 2010	KAV 5016, SDoc 105-16 KAV 7088, SDoc 109-14
Czech Republic[7]* *Supplementary* *EU Bilateral*	July 2, 1925 April 29, 1935 May 16, 2006	March 29, 1926 August 28, 1935 February 1, 2010	44 Stat. 2367 49 Stat. 3253 KAV 7088, SDoc 109-14
Denmark* *EU Bilateral*	June 22, 1972 June 23, 2005	July 31, 1974 February 1, 2010	25 UST 1293, TIAS 7864 KAV 7088, SDoc 109-14
Dominica*[a]	October 10, 1996	May 25, 2000	KAV 5869, SDoc 105-19
Dominican Republic*[a]	June 19, 1909	August 2, 1910	36 Stat. 2468, TS 550, 7 Bevans 200
Ecuador* *Supplementary*	June 28, 1872 September 22, 1939	November 12, 1873 May 29, 1941	18 Stat. 199, TS 79, 7 Bevans 321 55 Stat. 1196, TS 972, 7 Bevans 346

3 The Supreme Court of Colombia declared the treaty unconstitutional in December 1986 and June 1987. *See* 27 ILM 492 (1988). In September 1989, the Colombian government extradited Eduardo Martinez Romero to the United States. The extradition was carried out by executive order of the president and outside any extradition treaty between the United States and Colombia. (Kavass, Vol. III, p. 489)

4 Treaty concluded between the United States and France, but remains in force with respect to the Congo after independence.

5 Treaty concluded between the United States and France, but remains in force with respect to the Congo after independence.

6 Treaty concluded between the United States and France, but remains in force with respect to the Congo after independence.

7 Czechoslovakia split into the independent Czech Republic and Slovak Republic at midnight on December 31, 1991. The Czech and Slovak Republics have independent extradition agreements with the United States, which entered into force in 2010. The existing extradition treaties of 1926 and 1935 between the United States and Czechoslovakia may apply to the Czech and Slovak Republics under the doctrine of state succession. The status of the extradition treaties between the United States and Czechoslovakia is under review by the Department of State.

Country	Date signed	Entered into Force	Citation
Egypt[a]	August 11, 1874[8]	April 22, 1875	19 Stat. 572, TS 270, 10 Bevans 642
El Salvador*[a]	April 18, 1911	July 10, 1911	37 Stat. 1516, TS 560, 7 Bevans 507
Estonia*	February 8, 2006	April 7, 2009	KAV 7642, SDoc 109-16
European Union (EU)[9]	June 25, 2003	February 1, 2010	KAV 7088, SDoc 109-14
Fiji*[a] *Ex. of Notes* *Ex. of Notes*	December 22, 1931[10] July 14, 1972 August 17, 1973	June 24, 1935 August 17, 1973 August 17, 1973	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 24 UST 1965 TIAS 7707
Finland* *EU Bilateral*	June 11, 1976 December 16, 2004	May 11, 1980 February 1, 2010	31 UST 944, TIAS 9626, 1203 UNTS 165 KAV 7088, SDoc 109-14
France* *EU Bilateral*	April 23, 1996 September 30, 2004	February 1, 2002 February 1, 2010	KAV 4920, SDoc 105-13, 2179 UNTS 341 KAV 7088, SDoc 109-14
Gambia*[a]	December 22, 1931[11]	June 24, 1935	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Germany* *Supplementary* *EU Bilateral*	June 20, 1978 Oct. 21, 1986 April 18, 2006	August 29, 1980 March 11, 1993 February 1, 2010	32 UST 1485, TIAS 9785, 1220 UNTS 269 KAV 705, 1909 UNTS 441 KAV 7088, SDoc 109-14
Ghana*[a]	December 22, 1931[12]	June 24, 1935	47 Stat. 2122, TS 849, 12 Bevans 842, 163 LNTS 59

8 Treaty with the Ottoman Empire; Superseded on August 18, 1932 by treaty between the United States and Turkey signed on August 6, 1923 (TS 872).

9 Upon entry into force of the EU-U.S. Extradition Agreement on February 1, 2010, the twenty-five bilateral agreements between the United States and EU member states also entered into force.

10 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Fiji after independence.

11 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Gambia after independence.

12 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Ghana after independence.

Country	Date signed	Entered into Force	Citation
Greece* *Supplementary* *EU Bilateral*	May 6, 1931 September 2, 1937 January 18, 2006	November 1, 1932 September 2, 1937 February 1, 2010	47 Stat. 2185, TS 855, 8 Bevans 353, 138 LNTS 293 51 Stat. 357, EAS 114, 8 Bevans 366, 185 LNTS 408 KAV 7088, SDoc 109-14
Grenada*[a]	May 30, 1996	September 14, 1999	KAV 5870, SDoc 105-19
Guatemala* *Supplementary*	February 27, 1903 February 20, 1940	August 15, 1903 March 13, 1941	33 Stat. 2147, TS 425, 8 Bevans 482 55 Stat. 1097, TS 963, 8 Bevans 528
Guyana*[a]	December 22, 1931[13]	June 24, 1935	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Haiti[a]	August 9, 1904	June 28, 1905	34 Stat. 2858, TS 447, 8 Bevans 653
Honduras*[a] *Supplementary*	January 15, 1909 February 21, 1927	July 10, 1912 June 5, 1928	37 Stat. 1616, TS 569, 8 Bevans 892 45 Stat. 2489, TS 761, 8 Bevans 903, 85 LNTS 491
Hong Kong (China)	December 20, 1996	January 21, 1998	KAV 4912, SDoc 105-3
Hungary* *EU Bilateral*	December 1, 1994 November 15, 2005	March 18, 1997 February 1, 2010	KAV 4252, SDoc 104-5 KAV 7088, SDoc 109-14
Iceland* *Supplementary*	January 6, 1902[14] November 6, 1905[15]	May 16, 1902 February 19, 1906	32 Stat. 1096, TS 405, 7 Bevans 38 34 Stat. 2887, TS 449, 7 Bevans 43
India[a]	June 25, 1997	July 21, 1999	KAV 5025, SDoc 105-30, TIAS 12873
Iraq	June 7, 1934	April 23, 1936	49 Stat. 3380, TS 907, 9 Bevans 1, 170 LNTS 267
Ireland* *EU Bilateral*	July 13, 1983 July 14, 2005	December 15, 1984 February 1, 2010	TIAS 10813 KAV 7088, SDoc 109-14

13 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Guyana after independence.

14 Treaty concluded between the United States and Denmark, but remains in force with respect to Iceland.

15 Treaty concluded between the United States and Denmark, but remains in force with respect to Iceland.

Country	Date signed	Entered into Force	Citation
Israel[a] *Explanatory Protocol*	December 10, 1962 April 11, 1967 July 6, 2005	December 5, 1963 April 11, 1967 January 10, 2007	14 UST 1707, TIAS 5476, 484 UNTS 283 18 UST 382, TIAS 6246 S.Doc 109-3
Italy*[16] *EU Bilateral*	October 13, 1983 May 3, 2006	September 24, 1984 February 1, 2010	35 UST 3023, TIAS 10837, 1590 UNTS 161 KAV 7088, SDoc 109-14
Jamaica	June 14, 1983	July 7, 1991	KAV 1026, SDoc 98-31
Japan*	March 3, 1978	March 26, 1980	31 UST 892, TIAS 9625, 1203 UNTS 225
Jordan*	March 28, 1995	July 29, 1995	KAV 4209, SDoc 104-3
Kenya*[a] *Ex of Notes*	December 22, 1931[17] August 19, 1965	June 24, 1935 August 19, 1965	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 16 UST 1866, TIAS 5916, 574 UNTS 153
Kiribati[a]	June 8, 1972[18]	January 21, 1977	28 UST 227, TIAS 8468
Korea, Republic of South*	June 9, 1998	December 20, 1999	KAV 5485, SDoc 106-2, TIAS 12962
Latvia* *EU Bilateral*	December 7, 2005	March 1, 1924 March 29, 1935 April 15, 2009	43 Stat. 1738 49 Stat. 3131 KAV 7641, SDoc 109-15
Lesotho*[a]	December 22, 1931[19]	June 24, 1935	47 Stat. 2122, TS 849, 12 bevans 482, 163 LNTS 59
Liberia*[a]	November 1, 1937	November 21, 1939	54 Stat. 1733, TS 955, 9 Bevans 589, 201 LNTS 151
Liechtenstein*	May 20, 1936	June 28, 1937	50 Stat. 1337, TS 915, 9 Bevans 648, 183 LNTS 181

16 The Italian Constitutional Court declared in July 1996 that Treaty to be unconstitutional due to the possible imposition of the death penalty in the United States. Italy's Constitution prohibits the imposition of the death penalty. (See Chapter VIII).

17 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Kenya after independence.

18 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Kiribati after independence.

19 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Lesotho after independence.

Country	Date signed	Entered into Force	Citation
Lithuania* *EU Bilateral*	October 23, 2001 June 15, 2005	March 31, 2003 February 1, 2010	KAV 6246, SDoc 107-4, TIAS 13166 KAV 7088, SDoc 109-14
Luxembourg* *EU Bilateral*	October 1, 1996 February 1, 2005	February 1, 2002 February 1, 2010	KAV 4917, SDoc 105-10, TIAS 12804 KAV 7088, SDoc 109-14
Malawi*[a] *Ex. of Notes*	December 22, 1931[20] April 4, 1967	June 24, 1935 April 4, 1967	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 18 UST 1822, TIAS 9656, 692 UNTS 191
Malaysia	August 3, 1995	June 2, 1997	KAV 4581, SDoc 104-26
Malta*	May 18, 2006	July 1, 2009	KAV 7643, SDoc 109-17 47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Mauritius*[a]	December 22, 1931[21]	June 24, 1935	31 UST 5059, TIAS 9656 TIAS 12897, SDoc 105-46
Mexico* *Protocol*	May 4, 1978 November 13, 1997	January 25, 1980 May 21, 2001	KAV 6519, St. Dpt. 04-152
Micronesia[a]	May 14, 2003	June 25, 2004	54 Stat. 1780, TS 959, 9 Bevans 1272, 202 LNTS 61
Monaco	February 15, 1939	March 28, 1940	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Nauru*[a]	December 22, 1931[22]	August 30, 1935	35 UST 1334, TIAS 10733 KAV 7088, SDoc 109-14
Netherlands[23]* *EU Bilateral*	June 24, 1980 September 29, 2004	September 15, 1983 February 1, 2010	22 UST 1, TIAS 7035, 791 UNTS 253
New Zealand*	January 12, 1970	December 8, 1970	735 Stat. 1869, TS 462, 10 Bevans 356
Nicaragua[a]	March 1, 1905	July 14, 1907	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59

20 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Malawi after independence.

21 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Mauritius after independence.

22 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Nauru after independence.

23 Applies to Aruba and the Netherlands Antilles.

Country	Date signed	Entered into Force	Citation
Nigeria*[a]	December 22, 1931[24]	June 24, 1935	31 UST 5619, TIAS 9679, 1220 UNTS 221
Norway*	June 9, 1977	March 7, 1980	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Pakistan[a]	December 22, 1931[25]	June 24, 1935	Executive agreement concluded pursuant to section 175 of the amended Compact of Free Association, P.L. 99-239, Title II
Palau[26a]		Oct. 1, 1994	34 Stat. 2851, TS 445, 10 Bevans 673
Panama*[a]	May 25, 1904	May 8, 1905	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 KAV 1557
Papua New Guinea[a]	December 22, 1931[27] February 23, 1988	August 30, 1935 February 23, 1988	KAV 5486, SDoc 106-4, TIAS 12995
Paraguay*	November 9, 1998	March 9, 2001	KAV 6248, SDoc 107-6
Peru*	July 26, 2001	August 25, 2003	KAV 4336, SDoc 104-16, 1994 UNTS 279
Philippines*[a]	November 13, 1994	November 22, 1996	KAV 4921, SDoc 105-14 KAV 7088, SDoc 109-14
Poland* *EU Bilateral*	July 10, 1996 June 9, 2006	September 17, 1999 February 1, 2010	35 Stat. 2071, TS 512, 11 Bevans 314 KAV 7088, SDoc 109-14
Portugal* *EU Bilateral*	May 7, 1908 July 14, 2005	November 14, 1908 February 1, 2010	KAV 8081, SDoc 110-11
Romania*	September 10, 2007	May 8, 2009	KAV 5872, SDoc 105-19, TIAS 12805
St. Kitts and Nevis*[a]	September 18, 1996	February 23, 2000	KAV 5871, SDoc 105-19

24 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Nigeria after independence.

25 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Pakistan after its independence.

26 Although the only official listing of this extradition agreement is an executive order, which is not technically a treaty as it does not require the advice and consent of the Senate, at least one extradition has taken place under it. *See In re Extradition of Lin,* 915 F. Supp. 206, 207 (D. Guam 1995); P.L. 99-239, 99 Stat. 1770 (1986); H.Rep. 99-188 (Pt. I) 192 (1985).

27 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Papua New Guinea after its independence.

Country	Date signed	Entered into Force	Citation
St. Lucia*	April 18, 1996	February 2, 2000	KAV 5873, SDoc 105-19
St. Vincent and the Grenadines*	August 15, 1996	September 8, 1999	35 Stat. 1971, TS 495, 11 Bevans 440 49 Stat. 3198, TS 891, 11 Bevans 446, 161 LNTS 149
San Marino* *Supplementary*	January 10, 1906 October 10, 1934	July 8, 1908 June 28, 1935	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Seychelles*[a]	December 22, 1931[28]	June 24, 1935	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Sierra Leone*[a]	December 22, 1931[29]	June 24, 1935	47 Stat. 2122,, TS 849, 12 Bevans 482, 163 LNTS 59 20 UST 2764, TIAS 6744, 723 UNTS 201
Singapore[a] *Ex. of Notes*	December 22, 1931 June 10, 1969	June 24, 1935 June 10, 1969	44 Stat. 2367 49 Stat. 3253 SDoc 109-14
Slovak Republic[30]* *Supplementary* *EU Bilateral*	July 2, 1925 April 29, 1935 February 6, 2006	March 29, 1926 August 28, 1935 February 1, 2010	KAV 7088, SDoc 109-14
Slovenia*[a][31] *EU Bilateral*	October 17, 2005	February 1, 2010	28 UST 227, TIAS 8468
Solomon Islands[a]	June 8, 1972[32]	January 21, 1977	KAV 5720, SDoc 106-24, TIAS 13060

28 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to the Seychelles after its independence.

29 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Sierra Leone after independence.

30 Czechoslovakia split into the independent Czech Republic and Slovak Republic at midnight on December 31, 1991. The Czech and Slovak Republics have independent extradition agreements with the United States, which entered into force in 2010. The existing extradition treaties of 1926 and 1935 between the United States and Czechoslovakia may apply to the Czech and Slovak Republics under the doctrine of state succession. The status of the extradition treaties between the United States and Czechoslovakia is under review by the Department of State.

31 See footnote to the Treaty with Yugoslavia for more information.

32 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to the Solomon Islands after its independence.

Country	Date signed	Entered into Force	Citation
South Africa*	September 16, 1999	June 25, 2001	22 UST 737, TIAS 7136, 796 UNTS 245 29 UST 2283, TIAS 8938 KAV 1846 KAV 4922 KAV 7088, SDoc 109-14
Spain* *Supplementary* *Supplementary* *Supplementary* *EU Bilateral*	May 29, 1970 January 25, 1975 February 9, 1988 March 12, 1996 December 17, 2004	June 16, 1971 June 2, 1978 July 2, 1993 July 25, 1999 February 1, 2010	KAV 5729, TIAS 13066
Sri Lanka[a]	September 30, 1999	January 12, 2001	26 Stat. 1481, TS 256, 10 Bevans 47 33 Stat. 2257, TS 436, 10 Bevans 53
Suriname* *Extension*	June 2, 1887[33] January 18, 1904[34]	July 11, 1889 August 28, 1904	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 21 UST 1930, TIAS 6934, 756 UNTS 103
Swaziland[a] *Ex. of Notes*	December 22, 1931[35] July 28, 1970	June 24, 1935 July 28, 1970	14 UST 1845, TIAS 5496, 494 UNTS 141 35 UST 2501, TIAS 10812 KAV 7088, SDoc 109-14
Sweden* *Supplementary* *EU Bilateral*	October 24, 1961 March 14, 1983 December 16, 2004	December 3, 1963 September 24, 1984 February 1, 2010	KAV 2829, SDoc 104-9
Switzerland*	November 14, 1990	September 10, 1997	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 16 UST 2066, TIAS 5946

33 Treaty concluded between the United States and the Netherlands, but remains in force with respect to Suriname after its independence.

34 Treaty concluded between the United States and the Netherlands, but remains in force with respect to Suriname after its independence.

35 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Swaziland after its independence.

Country	Date signed	Entered into Force	Citation
Tanzania* *Ex. of Notes*	December 22, 1931[36] December 6, 1965	June 24, 1935 December 6, 1965	KAV 1940, SDoc 98-16
Thailand[a]	December 14, 1983	May 17, 1991	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59 28 UST 5290, TIAS 8628, 1087 UNTS 281
Tonga *Ex. of Notes*	December 22, 1931[37] April 13, 1977	August 1, 1966 April 13, 1977	KAV 5020
Trinidad and Tobago*	March 4, 1996	November 29, 1999	32 UST 3111, TIAS 9891
Turkey	June 7, 1979	January 1, 1981	28 UST 227, TIAS 8468 32 UST 1310/TIAS 9770
Tuvalu[a]	June 8, 1972[38] April 25, 1980[39]	January 21, 1977 April 25, 1980	SDoc 108-23 KAV 7088, SDoc 109-14
United Kingdom[40]* *EU Bilateral*	March 31, 2003 December 16, 2004	April 26, 2007 February 1, 2010	35 UST 3197, TIAS 10850
Uruguay*	April 6, 1973	April 11, 1984	43 Stat. 1698, TS 675, 12 Bevans 1128, 49 LNTS 435
Venezuela*	January 21, 1922	April 14, 1923	32 Stat. 1890, TS 406, 12 Bevans 1238

36 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Tanzania after its independence.

37 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Tonga after its independence.

38 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Tuvalu after independence.

39 This document is listed in the United States Code, but is not listed in the Department of State's list of Treaties in Force.

40 Applies to all U.K. territories including the Channel Islands, Isle of Man, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gibralter, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, Angilla, St. Helena and Dependencies, Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus, and Turks and Caicos Islands.

Country	Date signed	Entered into Force	Citation
Yugoslavia[41]	October 25, 1901	June 12, 1902	47 Stat. 2122, TS 849, 12 Bevans 482, 163 LNTS 59
Zambia*[a]	December 22, 1931[42]	June 24, 1935	KAV 5198, SDoc 105-33
Zimbabwe	July 25, 1997	April 26, 2000	

41 The former Republic of Yugoslavia began to dissolve in 1991, resulting in the creation of Bosnia and Herzegovina, the Republic of Croatia, Kosovo, the Republic of Macedonia, Montenegro, the Republic of Serbia, and the Republic of Slovenia. Slovenia entered into an extradition treaty with the United States in 2010. The successor states to the Republic of Yugoslavia may be bound by the 1902 treaty of extradition between the United States and the Kingdom of Serbia, which applied to the former Republic of Yugoslavia and its above listed successor states under the doctrine of state succession. The status of the extradition treaty between the United States and Yugoslavia is under review by the Department of State.

42 Treaty concluded between the United States and the United Kingdom, but remains in force with respect to Zambia after independence.

Appendix IV

Countries with Which the United States Has No Bilateral Extradition Treaty

Afghanistan
Algeria
Andorra
Angola
Armenia
Azerbaijan
Bahrain
Bangladesh
Belarus
Benin
Bhutan
Bosnia and Herzegovina*
Botswana
Brunei
Burkina Faso
Burundi
Cambodia
Cameroon
Côte D'Ivoire (Ivory Coast)
Central African Republic
Chad
China
Comoros Democratic Republic of the Congo
Côte D'Ivoire (Ivory Coast)
Cook Islands
Croatia*
Djibouti
Equatorial Guinea
Eritrea
Ethiopia
Gabon
Georgia
Guinea
Guinea-Bissau
Indonesia
Iran
Kazakhstan
North Korea
Kosovo*
Kuwait
Kyrgyzstan
Laos
Lebanon
Libya
Macedoniaa
Madagascar
Maldives
Mali
Marshall Islands
Mauritania
Micronesia
Moldova
Mongolia
Montenegro*
Morocco
Mozambique
Namibia
Nepal
Niger
Oman
Qatar
Russian Federation
Rwanda
Samoa
São Tomé and Príncipe
Saudi Arabia
Senegal
Serbia*
Somalia
Sudan
South Sudan
Syrian Arab Republic

Taiwan	Turkmenistan	Vanuatu
Tajikistan	Uganda	Vatican City
Timor-Leste	Ukraine	Vietnam
Togo	United Arab Emirates	Yemen
Tunisia	Uzbekistan	

* The former Republic of Yugoslavia began to dissolve in 1991, resulting in the creation of Bosnia and Herzegovina, the Republic of Croatia, Kosovo, the Republic of Macedonia, Montenegro, the Republic of Serbia, and the Republic of Slovenia. Slovenia entered into an extradition treaty with the United States in 2010. The successor states to the Republic of Yugoslavia may be bound by the 1902 treaty of extradition between the United States and the Kingdom of Serbia, which applied to the former Republic of Yugoslavia and its above-listed successor states under the doctrine of state succession. The status of the extradition treaty between the United States and Yugoslavia is under review by the Department of State. Various federal district courts have recognized several of the above-listed countries as successor states, *see, e.g.*, Arambasic v. Ashcroft, 403 F. Supp. 2d 951 (D.S.D. 2005) (Croatia); Sacirbey v. Guccione, 2006 WL 2585561 (No. 05 Cv. 2949(BSJ)(FM)) (S.D.N.Y. Sept. 7, 2006) (Bosnia and Herzegovina), overruled on other grounds by 589 F.3d 52 (2d Cir. 2009), Zelenovic v. O'Malley, 2010 U.S. Dist. LEXIS 92632 (N.D. Il. 2010) (Serbia).

Appendix V

Countries with Which the United States Has Signed an "Article 98" Agreement Not to Surrender Its Citizens to the International Criminal Court

Afghanistan
Albania
Algeria
Angola
Antigua and Barbuda
Armenia
Azerbaijan
Bangladesh
Belize
Benin
Bhutan
Bosnia and Herzegovina
Botswana
Brunei
Burkina Faso
Burundi
Cambodia
Cameroon
Cape Verde
Central African Republic
Chad
Colombia
Comoros
Democratic Republic of the Congo
Republic of Congo
Côte D'Ivoire (Ivory Coast)
Djibouti
Dominica
Dominican Republic
Egypt
El Salvador
Equatorial Guinea
Eritrea
Fiji
Gabon
Gambia
Georgia
Ghana
Grenada
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
India
Israel
Kazakhstan
Kiribati
Laos
Lesotho
Liberia
Macedonia
Madagascar
Malawi
Maldives
Marshall Islands
Mauritania
Mauritius
Micronesia
Mongolia
Montenegro
Morocco
Mozambique
Nauru
Nepal
Nicaragua
Nigeria
Oman
Pakistan
Palau
Panama
Papua New Guinea
Philippines
Rwanda

St. Kitts and Nevis
São Tomé and Príncipe
Senegal
Seychelles
Sierra Leone
Singapore
Solomon Islands
Sri Lanka
Swaziland
Tajikistan
Thailand
Timor-Leste (East Timor)
Togo
Tonga
Tunisia
Turkmenistan
Tuvalu
Uganda
United Arab Emirates
Uzbekistan
Yemen
Zambia

Appendix VI

United States Legislation Applicable to Extradition

TITLE 18—CRIMES AND CRIMINAL PROCEDURES
CHAPTER 209—EXTRADITION[1]

Sec.

Amendments

1996 - Pub. L. 104-294, title VI, Sec. 601(f)(9), (10), Oct. 11, 1996, 110 Stat. 3500, inserted comma after "District" in item 3182 and after "Territory" in item 3183.

1990 - Pub. L. 101-623, Sec. 11(b), Nov. 21, 1990, 104 Stat. 3356, added item 3196.

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1 18 U.S.C. § 209 (2012) (http://uscode.house.gov/download/pls/18C209.txt).

SECTION 3181. SCOPE AND LIMITATION OF CHAPTER

(a) The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

(b) The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that -

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and

(2) the offenses charged are not of a political nature.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 104-132, title IV, Sec. 443(a), Apr. 24, 1996, 110 Stat. 1280.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 658 (R.S. Sec. 5274).

Minor changes were made in phraseology.

Amendments

1996 - Pub. L. 104-132 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

Extradition Treaties Interpretation

Pub. L. 105-323, title II, Oct. 30, 1998, 112 Stat. 3033, provided that:

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'Extradition Treaties Interpretation Act of 1998.'

"SEC. 202. FINDINGS.

"Congress finds that -

"(1) each year, several hundred children are kidnapped by a parent in violation of law, court order, or legally binding agreement and brought to, or taken from, the United States;

"(2) until the mid-1970's, parental abduction generally was not considered a criminal offense in the United States;

"(3) since the mid-1970's, United States criminal law has evolved such that parental abduction is now a criminal offense in each of the 50 States and the District of Columbia;

"(4) in enacting the International Parental Kidnapping Crime Act of 1993 (Public Law 103-173; 107 Stat. 1998; 18 U.S.C. 1204), Congress recognized the need to combat parental abduction by making the act of international parental kidnapping a Federal criminal offense;

"(5) many of the extradition treaties to which the United States is a party specifically list the offenses that are extraditable and use the word 'kidnapping,' but it has been the practice of the United States not to consider the term to include parental abduction because these treaties were negotiated by the United States prior to the development in United States criminal law described in paragraphs (3) and (4);

"(6) the more modern extradition treaties to which the United States is a party contain dual criminality provisions, which provide for extradition where both parties make the offense a felony, and therefore it is the practice of the United States to consider such treaties to include parental abduction if the other foreign state party also considers the act of parental abduction to be a criminal offense; and

"(7) this circumstance has resulted in a disparity in United States extradition law which should be rectified to better protect the interests of children and their parents.

"SEC. 203. INTERPRETATION OF EXTRADITION TREATIES.

"For purposes of any extradition treaty to which the United States is a party, Congress authorizes the interpretation of the terms 'kidnaping' and 'kidnapping' to include parental kidnapping."

Judicial Assistance to International Tribunal for Yugoslavia and International Tribunal for Rwanda

Pub. L. 104-106, div. A, title XIII, Sec. 1342, Feb. 10, 1996, 110 Stat. 486, as amended by Pub. L. 111-117, div. F, title VII, Sec. 7034(t), Dec. 16, 2009, 123 Stat. 3364, provided that:

"(a) Surrender of Persons. –

"(1) Application of united states extradition laws.—Except as provided in paragraphs (2) and (3), the provisions of chapter 209 of title 18, United States Code, relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to –

"(A) the International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and

"(B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

"(2) Evidence on hearings.—For purposes of applying section 3190 of title 18, United States Code, in accordance with paragraph (1), the certification referred to in that section may be made by the principal diplomatic or consular officer of the United States resident in such foreign countries where the International Tribunal for Yugoslavia or the International Tribunal for Rwanda may be permanently or temporarily situated.

"(3) Payment of fees and costs. –

"(A) The provisions of the Agreement Between the United States and the International Tribunal for Yugoslavia and of the Agreement Between the United States and the International Tribunal for Rwanda shall apply in lieu of the provisions of section 3195 of title 18, United States Code, with respect to the payment of expenses arising from the surrender by the United States of a person to the International Tribunal for Yugoslavia or the International Tribunal for Rwanda, respectively, or from any proceedings in the United States relating to such surrender.

"(B) The authority of subparagraph (A) may be exercised only to the extent and in the amounts provided in advance in appropriations Acts.

"(4) Nonapplicability of the federal rules.—The Federal Rules of Evidence [set out in the Appendix to Title 28, Judiciary and Judicial Procedure] and the Federal Rules of Criminal Procedure [set out in the Appendix to this title] do not apply to proceedings for the surrender of persons to the International Tribunal for Yugoslavia or the International Tribunal for Rwanda.

"(b) Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals.—[Amended section 1782 of Title 28, Judiciary and Judicial Procedure.]

"(c) Definitions.—For purposes of this section:

"(1) International tribunal for yugoslavia.—The term 'International Tribunal for Yugoslavia' means the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, as established by United Nations Security Council Resolution 827 of May 25, 1993.

"(2) International tribunal for rwanda.—The term 'International Tribunal for Rwanda' means the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, as established by United Nations Security Council Resolution 955 of November 8, 1994.

"(3) Agreement between the united states and the international tribunal for yugoslavia.—The term 'Agreement Between the United States and the International Tribunal for Yugoslavia' means the Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law in the Territory of the Former Yugoslavia, signed at The Hague, October 5, 1994, as amended.

"(4) Agreement between the united states and the international tribunal for rwanda.—The term 'Agreement between the United States and the International Tribunal for Rwanda' means the Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, signed at The Hague, January 24, 1995."

Extradition and Mutual Legal Assistance Treaties and Model Comprehensive Antidrug Laws

Pub. L. 100-690, title IV, Sec. 4605, Nov. 18, 1988, 102 Stat. 4290, which directed greater emphasis on updating of extradition treaties and on negotiating mutual legal assistance treaties with major drug producing and drug-transit countries, and called for development of model treaties and anti-narcotics legislation, was repealed by Pub. L. 102-583, Sec. 6(e)(1), Nov. 2, 1992, 106 Stat. 4933.

Pub. L. 100-204, title VIII, Sec. 803, Dec. 22, 1987, 101 Stat. 1397, provided that: "The Secretary of State shall ensure that the Country Plan for the United States diplomatic mission in each major illicit drug producing country and in each major drug-transit country (as those terms are defined in section 481(i) of the Foreign Assistance Act of 1961 [22 U.S.C. 2291(i)]) includes, as an objective to be pursued by the mission –

"(1) negotiating an updated extradition treaty which ensures that drug traffickers can be extradited to the United States, or

"(2) if an existing treaty provides for such extradition, taking such steps as may be necessary to ensure that the treaty is effectively implemented."

Pub. L. 99-93, title I, Sec. 133, Aug. 16, 1985, 99 Stat. 420, provided that: "The Secretary of State, with the assistance of the National Drug Enforcement Policy Board, shall increase United States efforts to negotiate updated extradition treaties relating to narcotics offenses with each major drug-producing country, particularly those in Latin America."

Extradition Agreements

The United States currently has bilateral extradition agreements with the following countries:

Country	Date signed	Entered into force	Citation
Albania	Mar. 1, 1933	Nov. 14, 1935	49 Stat. 3313.
Antigua and Barbuda	June 3, 1996	July 1, 1999	TIAS.
Argentina	June 10, 1997	June 15, 2000	TIAS 12866.
Australia	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
	May 14, 1974	May 8, 1976	27 UST 957.
	Sept. 4, 1990	Dec. 21, 1992	1736 UNTS 344.
Austria	Jan. 8, 1998	Jan. 1, 2000	TIAS 12916.
	July 20, 2005	Feb. 1, 2010	
Bahamas	Mar. 9, 1990	Sept. 22, 1994	TIAS.
Barbados	Feb. 28, 1996	Mar. 3, 2000	TIAS.
Belgium	Apr. 27, 1987	Sept. 1, 1997	TIAS.
	Dec. 16, 2004	Feb. 1, 2010	
Belize	Mar. 30, 2000	Mar. 27, 2001	TIAS.
Bolivia	June 27, 1995	Nov. 21, 1996	TIAS.
Brazil	Jan. 13, 1961	Dec. 17, 1964	15 UST 2093.
	June 18, 1962	Dec. 17, 1964	15 UST 2112.
Bulgaria	Mar. 19, 1924	June 24, 1924	43 Stat. 1886.
	June 8, 1934	Aug. 15, 1935	49 Stat. 3250.
	Sept. 19, 2007	May 21, 2009	
Burma	Dec. 22, 1931	Nov. 1, 1941	47 Stat. 2122.
Canada	Dec. 3, 1971	Mar. 22, 1976	27 UST 983.
	June 28, July	Mar. 22, 1976	27 UST 1017.
	July 9, 1974	Mar. 22, 1976	27 UST 1017.
	Jan. 11, 1988	Nov. 26, 1991	TIAS.
	Jan. 12, 2001	Apr. 30, 2003	
Chile	Apr. 17, 1900	June 26, 1902	32 Stat. 1850.
Colombia	Sept. 14, 1979	Mar. 4, 1982	TIAS.
Congo (Brazzaville)	Jan. 6, 1909	July 27, 1911	37 Stat. 1526.
	Jan. 15, 1929	May 19, 1929	46 Stat. 2276.
	Apr. 23, 1936	Sept. 24, 1936	50 Stat. 1117.
Costa Rica	Dec. 4, 1982	Oct. 11, 1991	TIAS.
Cuba	Apr. 6, 1904	Mar. 2, 1905	33 Stat. 2265.
	Dec. 6, 1904	Mar. 2, 1905	33 Stat. 2273.
	Jan. 14, 1926	June 18, 1926	44 Stat. 2392.
Cyprus	June 17, 1996	Sept. 14, 1999	TIAS.

Country	Date signed	Entered into force	Citation
		Jan. 20, 2006	Feb. 1, 2010
Czech Republic (!1)	July 2, 1925	Mar. 29, 1926	44 Stat. 2367.
	Apr. 29, 1935	Aug. 28, 1935	49 Stat. 3253.
	May 16, 2006	Feb. 1, 2010	
Denmark	June 22, 1972	July 31, 1974	25 UST 1293.
	June 23, 2005	Feb. 1, 2010	
Dominica	Oct. 10, 1996	May 25, 2000	TIAS.
Dominican Republic	June 19, 1909	Aug. 2, 1910	36 Stat. 2468.
Ecuador	June 28, 1872	Nov. 12, 1873	18 Stat. 199.
	Sept. 22, 1939	May 29, 1941	55 Stat. 1196.
Egypt	Aug. 11, 1874	Apr. 22, 1875	19 Stat. 572.
El Salvador	Apr. 18, 1911	July 10, 1911	37 Stat. 1516.
Estonia	Nov. 8, 1923	Nov. 15, 1924	43 Stat. 1849.
	Oct. 10, 1934	May 7, 1935	49 Stat. 3190.
	Feb. 8, 2006	Apr. 7, 2009	
European Union	June 25, 2003	Feb. 1, 2010	
Fiji	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	July 14, 1972	Aug. 17, 1973	24 UST 1965.
Finland	June 11, 1976	May 11, 1980	31 UST 944.
	Dec. 16, 2004	Feb. 1, 2010	
France	Apr. 23, 1996	Feb. 1, 2002	TIAS.
		Sept. 30, 2004	Feb. 1, 2010
Gambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Germany	June 20, 1978	Aug. 29, 1980	32 UST 1485.
	Oct. 21, 1986	Mar. 11, 1993	TIAS.
	Apr. 18, 2006	Feb. 1, 2010	
Ghana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Greece	May 6, 1931	Nov. 1, 1932	47 Stat. 2185.
	Sept. 2, 1937	Sept. 2, 1937	51 Stat. 357.
	Jan. 18, 2006	Feb. 1, 2010	
Grenada	May 30, 1996	Sept. 14, 1999	TIAS.
Guatemala	Feb. 27, 1903	Aug. 15, 1903	33 Stat. 2147.
	Feb. 20, 1940	Mar. 13, 1941	55 Stat. 1097.
Guyana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Haiti	Aug. 9, 1904	June 28, 1905	34 Stat. 2858.
Honduras	Jan. 15, 1909	July 10, 1912	37 Stat. 1616.
	Feb. 21, 1927	June 5, 1928	45 Stat. 2489.
Hong Kong	Dec. 20, 1996	Jan. 21, 1998	TIAS.

Country	Date signed	Entered into force	Citation
Hungary	Dec. 1, 1994	Mar. 18, 1997	TIAS.
	Nov. 15, 2005	Feb. 1, 2010	
Iceland	Jan. 6, 1902	May 16, 1902	32 Stat. 1096.
	Nov. 6, 1905	Feb. 19, 1906	34 Stat. 2887.
India	June 25, 1997	July 21, 1999	TIAS 12873.
Iraq	June 7, 1934	Apr. 23, 1936	49 Stat. 3380.
Ireland	July 13, 1983	Dec. 15, 1984	TIAS 10813.
	July 14, 2005	Feb. 1, 2010	
Israel	Dec. 10, 1962	Dec. 5, 1963	14 UST 1707. (!2)
	July 6, 2005	Jan. 10, 2007	
Italy	Oct. 13, 1983	Sept. 24, 1984	35 UST 3023.
	May 3, 2006	Feb. 1, 2010	
Jamaica	June 14, 1983	July 7, 1991	TIAS.
Japan	Mar. 3, 1978	Mar. 26, 1980	31 UST 892.
Jordan	Mar. 28, 1995	July 29, 1995	TIAS.
Kenya	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	May 14, Aug.	Aug. 19, 1965	16 UST 1866.
Kiribati	June 8, 1972	Jan. 21, 1977	28 UST 227.
Latvia	Oct. 16, 1923	Mar. 1, 1924	43 Stat. 1738.
	Oct. 10, 1934	Mar. 29, 1935	49 Stat. 3131.
	Dec. 7, 2005	Apr. 15, 2009	
Lesotho	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Liberia	Nov. 1, 1937	Nov. 21, 1939	54 Stat. 1733.
Liechtenstein	May 20, 1936	June 28, 1937	50 Stat. 1337.
Lithuania	Oct. 23, 2001	Mar. 31, 2003	TIAS 13166.
	June 15, 2005	Feb. 1, 2010	
Luxembourg	Oct. 1, 1996	Feb. 1, 2002	TIAS 12804.
	Feb. 1, 2005	Feb. 1, 2010	
Malawi	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	Dec. 17, 1966	Apr. 4, 1967	18 UST 1822.
Malaysia	Aug. 3, 1995	June 2, 1997	TIAS.
Malta	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	May 18, 2006	July 1, 2009	
Marshall Islands	Apr. 30, 2003	May 1, 2004	
Mauritius	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Mexico	May 4, 1978	Jan. 25, 1980	31 UST 5059.
	Nov. 13, 1997	May 21, 2001	TIAS 12897.
Micronesia, Federated States of	May 14, 2003	June 25, 2004	

Country	Date signed	Entered into force	Citation
Monaco	Feb. 15, 1939	Mar. 28, 1940	54 Stat. 1780.
Nauru	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
Netherlands	June 24, 1980	Sept. 15, 1983	35 UST 1334.
	Sept. 29, 2004	Feb. 1, 2010	
New Zealand	Jan. 12, 1970	Dec. 8, 1970	22 UST 1.
Nicaragua	Mar. 1, 1905	July 14, 1907	35 Stat. 1869.
Nigeria	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Norway	June 9, 1977	Mar. 7, 1980	31 UST 5619.
Pakistan	Dec. 22, 1931	Mar. 9, 1942	47 Stat. 2122.
Panama	May 25, 1904	May 8, 1905	34 Stat. 2851.
Papua New Guinea	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
	Feb. 2, 23, 1988	Feb. 23, 1988	TIAS.
Paraguay	Nov. 9, 1998	Mar. 9, 2001	TIAS 12995.
Peru	July 26, 2001	Aug. 25, 2003	
Philippines	Nov. 13, 1994	Nov. 22, 1996	TIAS.
Poland	July 10, 1996	Sept. 17, 1999	TIAS.
	June 9, 2006	Feb. 1, 2010	
Portugal	May 7, 1908	Nov. 14, 1908	35 Stat. 2071.
	July 14, 2005	Feb. 1, 2010	
Romania	July 23, 1924	Apr. 7, 1925	44 Stat. 2020.
	Nov. 10, 1936	July 27, 1937	50 Stat. 1349.
	Sept. 10, 2007	May 8, 2009	
Saint Kitts and Nevis	Sept. 18, 1996	Feb. 23, 2000	TIAS 12805.
Saint Lucia	Apr. 18, 1996	Feb. 2, 2000	TIAS.
Saint Vincent and the Grenadines	Aug. 15, 1996	Sept. 8, 1999	TIAS.
San Marino	Jan. 10, 1906	July 8, 1908	35 Stat. 1971.
	Oct. 10, 1934	June 28, 1935	49 Stat. 3198.
Seychelles	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Sierra Leone	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Singapore	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	Apr. 23, June	June 10, 1969	20 UST 2764.
Slovakia (!1)	July 2, 1925	Mar. 29, 1926	44 Stat. 2367.
	Apr. 29, 1935	Aug. 28, 1935	49 Stat. 3253.
	Feb. 6, 2006	Feb. 1, 2010	
Slovenia (!1)	Oct. 17, 2005	Feb. 1, 2010	
Solomon Islands	June 8, 1972	Jan. 21, 1977	28 UST 277.
South Africa	Sept. 16, 1999	June 25, 2001	TIAS.
South Korea	June 9, 1998	Dec. 20, 1999	TIAS 12962.

Country	Date signed	Entered into force	Citation
Spain	May 29, 1970	June 16, 1971	22 UST 737.
	Jan. 25, 1975	June 2, 1978	29 UST 2283.
	Feb. 9, 1988	July 2, 1993	TIAS.
	Mar. 12, 1996	July 25, 1999	TIAS.
	Dec. 17, 2004	Feb. 1, 2010	
Sri Lanka	Sept. 30, 1999	Jan. 12, 2001	TIAS.
Suriname	June 2, 1887	July 11, 1889	26 Stat. 1481.
	Jan. 18, 1904	Aug. 28, 1904	33 Stat. 2257.
Swaziland	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	May 13, July	July 28, 1970	21 UST 1930.
Sweden	Oct. 24, 1961	Dec. 3, 1963	14 UST 1845.
	Mar. 14, 1983	Sept. 24, 1984	35 UST 2501.
	Dec. 16, 2004	Feb. 1, 2010	
Switzerland	Nov. 14, 1990	Sept. 10, 1997	TIAS.
Tanzania	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
	Nov. 30, Dec.	Dec. 6, 1965	16 UST 2066.
Thailand	Dec. 14, 1983	May 17, 1991	TIAS.
Tonga	Dec. 22, 1931	Aug. 1, 1966	47 Stat. 2122.
	Mar. 14, Apr.	Apr. 13, 1977	28 UST 5290.
Trinidad and Tobago	Mar. 4, 1996	Nov. 29, 1999	TIAS.
Turkey	June 7, 1979	Jan. 1, 1981	32 UST 3111.
Tuvalu	June 8, 1972	Jan. 21, 1977	28 UST 227.
		Apr. 25, 1980	32 UST 1310.
United Kingdom	Mar. 31, 2003	Apr. 26, 2007	
	Dec. 16, 2004	Feb. 1, 2010	
Uruguay	Apr. 6, 1973	Apr. 11, 1984	35 UST 3197.
Venezuela	Jan. 21, 1922	Apr. 14, 1923	43 Stat. 1698.
Yugoslavia (!1)	Oct. 25, 1901	June 12, 1902	32 Stat. 1890.
Zambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Zimbabwe	July 25, 1997	Apr. 26, 2000	

(!1) Status of agreements with successor states of Czechoslovakia and Yugoslavia is under review; inquire of the Treaty Office of the United States Department of State.

(!2) Typographical error corrected by diplomatic notes exchanged Apr. 4 and 11, 1967. See 18 UST 382, 383.

Convention on Extradition

The United States is a party to the Multilateral Convention on Extradition signed at Montevideo on Dec. 26, 1933, entered into force for the United States on Jan. 25, 1935. 49 Stat. 3111. Other states which have become parties: Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama.

Sec. 3182. FUGITIVES FROM STATE OR TERRITORY TO STATE, DISTRICT, OR TERRITORY

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 104-294, title VI, Sec. 601(f)(9), Oct. 11, 1996, 110 Stat. 3500.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 662 (R.S. Sec. 5278). Last sentence as to costs and expenses to be paid by the demanding authority was incorporated in section 3195 of this title.

Word "District" was inserted twice to make section equally applicable to fugitives found in the District of Columbia.

"Thirty days" was substituted for "six months" since, in view of modern conditions, the smaller time is ample for the demanding authority to act.

Minor changes were made in phraseology.

Amendments

1996 - Pub. L. 104-294 inserted comma after "District" in section catchline and in two places in text.

Sec. 3183. FUGITIVES FROM STATE, TERRITORY, OR POSSESSION INTO EXTRATERRITORIAL JURISDICTION OF UNITED STATES

Whenever the executive authority of any State, Territory, District, or possession of the United States demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction, and produces a copy of an indictment found or an affidavit made before a magistrate of the demanding jurisdiction, charging the fugitive so demanded with having committed treason, felony, or other offense, certified as authentic by the Governor or chief magistrate of such demanding jurisdiction, or other person authorized to act, the officer or representative of the United States vested with judicial authority to whom the demand has been made shall cause such fugitive to be arrested and secured, and notify the executive authorities making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

If no such agent shall appear within three months from the time of the arrest, the prisoner may be discharged.

The agent who receives the fugitive into his custody shall be empowered to transport him to the jurisdiction from which he has fled.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 107-273, div. B, title IV, Sec. 4004(d), Nov. 2, 2002, 116 Stat. 1812.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 662c (Mar. 22, 1934, ch. 73, Sec. 2, 48 Stat. 455).

Said section 662c was incorporated in this section and sections 752 and 3195 of this title.

Provision as to costs or expenses to be paid by the demanding authority were incorporated in section 3196 of this title.

Reference to the Philippine Islands was deleted as obsolete in view of the independence of the Commonwealth of the Philippines effective July 4, 1946.

The attention of Congress is directed to the probability that this section may be of little, if any, possible use in view of present world conditions.

Minor changes were made in phraseology.

Amendments

2002 - Pub. L. 107-273 struck out "or the Panama Canal Zone," after "possession of the United States" in first par.

Sec. 3184. FUGITIVES FROM FOREIGN COUNTRY TO UNITED STATES

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 90-578, title III, Sec. 301(a)(3), Oct. 17, 1968, 82 Stat. 1115; Pub. L. 100-690, title VII, Sec. 7087, Nov. 18, 1988, 102 Stat. 4409; Pub. L. 101-647, title XVI, Sec. 1605, Nov. 29, 1990, 104 Stat. 4843; Pub. L. 101-650, title III, Sec. 321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 104-132, title IV, Sec. 443(b), Apr. 24, 1996, 110 Stat. 1281.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 651 (R.S. Sec. 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Minor changes of phraseology were made.

Amendments

1996 - Pub. L. 104-132, in first sentence, inserted "or in cases arising under section 3181(b)," after "United States and any foreign government," and "or provided for under section 3181(b)," after "treaty or convention," and in third sentence, inserted "or under section 3181(b)," after "treaty or convention,."

1990 - Pub. L. 101-647 inserted "or, if there is reason to believe the person will shortly enter the United States" after "are not known" in second sentence.

1988 - Pub. L. 100-690 inserted after first sentence "Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known."

1968 - Pub. L. 90-578 substituted "magistrate" for "commissioner" in two places.

Change of Name

Words "magistrate judge" substituted for "magistrate" wherever appearing in text pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates [now United States magistrate judges] and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Sec. 3185. FUGITIVES FROM COUNTRY UNDER CONTROL OF UNITED STATES INTO THE UNITED STATES

Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated below, departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed.

(1) Murder and assault with intent to commit murder;

(2) Counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money;

(3) Counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same;

(4) Forgery or altering and uttering what is forged or altered;

(5) Embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries;

(6) Larceny or embezzlement of an amount not less than $100 in value;

(7) Robbery;

(8) Burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein;

(9) Breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein;

(10) Entering, or breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein;

(11) Perjury or the subornation of perjury;

(12) A felony under chapter 109A of this title;

(13) Arson;

(14) Piracy by the law of nations;

(15) Murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government;

(16) Malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

This chapter, so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

No return or surrender shall be made of any person charged with the commission of any offense of a political nature.

If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 823; May 24, 1949, ch. 139, Sec. 49, 63 Stat. 96; Pub. L. 99-646, Sec. 87(c)(6), Nov. 10, 1986, 100 Stat. 3623; Pub. L. 99-654, Sec. 3(a)(6), Nov. 14, 1986, 100 Stat. 3663.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., Sec. 652 (R.S. Sec. 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Reference to territory of the United States and the District of Columbia was omitted as covered by definitive section 5 of this title.

Changes were made in phraseology and arrangement.

1949 ACT

This section [section 49] corrects typographical errors in section 3185 of title 18, U.S.C., by transferring to subdivision (3) the words, "indebtedness, bank notes, or other instruments of public," from subdivision (2) of such section where they had been erroneously included.

Amendments

1986 - Par. (12). Pub. L. 99-646 and Pub. L. 99-654 amended par. (12) identically, substituting "A felony under chapter 109A of this title" for "Rape."

1949 - Pars. (2), (3). Act May 24, 1949, transferred "indebtedness, bank notes, or other instruments of public" from par. (2) to par. (3).

Effective Date of 1986 Amendments

Amendments by Pub. L. 99-646 and Pub. L. 99-654 effective, respectively, 30 days after Nov. 10, 1986, and 30 days after Nov. 14, 1986, see section 87(e) of Pub. L. 99-646 and section 4 of Pub. L. 99-654, set out as an Effective Date note under section 2241 of this title.

Sec. 3186. SECRETARY OF STATE TO SURRENDER FUGITIVE

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 824.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 653 (R.S. Sec. 5272).

Changes were made in phraseology and surplusage was deleted.

Sec. 3187. PROVISIONAL ARREST AND DETENTION WITHIN EXTRATERRITORIAL JURISDICTION

The provisional arrest and detention of a fugitive, under sections 3042 and 3183 of this title, in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of the authority competent to request the surrender of such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

No person shall be held in custody under telegraphic request by virtue of this section for more than ninety days.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 824.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 662d (Mar. 22, 1934, ch. 73, Sec. 3, 48 Stat. 455).

Provision for expense to be borne by the demanding authority is incorporated in section 3195 of this title.

Changes were made in phraseology and arrangement.

Sec. 3188. TIME OF COMMITMENT PENDING EXTRADITION

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 824.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 654 (R.S. Sec. 5273).

Changes in phraseology only were made.

Sec. 3189. PLACE AND CHARACTER OF HEARING

Hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 824.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 657 (Aug. 3, 1882, ch. 378, Sec. 1, 22 Stat. 215).

First word "All" was omitted as unnecessary.

Sec. 3190. EVIDENCE ON HEARING

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 824.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 655 (R.S. Sec. 5271; Aug. 3, 1882, ch. 378, Sec. 5, 22 Stat. 216).

Unnecessary words were deleted.

Sec. 3191. WITNESSES FOR INDIGENT FUGITIVES

On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate judge hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 825; Pub. L. 90-578, title III, Sec. 301(a)(3), Oct. 17, 1968, 82 Stat. 1115; Pub. L. 101-650, title III, Sec. 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 656 (Aug. 3, 1882, ch. 378, Sec. 3, 22 Stat. 215).

Words "that similar" after "manner" were omitted as unnecessary.

Amendments

1968 - Pub. L. 90-578 substituted "magistrate" for "commissioner."

Change of Name

Words "magistrate judge" substituted for "magistrate" in text pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates [now United States magistrate judges] and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Sec. 3192. PROTECTION OF ACCUSED

Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 825.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 659 (R.S. Sec. 5275).

Words "crimes or" before "offenses" were omitted as unnecessary.

Sec. 3193. RECEIVING AGENT'S AUTHORITY OVER OFFENDERS

A duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 825.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 660 (R.S. Sec. 5276).

Words "jurisdiction of the" were omitted in view of the definition of United States in section 5 of this title.

Minor changes only were made in phraseology.

Ex. Ord. No. 11517. Issuance And Signature By Secretary Of State Of Warrants Appointing Agents To Return Fugitives From Justice Extradited To United States

Ex. Ord. No. 11517, Mar. 19, 1970, 35 F.R. 4937, provided:

WHEREAS the President of the United States, under section 3192 of Title 18, United States Code, has been granted the power to take all necessary measures for the transportation, safekeeping and security against lawless violence of any person delivered by any foreign government to an agent of the United States for return to the United States for trial for any offense of which he is duly accused; and

WHEREAS fugitives from justice in the United States whose extradition from abroad has been requested by the Government of the United States and granted by a foreign government are to be returned in the custody of duly appointed agents in accordance with the provisions of section 3193 of Title 18, United States Code; and

WHEREAS such duly appointed agents under the provisions of the law mentioned above, being authorized to receive delivery of the fugitive in behalf of the United States and to convey him to the place of his trial, are given the powers of a marshal of the United States in the several districts of the United States through which it may be necessary for them to pass with such prisoner, so far as such power is requisite for the prisoner's safekeeping; and

WHEREAS such warrants serve as a certification to the foreign government delivering the fugitives to any other foreign country through which such agents may pass, and to authorities in the United States of the powers therein conferred upon the agents; and

WHEREAS it is desirable by delegation of functions heretofore performed by the President to simplify and thereby expedite the issuance of such warrants to agents in the interests of the prompt return of fugitives to the United States:

NOW, THEREFORE, by virtue of the authority vested in me by section 301 of Title 3 of the United States Code, and as President of the United States, it is ordered as follows:

Section 1. The Secretary of State is hereby designated and empowered to issue and sign all warrants appointing agents to receive, in behalf of the United States, the delivery in extradition by a foreign government of any person accused of a crime committed within the United States, and to convey such person to the place of his trial.

Sec. 2. Agents appointed in accordance with section 1 of this order shall have all the powers conferred in respect of such agents by applicable treaties of the United States and by section 3193 of Title 18, United States Code, or by any other provisions of United States law.

Sec. 3. Executive Order No. 10347, April 18, 1952, as amended by Executive Order No. 11354, May 23, 1967, is further amended by deleting numbered paragraph 4 and renumbering paragraphs 5 and 6 as paragraphs 4 and 5, respectively.

Richard Nixon.

Sec. 3194. TRANSPORTATION OF FUGITIVE BY RECEIVING AGENT

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 825.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Sec. 663 (R.S. Sec. 5279).

Last sentence of said section 663, relating to rescue of such fugitive, was omitted as covered by section 752 of this title, the punishment provision of which is based on later statutes. (See reviser's note under that section.)

Minor changes were made in phraseology.

Sec. 3195. PAYMENT OF FEES AND COSTS

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate judge, shall be certified by the judge or magistrate judge before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

CREDIT(S)

(June 25, 1948, ch. 645, 62 Stat. 825; Pub. L. 90-578, title III, Sec. 301(a)(3), Oct. 17, 1968, 82 Stat. 1115; Pub. L. 101-650, title III, Sec. 321, Dec. 1, 1990, 104 Stat. 5117.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., Secs. 662, 662c, 662d, 668 (R.S. Sec. 5278; Aug. 3, 1882, ch. 378, Sec. 4, 22 Stat. 216; June 28, 1902, ch. 1301, Sec. 1, 32 Stat. 475; Mar. 22, 1934, ch. 73, Secs. 2, 3, 48 Stat. 455).

First paragraph of this section consolidates provisions as to costs and expenses from said sections 662, 662c, and 662d.

Minor changes were made in phraseology and surplusage was omitted.

Remaining provisions of said sections 662, 662c, and 662d of title 18, U.S.C., 1940 ed., are incorporated in sections 752, 3182, 3183, and 3187 of this title.

The words "or the Department of Justice as the case may be" were added at the end of the second paragraph in conformity with the appropriation acts of recent years. See for example act July 5, 1946, ch. 541, title II, 60 Stat. 460.

Amendments

1968 - Pub. L. 90-578 substituted "magistrate" for "commissioner" in two places.

Change of Name

Words "magistrate judge" substituted for "magistrate" wherever appearing in text pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of a date when implementation of amendment by appointment of magistrates [now United States magistrate judges] and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Sec. 3196. EXTRADITION OF UNITED STATES CITIZENS

If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

CREDIT(S)

(Added Pub. L. 101-623, Sec. 11(a), Nov. 21, 1990, 104 Stat. 3356.)

Appendix VII

United States Attorneys' Manual, Chapter 15[1]

9-15.000 INTERNATIONAL EXTRADITION AND RELATED MATTERS

1 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.100

9-15.100 DEFINITION AND GENERAL PRINCIPLES

International extradition is the formal process by which a person found in one country is surrendered to another country for trial or punishment. The process is regulated by treaty and conducted between the Federal Government of the United States and the government of a foreign country. It differs considerably from interstate rendition, commonly referred to as interstate extradition, mandated by the Constitution, Art. 4, Sec. 2.

Generally under United States law (18 U.S.C. § 3184), extradition may be granted only pursuant to a treaty. However, some countries grant extradition without a treaty. However, every such country requires an offer of reciprocity when extradition is accorded in the absence of a treaty. Further, the 1996 amendments to 18 U.S.C. 3181 and 3184 permit the United States to extradite, without regard to the existence of a treaty, persons (other than citizens, nationals or permanent residents of the United States), who have committed crimes of violence against nationals of the United States in foreign countries. A list of countries with which the United States has an extradition treaty relationship can be found in the Federal Criminal Code and Rules, following 18 U.S.C. § 3181, but consult the Criminal Division's Office of International Affairs (OIA) to verify the accuracy of the information. See the Criminal Resource Manual at 535 for the text of § 3184, and at 536 for links to some of the extradition treaties the United States has negotiated.

Because the law of extradition varies from country to country and is subject to foreign policy considerations, prosecutors should consult OIA for advice on any matter relating to extradition before taking any action in such a case, especially before contacting any foreign official.

See the Criminal Resource Manual at 601, for a discussion of the constitutionality of 18 U.S.C. § 3184.

9-15.200 PROCEDURES FOR REQUESTING EXTRADITION FROM ABROAD

See the Criminal Resource Manual at 602.

9-15.210 ROLE OF THE OFFICE OF INTERNATIONAL AFFAIRS

The Office of International Affairs (OIA) provides information and advice to Federal and State prosecutors about the procedure for requesting extradition from abroad. OIA also advises and provides support to Federal prosecutors handling foreign extradition requests for fugitives found in the United States.

Every formal request for international extradition based on Federal criminal charges must be reviewed and approved by OIA. At the request of the Department of State, formal requests based on State charges are also reviewed by OIA before submission to the Department of State.

Acting either directly or through the Department of State, OIA initiates all requests for provisional arrest of fugitives pursuant to extradition treaties. Neither prosecutors nor agents are permitted to contact their foreign counterparts to request the arrest of a fugitive for extradition. Unauthorized requests cause serious diplomatic difficulties and may subject the requester to financial liability or other sanctions.

Every extradition treaty is negotiated separately, and each contains different provisions. Experience with one treaty is not a guide to all others. Therefore, after reviewing this section of the United States Attorneys' Manual, the first step in any extradition case should be to contact OIA. Attorneys in OIA will advise prosecutors about the potential for extradition in a given case and the steps to be followed.

9-15.220 DETERMINATION OF EXTRADITABILITY

See the Criminal Resource Manual at 603.

9-15.225 PROCEDURE WHEN FUGITIVE IS NON-EXTRADITABLE

If the fugitive is not extraditable, other steps may be available to return him or her to the United States or to restrict his or her ability to live and travel overseas. See USAM 9-15.600 et seq. These steps, if taken, should likewise be documented.

Courts may require the government to request the extradition of a fugitive as soon as his or her location becomes known, unless the effort would be useless. If the decision is made to not seek extradition in a particular case, the prosecutor and the Office of International Affairs (OIA) will make a record to document why extradition was not possible in the event of a subsequent Speedy Trial challenge.

[cited in USAM 9-15.600; Criminal Resource Manual 602]

9-15.230 REQUEST FOR PROVISIONAL ARREST

Every extradition treaty to which the United States is a party requires a formal request for extradition, supported by appropriate documents. Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases. Once the United States requests provisional arrest pursuant to the treaty, the fugitive will be arrested and detained (or, in some countries, released on bail) as soon as he or she is located. Thereafter, the United States must submit a formal request for extradition, supported by all necessary documents, duly certified, authenticated and translated into the language of the country where the fugitive was arrested, within a specified time (from 30 days to three months, depending on the treaty). See USAM 9-15.240. Failure to follow through on an extradition request by submitting the requisite documents after a provisional arrest has been made will resu lt in release of the fugitive, strains on diplomatic relations, and possible liability for the prosecutor.

The Office of International Affairs (OIA) determines whether the facts meet the requirement of urgency under the terms of the applicable treaty. If they do, OIA requests provisional arrest; if not, the prosecutor assembles the documents for a formal request. The latter method is favored when the defendant is unlikely to flee because the time pressures generated by a request for provisional arrest often result in errors that can damage the case. If provisional arrest is necessary because of the risk of flight, the prosecutor should complete the form for requesting provisional arrest and forward it, along with a copy of the charging document and arrest warrant, to OIA by fax (see the Criminal Resource Manual at 604); alternatively, this exchange of forms and completed requests between the United States Attorney and OIA can be made by Email. State prosecutors who request provisional arrest must also certify that the necessary documents will be submitted on time and that all expenses, including the cost of transportation by United States Marshals, will be covered.

Prosecutors should complete the form in any case in which it appears that provisional arrest may be necessary. Once it is completed, it may be emailed directly to the Office of International Affairs (OIA) attorney or team responsible for the country in which the fugitive has been found or emailed to the general OIA email address, CRM03(OIAINBOX), and OIA's docketing unit will forward it to the appropriate attorney in OIA. The form may also be faxed to OIA at (202) 514-0080. A copy of the charging document and warrant should be faxed to OIA.

The form was created with both Federal and State cases in mind. Thus, Assistant United States Attorneys are free to print the form and give it to state and local prosecutors working on extradition cases. State prosecutors should fax the form to OIA at (202) 514-0080.

[cited in USAM 9-15.700]

9-15.240 DOCUMENTS REQUIRED IN SUPPORT OF REQUEST FOR EXTRADITION

The request for extradition is made by diplomatic note prepared by the Department of State and transmitted to the foreign government through diplomatic channels. It must be accompanied by the documents specified in the treaty. The Office of International Affairs (OIA) will advise the prosecutor of the documentary requirements, but it is the responsibility of the prosecutor to prepare and assemble them and forward the original and four copies to OIA in time to be reviewed, authenticated, translated, and sent through the Department of State to the foreign government by the deadline.

OIA will provide samples of the documents required in support of the request for extradition. Although every treaty varies, all generally require:

- *An affidavit from the prosecutor explaining the facts of the case. See Criminal Resource Manual at 605.*
- *Copies of the statutes alleged to have been violated and the statute of limitations. See Criminal Resource Manual at 607.*
- *If the fugitive has not been convicted, certified copies of the arrest warrant and complaint or indictment. See Criminal Resource Manual at 606.*
- *Evidence, in the form of affidavits or grand jury transcripts, establishing that the crime was committed, including sufficient evidence (*i.e.,*photograph, fingerprints, and affidavit of identifying witness) to establish the defendant's identity (CAVEAT: The use of grand jury transcripts or trial transcripts should, if at all possible, be avoided). See Criminal Resource Manual at 608.*
- *If the fugitive has been convicted, a certified copy of the order of judgment and committal establishing the conviction, an affidavit stating the sentence was not or was only partially served and the amount of time remaining to be served, and evidence concerning identity. See Criminal Resource Manual at 609.*

Prosecutors should be aware that there are few workable defenses to extradition, although appeals and delays are common. Fugitives, however, may be able to contest extradition on the basis of minor inconsistencies resulting from clerical or typographical errors. Although these can be remedied eventually, they take time to untangle. Therefore, pay careful attention to detail in preparing the documents.

[cited in USAM 9-15.230]

9-15.250 PROCEDURE AFTER ASSEMBLING DOCUMENTS

After assembling the documents required in support of extradition, the prosecutor must review them carefully to ensure that all dates and charges mentioned in the affidavit and accompanying exhibits are consistent.

Unless told that the foreign country will require a different number of copies of the documents, the prosecutor should forward the original and four copies of the entire package to Office of International Affairs (OIA).

Attorneys in OIA review the package for completeness and send a copy to the Department of State for translation, which can take three weeks even for common languages. The cost of translation will be billed to the district requesting extradition. OIA secures the required certifications on the original and transmits it to the Department of State.

9-15.300 PROCEDURE IN THE FOREIGN COUNTRY

The Department of State will send the extradition documents and the translation to the American Embassy in the foreign country, which will present them under cover of a diplomatic note formally requesting

extradition to the appropriate agency of the foreign government, usually the foreign ministry. The request and supporting documents are then forwarded to the court or other body responsible for determining whether the requirements of the treaty and the country's domestic law have been met.

In general, the foreign government's decision on our extradition request is based on the request itself and any evidence presented by the fugitive. Because the American prosecutor will not have the opportunity to appear before the foreign court, the written submission, particularly the prosecutor's affidavit, must be as persuasive as possible. This is particularly essential when the charges are based on statutes unique to United States law, such as RICO or CCE.

Though factual defenses to extradition are limited, the fugitive may delay a decision through procedural challenges. The determination of extraditability is often subject to review or appeal. Prediction of the time required to return an individual to the United States is difficult and depends on the circumstances of the individual case and the practice of the foreign country involved.

9-15.400 RETURN OF THE FUGITIVE

Once the foreign authorities notify the American Embassy that the fugitive is ready to be surrendered, the Office of International Affairs (OIA) will inform the prosecutor and arrange with the United States Marshals Service for agents to escort the fugitive to the United States. United States Marshals must provide the escort even in a State case. However, in rare cases arrangements are sometimes made for State or other federal law enforcement agents to accompany the U.S. Marshals. If the fugitive is an alien, OIA will ask the INS to issue a "parole letter" authorizing the alien to enter the country.

9-15.500 POST-EXTRADITION CONSIDERATIONS: LIMITATIONS ON FURTHER PROSECUTION

Every extradition treaty limits extradition to certain offenses. As a corollary, all extradition treaties restrict prosecution or punishment of the fugitive to the offense for which extradition was granted unless (1) the offense was committed after the fugitive's extradition or (2) the fugitive remains in the jurisdiction after expiration of a "reasonable time" (generally specified in the extradition treaty itself) following completion of his punishment. This limitation is referred to as the Rule of Specialty. Prosecutors who wish to proceed against an extradited person on charges other than those for which extradition was granted must contact the Office of International Affairs (OIA) for guidance regarding the availability of a waiver of the Rule by the sending State.

*Frequently, defendants who have been extradited to the United States attempt to dismiss or limit the government's case against them by invoking the Rule of Specialty. There is a split in the courts on whether the defendant has standing to raise specialty: some courts hold that only a party to the Treaty (*i.e.,*the sending State) may complain about an alleged violation of the specialty provision, other courts allow the defendant to raise the issue on his own behalf, and other courts take a middle position and allow the defendant to raise the issue if it is likely that the sending State would complain as well. Whenever a defendant raises a specialty claim, the prosecutor should contact OIA for assistance in responding.*

Defendants also occasionally make other substantive or procedural challenges to their extradition. It is impossible to anticipate all the creative challenges that may be devised; if a returned defendant challenges his extradition, you should contact OIA.

9-15.600 ALTERNATIVES TO EXTRADITION

A fugitive may be non-extraditable for any number of reasons, including but not limited to instances where he or she is a national of the country of refuge, the crime is not an extraditable offense, the

statute of limitations has run in the foreign country, or extradition was requested and denied. (If, after discussing the case with the Office of International Affairs (OIA), the prosecutor concludes that the fugitive is not extraditable, that conclusion and the reasons should be documented. See USAM 9-15.225.)

There may be available alternatives that will result either in the return of the fugitive or limitations on his or her ability to live or travel overseas. OIA will advise the prosecutor concerning the availability of these methods. These alternative methods are discussed in USAM 9-15.610- 650.

[cited in USAM 9-15.225]

9-15.610 DEPORTATIONS, EXPULSIONS OR OTHER EXTRAORDINARY RENDTIONS

If the fugitive is not a national or lawful resident of the country in which he or she is located, the Office of International Affairs (OIA), through the Department of State or other channels, may ask that country to deport or expel the fugitive.

In United States v. Alvarez-Machain, 504 U.S. 655 (1992), the Supreme Court ruled that a court has jurisdiction to try a criminal defendant even if the defendant was abducted from a foreign country against his or her will by United States agents. Though this decision reaffirmed the long-standing proposition that personal jurisdiction is not affected by claims of abuse in the process by which the defendant is brought before the court, it sparked concerns about potential abuse of foreign sovereignty and territorial integrity.

Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of Alvarez-Machain type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an Alvarez-Machain type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with OIA before such return. See Criminal Resource Manual at 610, for further discussion of the law on this issue.

[cited in USAM 9-15.600]

9-15.620 EXTRADITION FROM A THIRD COUNTRY

If the fugitive travels outside the country from which he or she is not extraditable, it may be possible to request his or her extradition from another country. This method is often used for fugitives who are citizens in their country of refuge. Some countries, however, will not permit extradition if the defendant has been lured into their territory. Such ruses may also cause foreign relations problems with both the countries from which and to which the lure takes place. Prosecutors must notify the Office of International Affairs before pursuing any scenario involving an undercover or other operation to lure a fugitive into a country for law enforcement purposes (extradition, deportation, prosecution).

[cited in USAM 9-15.635]

9-15.630 LURES

A lure involves using a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States, in international waters or airspace, or in a third country for subsequent extradition, expulsion, or deportation to the United States. Lures can be complicated schemes or they can be as simple as inviting a fugitive by telephone to a party in the United States.

As noted above, some countries will not extradite a person to the United States if the person's presence in that country was obtained through the use of a lure or other ruse. In addition, some countries may view a lure of a person from its territory as an infringement on its sovereignty. Consequently, a prosecutor must consult with the Office of International Affairs before undertaking a lure to the United States or a third country.

9-15.635 INTERPOL RED NOTICES

An Interpol Red Notice is the closest instrument to an international arrest warrant in use today. Please be aware that if a Red Notice is issued, the prosecutor's office is obligated to do whatever work is required to produce the necessary extradition documents within the time limits prescribed by the controlling extradition treaty whenever and wherever the fugitive is arrested. Further, the prosecutor's office is obliged to pay the expenses pursuant to the controlling treaty.

Interpol Red Notices are useful when the fugitive's location or the third country to which he or she may travel (see USAM 9-15.620), is unknown. For additional information about Interpol Red Notices, see the Criminal Resource Manual at 611.

9-15.640 REVOCATION OF UNITED STATES PASSPORTS

The Department of State may revoke the passport of a person who is the subject of an outstanding federal warrant. Revocation of the passport can result in loss of the fugitive's lawful residence status, which may lead to his or her deportation. If the fugitive is wanted on state charges only, it will be necessary to obtain a warrant on a UFAP complaint because the Department of State is only authorized to revoke the passports of persons named in Federal warrants.

9-15.650 FOREIGN PROSECUTION

If the fugitive has taken refuge in the country of which he or she is a national, and is thereby not extraditable, it may be possible to ask that country to prosecute the individual for the crime that was committed in the United States. This can be an expensive and time consuming process and in some countries domestic prosecution is limited to certain specified offenses. In addition, a request for domestic prosecution in a particular case may conflict with U.S. law enforcement efforts to change the "non-extradition of nationals" law or policy in the foreign country. Whether this option is available or appropriate should be discussed with OIA.

[cited in USAM 9-15.600]

9-15.700 FOREIGN EXTRADITION REQUESTS

Foreign requests for extradition of fugitives from the United States are ordinarily submitted by the embassy of the country making the request to the Department of State, which reviews and forwards them to the Criminal Division's Office of International Affairs (OIA). The requests are of two types: formal requisitions supported by all documents required under the applicable treaty, or requests for provisional arrest. (Requests for provisional arrest may be received directly by the Department of Justice if the treaty permits. See USAM 9-15.230 for an explanation of provisional arrest.)

When OIA received a foreign extradition request, in summary, the following occurs:

1. *OIA reviews both types of requests for sufficiency and forwards appropriate ones to the district.*
2. *The Assistant United States Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate judge or the district judge.*
3. *The government opposes bond in extradition cases.*

4. *A hearing under 18 U.S.C. § 3184 is scheduled to determine whether the fugitive is extraditable. If the court finds the fugitive to be extraditable, it enters an order of extraditability and certifies the record to the Secretary of State, who decides whether to surrender the fugitive to the requesting government. In some cases a fugitive may waive the hearing process.*

5. *OIA notifies the foreign government and arranges for the transfer of the fugitive to the agents appointed by the requesting country to receive him or her. Although the order following the extradition hearing is not appealable (by either the fugitive or the government), the fugitive may petition for a writ of habeas corpus as soon as the order is issued. The district court's decision on the writ is subject to appeal, and the extradition may be stayed if the court so orders.*

See Criminal Resource Manual at 612, for a more detailed discussion of foreign extradition requests.

9-15.800 PLEA AGREEMENTS AND RELATED MATTERS: PROHIBITION

Persons who are cooperating with a prosecutor may try to include a "no extradition" clause in their plea agreements. Such agreements, whether formal or informal, may be given effect by the courts. If a foreign country subsequently requests the person's extradition, the United States faces the unpleasant dilemma of breaching its solemn word either to the person involved or to its treaty partner. Petition of Geisser, 627 F.2d 745 (5th Cir. 1980), describes the enormous practical problems of resolving such a dilemma. Related matters involve agreements with potential witnesses to prevent or delay their deportation.

Prosecutors may not agree either formally or informally to prevent or delay extradition or deportation unless they submit a written request for authorization, and receive an express written approval from the Assistant Attorney General, Criminal Division. Requests should be submitted to the Office of International Affairs after endorsement by the head of the section or office responsible for supervising the case.

[cited in USAM 9-16.020; USAM 9-73.510]

CRIMINAL RESOURCE MANUAL

Relevant Provisions

535 International Extradition—Text of 18 U.S.C. § 3184[2]

Note: *See* Appendix V, "U.S. Legislation Applicable to Extradition"

536 Treaty List3

Included herein are some of the extradition treaties the United States has negotiated. Consult with the Office of International Affairs (OIA) concerning treaties with other countries as well as the currency of these treaties. [under construction]

[cited in USAM 9-15.100]

Note: *See* Appendix II, "Bilateral Extradition Treaties of the United States"

601 Constitutionality of 18 U.S.C. § 3184[4]

In *LoBue v. Christopher* 839 F. Supp. 65 (D.D.C. 1995) two plaintiffs filed a civil action in the District of Columbia seeking an injunction against their surrender and a declaratory judgment that 18 U.S.C. § 3184 is unconstitutional. The purported constitutional flaw lay in the ability of the Secretary of State to decline to surrender a fugitive whom the extradition judge had certified extraditable. The assignment of discretion to the Secretary of State, they argued, intruded on separation of powers and violated the Appointments Clause of the Constitution.

The district court agreed. It declared the statute unconstitutional and certified as a class all fugitives facing extradition and enjoined the surrender—though not any extradition proceedings—of any class member.

On the government's emergency application, the court of appeals stayed the class-wide injunction. Thereafter, it vacated the district court's declaratory judgment on jurisdictional grounds. The court of appeals held that a fugitive facing extradition in another district (in this case the N.D. of Ill.) could challenge the lawfulness of this extradition by way of a habeas petition in that district and not in a separate lawsuit against the Secretary of State in the District of Columbia. *See LoBue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996). While the constitutional issue is still being argued by persons facing extradition, no decision adopts the rationale urged by the plaintiffs in that case. To the contrary, every extradition and habeas court since *LoBue* has rejected the argument. *See*, e.g., *In re Extradition of Abu Marzook*, 924 F. Supp. 565, (S.D.N.Y. 1996); *Sutton v. Kimbrough*, 905 F. Supp. 631 (E.D.MO. 1995); *Matter of Extradition of Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995).

As those courts have variously noted, the extradition scheme is functionally equivalent to all other preliminary criminal proceedings. The extradition judge's certification that an extradition is supported by probable cause and is otherwise lawful is no different than a judge's issuance of a search or arrest warrant or a finding of probable cause at a preliminary hearing. In all these instances a judge makes a finding on legality and the Executive Branch thereafter exercises its

2 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00535.htm

3 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00536.htm

4 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00601.htm

discretion to determine whether to proceed to search, arrest, or prosecute. Courts have also noted that this executive discretion can only be exercised to a fugitive's benefit if the extraditing judge declines to certify extraditability. The government cannot proceed on that request.

The issue is not finally resolved, so it is possible that another judge in some future case may adopt the rationale of the district court in *LoBue*. However, the arguments in opposition to *LoBue* are compelling and have thus far persuaded every judge since *LoBue* to reject the *LoBue* analysis. If a *LoBue* motion is made in your extradition case, please inform the Office of International Affairs immediately.

[cited in USAM 9-15.100]

602 Procedures For Requesting Extradition From Abroad[5]

Extradition involves four basic steps:

- contacting OIA;
- making a preliminary determination of extraditability;
- deciding whether to ask for provisional arrest; and
- submitting the required documents in support of the formal request for extradition.

These steps are described more fully in the following sections.

Some courts have held that the Speedy Trial Clause of the Sixth Amendment or the Speedy Trial Act require the government to make a diligent good-faith effort to bring the defendant to trial promptly; in the context of extradition, this means that the government is obligated to seek the extradition of a fugitive as soon as his or her location becomes known unless the effort would be useless. E.g. *United States v. Blanco*, 861 F.2d 773 (2d Cir. 1988), *cert. Denied*, 489 U.S. 1019 (1989); *United States v. Pomeroy*, 822 F.2d 718 (8th Cir. 1987); *United States v. Walton*, 814 F.2d 376 (7th Cir. 1987). Consequently, the prosecutor should contact the Office of International Affairs as soon as the whereabouts of a fugitive or the target of an investigation is known. *See also* USAM 9-15.225.

603 Determination of Extraditability[6]

The following factors are relevant to determining whether an individual is extraditable in a given case. Please be prepared to discuss these questions before telephoning the Office of International Affairs (OIA):

A. **Location:** The country in which the fugitive is believed to be located, and his or her address there, if known. As noted above, generally extradition is not available unless there is a treaty in force between the United States and the country where the fugitive is located.

B. **Citizenship:** The citizenship of the fugitive, including in particular whether he or she is a dual citizen. Many countries will not extradite their own citizens.

C. **Offense Charged:** The crime with which the fugitive has been charged or of which he or she has been convicted. Some extradition treaties limit extradition to offenses specified in the treaty. The more recent treaties allow extradition in any case where the conduct is criminal and punishable as a felony in both countries. In either event, OIA must know the offense to determine whether an individual is extraditable.

D. **Docket Information:** The name of the court in which the criminal proceeding is pending or was concluded, the docket number of the case, and the name of the judge or magistrate who signed the warrant or judgment of conviction.

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5 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00602.htm

6 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00603.htm

E. **Current Status of Case:** Whether and when a warrant was issued, an indictment returned, a complaint filed, or the defendant was convicted.

F. **Facts of Offense:** The facts of the case in brief, i.e., who did what to whom, when, and where. The date of the offense is needed because many treaties bar extradition in cases where the foreign statute of limitations has run. The place of the offense is also essential since some treaties exclude extradition in cases where the United States asserts extraterritorial jurisdiction.

G. **Potential for Trial or Retrial:** If the fugitive has not been convicted, confirmation that the case is triable, i.e., that all necessary witnesses and evidence are still available and that the substantial costs involved in completing an extradition request are justified by the nature of the case.

H. **Time constraints in the preparation of Extradition documents:** Affiant's unavailability, difficulties in gathering supporting documentation, and complexity of the extradition case may be a factor in determining whether to proceed first as an urgent provisional arrest or a formal, fully documented extradition request. In a provisional arrest situation, a treaty deadline may make it impossible to prepare the necessary documentation and have it translated in time.

[cited in USAM 9-15.220]

604 Form—Request for Provisional Arrest[7]

International Extradition

Request for Provisional Arrest

A. Name of fugitive:

B. Case caption (if the fugitive is not the principal defendant in the case):

C. Date discussed with OIA and name of OIA contact:

D. Prosecutor responsible for this request (name, telephone number, fax number, E-mail address):

E. Case agent (name, agency, telephone number, pager number and fax number):

F. Name, telephone number, and fax number of State extradition official who authorized payment of all expenses required to complete extradition (State requests only):

G. List all charges for which extradition will be sought (name and statutory citation):

H. Warrant information (name of court (district and division), docket number, name of judge or magistrate who signed the warrant, date of warrant):

I. Description of fugitive:

aliases:

date of birth:

place of birth:

citizen of:

passport number/date and place of issue:

other identity documents:

height:

7 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00604.htm

weight:

hair:

eyes:

other identifying features:

J. Location of fugitive (full address and/or telephone number; names and addresses of associates, etc.) and any contact in the foreign country aware of fugitives's location (Name, title, telephone and pager number).

K. Facts of case. [Using a narrative style, provide sufficient information, including date and place of offense, to establish probable cause that a crime was committed and that the fugitive committed it. Choose simple, descriptive language that you might use in an affidavit in support of a warrant application, not the formal or statutory language of a formal charging document. Continue on a separate sheet if necessary.]

L. Prosecutor's certification. [A statement by the prosecutor acknowledging that if the fugitive is arrested it will be necessary for extradition documents to be prepared according to the terms of the relevant treaty. Further, the prosecutor must also certify that those documents will be prepared and sent to OIA according to the schedule set by the OIA attorney.]

[cited in USAM 9-15.230]

605 Prosecutor's Affidavit

The form of the prosecutor's affidavit depends on the country to which it is submitted and on whether the fugitive is sought for trial or just to complete a sentence. The Office of International Affairs (OIA) will provide guidance on format. The prosecutor should keep the following instructions in mind when drafting the prosecutor's affidavit.

Generally the affidavit should be captioned as a formal pleading with the name of the court and the style of the case. It should explain the facts of the case and its procedural history and identify the remaining documents submitted in support of the request, which are attached to the affidavit as exhibits. Because it is explanatory, the affidavit must be drafted in simple, straightforward language, avoiding technical legal terms that will be unfamiliar to the foreign court or agency that will decide on the fugitive's extraditability. The prosecutor must set out with particular clarity the underlying criminal conduct, particularly since some United States statutory crimes (like mail fraud, RICO, and Travel Act violations) contain elements unique to United States law. The prosecutor must also avoid jargon in the affidavit that might present translation difficulties.

The affidavit should begin with a description of the prosecutor's background. For requests directed to common law countries, this information should suffice to qualify the affiant as an expert on Federal criminal law, or the law of the State, if applicable.

Next, the affidavit should set out the procedural history of the case, including in particular the name of the court, the date of the complaint or indictment, the docket number of the case, the date of the warrant, and the name of the judge or magistrate. The complaint and/or indictment and the arrest warrant should be referred to as exhibits, and certified copies should be attached if the fugitive has not been convicted.

The affidavit should cite by name and code section the statutes alleged to have been violated and the applicable statute of limitations. The affidavit should declare that the statutes were in effect at the time charges were brought and still in full force and effect. The prosecutor should aver that neither prosecution nor punishment is barred by the statute of limitations. The text of the statutes may be incorporated in the body of the affidavit or attached as exhibits. If attached, they should be referred to in the affidavit.

The affidavit should describe the facts of the case succinctly and plainly. If the fugitive has not been convicted, affidavits of the investigator or witnesses establishing the commission of the crime and the fugitive's identity should be mentioned and attached to the affidavit as exhibits. A photograph and/or fingerprints will be needed to prove identity. If the fugitive has been convicted, the affidavit should recite that fact, explain why the sentence has not been served, and set out the sentence time remains to be served. Attach the exhibits described in this Manual at 609.

The affidavit should be executed before a judge or magistrate. Execution of the affidavit before a judicial officer is helpful because, especially in civil law countries, magistrates prepare extradition requests. Courts in civil law countries, being unfamiliar with United States procedures, are not used to seeing extradition requests that lack the signature of a judge or magistrate. Moreover, the original signature of a judge or magistrate is needed to certify the documents properly.

[cited in Criminal Resource Manual 506; Criminal Resource Manual 609; USAM 9-15.240]

606 Copies of Warrant and Complaint and/or Indictment[8]

If the fugitive has not been convicted, obtain certified copies of the arrest warrant and the complaint and/or indictment, and attach them to the prosecutor's affidavit as exhibits. For some countries, a certificate of exemplification (three signatures: clerk, judge, clerk) may be required.

If the fugitive has jumped bond or escaped before conviction, include certified copies of the warrant for bond jumping or escape and for the underlying offense. The prosecutor's affidavit should recite that the issuance of the bond jumping/escape warrant serves to bring the fugitive before the court on both the named charge and the underlying offense. Note that most older extradition treaties do not include bond jumping or escape as extraditable offenses. In such cases, it will not be possible to try the fugitive for those offenses.

In civil law countries, the warrant is the charging document. Warrants therefore have greater procedural significance in those countries than in the United States. For example, civil law courts often grant extradition only for the crimes listed in the warrant, not those in the indictment. This creates serious problems in United States extradition cases because warrants are usually prepared in the clerk's office, which routinely lists only one or two of the offenses in the indictment.

A related problem involves signature of the warrant by the clerk pursuant to the court's order. Given the significance of warrants in civil law countries, they are always signed by judges or magistrates. Even though extradition treaties do not require that warrants be signed by a judge or magistrate in order to be valid, problems have arisen in the past when the United States has submitted warrants signed by clerks.

Consequently, if the warrant does not list all the crimes in the indictment, or if it is not signed by a judge or magistrate, the prosecutor may need to have it amended. If the clerk's office will not permit amendment, move for the issuance of a new warrant containing the requisite information and signatures. Doing so will necessitate an additional paragraph in the prosecutor's affidavit explaining any discrepancies between the dates of the complaint, indictment, first warrant, and second warrant. A similar explanation should be included whenever two or more warrants have been issued because of superseding indictments or for any other reason.

[cited in Criminal Resource Manual 609; USAM 9-15.240]

8 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00606.htm

607 Statutes[9]

The text of all statutes alleged to have been violated, including the penalty provision, and the pertinent statute of limitations should be typed out in full either in the body of the prosecutor's affidavit or as exhibits to the prosecutor's affidavit. If attached as an exhibit, each statute should be typed on a separate page. If the text of the pertinent statute is unusually long or convoluted, contact the Office of International Affairs regarding the possibility of reduction. It is usually *not* necessary to also include the applicable provisions of the Sentencing Guidelines.

[cited in Criminal Resource Manual 609; USAM 9-15.240]

608 Affidavits Establishing the Crime and the Fugitive's Identity[10]

A. **Affidavits.** If the fugitive has not been convicted, it will be necessary to provide affidavits establishing the commission of the crime and the identity of the fugitive as the author of the crime. (If the fugitive has been convicted, *see* this Manual at 609. To satisfy this requirement, the prosecutor should prepare affidavits for signature by investigators, witnesses, co-conspirators or experts that, taken together, establish that each crime for which extradition is sought (1) was committed (2) by the fugitive. Affidavits should be prepared with formal captions showing the name of the court and the style of the case. Each affiant should state clearly and concisely the relevant facts, avoiding hearsay if possible.

Some common law countries have amended their domestic laws to make the requirements for extraditions somewhat less burdensome. However, in the United Kingdom, Canada, and most other common law countries, the documents in support of extradition must establish a prima facie case. A prima facie case is established when the evidence submitted to the foreign magistrate would, if standing alone, justify a properly instructed jury in returning a verdict of guilty. Further, those countries, the United Kingdom, Canada, and other common law countries, do *not* accept hearsay in affidavits submitted in support of requests for extradition.

The witnesses' affidavits do not necessarily have to be executed in the district where extradition is requested. Consult with the Office of International Affairs regarding the foreign law governing how the affidavit is to be executed. For instance, in some countries, the affidavits may be executed before a notary public rather than a judge or magistrate but a certificate of the notary's authority may be required.

Civil law countries are not as strict, but require factual support for every element of the crime which generally must meet a probable cause standard. For instance, hearsay is admissible in civil law countries, but is not accorded the same weight as first-hand knowledge.

B. **Grand Jury Transcripts.** A second, less-preferred means of establishing the crime involves attaching copies of grand jury transcripts to the prosecutor's affidavit. This method causes problems because some countries refuse to accept grand jury transcripts or may require an affidavit by the witness adopting them as true in the present time; they tend to be less concise than affidavits (resulting in higher translation costs); they are not accorded the same weight as affidavits in some countries; and, you must first obtain a disclosure order under Fed. R. Crim. P. 6(e).

C. **Identity.** One of the few successful defenses in extradition cases is mistaken identity. Prosecutors must establish that the person whose extradition is sought is the one who is accused or was convicted. Do so with an affidavit from an identifying witness, together with a photo of the fugitive. Use a single picture affixed to a plain sheet of paper with rivets or partially covered by the seal of the court. The picture, initialed and dated by the identifying witness, should be attached to the witness's affidavit as an exhibit. The affidavit should refer to the exhibit and to the fact that it was initialed and dated by the witness. (Do not attach a photospread if you

9 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00607.htm

10 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00608.htm

can avoid it; if you feel the need to show a photospread to the identifying witness to avoid later charges of a tainted identification (*see Manson v. Brathwaite*, 432 U.S. 98 (1977)), you can do so and then attach the selected photo to the affidavit. Similarly, do not have the witness recount in the affidavit that he or she selected the photo of the accused from a photospread. The use of photospreads invites needless argument before the foreign court.)

[cited in Criminal Resource Manual 609; USAM 9-15.240]

609 Evidence of Conviction[11]

For fugitives who have been convicted and either escaped or otherwise failed to complete their sentences, extradition treaties dispense with the requirement of establishing the crime through affidavits. Instead, the treaties require proof of conviction. In United States practice, conviction means a finding of guilt (i.e., a jury verdict or finding of fact by the judge) and imposition of sentence. If the defendant fled after the verdict but before sentencing, he or she has not been convicted, and the prosecutor must supply the affidavits described in this Manual at 608, unless the treaty specifically equates conviction with a finding of guilt.

The conviction may be proved by a certified copy of the Judgment and Commitment Order or the equivalent state form. Proof that the fugitive is unlawfully at large may take the form of an affidavit from the warden of the institution from which the fugitive escaped, or from the marshal if the fugitive failed to surrender after sentencing. The time remaining to be served (not counting reductions for good behavior) must be stated.

The facts and procedural history of the case must be explained fully and clearly in the prosecutor's affidavit, particularly if the defendant was sentenced in absentia. Evidence of the fugitive's identity as described in this Manual at 608, must be attached to the prosecutor's affidavit, together with the statutes under which the fugitive was convicted. *See* this Manual at 607. Most civil law countries have a statute of limitations on the time for execution of a sentence. The prosecutor's affidavit should therefore include an express statement that execution of the sentence is not barred by any statute of limitations under United States law.

If the fugitive has been charged with escape, check with the Office of International Affairs to see whether escape is an extraditable offense in the country of refuge. If not, the warrant for the charge of escape may be unnecessary because the fugitive cannot be tried for that offense. If it is an extraditable offense, the prosecutor must proceed on that charge as for an offense for which the fugitive has not been convicted. *See* this Manual at 605 and 606.

[cited in Criminal Resource Manual 605; Criminal Resource Manual 608; USAM 9-15.240]

610 Deportations, Expulsions, or other Extraordinary Renditions[12]

Fugitives deported to the United States or otherwise returned under other than a formal order of extradition often claim that they were kidnapped (by United States or foreign agents) and returned illegally. The courts generally dispose of those arguments under the *Ker-Frisbie* doctrine, holding that a defendant in a Federal criminal trial may not successfully challenge the District Court's jurisdiction over his person on the grounds that his presence before the Court was unlawfully secured. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952). *See*, e.g., *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *United States v. Mitchell*, 957 F.2d 465 (7th Cir. 1992); *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991); *United States v. Pelaez*, 930 F.2d 520 (6th Cir. 1991); *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1988); *United States v. Porter*, 909 F.2d 789 (4th Cir. 1990); *United States v. Winter*, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Postal*, 589 F.2d 862, 873 (5th Cir.), *cert. denied*,

11 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00609.htm

12 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00610.htm

444 U.S. 832 (1979). One court found an exception to the general doctrine, declaring that a court could refuse to exercise its jurisdiction if the person's presence had been secured by conduct shocking to the conscience of the court. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). No court has followed *Toscanino*, however, see *Matta-Ballesteros v. Henman*, 896 F.2d 255, 262-263 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990); *United States v. Darby*, 744 F.2d 1508, 1530 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); and the Second Circuit itself in a subsequent decision limited the exception to situations of extreme misconduct. *Lujan v. Gengler*, 510 F.2d 62 (2nd Cir.), *cert. denied*, 421 U.S. 1001 (1975).

[cited in USAM 9-15.610]

611 Interpol Red Notices[13]

An Interpol Red Notice is the closest instrument to an international arrest warrant in use today. Interpol (the International Criminal Police Organization) circulates notices to member countries listing persons who are wanted for extradition. The names of persons listed in the notices are placed on lookout lists (e.g., NCIC or its foreign counterpart). When a person whose name is listed comes to the attention of the police abroad, the country that sought the listing is notified through Interpol and can request either his provisional arrest (if there is urgency) or can file a formal request for extradition.

Please be aware that if a Red Notice is issued, the prosecutor's office is obligated to do whatever work is required to produce the necessary extradition documents within the time limits prescribed by the controlling extradition treaty whenever and wherever the fugitive is arrested. Further, the prosecutor's office is obliged to pay the expenses pursuant to the controlling treaty. Those expenses, which can be quite high, will typically include the costs of translating the extradition documents and may include the costs of hiring local counsel to represent the United States. Further, these obligations, which remain until the fugitive is arrested or the Red Notice is withdrawn, may result in prosecutors who have succeeded the Assistant United States Attorney who originally requested the Red Notice having to prepare the documents and arrange for payment of hefty fees years after the fugitive originally fled from the United States. Therefore, it is important for prosecutors to make certain that the case is significant enough to warrant placing their offices under such a burden in deciding whether or not to request issuance of a Red Notice.

[cited in USAM 9-15.635]

612 Role of the Department of State in Foreign Extradition Requests[14]

All extradition treaties currently in force require foreign requests for extradition to be submitted through diplomatic channels, usually from the country's embassy in Washington to the Department of State. Many treaties also require that requests for provisional arrest be submitted through diplomatic channels, although some permit provisional arrest requests to be sent directly to the Department of Justice. The Department of State reviews foreign extradition demands to identify any potential foreign policy problems and to ensure that there is a treaty in force between the United States and the country making the request, that the crime or crimes are extraditable offenses, and that the supporting documents are properly certified in accordance with 18 U.S.C. § 3190. If the request is in proper order, an attorney in the State Department's Office of the Legal Adviser prepares a certificate attesting to the existence of the treaty, etc., and forwards it with the original request to the Office of International Affairs.

13 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00611.htm

14 http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00612.htm

Appendix VIII

Content Analysis of Bilateral Extradition Treaties

To: Professor Bassiouni

From: Andrew Sidea

Date: 10/21/2011

Re: Statistical Analysis of U.S. Bilateral Extradition Treaty Provisions: Defenses to Extradition

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There are 175 U.S. bilateral extradition treaty provisions currently in force, including supplementary protocols/notes or explanatory protocols/notes. The following is a statistical analysis of the number of treaty provisions regarding various defenses to extradition. Where only a few countries allow for certain defenses, those countries are specified.

1. Treaty as Jurisdiction or Legal Basis for Extradition

Sixteen of the supplementary protocols/notes or explanatory protocols/notes do not address this point. Otherwise, every treaty has such a provision, generally as the first provision setting forth the obligation to extradite under the treaty. A total of 125 of these treaties, supplementary protocols/notes, or explanatory protocols/notes (over 70 percent of the various bilateral agreements) also have provisions regarding the scope and application of the treaty.

2. Double Criminality Provision

Sixty-nine of these treaties, supplementary protocols/notes, or explanatory protocols/notes (over 39 percent of the various bilateral agreements) have provisions requiring the crime to be punishable under the laws of both countries.

3. Definition of Extraditable Offenses

Fifty-nine of these treaties, supplementary protocols/notes or explanatory protocols/notes (over 33 percent of the various bilateral agreements) use a list to define extraditable offenses. Of these fifty-nine, seven of the supplementary protocols/notes or explanatory protocols/notes amend the

bilateral treaties that had used a list to define extraditable offenses to the categorical approach. These countries are in large part European Union member states for whom the EU–U.S. extradition agreement requires this change.

Forty-nine of the countries with whom the United States has a bilateral extradition treaty follow a categorical approach, defining extraditable offenses as crimes in both countries punishable by a certain period of time.

Australia, Brazil, Hong Kong (China), Israel, Spain, and Uruguay follow a combination of the list and categorical methods for defining extraditable offenses.

4. Rule of Non-Inquiry

None of the treaties, supplementary protocols/notes, or explanatory protocols/notes sets forth the rule of non-inquiry.

5. Guilty Pleas

None of the treaties, supplementary protocols/notes, or explanatory protocols/notes contains provisions specifically regarding guilty pleas, although various provisions exist regarding simplified extradition and consent or waiver of the extradition hearing.

6. Specialty

A total of 119 of the treaties, supplementary protocols/notes, or explanatory protocols/notes (68 percent of the various bilateral agreements) set forth the principle of specialty that governs extradition requests. Every country with whom the United States has a bilateral extradition treaty has a provision regarding specialty.

7. Political Offense (Political Crimes)

A total of 120 of the treaties, supplementary protocols/notes, or explanatory protocols/notes provide for this exception. Every country with whom the United States has a bilateral extradition treaty has a provision regarding political crimes.

8. Political Offense (Politically Motivated Request)

Albania, Bolivia, Brazil, Burma, Congo, Cuba, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, European Union, Fiji, Finland, France, Gambia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Iceland, Iraq, Israel, Italy, Japan, Kenya, Kiribati, Latvia, Lesotho, Liberia, Liechtenstein, Malawi, Marshall Islands, Mauritius, Mexico, Micronesia, Monaco, Nauru, the Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paupa New Guinea, Portugal, San Marino, Seychelles, Sierra Leone, Singapore, the Slovak Republic, Slovenia, the Solomon Islands, Spain, Suriname, Swaziland, Sweden, Tonga, Tuvalu, Uruguay, Venezuela, the former Yugoslavia, and Zambia do not have provisions regarding politically motivated requests.

Forty-seven of the treaties, supplementary protocols/notes, or explanatory protocols/notes (over 26 percent of the various bilateral agreements) provide for this exception.

9. Offenses of a Military Character

Albania, Australia, Burma, Canada, Chile, Congo, Cuba, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, European Union, Fiji, France, Gambia, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Iceland, Iraq, Israel, Japan, Kenya, Kiribati, Latvia, Lesotho, Liberia, Liechtenstein, Malawi, Marshall Islands, Mauritius, Micronesia, Monaco, Nauru, New Zealand, Nicaragua, Nigeria, Pakistan, Panama, Paupa New Guinea, the Philippines, Portugal, San Marino, Seychelles, Sierra Leone, Singapore, the Slovak Republic, Slovenia, the Solomon Islands, Suriname, Swaziland, Tanzania, Tonga, Tuvalu, the United Kingdom, Uruguay, Venezuela, the former Yugoslavia, and Zambia do not have provisions regarding offenses of a military character.

Fifty-two of the treaties, supplementary protocols/notes, or explanatory protocols/notes (over 29 percent of the various bilateral agreements) provide for this exception.

10. Offenses of a Fiscal Character

Only Germany, India, Luxembourg, Poland, and Switzerland have specific provisions in their extradition treaties with the United States regarding offenses of a fiscal character. The Republic of South Korea has a provision discussing these offenses but not labeling them as "Offenses of a Fiscal Character."

11. Exclusion of Nationals

There are ninety-two provisions in treaties, supplementary protocols/notes, or explanatory protocols/notes (over 52 percent of the various bilateral agreements) on this point. Of these, forty-three place some restriction on this point, ranging from not allowing nationality as a basis for denying the extradition request to providing for the submittal of the case for prosecuting in the requested state if the request is denied on grounds of nationality.

Burma, Canada, Ecuador, the European Union, Fiji, Gambia, Ghana, Guyana, Ireland, Kenya, Kiribati, Lesotho, Malawi, Mauritius, Nauru, Nigeria, Pakistan, Paupa New Guinea, Seychelles, Sierra Leone, Singapore, the Solomon Islands, Swaziland, Tanzania, Tonga, Tuvalu, and Zambia have no provision either allowing or disallowing nationality as a basis for refusal of an extradition request.

12. Double Jeopardy

Ninety-two of the treaties, supplementary protocols/notes, or explanatory protocols/notes (over 52 percent of the various bilateral agreements) have a provision on this point.

Albania, Chile, Cuba, the Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, the European Union, Greece, Guatemala, Haiti, Hong Kong (China), Iceland, Iraq, Latvia, Liberia, Liechtenstein, Nicaragua, Panama, Portugal, San Marino, Slovak Republic, Slovenia, Venezuela, and the former Yugoslavia do not have a provision on double jeopardy in their U.S. bilateral extradition treaties.

13. Statute of Limitations

One hundred of the treaties, supplementary protocols/notes or explanatory protocols/notes (over 57 percent of the various bilateral agreements) have provisions regarding the application of a statute of limitations to an extradition request.

Of these, eleven specifically provide that the requesting state's statute of limitation applies, seven specifically provide that the requested state's statute of limitation applies, forty-one provide that either state's statute of limitations may apply, Venezuela provides that the statute of limitation of the state in which the crime was committed applies, and the others specify generally that lapse of time may bar an extradition request.

Antigua and Barbuda, Argentina, Barbados, Belize, and Spain have provisions stating that no statute of limitations applies under their U.S. bilateral extradition treaties.

Bolivia, Ecuador, Egypt, the European Union,France, Haiti, Hong Kong (China), Ireland, Luxembourg, Malaysia, Monaco, Paraguay, and Zimbabwe do not have any provision either specifically allowing or disallowing refusal of extradition requests based on statutes of limitations in their U.S. bilateral extradition treaties.

14. Other Defenses

There are a number of other defenses, each of which is discussed below:

a. Age of the Offender (Minor)Canada, Finland, Spain, and Uruguay's U.S. bilateral extradition treaties contain provisions allowing for refusal of extradition based on the offender's age.

b. Death PenaltySixty-four of the treaties, supplementary protocols/notes, or explanatory protocols/notes (over 36 percent of the various bilateral agreements) contain provisions allowing for refusal of extradition where the death penalty is a possible sentence. Many of these provisions also discuss assurances that the death penalty will not be imposed as a prerequisite to a requested state's granting the extradition request.

c. Life ImprisonmentVenezuela's U.S. bilateral extradition treaty contains provisions allowing for refusal of extradition where life imprisonment is a possible sentence.

d. Convictions in Absentia and Due ProcessAustria, Malta, and Switzerland's U.S. bilateral extradition treaties contain provisions allowing for refusal of extradition based on in absentia convictions unless certain due process concerns have been met.

e. No Trials by Extraordinary CourtsBrazil, Germany, Peru, and Sweden's U.S. bilateral extradition treaties contain provisions allowing for refusal of extradition where the relator may be tried by an extraordinary court.

f. Amnesty or Pardon Specified as a Bar to ExtraditionTurkey and the United Kingdom have provisions regarding amnesty or pardon as a bar to extradition in their U.S. bilateral extradition treaties.

g. Humanitarian GroundsBelgium, Brazil (illness deferring surrender), Denmark, Finland, Hong Kong (China), Luxembourg, the Netherlands, Norway, and Sweden's U.S. bilateral extradition treaties contain provisions allowing for refusal of extradition for humanitarian grounds or considerations.

h. Other Grounds in the Requested State's LawsNorway has this provision in its U.S. bilateral extradition treaty.

i. Crime Is or Will Be Submitted for Prosecution in Requested StateTurkey has this provision in its U.S. bilateral extradition treaty for this provision.

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