Bringing fugitives to justice under international law: extradition and its alternatives

SADOFF, David

Abstract

This dissertation presents a novel and robust framework for the operational and legal analysis of recovering fugitives abroad. It addresses how States, working alone, in cooperation, or with third-party intervention, strive to secure the custody of fugitives to bring them to justice, while evaluating the propriety of those pursuit efforts under international law. It introduces redefined terms and new concepts to add precision to the discourse; sets forth comprehensive typologies, inter alia, for the various forms of extradition and its impediments; and provides a mapping to account for the full range of means and methods – extradition, collateral and remedial approaches to extradition, and fallback and full-scale alternatives to extradition – by which fugitives can be obtained. In addition, this study considers the judicial, diplomatic, and policy consequences of reliance on the more aggressive tactics; and proffers recommendations that, if adopted, could foster the recovery of fugitives while minimizing associated risks.

Reference


URN : urn:nbn:ch:unige-418725
DOI : 10.13097/archive-ouverte/unige:41872

Available at:
http://archive-ouverte.unige.ch/unige:41872

Disclaimer: layout of this document may differ from the published version.
Bringing Fugitives to Justice
Under International Law:
Extradition and Its Alternatives

Doctoral Dissertation / Thèse de Doctorat

Submitted By:
David A. Sadoff
Ph.D Candidate, Public International Law

Professor Robert Kolb
Dissertation Adviser / Directeur de Thèse

Imprimatur No. 883

October 10, 2014

Copyright © David A. Sadoff
Rome, 2014
ABSTRACT

This dissertation presents a novel and robust framework for the operational and legal analysis of recovering fugitives abroad. It addresses how States, working alone, in cooperation, or with third-party intervention, strive to secure the custody of fugitives to bring them to justice, while evaluating the propriety of those pursuit efforts under international law. It introduces redefined terms and new concepts to add precision to the discourse; sets forth comprehensive typologies, *inter alia*, for the various forms of extradition and its impediments; and provides a mapping to account for the full range of means and methods – extradition, collateral and remedial approaches to extradition, and fallback and full-scale alternatives to extradition – by which fugitives can be obtained. In addition, this study considers the judicial, diplomatic, and policy consequences of reliance on the more aggressive tactics; and proffers recommendations that, if adopted, could foster the recovery of fugitives while minimizing associated risks.
ACKNOWLEDGMENTS

This has been a protracted and challenging exercise that would not have been possible without the generous support and assistance of many people. I wish to begin by thanking Professor Robert Kolb, who not only faithfully served as my dissertation adviser and mentor, but whose outstanding teaching and passion for public international law inspired my interest in this field.

I also wish to express my gratitude to the other distinguished members of my committee, namely Professors Robert Roth and Paola Gaeta of the University of Geneva (UNIGE) Law Faculty and Professor Sean Murphy of the George Washington University Law Faculty, who were kind enough to review and thoughtfully comment on my dissertation. Thanks also are extended to UNIGE Law Faculty Dean Christine Chappuis and her staff for their administrative support throughout this process.

I am grateful to Irene Khan, Director-General of the International Development Law Organization (IDLO) in Rome, for granting me the leave needed in 2013 from my position as General Counsel to complete this dissertation. Considerable thanks also must go to retired U.S. Major General Charles (“Chuck”) Tucker, former IDLO colleague and seasoned legal practitioner, who provided me with helpful insights and constructive input.

Finally, I extend my deepest gratitude to my dear wife Claudia and our three teenage children, Haley, Rachel, and Jake, to whom I collectively dedicate this dissertation. Their patience – even indulgence – was always appreciated, but it is their love and encouragement that gave me the fortitude to ultimately complete this project.

All statements of fact, opinion, and analysis expressed herein are entirely my own and are not attributable to any organization or institution with which I have been or am currently affiliated.
ACRONYMS AND ABBREVIATIONS

AALCO – Asian-African Legal Consultative Organization
ACHR – American Convention on Human Rights (1969)
ADR – Alternative Dispute Resolution
AFB – Air Force Base
AFP – Agence France-Presse (French News Agency)
AG – Attorney General
AIDS – Acquired Immunodeficiency Syndrome
a/k/a – also known as
AJIL – American Journal of International Law
ALI – American Law Institute
ALR – Australian Law Reports
ANC – African National Congress
AP – Associated Press
AP I – Additional Protocol I (1977) to the Geneva Conventions of August 12, 1949
APEC – Asia Pacific Economic Cooperation Forum
App. Div. – Appellate Division
APRRN – Asia Pacific Refugee Rights Network
AQ – al-Qaeda (or al-Qaida)
ASIL – American Society of International Law
Asst. – Assistant
ATCA – Alien Tort Claims Act, a/k/a Alien Tort Statute (ATS) (U.S.)
ATRC – Alien Terrorist Removal Court (U.S.)
ATS – Alien Tort Statute, a/k/a Alien Tort Claims Act (ATCA) (U.S.)
A.T.S. – Australian Treaty Series
AU – African Union
Aus. – Austria
Austl. – Australia
B&H – Bosnia and Herzegovina
Belg. – Belgium
B.Y.B.I.L. – British Year Book of International Law
CAH – Crimes Against Humanity
Cal. – California
CARICOM – Caribbean Community
CAT – Convention against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (U.N.) (1984)
CCAIL – Code of Crimes Against International Law (Germany)
CCE – Continuing Criminal Enterprise (U.S.)
CEO – Chief Executive Officer
C.F.R. – Code of Federal Regulations (U.S.)
CFR – Council on Foreign Relations (U.S.)

1 A year designated in parentheses represents the year a legal instrument was signed.
CIA – Central Intelligence Agency (U.S.)
CID – Cruel, Inhuman, or Degrading Treatment or Punishment
CIL – Customary International Law
CIO – Central Intelligence Organisation (Zimb.)
CIS – Commonwealth of Independent States
C.J. – Chief Judge
CLR – COMMONWEALTH LAW REPORTS
CoE – Council of Europe
Conc. – Concurrent
Cong. – Congress or Congressional (U.S.)
Const. – Constitution
Conv. – Convention
CPPT – Convention for the Prevention and Punishment of Terrorism (1938) (never ratified)
C.R.S. – Congressional Research Service (U.S.)
CSCE – Conference on Security and Co-operation in Europe
CSIS – Center for Strategic and International Studies (Washington, D.C.)
CSJ – Corte Suprema de Justicia [Supreme Court of Justice] (Guatemala)
CSM – Convention on Special Missions (U.N.) (1969)
CTIA – CONSOLIDATED TREATIES & INTERNATIONAL AGREEMENTS (U.S.)
Ct. of App. – Court of Appeal
D.C. – Washington, District of Columbia, U.S.
DEA – Drug Enforcement Administration (U.S.)
Den. – Denmark
DHS – Department of Homeland Security (U.S.)
Dist. Ct. – District Court
Div. – Divisional [Court]
D.L.R. – DOMINION LAW REPORTS (Canada)
DoD – Department of Defense (U.S.)
DoJ – Department of Justice (U.S.)
D.R. – Dominican Republic
D.R. – DECISIONS AND REPORTS (law reporter)
DRC – Democratic Republic of the Congo
DS – Diplomatic Security (U.S. Department of State)
DWA – Deportation with Assurances (U.K.)
EAW – European Arrest Warrant
ECJ – European Court of Justice
ECOSOC – United Nations Economic and Social Council
ECOWAS – Economic Community of West African States
ECHR – European Court of Human Rights
EEC – European Economic Community
EEZ – Exclusive Economic Zone
E.G. – Equatorial Guinea
EHRR – EUROPEAN HUMAN RIGHTS REPORTS
EIF – Entered Into Force (with respect to treaties)
EJIL – European Journal of International Law
EJK – Extrajudicial killing
ETA – Euskadi Ta Askatasuna (Basque separatist organization) (Spain)
E.T.S. – EUROPEAN TREATY SERIES
EU – European Union
Eur. – European
EUROJUST – European Union’s Judicial Cooperation Unit
EUROPOL – European Police Office
EWHC – High Court of Justice of England and Wales
Exec. – Executive
FAM – FOREIGN AFFAIRS MANUAL (U.S. Department of State)
FARC – Fuerzas Armadas Revolucionarias de Colombia [Revolutionary Armed Forces of Colombia]
FARRA – Foreign Affairs Reform and Restructuring Act of 1998 (U.S.)
FAST – Foreign-Deployed Advisory Support Team (U.S. DEA)
FBI – Federal Bureau of Investigation (U.S.)
FCO – Foreign and Commonwealth Office (U.K.)
Fed. Trib. – Federal Tribunal
FGM – Female Genital Mutilation
FLN – Front de Libération Nationale (Algerian Liberation Movement)
Fr. – France or French
FRAPH – Front for the Advancement and Progress of Haiti (formed in 1993)
FED. R. CRIM. PR. – FEDERAL RULES OF CRIMINAL PROCEDURE (U.S.)
F.R.E. – FEDERAL RULES OF EVIDENCE (U.S.)
F.R.G. – Federal Republic of Germany
FSB – Federal Security Service of the Russian Federation (a KGB successor)
FSIA – Foreign Sovereign Immunities Act (U.S.)
FTCA – Federal Tort Claims Act (U.S.)
GB(s) – Grave Breach(es) (of the Geneva Conventions of Aug. 12, 1949)
GC I – Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
GC II – Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GC III – Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
GC IV – Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
Gen. – General (military title)
Ger. – Germany
GIA – Groupe Islamique Armé (militant organization) (Algeria)
GPO – Government Printing Office (U.S.)
GRU – Foreign Intelligence Directorate of the Russian Armed Forces
GWOT – Global War on Terrorism (U.S.)
HCP – High Contracting Party
HIV – Human Immunodeficiency Virus
H.K. – Hong Kong
HKSAR – Hong Kong Special Administrative Region (established after July 1, 1997, when Hong Kong reverted to the PRC)
H.L. – House of Lords (U.K.)
H.R. – House of Representatives (U.S.)
HRC – Human Rights Committee (ICCPR implementing body)
HVT – High-Value Target
IAC – International Armed Conflict
IAJC – Inter-American Juridical Committee (based in Rio de Janeiro, Brazil)
ICAO – International Civil Aviation Organization (U.N. agency based in Montreal)
ICC – International Criminal Court
ICE – Immigration and Customs Enforcement (agency of U.S. DHS)
ICHR – Inter-American Court of Human Rights (based in San Jose, Costa Rica)
ICHRP – International Council on Human Rights Policy
ICJ – International Court of Justice (U.N.)
ICL – International Criminal Law
ICRC – International Committee of the Red Cross (based in Geneva)
ICTR – International Criminal Tribunal for Rwanda (based in Arusha, Tanzania)
ICTY – International Criminal Tribunal for the former Yugoslavia (based in The Hague)
IDF – Israeli Defense Forces
IDI – Institut de droit international (see also IIL) (based in Belgium)
IELR – INTERNATIONAL ENFORCEMENT LAW REPORTER
IGG – Inspector General of Government (Uganda)
IGO – Inter-governmental Organization
IHL – International Humanitarian Law
IHRL – International Human Rights Law
IHRR – INTERNATIONAL HUMAN RIGHTS REPORTS
IHT – International Herald Tribune
IIA – Inter-American Institute for Cooperation on Agriculture
IIL – Institute of International Law (see also IDI) (based in Belgium)
ILA – International Law Association (based in London)
ILC – International Law Commission (U.N.)
ILM – INTERNATIONAL LEGAL MATERIALS
ILR – INTERNATIONAL LAW REPORTS
IMAC – Federal Act on International Mutual Assistance in Criminal Matters (a/k/a Act on International Criminal Assistance) (Switz.)
IMF – International Monetary Fund
IMT – International Military Tribunal (Nuremberg)
INA – Immigration and Naturalization Act (U.S.)
INCD – Institute for Combating Drugs in Mexico
INLA – Irish National Liberation Army
INS – Immigration and Naturalization Service (U.S.)
Inter-Am. Ct. H.R. – Inter-American Court of Human Rights
INTERPOL – International Criminal Police Organization (based in Lyon, France)
Int’l – International
INYT – International New York Times (successor to the IHT)
IPLA – International Penal Law Association
IPP – Internationally Protected Person
Ir. – Ireland or Irish
IRA – Irish Republican Army
IRC – Islamic Revolutionary Committee (Iran)
IRIN – Integrated Regional Information Networks (based in Nairobi, Kenya)
IRS – Internal Revenue Service (U.S.)
IRTPA – Intelligence Reform and Terrorism Prevention Act of 2004 (U.S.)
ITLOS – International Tribunal for the Law of the Sea
IWPR – Institute for War & Peace Reporting (based in London)
JTA – Jewish Telegraphic Agency (based in New York)
KB – King’s Bench (U.K.)
LCO – Lure and Capture Operation (new term)
LeT – Lashkar-e-Taiba [“Army of the Righteous” in Urdu] (militant organization)
LGP – Ley General de Poblacion [General Law of the Population] (Mexico)
L. of N. – League of Nations (predecessor to the U.N.)
L.S.I. – Laws of the State of Israel
MLAA – Mutual Legal Assistance Agreement
MLAT – Mutual Legal Assistance Treaty
MOIS – Ministry of Intelligence and National Security of the Islamic Republic of Iran (a/k/a VEVAK, MISIRI, or VAJA)
MoJ – Ministry of Justice
MOU – Memorandum of Understanding
NASA – National Aeronautics and Space Administration (U.S.)
NATO – North Atlantic Treaty Organization (based in Belgium)
NCIS – Naval Criminal Investigative Service (U.S.)
NGO – Non-Governmental Organization
NIAC – Non-International Armed Conflict
NMT – Nuremberg Military Tribunal
NSC – National Security Council
NSSF – National Social Security Fund (Uganda)
N.S.W. – New South Wales (Australia)
NZACL – New Zealand Association for Comparative Law
NZLR – NEW ZEALAND LAW REPORTS
OAS – Organization of American States
OAS – Organisation de l’armée secrète [Secret Army Organization] (France)
OAU – Organization of African Unity
OCAM – Organization Communale Africaine et Malgache
OECD – Organisation of Economic Co-operation and Development
OECS – Organization of Eastern Caribbean States
OHCHR – Office of the High Commissioner for Human Rights (U.N.)
OIA – Office of International Affairs (U.S. DoJ)
O.J. – Official journal (League of Nations)
OJC – Official Journal (C Series) (publication of the EU)
OEJC – Official Journal of European Communities
OJEU – Official Journal of the European Union
Sess. – Session (U.S. Congress)
SIAC – Special Immigration Appeals Commission (U.K.)
SIRENE – Supplementary Information Request at the National Entity (a database)
SIS – Secret Intelligence Service (a/k/a MI-6) (U.K.)
SOFA – Status of Forces Agreement
SS – Schutzstaffel [“Protection Squadron”] (Nazi Germany)
STL – Special Tribunal for Lebanon (2009 – )
Sup. Ct. – Supreme Court
Super. Ct. – Superior Court
SVR – Foreign Intelligence Service of the Russian Federation (a successor to the KGB)
Switz. – Switzerland
T&T – Trinidad & Tobago
T.I.A.S. – TREATIES AND OTHER INTERNATIONAL ACTS SERIES (U.S.)
TIP – Terrorist Interdiction Program (U.S.)
TRC – Truth and Reconciliation Commission
T.S. – TREATY SERIES
TVPA – Torture Victim Protection Act (U.S.)
UAE – United Arab Emirates
UAV – Unmanned Aerial Vehicle (a/k/a a drone)
UBL – Usama Bin Laden (alternatively spelled as Osama Bin Laden)
UCMJ – Uniform Code of Military Justice (U.S.)
UDHR – Universal Declaration of Human Rights (1948)
UFAP – Unlawful Flight to Avoid Prosecution (type of U.S. federal crime)
U.K. – United Kingdom
U.N. – United Nations
UNGA – United Nations General Assembly
UNHCHR – United Nations High Commissioner for Human Rights
UNHCR – United Nations High Commissioner for Refugees
UNHRC – United Nations Human Rights Council (succeeded UNCHR in 2006)
UNODC – United Nations Office of Drugs and Crime
UNSC – United Nations Security Council
U.N.T.S. – UNITED NATIONS TREATY SERIES
UPI – United Press International
U.S. – United States
USAF – United States Air Force
USCS – United States Customs Service
USCG – United States Coast Guard
USN&WR – U.S. News & World Report
UST – University of Santo Tomas, The Philippines
VCCR – Vienna Convention on Consular Relations (1963)
VCDR – Vienna Convention on Diplomatic Relations (1961)
VFA – Visiting Forces Agreement
WC(s) – War Crime(s)
WLR – WEEKLY LAW REPORTS (U.K.)
WPP – Witness Protection Program (U.S.)
WTC – World Trade Center (New York City)
WWI – First World War (1914-18)
WWII – Second World War (1939-45)
Y.B. – YEARBOOK
Zimb. – Zimbabwe
GLOSSARY

Active Extradition – when a pursuing State requests the extradition of a fugitive from the host State. (Compare with Passive Extradition)

Alternatives to Extradition – refers expansively to all measures, methods, and mechanisms, whether ultimately regarded as lawful or unlawful, that: (i) fall outside the extradition regime, (ii) aim to bring a fugitive to justice fully or partially, directly or indirectly, and (iii) do not entail a fugitive’s delivery as a function of sheer fortuity.

Aut dedere aut judicare – a Latin term that stands for the legal principle under which a host State is contractually obligated either to deliver a fugitive to a pursuing State or undertake good faith measures toward adjudicating the fugitive under its own judicial system. (Sometimes referred to by the functionally synonymous term aut dedere aut punire or aut dedere aut prosequi)

Bring to Justice – a law enforcement action with the end result of: (i) prosecuting an individual for a charged crime; (ii) sentencing or punishing an individual who escaped from custody following his conviction but before sentencing or punishment could be effected; or (iii) re-incarcerating an individual who escaped from prison.

Commandeering Operation – an operation that, through either force or the threat of force exerted from the inside of a transport vessel or vehicle, wrests its control and charts a course to a destination where the identity of any suspected fugitives on board can be safely confirmed and, if so, apprehended.

Conditional Extradition – a host State’s agreement to extradite an individual on one or more stipulated conditions, such as that he be retried in the event of a prior in absentia conviction or that a national serve any imposed prison sentence in his own country.

Conditional Release – a variant of summary extradition in which an individual in host State custody is transferred to a pursuing State for the purpose of prosecution on the condition that he will be returned to the (original) host State upon the completion of any imposed sentence.

Consensual Rendition/Operation – the physical transfer of an individual from host State territory to pursuing State custody or control when conducted exclusively by pursuing State officials or agents but with the prior consent of the host State, often via a “wink and a nod”.

De Facto Extradition – a State’s formal or informal exercise of non-extradition-related laws, authorities, or administrative procedures that yields the delivery of a fugitive directly or indirectly to a State with a law enforcement interest in him.
Deportation – the expulsion by a State from its sovereign territory of an alien, even if only having been temporarily admitted, on the ground that he violated its immigration laws upon entering the territory, is otherwise illegally within the territory, or while present has proven to be a public menace or security threat.

Disguised Extradition – a subset of de facto extradition that entails a purposeful circumvention of extradition laws or treaties by a host State to deliver a fugitive directly or indirectly to a State with a law enforcement interest in him, typically via immigration laws.

Erga Omnes Obligations – “obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act.”¹

Exclusion – the ejection of an alien by a State on account of security or other significant concerns when he is seeking admission or asylum at a border or other port of entry.

Expulsion – “the exercise of State power which secures the removal, either ‘voluntarily’, under threat of forcible removal, or forcibly, of an alien from the territory of a State.”²

Extradition – a cooperative law enforcement process by which the physical custody of a person: (i) charged with committing a crime or (ii) convicted of a crime whose punishment has not yet been determined or fully served, is formally transferred by authorities of one State to those of another at the request of the latter for the purpose of prosecution or the execution of a criminal sentence, respectively.³

Extraordinary Rendition – “the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment”.⁴

³ This definition applies specifically to international versus domestic extradition.
**Failed State** – “A state that is failing has several attributes. One of the most common is the loss of physical control of its territory or a monopoly on the legitimate use of force. Other attributes of state failure include the erosion of legitimate authority to make collective decisions, an inability to provide reasonable public services, and the inability to interact with other states as a full member of the international community.”5

**Fallback Alternatives to Extradition** – the partial or redirected means of bringing a fugitive to justice other than by extradition that, by virtue of a pursuing State’s inability to meet the functional end result of extradition – namely, securing the physical custody of a fugitive and prosecuting or punishing him under its own judicial system – reflects a second-order preference.

**Formal Deportation** – an involuntary deportation undertaken through officially established channels while complying with the applicable conditions and requirements of a removing State’s laws.

**Formal Rendition** – any rendition pursuant to a formal written agreement in which the physical custody of an individual is transferred between States.

**Fugitive** – see **International Fugitive from Justice**

**Full-scale Alternatives to Extradition** – non-extradition-related means of bringing a fugitive to justice that functionally approximate the end result of extradition; namely, securing the physical custody of a fugitive and bringing him within the pursuing State’s judicial system to be prosecuted or punished.

**Hijacking** – the “unlawful seizure, by force or threat of force or any other form of intimidation, of a [private or commercial] aircraft, committed while on board an aircraft in flight.”6

**Host State** – the State within whose territory a particular fugitive is currently located, however temporarily, whether inside or outside of the extradition context.

**Indirect Extradition** – an extradition between States that lack diplomatic relations with one another, and therefore all related communications and the physical transfer itself occur via an intermediary party.

**Informal Deportation** – an involuntary deportation undertaken through casual arrangements and typically handled on an expedited basis.

**Informal Law Enforcement Cooperation** – a form of inter-State cooperation handled through non-conventional legal procedures or channels between law

---


enforcement authorities (or other types of government officials acting in support of law enforcement) resulting in the direct or indirect rendition of a fugitive.

**Informal Rendition** – any rendition handled absent legal process.

**Interception Operation** – An operation that, through either force or the threat of force exerted from the outside of a transport vessel or vehicle, diverts its direction to, or ceases its movement at, a location where the identity of any suspected fugitives on board can be safely confirmed and, if so, apprehended.

**Intermediate Rendition/Operation** – the physical transfer of a fugitive initially to third State territory but where the aim is subsequently to transfer him to pursuing State territory or custody. 7 (Compare with **Tactical Rendition/Operation**)

**International Arrest** – the apprehension of a fugitive by pursuing State authorities carried out on own occupied or failed State territory or on non-sovereign territory/international space.

**International Fugitive from Justice** – a person formally charged with a crime, or a convicted criminal whose punishment has not been determined or fully served, who is currently at large [i.e., free or uncaptured] outside the territorial jurisdiction of the State pursuing him.

**International Rendition** – the involuntary physical transfer by officials or agents of a State of an individual of interest from one State’s jurisdiction to another for any law enforcement, military, or intelligence purpose. (Compare with **Rendition**)

**Joint Rendition/Operation** – the physical transfer of an individual from host State territory to pursuing State custody or control when conducted by pursuing and host State officials or agents working together.

**Jus cogens norms** – preeminent customary international law norms that are universal, peremptory, and nonderogable; and cannot be preempted by treaty but rather only by an emergent norm of equal status.

**Lure and Capture Operation (LCO)** – a deceptive activity in which pursuing State and/or host State officials or agents entice a fugitive to travel to another location or jurisdiction with the intended or actual consequential apprehension of that fugitive for law enforcement purposes.

**Male captus bene detentus** – a Latin term that means “an unlawful apprehension may nevertheless give rise to lawful detention and prosecution,” and stands for the proposition that a court must (or should) treat as immaterial for adjudicative purposes how a criminal defendant came before it. (See **Rule of Non-Inquiry**)

---

7 Given their ultimate aim, such instances do not qualify as fallback alternatives to extradition.
Non-refoulement – an international legal principle that prohibits individuals from being returned, removed, transferred, or otherwise refouled (i.e., “turned back”) to States where their rights to life, liberty, and security of person, particularly including the freedom from extra-judicial killing, enforced disappearance, torture or other abusive treatment, or imprisonment on improper grounds, are believed to be threatened.

Non-Sovereign Territory/International Space – any territory or space not recognized by the international community as currently subject to sovereign ownership or control.

Passive Extradition – when the host State receives an extradition request by a pursuing State. (Compare with Active Extradition)

Piracy – “(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or (c) any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).”

Provisional Arrest – the temporary arrest of a fugitive made on an emergency basis at the behest of a pursuing State (or international criminal tribunal) prior to but in anticipation of an extradition (or surrender) request.

Pursuing State – a State that seeks the prosecution or punishment of a fugitive for law enforcement purposes, whether inside or outside of the extradition context.

Receiving State – in the immigration law context, a State in the process of accepting into its sovereign territory an alien who has been removed by another State (see Removal and Removing State); or in the diplomatic context, a State to which a foreign diplomat or consular officer is posted or assigned to work (see Sending State).

Removal – a State’s exercise of immigration power through either exclusion or deportation and that can be effected directly, indirectly (with the assistance of a third State intermediary), or via a negotiated arrangement.

Removing State – a State in the process of removing an alien from its sovereign territory. (See Receiving State)

---

**Rendition** – the involuntary physical transfer by officials or agents of a State of an individual of interest from one location or jurisdiction to another for any law enforcement, military, or intelligence purpose. (Compare with *International Rendition*).

**Rule of Non-Inquiry** – a principle in which a State’s executive deems it inappropriate to ascertain the motive behind another State’s request for the custodial transfer of a fugitive or to examine another State’s legal standards or procedures for handling a fugitive post-transfer, and therefore is prepared to transfer a fugitive without scrutiny; or in which a State’s judiciary does not regard it as proper to query how a criminal defendant came before it, and therefore is willing to assert personal jurisdiction regardless of the circumstances surrounding his capture and transfer. (See *Male Captus Bene Detentus*).

**Safe Haven** – a State that provides legal protection to an individual (or group) residing within its jurisdictional control while he (or they) carry out unlawful operations and/or evades the reach of overseas law enforcement.

**Seizure and Delivery Operation (SDO)** – the capture or arrest of a fugitive effected in territory other than that of the pursuing State carried out by pursuing State and/or host State officials or agents with the intended or actual subsequent delivery of that fugitive to pursuing State territory or custody for law enforcement purposes.

**Semi-formal Rendition** – any rendition handled through an *ad hoc*, non-treaty-based arrangement involving some legal process that results in the transfer of physical custody of an individual between States.

**Sending State** – the State that dispatches a diplomatic or consular officer to another State for representation purposes. (See *Receiving State*).

**Silver Platter Scenarios** – situations in which a fugitive returns or is returned to pursuing State custody or control by sheer fortuity. More specifically, such scenarios may occur: (i) based on an error or misunderstanding by the fugitive or by host State or international tribunal officials or agents, (ii) intentionally by the fugitive but in reliance on personal motivations unrelated to law enforcement measures or pressures, (iii) purposefully by the host State pursuant to its immigration laws when unaware of receiving State law enforcement interest in the fugitive or in reversing an initial extradition denial when prompted by external, non-law enforcement-related factors, or (iv) by private actors regardless of motivation.

**Specialty** – a rule of customary international law applied in the extradition context in which a pursuing State may not detain, try, or punish a fugitive for any offense committed before his extradition, except those that were the subject of the extradition request and approval, unless the host State lends its agreement or a lesser included offense arose out of the same underlying facts.
State Agents – any persons contracted on behalf of a national government to undertake a specific task, project, or mission whose conduct during such time is attributable to that State; such persons could include paid or unpaid private citizens or even State Officials of another government while acting in their personal (non-official) capacity.

State Officials – any national government employees, i.e., bureaucrats.

Strategic Rendition/Operation – the physical transfer of an individual to pursuing State territory or into pursuing State custody. (Compare with Tactical Rendition/Operation)

Summary Extradition – an expedited or abbreviated extradition, which may be formally or informally executed, and which typically but not necessarily requires the consent of the individual involved.

Surrender – the transfer of physical custody of a fugitive from a State ‘vertically’ to an international criminal tribunal (e.g., the ICC or ICTY) as opposed to ‘horizontally’ to another State.

Surrogate Rendition/Operation – the physical transfer of an individual from host State territory to pursuing State custody or control when conducted exclusively by host State officials or agents at the pursuing State’s behest.

Tactical Rendition/Operation – the physical transfer of an individual to non-pursuing State territory or custody, whether on an intermediate basis or as a final destination. (Compare with Intermediate Rendition/Operation and with Strategic Rendition/Operation)

Territorial State – the State in which the actual or alleged crime by the fugitive in question was committed, regardless of where the fugitive is presently located.

Transferor State – the former host State following the physical transfer of a fugitive by any means into the custody or control of another State, typically a once-pursuing State. (See Transferee State)

Transferee State – the State, typically a once-pursuing State, into whose custody or control a fugitive has been physically transferred by any means by the former host State. (See Transferor State)

Unilateral Rendition/Operation – the physical transfer of an individual from host State territory to pursuing State custody or control when conducted by pursuing State officials or agents without the participation, knowledge, or consent of the host State.

Voluntary Deportation – a deportation in which an alien freely consents to be deported to his home or a third State prior to a deportation determination by the host State.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>i</td>
</tr>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>ii</td>
</tr>
<tr>
<td>ACRONYMS AND ABBREVIATIONS</td>
<td>iii</td>
</tr>
<tr>
<td>GLOSSARY</td>
<td>xi</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>xviii</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>a. The Inquiry</td>
<td></td>
</tr>
<tr>
<td>i. Nature and Purpose</td>
<td>2</td>
</tr>
<tr>
<td>ii. Scope</td>
<td>7</td>
</tr>
<tr>
<td>iii. Significance</td>
<td>18</td>
</tr>
<tr>
<td>b. The Discourse</td>
<td>22</td>
</tr>
<tr>
<td>i. Methodology</td>
<td>22</td>
</tr>
<tr>
<td>ii. Features and Challenges</td>
<td>24</td>
</tr>
<tr>
<td>PART I – BACKGROUND CONTEXT</td>
<td>28</td>
</tr>
<tr>
<td>CHAPTER 1 – Core Terminology: A Fresh Look</td>
<td>29</td>
</tr>
<tr>
<td>a. “International Fugitive From Justice”</td>
<td>30</td>
</tr>
<tr>
<td>b. “Pursuing State” and “Host State”</td>
<td>34</td>
</tr>
<tr>
<td>c. “Rendition”</td>
<td>38</td>
</tr>
<tr>
<td>d. “Extradition” and “Summary Extradition”</td>
<td>42</td>
</tr>
<tr>
<td>e. “De Facto Extradition” and “Disguised Extradition”</td>
<td>50</td>
</tr>
<tr>
<td>f. “Surrender”</td>
<td>52</td>
</tr>
<tr>
<td>g. “Lure and Capture Operation”</td>
<td>54</td>
</tr>
<tr>
<td>h. “Seizure and Delivery Operation”</td>
<td>55</td>
</tr>
<tr>
<td>CHAPTER 2 – Subject Matter Jurisdiction</td>
<td>59</td>
</tr>
<tr>
<td>a. Concept of Jurisdiction</td>
<td>59</td>
</tr>
<tr>
<td>b. Requirements for State Criminal Jurisdiction</td>
<td>68</td>
</tr>
<tr>
<td>c. Subject Matter Jurisdiction: Scope and Dynamics</td>
<td>69</td>
</tr>
<tr>
<td>i. Territorial Jurisdiction</td>
<td>71</td>
</tr>
<tr>
<td>ii. Extraterritorial Jurisdiction</td>
<td>79</td>
</tr>
<tr>
<td>iii. Establishing, De-conflicting, and Extending Jurisdiction</td>
<td>97</td>
</tr>
<tr>
<td>iv. Contrast with Concurrent Jurisdiction</td>
<td>101</td>
</tr>
</tbody>
</table>
CHAPTER 3 – “Silver Platter” Scenarios 113

   a. Action by the Fugitive 114
   b. Action by Private Actor(s) 119
   c. Action by the Host State or an International Tribunal 126

PART II – EXTRADITION AND ITS IMPEDIMENTS 131

CHAPTER 4 – Extradition 132

   a. Aims 133
   b. Status 137
   c. Vehicles 141
   d. Mechanics 157
   e. Adaptability 168
   f. Developments 177

CHAPTER 5 – Impediments I: Legal Standards and Procedures 189

   a. Inherent Nature and Scope of Offense 191
      i. Extraditable Offense 191
      ii. Dual Criminality 194
      iii. Prescription 204
      iv. Specified Offense Exclusions 206
   b. Evidentiary Standards 220
   c. Procedural Requirements 226
   d. Government Processing 230

CHAPTER 6 – Impediments II: Individual Status and Circumstances 237

   a. Nationality or Residency Bars 237
   b. Immunities 249
   c. Special Relationships 262
   d. Personal Circumstances 272

CHAPTER 7 – Impediments III: State Relations and Sensitivities 275

   a. Bilateral Relations 275
   b. Justice System Interplay Restrictions 282
      i. Double Jeopardy 282
      ii. Specialty 285
      iii. Concurrent Proceedings 290
   c. Competing Jurisdictional Claims 291
   d. International Human Rights Concerns 294
      i. Substantive Issues 295
      ii. Procedural Issues 317
   e. Peace, Security, and Foreign Policy Considerations 323
### PART III – REMEDIAL AND COLLATERAL MEANS TO SECURE EXTRADITION

#### CHAPTER 8 – Revisions, Inducements, and Interventions

<table>
<thead>
<tr>
<th>Options Based on Legal Procedures</th>
<th>330</th>
</tr>
</thead>
<tbody>
<tr>
<td>Options Requiring Bilateral Diplomacy</td>
<td>332</td>
</tr>
<tr>
<td>Options Entailing a Third-Party Role</td>
<td>337</td>
</tr>
</tbody>
</table>

### PART IV – FALBACK ALTERNATIVES TO EXTRADITION

#### CHAPTER 9 – Partial or Redirected Alternatives

| Independent Measures to Facilitate a Fugitive's Capture or Return | 349 |
| Reliance on Others to Locate or Arrest a Fugitive Abroad | 354 |
| Assistance From or Coordination with the Host State | 354 |
| Third-Party Support | 362 |
| Avenues of Recourse Under Another's Judicial System | 371 |

### PART V – FULL-SCALE ALTERNATIVES TO EXTRADITION

#### CHAPTER 10 – Alternative I: Reliance on Immigration Laws

| Immigration Law | 392 |
| Removal v. Extradition | 403 |
| Application | 407 |
| Why Removal is Appealing | 407 |
| How Removal Operates | 409 |
| Removal Considerations | 413 |
| Human Rights and International Humanitarian Law Protections | 415 |
| Law Relevant to Removing State Conduct | 415 |
| Law Relevant to Receiving State Conduct | 431 |
| Law Relevant to the Removal Method | 445 |
| “Disguised Extradition” | 448 |

#### CHAPTER 11 – Alternative II: Informal Law Enforcement Cooperation

| Definition, Nature, and Scope | 467 |
| Application | 470 |
| Host State Motivation | 470 |
| Host State Participation | 471 |
| Host State Acquiescence | 478 |
| Lawfulness Analysis | 482 |
| General Principles | 483 |
| Specific Grounds | 488 |
| Case Study: Öcalan v. Turkey | 494 |
CHAPTER 12 – Alternative III: Unilateral Measures

b. Application 502
   i. Negotiations for the Fugitive’s Return 502
   ii. Unilateral Lure and Capture Operations 504
   iii. Unilateral Seizure and Delivery Operations 509
   iv. Interception or Commandeering Operations 514
c. Lawfulness Analysis 518
   i. Lure and Capture Operations (All Kinds) 518
   ii. Unilateral Seizure and Delivery Operations 526
      a. Territorial Sovereignty Analysis 527
      b. Treaty Compliance Analysis 539
      c. Human Rights Analysis 548
   iii. Interception or Commandeering Operations 551
      a. Territorial Sovereignty Analysis 551
      b. Treaty Compliance Analysis 552
      iv. Cross-Cutting Justifications 558

PART VI – POST-RETURN REVIEW, RE COURSE, AND IMPACT 568

CHAPTER 13 – Judicial, Diplomatic, and Policy Dimensions 569

a. Judicial Considerations 569
   i. Personal Jurisdiction 570
      a. *Male Captus Bene Detentus* 571
      b. State Practice and Modern Trends 576
      c. Abuse of Process and Inherent Supervisory Powers 588
   ii. Individual Standing 593
b. Diplomatic Remedies 598
   i. Demands 599
   ii. Retaliation 603
   iii. Engagement 605
c. Policy Implications 606

CONCLUSION 610

a. Summary 610
b. Observations 612
c. Recommendations 619
   i. Increase Use and Effectiveness of Extradition 619
   ii. Render Operational Full-Scale Alternatives to Extradition Less Necessary 621
   iii. Render Operational Full-Scale Alternatives to Extradition Less Desirable 622
   iv. Diminish Risk of Retaliation Following Unilateral Operations 625
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>APPENDIX I: TREATIES</td>
<td>A-1</td>
</tr>
<tr>
<td>APPENDIX II: CASES</td>
<td>A-17</td>
</tr>
<tr>
<td>APPENDIX III: NATIONAL CONSTITUTIONS AND LEGISLATION</td>
<td>A-60</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>B-1</td>
</tr>
</tbody>
</table>

xxii
INTRODUCTION

This dissertation concerns the often dramatic, yet at times incongruous, world of capturing and delivering international fugitives from justice. This topical and dynamic subject lies at the crossroads of law and politics, of municipal and international law, and of law enforcement and individual rights. This subject also gives rise to the full spectrum of inter-State relations running the gamut

---

1 This study includes references to undercover operations, forcible seizures, and even military interventions. A U.S. appellate court judge described the facts of one such case as "present[ing] elements one might expect to encounter in a grade-B film scenario – an organized underworld conspiracy to import massive quantities of heroin into the United States, and American agents kidnapping the leading perpetrators from South America to bring them to trial." United States ex rel. Lujan v. Gengler, 510 F.2d 62, 63 (2d Cir. 1975) (Kaufman, C.J.), cert. denied, 421 U.S. 1001 (1975).

All citations in this dissertation conform to THE BLUEBOOK: A UNIFORM STYLE OF CITATION (Colum. L. Rev. Ass’n, et al. eds., 19th ed. 2010), the most widely adopted form of legal citation in the United States.

2 "International fugitive from justice," along with other core terms pertinent to this study, will be defined and explicated in Chapter 1 or elsewhere in due course. Such terms also may be found in the Glossary.

3 The terms "municipal," "domestic," "national," and "State," when used as modifiers to such terms as "law," "legislation," or "courts," are intended to be interchangeable throughout this dissertation.

4 The term "State" herein refers to nation-states and appears in upper case (unless quoting a source in lower case) to distinguish it from those sub-national entities of the same name: "state" (e.g., California, Florida, or Ohio). "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." American Law Institute (ALI), RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987), May 14, 1986, available at http://internationalcriminallaw.org/Restatement(Third) of Foreign Relations Law/RSecs334_401-04 411 432 442.PDF (last visited on Nov. 9, 2013) [hereinafter RESTATEMENT (THIRD)]; accord Montevideo Conv. on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, reprinted in 28 AJIL 75 (1934). Some scholars have added other or re-characterized existing criteria for Statehood, such as legal independence, political autonomy, and formal acceptance as such by the international community, e.g., Michael Ross Fowler & Julie Marie Bunck, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 36-61 (1995); and/or a willingness to observe international law and a certain degree of civilization. James Crawford, Brownlie’s Principles of Public International Law 134 (8th ed. 2012) [hereinafter CRAWFORD, Brownlie’s Principles]. From a legal perspective, all States are treated herein as equal regardless of their political, military, or material strength, whether they are a “dwarf” or a “giant.” Satyadeva Bedi, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 28 (1968) (quoting Emmerich de Vattel, I The Law of Nations or the Principles of Natural Law, Book 7 (J.B. Scott, ed. reprinted in 1964)).
from diplomatic cooperation to political tensions to open hostility; involves extraterritorial conduct that bores to the heart of State sovereignty; and implicates a diverse array of public international law (PIL) subject areas, ranging from immigration and treaty law to the law of the sea and United Nations law to human rights and criminal law. This dissertation begins with an examination of the general features of the inquiry at hand.

a. The Inquiry
i. Nature and Purpose

The nature of this inquiry can best be mapped via a hypothetical scenario. Suppose a crime such as corporate fraud or manslaughter has been perpetrated on State A’s territory, or weapons or narcotics have been illegally trafficked into State A, or a violation of State A’s laws such as currency counterfeiting or treason\(^5\) has occurred outside its boundaries, or other unlawful conduct has occurred in virtual space, such as by the Internet posting of classified government documents of State A or of an insult to a royal family member of State A under its lèse majesté\(^6\) laws. A prosecutor from State A then charges the crime’s chief suspect under State A’s domestic law based on a combination of eyewitness testimony and physical evidence. Before the charged individual can be arrested, however, he\(^7\) travels to a neighboring country, State B, of which he is a national.\(^8\) (Alternatively, he already may have fled to State B after escaping

---

\(^5\) E.g., Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (U.S. national charged with broadcasting anti-U.S. propaganda from Germany during World War II), cert. denied, 336 U.S. 918 (1949), reh’g denied, 336 U.S. 947 (1949).

\(^6\) Lèse majesté, which means literally “injured majesty,” refers to crimes that insult, threaten, or violate the dignity of a sovereign power, sometimes extended to include visiting heads of State. See, e.g., Thailand, Crim. Code B.E. 2499 (1956), art. 112, as amended, Crim. Code (No. 17), B.E. 2547 (2003), available at \text{http://www.samuiforsale.com/law-texts/thailand-penal-code.html\#106} (last visited on Nov. 10, 2013) (“Whoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years.”). Such laws can extend to authors who post views on the Internet. See, e.g., James Hookway, “Thai Man Jailed for His Monarchy Comments,” \textit{Wall St. J.}, Dec. 27, 2012, at A8 (discussing how Katha Pajariyapong had been arrested in Bangkok in 2009 and sentenced to a four-year prison term in 2012 for posting comments on the Internet speculating about Thai King Bhumibol Adulyadej’s health).

\(^7\) The use of “he” or “his” in definitions, hypothetical examples, or non-case-specific legal analysis, whether in reference to a fugitive, government official, or otherwise, is intended strictly for shorthand convenience, and accordingly is to be understood as gender neutral.

\(^8\) For present purposes, a “national” is “a natural person upon whom [a State] has conferred its nationality . . . in conformity with international law.” Draft Conv. on Research in Int’l Law of the Harvard Law School, “Jurisdiction with Respect to Crime,” 29 AJIL 435, 473 (Supp. 1935) (not
from police custody or prison following a criminal conviction but before receiving or completing his sentence, respectively. 9)

State A subsequently submits official requests to State B to locate, provisionally arrest, 10 and extradite the fugitive, seeking his return to face criminal charges (or to receive and/or serve out his sentence). State B law enforcement authorities find, apprehend, and temporarily detain the fugitive, but he does not consent to return to State A, and is not otherwise accidentally returned. State B may choose to extradite him but also may refuse on one of many grounds, including that, under its constitution or statutory law, State B is barred from extraditing one of its own nationals. 11

formally adopted by States) [hereinafter Harvard Research]. According to the International Court of Justice (ICJ), nationality has “as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties,” and therefore much latitude exists for States claiming a fugitive as one of its own. Nottebohm Case (Liech. v Guat.), Second Phase, Judgment, [1955] I.C.J. Rep. 4, 23 (Apr. 6), available at http://www.icj-cij.org/docket/files/18/2674.pdf (last visited on Nov. 2, 2013). For example, the Japanese government decided to treat Alberto Fujimori as a Japanese national, because, consistent with Japanese legislation, his father was a Japanese national at the time of Alberto’s birth, notwithstanding the fact that Alberto had served as the President of Peru. Arnd Dürer, The Extradition of Nationals: Comments on the Extradition Request for Alberto Fujimori, 4 German L.J. 1165, 1167-68 (2003). Nationality can arise as a function of birth or naturalization. There may even be differences of opinion within a State’s government regarding whether a given individual is a bona fide national of that State. See, e.g., Marjorie Miller, "Mexico Prepares to ‘Deport’ Salcido to Stand Trial in U.S. Murder Spree," L.A. Times, Apr. 21, 1989, available at http://articles.latimes.com/1989-04-21/news/mn-2169_1_ramon-salcido-salcido-s-wife-mexican-authorities (last visited on Aug. 15, 2014) (noting dispute between the Attorney General’s Office and Ministry of Foreign Affairs of Mexico regarding whether Ramon Salcido, who was born in Mexico but then in his teens left for the United States, had renounced his Mexican nationality by virtue of residing for nine years there and assuming permanent residency status through his marriage to an American woman).

A national of a given State is generally, but not necessarily, also a “citizen” of that State; the distinction, where it exists, tends to lie in citizens having certain additional political rights, such as the right to vote and stand for elected office. See, e.g., Immigration and Refugee Board of Canada, Peru: Information on the distinction between citizenship and nationality, May 1, 1997, PER26857.E, available at http://www.refworld.org/docid/3ae6ab83a8.html (last visited on Jan. 11, 2014) (provided during a telephone interview by an official at the Embassy of Peru in Ottawa).

9 An example of an extradition request related to an escape from prison can be found in In re Requested Extradition of Smyth, 863 F. Supp. 1127 (N.D. Cal. 1994) (an IRA prison inmate in Northern Ireland escaped and fled to San Francisco after completing only five years of a 20-year sentence), rev’d, 61 F.3d 711 (9th Cir. 1995), amended, 73 F.3d 887 (9th Cir. 1995), cert. denied, 518 U.S. 1022 (1996).

10 A “provisional arrest” is the temporary arrest of a fugitive made on an emergency basis at the behest of a pursuing State (or international criminal tribunal) prior to but in anticipation of an extradition (or surrender) request.

11 In May 2011, while on the tarmac awaiting departure of his Air France flight from New York to Paris, Dominique Strauss-Kahn, then-President of the International Monetary Fund (IMF) and a prominent French politician with presidential aspirations, was arrested by U.S. law enforcement
Despite a number of recent and meaningful improvements to the international extradition system (discussed in Chapter 4.f infra), there remain many impediments that obstruct or at least complicate the transfer of known or alleged criminals from one State to another for the purpose of bringing them to face justice.\textsuperscript{12} To the extent, then, that extradition is: (i) unavailable – whether because it has been unsuccessfully pursued or, because under the circumstances, including the absence of an extradition treaty and/or a bilateral political climate non-conducive to extradition,\textsuperscript{13} it is reasonably anticipated that it will be denied if sought\textsuperscript{14} – or (ii) undesirable whether because its procedures are deemed too onerous or time-consuming, its outcome too uncertain, and/or more expeditious or predictable means are preferred\textsuperscript{15} – which lawful recourses, including

\begin{footnotesize}
\textsuperscript{12} These “impediments” will be examined in Chapters 5-7 infra. Suffice it to say at this juncture, as one legal commentator has observed, that “there is ample opportunity for the extradition process to fail, and fail it does with ordinary offenders.” Alona E. Evans, The Apprehension and Prosecution of Offenders: Some Current Problems, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 494 (Alona E. Evans & John F. Murphy eds. 1978).

\textsuperscript{13} For example, Israel and its Arab neighbors lack extradition arrangements with one another.

\textsuperscript{14} Sometimes host States will make clear in advance that any request for extradition of a given individual will be denied. For example, British officials warned that Sarah Ferguson, the Duchess of York, would not be extradited to Turkey for charges related to her covert filming of a documentary in Turkish orphanages. Bruce Zagaris, Turkish Government Pursues Criminal Charges Against Duchess of York, 28 IELR 88 (2012). But a State may, for reasons of principle or in combination with political pressure, still choose to submit an extradition request.

\textsuperscript{15} See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 398-99 (1993) [hereinafter NADELMANN, COPS] (recognizing that States may pursue
remedial or collateral approaches, or alternatives, to extradition,\textsuperscript{16} does a State have for bringing a charged or convicted individual ultimately to justice?\textsuperscript{17}

In a departure from convention, this dissertation does not test a particular hypothesis or proposition, but rather aims to present a novel and robust framework for the operational and legal analysis of recovering fugitives abroad. It addresses how States, working alone or in cooperation, strive to secure the custody of fugitives in order to bring them to justice\textsuperscript{18} through prosecution or punishment,\textsuperscript{19} while evaluating the propriety of those pursuit efforts under international law.\textsuperscript{20}

\textsuperscript{16} The term “alternatives to extradition” herein refers expansively to all measures, methods, and mechanisms, whether ultimately regarded as lawful or unlawful, that: (i) fall outside the extradition regime, (ii) aim to bring a fugitive to justice fully or partially, directly or indirectly, and (iii) do not entail a fugitive’s delivery as a function of sheer fortuity.

\textsuperscript{17} Although rare, a State may choose for one reason or another not to actively seek the custody of fugitives and therefore pursue neither extradition nor one of its alternatives. For example, until 1982, with one notable exception (i.e., the requested extradition of naturalized U.S. citizen Hermine Braunsteiner Ryan in 1973 for multiple counts of murder committed while she was a guard at the Lublin Concentration Camp in Poland), the Federal Republic of Germany (FRG) did not seek extradition from the U.S. of former Nazis, as it was reluctant to prosecute Ukrainians, Lithuanians, and other individuals not of German origin and who acted beyond the territorial borders of Nazi Germany during World War II. James W. Moeller, \textit{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, 810 & n.86 (1985). Likewise, for over 20 years between 1962 (the year in which Adolf Eichmann was hanged) and October 1983 (with the case of Ivan Demjanjuk, discussed infra), the Government of Israel ceased to prosecute any Holocaust cases, and only under pressure did it eventually lay down strict criteria for trying Nazis and their collaborators; namely, the accused must have committed murder with his or her own hands, the accused must be relatively young and in good health, and there must be Jewish eyewitnesses who could testify about such crimes in Israel. Christopher H. Pyle, \textit{Extradition, Politics, and Human Rights} 245-46 (2001).

\textsuperscript{18} In this study, “bringing to justice” is defined as a law enforcement action with the end result of: (i) prosecuting an individual for a charged crime; (ii) sentencing or punishing an individual who escaped from custody following his conviction but before sentencing or punishment could be effected; or (iii) re-incarcerating an individual who escaped from prison.

\textsuperscript{19} Criminal punishment frequently, but not always, consists of a prison term; other possibilities include fines, curfews, discharges, community service, hard labor, or the death penalty. For simplicity sake and because extradition treaties characteristically call for conduct punishable by some form of imprisonment or deprivation of liberty, imprisonment is the presumed type of criminal sentence at issue for purposes of this analysis.

\textsuperscript{20} Even if a pursuing State ultimately succeeds in bringing a fugitive to justice, however, the potential future injury and damage he can cause, directly or through his agents, does not necessarily cease, even if sentenced for life. A fugitive could escape from incarceration, including while on a furlough; he could eventually be set free early based on a grant of amnesty or a political deal, and return to a life of crime; he could wreak havoc from his prison cell through agents he still controls; or his associates could seek his release through blackmail, ransom, or violence. See, e.g., Mary Anne Weaver, “Terrorist’s Extradition Ends Greek Legal Battle,” \textit{Wash. Post}, Oct. 4, 1976, at 24 (discussing how Rolf Pohle, a member of West Germany’s Baader-
With that perspective in mind, it is hoped this study will contribute primarily to the work of government officials who handle international criminal law enforcement matters, principally those hailing from foreign affairs and justice ministries, as well as their in-house legal advisers. The aim is to assist such officials when contemplating extradition or one of its alternatives to ensure they make informed, sound, and lawful decisions by fully appreciating the range of options available and their corresponding legal implications. This study should also prove beneficial to legal scholars with an interest in international criminal law and to private practitioners representing fugitives.

At the same time, this analysis in no way intends to suggest that the extradition system is broken or hollow – indeed, it serves an indispensable function, operates reasonably well in the vast majority of instances, and continues to represent the generally preferred means of bringing fugitives to justice. Similarly, there is no intention here to imply that alternatives – such as a requested deportation, informal law enforcement cooperation, or a lure and capture operation – should displace extradition altogether, but rather acknowledges that in today’s world neither extradition nor its alternatives alone

---

21 This analysis does not purport to address individual remedial measures for fugitive defendants, such as the dismissal of an indictment, the reversal of a conviction, or monetary relief under domestic laws, see, e.g., Sosa v. Álvarez-Machain, 542 U.S. 692 (2004) (addressing liability under the Federal Tort Claims Act (FTCA) and the Alien Tort Statute (ATS)). Likewise, this analysis does not address remedies for the victims of underlying criminal acts. See generally ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW (2004).

22 Richard Downing, Recent Development, The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil, 26 STAN. J. INT’L L. 573, 577 (1989-90). At the same time, however, it should not be overlooked that effecting an arrest pursuant to an extradition request can present its own set of risks. For example, in May 2010, when, pursuant to a U.S. extradition request, Jamaican police sought to apprehend Christopher (Dudus) Coke, the leader of Tivoli Gardens in West Kingston, a “garrison community” that he effectively controlled, the assault resulted in the deaths of no fewer than 74 persons while failing to locate Coke, who was only discovered adventitiously a month later at a roadblock disguised as a woman. Mattathais Schwartz, A Report At Large: A Massacre in Jamaica, THE NEW YORKER, Dec. 2011, at 64, 69.

23 NADELMAN, COPS, supra n.15, at 398.

24 Each of these approaches, as well as others, will be discussed extensively in Part V infra.
will suffice.25 The two must co-exist while meeting complementary functions.26 While recognizing the additional risks and legal complications that alternatives to extradition can impose and while seeking to mitigate those risks (see Recommendations in the Conclusion), this dissertation adopts a neutral posture regarding the relative policy desirability of extradition or its alternatives in a given instance, and is concerned solely with identifying all available operational options for bringing a fugitive to justice and evaluating the extent of their lawfulness.27

ii. **Scope**

Beyond the nature and purpose of this inquiry, it is also critical to set clear parameters governing its scope, specifically with regard to the types of players and crimes at issue, the geographic coverage, and the sources and character of applicable law. In the present context, subjects of interest must be natural persons – not States28 or legal or juridical persons such as businesses or organizations. In addition, the subject must be a convicted or alleged criminal

---

25 As one legal commentator has observed, “extradition cannot meet all contingencies arising out of a fugitive’s taking asylum abroad” and the ‘alternatives’ supplement, but do not supplant, nor are they intended to supplant, the formal process of extradition.” Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 B.Y.B.I.L. 77, 103 (1964). See also Bruce Swartz, Dep’y Asst. AG, in Testimony before the Criminal Justice, Drug Policy, and Human Resources Subcomm. of the House Gov’t Reform Comm. on Oct. 1, 2003 (“Solving the Extradition Problem”), available at http://www.gpo.gov/fdsys/pkg/CHRG-108hrrg92899/html/CHRG-108hrrg92899.htm (last visited on Nov. 10, 2013) (“Although important and effective, formal extradition is not the only mechanism available for obtaining the international surrender of fugitives.”); David P. Warner, *Challenges to International Law Enforcement Cooperation for the U.S. in the Middle East and North Africa: Extradition and Its Alternatives*, 50 VILL. L. REV. 479, 507 (2005) (observing that “[e]xtradition and its alternatives are tools that enable governments to locate, apprehend and return fugitives to face justice. In the context of the Middle East and North Africa, the focus must be on the alternatives given a dearth of bilateral extradition treaties between the United States and countries throughout the region.”).

26 *Cf. M. Cherif Bassoouni, International Extradition and World Public Order* 184 (1974) (the purpose of alternatives is merely to supplement the formal process of extradition). An analogy may be drawn with an inter-governmental organization (IGO) maintaining both informal and formal workplace dispute resolution mechanisms, each having its own purpose and function, but the IGO sometimes needing to rely on formal mechanisms (e.g., arbitration) while under other circumstances wanting to make informal systems (such as mediation or the use of an ombudsperson) available to its employees.

27 Likewise, while this study adopts the perspective of law enforcement in tracking down fugitives and bringing them to justice, the legal analysis strives to be balanced and accordingly is neither pro- nor anti-fugitive.

who is “wanted” for law enforcement purposes, rather than a mere suspect, a material witness in an investigation, or a missing person. Convicted criminals include those who have escaped from police custody or prison before receiving or serving out their assigned sentences, while alleged ones have been charged with a crime (or the functional equivalent thereof), whether in public or secret proceedings, and whether as its author, an accomplice, or a co-conspirator.

29 When suspects are involved, States typically invoke mutual legal assistance treaties (MLATs), versus extradition treaties, that authorize the collection of evidence, the taking of witness statements, the provision of data, the return of property, and the like. See, e.g., Mutual Legal Assistance Treaty, Braz.-Cuba, Decree 6,462, May 21, 2008.

30 Because the focus of this study is on fugitives, it does not address the numerous circumstances in which a State might try to obtain custody over non-fugitives to meet various national interests, such as: (i) to return persons illegally seeking immigration (see, e.g., Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (discussing seizures of Haitian boat people on the high seas and returned to Haiti)); (ii) to arrange for a prospective prisoner exchange of one’s own spies or other government assets (e.g., in 1964, Greville Wynne, a British spy convicted of espionage by the Soviet Union, was exchanged for Conon Molody, better known as Gordon Lonsdale in the U.S., who spied for the Soviets and was convicted to a 15-year sentence, AP, “Greville Wynne, Spy for Britain in the Soviet Bloc, Is Dead at 71,” N.Y. Times, Mar. 2, 1990, available at http://www.nytimes.com/1990/03/02/obituaries/greville-wynne-spy-for-britain-in-the-soviet-bloc-is-dead-at-71.html (last visited on Feb. 19, 2012)); (iii) to serve the language and cultural needs of national spy schools (see Justin McCurry, “North Korea’s Kidnap Victims Return Home after 25 Years,” The Guardian, Oct. 16, 2002, available at http://www.theguardian.com/world/2002/oct/16/northkorea.japan (last visited on Oct. 27, 2013) (discussing how in the late 1970s and early 1980s more than a dozen Japanese nationals were seized by and taken back to North Korea presumably to train its spies in Japanese culture and language); or (iv) to impede progress on an enemy weapons program (e.g., Germany’s Werner Heisenberg, who had been appointed director of the Kaiser-Wilhelm Institute, a nuclear research facility in Berlin and was critical to its atomic weapons program, was considered as a target for capture, KAI BIRD & MARTIN J. SHERWIN, AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER 222 (2005)).

31 To be “charged” does not necessarily mean an individual has been indicted; “[a]n accusation of a crime supported by an arrest warrant [or an intent to prosecute] is sufficient.” M. CHERIF BASSIOUNI, INTERNATIONAL EXTRACTION: UNITED STATES LAW AND PRACTICE 888 (6th ed. 2014) (citing In re Assarson, 687 F.2d 1157, 1162 (8th Cir. 1982)). Swedish law is a notable exception; under that system, the national prosecutor, which conducts both the investigation and prosecution, seeks extradition after the preliminary investigation is over but only formally charges an individual after completing the investigation, including an interrogation on Swedish soil. This provision played out in the highly publicized case in which Sweden successfully sought the approved extradition from the U.K. of Julian Assange, the founder and editor-in-chief of Wikileaks, a “whistleblower” website responsible for disclosing hundreds of thousands of classified U.S. Government documents, for pre-indictment questioning by Swedish prosecutors in connection with one count of unlawful coercion, two counts of sexual molestation, and one count of rape in Stockholm in August 2010, unrelated to his organization’s mission or actions, as alleged by two Swedish women who were serving as Wikileaks volunteers. The fact that Mr. Assange was extradited prior to formal indictment was little more than a function of an unusual feature of the Swedish criminal law system, wherein formal charges only follow a second round of suspect questioning. It is also significant that the prosecutors had identified the legal violations (four counts) when they issued the extradition request, which reflects a more advanced stage than mere suspect questioning. Furthermore, a European Arrest Warrant (EAW) (discussed infra, beginning in Chapter 4.c) was issued by Swedish prosecutors only after it had been subject to independent scrutiny by a Swedish court. The U.K. Supreme Court found that, under the operative EAW system, the Swedish prosecutor was equivalent to a “judicial
The subject could be a national of the State seeking his physical custody, the State in which he is currently located, or even a third State. The subject must be pursued because of his individual actions – not solely as the agent or representative of or merely because of an affiliation with, a government.\footnote{Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 882 (1993) [hereinafter Nadelmann, *International Rendition*].} In addition, this dissertation does not address the extradition or alternative means of securing the custody of minors (i.e., those under the age of majority, typically 18), as not only do they represent a negligible portion of the actual or alleged fugitive population, but also because special protective rules typically apply to them.\footnote{Some States, for example, refuse to extradite on the grounds that the alleged offender is a minor. See Sibylle Kapferer, Dep’t of Int’l Protection, U.N. High Commissioner for Refugees, Legal and Protection Policy Research Series, *The Interface Between Extradition and Asylum*, PPLA/2003/05, Nov. 2003, ¶ 112 & n.212, available at http://www.refworld.org/docid/3fe846da4.html (last visited on Nov. 7, 2013) (citing Belgium and Spain as examples). Others impose conditions that require compliance with certain minimum standards; e.g., Canada Extradition Act, June 17, 1999, as amended July 19, 2005, art. 47, available at http://laws-lois.justice.gc.ca/eng/acts/E-23.01/FullText.html (last visited on Nov. 10, 2013) (the Minister may refuse an extradition request if he is satisfied that: “(c) the person was less than eighteen years old at the time of the offense and the law that applies to them in the treaty over which the extradition partner has jurisdiction is not consistent with the fundamental principles governing the Youth Criminal Justice Act”); Switzerland, Federal Act on International Mutual Assistance in Criminal Matters [Act on International Criminal Assistance, or IMAC], Mar. 20, 1981, art. 33, as amended (updated to Jan. 1, 2010) (unofficial translation), reprinted in 20 ILM 1339 (1981) (where extradition requested, juveniles under 18 “shall, if possible, be repatriated by the juvenile authorities. The same applies for persons between 18 and 20 if extradition could endanger their mental development or social rehabilitation.”). Other international instruments also may have direct relevance to extradition or its alternatives; for example, with respect to Article 38 of the Convention on the Rights of the Child (CRC), the Committee on the Rights of the Child adopted a General Comment noting, *inter alia*, that “States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.” Committee on the Rights of the Child, Gen. Cmt. No. 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 39th Sess., Sept. 1, 2005, ¶ 28, available at http://www.unhchr.ch/tbs/doc.nsf/898586b1de7b4043c1256a450044f331/532769d21fd8302c1257020002b65d9/$FILE/G0543805.pdf (last visited on Feb. 2, 2012).} Furthermore, as this study is concerned with securing the custody of persons, it does not address the often closely related legal issues regarding the authority,” such as a judge, capable of issuing the arrest warrant. *Assange v. The Swedish Prosecution Authority*, Judgment, [2012] UKSC 22, May 30, 2012, on appeal from [2011] EWHC Admin 2849. Mr. Assange, a 40-year-old Australian, had been arrested by British authorities in December 2010, eventually granted bail, and then resided on an estate under house arrest, and later at the Ecuadorian Embassy as a diplomatic asylee in London pending his extradition. Bruce Zagaris, *British Appellate Court Affirms Assange’s Extradition to Sweden*, 28 IELR 14, 14-16 (2012).
lawfulness of a seizure and/or the admissibility of physical evidence found on or in the property of an accused.\textsuperscript{34}

As for the protagonist of this inquiry, the focus is on States seeking the return of a fugitive abroad. This means that, while some limited discussion will ensue with respect to the roles of: (i) international criminal tribunals;\textsuperscript{35} (ii) U.N. peacekeeping missions;\textsuperscript{36} and (iii) regional organizations,\textsuperscript{37} such treatment will be largely by way of comparison with the role of States and exceptionally with respect to any relevant legal analysis or supportive case law they can provide.\textsuperscript{38} When States pursue a fugitive, they may rely on their own “State officials” (i.e., government employees) or “State agents” who encompass any non-State officials contracted on behalf of a national government to undertake a specific task, project, or mission whose conduct during such time is attributable to that State.\textsuperscript{39} Such

\textsuperscript{34} See, e.g., Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) (addressing the admissibility of amphetamine tablets found in the defendant’s car in Mexico absent a search warrant).

\textsuperscript{35} E.g., the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), or the Nazi war tribunals at Nuremberg, of which there were actually two: the initial International Military Tribunal (IMT) for the major war criminals and the subsequent Nuremberg Military Tribunal (NMT) for lesser war criminals.

\textsuperscript{36} E.g., UNOSOM I or II (Somalia) or UNMIL (Liberia), including any endowed with arrest and detention authority and operating on behalf of an international criminal tribunal.

\textsuperscript{37} E.g., the Caribbean Community (CARICOM), the European Economic Community (EEC), or the NATO-led Implementation Force (IFOR) in Bosnia and Herzegovina (B&H).

\textsuperscript{38} In fact, for a number of crimes no international forum has jurisdiction to prosecute alleged perpetrators, so the responsibility for such criminal prosecutions falls by default to States. See Margaret L. Satterthwaite, The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism, N.Y.U. Public Law and Legal Theory Working Papers, Paper 192 (2010), at 1 n.1, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1192&context=nyu_plttwp&sei-redir=1&referrer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26q%3D%2522international%2522%2522%2B%2522NYU%2BSchool%2Bof%2BLaw%2522%26ie%3DUTF-8%26oe%3DUTF-8#search=%22international%20rendition%20NYU%20School%20Law%22 (last visited on Dec. 26, 2013) (discussing terrorism crimes).

persons could include paid or unpaid private citizens\textsuperscript{40} or even State officials of another government while acting in their personal (non-official) capacity.

Actual or alleged criminal conduct germane to this inquiry broadly consist of violations of municipal or international law enforceable by municipal courts (civilian and military alike\textsuperscript{41}) whether: (1) implicating individual or corporate rights or governmental interests (a) in a single State (such as burglary, gambling, or manslaughter) or (b) across two or more States (such as transborder narcotics trafficking or “childnapping”;\textsuperscript{42}) or (2) constituting offenses against the world community itself (such as crimes against humanity or piracy\textsuperscript{43}). More

\textsuperscript{40} For example, over a century ago, in 1909, a “private individual who was acting under the direction of a German police officer” and who allegedly self-identified as a German police officer himself, lured a Swiss resident named Göntsch across the border into Germany “to search for a lost child” where he was then arrested for espionage. Lawrence Preuss, \textit{Kidnapping of Fugitives from Justice on Foreign Territory}, 29 AJIL 502, 506 (1935). After the Swiss lodged a protest, Göntsch was returned and the German police officer who directed the action was “later censured and dismissed for his part in the incident.” \textit{Id}.

\textsuperscript{41} Violations under military law include those related to military absenteeism and desertion, but, as such, may fall within the military offense exclusion recognized in many extradition treaties (see Chapter 5.a.iv infra).

\textsuperscript{42} “Childnappers” are parents who take their own child away, usually from a divorced or separated spouse with whom the child is residing, contrary to the terms of a court-imposed custody order or arrangement, often but not necessarily by crossing State borders. The recovery of such parental offenders is challenging, in part, because few States recognize such conduct as an extraditable crime (see Chapter 5.a.i infra) and, in part, because the perpetrators often return to States of their own nationality (which may have a law prohibiting the extradition of their own nationals, as addressed in Chapter 6.a infra). See U.S. Department of State, \textit{Foreign Affairs Manual}, Vol. 7 – Consular Affairs, \textit{Other Extradition Matters}, 7 FAM 1640, 1647, updated Feb. 18, 2011, available at \url{http://www.state.gov/documents/organization/86816.pdf} (last visited on Jan. 27, 2012). As a result, the Hague Convention on the Civil Aspects of International Child Abduction, outlines a constructive and creative approach for the recovery of the \textit{unlawfully seized child}, rather than of the perpetrator parent himself, and thereby serves the best interests of the child while vitiating any wrongful gains, even if the offending parent is not ultimately subject to prosecution or punishment. See The Hague Conv. on the Civil Aspects of Int’l Child Abduction, Oct. 25, 1980, available at \url{http://www.hcch.net/index_en.php?act=conventions.text&cid=24} (last visited on Oct. 9, 2013). Instances exist, however, of extradition based on the crime of childnapping. See, e.g., “Eileen Clark Extradition: ‘Final Step in a Very Painful Time,’” \textit{BBC News}, July 5, 2014, available at \url{http://www.bbc.com/news/uk-england-oxfordshire-28169406} (last visited on Aug. 16, 2014) (discussing the case of a woman who fled from the U.S. with her three children to Oxford, U.K., in 1998, but whose challenge of an extradition order failed).

traditional labels, such as “international offenses” and “transnational crimes,” assiduously have been avoided in outlining the crimes covered by this inquiry, as such labels have come to assume multiple meanings and consequently have sown confusion.  

In any event, the point is not to classify types of crimes into defined categories, but rather to underscore how virtually any domestically or universally recognized crime conceivably could be the trigger for an extradition request or an alternative approach to recovering a fugitive.

That said, some crimes are not prone to neat categorization even under the functional typology above. For example, money laundering could occur strictly within the territory of a single State (rather than cross-border), while manslaughter may implicate the interests of two States (rather than one) where, say, the perpetrator is a foreign diplomat. Depending on the circumstance, torture may qualify either as a domestic law violation implicating rights in a


45 This is not to suggest that differences between international offenses (i.e., those directly criminalized by international treaty or customary law) and strictly domestic offenses (e.g., burglary) are not meaningful in the extradition context. One legal scholar noted that international offenses, by contrast with domestic ones, may give rise to universal jurisdiction, are more likely to be treated as exceptions to the political offense exclusion, and fully allow for the operation of the aut dedere aut judicare principle. See Yoram Dinstein, Some Reflections on Extradition, 36 Ger. Y.B. INT’L L. 46, 57-58 (1993). (All referenced concepts will be discussed infra.)
single State or as an international law violation constituting an offense against
the world community. In addition, terrorism is a special case as it may implicate
only one’s State’s interests, as in the case of domestic terrorism, or could be the
product of foreign government financing or other material support and thereby
imbuing it with an international complexion. Finally, while some may question
the role of domestic courts in prosecuting offenses against the world community,
such crimes are not limited to the jurisdiction of international tribunals. For
example, a number of States, notably Austria, France, Germany, and Israel, have
passed legislation permitting them to hold Nazi war criminals accountable, while other States have prosecuted violations arising out of international armed
conflicts on their native soil, such as Croatia, Iraq, and Serbia.

The geographic coverage relevant to this inquiry is global: This study is not
confined to a single State or region or to some particular collection of States with
shared interests (e.g., the British Commonwealth), and intends that its analysis,
conclusions, and policy prescriptions are fully applicable and of interest to States
writ large. At the same time, however, this dissertation places a special
emphasis on the United States (U.S.), which has entered into the most

46 For example, in July 2005, Canada approved a U.S. prosecutor’s presentation of evidence for
the extradition of Tre Arrow (a/k/a Michael Scarpitti), a U.S. citizen, arrested in Victoria
(Canada) in connection with perpetrating two attacks in 2001 against a gravel company and a
logging company, resulting in $250,000 worth of damage as a member of the Earth Liberation
Front (ELF), which the U.S. FBI categorized as a domestic terrorist group. Jed Borod, Vancouver
47 E.g., Nazi and Nazi Collaborators (Punishment) Law, 57 Sefer Ha-Chukhim 281, Aug. 9, 1950,
available at http://www.jewishvirtuallibrary.org/jsource/Politics/nazilaw.html (last visited on
Nov. 3, 2013).
48 For example, after more than six years Croatia secured the extradition from Australia of dual
Australian-Serbian national Dragan Vasiljkovic, who was wanted for alleged war crimes – i.e., for
torturing and killing Croat combatants and civilians along with a foreign journalist – while
commanding a Serbian paramilitary outfit during the armed conflict in the former Yugoslavia for
which the ICTY also retains jurisdiction. Lanai Vasek, “Croatia Bid for Dragan Vasiljkovic
49 “Like pollution, commerce, and war, criminal activity knows no territorial bounds.” Edward M.
Morgan, Criminal Process, International Law, and Extraterritorial Crime, 38 U. TORONTO L.J. 245,
245 (1988).
50 For those less familiar with the U.S. legal system, a brief overview of several critical features
may prove instructive: (i) the U.S. operates under a federalist system of government that divides
jurisdiction over its laws between its 50 individual states and the federal government, so a
fugitive could be indicted by a state or federal prosecutor, tried in a state or federal court, and
sentenced to serve in a state or federal prison; only the federal government, however, may
extradition treaties of any State,\textsuperscript{51} has been a particularly active exponent of bold and/or innovative approaches and alternatives to extradition, and has generated a disproportionately large body of law in this field, although concededly its jurisprudence is not uniformly followed. In addition, the alternatives to extradition explored herein involve either a second (or third) State, or at least non-sovereign territory/international space,\textsuperscript{52} such that a State seeking return of

request extradition from or process extradition to another State, so in such instances, the federal government must represent a state’s interests, 18 U.S.C. §§ 3183 (2012) (covering not only states, but also any U.S. “Territory, District, or Possession”); U.S. Dep’t of Justice, \textit{U.S. Attorney’s Manual}, Title 9, Chapter 9-15.000 (Int’l Extradition and Related Matters), at Chapter 9-15.100, available at \url{http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm} (last visited on Nov. 9, 2013); there is also a Uniform Code of Military Justice (UCMJ) that governs U.S. military law, 10 U.S.C. § 821 (2012); (ii) the U.S. Supreme Court does not hear appeals as a matter of right (with one exception not applicable here), but rather must agree to hear a case based on a so-called petition for a \textit{writ of certiorari}; only about 80 cases on average are heard by the U.S. Supreme Court each year, or about one percent of all cases petitioned, \textsc{Stephen Breyer, Making Our Democracy Work: A Judge’s View} 229 (2010), so in practice U.S. Courts of Appeals are most frequently the final arbiters; there are 12 geographic appellate courts (numbered by circuit) covering 94 judicial districts plus a U.S. Court of Appeals for the Federal Circuit that handles specialized cases, Admin. Office of the U.S. Courts, available at \url{http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx} (last visited on Sept. 7, 2013); and (iii) the United States is a dualist system, so when its executive enters into an international treaty, those provisions do not automatically take effect as U.S. law, but rather must first be adopted in one form or another into U.S. legislation; within the hierarchy of U.S. law, treaties are regarded on par with U.S. statutes but both are subordinate to the U.S. Constitution. \textsc{John M. Rogers, International Law and United States Law} 76 (1999). Where a statute and treaty are inconsistent, the one that last came into effect prevails. \textit{See Whitney v. Robertson}, 124 U.S. 190, 194 (1888) (applying “last in time” rule). To the extent possible, U.S. courts are to interpret U.S. law so as to avoid violating principles of public international law (PIL), \textit{Murray v. Schooner Charming Betsy}, 6 U.S. (2 Cr.) 64, 102 (1804), but Public International Law (PIL) controls only by default “where there is no treaty and no controlling executive or legislative act or judicial decision.” \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900).

\textsuperscript{51} \textit{See n.54 in Chapter 4 infra.}

\textsuperscript{52} This study dispenses with such Latin terms as \textit{terra nullius}, \textit{res nullius}, and \textit{res communis}, as their meanings have become somewhat confused or conflated over time in legal discourse. \textit{See Kathryn Milun, The Political Uncommons: The Cross-cultural Logic of the Global Commons} 57-70 (2011) (discussing and comparing these terms and their definitions); \textit{cf. Malcolm N. Shaw, Public International Law} 492, 533-34 (6th ed. 2008) (distinguishing \textit{terra nullius}, which technically stands for territory in which international law does not recognize a sovereign, from its cousin \textit{res communis}, which constitutes territory that is “generally not capable of being reduced to sovereign control” from space denominated for the time being as the “common heritage of mankind”). Besides, the point here is only to emphasize that there are some places that, whether or not they are potentially susceptible to sovereign acquisition or whether or not they represent part of the global commons, are not recognized by the international community as currently subject to sovereign ownership or control. Accordingly, examples of “non-sovereign territory/international space” for purposes of this analysis include: (i) the high seas, (ii) Antarctica \textit{(see Shaw, supra, at 536 (discussing that continent as having competing territorial claims by seven States but that each claimant State is a party to the Antarctic Treaty, Dec. 1, 1959, art. IV(2), available at \url{http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/update_1959.php} (last visited on Nov. 10, 2013) which suspended all such claims during the duration of the treaty)), (iii) unclaimed islands outside of territorial waters, (iv) the moon, and (v) various lands between the border posts of sovereign States \textit{(e.g., “Namibia: Congolese Refugees Trapped in No-Man’s}
a fugitive must exercise extraterritorial reach. This inquiry is therefore not concerned with either intra-State relations\textsuperscript{53} (\textit{e.g.}, as between two Canadian provinces or American states\textsuperscript{54} or the removal of a defendant between federal districts\textsuperscript{55}), with relationships between a sub-national entity and another State,\textsuperscript{56} or between a State and an international tribunal, except to the extent of illustrating such dynamics by contrast.

The final scope consideration is the source and nature of laws that will be examined. This inquiry takes an inclusive approach to legal sources,\textsuperscript{57} factoring in not only conventional or treaty law (whether bilateral or multilateral and whether aimed at crime suppression, extradition, human rights protection, or otherwise)\textsuperscript{58} and customary international law (CIL),\textsuperscript{59} but also general principles

\footnotesize

\textsuperscript{53} Although some cases examined in this study involve offenses prosecuted in U.S. state courts, in each instance inter-State relations were implicated; \textit{e.g.}, \textit{Kasi v. Commonwealth of Virginia}, 508 S.E.2d 57 (Va. 1998) (Virginia trial court convicted Mir Aimal Kasi, a Pakistani national, of capital murder and related crimes in connection with his shooting of five CIA employees outside CIA Headquarters in Fairfax County, Virginia), cert. denied, 527 U.S. 1038 (1999).

\textsuperscript{54} See, \textit{e.g.}, \textit{Beachem v. Attorney General of Missouri}, 808 F.2d 1303 (8th Cir. 1987) (per curiam) (denying a challenge to the validity of extradition between Maryland and Missouri). \textit{See generally JAMES A. SCOTT, THE LAW OF INTERSTATE RENDITION: A TREATISE} 2-4 (1983) (highlighting “seven fundamental points of difference” regarding the “methods of demanding, arresting and surrendering fugitives from justice” between the international norms and those of the U.S. domestic system).


\textsuperscript{56} In the U.S., for example, extradition is governed by federal law, 18 USCA \textit{§} 3181 \textit{et seq.} (2012), and does not empower states to extradite fugitives to foreign countries. See \textit{supra} n.50.

\textsuperscript{57} See Statute of the ICJ, Apr. 18, 1946, art. 38 [recognizing as applicable sources of law in rendering its decisions “international conventions,” “international custom,” “general principles of [international] law,” and (as subsidiary means) “judicial decisions and the teachings of the most highly qualified publicists of the various nations”].

\textsuperscript{58} Such documents must actually qualify as treaties (versus, say, resolutions, declarations, or guidelines), must have entered into force, and must take account of any reservations, declarations, or understandings invoked by a given State party, although even if a State has only signed but not yet ratified a treaty, it is still expected to “refrain from acts which defeat the object and purpose of a treaty.” Vienna Conv. on the Law of Treaties (VCLT), May 23, 1969, art. 18(a), 1155 U.N.T.S. 332, \textit{reprinted in} 8 ILM 679. The treaty also must not be invalid (\textit{e.g.}, \textit{Treaty on the Basic Relations between Japan and the Republic of Korea}, June 22, 1965, art. II, 2 \textit{JAPAN’S FOREIGN RELATIONS-BASIC DOCUMENTS} 569-572, \textit{available at} http://www.jocu-tokyo.ac.jp/~worldpin/documents/texts/docs/19650622.T1E.html) (last visited on Jan. 20, 2014) (“It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are already null and void.”) (referencing a
of international law, \textsuperscript{59} judicial opinions \textsuperscript{61} (from international tribunals, domestic courts, \textsuperscript{62} and arbitral panels alike), the writings of publicists, \textsuperscript{63} and even soft law. \textsuperscript{64} With the notable exception of immigration law as discussed in Chapter 10

\textsuperscript{59} CIL was formerly known as the “law of nations.” See, e.g., \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 714 (9\textsuperscript{th} Cir. 1992), cert. denied, 507 U.S. 1017 (1993); Michael Akehurst, \textit{Jurisdiction in International Law}, 46 B.Y.B.I.L. 145, 212 (1972-73) [hereinafter Akehurst, \textit{Jurisdiction}] (“The law of nations’ is a translation of the Latin \textit{ius gentium}, which did not mean international law in the modern sense, but those rules of municipal law which were common to all peoples.”). CIL is defined as the “general and consistent practice of states followed by them from a sense of legal obligation.” \textit{Restatement (Third), supra} n.4, § 102(2); accord \textit{North Sea Continental Shelf Cases} (FRG v. Den., FRG v. Neth.), [1969] I.C.J. Rep. 3, ¶¶ 71-73, available at http://www.icj-cij.org/docket/files/52/5561.pdf (last visited on Dec. 26, 2013). CIL, which depends on the consent of States (in Latin known as \textit{jus dispositivum}), does not bind those States that persistently object to the norm. \textit{Restatement (Third), supra} n.4, § 102, cmt. d. “The law of nations’ may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” \textit{Fidartiga v. Pena-Iratal,} 630 F.2d 876, 880 (2d Cir. 1980) (quoting \textit{United States v. Smith}, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

\textsuperscript{61} This analysis will review case law mainly from courts in the State where the fugitive is found (typically to challenge his extradition or deportation) and in the State that has successfully secured his custody (usually to challenge the court’s personal jurisdiction or the specialty rule, discussed infra).

\textsuperscript{62} Decisions of national courts “have been an important source for material on . . . extradition[;] whenever the value of these decisions varies considerably, and many present a narrow national outlook or rest on a very inadequate use of the sources.” \textit{Crawford, Brownlie’s Principles, supra} n.4, at 37 (citing examples including “consent, reciprocity, equality of states . . . the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas”).

\textsuperscript{63} See \textit{Crawford, Brownlie’s Principles, supra} n.4, at 41. \textit{See also} Introductory Comment to Harvard Research, \textit{supra} n.8, at 444 (“[T]he materials which are clearly of the greatest significance for the work of codification are found in the national legislation on penal law and penal procedure and in the adjudications of national courts. If it is true, as a recent writer has suggested, that ‘international law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others’ . . . it follows certainly that an adequate statement of the international law of penal jurisdiction must rest primarily upon a foundation built of materials from the cases, codes and statutes of national law.”) (citation omitted). See also Akehurst, \textit{Jurisdiction, supra} n.59, at 216 (“International law sometimes incorporates rules of municipal law. For instance, a treaty between States may provide that some question related to the subject-matter of the treaty shall be governed by some system of municipal law.”).

\textsuperscript{64} See \textit{Crawford, Brownlie’s Principles, supra} n.4, at 43 (including not only eminent jurists like de Vattel but also by analogy such equally authoritative sources as the ILC’s \textit{Draft Articles on State Responsibility} and the Harvard Research drafts).

\textsuperscript{64} By “soft law” is meant “[g]uidelines, policy declarations, or codes of conduct that set standards of conduct that are not legally binding.” \textit{Black’s Law Dictionary} 1519 (9\textsuperscript{th} ed. 2009). In short, such legal pronouncements are exhortatory rather than mandatory in character. UN General Assembly (UNGA) declarations represent a unique breed; while not binding on member States, as such pronouncements are recommendatory only, there is a strong expectation that members will abide by such pronouncements and “insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon states.” Stephen M. Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International Law,” 73 ASIL Proc. 301, 304 (1979) (quoting a 1962 memorandum issued by the U.N. Office of Legal Affairs and transmitted to the UNGA).
infra, our focus is on criminal as opposed to civil law. While this dissertation addresses domestic law in a myriad of respects (e.g., constitutional or statutory bars to extradition), the thrust of the legal analysis will be based on international law standards. Accordingly, this analysis is not concerned as a legal matter
with instances in which a State intentionally, negligently, or unwittingly violates solely its own domestic law in effecting the transfer of a fugitive to another State.\textsuperscript{67} In addition, although this analysis explores statutes and jurisprudence from both common law and civil law jurisdictions, our focus is strictly on public international law; therefore, commercial and property law,\textsuperscript{68} as well as most other types of private international law,\textsuperscript{69} do not figure into the analysis. Finally, within the arena of international criminal law enforcement cooperation, this study is interested principally in extradition laws and vehicles, although there are a number of references to other such types of cooperation within the context of alternatives to extradition, such as mutual legal assistance and the sharing of intelligence information.

iii. **Significance**

The issue of securing the custody of fugitives has become increasingly important in recent years due largely to three international developments. First, the global prospects for and incidence of crime, particularly of a transnational character, are greater than ever before.\textsuperscript{70} The world is vastly more inter-connected through telecommunications, improved transportation links, and advanced transactional mechanisms.\textsuperscript{71} In addition, commercial markets are expanding,

---

\textsuperscript{67} For example, despite the Bosnian Supreme Court having released Algerian individuals suspected by the U.S. of terrorism on the basis of insufficient evidence against them, Bosnian executive branch officials seized them and handed them over to U.S. authorities. Human Rights Watch, World Report 2003, available at http://www.hrw.org/wr2k3/ (last visited on Nov. 9, 2013).

\textsuperscript{68} This inquiry will not touch on property rights or in rem actions (\textit{e.g.}, \textit{United States v. Saccoccia}, 58 F.3d 757, 784 (1st Cir. 1995)), except to the extent of seizing or freezing a fugitive’s assets (see Chapter 9.a infra).

\textsuperscript{69} One notable exception to this general rule is an examination of the role of professional bondsmen acting beyond national boundaries so as not to forgo their or their companies’ posted bail (see Chapter 3.b infra).

\textsuperscript{70} See Hermann F. Woltring & Joanne Greig, \textit{State-Sponsored Kidnapping of Fugitives: An Alternative to Extradition?}, in \textit{THE ALLEGED TRANSNATIONAL CRIMINAL: THE SECOND BIENNIAL INTERNATIONAL CRIMINAL LAW SEMINAR 117} (Richard D. Atkins ed. 1993). In fairness, not all types of crimes are on the rise. Property crimes throughout much of Europe, for example, have declined in recent years, probably due in part to target hardening. See UNODC, 2010 Crime Report, supra n.43, at 3.

\textsuperscript{71} See David Lauter, “There’s No Place to Hide: Extraditions Have Tripled, and It’s Only the Beginning,” \textit{Nat’l L.J.}, Nov. 26, 1984, at 1 (“Prosecutors said the new emphasis [on extraditions] became necessary as international communications and transportation have increased the ability of criminals to move across borders.”).
fueled by greater opportunities for trade and profit\textsuperscript{72} and the more rapid and efficient movement of goods, services, and capital.\textsuperscript{73} This also means that criminals today can more easily harm one State’s interests while acting from another State’s territory through counterfeiting, financial fraud, and computer hacking,\textsuperscript{74} among other activities. Moreover, the advent of certain transborder crimes can precipitate still others; for example, narcotics trafficking can lead to such attendant crimes as murder to protect cartel profits, money laundering to dispose of unlawful revenues,\textsuperscript{75} and robbery to support individual drug addictions.\textsuperscript{76}

Second, criminals today have more available safe havens\textsuperscript{77} and greater physical mobility,\textsuperscript{78} including porous international borders,\textsuperscript{79} than in times past and


\textsuperscript{73} See Louise I. Shelley, “Obama’s Plan against Transnational Crime Sparks Concern,” July 27, 2011, Terrorism, Transnational Crime, and Corruption Center, George Mason Univ., available at \url{http://policy-traccc.gmu.edu/} (last visited on Sept. 7, 2013) (“Transnational crime will be a defining issue of the 21st century for policymakers - as defining as the Cold War was for the 20th century and colonialism was for the 19th. Terrorists and transnational crime groups will proliferate because these crime groups are major beneficiaries of globalization. They take advantage of increased travel, trade, rapid money movements, telecommunications and computer links, and are well positioned for growth.”); NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 287-88 (2012) (changes in society have promoted new forms of crime, such as money laundering, international counterfeiting, and terrorism, which even though they have been around for a while, their extensive transnational boundary nature is a relatively new phenomenon).

\textsuperscript{74} With respect to the last example, see Mike Nizza, “British Hacker Closer to Facing Trial in America,” The Lede, July 30, 2008, available at \url{http://thelede.blogs.nytimes.com/2008/07/30/british-hacker-closer-to-facing-trial-in-america/} (last visited on Nov. 10, 2013) (describing how U.S. prosecutors sought to secure custody over and try British national Gary McKinnon for hacking into computers belonging to NASA, the U.S. Department of Defense, and elsewhere within the U.S. government in 2001-2002 from his London apartment).

\textsuperscript{75} See Woltring & Greig, supra n.70, at 118 (“[C]onservative estimates place the size of money laundering activities from the sale of certain drugs in the U.S. and Europe to be about $500 billion a year.”). That figure is most likely far higher 20 years on.

\textsuperscript{76} Indeed, it turns out that drug-related crimes are decidedly on the rise. The rate of drug-related crimes in 19 countries that collect long-term data almost doubled between 1995 and 2008. UNODC, 2010 Crime Report, supra n.43, at 3.

\textsuperscript{77} A “safe haven” is defined herein as a State that provides legal protection to an individual (or group) residing within its jurisdictional control while he (or they) carries out unlawful operations and/or evades the reach of overseas law enforcement. Specific safe havens are sought by criminals as operating bases for one or more of three essential reasons: (i) the harboring State politically sympathizes with the criminal’s aims (for example, the Taliban in Afghanistan supported the like-minded al Qaeda terrorist organization for many years); (ii) the harboring government is unable or unwilling to control the criminal conduct either because of a weak police force or collusion by its officers (for example, drug cartels have long and notoriously operated in Colombia with effective impunity); and/or (iii) the harboring State lacks the legal
consequently can more easily evade detection and arrest.\textsuperscript{80} One reasonably would expect such mobility and evasiveness to result in a growing pool of international fugitives. While such statistical data are difficult to pin down, one

---

\textsuperscript{80} See Foster v. Minister for Customs and Justice (2000) 200 C.L.R. 442, 474 (Austl.) (observing that the world today is characterized by “increased mobility”). It is interesting to note that as far back as the 1930s, a U.S. appellate court judge made an observation that resonates equally today: “The rapid advancement and progress in intercommunications amongst nations, and the ease with which a criminal can flee from the country of his crime and seek an asylum in another country, the lessening of national barriers, all tend to minimize the fact that crime has always been considered a local matter.” United States ex rel. Donnelly v. Mulligan, 74 F.2d 220, 221 (2d Cir. 1934) [Manton, J.].


\textsuperscript{80} Some fugitives employ a variety of clever techniques to evade detection for years. For example, Vazquez Mendoza, wanted by the U.S. for armed robbery- and murder-related charges, managed to remain free for almost six years; “[h]e avoided cell phones and modern communications, severed ties to relatives and started a new family under a stolen name. He lived simply in some remote areas of Mexico, protected from the police by neighbors, dense vegetation and terrain best traversed on burro or horse.” Bruce Zagaris, Mexico Arrests Mexican National on U.S. Extradition Warrant for Murder of DEA Agent, 16 IELR 902, 903 (2000).
proxy measure is the number of INTERPOL\textsuperscript{81} “Red Notices”\textsuperscript{82} issued for wanted persons, which increased from 1,077 in 2000 to 2,343 in 2005 to 6,344 in 2010\textsuperscript{83} to 7,958 in 2011.\textsuperscript{84} While these figures may be explained by multiple variables and not a rising tide of fugitives alone, this massive increase in the volume of issued postings for wanted persons abroad over the past decade is noteworthy.

Third, progressively since World War II and particularly since the 1970s and 1980s with the “internationalization of drug enforcement,” the global demand for tracking down and bringing fugitives to justice has increased.\textsuperscript{85} States have asserted more expansive and innovative grounds for extraterritorial jurisdiction (discussed in Chapter 2.c.iii infra) and for exploring alternative means to extradition to secure their physical custody abroad (examples can be found in

---

\textsuperscript{81} INTERPOL, which stands for the International Criminal Police Force, is “the world’s largest international police organization, with 190 member countries.” INTERPOL Website, available at \url{http://www.interpol.int/About-INTERPOL/Overview} (last visited on Sept. 8, 2013). The organization is based in Lyon, France, has seven regional offices, and each of its members maintains a National Central Bureau staffed by its own law enforcement officers. INTERPOL “work[s] to ensure that police around the world have access to the tools and services necessary to do their jobs effectively. [They] provide targeted training, expert investigative support, relevant data and secure communications channels. This combined framework helps police on the ground understand crime trends, analyse information, conduct operations and, ultimately, arrest as many criminals as possible.” \textit{Id.}

\textsuperscript{82} A Red Notice is a posting circulated by INTERPOL (see supra n.81) to national police forces of concern that a particular individual is wanted for arrest by an INTERPOL member State. It is the closest equivalent to an international arrest warrant that exists today. The Red Notice, by contrast with other colored INTERPOL-issued notices that serve other functions, is an efficient mechanism for alerting the international law enforcement community to the identity and possible whereabouts of a fugitive and requesting his arrest and provisional detention pending a formal extradition request from the requesting State. While Red Notices are frequently taken seriously, some governments regard them as a notice to locate a fugitive but not necessarily arrest him absent an extradition request. Nadelmann, \textit{International Rendition}, supra n.32, at 819. In certain instances, the Red Notices may be ignored altogether. See \textit{Id}, “Niger Will Not Extradite Kadafi Son,” Feb. 12, 2012, available at \url{http://news.yahoo.com/niger-not-extradite-kadhafi-son-140030070.html} (last visited on Feb. 12, 2012) (Niger unwilling to arrest and extradite Saadi Kadafi, son of slain Libyan leader Moammar Kadhafi, despite INTERPOL having issued a Red Notice for his arrest); Peter Baker, “Prayer Breakfast Includes Russian Fugitives,” \textit{Wash. Post}, Feb. 5, 2005, at A5 (“U.S. officials said they saw no reason to honor the Interpol red notices” with respect to Russian indictees and partners of billionaire Mikhail Khodorkovsky, Mikhail Brudno and Vladimir Dubov, who attended a prayer breakfast with U.S. President George W. Bush at the White House).


\textsuperscript{85} \textit{NADELLEMAN, COPS, supra} n.15, at 403.
Chapters 9-13 *infra*). This trend is exemplified by the spate of model treaties on international law enforcement cooperation adopted by the United Nations General Assembly between 1985 and the early 1990s; the growing number of multilateral crime suppression treaties related to terrorism, drug trafficking, and other forms of misconduct; by the spawning of specialized criminal tribunals (*e.g.*, the ICTY, ICC, and hybrid courts); and by the frequency with which such cases are featured in the mass media (*e.g.*, involving Viktor Bout, Amanda Knox, and Julian Assange). In March 2003, the Grand Chamber of the European Court of Human Rights (ECtHR) summed up the overall importance of this subject, including its contributing factors, when it stated: "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."\(^{87}\)

b. **The Discourse**

i. **Methodology**

This dissertation adheres to the following six-part methodology. In Part One, it addresses the two foundational elements for this analysis, namely, the definition


\(^{87}\) *Öcalan* v. *Turkey*, App. No. 46221/99, ECHR Judgment, Grand Ch., Merits and Just Satisfaction, May 12, 2005, ¶ 88, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#1%22itemid%22%3d%222001-69022%22]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022#1%22itemid%22%3d%222001-69022%22]]) (last visited on Nov. 2, 2013). This need has been recognized by domestic courts as well. See, *e.g.*, *United States v. Cotrioni*, [1989] 48 C.C.C. 3d 193, 215 (Can.) ("The investigation, prosecution, and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today.").
and explication of core terms and a discussion of the principles and dynamics underlying subject matter jurisdiction. Part One also treats as a background matter the various methods in which fugitives return, or are returned, to the State interested in their prosecution or punishment without any effort on the part of that State or otherwise through mere fortuity, so as to distinguish them from the active pursuit of fugitives via extradition or one of its alternatives, which is the thrust of this inquiry.

In Part Two, this dissertation focuses on extradition, its aims, legal status, various applications (ranging from bilateral extradition treaties to comity88), mechanics (i.e., a step-by-step process for managing and responding to a request), adaptability, and recent developments. This examination describes the nature and operation of extradition as the principal vehicle for securing the custody of a fugitive abroad and sets the stage for a comprehensive analysis of its own impediments and shortcomings that help explain why States may choose to entertain alternatives to extradition in their pursuit of fugitives.

Part Three explores means by which a State can seek to obtain extradition by revamping its approach, creating incentives or disincentives for the host State, or seeking external engagement. Such efforts do not qualify as bona fide alternatives to extradition, as extradition itself remains the ultimate objective.

In Part Four, this study catalogues, describes, and evaluates for their legality under international law standards what are termed herein as fallback alternatives to extradition (those of second-order preference), which comprise partial or redirected means limited to merely locating or arresting a fugitive or those that result specifically in returning the fugitive to another State's judiciary or to an international criminal tribunal to face prosecution.

88 "International comity is said to describe those actions between States based solely on goodwill or courtesy." Harksen v. President of the Republic of South Africa and Others, Const'l Ct. of So. Afr., Mar. 30, 2000, 2000 (2) SA 825, reprinted in 132 ILR 529, 557 n.1 (E. Lauterpacht, et al., eds. 2008).
Part Five explores *full-scale* alternatives to extradition, meaning those whose end result would functionally achieve what extradition seeks, namely, the physical return to one’s own jurisdiction of a fugitive overseas to face prosecution or punishment in one’s own judicial system. Such alternatives fall into one of three categories: those that (i) rely on domestic immigration laws, (ii) exploit informal law enforcement cooperation, or (iii) are undertaken unilaterally.

Part Six considers the implications of the *full-scale* operational alternatives outlined in Part V, which generally being more controversial, give rise to key questions of personal jurisdiction and individual standing, diplomatic recourse (including legal remedies), and consequences for world public order. The Conclusion summarizes the content of the discourse, draws some high-level observations, and advances a set of recommendations to rectify some of the problem areas encountered in this field.

### ii. Features and Challenges

This dissertation has a number of distinctive features that collectively, it is hoped, will enable this dissertation to contribute qualitatively to the literature. These features include:

- The introduction of new, more precise terms; the avoidance of popular yet less helpful ones; and a reliance on fresh definitions that are objective and less problematic;

- A truly global perspective not limited geographically to a single State, a region, or other collection of States;

- A consideration of the full panoply of crimes – not confined to just one type, such as terrorism, war crimes, white-collar crime, or drug trafficking;

- A comprehensive listing and description of all formal and informal extradition or extradition-like vehicles or arrangements;
• A systematic typology of all operative impediments to extradition as opposed to a sampling or notional checklist of available defenses and exclusions;

• A proper delineation regarding “alternatives to extradition” that distinguishes those measures that ultimately bring fugitives to justice under a pursuing State’s judiciary versus those: (i) that aim for a lesser objective; (ii) that seek some variant of extradition; or (iii) that rely on mere fortuity versus a State’s directed efforts to recover a fugitive;

• A discriminating, non-categorical approach to analyzing the lawfulness of operational means that discerns where even controversial means to securing the custody of fugitives may narrowly pass muster under international law standards;

• A consideration of the full set of implications – judicial, diplomatic, and policy – arising out of a State’s exercise of the more aggressive alternatives to extradition;

• Clear distinctions drawn between substantive, procedural, and jurisdictional matters, which are often erroneously conflated;89

• Concrete, real-world illustrations throughout; and

• A practitioner-friendly approach to this field that outlines the pertinent context, issues, and available methods in connection with contemplating whether and how to lawfully seek custody of a fugitive.

To address this complex subject matter while adhering to the methodological approach described above entails a number of challenges that are worth a brief mention. To begin, this subject is indeterminate and evolving, and much of it is based ultimately on voluntary State cooperation. In addition, the coverage is

89 See, e.g., Arlen Specter, “How To Make Terrorists Think Twice,” N.Y. Times, May 22, 1986, at A31 (assuming that the U.S. Supreme Court’s upholding of the conviction in Ker that addressed only personal jurisdiction demonstrated instead that forcible seizures on foreign territory actually are deemed permissible as a substantive matter).
broad in terms of geographical expanse, the nature of criminals (spanning national leaders to those operating on the margins of society, from war criminals to military deserters, and from drug kingpins to celebrity entertainers), and the applicable time period (from centuries-old to present-day situations).

Furthermore, extradition law, which is central to this inquiry, is not generally a major topic in PIL textbooks or in contemporary law school course curricula, and the alternatives to extradition are the subject of even less academic focus. This is probably in no small part due to the fact that extradition defies simple classification. By focusing on the alternatives to extradition, this inquiry raises a host of diverse issues ranging from privileges and immunities to immigration, from State sovereignty to State responsibility, and from diplomacy to the use of force. Finally, this area of law is so deeply suffused with politics to the point where the two often become inseparably co-mingled and the law itself can be difficult to isolate as an independent variable. Examples of politics figuring into this arena can be found with respect to extradition avoidance, as the motivational force behind an extradition request, as a disinclination to extradite to a given State, as a response to extradition approvals or denials, and in the context of alternatives to extradition.

---

90 For example, University of Leicester Law Professor Malcolm Shaw’s popular textbook, Shaw, supra n.52, devotes only 2 pages out of over 1,300 total to extradition.
91 See, e.g., Georgetown University Law Center’s Online Curriculum Guide 2013, available at http://apps.law.georgetown.edu/curriculum/index.cfm (last visited on Sept. 7, 2013) (identifying only one course, International Criminal Law, that addresses extradition, and as only one portion of its overall syllabus, despite claiming to “offer one of the widest selections of law courses in the country”).
93 See C.J. Chivers, “In Swiss Court, Russian Avoids Extradition to the U.S.,” N.Y. Times, Dec. 30, 2005, at A8 (after the U.S. sought the extradition from Switzerland of Russia’s former nuclear energy minister, Yevgeny Adamov, on fraud and money laundering charges, Russia “reacted . . . viscerally, insisting that Mr. Adamov was chosen for prosecution by the United States in hopes of prying nuclear secrets from him.”).
95 See Bruce Zagaris, German Arrest and Extradition of Rwandan Chief Protocol Officer to France Produces Diplomatic Tensions with Rwanda, 25 IELR 1, 1 (2009) (in November 2008, when, pursuant to a request from France, Germany arrested and extradited Rose Kabuye, “the chief
protocol officer for the Rwandan government on French charges that she participated in the 1994 assassination of then Rwandan president Juvenal Habyarimana,“ and Rwanda responded by expelling Germany’s ambassador to Kigali).

* For example, from the beginning of its history, the U.S. was opposed to the seizure of sailors from its ships by the British navy, many of whom were British deserters and faced military trials upon their return. Their seizure was a chronic source of conflict, so when the *HMS Leopard* attacked the *USS Chesapeake* in 1807 and abducted sailors from her crew, U.S. President Thomas Jefferson ordered an embargo on trade with Great Britain, but abductions did not end, and that practice became one of the causes of the War of 1812. *Pyle*, *supra* n.17, at 265.
PART I:

BACKGROUND CONTEXT
CHAPTER 1

CORE TERMINOLOGY: A FRESH LOOK

Over this and the next two chapters, this dissertation examines topics that, in the aggregate, lay the foundation and provide the necessary backdrop for the operational and legal analysis of extradition and its alternatives. This chapter proffers definitions for all terms that are essential to undergirding and developing our discourse, as well as identifies others that can and should be avoided. Chapter 2 examines subject matter jurisdiction and its various underlying principles for extending a State’s extraterritorial reach to bringing a fugitive to justice. Chapter 3 focuses on the various ways in which a fugitive returns, or is returned, to a State interested in his custody but without having to undertake any effort on its own part or in which the fugitive is otherwise delivered by mere fortuity – so-called “silver platter” scenarios.

To begin, we need to understand the meaning of the term, “international fugitive from justice,” as that individual’s custody lies at the centerpiece of this inquiry. We also require a nomenclature for the State that wants to prosecute or punish a fugitive but for which it lacks custody or control, as well as for the State within whose territory the fugitive is located. In addition, the term “rendition” has entered the popular lexicon and regrettably lost its bearings and therefore requires clarification as well as some internal differentiation to appreciate its numerous variants. Furthermore, because the term “extradition” tends to be defined at a superficial level without many of its integral nuances, a more robust definition is herein supplied. A closer look at the term “summary extradition,” as well as the often conflated terms “de facto extradition” and “disguised extradition,” is also warranted. Further, a terminological distinction should be drawn between the functionally similar but contextually oppositional terms “extradition” and “surrender.” Finally, two new terms, “Lure and Capture
Operation” (as a surrogate for a “lure”) and “Seizure and Delivery Operation” (as a substitute for an “abduction” or “kidnapping”) are introduced. This section seeks to provide robust definitions and explications for each of these core terms while justifying any departure from conventional usage.

a. “International Fugitive From Justice”

When precisely is an individual regarded as an international fugitive from justice? A clear definition is important not only so there is no misunderstanding about who is being pursued (or safeguarded, as the case may be) and whether particular treaty provisions or municipal laws apply to such persons, but also because whether an individual qualifies as a fugitive from justice may be relevant to certain domestic judicial considerations, including statutes of limitations and speedy trial obligations.¹ No single authoritative definition of the term “international fugitive from justice” exists, however;² and, indeed, those advanced often contain material differences, particularly with respect to the element of motivation or awareness of such individuals subject to governmental pursuit.³

For purposes of this analysis, the term “international fugitive from justice” shall be defined as a person formally charged with a crime, or a convicted criminal whose punishment has not been determined or fully served, who is currently at large [i.e., free or uncaptured] outside the territorial jurisdiction of the State

¹ E.g., United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994) (statute of limitations analysis); United States v. Blanco, 861 F.2d 774 (2d Cir. 1988) (speedy trial analysis)
² For one example, see BLACK’S LAW DICTIONARY 741 (9th ed. 2009) (a “fugitive” [from justice] means “[a] criminal suspect or a witness in a criminal case who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony, especially by fleeing the jurisdiction or by hiding.”).
³ Compare Rodriguez v. Comm’n on Elections, G.R. No. 120099, July 24, 1996 (Phil.), available at http://sc.judiciary.gov.ph/jurisprudence/1996/jul1996/120099.htm (last visited on Nov. 3, 2013) (adopting definition that includes “not only those who flee after conviction to avoid punishment but likewise those who, after being charged, flee to avoid prosecution.”) with Hughes v. Pfanz, 138 F. 980 (6th Cir. 1905) (defining “fugitive” as “a person who, having committed within a state a crime, when sought for, to be subjected to criminal process, is found within the territory of another state.”) and United States v. Steinberg, 478 F. Supp. 29, 32 (N.D. Ill. 1979) (“[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.”).
pursuing him. This definition, which adopts the perspective of law enforcement authorities, rather than that of the individual at issue, is worthy of some elaboration:

- Although the term “fugitive” is generally defined as “one who flees or tries to escape,” stemming from the Latin *fugere*, meaning “to flee,” the subject may not necessarily have committed a crime and may not have fled a jurisdiction at all.

- The subject must be (or is reasonably believed to be) present within the territory of a State other than that which is seeking his custody or otherwise in non-sovereign territory/international space, although his specific whereabouts may be unknown; this is what imbues the term with its international dimension.

- A fugitive from justice connotes an individual who is wanted by law enforcement authorities on criminal grounds and therefore excludes from its scope fugitive soldiers (those escaping

---

4 Because “there is no prerequisite that the relator be a fugitive in order to seek his extradition,” M. CHÉRIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 831 (5th ed. 2007), how narrowly or broadly the term “fugitive” is defined is not ultimately determinative of whether extradition can be pursued.

5 WEBSTER’S NEW WORLD DICTIONARY 544 (1988).

6 Such persons ultimately may be exonerated at trial or retrial, as the case may be. Consequently, unless the individual was previously convicted and later escaped custody, the use of the term “fugitive offender,” which is commonly encountered in the literature, should be avoided as prejudicial. To the extent a fugitive is on the loose, he should be called instead a “fugitive from justice.”

7 For example, a fugitive may have committed the crime at issue beyond the borders of the State pursuing him and simply remained there following the crime. See 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 768 (1968) (“The English High Court of Justice, King’s Bench Division, held that it is not essential to the concept of ‘fugitive’ that the accused have fled from the country in which he was alleged to have committed the crime”) (citations omitted). But see Appleyard v. Commonwealth of Massachusetts, 203 U.S. 222, 222-23 (1906) (defining fugitive as one who commits or is charged with a crime in one state and then “leaves it”).

8 See Paul Michell, English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain, 29 CORNELL INT’L L.J. 383, 390 & n.24 (1996). For example, Jamaican police caught Christopher (Dudus) Coke, the powerful don of a “garrison community” in West Kingston, Jamaica, at a roadblock a month after the Jamaican government aggressively sought his arrest pursuant to a U.S. extradition request. Mattathais Schwartz, A Reporter at Large: A Massacre in Jamaica, THE NEW YORKER, Dec. 2011, at 64, 69. Under these circumstances, Coke was an “international fugitive from justice” despite the fact that he had not yet fled across a State border, as the international dimension derives from the perspective not of the State where he is arrested but by the one that ultimately seeks to prosecute or punish him.

9 This concept is defined at n.52 of the Introduction supra.
military risk), fugitive debtors (those escaping financial obligations), fugitive slaves (those escaping physical constraints), and those individuals escaping private retribution.

- The subject must have been at least criminally charged (or its functional equivalent); it is not sufficient if he is still merely a suspect under investigation, and it is of no matter whether the charge was issued publicly or in secret.

- To the extent that the subject was earlier convicted, it makes no difference to this definition whether that conviction was determined by a judge, judicial panel, or jury; whether the convict represented himself or was represented by counsel; or whether he was tried in absentia or personally appeared in court.

- The subject could have resided in the State in whose jurisdiction he is physically present before the crime was committed (whether by himself or someone else), or relocated there in connection with it or at any time thereafter: (i) before the charges were brought, (ii) after the charges were brought but before being caught, (iii) after being caught but before or during trial proceedings, whether during bail or while in police custody, or (iv) after incarceration as a prison escapee.

- The state of mind or motivation of the individual being pursued is irrelevant; he may be in active post-crime flight to avoid capture; he may have unwittingly and coincidentally crossed a border shortly following another’s commission of a crime; he may be innocent and yet trying to

---

10 See, e.g., WHITEMAN, supra n.7, at 768 (“It is apparently contended by Mylonas that since no charges were outstanding in Greece at the time he came to the United States from that country he is therefore not a fugitive seeking asylum and is therefore not subject to the provisions of the [U.S.-Greece] Extradition Treaty. We know of no requirement in international extradition that the individual being sought must have been charged with the offense at the time he left the country which subsequently seeks his extradition.”).

11 It is notable that, under at least some domestic laws, it is an independent crime to avoid prosecution, custody, or confinement after conviction. See, e.g., 18 U.S.C. § 1073 (2012) (“Whoever moves or travels in interstate or foreign commerce with intent . . . to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees . . . shall be fined under this title or imprisoned not more than five years, or both.”).

12 Whether or not a subject fled and was living in secret versus left at a leisurely pace prior to any actual or anticipated indictment and was living openly could be a relevant factor regarding the
avoid undeserved punishment because of possible feared misidentification, discrimination, or a case of “guilt by association;” or he may have committed the crime in question yet be unaware that he has been charged and an arrest warrant has been issued\(^\text{13}\) (possibly because of a secret indictment\(^\text{14}\)).

- The subject must be the ongoing object of pursuit by law enforcement authorities;\(^\text{15}\) accordingly, a criminal case must not have been closed, and to the extent the subject has been convicted, his sentence must remain unfinished, including that in the meantime no amnesty has been imposed on the crimes at issue,\(^\text{16}\) or a presidential pardon granted to the individual.

- The length of time the subject is at large is immaterial – it could be mere hours or many years\(^\text{17}\) – unless, of course, the domestic statute of limitations corresponding to the crime has run (assuming that the clock did not toll on account of his effort to evade detection by law

---

\(^\text{13}\) A State need not show that an alleged offender fled to avoid prosecution or that he was even aware of the charges against him. \textit{See, e.g., White v. Armontrout}, 29 F.3d 357, 359 (8th Cir. 1994) (rejecting defendant’s argument that he was not a fugitive because he did not know that charges had been filed against him) (inter-state case).

\(^\text{14}\) For example, in August 1999, Austrian plainclothes police officers arrested General Momir Talic, Chief of Staff of the Bosnian Serb Army, while he was attending a conference at the National Defense Academy in Vienna, unaware that he had been charged in a secret indictment by the ICTY with Crimes Against Humanity (CAH) during the 1992-95 Bosnian war. Marlise Simons, “Top Bosnian Serb Officer Arrested for U.N. Tribunal,” \textit{N.Y. Times}, Aug. 26, 1999, at A10 (international criminal tribunal case).

\(^\text{15}\) Michell, \textit{supra} n.8, at 390 & n.24. Three of the most wanted international fugitives today include: Ayman al-Zawahiri (terrorism), Joseph Kony (genocide), and Joaquin Guzman (drug trafficking).

\(^\text{16}\) For example, in 1968 France granted amnesty to all crimes committed in connection with the civil upheaval in Algeria in the early 1960s. Axel Knabe, \textit{Double Jeopardy Case Highlights Inconsistencies in International Criminal Law}, 25 IELR 143, 143 (2009).

\(^\text{17}\) For example, in 1968 France granted amnesty to all crimes committed in connection with the civil upheaval in Algeria in the early 1960s. Axel Knabe, \textit{Double Jeopardy Case Highlights Inconsistencies in International Criminal Law}, 25 IELR 143, 143 (2009).
enforcement authorities\textsuperscript{18}), and the person thereby has lost his criminal status.\textsuperscript{19}

- The State in which the person has nationality and where the actual or alleged crime was committed is not relevant to this definition.\textsuperscript{20}

For shorthand convenience, any reference to “fugitive” in this study should be understood to constitute an “international fugitive from justice” based on the foregoing definition.

\textbf{b. “Pursuing State” and “Host State”}

Labels are required for both the State seeking custody of a fugitive and the State within whose territory a fugitive is presently located. To simplify matters, this analysis has chosen to use terms that clearly identify the relationship between those States whether they are engaged in an extradition or a non-extradition exercise. Having uniform terminology across these two scenarios also will help when referring to a State that seeks both extradition and deportation (of an unlawful alien), whether concurrently or sequentially. In the extradition context, the terms typically used to designate these States are the “requesting” (or at times “requisitioning” or “petitioner”) State and the “requested” State, respectively.\textsuperscript{21} In addition to being inapposite in the non-extradition context, there may be times when those labels can even become \textit{reversed in meaning}, as when the State where the fugitive is located (now in effect the \textit{requesting} State)

\textsuperscript{18} Some States accord no statute of limitations (time bar) in instances where an individual has fled from justice. \textit{E.g.}, 18 U.S.C. § 3290 (2012).

\textsuperscript{19} The fact that an extradition request may be denied by the custodial State based on its interpretation that the statute of limitations has run on the underlying crime does not itself have to alter the subject’s fugitive status from the legal perspective of the State seeking his custody. For example, just because a Portuguese court ultimately denied the U.S. extradition request for George Wright reportedly in part on the grounds that the statute of limitations on his murder conviction had run, Barry Hatton, “Portugal Refuses to Send US Fugitive Home,” \textit{AP}, Nov. 17, 2011, available at \url{http://news.yahoo.com/portugal-court-refuses-send-us-fugitive-home-164301468.html} (last visited on Nov. 4, 2013), does not mean the U.S. had to remove Wright from its list of wanted fugitives.

\textsuperscript{20} Michell, \textit{supra} n.8, at 390 & n.24.

chooses to reach out to and inquire with a State to which he could be extradited (now in effect the requested State), say, because the State where the fugitive is located has no interest itself in prosecuting and yet wants to see justice done.\textsuperscript{22}

Alternatively, and typically in the non-extradition context, most scholars and practitioners rely on the terms “forum” (or “prosecuting”) State and “asylum” (or “refuge”) State to refer, respectively, to the State where a future prosecution will be held and the State that has jurisdiction over the subject individual.\textsuperscript{23} These terms are affirmatively unhelpful for our purposes. The term, “forum,” suggests that that State will provide the prosecution forum in a given case, but in fact the fugitive might not ever be tried in that State’s courts and, moreover, there could be multiple States seeking recovery of a fugitive and it is uncertain which, if any, will eventually prevail.\textsuperscript{24} Besides, when a State seeks a fugitive to serve out an unfinished sentence, rather than to face prosecution, there would be no role for a judicial “forum” at all. Therefore, in the meantime, referring to such a State as a “forum” State seems premature and potentially misleading.

Similarly, the term “asylum” State could generate confusion to the extent that the State is inferred to be providing asylum to a fugitive seeking political refuge or other protection, and may even imply a non-national (or non-resident) status of the fugitive, which, again, may not bear out factually. Moreover, in instances where a State has requested extradition but simultaneously is pursuing another means of securing a fugitive’s custody (\textit{e.g.}, via deportation), that State could be dually labeled as an requesting State \textit{and} a forum State; the same logic, of course, would apply to the requested \textit{and} asylum State. It undoubtedly would be less awkward and problematic to use a single term to cover both scenarios.

\textsuperscript{22} See Claire Mitchell, \textit{The Scope and Operate of the Obligation (Part 2) of Aut Dedere,} aut Judicare: The Extradite or Prosecute Clause in International Law, IHEID, Graduate Institute Publications Online, 2009, ¶ 17, available at \url{http://iheid.revues.org/302#fnt2} (last visited on Feb. 28, 2012) (“[I]f a State does not wish to prosecute the alleged offender itself, it is not precluded from actively seeking another State who is willing to [do so].”).

\textsuperscript{23} See, \textit{e.g.}, Manuel R. Garcia-Mora, \textit{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).

\textsuperscript{24} Although the term “forum State” often will be synonymous with the State that had pursued the fugitive, it plausibly could be a third State to which the fugitive is ultimately rendered or a situation in which the fugitive is not rendered at all, and therefore to that extent the term “forum State” would not properly identify the State that sought the fugitive’s custody.
Accordingly, let us substitute these sets of terms with the use of “pursuing” State and “host” State,25 and thereby eliminate sources of confusion. A “pursuing State” is to be understood herein as a State that seeks the prosecution or punishment of a fugitive for law enforcement purposes, whether inside or outside of the extradition context. The term “pursuing” directly and functionally links a State in question to the fugitive, regardless of the means of acquisition, intended destination, or ultimate success, while allowing for the possibility that there could be multiple States concurrently seeking the fugitive for charges under their respective domestic laws and, in that case, each could accurately be called a “pursuing” State.

A “host State” is to be understood as the State within whose territory a particular fugitive is currently located, however temporarily, whether inside or outside of the extradition context. The term is intended as neutral without any hint as to the relationship of the fugitive to the State apart from his physical presence, not necessarily accompanied by any protection, service, or other benefit.26 By contrast with “pursuing States” of which there could be one or more in play, in the case of a “host State,” there can be only one with regard to a specific fugitive. The term has a convenient variable quality to it as well, as it refers to the State in which the fugitive is located at any given point in time, so its status can, and does, change when the fugitive, say, is on foreign business travel or is an aircraft

25 To this author’s knowledge, these terms have not been used before in tandem in this context, although the individual terms can be found sprinkled throughout the international law literature in one reference or another when discussing such varied topics as the “right of hot pursuit” (discussed in Chapter 11.b.iii infra), refugee matters, and consent to exercise the use of force on one’s territory. In one instance, for example, a legal scholar has referred to the “nation where the suspect has taken refuge” as the “host state,” but continued to refer to the State with interest in the fugitive’s custody as the “requesting state” or “transferring state.” Margaret L. Satterthwaite, The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism, N.Y.U. Public Law and Legal Theory Working Papers, Paper 192 (2010), at 3, 6, available at http://bwr.nellco.org/cgi/viewcontent.cgi?article=11922&context=nyu_plltwp&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26e%262%262%25%25international%25%25rendition%2522%26b%2522NYU%2522School%2522BoF%2522Law%2522%26ie%26UTF-8%256e%26UTF-8#search=%22international%25rendition%2520NYU%2520School%2520Law%22 (last visited on Nov. 30, 2013).

26 Indeed, the nationality or immigration status of the fugitive makes no difference as to the designation of the “host” State. The fugitive could be a native-born citizen, a naturalized citizen, a refugee or asylee, a resident alien, a temporary visitor, or even a denaturalized citizen pending deportation.
passenger on an international route that has stopped temporarily for refueling.\textsuperscript{27} The term “asylum State” does not convey nearly the same degree of flexibility.

The denomination of “host State” avoids any confusion arising from another common term, “territorial State,” which potentially could mean either the State where the person of interest currently is located or where the underlying crime was committed (see discussion of jurisdiction in Chapter 2). While the term “custodial State” is also facially appealing, it could imply that the State had physical custody of the accused, but in many instances a request from a pursuing State will be issued before the individual of interest has been located and detained by law enforcement authorities.

Finally, a pursuing State, once successful, could transform into a “forum” or “adjudicating” State (assuming the aim was to seek his prosecution versus his punishment), but to ensure clarity and flexibility in our discussion, particularly in the context of specialty (see Chapter 7.b.ii) and post-transfer issues (see Chapter 13), as the fugitive could have been the subject of extradition, deportation, or one of several types of renditions (discussed infra), it will be referred to herein as the “transferee State.” A “transferee State” is defined as the State, typically a once-pursuing State, into whose custody or control a fugitive has been physically transferred by any means by the former host State.\textsuperscript{28} Likewise, once a fugitive has been transferred by the host State, that State will then be relabeled as the “transferor State,” although it may also qualify as an “injured State.” A “transferor State” is defined herein as the former host State following the physical transfer of a fugitive by any means into the custody or control of another State, typically a once-pursuing State. These new terms possess the

\footnotesize{\textsuperscript{27} For example, when Vinayak Damodar Savarkar, an Indian revolutionary charged with murder, escaped while his ship was docked in Marseilles in the course of an England-to-India voyage, the host State when he was arrested along the port was France, even though Indian Army military police were responsible for escorting him. Savarkar Case (Fr. v. Brit.), PCA, Feb. 24, 1911, 1916 HAGUE CT. REP. 276 (J.B. Scott ed. 1916).

\textsuperscript{28} Referring alternatively to that State as the “former pursuing State” or the “pursuing State-cum-forum State,” depending on the context, conveys an awkward phraseology worth avoiding. Besides, the State that receives physical custody of the fugitive need not be a former pursuing State at all.}
advantage of accurately, concisely, and flexibly reflecting the post-transactional status.

c. **“Rendition”**

Primarily in connection with the U.S. Global War on Terrorism (GWOT), the term “rendition” has embedded itself in the public consciousness. Unfortunately, however, its meaning has been glossed, if not obfuscated, by the term’s most extreme and popular variation – “extraordinary rendition.” Because “rendition” is subject to varying understandings, because it has no strict definition under international law, and because it is relevant to the present context, this discourse attempts to furnish a clear and helpful meaning. “Rendition” herein refers flexibly to the involuntary physical transfer by officials or agents of a State of an individual of interest from one location or jurisdiction to another for any law enforcement, military, or intelligence purpose. (An

---

29 See OUP, Oxford Dictionaries Website, “Rendition,” available at http://oxforddictionaries.com/definition/rendition (last visited on Feb. 24, 2012) (“The Oxford English Corpus has shown a steady increase in examples throughout the last decade, with a particular rise in the phrase extraordinary rendition, which is now the most common collocate of rendition by far.”) (emphasis in original).

30 This term is defined on pages 40-41 infra.

31 Compare U.K. Parliament, Foreign Affairs Committee, Human Rights Annual Report 2008, Chapter 2: Rendition, available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/557/55705.htm (last visited on Jan. 17, 2012) [hereinafter Hum. Rgts. Ann. Rpt. 2008] (referring to it as “a political term of art”) with E.P. Aughterson, THE LAWS OF AUSTRALIA: JURISDICTIONAL ENFORCEMENT, § 11.10, Part A, at 7 (1995) (noting that the term “rendition,” by contrast with “extradition,” has “been used in relation to the return of persons between states and territories within a federal system.”) with Michael Ford & Kieran Kelly, EXTRADITION LAW AND TRANSNATIONAL CRIMINAL PROCEDURE 5 (4th ed. 2012) (“under a common understanding . . . two or more states affected enact virtually identical legislation, which provides for handing over those who are sought by the other state or states” citing, by example, the arrangement of the Nordic States since 1962) with David B. Ottaway & Don Oberdorfer, “Administration Alters Assassination Ban: In Interview, Webster Reveals Interpretation,” Wash. Post, Nov. 4, 1989, at A1, A4 (describing use of the term “rendition” by Judge William H. Webster, CIA Director, in 1989, as a “new term” contained in a Department of Justice (DoJ) legal opinion issued in June 1989, referring to the act of capturing and bringing back to the United States a criminal suspect particularly aimed at allowing the CIA or FBI to seize a terrorist in countries like Lebanon where there is no longer any rule of law or capacity to provide law enforcement or assistance); with John Rizzo, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 259 (2014) (defining “rendition” as occurring “when an individual is transported involuntarily from one country – where the individual is found – to another country where he . . . is facing criminal charges or is wanted for questioning in connection with an investigation.”).

32 Notably, immigration-related transfers fall outside the scope of this definition. Although this author has not found any fully satisfactory definition in the literature, for the general notion, see Michael John Garcia, Renditions: Constraints Imposed by Laws on Torture, CRS, Report No. 7-5700, Sept. 8, 2009, available at http://www.fas.org/sgp/crs/ctnatsec/RL32890.pdf (last visited on Feb. 24, 2012) (“The surrender of a fugitive from one State to another”) (citing Black’s LAW
international rendition would entail such an involuntary physical transfer specifically between State jurisdictions.)

Notably, under this definition, “rendition” is a neutral term that is not intended to suggest either lawfulness or unlawfulness, although the specific conduct at issue could be positively or negatively sanctioned. By contrast with some common definitions, a rendition need not result in a change of custody between States, but can rather involve the cross-jurisdictional transfer (or simply the relocation within a domestic context) of an individual between officials or agents of the same State. Renditions that result in the individual’s transfer to pursuing State territory or into pursuing State custody are known herein as “strategic” and those that result in the individual’s transfer to any other location or into another’s custody, whether on an intermediate basis or as a final destination, are referred to in this study as “tactical.”33 Renditions may be carried out pursuant to extradition or non-extradition proceedings,34 although in such instances the more specific operational term (e.g., extradition, prisoner exchange, ad hoc transfer) is generally used.

Apart from the “strategic” versus “tactical” distinction above, the term “rendition” encompasses three operational variants: formal, semi-formal, and informal. Although seldom separated out, such terminological differentiation recognizes noteworthy differences that lie within the overall meaning of the term and lends precision to their application in a given context. “Formal rendition” refers to any rendition pursuant to a formal written agreement in

---

Dictionary 1298-99 (7th ed. 1999); Jordan Paust, et al., International Criminal Law 436 (2d ed. 2000) (“when an individual is surrendered by a requested country to a requesting state”); Michell, supra n.8, at 388 n.15 (rendition does not include where a State intervenes to evacuate its own nationals from another state because the intent there is protection, not prosecution); John F. Murphy, Punishing International Terrorists: The Legal Framework for Policy Initiatives 36 (1985) (rendition can consist of both formal and informal transfers). But see Simona Granata, Note, Review of Judgments and Decisions Delivered in 2005 and 2006 by the European Court of Human Rights on Subjects Relevant to International Law, 16 Ital. Y.B. Int’l L. 283, 290 (2006) (renditions are “unlawful inter-State transfers of prisoners”) (emphasis in original).

33 An “intermediate rendition” would occur where the fugitive were transferred to a third State initially with the subsequent aim of transferring him to pursuing State territory or custody.

34 See Satterthwaite, supra n.25, at 6 n.20 (indicating that while her article has defined the term “rendition” only to encompass informal transfers, the author acknowledges that other scholars use the term to refer to both formal and informal transfers).
which the physical custody of an individual is transferred between States. These include any transfers undertaken via an extradition treaty or a specialized bilateral arrangement (e.g., Status of Forces Agreement or SOFA).

“Semi-formal rendition” refers to any rendition handled through an ad hoc, non-treaty-based arrangement involving some legal process that results in the transfer of physical custody of an individual between States. These renditions would include extradition via comity35 or reciprocity,36 arrangements authorized under domestic law; political understandings in which fugitive prisoners are exchanged; and certain facilitated operations by a third State while the person is being transited through its territory.

“Informal rendition” refers to any rendition handled absent legal process. Informal rendition can be sub-divided based on the nature of participation into four types: (i) unilateral when conducted by pursuing State officials or agents without the participation, knowledge, or consent of the host State; (ii) consensual when conducted exclusively by pursuing State officials or agents but with the prior consent of the host State, often via a “wink and a nod;” (iii) surrogate when conducted exclusively by host State officials or agents at the pursuing State’s behest; and (iv) joint when conducted by pursuing and host State officials or agents working together. In all of these instances except the unilateral scenario, there is some degree of cooperation (or complicity, as the case may be) on the part of the host State. Defined in this disaggregated manner, contrary to some legal analyses, “informal renditions” may well entail operations beyond exclusively “unilateral abductions.”

There are two other well-known variants of “rendition” that warrant mention, if only to eliminate potential confusion. One of them – “extraordinary rendition” –

---

35 See 3 HERSCH LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 223 (E. Lauterpacht ed. 1977) (“comity of nations” refers to “considerations of courtesy, amity, neighbourly feeling and reciprocity.”)

is not relevant to our inquiry, while the second – so-called “irregular rendition” (or its functional equivalent “irregular seizure”\(^{37}\)) – is a slippery and overbroad term that has no discernible legal significance and thereby is omitted from reference in this analysis.\(^{38}\) An “extraordinary rendition”\(^{39}\) refers to a rendition that entails “the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment.”\(^{40}\) As this dissertation is not concerned with mere suspects or with any intended scenario apart from prosecution or punishment for those who have yet to serve their full, legally authorized sentence,\(^{41}\) such operations necessarily lie outside the scope of this study.

\(\text{\(^{37}\) E.g., United States v. Sobell, 142 F. Supp. 515, 522 (S.D.N.Y. 1956), aff’d, 244 F.2d 520 (2d Cir. 1957), cert. denied, 355 U.S. 873 (1957), reh’g denied, 355 U.S. 920 (1958).}\)

\(\text{\(^{38}\) One treatise author has defined “irregular rendition” as when an “individual[ is] taken from one country to another as a criminal suspect against [his] free will and without consent of the country from which [he is] taken.” PAUST, supra n.32, at 436. Several problems arise with such a definition, including, for instance, whether the word “taken” refers solely to seizures but not to lures, whether the person taken could be an indictee or someone who had been previously convicted of a crime but escaped before his sentence was completed rather than strictly a “suspect,” and whether a State’s acquiescence after the fact would negate its “irregular” status.}\)

\(\text{\(^{39}\) According to former senior CIA legal counsel John Rizzo, an “extraordinary rendition” “just amounts to a pejorative redundancy” as “it is a practice [i.e., rendition] that has been employed through the years in extraordinary circumstances, including “outside normal judicial processes such as extradition.” RIZZO, supra n.31, at 259-60.}\)

\(\text{\(^{40}\) This definition was first adopted by the ECtHR in Ahmad and Others v. U.K., Appl. Nos. 24027/07, 11949/08, and 36742/08, ECtHR, Apr. 10, 2012 (final on Sept. 24, 2012), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267\#%22itemid%22-%22001-110267%22\} (last visited on Nov. 11, 2013), and was later embraced by the U.K. Intelligence and Security Committee, and then again by the Grand Chamber of the ECtHR in El-Masri v. Former Yugoslav Republic of Macedonia, Appl. No. 39630/09, Judgment, ECtHR, Grand Chamber, Dec. 13, 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621\#%22itemid%22-%22001-115621%22\} (last visited on Nov. 11, 2013). See also Hum. Rts. Ann. Rpt. 2008, supra n.31, Chapter 2: Rendition, ¶ 11 (“The phrase ’Extraordinary Rendition’ is generally used to describe activities involving the clandestine and deliberate transfer of terrorist subjects to foreign countries for interrogation using torture, inhuman or degrading treatment in order to gain intelligence for the ‘war against terrorism’. The process exists entirely outside normal, formal extradition proceedings. It is also referred to as ‘torture by proxy’ or ‘outsourcing torture.’”) (supplied by the House of Commons Library).}\)

\(\text{\(^{41}\) Two well-known alleged examples of extraordinary rendition cases include those of: (i) Maher Arar, a Canadian citizen, who was transferred from U.S. to Syrian custody on suspicion of having a connection to terrorism, Bruce Zagaris, Canada Protests Deportation of Canadian Citizen to Syria, 20 IELR 10 (2004); and (ii) Khaled El-Masri, a German citizen who was seized by U.S. officials or agents while on holiday in Macedonia and taken to Afghanistan. Bruce Zagaris, ACLU Sues Former CIA Director on Extraordinary Rendition, 22 IELR 56-57 (2006).}\)
The term “irregular rendition” is of no value to this analysis (and therefore does not appear in the Glossary), as it appears to refer obliquely to the universe of renditions that are not conventionally configured. It is unclear whether the term is intended to include only unlawful methods (in which case it should simply say so) or perhaps less conventionally exercised but still lawful ones as well (but then why mix the two?).

At a minimum, however, the term would appear to embrace extraordinary renditions, which are not relevant to our inquiry. It is also at least arguable that such unconventional methods, which presumably include some combination of semi-formal and informal renditions, when taken in the aggregate, are not so uncommon in practice. Furthermore, it is far more desirable to treat each case on an individual basis in evaluating its lawfulness than to characterize it as “irregular” and thereby in effect pre-judge the wrongfulness or unacceptability of such conduct. For these reasons, that term is dispensed with in the present treatment.

d. “Extradition” and “Summary Extradition”

Another term that warrants a close examination at this initial juncture is “extradition.” That term has been subject to multiple definitions, none of

---


43 See Abraham Abramovsky, Extraterritorial Abductions: America’s ‘Catch and Snatch’ Policy Run Amok, 31 VA. J. INT’L L. 151, 155 (1991) (defining “irregular rendition” as “an apprehension that receives the tacit approval or acquiescence of the country from which the defendant is rendered” versus an “abduction,” which operates absent any consultation with a responsible representative of a host State).

44 See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 437 (1993) (“Some Justice Department officials have claimed that . . . ‘irregular rendition’ is largely a misnomer because rendition of fugitives by means other than an extradition treaty is neither illegal nor unusual”); J.E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 165 (2007) (“Informal processes of transfer are the prevalent method for obtaining custody over fugitives abroad.”).

45 The term first officiallysurfaced in the late 1700s in France. See FORDE & KELLY, supra n.31, at 1 (1791 in France); IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 4 (2d ed. 2000) (1781 in a treaty between Louis XVI of France and Prince Bishop of Basle). See generally 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 171-72 (1992) [hereinafter BLAKESLEY, COMPARATIVE STUDY] (although the term was not used until the late 18th century, the concept was around long before).

46 Curiously, in none of the international or regional conventions obligating States to “extradite or prosecute” under the principle known as aut dedere aut judicare (discussed in Chapters 2.c.ii and 9.c infra) is the term “extradite” ever defined. Claire Mitchell, The Scope and Operate of the
which has assumed a position of unquestioned primacy, and each of which regrettably is either imprecise or incomplete, or both.\footnote{47} This dissertation proposes a new definition that seeks to rectify these defects. The following definition of (de jure) “extradition” will be used throughout this study: A cooperative law enforcement process by which the physical custody of a person: (i) charged with committing a crime or (ii) convicted of a crime whose punishment has not yet been determined or fully served, is formally transferred by authorities of one State to those of another at the request of the latter for the purpose of prosecution or the execution of a criminal sentence, respectively.\footnote{48}

Let us now unpack this definition to appreciate its essential elements and dimensions, as a complete definition should account for each of them.

- Extradition constitutes a process, means, or legal device\footnote{49} – it does not itself render underlying acts or omissions unlawful,\footnote{50} confirm the guilt of the extradited individual (who ultimately may be

\begin{center}

\end{center}

\begin{center}
\footnote{47} An example of one that is generally accurate but not helpfully specific (for reasons that will be discussed \textit{infra}) states: “Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment.” American Law Institute (ALI), \textsc{Restatement (Third) of the Foreign Relations Law of the United States}, May 14, 1986 (1987), Subchapter B (Extradition), Intro. Note, at 556-57, available at http://internationalcriminallaw.org/Restatement(Third)_of_Foreign_Relations_Law/RSecs334_401-04_411_432_442.PDF (last visited on Nov. 9, 2013) [hereinafter \textsc{Restatement (Third)}]. Another example defines “extradition” as “the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found.” \textsc{Black’s Law Dictionary} 665 (9th ed. 2009).

\end{center}

\begin{center}
\footnote{48} Technically, this definition pertains to “international extradition,” as extradition can also occur domestically within a given State between sub-national entities. \textsc{Whiteman}, supra n.7, at 727 (distinguishing extradition between international personalities versus inter-state rendition).

\end{center}

\begin{center}
\footnote{49} Most definitions refer to extradition as a “process,” see, e.g., \textsc{Restatement (Third)}, supra n.47, Subchapter B (Extradition), Intro. Note, at 556-57; \textsc{Arvinder Sabbe} & \textsc{John R.W.D. Jones}, \textsc{Extradition Law Handbook} 1 (2005), or a “legal device,” M. Cherif Bassiouni, \textit{Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition}, 7 \textit{Vand. J. Transnat’l L.} 25, 25 (1973) [hereinafter Bassiouni, \textit{Unlawful Seizures}]. Despite colloquial usage to the contrary and the reliance by some States on the non-intuitive term “passive extradition” (see the Glossary), the act of extradition itself is carried out in one direction by the transferring State. That is to say the receiving State does not extradite \textit{per se}, but rather requests extradition and then secures custody of the extraditee.

\end{center}

\begin{center}
\footnote{50} \textit{See Whiteman}, supra n.7, at 753 (“Extradition treaties do not, of course, make acts crimes”).

\end{center}
exonerated\textsuperscript{51}), or constitute punishment for an offense\textsuperscript{52}

- Extradition takes place between functioning States\textsuperscript{53} – not between a State and either a sub-national entity\textsuperscript{54} (e.g., municipality, state, or province) or a supranational body (including a tribunal),\textsuperscript{55} let alone between any two such non-State entities, or involving an entity no longer recognized as a State by the international community.\textsuperscript{56}

- Extradition is used exclusively for criminal law enforcement purposes,\textsuperscript{57} rather than for military,


\textsuperscript{52} See, e.g., \textit{United States ex rel. Oppenheim v. Hecht}, 16 F.2d 955, 956 (2d Cir.) (“[E]xtradition is not punishment for crime, though such punishment may follow extradition”), \textit{cert. denied}, 273 U.S. 769 (1927).


\textsuperscript{54} Hong Kong presents an anomaly. Although the U.S. and Hong Kong executed an extradition treaty in December 1996, \textit{Agreement Between the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders}, Dec. 20, 1996, available at http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc3/pd/CDOC-105tdoc3.pdf (last visited on Dec. 6, 2011), the unprecedented agreement was struck while Hong Kong was still under the control of the U.K. (its 99-year territorial lease did not end until July 1, 1997), China authorized the arrangement, and Hong Kong holds a unique status within China as a Special Administrative Region with an unusually high degree of autonomy. To the extent that historical instances exist in which a U.S. state arranged for the direct transfer of a fugitive from a foreign State, these would be more properly characterized as “semi-formal renditions” (see definition on page 39 supra) as opposed to “extraditions.”

\textsuperscript{55} See discussion of the term “surrender” on pages 52-53 \textit{infra}. The EU-U.S. Extradition Treaty executed in June 2003, \textit{Agreement on Extradition Between the European Union and the United States}, reprinted in S. Treaty Doc. 109-14, June 25, 2003, available at http://www.foreign.senate.gov/treaties/109-14 (last visited on Sept. 28, 2013), is in fact merely a “framework agreement” that called upon individual EU member States to amend or supplement, as needed, their respective bilateral treaties with the United States consistent with the provisions set forth in the EU-U.S. Extradition Treaty. Accordingly, extradition does not take place between the EU and the U.S., but rather between individual EU member States and the U.S.

\textsuperscript{56} \textit{Whiteman, supra n.7}, at 769.

\textsuperscript{57} Extradition is one of eight recognized forms of inter-State law enforcement cooperation; the other seven are: (i) legal assistance; (ii) execution of foreign penal sentences; (iii) recognition of foreign penal judgments; (iv) transfer of criminal proceedings; (v) freezing and seizing of assets deriving from criminal conduct; (vi) intelligence and law enforcement information-sharing; and (vii) regional and sub-regional “judicial spaces.” M. \textsc{Cherif Bassiouni}, \textsc{Introduction to International Criminal Law} 333 (2003).
intelligence collection,\textsuperscript{58} diplomatic, immigration, or other reasons, such as the enforcement of civil judgments.\textsuperscript{59}

- Extradition must stem from some type of criminal conduct,\textsuperscript{60} although typically minor offenses do not qualify;\textsuperscript{61} it is not limited to common crimes, and may include ones that might otherwise fall within the jurisdiction of international criminal tribunals, such as war crimes or crimes against humanity.\textsuperscript{62}

- It is a cooperative mechanism that calls upon States to work in a coordinated manner\textsuperscript{63} and is therefore not based on unilateral efforts to transfer an individual’s custody;\textsuperscript{64} sometimes, it even involves negotiated compromises in which the extradition is made on a conditional basis.\textsuperscript{65}

\textsuperscript{58} See Bruce Zagaris, British Appellate Court Allows Algerian Pilot Held on U.S. Extradition Charges to Pursue Compensation Claims, 24 IELR 132, 132-33 (2008) (discussing how in February 2008 after Lotfi Raissi, the first individual formally accused of a connection to the September 11, 2001, attacks in the U.S., was released from extended detention and sought compensation, a British appeals court found that the U.S. had exploited the extradition process to “secure his presence” in the U.S. for the purpose of investigating the terrorist attacks rather than prosecuting him for the offenses on which his extradition was based).

\textsuperscript{59} See WHITEMAN, supra n.7, at 727 (defining “extradition” so as to exclude “obtaining or enforcing civil judgments”).


\textsuperscript{61} See RESTATEMENT (THIRD), supra n.47, § 475, cmt. c (“Extradition is generally granted only for serious crimes, usually those punishable in both the requesting and the requested state by imprisonment for one year or more.”); \textit{e.g.}, Katherine Shaver, “A Murder’s Long Shadow,” \textit{Wash. Post}, Sept. 29, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/28/AR2007092801973.html (last visited on Sept. 7, 2013) (discussing how Sol Steinbein, who was charged with the misdemeanor of obstructing a police investigation related to his son Samuel’s murder charge, may not be subject to extradition for such a minor crime). See discussion of extraditable crimes in Chapter 5.a.i infra.


\textsuperscript{64} See James W. 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, 803 (1985) (extradition requires a request by one State and the return by another). By contrast, deportation or exclusion procedures, undertaken pursuant to a State’s domestic laws, entail the unilateral removal of an individual from that State’s territory with only passive participation, in principle, on the part of the receiving State. See page 404 in Chapter 10 infra.

• It is not necessary, no matter how common, that extradition be effected via a treaty, whether bilateral or multilateral;\textsuperscript{66} it may also occur by means of comity, reciprocity, or other agreements or arrangements, even possibly indirectly.\textsuperscript{67}

• Extradition consists solely of a physical transfer; while it typically entails an arrest of an individual beforehand, such antecedent action is not technically part of the extradition process itself;\textsuperscript{68} nor is the prosecution, sentencing, and/or punishment that may follow.\textsuperscript{69}

• The person whose custody is being transferred must have been charged or convicted\textsuperscript{70} of a crime (in the latter instance whose punishment has not yet been determined or fully served\textsuperscript{71}), rather than being a mere suspect in a crime\textsuperscript{72} or wanted for questioning as a material witness.\textsuperscript{73}

(providing for conditional extradition); Michael Plachta, \textit{The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare}, 12 EJIL 125, 130 & n.15 (2001) (noting how extraditions can arise out of compromises); e.g., Bruce Zagaris, \textit{Mexico Extradites Mexican National Wanted for Murdering U.S. Drug Agent}, 21 IELR 137, 137-38 (2005) (in January 2005, U.S. prosecutors agreed to recommend that any prospective sentence include the possibility of parole, in connection with the extradition of Augustin Vázquez Mendoza, a Mexican national suspected of conspiring to murder an undercover U.S. drug agent in Arizona in 1994, in order to accommodate a Mexican Supreme Court ruling that barred the extradition of individuals facing life sentences abroad).

\textsuperscript{66} See the variety of extradition-like vehicles in Chapter 4.c infra.

\textsuperscript{67} An “indirect extradition” is an \textit{extradition between States that lack diplomatic relations with one another, and therefore all related communications and the physical transfer itself occur via an intermediary party}. For example, in the \textit{Pan Am 103/Lockerbie Case} (discussed infra), the U.S. and the U.K. submitted an extradition request to Libya via the Belgian Embassy in Tripoli to turn over two Libyan suspects in the bombing (Fhimah and al-Megrahi). Plachta, \textit{supra} n.65, at 126.

\textsuperscript{68} This feature reflects an unnecessarily narrow feature of the \textit{Restatement (Third)}'s definition: “Extradition is the process by which a person charged with or convicted of a crime under the law of one state is \textit{arrested} in another state and returned for trial or punishment.” \textit{Restatement (Third), supra} n.47, Subchapter B (Extradition), Intro. Note, at 556-57 (emphasis supplied).

\textsuperscript{69} See GEOFF GILBERT, \textit{RESPONDING TO INTERNATIONAL CRIME 5} (2006) (extradition only deals with the turning over of a fugitive).

\textsuperscript{70} See CLIVE NICHOLLS, \textit{ET AL.}, EDS., \textit{THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE} 17 (2d ed. 2007). Sometimes a dispute will arise regarding whether a person has been formally charged. \textit{E.g., Emami v U.S. Dist. Ct.}, 834 F.2d 1444 (9th Cir. 1987). Many extraditions involve the transfer of convicted persons who have since escaped from prison or have been tried \textit{in absentia} and found guilty of the charges lodged against them.

\textsuperscript{71} See FORDE & KELLY, \textit{supra} n.31, at 1 (“Extradition may be loosely defined as a formal process based on international agreement whereby a person in one country, who is wanted in another country to stand trial or to be sentenced, or to serve imprisonment or other punishment there, is handed over by the authorities in the former country to officials in the latter.”) (emphasis supplied).

\textsuperscript{72} BLAKESLEY, \textit{COMPARATIVE STUDY, supra} n.45, at 171.

\textsuperscript{73} NICHOLLS, \textit{supra} n.70, at 17.
• Extradition does not require the consent of the person whose custody is being transferred, although the term can accommodate voluntary returns as well.75

• Extradition entails the government-to-government transfer76 between the authorities of two States, as opposed to the States themselves, as an indicted or convicted criminal conceivably could be turned over to pursuing State officials in host State territory,78 in non-sovereign territory/international space, or

---


75 Perhaps surprisingly, extradition is not always contested by its subjects; sometimes, individuals wish to be extradited, such as when they expect to be better off in their home country based on more favorable judicial treatment, the prospective length or conditions of incarceration, or where they are keen to prove their innocence. See, e.g., Bruce Zagaris, *Turkey Requests Iraqi Extradition of Two Islamists for 2003 Attack*, 21 IELR 356, 356-57 (2005) (counsel for two Turkish Islamists detained at Abu Ghraib prison in Iraq and sought by Turkey argued for their return to Turkey); Coggle Gibbons, “Deuss in Court Again Amid Extradition Moves,” *Bermuda Sun*, Oct. 18, 2006, available at [http://www.bermudasun.bm/print.asp?ArticleID=31279&SectionID=24&SubSectionID=270](http://www.bermudasun.bm/print.asp?ArticleID=31279&SectionID=24&SubSectionID=270) (last visited on Jan. 11, 2012) (in October 2006, following his legal defeat in contesting extradition, oil executive and banker John Deuss voluntarily returned through official channels from Bermuda to his native Netherlands to face charges related to the diversion of public funds into his private bank account). A fugitive also may consent to extradition to be closer to family or friends in the pursuing State or because he does not have the funds (or does not choose to spend them) with respect to fighting against extradition. Domestic extradition laws frequently allow for voluntary returns. *E.g.*, Canada, Extradition Act of Canada, Royal Statutes of Canada (R.S.C.) June 17, 1999, art. 71(3), as amended, July 19, 2005, available at Canadian Legal Information Institute Website, [http://www.canlii.org/en/ca/laws/stat/sc-1999-c-18/latest/sc-1999-c-18.html](http://www.canlii.org/en/ca/laws/stat/sc-1999-c-18/latest/sc-1999-c-18.html) (last visited on Nov. 3, 2013) (can extradite person who has so consented). *Contra* Swiss Federal Office of Justice (FOJ) Website, available at [https://www.bj.admin.ch/bj/en/home.html](https://www.bj.admin.ch/bj/en/home.html) (last visited on Nov. 14, 2013) (defining “extradition” as “the surrender by force of a wanted person by the requested State to the requesting State.”) (emphasis supplied). Most States now provide a legal means of voluntary extradition by which the fugitive submits to being returned to the pursuing State without the need for the legal processes and safeguards provided for under formal extradition. STANBROOK & STANBROOK, supra n.45, at 60; *e.g.*, *The King v. Corrigan*, (1931-32) 6 ANN. DIG. & REP. INT’L L. CASES 319, 319-21 (No. 177) (H. Lauterpacht ed. 1938) (finding that accused had not been extradited under the France-U.K. Extradition Treaty and that therefore the specialty rule did not apply to bar the additional charge, given that accused had “consented to be returned to England, and by his waiver relieved the French Court of the necessity of making any order for his surrender under the Treaty”).

76 If the fugitive returns voluntarily through private arrangements, however, then it does not technically qualify as extradition. STANBROOK & STANBROOK, supra n.45, at 60.

77 See *SIR ROBERT JENNINGS & SIR ARTHUR WATTS, EDS.*, 1 OPPENHEIM’S INTERNATIONAL LAW 960 (9th ed. 1992) (describing extradition as the handing over of a fugitive between the respective police authorities of the two States).

78 See, *e.g.*, Bruce Zagaris, *Mexico Extradites Salvadoran National to the U.S. on Murder Charges*, 16 IELR 902, 902 (2000) (describing Mexican government handover of Salvadoran national Mao Ali Lainez to U.S. authorities at Mexico City Airport, noting that such arrangements are more apt to occur in cases where the fugitive is not a host State national and entered the host State illegally).
within the geographical borders of a third State.\footnote{See Arzt, supra n.74, at 167-68 (discussing the Lockerbie Case, where an extradition was effected between Dutch and Scottish authorities, allowing for the criminal prosecution of two Libyan nationals before a Scottish judicial panel in a courtroom on a former NATO airfield in the Netherlands; this was notably “the first time that a national civilian court had ever conducted an entire criminal trial in the territory of another sovereign country”). Failure to account for this factor is a common oversight in many definitions of extradition; e.g., RESTATEMENT (THIRD), supra n.47, Subchapter B (Extradition), Intro. Note, at 556-57 (“Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment to the state under whose law he has been charged or convicted.”) (emphasis supplied).}

- An extradition request need not be made by authorities of the fugitive’s homeland or country of residence, as is often assumed because it is the most common scenario, but rather could be made by the authorities of any State wishing to prosecute, sentence, and/or punish the subject individual.\footnote{See, e.g., AP, "EU Court Rules for Extradition of British Hacker to U.S.," IHT, Aug. 28, 2008 (discussing the case of British national Gary McKinnon who, by virtue of a U.S. extradition request, in the words of his counsel, faced “the prospect of prosecution and imprisonment thousands of miles away from his family in a country in which he has never set foot.”).}

- Extradition must entail a \textit{formal} transfer of custody in which an individual is physically passed through means and channels officially established and intended for that purpose.\footnote{Many definitions of “extradition” omit this requisite element. \textit{Informal law enforcement} transfers of custody are addressed in Chapter 11 infra as a full-scale alternative to extradition.}

- Extradition is triggered by a request from the \textit{pursuing State},\footnote{See JENNINGS & WATTS, supra n.77, at 959 (extradition is granted only if asked for); WHITEMAN, supra n.7, at 727; Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (requiring a demand to distinguish it from unilateral removal of unwanted aliens); Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) (“[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.”).} reflecting its national interest, and thereby marking an important distinction with immigration-based procedures, which are generally precipitated by, or at least must be legally justified based on, \textit{host State} concerns.\footnote{Some States draw a distinction between so-called “active” and “passive” extradition; under that construct, \textit{active extraditions are those that a State pursues on its own initiative while passive extraditions are ones in which a host State receives a request for the extradition of a fugitive by a pursuing State. E.g., Nicaragua Extradition Procedures, available at www.oas.org/juridico/mla/en/nic/en_nic-ext-gen-process.doc (last visited on Sept. 14, 2013).}

- The aim of an extradition must be to bring a person to trial, or to have him serve a prior
punishment meted out\textsuperscript{84} (or possibly have the punishment determined first, in the event he escaped between conviction and sentencing), rather than, say, to punish him absent a fair trial.\textsuperscript{85}

The term “summary extradition” surfaces with respect to treaty provisions, case law, and scholarly and practitioner analyses.\textsuperscript{86} The term “summary,” as used in such contexts as trials, convictions, and executions, generally means shortened in time or immediate as distinct from occurring within the ordinary course. Consistent with that usage, a summary extradition is, in effect, a short-cut that dispenses with much of the typical legal process associated with this particular law enforcement modality, but generally requires the subject individual’s consent.\textsuperscript{87} It is defined herein simply as an \textit{expedited} or \textit{abbreviated} extradition, which may be formally or informally executed, and which typically but not necessarily requires the consent of the individual involved.\textsuperscript{88}

\textsuperscript{84} See Michael Abbell, \textit{Extradition to and from the United States} 2-31 (2001 & Supp. 2007) (discussing U.S. law and the limited purposes that extradition must serve); \textit{e.g.}, Mary Anne Weaver, “Terrorist’s Extradition Ends Greek Legal Battle,” \textit{Wash. Post}, Oct. 4, 1976, at 24 (Rolf Pohle, a member of the West German Baader-Meinhof terrorist group, was extradited by Greece to West Germany in order to complete five years of a six-and-a-half-year prison term).

\textsuperscript{85} A number of definitions of “extradition,” while otherwise accurate, remain incomplete by failing to reference the objective of this law enforcement mechanism. \textit{E.g.}, Bassiouni, \textit{Unlawful Seizures}, supra n.49, at 25 (“Extradition is a legal device whereby a state requests from another the surrender of a person accused or convicted of a crime. It is one of the modes of cooperation in penal matters between states.”); Sambie & Jones, \textit{supra} n.49, at 1. In addition, the pursuing State typically will represent its competence to prosecute or punish the subject individual but doing so is not a definitional requirement and may, as a factual matter, not bear out. This is one flaw in the definition propounded by the U.S. Supreme Court in an opinion rendered more than a century ago. See \textit{Terlinden v. Ames}, 184 U.S. 270, 289 (1902) (“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, \textit{being competent to try and to punish him}, demands his surrender.”) (emphasis supplied).

\textsuperscript{86} \textit{E.g.}, Treaty on Extradition, U.S.-Mex., May 4, 1978, art. 18, 31 U.S.T. 5059, T.I.A.S. 9656, \textit{reprinted in} 17 ILM 1058 (1978) (if a person consents to extradition, he may be extradited on an expedited or summary basis without the need for further proceedings).

\textsuperscript{87} For example, in January 2004, it took only four days for Panama to “extradite” Arcangel de Jesus Henao Montoya, an alleged Colombian drug lord and one of its most suspected cocaine traffickers to the U.S. on charges of smuggling large amounts of cocaine. He was arrested during a joint Panamanian-U.S. law enforcement operation on January 10 and by January 14 he was flown to the United States on a DOJ plane and taken to New York to face arraignment. Bruce Zagaris, \textit{Panama Extradites Alleged Colombia Drug Lord to the U.S.}, 20 IELR 89 (2004). This operation arguably also fits the parameters of informal law enforcement cooperation as discussed in Chapter 11 infra.

e. “De Facto Extradition” and “Disguised Extradition”

“De facto extradition,” by contrast with *de jure* extradition (discussed supra), can be defined, as follows: A State’s formal or informal exercise of non-extradition-related laws, authorities, or administrative procedures that yields the delivery of a fugitive directly or indirectly to a State with a law enforcement interest in him. *De facto* extradition is a neutral term that does not necessarily connote either lawfulness or unlawfulness or characterize positively or negatively a State’s motivations (which cannot always be ascertained in any event), but merely indicates that the functional upshot of extradition⁹⁹ has been achieved by means that were designed for other purposes.

*De facto* extradition can occur in the presence or absence of an extradition treaty,⁹⁰ as a legitimate contingency option when extradition has failed or is

---

⁹⁹ Accordingly, the deportation of an alien to a State that has no current interest in prosecuting or punishing him (for an earlier conviction) would not qualify as *de facto* extradition. For example, when the U.S. deported Mousa Mohammed Abu Marzook (Abu Marzook), the then-political leader of Hamas, to Jordan in May 1997 – even though he had been earlier expelled by Jordan, detained for 22 months in the U.S. as a terrorist suspect, and at one point wanted by Israel to face criminal charges – because Jordan agreed to receive him unconditionally and had no intention of prosecuting or punishing him, Neil MacFarquhar, “Jordan to Let Terror Suspect Held in U.S. Into Kingdom,” *N.Y. Times*, May 1, 1997, available at http://www.nytimes.com/1997/05/01/world/jordan-to-let-terror-suspect-held-in-us-into-kingdom.html?ref=mousamohammedabumarzook (last visited on Feb. 16, 2012), this action did not bear the trappings of extradition.

reasonably expected to fail (for example, where no other State is willing to receive a removed alien and the host State has complied with all other applicable international legal obligations), or as a deliberate bypass of an otherwise available but undesirable extradition procedure. It is most typically effected under a State’s immigration laws but also sometimes pursuant to other law enforcement authorities or procedures (e.g., a cross-border handover of a fugitive between cooperating law enforcement officials or a host State reconfiguring a fugitive’s airline flight schedule so that he lands in pursuing State territory).

_Disguised extradition_91 is a term closely associated but not co-extensive with _de facto_ extradition, although the two terms often are defined in overlapping ways, if not conflated altogether.92 “Disguised extradition” is best understood as a subset of de facto extradition that entails a purposeful circumvention of extradition laws or treaties by a host State to deliver a fugitive directly or indirectly to a State with a law enforcement interest in him, typically via immigration laws.93 Indeed, the word “disguised” implies such a hidden motive,
and the case law overall reflects that understanding. This concept will be discussed more extensively in Part V in connection with full-scale alternatives to extradition.

f. “Surrender”

“Surrender” is a term sometimes used synonymously with “extradition.” There are two problems with such treatment. First, “surrender” is a broader term than “extradition,” as the former could be used to describe not only extraditions but also other types of semi-formal or informal renditions or even deportations. Second, even assuming the two terms were functionally equivalent, they operate in distinctive contexts. “Surrender” is a term that properly applies in instances when the physical custody of an individual is transferred “vertically” from a State to an international criminal tribunal, such as the ICTY, ICTR, or ICC, as opposed to “horizontally” to another State. Indeed, that distinction has been found to be

Silvia Borelli, The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 338 n.27 (Andrea Bianchi ed. 2004) (purpose of deportation and expulsion is to remove unwanted aliens from their territory, in theory, deporting or expelling state should not be interested in destination of immigrant; so deportation/expulsion is a form of disguised extradition where deport alien to a specific state seeking his return for prosecution); Satterthwaite, supra n.25, at 8 ("term used to describe the reliance by a state on its immigration procedures such as exclusion, deportation, and removal to affect the transfer of an individual to the custody of another state for the purpose of punishment."); Wendy L. Fink, Note, Joseph Doherty and the INS: A Long Way to International Justice, 41 DePaul L. Rev. 927, 955 (1992) (when a state accomplishes with immigration laws what it could not do under an extradition treaty – namely, returning the fugitive to the requesting country).


95 At the opposite end of the spectrum from surrender are bilateral non-surrender agreements, including the approximately five dozen entered into by the U.S. to date to prohibit the surrender or transfer by any means of any current or former government officials, employees, military personnel or nationals of the other party to any international tribunal for any purpose, except one established by the UNSC. Chet J. Tan, Jr., The Proliferation of Bilateral Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court, 19 AM. U. INT’L L. Rev. 1115 (2004).

96 See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 361 (2003) ("while one may speak of extradition of the accused from one State to another, it is more appropriate to speak of transfer of the accused from a State to an international criminal tribunal.") (emphasis in original); Michael
meaningful by the European Court of Human Rights when it denied a claim that an individual might suffer a flagrant denial of his fair trial rights if “extradited” to the ICTY.77

As these tribunals have no police forces of their own,98 they must rely on State cooperation to hand over charged persons or escaped convicts in cases falling under their jurisdiction.99 The constitutive documents for these tribunals notably never use the term “extradition” but instead rely principally on the word “surrender” and occasionally “transfer.”100 Differences between “surrender” (or “transfer”) in the international criminal tribunal context and “extradition” in the bilateral State context are explored in Chapter 2.civ infra. To avoid confusion between these terms in their particularized contexts, this analysis will refrain from any reference to “extradition” in the international criminal tribunal context.

---

77 See Naletilić v. Croatia, Appl. No. 51891/99, ECHR Judgment, May 4, 2000, reprinted in 121 ILR 209, 212 (E. Lauterpacht, et al., eds. 2002) (“The Court recalls that exceptionally, an issue might be raised under Article 6 of the Convention by an extradition decision in circumstances where the applicant risks suffering a flagrant denial of a fair trial. However, it is not an act in the nature of an extradition which is at stake here, as the applicant seems to think. Involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence.”) (emphasis supplied).

98 See Cassese, supra n.96, at 355 (these tribunals lack the necessary enforcement agencies to “seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants.”).

99 E.g., Ntakirutimana v Reno, 184 F.3d 419 (5th Cir. 1999) (approving the surrender of a fugitive to the ICTR).

100 See, e.g., Rome Statute of the International Criminal Court (ICC), July 17, 1998, art. 102(a), 2187 U.N.T.S. 3, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 ILM 999 (“surrender” defined as the delivery of a person from a State to the Court pursuant to the Statute; id., art. 102(b) (“extradition” defined as the delivery of a person between States pursuant to treaty or domestic legislation). All related documents, including the UNSC resolutions establishing the tribunals, the implementing Rules of Procedure and Evidence (RPE), and the Secretary General's Reports by which the Secretariat presented the Statutes to the UNSC, consistently rely on the terms “surrender” and “transfer.” See also Sambei & Jones, supra n.49, at 12-13; Kenneth S. Gallant, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, in THE PROSECUTION OF INTERNATIONAL CRIMES 344-46 (Roger S. Clark & Madeleine Sann eds. 1996); Jackson Nyamuya Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome 167 (2003) (“Transfer’ is a new regime in international law introduced by the ICTY Statute to circumvent legal and political bottlenecks inherent in the extradition regime governing inter-State relations” as it is “envisioned that the normal questions raised by extradition requests – the fairness of the proceeding and legitimacy of the charges – should not arise”).
and from any reference to “surrender” when discussing cases that involve State-to-State transfers.\textsuperscript{101}

\textbf{g. “Lure and Capture Operation”}

The U.S. Attorney’s Manual defines a “lure” as “involv[ing] 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.”\textsuperscript{102} This definition contains many essential elements of a lure, but several refinements are warranted for our purposes: (i) it needs to apply less specifically to the U.S. and more broadly to the international community, (ii) a few of the elements must be tweaked for accuracy, (iii) it should reflect the full range of possible participants, and (iv) it should be reframed in operational terms and reflect its actual purpose.\textsuperscript{103} Accordingly, a definition for a new term, to be referred to as a “Lure and Capture Operation,” or LCO, is hereby proposed: \textit{A deceptive activity in which pursuing State and/or host State officials or agents entice a fugitive to travel to another location or jurisdiction with the intended or actual consequential apprehension of that fugitive for law enforcement purposes}. Of particular note, the fugitive could be lured to travel to another part of the host State,\textsuperscript{104} pursuing State territory, third State territory, or non-sovereign territory/international space.

\textsuperscript{101} It should be noted that the European Arrest Warrant (EAW) (discussed in Chapter 4.f infra) has adopted the term “surrender” or “execution” when discussing State-to-State extraditions. Zsuzsanna Deen-Racsmány, \textit{Modernizing the Nationality Exception: Is the Non-extradition of Residents a Better Rule?}, 75 NORDIC J. INT’L L. 29, 32 n.10 (2006). That usage has proved misleading. See Plachta, supra n.96, at 192 (concluding that use of term “surrender” in the context of the 2002 EU Framework Decision, as opposed to “extradition,” is a misnomer).

\textsuperscript{102} U.S. Dep’t of Justice, \textit{U.S. Attorney’s Manual}, § 9-15.630 (2d ed. 2007-3 Supp.), available at \url{http://www.justice.gov/usaio/eousa/foia_reading_room/usam/title9/15mcrm.htm} (last visited on Nov. 9, 2013). Accord NADELLENN, supra n.44, at 443-44 (describing lures as moving “fugitives from their foreign havens to other countries in which cooperative law enforcement officials would then arrest them and extradite or deport them”).

\textsuperscript{103} A lure need not have as its object capture; it could, instead, seek to remove someone from one location to another (say, so as not to be a witness or an interfering influence), or it may be used to entrap or embarrass an individual, entice him into a particular business transaction, or lead him into a risky or dangerous situation.

\textsuperscript{104} While atypical, such a scenario could occur where a fugitive was viewed as being more easily captured or arrested, say, outside the capital city or near an unprotected border area, rather than in another State’s territory.
Strategic LCOs occur when the operation results in the fugitive’s relocation directly to pursuing State territory or custody (see Part IV), whereas if it results in his transfer to another (final or intermediate) destination or into another’s custody, it would be called a tactical lure (see Part III). Tactical LCOs tend to be more common than strategic ones because it is generally easier to entice a fugitive to a State where they are not wanted for prosecution or punishment than to a State where they know or suspect they are. Four varieties of LCOs can be discerned: (i) unilateral when conducted by pursuing State officials or agents without the participation, knowledge, or consent of the host State (Chapter 12); (ii) consensual when conducted exclusively by pursuing State officials or agents but with the prior consent of the host State (Chapter 11); (iii) surrogate when conducted exclusively by host State officials or agents at the pursuing State government’s behest (Chapter 11); and (iv) joint when conducted by both pursuing and host State officials or agents working together (Chapter 11).

h. “Seizure and Delivery Operation”

When discussing the informal transnational capture in, and movement of fugitives from, foreign State territory by or at the behest of pursuing State officials or agents, courts and scholars often prefer to rely on such terms as “abduction” and “kidnapping.” Such nomenclature, however, is affirmatively unhelpful: not only is there wide inconsistency in the way these terms are defined, but they tend to be incomplete and/or misleading, in addition to being essentially pre-determinative of the unlawfulness of the conduct.

With respect to inconsistency across definitions, some authorities focus on the seizure of the fugitive while others focus on his movement or transfer.106

---

105 See, e.g., Andrew B. Campbell, Note, The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs, 23 Vand. J. Transnat’l L. 385, 409 (1990) (“Abduction occurs when agents of the apprehending state, acting under color of law, seize the alleged offender without the cooperation or acquiescence of the holding state.”). The phrase “snatch and grab operations” is also sometimes invoked to describe this particular conduct. That terminology has a regrettably casual tone that additionally is unclear regarding whether the fugitive ultimately is to be delivered into the custody of a State or even whether the purpose is limited to detention, and therefore is avoided herein.

106 Compare Bassiouuni, World Public Order, supra n.92, at 124 (“Abduction is characterized by the following: agents of one state acting under the color of law unlawfully seize the body of a person within the jurisdiction of another state without its consent.”) (emphasis supplied) with
Another source of inconsistency is whether the lack of consent referenced in many definitions denotes that of the fugitive or that of the State where the conduct occurs. Moreover, some definitions of “abduction” are limited in scope to forcible actions while others are open to non-forcible actions, by which is generally meant deception or fraud. (Indeed, the very notion of a “non-forcible abduction,” as used by a number of legal authorities seems oxymoronic, as any reasonably understood definition of “abduction” ought to entail some form of physical force, restraint, or incapacitation.)

These definitions also tend to be potentially misleading or incomplete. The very purpose of these actions is left open to question: Is the aim to capture the fugitive or to transfer him to another State, when it actually should be both? In addition, the use of the word “removal,” as found in several leading definitions, is potentially confusing, as that word, as discussed in Chapter 10 infra, is now sometimes used to specifically denote deportations and exclusions.

As for the nonconsensual character of such an action, to the extent that it refers

Abraham D. Sofaer, Terrorism, the Law, and the National Defense, 126 Mil. L. Rev. 95, 109-10 (1989) (“The forcible, unconsented removal of a person by agents of one State from the territory [or jurisdiction] of another State.”) (emphais supplied).

107 Compare Bedi, supra n.90, at 393 (“Abduction is the process by which a person is removed without his consent from the jurisdiction of one state to another by force, threat of force, or by fraud, trickery or deception”) (emphasis supplied) with Philip B. Heymann & Ian Heath Gershengorn, Pursuing Justice, Respecting the Law, in Principles and Procedures for a New Transnational Criminal Law: Documentation of an International Workshop in Freiburg, May 1991, at 121 (Albin Eser & Otto Lagodny eds. 1992) (abductions occur “when agents of one state acting under color of law unlawfully seize a person within the jurisdiction of another state without that state’s consent”) (citing to Basiouni) (emphasis supplied).


109 Compare Sofaer, supra n.106, at 109-110 (”The forcible, unconsented removal of a person by agents of one State from the territory [or jurisdiction] of another State.”) (emphasis supplied) with Bedi, supra n.87, at 393 (“Abduction is a process by which a person is removed without his consent from the jurisdiction of one state to another by force, threat of force, or by fraud, trickery or deception”) (emphasis supplied) and BLACK’S LAW DICTIONARY 4 (9th ed. 2009) (“Abduction” has been defined as “[t]he act of leading someone away by force or fraudulent persuasion.”).

110 E.g., Int’l Comm’n of Jurists, “Kidnapping Incidents,” 32 Bull. of the Int’l Comm’n of Jurists 24, 27 (Dec. 1967) (treating lures as abductions). The use of the term “fraud” is unfortunate, as there is a significant difference between a fraud perpetrated against a law-abiding citizen for profit and a public deception undertaken by law enforcement officers to bring a criminal to justice; the former is a clear violation of the law while the latter serves an important public function, and yet the term “fraud” is conceptually broad enough to embrace both meanings.

111 E.g., Jackson Nyomuya Magoto, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror 65 (2005) (“the forcible, unconsented removal of a person by agents of one state from the territory of another state.”) (emphasis supplied).
to the host State (versus the fugitive), it is unclear whether the consent must be 
*ex ante* or can be *ex post* or if an official protest by the executive branch of 
government is required. Furthermore, it remains ambiguous whether “forcible” 
conduct is presumed to include the *threat* of force as well. Perhaps most 
importantly, the terms “abduction” and “kidnapping” unfairly prejudge the 
lawfulness of the conduct in question. They are morally loaded terms that by 
their very definition imply a violation of law, if they do not say as much 
expressly,\(^\text{112}\) while such terms are additionally commonly associated with 
pecuniary or other non-law enforcement motives (*e.g.*, ransom).

For all of these reasons, these terms are not used in this discourse; instead, a 
term is needed that will be clearer and more consistent, prove flexible to account 
for a variety of situations (including standard arrests), and signal legal 
neutrality. To those ends, this study proposes an alternative term: “Seizure and 
Delivery Operation,” or SDO, to be defined as follows: *The capture or arrest of a 
fugitive effected in territory other than that of the pursuing State carried out by 
pursuing State and/or host State officials or agents with the intended or actual 
subsequent delivery of that fugitive to pursuing State territory or custody for law 
enforcement purposes.*

There are five types of SDOs, four of which occur within host State territory: (i) 
*unilateral* when conducted by pursuing State officials or agents without the 
knowledge, consent, or participation of the host State (Chapter 12) and would 
include, *inter alia*, cross-border military raids; (ii) *consensual* when conducted by 
pursuing State officials or agents alone but *with* the consent of the host State 
(Chapter 11); (iii) *surrogate* when conducted by host State officials or agents at

\(^{112}\) *See, e.g.*, BEDI, *supra* n.90, at 393 (“Abduction is the process by which a person is removed 
without his consent from the jurisdiction of one state to another by force, threat of force, or by 
fraud, trickery or deception; it constitutes an illegal act under municipal law where it occurs and 
under international law”) (emphasis supplied). *Cf.* Daniel Statman, *Targeted Killing, 5 
Theoretical Inquiries in Law*, No. 1, at 179 (2004), *available at*
choosing the term ‘targeted killing’ rather than ‘assassination,’ I have sought to avoid the 
negative moral connotation that is almost inherent in the latter.”).
the pursuing State government’s behest (Chapter 11); and (iv) joint when conducted by both pursuing and host State officials or agents working together (Chapter 11). A fifth variant, simply called an “international arrest,” occurs when a fugitive is apprehended by pursuing State authorities on own occupied or failed State territory or on non-sovereign territory/international space. An SDO is generally “strategic” in that such operations tend to be directed back to pursuing State territory or into its control, but could be “tactical” in the sense of arranging for their delivery, temporarily or otherwise, into another State’s territory or custody.

* * * * *

Armed with new terms and definitions, our analysis of the ways in which States pursue fugitives overseas can be more precise and targeted. Before exploring those specific forms of pursuit and the extent of their lawfulness, however, it is essential to understand why and how States assert extraterritorial jurisdiction over crimes.

---

113 Were this operation limited to an apprehension on host State soil (i.e., the “seizure” component), it could be considered a domestic arrest; however, given that it also entails a transfer to pursuing State authorities (i.e., the “delivery” component), it is more properly referred to as a form of SDO.

114 This is consistent with Harvard Law Professor Philip Heymann’s definition of “international arrest” as occurring when no violation of territorial sovereignty is involved. Heymann & Gershengorn, supra n.107, at 137 n.211.
CHAPTER 2

SUBJECT MATTER JURISDICTION

This chapter begins by examining the foundational concept of jurisdiction, including its inextricable relationship with the principle of sovereignty. It then discusses the two types of jurisdiction required by a State to effectively hold a fugitive judicially accountable; namely, “personal jurisdiction” (i.e., over an individual who has been charged or convicted of a crime) and “subject matter jurisdiction” (i.e., over his actual or alleged offense). This chapter then focuses in depth on subject matter jurisdiction by exploring its territorial and extraterritorial dimensions, how it is asserted, how competing jurisdictional claims are resolved, and recent efforts to extend State extraterritorial reach in the criminal arena. Finally, it considers the concept of concurrent jurisdiction, as exhibited by certain international criminal tribunals, by way of illustrative contrast. (Personal jurisdiction will be discussed in detail in Chapter 13.a.i infra.)

a. Concept of Jurisdiction

In common parlance, jurisdiction refers variously to geographic boundaries; governmental, supranational, or judicial structures or powers; or even certain people, positions, or procedures.\(^1\) Where jurisdiction is a function specifically of international law, however, the term is most usefully defined as “the power of a sovereign to affect the rights of persons, whether by legislation, executive decree, or by the judgment of a court.”\(^2\) Alternatively phrased, by virtue of its

\(^1\) B.J. George, Jr., Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609, 609 (1966). See generally Michael Akehurst, Jurisdiction in International Law, 46 B.Y.B.I.L. 145, 145 (1972-73) (“[T]he word ‘jurisdiction’ is used by different writers to denote a wide variety of different things.”). For purposes of this discussion, the focus will be on States.

sovereignty, a State has the “legal power or competence to exercise governmental functions”\(^3\) and thereby “affect legal interests.”\(^4\)

The concept of jurisdiction is intertwined with that of State sovereignty. Indeed, jurisdiction is properly viewed as an expression or dimension of sovereignty\(^5\) and arguably “one of [its] most jealously guarded aspects.”\(^6\) While the term “sovereignty” is subject to multiple interpretations,\(^7\) and is not an absolute or rigid concept,\(^8\) this analysis is concerned with sovereignty in the sense of a State possessing legal personality and competence along with the various rights and powers attendant to that status – such as the rights to acquire title to and dispose of territory, the rights to internally govern and administer (including its own security), and various historic or prescriptive rights to ownership or

---

\(^3\) Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives 3 (2003).


\(^5\) See Cameron, supra n.2, at 3 (jurisdiction under international law is “an aspect or an ingredient or a consequence of sovereignty”) (quoting Frederick Mann). A State with sovereignty over a piece of land may, however, cede jurisdiction over that land to another State without abdicating its ownership. E.g., Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, art. III, available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp (last visited on Nov. 4, 2013) [hereinafter U.S.-Cuba Agreement] (“While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.”).

\(^6\) Cameron, supra n.2, at 6.

\(^7\) The term variously may “mean status in international relations as a dependent part of another country; or degree of political freedom that might be termed de facto independence; or degree of legal freedom that might be termed de jure independence.” Michael Ross Fowler & Julie Marie Bunck, Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty 6-7 (1995). In fact, such ambiguity has led at least two co-authors to characterize sovereignty as “a somewhat misty concept clouded by a fog of contested assumptions and unresolved questions.” Id. at 32.

\(^8\) See Josef L. Kunz, The Nottebohm Judgment, 54 AJIL 536, 545 (1960) (“Any a priori or unlimited political concept of sovereignty must, with inescapable logic, lead to the non-existence of international law as law. Sovereignty is, therefore, essentially a relative notion.”) (emphasis in original).
passage – that rely on customary law rather than on the consent of another State.9

Sovereignty supplies the general legal basis upon which a State has primacy not only over who comes inside or leaves its borders, but also over the control and treatment of all persons within its boundaries,10 including, for example, the right to confer11 or waive an individual’s immunity12 (discussed more extensively in Chapter 6.b infra) and the right to control a foreign national while physically within its sovereign space.13 But it is not only about a State’s jurisdiction over individuals; “as a proxy for state power, jurisdiction also defines another species of legal relationship, namely that of the state to other sovereigns, and in this

---

9 See Covey T. Oliver, The Jurisdiction (Competence) of States, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 307 (Mohammed Bedjaoui ed. 1991) (jurisdiction “is overwhelmingly sourced in customary international law”).
10 See R. Stuart Phillips, The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposal for Its Future, 15 DICKINSON J. INT’L L. 337, 338 (1997) (State sovereignty encompasses the right of a State to control all persons within its territory); Michael Akehurst, Jurisdiction in International Law, 46 B.Y.B.L.L. 145, 146 (1972-73) (an act by one State in the territory of another “is contrary to international law only if it represents a usurpation of the sovereign powers of the local State.”); SS “Lotus” (Fr. v. Turk.) [1927] P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7, 1927), reprinted in ANN. DIG. PUB. INT’L L. CASES 153 (No. 98) (H. Lauterpacht ed. 1938) [hereinafter Lotus Case] (“the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State.”). This notion is captured by the Latin expression quidquid est in territorio est etiam de territorio – a State has supreme authority over all individuals and property within its boundaries. Rishi Hingorane, International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium, 30 GA. J. INT’L & COMP. L. 331, 334 (2002).
11 See Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 137 (1812) (nations, including the U.S., have agreed to accept certain limitations on their territorial jurisdiction due to the “common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other,” including “the exemption of the person of the sovereign from arrest or detention within a foreign territory.”).
12 See, e.g., In re Doe, 860 F.2d 40, 45-46 (2d Cir. 1988) (discussing the right of the government of the Philippines to waive former head-of-state immunity for Ferdinand and Imelda Marcos).
13 See, e.g., Letter from Ernest A. Gross, State Dept Legal Adviser, to The Hon. Samuel Dickstein, N.Y. Sup. Ct. Justice, Aug. 18, 1948, “Position on Status of Mrs. Oksana Kasenkina,” reprinted in Dep’t of State Bull., Vol. 19, No. 478, Pub. No. 3267, Aug. 29, 1948, at 261-62 (“It is the view of the United States Government that there is no basis under international law . . . for considering that [Soviet national] Mrs. Kosenkina [sic] is in any manner subject to the control or the authority of the Soviet Government so long as she remains in this country. The Department of State already has advised the Soviet Embassy that Mrs Kosenkina [sic] will not be placed under control of any person against her own will. The Department has also advised the Soviet Embassy that although it recognizes the right of the Soviet Government, through its officials abroad to extend all proper assistance and protection to Soviet nationals, this right does not include authority to take charge of Soviet citizens in this country irrespective of their wishes.”).
context it might be referred to loosely as national jurisdiction, domestic jurisdiction, or simply 'sovereignty.'”\(^14\)

Sovereign power logically extends to how actual or alleged offenders found on its territory are managed, notably including any criminal law enforcement-related activity.\(^15\) Accordingly, a State is prohibited in principle from “perform[ing] outside its territory acts auxiliary to prosecution and trial of an offense (e.g., arresting suspects, collecting evidence, inspecting sites, deposing witnesses, serving documents) unless explicitly authorized by [the host State].”\(^16\) With few self-imposed exceptions – consisting mainly of certain privileges and immunities granted to individuals or missions,\(^17\) concessions to supranational

\(^{14}\) Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. Int'l L.J. 121, 126 (2007); III, Draft Resolution, supra n.4, art. 2(2).

\(^{15}\) See Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation 251 (1997) (in general, a State has exclusive criminal jurisdiction over persons and property to the limits of its territorial sovereignty); Neil Boister, The Trend to ‘Universal Extradition’ over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime, 2003 ACTA JURIDICA 287 (2003) (international law considers national criminal jurisdiction to be coterminous with sovereignty); Satyadeva Bedi, Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries 392 (2002) (giving up of criminals and fugitives from justice are matters in which a State regulates its conduct according to its discretion as each State has sole power of execution of laws within its domain); B.J. George Jr., Immunities and Exceptions, in 1 International Criminal Law: Crimes 107 (2d ed. M. Cherif Bassiouni ed. 1999) (a basic principle of international criminal law is that each State has full power to regulate the conduct of persons physically present within its territory and to punish those who contravene its penal legislation or doctrines); Wilson v. Girard, 354 U.S. 524, 529-30 (1957) (“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.”). The reluctance of States to allow the application of foreign criminal laws in their territories stands in stark contrast to States’ general willingness to permit their courts to apply foreign law to disputes in private law arenas involving a foreign element. Camerone, supra n.2, at 6.

\(^{16}\) Reydams, supra n.3, at 3. See also Covey T. Oliver, The Jurisdiction (Competence) of States, in International Law: Achievements and Prospects 309 (Mohammed Bedjaoui ed. 1991) (“A fundamental principle of international relations is that the government of a state has the exclusive authority to govern within the territory of the state, as to all events and persons there, except as this authority may have been modified by consent of the territorial sovereign.”); American Law Institute (ALI), Restatement (Third) of the Foreign Relations Law of the United States, May 14, 1986 (1987), § 432, cmt. b, available at http://internationalcriminallaw.org/Restatement(Third)_of_Foreign_Relations_Law/RSecs334.401-04.411.432.442.PDF (last visited on Nov. 9, 2013) [hereinafter Restatement (Third)] (“It is universally recognized, as a corollary of state sovereignty, that [law enforcement] officials of one state may not exercise their functions in the territory of another state without the latter’s consent,” such as conducting investigations or effecting arrests, apart from non-judicial measures such as the imposition of trade restrictions or the removal from a list of eligible bidders on government contracts).

\(^{17}\) See A.R. Carnegie, Jurisdiction over Violations of the Laws and Customs of War, 39 B.Y.B.I.L. 402, 402 (1963) (A State’s exercise of criminal jurisdiction is subject “to the immunities which attach

62
bodies,\textsuperscript{18} and rights conveyed via treaty,\textsuperscript{19} ad hoc certifications,\textsuperscript{20} or other agreements – a State has virtually unfettered authority over all persons and property within its territory, including through the exercise of its police and immigration powers.\textsuperscript{21} It is therefore the host State in the first instance that must determine how to deal with a fugitive found on its territory.\textsuperscript{22} Indeed, this broad jurisdictional power accorded to sovereign States or its corollary restriction on those lacking sovereignty in a given instance is at times expressly

to the persons of sovereigns of other States and their representatives . . . “); HUGH M. KINDRED & PHILLIP M. SAUNDERS, EDS., INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 598 (7\textsuperscript{th} ed. 2006) (recognizing the immunities States have accorded foreign diplomats); Akehurst, supra n.1, at 148 (no usurpation of sovereign powers occurs when foreign deployed diplomats seize someone attempting to burglarize their embassy and hand him over to the police).

\textsuperscript{18} In recent years States increasingly have conferred criminal jurisdiction over individuals to certain supranational bodies. For example, the European Court of Human Rights (ECtHR) and other regional human rights tribunals may find a State in violation of its treaty obligations if it were to extradite or deport an individual to another State where the person’s human rights would not be expected to be properly respected. See examples in Chapters 7.d and 10.d infra. In addition, States are obligated to surrender individuals wanted for prosecution to the UNSC-established ICTY and ICTR. UNSC Res. 827, U.N. SCOR, 48\textsuperscript{th} Year, 3217\textsuperscript{th} mtg. (May 25, 1993) at 1, U.N. Doc. S/RES/827 (1993), reprinted in 32 ILM 1203 [ICTY Resolution]; and UNSC Res. 955, U.N. SCOR, 49\textsuperscript{th} Year (Nov. 8, 1994), U.N. Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 [ICTR Resolution]; see also Hazel Fox, The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal, 46 INT’L & COMP. L.Q. 434, 435 (1997).

\textsuperscript{19} See, e.g., United States v. Shiroma, 123 F. Supp. 145, 149 (D. Haw. 1954) (Japan ceded criminal jurisdiction of its sovereign territory via treaty to the U.S.: “Under Article 3 of the Treaty of Peace, Japan which previously had full sovereignty over Okinawa transferred a part of that sovereignty, while retaining the residue. That portion of the sovereignty which gives the United States ‘the right to exercise all and any powers of administration, legislation and jurisdiction’ under Article 3 may be labeled ‘de facto sovereignty.’ The residue or ‘residual sovereignty’ retained by Japan is the traditional ‘de jure sovereignty.’”).

\textsuperscript{20} See, e.g., United States v. Robinson, 843 F.2d 1, 4 (1\textsuperscript{st} Cir.) (finding 1986 certification by Panama’s Director General of Consular and Shipping Affairs authorizing the U.S. not only “to board, inspect, search, seize and escort the vessel to the United States” but also “to prosecute the persons aboard the vessel” as sufficient basis under international law for the exercise of U.S. jurisdiction), cert. denied, 488 U.S. 834 (1988).


\textsuperscript{22} It is worth noting that sovereignty operates as a two-edged sword, as while conferring on individual States such powerful jurisdictional authorities, it also offers criminals an opportunity to evade arrest by exploiting legal differences between States and any lack of cooperation between them. For example, Edward Snowden, the NSA contractor who posted classified U.S. government surveillance program information on the Internet, considered seeking refuge in Ecuador specifically in order to thwart his extradition, given its defiant posture against cooperation with the U.S. with regard to capturing fugitives. James Pomfret & Lidia Kelly, “U.S. Warns Countries against Snowden Travel,” Reuters, U.S. Ed., June 23, 2013, available at http://www.reuters.com/article/2013/06/23/us-usa-security-flight-idUSSBRE95SMO2H20130623 (last visited on Dec. 30, 2013) (noting how Snowden had sought asylum from Ecuador, a “member[ ] of the ALBA bloc, an alliance of leftist governments in Latin America that pride themselves on their ‘anti-imperialist’ credentials.”).
reinforced in multilateral conventions. 23 “Among the many problems concerning the limits of the sovereignty of States, few are as difficult or as much disputed as that which concerns the extent of the right of a State to exercise its criminal jurisdiction as it pleases.” 24

Viewed from an international law perspective, jurisdiction consists of three types of government powers or competencies: prescriptive, enforcement, and adjudicative. 25 The prescriptive power allows the State to formulate or promulgate laws, regulations, or rules “applicable to the activities, relations, or status of persons, or the interests of persons in things.” 26 For present purposes, such authority addresses matters including prohibited conduct; 27 extradition; deportation; and the capture, treatment, and punishment of criminals. 28 Of

23 See, e.g., CHARTER OF THE UNITED NATIONS, June 26, 1945, arts. 2(1), 2(4) and 2(7) [hereinafter U.N. CHARTER] (the exercise of extra-territorial jurisdiction in the territory of another State without the latter’s consent is forbidden under international law); Inter-Am. Conv. Against Terrorism, June 3, 2002, art. 19, OAS Res. 1840 (XII-0/02), O.A.S. No. A-66, available at http://www.oas.org/juridico/english/treaties/a-66.html (last visited on July 16, 2013) (“Nothing in this Convention entitles a state party to undertake in the territory of another state party the exercise of jurisdiction or performance of functions that are exclusively reserved to the authorities of that other state party by its domestic law.”).


25 RESTATEMENT (THIRD), supra n.16, § 401. Accord ARVINDER SAMBEI & JOHN R.W.D. JONES, EXTRADITION LAW HANDBOOK 2 (2005) (States have judicial, legislative, and administrative competence for jurisdiction); IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 111 n.1 (2d ed. 2000); McAlister, supra n.4, at 453 (functionally, jurisdiction consists of a State’s power to prescribe, adjudicate, and enforce). Not all international law scholars and textbooks, however, recognize the adjudicative power.

26 RESTATEMENT (THIRD), supra n.16, § 401(a); e.g., United States v. Crews, 605 F. Supp. 730, 734 (S.D. Fla. 1985) (“As a matter of international law, any country may exercise its jurisdiction to prescribe, i.e., it may apply its body of law, to its citizens anywhere in the world.”).


28 Significantly, extraterritorial prescription does not necessarily give rise to co-extensive extraterritorial enforcement authority (see discussion infra). While the U.S. Congress, for example, may have intended the reach of a criminal statute to extend beyond U.S. borders does not mean that federal law enforcement officers were thereby granted unfettered authority to conduct operations in the sovereign territory of other States to enforce those laws. SEAN D. MURPHY, 2 UNITED STATES PRACTICE in INTERNATIONAL LAW, 2002-2004, at 214 (2006). See also Joshua Robinson, Note, United States Practice Penalizing International Terrorists Needlessly
particular significance in this analysis, such *substantive* authority also may
establish (based on principles discussed *infra*) what is known as “subject matter
jurisdiction” to denote which types of criminal conduct, where they occur, or
who is involved, fall within the competency of that State’s courts. Such
legislation or regulation ensures that once that fugitive is captured and returned,
he can face prosecution in the pursuing State’s courts for crimes within their
competency.

The *enforcement* power is a State’s authority to “induce or compel compliance
or to punish noncompliance” with those laws or other prescribed mandates.
“Jurisdiction to enforce generally entails some exercise of executive power –
whether by police, prosecutorial or military action.” This could involve such
illustrative actions as collecting taxes, inspecting ships, expropriating property
from another State, or seizing and returning persons wanted by law enforcement
authorities. Consistent with the principle of sovereignty discussed above, as a
general rule, “[a] State may not exercise jurisdiction to enforce in the territory of
another State without the other State’s express consent thereto.” *The extent of

essential to distinguish between “the legislative act of promulgating [a statute] and the executive
act of asserting jurisdiction under it.”).

has subject matter jurisdiction “if it has jurisdiction of the crime charged”), aff’d, 244 F.2d 520
(2d Cir. 1957), cert. denied, 355 U.S. 873 (1957), reh’g denied, 355 U.S. 920 (1958); Colangelo, _supra_ n.14, at 126.

30 See Philip B. Heymann & Ian Heath Gershengorn, *Pursuing Justice, Respecting the Law, in
Principles and Procedures for a New Transnational Criminal Law: Documentation of an

31 _Restatement (Third), supra_ n.16, § 401(c). See also III, _Draft Resolution, supra_ n.4
(“Jurisdiction to enforce is to be understood as a State’s authority to effect compliance with
orders emanating from its legal order, whether by police action, or by other official sanction.”).
In the course of enforcement on another State’s sovereign territory, a pursuing State’s national
law or mandate must be construed in conformity with international law. Robinson, _supra_ n.28, at 495.

32 Colangelo, _supra_ n.14, at 126. See also Oliver, _supra_ n.9, at 307 (enforcement jurisdiction
“includes the *enforcement* of legal processes in a range from official investigations to the
execution of the orders of tribunals and administrative agencies of the state.”) (emphasis in
original).

33 *See, e.g., Authority of the Federal Bureau of Investigation to Override International Law in

34 III, _Draft Resolution, supra_ n.4, art. 3(4). See also _Cameron, supra_ n.2, at 93 (customary
international law prohibits one State’s exercise of enforcement jurisdiction in the territory of
another State, although noting that subpoena power may or may not constitute such exercise);
David Freestone, _International Cooperation against Terrorism and the Development of
lawfulness of a State’s enforcement measures in another’s sovereign territory lies at the heart of this study.

The adjudicative power signifies a State’s authority to assert judicial control or process over persons or things, when this authority is exercised with respect to persons it is commonly known as “personal jurisdiction,” and addresses procedurally whether a court (or administrative agency) may hear a case against a person brought before it. For example, U.S. courts cannot adjudicate cases involving violations of foreign criminal law unless the U.S. Congress also has enacted a law that provides for prescriptive jurisdiction over that crime, and U.S. courts generally may not try persons in absentia, unless waived. Securing physical custody over a fugitive in order to assert personal jurisdiction is precisely why States enter into extradition arrangements or pursue alternative methods.

These three sets of jurisdictional powers correspond only roughly with the branches of government to which they are generally associated. Accordingly, while the legislature makes laws and is in fact the principal branch involved in prescription, the executive branch or the courts can also participate on this front. Likewise, while the executive branch is predominantly responsible for a
State’s enforcement functions, the courts can exercise such power as well.\(^{42}\) And although the courts exercise primary adjudicatory powers, executive branch agencies sometimes play such a role as well.\(^{43}\) It is therefore advisable to speak of the authorities exercised rather than the governmental branches when discussing State jurisdiction.\(^{44}\)

These jurisdictional authorities need not be co-extensive,\(^{45}\) but in any event the enforcement and adjudicative competencies cannot exceed or deviate from what has been prescribed.\(^{46}\) These forms of State jurisdiction operate with greater conviction when dealing with persons, things, or property within its own territory than extraterritorially,\(^{47}\) but must in any event comply with the norms and standards of international law.\(^{48}\) Furthermore, although such jurisdictional authority falls within the exclusive domain of each State, such jurisdiction can be, and sometimes is, conceded or waived, whether expressly or impliedly.\(^{49}\)

---

\(^{42}\) See id. § 401(c) (States can enforce jurisdiction “through the courts or by use of executive, administrative, police, or other nonjudicial action.”).

\(^{43}\) HENKIN, supra n.4, at 1046.

\(^{44}\) CAMERON, supra n.2, at 4.

\(^{45}\) A State is not obliged to exercise its prescriptive jurisdiction to the fullest extent allowed by international law; even if it does so, it may choose not to provide for the same level of enforcement competence for its courts. Id. at 14. An example of a State that did not seek maximum reach of its prescriptive jurisdiction, at least as construed by its national courts, can be seen in Public Prosecutor v. Antoni, Sup. Ct., Sweden, 1960, reprinted in 32 ILR 140 (E. Lauterpacht ed. 1966) (holding that because Sweden’s “Road Traffic Ordinance . . . was not intended to apply to acts committed outside Swedish territory,” a Swedish citizen was not found to be criminally negligent for his falling asleep while driving a car in Germany and gravely injuring three persons).

\(^{46}\) See RESTATMENT (THIRD), supra n.16, § 431, cmt. a ("Under international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe."); Lotus Case, supra n.10 (despite physical presence of French ship officer on Turkish territory, Turkey could not enforce its law against him absent prescriptive jurisdiction); Rivard v. United States, 375 F.2d 882, 885 (5th Cir.)("Under international law a state does not have jurisdiction to enforce a rule of law prescribed by it, unless it had jurisdiction to prescribe the rule."), cert. denied, 389 U.S. 884 (1967).

\(^{47}\) See STANBROOK & STANBROOK, supra n.25, at 111; Colangelo, supra n.14, at 126 (a State's strongest claim of power pertains to persons or things within its jurisdiction).

\(^{48}\) For example, were a national statute to permit the expropriation of aliens' property without just compensation or allow a State's own nationals to counterfeit the currency of another State, that would constitute a violation of international law. Akehurst, supra n.1, at 188.

\(^{49}\) E.g., Smallwood v. Clifford, 286 F. Supp. 97, 100 (D.D.C. 1968). Such consent can be communicated in ad hoc instances as well as via treaties. See, e.g., Robinson, 843 F.2d 1 (upholding conviction of two Panamanian crew members stopped by the U.S. Coast Guard (USCG) on the high seas for possession of 20 tons of marijuana on the ground that Panama had agreed to the U.S. prosecution), cert. denied, 488 U.S. 834 (1988); Wilson v. Girard, 354 U.S. 524 (1957) (upholding conviction by a Japanese court of a member of the U.S. armed forces for the murder of a Japanese woman where it was deemed a waiver when the U.S. government turned him over to the Government of Japan to face prosecution).
b. **Requirements for State Criminal Jurisdiction**

To bring a fugitive to face justice, and thereby enforce applicable laws, a State must have both subject matter jurisdiction over the crime (a function of prescriptive authority\(^{50}\)) and personal jurisdiction over the individual of interest (a form of adjudicative authority\(^{51}\)).\(^{52}\) The first characterizes a relationship between the State and the crime; the second describes a connection between the State and the individual of interest.

One of these alone will not suffice. Accordingly, a State cannot bring a charged individual to justice, even if it has secured effective control over him through an extradition request or some alternative means,\(^{53}\) so long as it lacks a recognized connection to the underlying crime, for example, that it occurred absent a sufficient State nexus to the perpetrator or victim.\(^{54}\) Likewise, a criminal connection by itself does not afford a State license to prosecute where no personal jurisdiction exists,\(^{55}\) typically due to lack of physical custody,\(^{56}\) but also possibly to other factors, such as a fugitive’s presence obtained via an invalid

---


52. See McAllister, *supra* n.4, at 453.

53. Sometimes, States assert jurisdiction against the property of absent persons (e.g., ships or bank accounts), *Kindred & Saunders, supra* n.17, at 598, but such actions are beyond the scope of this discourse.

54. See *Goldstone Co. v. Payne*, 94 F.2d 855, 857 (2d Cir. 1938) (“where the court lacks jurisdiction over the subject matter of the case, the defect is not cured by getting personal jurisdiction of the defendant.”). The grounds on which subject matter jurisdiction is based will be discussed infra.

55. See *Rankin v. Howard*, 633 F.2d 844, 848 (9th Cir. 1980) (“If a court lacks jurisdiction over a party, then it lacks ‘all jurisdiction’ to adjudicate the party’s rights, whether or not the subject matter is properly before it.”), cert. denied, 451 U.S. 939 (1981); *Kindred & Saunders, supra* n.17, at 598 (“Beyond possessing prescriptive jurisdiction over the subject matter, a state also needs jurisdiction over the person in order to enforce its laws.”).

56. See *Kindred & Saunders, supra* n.17, at 598; Abraham Abramovsky & Steven J. Eagle, *United States Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?*, 57 Or. L. Rev. 51, 53-54 (1977). If a State lacks physical custody, it could still conceivably exercise personal jurisdiction where it had some other form of control over an individual, such as where that individual were temporarily held by another State at the pursuing State’s behest.
extradition treaty,\textsuperscript{57} in breach of an applicable treaty (extradition or otherwise),\textsuperscript{58} or through outrageous governmental conduct.\textsuperscript{59} In absentia criminal proceedings present an interesting twist on the matter of personal jurisdiction, and while many States permit their use,\textsuperscript{60} as a practical matter, absent physical custody of an accused, no punishment can obtain.\textsuperscript{61}

c. Subject Matter Jurisdiction: Scope and Dynamics

Although obtaining personal jurisdiction is essential to bringing international fugitives to justice and, indeed, is the raison d’être for an extradition request or the exercise of one of its alternatives, it is important in the context of this inquiry

\textsuperscript{57} See, e.g., United States v. Deaton, 448 F. Supp. 532, 534 (N.D. Ohio 1978) (finding personal jurisdiction over the defendant after rejecting his claim that he had been improperly transferred under an invalid extradition treaty).

\textsuperscript{58} Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1932). Notably, Gen. Manuel Noriega sought to divest the federal district court’s jurisdiction over his person on the grounds that he was a Prisoner of War (POW) under a variety of articles of the Third Geneva Convention of 1949 (GC III), including 82, 84, 85, 87, 99, 22, and 118, but the court rejected each of those contentions under the operative facts. United States v. Noriega, 746 F. Supp. 1506, 1525-29 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997).

\textsuperscript{59} See United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974) (a federal court “must 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.”), reh’g denied, 504 F.2d 1830 (1974), motion to dismiss denied on remand, 398 F. Supp. 916 (E.D.N.Y. 1975). Other bases for lack of personal jurisdiction exist under domestic law; for example, U.S. courts martial have no personal jurisdiction over American civilians overseas for crimes they committed during peacetime. Reid v. Covert, 354 U.S. 1, 35 (1957).

\textsuperscript{60} See Anne Klerks, Trials in absentia in International (Criminal) Law, LL.M Thesis, Tilburg Univ., June 2008, available at http://arno.uvt.nl/show.cgi?id=81103 (last viewed on Jan. 1, 2014) (“In the civil law tradition, trials in absentia are usually a normal part of the criminal system. However, this does not mean that all civil law traditions allow for trials in absentia. Whether a State allows for trials in absentia depends on the national law of the State and often on the severity of the crime concerned. For instance, Germany does not allow for trials in absentia at all. However, the French Code of Criminal Procedure permits trials in absentia for felony cases, under the condition that when the suspect is captured, he has the right to a retrial. Moreover, several States of the European Union, including the Netherlands, allow for trials in absentia. In countries that have a common law tradition, trials in absentia are however ‘not an ordinary part of the criminal system’. The requirements set by the national law differ in every country. For example, the United Kingdom requires that the accused is present throughout the trial when it concerns a serious offense. In a federal case in the United States of America, the defendant ‘must be present at every stage of his or her trial’. However, based on Rule 43 of the Federal Rules of Criminal Procedure, the defendant automatically waives his or her right to be present when (s)he is voluntarily absent after the trial has begun.”).

\textsuperscript{61} In some such cases, the defendant simply refuses to appear in court although he has been provided a full and fair opportunity to do so and remains within the control of the prosecuting State. Although technically qualifying as in absentia trials, personal jurisdiction is nevertheless fully satisfied. In other instances, the defendant remains a fugitive, and while the State proceeds with a criminal trial, cognizant all the while of protecting the defendant’s due process rights, the State would not be in a position to subject a convicted person to imprisonment and, to that extent, lacks personal jurisdiction over him.
to clarify the nature and scope of subject matter jurisdiction not only because of its interplay with adjudicative powers, and to distinguish it from personal jurisdiction (as the two terms are often confused or conflated), but also because this prescriptive element is the triggering mechanism for all the law enforcement efforts that may follow.

“States have developed and apply different types of rules regulating the spatial scope of their respective criminal laws.” Subject matter jurisdiction can be justified on either a territorial or extraterritorial basis, but in any event, that exercise must not be unreasonable. If a crime were committed on a pursuing State’s soil, even if the perpetrator then fled to another State, that pursuing State can set out a territorial claim over the crime. If, by contrast, the crime were to take place within another State’s territory, a pursuing State must make its case based on an extraterritorial ground to claim jurisdiction over the conduct at issue. At times, there may be competing demands by two or more States for subject matter jurisdiction. This dissertation will now briefly identify, describe, and assess the relative strength of each available ground for subject matter jurisdiction.

---

62 Under U.S. law at least, to the extent subject matter jurisdiction is in doubt, a federal court is expected to raise the issue at oral argument and solicit views from the parties. See In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988); United States v. Vreeken, 803 F.2d 1085, 1089 (10th Cir. 1986).
63 One important difference between them is that while an individual can consent to personal jurisdiction, he cannot consent to subject matter jurisdiction, as the latter is a State’s prerogative alone.
64 Cameron, supra n.2, at 16 (emphasis supplied).
65 Extraterritoriality was not always recognized as a legitimate basis for jurisdiction. See Sambei & Jones, supra n.25, at 1-2 (historically States did not assert extraterritorial jurisdiction); e.g., The Apollon, 22 U.S. (9 Wheat.) 362 (1824) (stressing that the domestic laws of one nation do not extend beyond its territory).
66 See Restatement (Third), supra n.16, § 403, cmt. a (“The principle that an exercise of jurisdiction on one of the bases indicated . . . is nonetheless unlawful if it is unreasonable . . . has emerged as a principle of international law”); id. § 403(2) (reasonableness is evaluated according to certain criteria, including notably: “(g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state”); e.g., United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994) (holding the extraterritorial application of 18 U.S.C. § 1959 (2012), which penalizes violent crimes committed in aid of a racketeering enterprise, to be reasonable under international law).
67 See Boister, supra n.15, at 290.
68 How such a conflict is resolved will depend to a large extent on any applicable treaty provisions. See subsection c.iii infra on de-confliction.
i. **Territorial Jurisdiction**

Territoriality is a universally recognized and generally dispositive basis for subject matter jurisdiction, authorizing the State within whose territory a crime actually or allegedly occurred (the *locus delicti commissi*) to exercise its prescriptive reach over that crime.69 This jurisdictional ground is rooted in the principle of national sovereignty,70 and accepts that when an individual violates the domestic laws of another State, he is legally accountable to the host State for any such acts or omissions, even if he has no domicile or residency there.71

For criminal jurisdictional claims based on territory, one must understand the full extent of a State's territorial reach.72 To begin, a State's territory comprises:

---

69 See Restatement (Third), supra n.16, § 402, cmt. c ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy."); Lotus Case, supra n.10; Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 Mich. L. Rev. 1087, 1089 (1974) [hereinafter Note, Israeli Precedent]; Rüdiger Wolfrum, The Decentralized Prosecution of International Offences Through National Courts, in War Crimes in International Law 233 (Yoram Dinstein & Mala Tabory eds. 1996). Consistent with this understanding, it is notable that until the early 1990s, there had been no case in which the Botswana courts determined they had jurisdiction over an offense committed in a foreign country, as exemplified by Ngwenya v. State, Crim. Appl. No. 202, Botsw., 1983 (unreported), discussed in Kwame Frimpong, Punishing Offences Committed Abroad: Practical (National) Relevance or Theoretical Claim, in Principles and Procedures for a New Transnational Criminal Law: Documentation of an International Workshop in Freiburg 35, May 1991 (Albin Eser & Otto Lagodny eds. 1992).

70 See Note, Israeli Precedent, supra n.69, at 1089; Stanbrook & Stanbrook, supra n.25, at 112; Restatement (Third), supra n.16, § 402(1)(a) and cmt. c (1987); Terry Richard Kane, Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold, 12 Yale J. Int’l L. 294, 297 (1987).

71 Reydams, supra n.3, at 3; Sir Robert Jennings & Sir Arthur Watts, eds., 1 Oppenheim’s International Law 901 (9th ed. 1992) ("The fact that every state exercises territorial supremacy over all persons on its territory, whether they are its nationals or aliens, excludes the exercise of the power of foreign states over its nationals in the territory of another state."); United States v. Burns, Sup. Ct. of Canada, Feb. 15, 2001, 2001 SCC 7, ¶ 72 [2001] 1 SCR 283, 195 D.L.R. (4th) 1 ("individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents"); In re State of Vermont v. Brewster, 7 Vt. 118, 120 (1835) ("It is a well settled rule of international law, that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offence there committed, he is amenable to those laws. . . . [Thus, an alien’s] escape [from the United States] into Canada did not purge the offence, nor oust our jurisdiction."). Before the territorial principle was recognized, States relied on the personality of laws whereby an individual was governed by the national law wherever he happened to reside. Antonio Cassese, International Criminal Law 276 (2003).

72 “Statehood is inconceivable in the absence of a reasonably defined geographical base. The frontiers of such an entity need not be established beyond dispute, nor is there any prescribed minimum of territory for the existence of a state, but some piece of land is essential before one can accept the establishment and continuation of a state.” Malcolm N. Shaw, Territory in International Law, in Title to Territory 3 (Malcolm N. Shaw ed. 2005) [hereinafter Shaw, Territory]; accord Surya P. Sharma, Territorial Acquisition, Disputes and International Law 2 (1997).
(i) the land and water areas within its borders, (ii) its internationally defined territorial seas,\textsuperscript{73} and (iii) earth subjacent and air space superjacent to all such geographical surfaces.\textsuperscript{74} Territory is also defined to encompass, if only on a constructive basis, a State’s nationally registered or flagged vessels\textsuperscript{75} – whether sea-faring, airborne, or aloft in outer space\textsuperscript{76} (sometimes referred to as “floating territoriality” or “constructive territoriality”\textsuperscript{77}). In such instances, only one national flag may be used per vessel,\textsuperscript{78} there must be (at least in principle) a


\textsuperscript{74} This follows from the Latin maxim, \textit{cuius est solum est usque ad caelum et ad inferos}, or “he who owns the surface has title both to the airspace above and the subsoil below.”

\textsuperscript{75} See Conv. on Int'l Civil Aviation, Chicago, Annex 9 (1944), art. 17, as amended (9th ed. 2006), available at http://www.icao.int/publications/Documents/7300_cons.pdf (last visited on Feb. 23, 2012) (“Aircraft have the nationality of the State in which they are registered.”); Law of the Sea Conv., supra n.73, art. 91(1) (“States shall have the nationality of the State whose flag they are entitled to fly.”).

\textsuperscript{76} Kane, supra n.70, at 298.


\textsuperscript{78} See Conv. on Int'l Civil Aviation, Dec. 7, 1944, art. 18, available at http://www.icao.int/publications/Documents/7300_cons.pdf (last visited on Jan. 2, 2014) [hereinafter Chicago Conv.] (no dual registration permitted). A ship on the high seas that flies more than one State flag “may be treated as a ship without nationality” and a Stateless ship “may be boarded and seized on the high seas.” \textit{Malcolm Shaw, International Law} 613 [hereinafter
genuine link between the State and the vessel,\textsuperscript{79} and such jurisdictional primacy cannot be presumed and remains unresolved as a matter of international law when such vessels are found in another State's territorial waters or air space.\textsuperscript{80} Other forms of a State's "constructive" territory include its embassies,\textsuperscript{81} consular premises,\textsuperscript{82} and military facilities abroad,\textsuperscript{83} in addition to any overseas territory

\begin{footnotesize}


\textsuperscript{80} See Draft Conv. on Research in Int'l Law of the Harvard Law School, "Jurisdiction with Respect to Crime," art. 4, 29 AJIL 435 (Supp. 1935) [hereinafter Harvard Research]; Bart DeSchutter, \textit{Problems of Jurisdiction in the International Control and Repression of Terrorism, in International Terrorism and Political Crimes} 382 n.10 (M. Cherif Bassiouni ed. 1975). Cf. Chooi Pong, \textit{Some Legal Aspects of the Search for Admission into other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats}, 52 B.Y.B.I.L. 53 (1982) ("In this field there are two conflicting theories, the one stating that the ship is a floating piece of State territory and the other that a ship is only the property of a State at a place where no local jurisdiction exists. Neither theory is accepted by the majority of specialists on international law. The generally accepted view is that a merchant ship in the open sea is subject not to territorial jurisdiction but to the jurisdiction of the State of the flag."). For one example, see Chung Chi Cheung v. The King [1939] AC 160 (U.K.) (rejecting notion of floating jurisdiction at least in criminal matters; where a crime was committed on a Chinese-flagged vessel in Hong Kong territorial waters then under U.K. sovereignty, the accused was prosecuted under Hong Kong law on the ground that "a public ship in foreign waters is not and is not treated as, territory of her own nation.").

\textsuperscript{81} See Alfred P. Rubin, "U.S. Embassies are Not U.S. Territory," Opinion, \textit{N.Y. Times}, Mar. 1, 1984, available at \url{http://www.nytimes.com/1984/03/01/opinion/u-s-embassies-are-not-u-s-territory-022156.html} (last visited on Dec. 27, 2013) ("As a matter of international law, an embassy is not "territory" of the sending state; it is territory of the receiving state that is accorded, through various treaties and customs, some immunities from host-country law."); U.S. Dep't of State Website, Discover Diplomacy, "What Is a U.S. Embassy?", available at \url{http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.html} (last visited on Dec. 27, 2013) ("While diplomatic spaces remain the territory of the host state, an embassy or consulate represents a sovereign state. International rules do not allow representatives of the host country to enter an embassy without permission – even to put out a fire – and designate an attack on an embassy as an attack on the country it represents.") (emphasis supplied).

\textsuperscript{82} Previously, States held the view that their embassies and consulates on foreign soil constituted sending State territory \textit{per se}. \textit{See, e.g., United States v. Archer}, 51 F. Supp. 708, 709 (S.D. Cal. 1943) (a consulate, even if the building is not owned by the U.S. government, it is still "a part of the territory of the United States of America.").

\textsuperscript{83} See Boister, \textit{supra} n.15, at 290 n.9. \textit{See also} \textit{6 Marjorie M. Whiteman, Digest of International Law} 744 (1968) (discussing case from 1965 in which the U.S. requested and obtained extradition from Austria of an American soldier charged by U.S. military authorities with robbery committed at a U.S. military base at Berchtesgaden, Germany, who had fled to Austria). \textit{Cf. United States v. Morton}, 314 F. Supp.2d 509, 512-15 (D. Md. 2004) (finding no subject matter jurisdiction in case involving a civilian accused of sexual misconduct with a minor while visiting a U.S. government housing facility off the premises of Ramstein AFB, which, while the land was "reserved or acquired for the use of the United States," it was not under the "exclusive or concurrent jurisdiction" of the United States, and therefore did not qualify as a "special maritime and

\end{footnotesize}
for which an agreement establishes some permanent or temporary right of use or ownership, such as leased land, a trusteeship, or occupied territory pursuant to an unconditional surrender (e.g., Berlin following World War II).\footnote{See Hans Smit, The Panama Canal: A National or International Waterway?, 76 Colum. L. Rev. 965 (1976) (Panama Canal Zone transferred to the U.S. under the Hay-Bunau-Varilla Convention of 1903 and U.S. to exercise its rights as if it were the territorial sovereign); U.S.-Cuba Agreement, supra n.5 (Cuba leased to the U.S. Guantánamo for use as naval station and the U.S. to exercise complete jurisdiction and control over and within leased areas); Sunga, supra n.15, at 300 (the Nuremberg and Tokyo trials were conducted in territory occupied by the Allies, who were entitled to occupy Germany and Japan pursuant to terms of unconditional surrender; thus, the Allies were in a position to apprehend and prosecute the offenders on the spot through the tribunals themselves or through thousands of subsequent trials in the occupied zones); U.N. CHARTER, supra n.23, Chap. XII (Trusteeships), available at http://www.un.org/en/documents/charter/chapter12 (last visited on Nov. 17, 2013).}

Territorial claims of criminal jurisdiction become more complicated when an offense begins (or is conceived) on one State’s territory but is consummated (or its effects are experienced) on another’s. Does, for instance, the criminal act of murder occur only on the territory of State A from which a rifleman shoots a cross-border bullet, only on the territory of State B where the murder victim is mortally wounded, or on both States’ territories? How about if a crime were hatched by a mastermind entirely in State A, but carried out by his agents only in State B, or was never executed at all but remained inchoate, such as attempted homicide in which no one was harmed or a conspiracy to defraud in which no fraud ever actually occurred? Would State A or B be equally entitled to assert territorial jurisdiction over such crimes? Cyber-crimes – whether cyberspace is
exploited for fraudulent, pornographic, stalking, terrorist, or other criminal purposes – pose a particular jurisdictional challenge.\footnote{See Armando A. Cottin, Cybercrime, Cyberterrorism and Jurisdiction: An Analysis of Article 22 of the COE Convention on Cybercrime, available at http://www.ejls.eu/6/780UK.htm (last visited on Dec. 30, 2013) (“The Convention on Cybercrime points the way toward cooperation with respect to criminalizing certain behaviours and pursuing those responsible. It does not, however, resolve the issues of international jurisdiction.”).}

There are no uniform answers to these questions; rather, States vary in their approach, each generally recognizing and applying one of the following three doctrines. First, there is the so-called “subjective territorial principle” where a State stakes a jurisdictional claim to prosecute or punish\footnote{To be clear, a reference in this analysis to “punish” in the context of “prosecute or punish” means to ensure that a fugitive serves out the remainder of an imposed prison sentence following a criminal conviction rather than to be punished arbitrarily without some connection to an imposed sentence.} a crime that commenced or a portion of which occurred within its territory, even though the crime was concluded or its effects felt elsewhere.\footnote{Freestone, supra n.34, at 43-44 & n.4; Cameron, supra n.2, at 53-54 (preferring the label “initiatory jurisdiction” to avoid confusion between the differential American and British understandings of the term “subjective territorial”). Many States are prepared to assert territorial jurisdiction over a crime even if the lion’s share occurred elsewhere so long as part of the offense occurred within its territory. E.g., N.Z. Crimes Act, Pub. Act 43, Nov. 1, 1961, § 7, available at http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html (last visited on Nov. 3, 2013); U.K., Criminal Justice Act, 1993 (England and Wales), available at http://www.legislation.gov.uk/ukpga/1993/36/contents (last visited on Nov. 3, 2013); Conv. for the Suppression of Illicit Traffic in Dangerous Drugs, June 26, 1936, § 2, 198 L.N.T.S. 299 (1939) [hereinafter Dangerous Drugs Conv.]; Libman v. The Queen, 21 DLR (4th), 174 SCC 1986 (Can.).} A second approach is the “objective territorial principle” (occasionally referred to as the “effects doctrine” or “qualified territorial principle”) wherein a State chooses to assert jurisdiction over a crime that, while commenced elsewhere, was completed or resulted in injury or damage within its territory,\footnote{Freestone, supra n.34, at 43-44 & n.4; Cameron, supra n.2, at 54 (preferring the label “terminatory jurisdiction”); Note, Israeli Precedent, supra n.69, at 1089 & n.11; Adelheid Puttler, Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad, in EXTRATERITORIAL JURISDICTION IN THEORY AND PRACTICE 106-07 (Karl M. Meessen ed. 1996); Geoff Gilbert, Extradition, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 416-20 (John P. Grant & J. Craig Barker eds. 2007) (noting that the entire commission of the crime could have taken place within the territory of the non-prosecuting State); United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998) (this principle “applies where the defendant’s actions either produced some effect in the United States, or where he was part of a conspiracy in which any conspirator’s overt acts were committed within the United States’ territory.”). A prime example can be found in the famous Lotus Case. A collision occurred on the high seas between a French ship, the SS Lotus, and a Turkish ship, the Boz-Kourt, which resulted in the death of 8 passengers and crew on the Turkish vessel. The French officer in charge (Demos) was put on trial in Turkey charged with causing”}
instances where the chief offender never set foot on the prosecuting State’s territory. As a U.S. Court of Appeals observed: “All the nations of the world recognize ‘the principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done.’ In a case involving strictly criminal consequences within a State’s territory, it is generally expected not only that the effect on the prosecuting State would be “primary, direct, and substantial,” but also that criminal intent is established.

death by criminal negligence. France argued that the Turkish exercise of jurisdiction was contrary to international law and submitted the dispute to the Permanent Court of International Justice (PCIJ). The main issue facing the Court was whether Turkey had jurisdiction to try Demons for a crime committed outside Turkish territory. A divided court ruled (on the President’s deciding vote) that Turkey had jurisdiction under the objective territoriality principle in that his crime of negligence had been consummated on a Turkish vessel, which constituted Turkish territory. Lotus Case, supra n.10.

See, e.g., AP, “U.S. Citizen Pleads Guilty to Defaming Thai King,” IHT, Oct. 11, 2011, at 4 (Thailand asserted territorial jurisdiction over Joe Gordon, a Thai-born American, who pled guilty to charges under Thai law prohibiting insults of its king (lèse-majesté) for translating excerpts of a nationally banned biography of King Bhumibol Adulyadej entitled, The King Never Sleeps, and posting them on an online blog and by providing links to the translation to other Internet access in Thailand); Bruce Zagaris, Australia Extradites Alleged Software Pirate to U.S., 23 IELR 189, 189-90 (2007) (in early 2007, Australia extradited a British national, Hew Raymond Griffiths, residing in Bateau Bay, Australia, on criminal copyright infringement charges as leader of a prominent Internet software piracy group called DrinkOrDie; significantly, while he argued he had never set foot in the United States, Australia still found that the United States had territorial jurisdiction by virtue of his violation of U.S. laws). Firm jurisdictional basis exists even if an accused was part of a conspiracy but never actually entered the territory in question and relied instead on agents, innocent or not, to complete his crime. See, e.g., Noriega, 746 F. Supp. at 1513 (“Even if the extraterritorial conduct produces no effect within the United States, a defendant may still be reached if he was part of a conspiracy in which some co-conspirator’s activities took place within United States territory.”) (citing United States v. Baker, 609 F.2d 134, 138 (5th Cir. 1980) (case involved cocaine trafficking from Panama into the U.S.), aff’d, 117 F.3d 1206 (11th Cir. 1997).

Rivard, 375 F.2d at 887 (citations omitted).

Third Restatement, supra n.16, § 402(1)(c) and cmt. d; Puttler, supra n.88, at 107; Boister, supra n.15, at 294 & n.36. See also III, Draft Resolution, supra n.4, at 2(4) (“Under international law, the territorial jurisdiction of a State extends to activities performed outside the State’s territory (‘effects doctrine’), provided the effect is a significant one relating to the State’s public order or interest.”); cf. R.Y. Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 B.Y.B.I.L. 146, 159 (1957) (if it were permissible to found objective territorial jurisdiction on territoriality of more or less remote repercussions of an act wholly performed in another territory, then there were virtually no limit to a State’s territorial jurisdiction).

For example, if a Dutch drug dealer intended to bring cannabis into Germany by giving it to German citizens who then smuggled it in for him, the test would be met, but if he sold cannabis to Germans in the Netherlands and did not care where they consumed it or what they did with it, then there would be an insufficient nexus. Puttler, supra n.88, at 106. See also United States v. Columba-Colella, 604 F.2d 356, 359 (5th Cir. 1979) (“Assume . . . that persons or their agents conspire to rent a boat in Miami, sail it beyond United States coastal waters, and load it with a cargo of illegal drugs. Then, en route to a United States port but while still on the high seas, the conspirators are apprehended. This country may under the objective territorial theory apply its
The third approach is the “ubiquity” principle (often associated with Germany where it originated) that provides maximum latitude to States, with subscribers flexibly accepting either conduct or effects as a basis for a territorial claim of jurisdiction.

We must also consider whether a State can claim jurisdiction over inchoate crimes, i.e., those that intend to cause damage or injury on a State’s territory, such as conspiracy or attempt, but that do not actually materialize. Although such crimes are more difficult to prove and many international conventions are

drug laws to punish them if it can establish intent to violate those laws.”) (finding no basis for subject matter jurisdiction in the case at bar).

93 This approach, however, tends to yield concurrent jurisdictional claims. 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 199 (1992) [hereinafter BLAKESLEY, COMPARATIVE STUDY].

94 See Christopher L. Blakesley & Otto Lagodny, Finding Harmony Amidst Disagreement over
Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality in International
that a crime is deemed to have occurred in the place where the perpetrator acted or in the place
where the statutorily proscribed harm occurred.”) (citing German Penal Code, see infra n.116);
CAMERON, supra n.2, at 54-55. The U.S. has liberalized its conception of territorial jurisdiction
over the years by gradually coming to accept a position closely approximating the ubiquity
decree, permitting prosecutions of individuals responsible for either a material element of an
offense or a criminal result on U.S. territory. BLAKESLEY, COMPARATIVE STUDY, supra n.93, at 198-99.

95 See RESTATEMENT (THIRD), supra n.16, § 402, cmt. d (“Cases involving intended but unrealized
effect are rare, but international law does not preclude jurisdiction in such instances, subject to
the principle of reasonableness. When the intent to commit the proscribed act is clear and
demonstrated by some activity, and the effect to be produced by the activity is substantial and
foreseeable, the fact that a plan or conspiracy was thwarted does not deprive the target state of
jurisdiction to make its law applicable.”).
silent as to their applicability, some judicial support, including in the U.K. and the U.S., exists for this proposition.

Territoriality boasts a number of advantages that commend it as a jurisdictional base: (i) non-territorial States generally wish to honor the principles of territorial sovereignty and the equality of States, and not interfere in the internal affairs of the State where an offense occurred; (ii) the territorial State is typically most affected by the criminal conduct at issue and therefore tends to be more willing to invest the time, money, and people necessary to investigate and prosecute a case; (iii) the territorial State has the greatest interest in demonstrating its resolve to combat crime within its territory and deterring the further commission of such crime; (iv) it is likely that the accused will be identified and arrested on the territory where the actual or alleged crime occurred and that material evidence and witnesses will be more easily accessed and produced in the territorial State; and (v) the accused often stands an improved prospect of having his rights protected and understanding the local

---

96 E.g., Dangerous Drugs Conv., supra n.87.
97 In 1991, the Judicial Committee of the Privy Council ruled that the Governor of Hong Kong had jurisdiction to order the extradition to the U.S. of an individual charged with conspiracy to import heroin into the United States. The individual had agreed to supply heroin while he was in Thailand but was arrested in Hong Kong, when he went to collect payment there, even though there was no overt act in furtherance of the conspiracy in Hong Kong. The Court reasoned that “there is nothing in precedent, comity, or good sense that would inhibit the common law from regarding a conspiracy abroad as an offense if it was intended to result in a criminal offense in England even though no overt act took place there.” Liansisriprasert v. United States [1990] 2 All E.R. 866, 878 (P.C.), [1991] 1 A.C. 225 (U.K.) (Lord Griffiths). Accord Regina v. Sansom, et al. [1991] 2 WLR 366, 366 (Feb. 1) (U.K. Ct. of App.) (holding that where “an alleged conspiracy entered into in Morocco to import cannabis in bulk from Morocco to England could be prosecuted in England, even where there was no proof of any act pursuant to that conspiracy having been committed in England”).
98 See United States v. Winter, 509 F.2d 975, 982-83 (5th Cir. 1975) (where a co-conspirator committed an act in furtherance of a conspiracy on U.S. territory, the court had jurisdiction even though the co-conspirators were arrested on the high seas and had not yet entered U.S. territory); Norieg a, 746 F. Supp. at 1513 (international law now recognizes “a mere showing of intent to produce effects in this country, without requiring proof of an overt act or effect within the United States.”) (emphasis in original) (citing United States v. Wright-Barker, 784 F.2d 161, 168 (3d Cir. 1986)), aff’d, 117 F.3d 1206 (11th Cir. 1997).
99 See, e.g., Conv. on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277, reprinted in 28 I.L.M. 763 [hereinafter Genocide Conv.] (requiring that persons accused must be brought before the national court where the act was performed).
100 Gilbert, supra n.88, at 416 & n.6; Note, Israeli Precedent, supra n.71, at 1089.
102 Note, Israeli Precedent, supra n.69, at 1089; Casseze, supra n.71, at 279.
language, while the judge and jury normally will better reflect local views regarding the crime.103

At the same time, however, the territorial principle suffers from several challenges, some of which have been referenced above. To begin, it is not always clear within whose territory an actual or alleged crime was committed, as, say, certain vessels or buildings may belong to one State but be located within another’s territory, or certain tracts of land may be co-owned by two States or leased by one State but owned by another. In addition, when a crime is initiated on one State’s territory but consummated on another, or a crime was intended to injure a State but never came to fruition, there could be multiple competing claims of jurisdiction over that crime. Furthermore, an accused may enjoy official immunity or even amnesty under the territorial State’s laws while a non-territorial State would be more likely to prosecute and, if convicted and sentenced, keep the fugitive imprisoned.104 Finally, there could be political unwillingness on the part of territorial State prosecutors to pursue claims against individuals if it could implicate certain public officials or State agencies for their complicity in the underlying crime.105

ii. Extraterritorial Jurisdiction

As a great many crimes do not occur on the territory of a State that has an interest in prosecuting or punishing an actual or alleged offender, States are left to establish extraterritorial reach for their criminal laws.106 Under international law, States have reasonably wide latitude to establish criminal laws with the

---

103 CASSESSE, supra n.71, at 279.
104 Id. at 280.
105 Id.
106 See, e.g., Destruction of Aircraft or Aircraft Facilities, 18 U.S.C. § 32(b)(1) (2012), available at http://www.law.cornell.edu/uscode/text/18/32 (last visited on Nov. 17, 2013) (“Whoever willfully performs an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such aircraft is likely to endanger the safety of that aircraft . . . shall be fined under this title or imprisoned not more than twenty years, or both. There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterward found in the United States.”).
“spatial scope” to cover events or conduct occurring overseas107 and then to authorize their courts to adjudicate such crimes108 – and all States to some extent exercise such discretion.109 (Under U.S. law, where a statute is silent as to its extraterritorial application, the rebuttable presumption is that it was not intended to have such reach; accordingly, U.S. courts examine statutes to determine whether that intention is explicit or “may be inferred from the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved.”110) Beginning in 1935 with the seminal, albeit unofficial, Harvard Research Draft Convention on Jurisdiction with Respect to Crime,111 four bases for extraterritorial jurisdiction have been consistently recognized over the years;112 they will be identified, described, and explicated throughout the remainder of this section.

107 See Lotus Case, supra n.10, at 19 (States have a “wide measure of discretion which is only limited in certain cases by prohibitive rules.”); In re Extradition of Demjanjuk, 612 F. Supp. 544, 555 (D.C. Ohio 1985) (citing Lotus Case).
108 See Wolfram, supra n.69, at 233 (a State can prosecute and punish within its territory criminal offenses even if committed abroad); STANBROOK & STANBROOK, supra n.25, at 113 (under U.K. law, an extraterritorial offense means “an offense against U.K. law although it occurred entirely outside the U.K. and its territorial waters”); Boister, supra n.15, at 290; EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (“Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”).
109 See Cameron, supra n.2, at 12. Traditionally, civil law States have been more inclined than common law States to exercise extraterritorial jurisdiction. IliaS BanTekaS & Susan Nash, INTERNATIONAL CRIMINAL LAW 179 (2d ed. 2003).
111 Harvard Research, supra n.80. Although the Harvard Research draft is not official text, it is useful nonetheless as it represents a synthesis of State practice that continues to be relied on today. Sunga, supra n.15, at 251. States and scholars alike have since accepted these Harvard Research draft principles as defensible grounds for asserting jurisdiction. Patrick L. Donnelly, Note, Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Anti-terrorism Act of 1986, 72 CORNELL L. REV. 599, 601 (1987).
112 Many treaties do not preclude the application of criminal jurisdiction exercised in accordance with national laws; thus, to the extent such laws are not contrary to international law, they can be treated as complementary principles, and prosecution may be independently based on them. DeSchutter, supra n.80, at 386.
**Active Personality Principle.** Under this jurisdictional basis, a pursuing State may prosecute or punish its own nationals for crimes they committed abroad\(^{113}\) even if not punishable under the law of the host State or elsewhere\(^{114}\) and even if the accused is also a national of the host State itself (i.e., a dual citizen).\(^{115}\) As a well-established ground for asserting subject matter jurisdiction,\(^{116}\) a State need not demonstrate substantial harm to its domestic interests when justifying its application.\(^{117}\) That said, the active personality principle is not often invoked\(^{118}\) and its application in practice is not altogether standardized.\(^{119}\)

Indeed, such practice historically has varied considerably as between civil law and common law States, with the former, as a general rule, much more prone to apply the principle and the latter only recently beginning to appreciate the principle’s appeal.\(^{120}\) Common law countries have been inclined, however, to assert the active personality principle in instances where: (i) serious offenses,

---


\(^{114}\) *Wolfram, supra* n.69, at 233; *Cassese, supra* n.71, at 278-300.

\(^{115}\) *E.g., Kawakita v. United States*, 343 U.S. 717 (1952).


\(^{117}\) *Boister, supra* n.15, at 291.

\(^{118}\) Its infrequent use derives mainly from the fact that in such instances States have no compelling reason to assert jurisdiction and pursue prosecution against such individuals. *Id.* at 292.

\(^{119}\) *See Gilbert, supra* n.88, at 417 (wide variations in use); *Cassese, supra* n.71, at 278-300 (no uniformity of application with respect to whether the alleged offender must possess the nationality of the pursuing State when the crime occurred or, alternatively, when the criminal proceedings were instituted).

\(^{120}\) *Freestone, supra* n.34, at 44 n.5; *Gilbert, supra* n.88, at 417; *Sambe & Jones, supra* n.25, at 2.
such as murder or manslaughter, are committed by its nationals abroad;\textsuperscript{121} (ii) a State’s own security is put at risk by treasonous acts or the like by its nationals overseas;\textsuperscript{122} or (iii) due to economic or cultural factors, developing countries are perceived as unable to suppress certain crimes in which a developed State’s nationals are directly engaged.\textsuperscript{123}

Several justifications have been advanced to support the active personality principle: (i) to ensure one’s own nationals comply with foreign law as a matter of respect, if not reciprocity;\textsuperscript{124} (ii) to ensure that a State not become a safe haven for its own nationals who commit crimes overseas;\textsuperscript{125} (iii) to hold criminally accountable nationals to the extent they owe allegiance to their State in part because of the protections it extends;\textsuperscript{126} and (iv) to help rectify any negative reputational light such criminal acts may cast on the State of their nationality.\textsuperscript{127} One criticism historically directed at this principle had been that it did not apply to the population of non-nationals. Yet in recent years the active personality doctrine has at times expanded to encompass resident or domiciled aliens,\textsuperscript{128} as well as those who have since become nationals even if they were foreigners at the time the crime was committed.\textsuperscript{129}

**Passive Personality Principle.** By direct contrast with active personality that focuses on a national who is an actual or alleged offender of a crime overseas,

\begin{footnotes}
\footnote{\textsuperscript{121} STANBRICK \& STANBRICK, supra n.25, at 113-14 (discussing U.K. treatment).}
\footnote{\textsuperscript{122} United States v. Columbo-Colletta, 604 F.2d 356 (5th Cir. 1979) (discussing U.S. treatment).}
\footnote{\textsuperscript{124} CASSESE, supra n.71, at 278-300.}
\footnote{\textsuperscript{125} Gilbert, supra n.88, at 417.}
\footnote{\textsuperscript{126} See Antoni, 32 I.L.R 140. This rationale goes hand-in-hand with the limitation imposed by many civil law countries not to extradite their own nationals. SAMBEI \& JONES, supra n.25, at 2; Boister, supra n.15, at 291.}
\footnote{\textsuperscript{127} BLAKESLEY, COMPARATIVE STUDY, supra n.93, at 63.}
\footnote{\textsuperscript{128} Note, Israeli Precedent, supra n.69, at 1090 \& n.14; e.g., U.K., War Crimes Act, 1991, § 1(2), available at \texttt{http://www.legislation.gov.uk/ukpga/1991/13/contents} (last visited on Nov. 3, 2013) (permitting extraterritorial jurisdiction over crimes by habitual residents in addition to nationals); Milliken v Meyer, 311 U.S. 457, 462 (U.S. 1940). See generally WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 235-36 (1984) (domicile as potential basis for jurisdiction); RESTATEMENT (THIRD), supra n.16, § 402 cmt. e (“International law has increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence, rather than nationality, especially in regard to ‘private law’ matters such as the laws of wills and succession, divorce and family rights, and, in some cases, liability for damages for injury.”).}
\footnote{\textsuperscript{129} CASSESE, supra n.71, at 278-300.}
\end{footnotes}
passive personality allows a State to claim extraterritorial jurisdiction over a national who is the victim of a crime committed abroad.130 Along with the universal principle (discussed infra), the passive personality principle is arguably the most controversial basis of jurisdiction131 and traditionally was strongly disfavored by the U.S.132 and other Western States,133 although a number of States have long recognized this principle.134 However, with the increased incidence of, and intolerance for, such pernicious offenses as international terrorism,135 torture, hostage-taking,136 crimes against humanity, and genocide, many States have come to adopt legislation and enter into treaties

130 Donnelly, supra n.111, at 601. Because of its requirement for one or more victims, this principle has no utility regarding “victimless” crimes such as drug smuggling. Boister, supra n.15, at 293.

131 RESTATEMENT (THIRD), supra n.16, § 402 cmt. g; Robinson, supra n.31, at 487 et seq.

132 The U.S. Government vigorously opposed this principle throughout much of its history. In one celebrated case in the late 1880s, when a Mexican court convicted an American national for libel against a Mexican national based on a newspaper article published in Texas, U.S. Secretary of State Bayard wrote to his Mexican counterpart: “A sovereign has jurisdiction of offenses which take effect within his territory, although concocted or commenced outside of it; but the right is denied of any foreign sovereign to punish a citizen of the United States for an offense consummated on our soil in violation of our laws, even though the offense be against a subject or citizen of such sovereign.” Cutting Case (1887), reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 23-24 (1906). It is also telling that the ALI’s previous Restatement on Foreign Relations did not accept the principle. American Law Institute (ALI), RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2)(1965).

133 See Donnelly, supra n.111, at 602 (Western nations have contested this more than any other theory of jurisdiction); Freestone, supra n.34, at 44-45 (Anglo States were strongly opposed); Lotus Case, supra n.10 (France challenged the legality of passive personality before the PCIJ).

134 See Harvard Research, supra n.80, at 578 (identifying the following countries as claiming passive personality jurisdiction in one guise or another since the mid-1930s or earlier: Albania, Brazil, China, Cuba, Czechoslovakia, Estonia, Finland, Greece, Guatemala, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Peru, Poland, Rumania, San Marino, the Soviet Union, Sweden, Switzerland, Turkey, Uruguay, Venezuela, and Yugoslavia).

135 In response to international terrorism, France embraced the passive personality principle in 1975, French Penal Code, supra n.116, art. 689(1); in June 1987, Israel requested the extradition of Mahmoud El-Abed Ahmad, a non-Israeli national charged with bombing a bus full of civilians in Israeli-occupied territory, Ahmad v. Wigen, 726 F. Supp. 389, 398 (E.D.N.Y. 1989), aff’d, 910 F.2d 1063 (2d Cir. 1990), stay denied, 111 S. Ct. 23 (1990); and the U.S. adopted the principle in its Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 443(a), 110 Stat. 1214 (1996). See generally RESTATEMENT (THIRD), supra n.16, § 402 cmt. g. (the principle “is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.”).

that authorize such subject matter jurisdiction\textsuperscript{137} while, at the same time, not contesting others’ assertions on this ground.\textsuperscript{138}

The growing appeal of this principle stems from a perception that States increasingly need to intervene out of a duty to protect their nationals living, working, studying, or traveling abroad, especially as many are targeted precisely because of their citizenship;\textsuperscript{139} and territorial States cannot always be counted on to demonstrate the judicial capacity and/or political will to hold violators accountable.\textsuperscript{140} Reasons for initial or continued resistance to this principle include: (i) its tendency to undercut the sovereignty of the State where the actual or alleged crime occurred, and thereby promote, rather than minimize, inter-State jurisdictional conflicts;\textsuperscript{141} (ii) its prospects for prosecutorial abuse through

\footnotesize{
137 There is a growing trend toward the use of this principle. See CAT, supra n.116, art. 5(1); Wolfrum, supra n.69, at 233; Freestone, supra n.34, at 45. Domestic courts are relying increasingly on passive personality with respect to crimes against humanity and torture. E.g., “Argentina Rejects French Astiz Bid,” BBC News, Sept. 21, 2003, available at http://news.bbc.co.uk/2/hi/americas/3126260.stm (last visited on Sept. 21, 2013) (former naval officer Alfredo Astiz, known as the “Blond Angel of Death,” was convicted in absentia in France for the murder of two French nuns who had disappeared in Argentina in 1977); “Argentina Generals Get Life,” BBC News, Dec. 6, 2000, available at http://news.bbc.co.uk/1/hi/world/americas/1058205.stm (last visited on Sept. 21, 2013) (discussing case in which Argentina Gen. Carlos Guillermo Suarez Mason was convicted in absentia in Italy for the kidnapping and murder of eight Italian nationals in Argentina during its “Dirty War”).

138 For example, the U.K., which does not endorse the principle for its own use, is willing to accommodate other States’ invocation of jurisdiction in compliance with the terms of an international treaty. See Rees v. Secretary of State for the Home Department [1986] 2 All E.R. 321, 1 A.C. 937 (U.K.) (while rejecting Germany’s assertion of jurisdiction on passive personality grounds where one of its diplomats was kidnapped in Bolivia, the U.K. House of Lords conceded to its invocation under the terms of the 1979 Hostage-Taking Convention).

139 The passive personality principle is “increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality.” RESTATEMENT (THIRD), supra n.16, § 402 cmt. g. Consistent with this trend, Harvard Law professor Philip Heymann has developed a variant of this principle to address those persons targeted by an attack specifically because of their nationality. Designated as the “Targeted Passive Personality Principle,” it combines the protective principle (discussed infra) and the passive personality principle. Heymann & Gershengorn, supra n.30, at 119. This ground is particularly appropriate for terrorist attacks as the crime against the individual is really one directed against the State and intended to cause fear in all of its citizens, so the victim’s State has a strong interest in punishing the perpetrator. Id. at 119-20.

140 CASSESE, supra n.71, at 278-300; e.g., Omnibus Act of 1986, supra n.27, at 896-97. A number of States since the mid-1970s (e.g., France and Sweden) have come to expressly adopt the passive personality principle as they believe that a State should prosecute terrorists for crimes perpetrated against its citizens when the State with primary responsibility for such prosecution has failed to do so. Donnelly, supra n.111, at 602-03.

141 Gilbert, supra n.88, at 418, 419.
States’ selective enforcement to protect their nationals abroad;142 (iii) it may be viewed as tantamount to a “vote of no confidence” in other States’ criminal law systems and their capacity to effectively bring offenders to justice;143 and (iv) its questionable utility in light of the substantial overlap with the “protective principle,”144 (discussed infra) which has comparatively more international support.145

The operation of this principle varies widely among States. A small number apply the passive personality principle in its unfettered form,146 with at least one State going so far as to treat residents on par with nationals and to factor in inchoate crimes.147 Most, however, impose some kind of conditionality or limitation.148 For instance, some require dual criminality (discussed infra) in which the offense must be cognizable in the State where the crime was committed (the “territorial State”) as well as in the State asserting passive personality jurisdiction.149 Others adopt a deferential posture vis-à-vis the territorial State, limiting the assertion of jurisdiction to instances where its nationals were victims of crimes abroad that implicated national security.150

---

142 DeSchutter, supra n.80, at 382-83 & n.13.
143 Gilbert, supra n.88, at 419.
144 For example, the U.S. Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 granted federal courts subject matter jurisdiction over the killing of any U.S. national if intended to coerce, intimidate, or retaliate against a government or civilian population. Id. at 422.
145 Boister, supra n.15, at 293.
147 Under its municipal law, Israel may exercise jurisdiction over persons “who commit abroad an act which would have been an offense had it been committed in Israel and which injured or was intended to injure the life, person, health, freedom or property of an Israeli national or resident of Israel.” Israel, Knesset, Penal Law (Offenses Committed Abroad), § 7(a), 5716 (1955), Sefer Ha-Chukhim 7, 10 Laws of the State of Israel (L.S.I.) 7, as amended on 6th Nisan 5732 (Mar. 21, 1972), Sefer Ha-Chukhim 52, reprinted in 32 L.S.I. 63 (1978).
148 DeSchutter, supra n.80, at 382-83 & n.13. The passive personality principle, much like the active personality principle, is subject to temporality concerns with respect to when specifically an individual acquires his nationality as such timing will have a bearing on the principle’s application.
149 For example, under the German Penal Code, jurisdiction is available for “crimes committed abroad against a German if such conduct is punishable by the law of the place where it occurred.” German Penal Code, supra n.116, § 7.
150 Under French law, “every alien who is either a principal or accomplice in a crime (as opposed to a “delit” or misdemeanor) committed outside French territory may be prosecuted and adjudged on the basis of French law, if the victim of the crime is a French national;” however, this jurisdiction is “subsidiary to that of the country in which the offense occurs, except in cases involving national security.” Christopher L. Blakesley, A Conceptual Framework for Extradition

85
Still others insist that this principle must meet a minimum threshold of punishment;\textsuperscript{151} entail a serious violation of international law, such as a war crime or crime against humanity;\textsuperscript{152} or constitute an act where the pursuing State has a compelling national interest, such as in combatting terrorism or hostage-taking.\textsuperscript{153} In addition, some States, to the maximum extent possible, try to couple any assertion of the passive personality principle with another jurisdictional basis, typically the protective principle, so that passive personality need not carry the full jurisdictional weight alone.\textsuperscript{154}

**Protective Principle.** A third basis for extraterritorial jurisdiction is the so-called “protective principle,” also occasionally labeled the “security principle”\textsuperscript{155} or the “principle of the injured forum.”\textsuperscript{156} Under this principle, which derives from its sovereign status,\textsuperscript{157} a State may choose to prosecute or punish nonnationals who commit crimes abroad that threaten the integrity or security of the State or endanger or undermine its essential governmental institutions or functions, or public interests.\textsuperscript{158} While neither conduct need occur nor effects be


\textsuperscript{151} The Italian Penal Code provides for jurisdiction over acts committed by foreigners abroad that injure Italian citizens, provided the offense is punishable under Italian law by perpetual hard labor or imprisonment for one year or more. Italy, Penal Code, approved by Royal Decree No. 1398, Oct. 19, 1930, art. 10, \textit{as amended} by Law 547, Dec. 23, 1993, \textit{available at} http://www.wipo.int/wipolex/en/details.jsp?id=2507 (last visited on Nov. 17, 2013).

\textsuperscript{152} Argentina imposes a dual criminality requirement in connection with the assertion of jurisdiction on passive personality grounds unless the offense is regarded as an international crime. \emph{E.g.}, \textit{The Priebe Extradition Case}, Case No. 16.063/94, Sup. Ct., Arg., Nov. 2, 1995, \textit{summarized in} 1998 Y.B. Int'l Human. L. 341 (war crime at issue).

\textsuperscript{153} \textit{Restatement (Third)}, supra n.16, \S 402 cmt. g; \textit{e.g.}, \textit{United States v. Fawas Yunis}, 924 F.2d 1086 (D.C. Cir. 1991) (a State may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the State has a particularly strong interest in the crime) (prosecuted under Hostage Taking Act); \textit{United States v. Benitez}, 741 F.2d 1312, 1316 (11th Cir. 1984) (passive nationality principle invoked to approve prosecution of Colombian citizen convicted of shooting U.S. drug agents in Colombia), \textit{cert. denied}, 471 U.S. 1137 (1985).

\textsuperscript{154} Even in the case of terrorist acts against U.S. nationals, the passive personality principle has usually been adopted in conjunction with others. Boister, supra n.15, at 292-93 & n.28; Blakesley, \textit{Comparative Study}, supra n.93, at 201-02; \textit{e.g.}, \textit{United States v. Layton}, 509 F. Supp. 212 (N.D. Cal.), \textit{cert. denied}, 452 U.S. 972 (1981).

\textsuperscript{155} Sambue & Jones, supra n.25, at 3.

\textsuperscript{156} Cameron, supra n.2, at 2-3 n.1.

\textsuperscript{157} Sambue & Jones, supra n.25, at 3; Boister, supra n.15, at 295.

\textsuperscript{158} Wolfrum, supra n.69, at p.233; \textit{Restatement (Third)}, supra n.16, \S 402(3); Cameron, supra n.2, at 2; DeSCHUTTER, supra n.80, at 382; Puttler, supra n.88, at 109; Blakesley, \textit{Comparative Study}, supra n.93, at 200-01; \textit{e.g.}, \textit{United States v. Pizzaruso}, 388 F.2d 8 (2d Cir. 1968).
felt on the jurisdictional State’s territory, its fundamental purpose is to “safeguard the political independence of the State,” rather than merely to foster a State’s policies or interests overseas or to protect nationals abroad from any possible harm. Its rationale derives from the twin concerns of self-protection and inadequate State legislation to penalize conduct on its territory that adversely affects other States’ vital interests. Examples of such qualifying conduct, which need not arise out of a state of armed conflict, include treason, espionage, crimes against the peace, attacks on diplomats, counterfeiting State seals or currency, forgery of official documents, and perjury before a diplomatic or consular officer.

This principle, which traces its origins back to the Italian Renaissance but was not always embraced by common law countries, is widely recognized by States today, as reflected in statutes and international treaties alike. That

---

159 Gilbert, supra n.88, at 420 (jurisdiction can be exercised whenever a State’s vital interests are damaged or challenged, even if a crime was committed outside of, and consequences have no direct effect within, the State’s territory); e.g., United States v. Biermann, 678 F. Supp. 1437, 1444 (N.D. Cal. 1988) (“The protective principle recognizes that a nation may assert jurisdiction over foreign vessels on the high seas that threaten its security or governmental functions, without the requirement of demonstrating an actual effect on the nation itself.”).

160 Puttler, supra n.88, at 109.

161 Heymann & Gershengorn, supra n.30, at 118.


163 Note, Israeli Precedent, supra n.69, at 1090-91; Cameron, supra n.2, at 31-32.

164 See In re Bayot, Court of Cassation, Crim. Ch., Fr., 1923, reprinted in 2 ANN. D.IG. PUB. INT’L L. CASES 109, 109 (No. 54) [1923-24] (J.F. Williams & H. Lauterpacht eds. 1933) (application of criminal code provision embodying the protective principle “is not of a temporary nature and does not depend upon the continuance of the state of war with the enemy nation on whose behalf the offence was committed.”).

165 See Restatement (Third), supra n.16, § 402 cmt. f; e.g., Archer, 51 F. Supp. 708 (criminalizing perjury by an alien or U.S. citizen before a diplomatic or consular officer in reliance on the protective principle and convicting thereunder an alien who committed perjury before a vice consul in Mexico in connection with an application for a non-immigrant visa); Columba-Colellia, 604 F.2d at 358 (“A state/nation is competent, for example, to punish one who has successfully defrauded its treasury, no matter where the fraudulent scheme was perpetrated.”).

166 Note, Israeli Precedent, supra n.69, at 1090-91.

167 E.g., U.S. Omnibus Act of 1986, supra n.27 (granting jurisdiction to federal courts over the killing of any U.S. national if intended to coerce, intimidate, or retaliate against a government or civilian population); French Code of Criminal Procedure, adopted by Law No. 2004-204, Mar. 9, 2004, art. 694, available at www.legifrance.gouv.fr/content/download/1958/13719/…/Code_34.pdf (last visited on Nov. 10, 2013) (conferring jurisdiction over foreigners who outside territory commit acts either as a perpetrator or an accomplice against the security of the State); Israel, Knesset, Mar. 21, 1972, Sefer Ha-Chukkim 52, reprinted in 32 L.S.I. 63 (1978) (extending jurisdiction over offenses
said, the principle is generally viewed as a basis of last resort\textsuperscript{169} and is applied mainly in connection with terrorism, drug trafficking, and illegal immigration cases.\textsuperscript{170} State practice varies considerably and turns largely on the types of security and other threats States face as well as their overall attitude toward human rights.\textsuperscript{171} For instance, while most States specify applicable crimes in their domestic statutes,\textsuperscript{172} other States leave such provisions open-ended;\textsuperscript{173} and while certain States recognize only intentional crimes under the protective principle, others authorize jurisdiction for mere negligence.\textsuperscript{174}

Problems associated with the protective principle mainly consist of those that apply to extraterritorial jurisdictional bases writ large, including: (i) the potential for multiple State assertions of jurisdiction and consequential conflicts, as well as the possibility of triggering double jeopardy if the same offender were to be prosecuted in multiple States for the same offense; (ii) the accused could be prosecuted for conduct not punishable in the State where his acts occurred, raising questions about how fair it would be to expect him to be aware of all non-obvious yet relevant criminal laws in that State; and (iii) the defendant might


\textsuperscript{170} STANBROOK & STANBROOK, supra n.25, at 120. This jurisdictional principle was notably invoked in a series of French cases arising out of World War I (\textit{e.g.}, \textit{In re Urios}, Ct. of Cassation, Crim.Ch., Fr., 1920 (in French Algeria), 1919-22 1 ANN. DIG. PUB. INT'L. L. CASES 107 (No. 70) (J.F. Williams & H. Lauterpacht eds. 1932)); and by Israel with regard to Adolf Eichmann, who was prosecuted for crimes committed during World War II before Israel was founded as a State, on the rationale that there is a close nexus between the Jewish people and the State of Israel. Gilbert, \textit{supra} n.88, at 422. Otherwise, States infrequently have exercised jurisdiction over non-nationals acting abroad to the detriment of the security of the State, despite claims in statutes and \textit{dicta} that a State may invoke such jurisdiction. Even during Germany's Third Reich, the National Socialist (Nazi) regime in Germany refrained from invoking the protective jurisdiction asserted in German statutes, despite frequent opportunities to do so. \textit{Note, Israeli Precedent, supra} n.69, at 1094-95.


\textsuperscript{172} \textit{Cameron, supra} n.2, at 50.

\textsuperscript{173} \textit{Cameron, supra} n.116, art. 694 (identifying crimes directed against the security of France, counterfeiting seal or currency of France, and those against French diplomatic or consular officers or missions).

\textsuperscript{174} Gilbert, \textit{supra} n.88, at 419 n.30; \textit{Cameron, supra} 2, at 49-50.
well suffer from language barriers, ignorance regarding host State legal procedures, and delays in collecting evidence and rounding up witnesses.\textsuperscript{175} In addition, because defining a State’s vital interests and determining what is required to reasonably maintain its security is subject to both significant variability and discretion, the applicable scope could be expanded in extremis and thereby prove abusive.\textsuperscript{176}

\textit{Universal Principle.} This principle entails the exercise of jurisdiction by any State to prosecute or punish a crime\textsuperscript{177} even when committed within a foreign territory, involving non-nationals as perpetrator(s) \textit{and} victim(s), and lacking any protective interest on the part of the State, but which, given the seriousness and broadly condemned character of the crime, nevertheless constitutes an offense against the international community itself.\textsuperscript{178} In effect, “certain offenses may be punished by any State because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.”\textsuperscript{179} The “idea is to cast the widest net of jurisdiction possible for those limited number of offenses that qualify.”\textsuperscript{180} Crimes generally regarded as satisfying this standard, as reflected in international agreements and resolutions, include piracy,\textsuperscript{181} slave trade,\textsuperscript{182} aircraft hijacking,\textsuperscript{183} hostage-taking,\textsuperscript{184} grave

\textsuperscript{175} \textit{Id.} at 32-34.
\textsuperscript{176} Gilbert, \textit{supra} n.88, at 419; Blakesley, \textit{Conceptual Framework, supra} n.150, at 705; Heymann & Gershengorn, \textit{supra} n.30, at 111; Boister, \textit{supra} n.15, at 295 (noting problems arising from over-inclusive claims such as those implicating economic interests); Note, \textit{Israeli Precedent, supra} n.69, at 1097 (pointing out that Israel has pushed the limits on this principle and set a new standard by authorizing jurisdiction merely for an individual’s membership in an organization rather than for any acts themselves directed at Israel’s security).
\textsuperscript{177} Universal jurisdiction applies generally to crimes, but “international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.” \textit{Restatement (Third), supra} n.16, \S 404 cmt. b.
\textsuperscript{178} \textbf{HELEN DUFFY,} THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 99-100 (2005); \textit{Cassese, supra} n.71, at 278-300; DeSchutter, \textit{supra} n.80, at 383 (discussing specific grave breaches of an international character).
\textsuperscript{179} \textit{In re Extradition of Demjanjuk,} 612 F. Supp. 544, 556 (D.C. Ohio 1985) (citations omitted). Such crimes tend to include those directed against the international public order (\textit{delicta juris gentium}). Robert Kolb, \textit{The Exercise of Criminal Jurisdiction over International Terrorists, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM} 249 n.80 (Andrea Bianchi ed. 2004).
\textsuperscript{180} Freestone, \textit{supra} n.34, at 44.
\textsuperscript{181} \textit{Piracy jure gentium} has long been recognized as a crime against all States under international law, \textit{STANBROOK & STANBROOK, supra} n.25, at 120, evidenced in part by the Conv. of the High Seas, Apr. 29, 1958, art. 14, 13 U.S.T. 2312, 450 U.N.T.S. 82, T.I.A.S. No. 5200 (“All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”); \textit{Law of the Sea Conv., supra} n.73, art. 100 (same);
breaches (*i.e.*, the most serious war crimes) of the Geneva Conventions of 1949 and Additional Protocol I of 1977,\textsuperscript{185} apartheid,\textsuperscript{186} torture,\textsuperscript{187} and crimes against humanity.\textsuperscript{188} Other inarguably egregious crimes of an international nature\textsuperscript{189} that appear currently to lack the full consensus to pass muster under the universality principle include genocide\textsuperscript{190} and terrorism,\textsuperscript{191} although the list of qualifying crimes continues to evolve.\textsuperscript{192}

and Restatement (Third), supra n.16, § 404 ("A state has jurisdiction to define and prescribe punishment" for piracy).

\textsuperscript{182} Restatement (Third), supra n.16, § 404; Sambei & Jones, supra n.25, at 3.


\textsuperscript{184} By its own text, the Hostage-Taking Convention designates hostage-taking as a universal crime. Hostage-Taking Conv., supra n.136, art. 1. Notably, however, while hostage-taking per se is absent from the list of crimes subject to universal jurisdiction in the Restatement (Third), supra n.16, it arguably is captured by reference to the "hijacking of aircraft" and by "perhaps certain [other] acts of terrorism." Id. § 404.

\textsuperscript{185} Gilbert, supra n.88, at 423 n.61; Sambei & Jones, supra n.25, at 3; Donnelly, supra n.111, at 602; Heymann & Gershengorn, supra n.30, at 112; Duffy, supra n.178, at 99-100. It should be noted that not all States, including the U.S., have ratified Additional Protocol I to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 [ Additional Protocol I], U.N. Doc. A/32/144 (1977) Annex I, reprinted in 16 ILM 1391, and therefore are not bound by its provisions as a party but nevertheless would be obligated to honor any specific provisions deemed to constitute customary international law.


\textsuperscript{187} See Cat. supra n.116; Sambei & Jones, supra n.25, at 3; Colangelo, supra n.14, at 130.


\textsuperscript{189} Crimes subject to universal jurisdiction and "crimes against international law" are not necessarily equivalent terms, although they are at times treated synonymously. Some crimes fall within one category but not the other, Gilbert, supra n.88, at 423 n.61, and what constitutes a "universal" crime is far from settled or static. Heymann & Gershengorn, supra n.30, at 112.

\textsuperscript{190} It is unclear whether genocide should qualify as a crime subject to universal jurisdiction. By its own terms, the Convention on Genocide does not contemplate genocide as a universal crime. Genocide Conv., supra n.99, art. VI ("Persons charged with genocide or any of the other acts
The logic undergirding application of this principle is as follows: (i) to broadly signal intolerance for certain heinous types of conduct;\textsuperscript{193} (ii) to enhance deterrence against such conduct by maximizing the number of potential prosecutorial forums and thereby eliminating prospective safe havens;\textsuperscript{194} (iii) to combat impunity where the territorial State or another State with an extraterritorial nexus to the crime either does not have applicable domestic legislation on the books or the capacity or will to enforce those laws;\textsuperscript{195} and (iv) to allow any State to prosecute and punish on behalf of the international

\textsuperscript{193}\textsc{Restatement (Third)} has acknowledged that “perhaps certain acts of terrorism” should be subject to universal jurisdiction but not all, and it leaves unclear which ones. \textsc{Restatement (Third)}, supra n.16, \S 404. \textit{See also} \textit{Note, Israeli Precedent, supra} n.69, at 1099-1100 (noting lack of current recognition); Kolb, supra n.183, at 277 (pointing out unsuccessful efforts to date of the UN Working Group to draft a comprehensive convention on international terrorism). Some courts have ruled negatively on this proposition. \textit{See, e.g.}, \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774 (D.C. Cir. 1984) (upholding dismissal for lack of subject matter jurisdiction, ruling that terrorist attacks do not violate the law of nations or other federal law), \textit{cert. denied}, 470 U.S. 1003 (1985). A major reason for the reluctance in elevating terrorism to universal crime status is the lack of an agreed-upon meaning of terrorism. Heymann \& Gershengorn, supra n.30, at 116-17; Donnelly, supra n.111, at 603-04. Finally, even at the national legislative level, governments have struggled with how to define and criminalize terrorism. \textit{See} Heymann \& Gershengorn, supra n.30, at 116-17 (refuting the contention that the U.S. Terrorist Prosecution Act was relevant to this principle because the Act effectively criminalizes murder while making no mention of terrorism). In any event, the definition of terrorism “must be accepted at the international level since the crime envisaged should be international in nature and not merely criminalized at the national level.” Kolb, supra n.179, at 276.

\textsuperscript{194} \textit{See Note, Israeli Precedent, supra} n.69, at 1099 (noting the lack of consensus at present in treating as “universal crimes” the “use of explosives to cause a common danger, traffic in narcotics or pornography, injury to submarine cables, crimes against the public health, and injury to international means of communication”).

\textsuperscript{195} \textit{See ICHRPR, supra} n.188, at 16 (showing that “serious human rights violations are a concern of everyone”).
community for crimes of such gravity and that are injurious to universal values that they give rise to an *erga omnes* obligation\textsuperscript{196} to repress and punish.\textsuperscript{197}

An early example of universal jurisdiction arose in the 17\textsuperscript{th} Century with respect to piracy, a crime that occurred on the high seas (*i.e.*, beyond any single nation’s territorial reach\textsuperscript{198}) and that threatened all nations alike.\textsuperscript{199} Today universal jurisdiction is recognized under both customary international law (for crimes like piracy) as well as expressly under international conventions\textsuperscript{200} (*e.g.*, concerning hostage-taking and aircraft hijacking). Although broadly accepted as a *bona fide* jurisdictional principle, because application of universal jurisdiction is generally not mandatory\textsuperscript{201} and because few States are prone to prosecute cases in which they have no clear national interest at stake, it has been asserted

\begin{itemize}
\item \textsuperscript{196} *Erga omnes obligations* refer to those “[o]bligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act.” “*Erga Omnes Obligations,*” Oxford Reference, available at \url{http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095756413} (last visited on Dec. 30, 2013).
\item \textsuperscript{197} See Kolb, *supra* n.179, at 249 n.80 (universal jurisdiction touches on *erga omnes* rights and *jus cogens* norms understood as embodying essential values of international community); CASSESE, *supra* n.71, at 278-300 (States need to serve as “universal guardians”); ICHR, *supra* n.188, at 4-5 (“it is a duty and in interest of every state to uphold that [international] law.”).
\item \textsuperscript{198} See United States v. Wright-Barker, 784 F.2d 161, 166 (3d Cir. 1986) (although no State may assert territorial jurisdiction over the high seas, States may assert extraterritorial jurisdiction over domestic law violations occurring on the high seas consistent with their constitutional and international law commitments).
\item \textsuperscript{199} Compare CASSESE, *supra* n.71, at 278-300 and Note, Israeli Precedent, *supra* n.69, at 1091 (universal jurisdiction originated with piracy when a menace existed to international commerce) with SUNGA, *supra* n.15, at 253 (“universal jurisdiction arose out of ancient customs and laws of war, which provided that certain acts, such as use of certain prohibited weapons or subjection of civilians to murder or rape, pose such a serious affront to the honor of the military profession that perpetrators could be tried anywhere, regardless of the *locus delictum* or nationality of the offender”).
\item \textsuperscript{200} DUFFY, *supra* n.178, at 100; Gilbert, *supra* n.88, at 424. To establish universal jurisdiction by a convention, the treaty must both specify certain conduct as constituting a crime and contain agreement of the parties to apply universal jurisdiction to that offense. Puttler, *supra* n.88, at 110-11.
\end{itemize}
infrequently. Examples can be found, however, in the courts of Spain, Belgium, and the United States.

202 Sunga, supra n.15, at 254; United States v. Yousef, 927 F. Supp. 673, 681-82 (S.D.N.Y. 1996) (arguing that “while courts have discussed universality as a basis of jurisdiction, in practice, it has never been used as the sole basis for the United States to assert jurisdiction over a defendant.”) (quoting defendant’s brief). See also Tom Gede, Universal Jurisdiction: The German Case against Donald Rumsfeld, 8 ENGAGE 41, 41 (June 3, 2007), available at https://www.fed-soc.org/publications/detail/universal-jurisdiction-the-german-case-against-donald-rumsfeld (last visited on Dec. 31, 2013) (“On April 27, 2007, the German Federal Prosecutor General announced that she would not commence an investigation against former U.S. Defense Secretary Donald Rumsfeld and others for international human rights violations associated with the handling of prisoners at Abu Ghraib in Iraq and Guantánamo Bay in Cuba. For the second time within the last two years, the Federal Public Prosecutor’s office declined to commence an investigation against Rumsfeld, based upon a criminal accusation filed by German human rights lawyer Wolfgang Kaleck, on behalf of the Center for Constitutional Rights (CCR) and other organizations and individuals. Kaleck argued for, among other things, the application of Germany’s Code of Crimes Against International Law (CCAIL), a controversial law adopted in 2002 that purports to extend Germany’s domestic criminal law jurisdiction to crimes against international law, specifically genocide, crimes against humanity and war crimes.”).

203 Spain’s first prosecution under universal jurisdiction commenced in January 2005 and was directed against Adolfo Scilingo, a former Argentine naval officer who had been charged with committing acts of genocide, torture, and crimes against humanity during Argentina’s “Dirty War.” Jason McClurg, Argentine Naval Officer Tried in Spain for Genocide, 21 IELR 151 (2005). Although it is widely understood that Spain’s attempt to bring to justice Gen. Auguste Pinochet, former president of Chile, was based on an assertion of universal jurisdiction, in fact, it was under the passive personality principle because the crimes he was alleged to have committed were against Spanish nationals during his regime in the 1970s. Win-Chat Lee, supra n.195, at 204. Notably, in June 2009, Spain’s lower house of Parliament passed a bill that would limit the reach of Spain’s universal jurisdiction such that the alleged perpetrator must be on Spanish territory, the victim(s) must be of Spanish nationality, or the crime must consist of some demonstrable link to Spanish national interests. Center for Justice and Accountability, The End of Universal Jurisdiction? Spanish Lawmakers Try to Close Door on Human Rights Prosecutions, June 26, 2009, available at http://www.cja.org/article.php?id=666 (last visited on Sept. 22, 2013).

204 Belgium has been the most active exponent of universal jurisdiction to date, although as shown below, its domestic law authorizing universal jurisdiction has been subject to significant dilution over the past decade: (i) In 2001, Belgium successfully prosecuted Sisters Maria Kisito and Gertrude, two Benedictine nuns, for complicity in the commission of genocide in Rwanda in 1994 under a 1999 domestic law that authorized Belgian courts to exercise universal jurisdiction in cases related to genocide and CAH, Anthony Sammons, The ‘Under-Theorization’ of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts, 21 BERKELEY J. INT’L L. 111, 138 (2003); “Special Report: Judging Genocide,” The Economist, June 16, 2001, at 23-24; (ii) in 2005, Belgium successfully prosecuted two prominent Rwandan businessmen, Samuel Ndashiyikwi and Etienne Nzabonimana, for war crimes also connected to the 1994 genocide in Rwanda but under an amended domestic law that permitted trials for war crimes even when committed by foreigners outside of Belgium so long as the persons charged resided in Belgium. “Two Rwandans Guilty over Genocide,” BBC News, June 29, 2005, available at http://news.bbc.co.uk/2/hi/afrika/4632469.stm (last visited on Nov. 17, 2013); and (iii) on behalf of Chadians living in Belgium, Belgium prosecuted the former Chadian leader Hissène Habré in absentia on charges of torture and crimes against humanity; the case was allowed to proceed on a “grandfathered” basis as the law governing universal jurisdiction was later revoked. Bruce Zagaris, Senegal Allows Habré to Stay Pending African Union Decision, 22 IELR 59, 59-60 (2006).

Universal jurisdiction has been the subject of pointed criticism. It faces many of the same challenges seen in other extraterritorial contexts, namely, potentially pitting one State’s jurisdictional claim against another, exposing an accused to an unfamiliar legal and linguistic environment, and complicating access to evidence and witnesses. This jurisdictional base, however, introduces additional problems, including: (i) arguably undermining the principle of State sovereignty and thereby setting a dangerous precedent that could later be reciprocated against the State asserting jurisdiction; (ii) creating political tensions with other, more interested governments, particularly where the jurisdictional State is viewed as having either unfair judicial standards, ulterior motives, or unusually strict sentencing; (iii) burdening a domestic court system with what could well amount to a lengthy and complex set of proceedings with no discernible benefit to the local population; and (iv) triggering a resented international imbalance to the extent that this principle were to consistently play out with developed States trying repressive or corrupt officials from developing ones.

An important variant on universal jurisdiction, especially in the extradition context, is a principle known as subsidiary universal jurisdiction. Subsidiary

---


206 Kolb, supra n.179, at 278.

207 Note, Israeli Precedent, supra n.69, at 1101; Boister, supra n.15, at 308-09 (observing that criminal laws vary too much across States for individuals to be able to necessarily understand and comply with them).

208 See Sammons, supra n.204, at 143 (recognizing that this principle operates as a limited exception to the competing principle of non-interference in the affairs of a sovereign State); Puttler, supra n.88, at 110 (acknowledging that the crimes covered under this principle have been approved for such treatment by the international community).


210 The assertion of universal jurisdiction may embroil that State in a diplomatic confrontation with one or more other States. Id.

211 Kolb, supra n.179, at 278 (noting the risk of an unfair trial). See generally Oscar Schachter, International Law in Theory and Practice, 179 REC. DES COURS 263-64 (1982-V) (querying whether the possible absence of any link between the State exercising universal jurisdiction and the person over whom it is exercised requires more extensive safeguards for individual protection).

212 Bass, supra n.209, at 78.

213 ICHR, supra n.188, at 17-28.
universal jurisdiction arises when the State that arrests an alleged offender on its territory chooses to prosecute that person in its courts, even if that State has no other nexus to the crime, the individual, any victims, or its national interests, provided that no other State entitled to exercise jurisdiction on one of the other grounds discussed above chooses to do so.214 This concept is referred to as “subsidiary”215 because the prosecuting State is in effect acting on behalf of the territorial State, as well as possibly others, given the absence or rejection of an extradition request; and is “universal” in the sense that there is no other recognized basis for the assertion of jurisdiction216 and any custodial State could exercise jurisdiction on that basis. The custodial component alone is what gives rise to this specialized form of jurisdiction.217

This brand of jurisdiction confusedly goes by many names: It is sometimes known as the “Custodial (or Representative) Principle of Jurisdiction,” as “Vicarious (or Sound) Administration of Justice,” or as “Secondary (or Last Resort) Universal Jurisdiction.”218 Regardless of its label, however, it functions the same with the custodial State “stepping into the shoes” of the territorial State219 and, representing its interests, prosecutes the alleged offender but virtually always in cases where the custodial State also treats the conduct at issue as criminal. This principle arises out of the notion of solidarity among States to bring criminals to justice,220 and generally operates pursuant to a treaty

215 There is a second subsidiary basis for jurisdiction called the “Distribution of Competence Principle.” Under this principle, the territorial State waives its claim to prosecute or punish an offender by requesting the offender’s State of nationality (or domicile) to do so on its behalf. CAMERON, supra n.2, at 18. This principle tends to operate with respect to minor offenses like street traffic violations that are of negligible judicial interest to the territorial State, or in instances where the territorial State would prefer that the offender’s State of nationality (or domicile) manage the punishment, such as when the offense may call for a stiffer prison sentence in the State of nationality. Id. at 83; D. Oehler, Internationales Strafrecht 138-40 (2d ed. 1983).
218 See, e.g., DeSchutter, supra n.80, at 381 (discussing “Sound Administration of Justice”); Boister, supra n.15, at 305 (referring to “representative or vicarious administration of justice”).
219 Gilbert, supra n.88, at 423.
220 Puttler, supra n.88, at 113.
provision\textsuperscript{221} that authorizes a custodial State to proceed with prosecution in the event it cannot or chooses not to extradite.\textsuperscript{222} A mandated counterpart to subsidiary universal jurisdiction, commonly known by the Latin expression \textit{aut dedere aut judicare},\textsuperscript{223} which would contractually obligate a State to at least explore in good faith the possibility of prosecution where it chose not to extradite,\textsuperscript{224} will be discussed more extensively in Chapter 9.c as a redirected alternative to extradition.

Scholarly difference of opinion also persists regarding the question whether \textit{aut dedere} is a specific manifestation or “sub-species”\textsuperscript{225} of universal jurisdiction or, alternatively, should not be properly regarded as a form of universal jurisdiction at all. At bottom, because the \textit{aut dedere} concept shares the single most significant defining characteristic with universal jurisdiction – namely, the absence of any other recognized nexus between the State and the crime – the noted differences (\textit{e.g.}, right vs. duty,\textsuperscript{226} universal application vs. limited

\textsuperscript{221} A custodial State sometimes applies this principle in its domestic law absent a treaty but most States seek international treaty support (generally pursuant to a crime suppression or extradition treaty) for what may be a controversial assumption of jurisdiction from the perspective of the State where the crime occurred. Boister, supra n.15, at 305.

\textsuperscript{222} See, e.g., \textit{Universal Jurisdiction (Austria) Case}, Sup. Ct., Aus., May 29, 1958, reprinted in 28 ILR 341, 342 (1963) (finding that Austrian courts had subsidiary universal jurisdiction under domestic law to prosecute a Yugoslav citizen for crimes alleged to have been committed in Yugoslavia even though it was unwilling to extradite him to Yugoslavia on political offense exclusion grounds).

\textsuperscript{223} \textit{Aut dedere aut judicare} is understood to mean “one must deliver or adjudicate.” The concept originated with Hugo Grotius, the 17th Century Dutch international jurist, as \textit{aut dedere aut punire}, which called for punishment by the host State as an alternative to transferring a fugitive, and has since been updated to reflect the concept of judging conduct via trial versus punishment. M. Cherif Bassiouni, \textit{Introduction to International Criminal Law} 334 (2003) [hereinafter Bassiouni, \textit{Introduction}]. Also, while no letter “i” existed in classical Latin, M. Cherif Bassiouni & Edward M. Wise, \textit{Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law} xii-xiii n.7 (1995), and so sometimes the term \textit{judicare} is rendered with an “i” as \textit{judicare}, this dissertation adopts the modern era spelling. The Latin term \textit{aut} means the conjunction “or”; when used as a pair in this fashion, it denotes “either . . . or” – not both. Some scholars, including Professor Robert Kolb, see Kolb, supra n.179, at 247, have expressed a preference for \textit{aut dedere aut prosequi} as a more precise formulation of the term (\textit{i.e.}, “prosecute” versus “adjudicate”).

\textsuperscript{224} An example of \textit{aut dedere} can be found in the case of Mohammed Hamadei, a 22-year-old Lebanese man whom the U.S. charged, \textit{inter alia}, with hostage-taking and aircraft sabotage in connection with a June 1985 TWA airplane hijacking that resulted in the murder of U.S. Navy diver Robert Stethem. After the West German government denied his extradition to the U.S., with the exertion of diplomatic pressure, West Germany agreed to prosecute him, leading to his conviction. Heymann & Gershengorn, supra n.30, at 145.

\textsuperscript{225} Duffy, supra n.178, at 99 & n.141.

application to States parties to conventions, and a broad vs. narrow range of applicable crimes) represent minor variations by comparison. As University of Geneva Law Professor Robert Kolb succinctly summed it up, aut dedere is a form of universal jurisdiction that is: (i) relative (dependent on States parties to, and the purpose of, the underlying convention), (ii) compulsory (pursuant to a convention-dictated duty), and (iii) subsidiary (where the person of interest has been extradited, there is no need to take steps toward prosecution).

### iii. Establishing, De-conflicting, and Extending Jurisdiction

This section addresses three critical aspects of jurisdiction: how States prescribe subject matter jurisdiction over crimes, how competing State claims of subject matter jurisdiction are resolved, and in what ways – and why – the United States (among others) has recently attempted to extend the scope of its criminal jurisdiction.

Although international law does not restrict State legislatures from pronouncing jurisdiction over conduct they deem to be in violation of their domestic law, international law does limit how States prescribe the authority of their court systems to adjudicate those actual or alleged offenses, at least when the matter is not exclusively the concern of a single State. States take direction either from

---

Feb. 28, 2012) (distinguishing universal jurisdiction, as permissive, from the aut dedere principle, as compulsory).

227 Kolb, supra n.179, at 249-54

228 Id. at 253-54.

229 States have even been known, through constitutional or legislative amendment, to create express exceptions to the principle of non-retroactivity of their criminal laws, in order to establish jurisdiction over certain offenses, sometimes to bring their laws into conformity with international treaty obligations. See, e.g., Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), ¶¶ 28, 31, available at [http://www.icj-cij.org/docket/files/144/17064.pdf](http://www.icj-cij.org/docket/files/144/17064.pdf) (last visited on Nov. 2, 2013) (in 2007, to implement measures necessary to observe its obligations under the Convention against Torture (CAT), Senegal amended Article 9 of its constitution and made a variety of changes to its criminal laws to allow for the prosecution and sentencing of persons allegedly liable for genocide, crimes against humanity, and war crimes even though such conduct did not constitute a crime under Senegalese law at the time they occurred but where they were considered criminal offenses under then-prevailing general principles of international law).

230 See McAlister, supra n.4, at 467-68; Wolrum, supra n.69, at 233 (State jurisdiction to prescribe criminal law is limited by international law under basic principles of territorial sovereignty and equality of states); Puttler, supra n.88, at 105 (German domestic law asserts German jurisdiction over drug-related cases involving the conduct of foreign nationals (especially Dutch) abroad, but international law governs whether Germany has jurisdiction at all to bring such cases before its courts).
international conventions that obligate or authorize them to assume jurisdiction over certain crimes premised on one or more of the principles outlined above or from customary international law principles that permit States to prescribe subject matter jurisdiction where no prohibition exists. While under the traditional rule, as reflected in the PCIJ’s S.S. Lotus Case (1927), a State could prescribe criminal jurisdiction without necessarily presenting a legitimate nexus to the conduct in question (i.e., the burden of proof lay with a challenger), today States must affirmatively set forth a reasonably close connection. Fortunately, in many cases, the principles of territoriality, active and passive personality, protection, and universality often readily justify jurisdiction.

Sometimes two or more States will claim subject matter jurisdiction over a given act or incident. In such instances of so-called “concurrent jurisdiction,” a situation recognized by international law, de-confliction is required to determine which State has primacy. Some treaties provide a priority

\footnote{231 See Robinson, supra n.28, at 488 (subject matter jurisdiction can be supported by overlapping bases). In Israel’s request for the extradition of Mahmoud El-Abed Ahmad (see Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), aff’d, 910 F.2d 1063 (2d Cir. 1990), stay denied, 111 S. Ct. 23 (1990)), where Ahmad was charged with bombing a bus full of civilians in Israeli-occupied territory, Israel premised its jurisdictional claim on both passive personality and protective principles. Heymann & Gershengorn, supra n.30, at 143.}

\footnote{232 DeSchutter, supra n.80, at 380-81.}

\footnote{233 Under the classical view, as set forth in the Lotus Case, there was no principled limit to the nature and scope of criminal jurisdiction a State could claim, although such an invocation could be challenged as prohibited by international law. STANBROOK & STANBROOK, supra n.25, at 111. See also DeSchutter, supra n.80, at 380-81 (the Lotus opinion allowed States to exercise criminal jurisdiction absent a prohibitive rule).}

\footnote{234 See Boister, supra n.15, at 290 (States seeking to establish extra-territorial jurisdiction must show a “reasonable, significant, legitimate, or close connection”); Puttler, supra n.88, at 105-06 (while still controversial, the “general position today seems to be that the right to exercise jurisdiction depends on whether it is possible to identify a sufficiently close nexus between the subject matter and the State”).}


\footnote{236 This term is not to be confused with the other type of concurrent jurisdiction (discussed in this Chapter infra) that refers to competing claims of jurisdiction between a State and an international criminal tribunal like the ICC of which the State is also a party.}

\footnote{237 See RESTATEMENT (THIRD), supra n.16, § 403, cmt. d; Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984) (“Because two or more states may have legitimate interests in prescribing governing law over a particular controversy . . . jurisdictional bases are not mutually exclusive . . . Thus, under international law, territoriality and nationality often give rise to concurrent jurisdiction.”).}

\footnote{238 See Boister, supra n.15, at 291 (this can be “as much a political as it is a legal problem.”).}
consideration yet many others do not, and no pre-determined hierarchy exists. Oftentimes, the territoriality principle prevails over the others, but that assumes the territorial State has the capacity to effectively and fairly adjudicate the matter. In addition, some exceptions to this rule exist and

239 See, e.g., Conv. for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, Mar. 10, 1988, art. 11(5), IMO Doc. Sua/Con/15/Rev.1, reprinted in 27 ILM 668 (1988) (“[I]n selecting the State to which the offender or alleged offender is to be extradited,” States parties shall “pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.”); Conv. on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. 16, U.N. Doc. A/C.6/418/Corr.1, Annex II, 704 U.N.T.S. 219, 20 U.S.T. 2941, ICAO Doc. 8364, reprinted in 2 ILM 1042 [hereinafter Tokyo Hijacking Conv.] (“Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.”). See, e.g., Hague Hijacking Conv., supra n.183 (offering no provision establishing priority of claims in event of concurrent jurisdiction regarding a hijacking); JOSEPH J. LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW 163 (1990) (noting that even the State with territorial jurisdiction over the offense has no priority claim and that “priority would seem to depend solely on custody”); Crim. Law Section, Legal and Constitutional Affairs Division, Commonwealth Secretariat, U.K., Implementation Kits for the International Counter-Terrorism Conventions, undated, ¶ 19, available at https://www.unodc.org/tldb/pdf/commonwealth_manual.pdf (last visited on Dec. 1, 2013) (“The conventions do not say which State has priority of jurisdiction.”) (emphasis in original).

241 CASSESE, supra n.71, at 348 (“There are no general international rules determinative of this matter, just as there are no international customary rules designed to resolve the question of concurrent jurisdiction of two or more States, by giving pride of place to one legal ground of national jurisdiction . . . over another such ground”); Christopher Blakesley, Extraterritorial Jurisdiction, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE AND ENFORCEMENT MECHANISMS 82 (2d ed. M. Cherif Bassiouni ed. 1999) (“Thus, it is far from clear that the bases of jurisdiction are hierarchical. Attempting to establish a hierarchy is highly problematical.”).

242 See III, Draft Resolution, supra n.4, art. 9(1) (“the jurisdiction of that State shall prevail which shows the closest territorial link with the adressee [sic] of the two orders.”); Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Conv. Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Jan. 31, 1995, art. 3(4), CoE, E.T.S. No. 156, available at http://conventions.coe.int/Treaty/en/Treaties/Html/156.htm (last visited on Sept. 28, 2013) (“The flag State has preferential jurisdiction over any relevant offence committed on board its vessel.”). International law scholar Cesare Beccaria, among others, argued for territorial principle on two grounds: (i) as State laws vary, one should only be punished in a place where one has infringed the law; and (ii) as crime constitutes a violation of the social contract, it is only just that be punished where the contract was breached. CASSESE, supra n.71, at 278. The more a crime can be localized to the territory of a State, the less need there is for that State to rely on the protective principle or any other principle of extraterritoriality to take jurisdiction over it. CAMERON, supra n.2, at 52.

243 See OAS Res. 1/03 on “Trial for International Crimes,” Wash., DC, Oct. 24, 2003, Preamble, available at http://www.cidh.oas.org/resolutions/1.03.int.crimes.resolution.htm (last visited on Nov. 7, 2013) (“[T]he principle of territoriality must prevail in the case of a jurisdictional conflict, provided that there are adequate, effective remedies in that state to prosecute such crimes and guarantee the application of rules of due process for the alleged perpetrators, and that there is an effective will to bring them to justice.”). For example, concerns remain about transferring jurisdiction from the ICTR to Rwandan courts, including how effectively they can protect witnesses, the adequacy of working conditions for defense counsel, and the prospect that those convicted to life imprisonment could be placed in solitary confinement. Robert Mugabe, “U.N. Urges ICTR to Transfer Genocide Suspects to Rwanda,” The New Times, Dec. 17, 2008.
the territorial State may always waive or concede criminal jurisdiction. Ultimately, however, concurrent claims tend to be resolved through consultation or negotiation\textsuperscript{245} and are generally based on a “reasonableness” standard\textsuperscript{246} that applies with respect to each of the jurisdictional bases, except possibly the universal principle.\textsuperscript{247} Under that standard, each State’s claim is measured and compared against others according to the significance and proximity of the nexus established between the State and the crime.\textsuperscript{248}

Over the past three decades, triggered by growing globalization and a spike in international terrorism against their nationals abroad,\textsuperscript{249} some States, most notably the U.S., have extended the reach of their extraterritorial criminal jurisdiction.\textsuperscript{250} In a series of federal statutes – the Aircraft Sabotage Act (1984), the Omnibus Diplomatic Security and Antiterrorism Act (1986), the Hostage Taking Act (1988), and the Terrorist Prosecution Act (1988) – the U.S. Congress sought to raise the prospects of bringing a class of criminals to justice by expressly extending U.S. subject matter jurisdiction, primarily through liberalized usage of the passive personality principle, for certain crimes committed against U.S. citizens abroad. This stream of legislation represented a deviation from former American practice, which had relied exclusively on

\textsuperscript{244} For example, “the jurisdiction of a State acting upon a binding decision of the Security Council of the United Nations always prevails over the jurisdiction of a State not so acting.” IIL, \textit{Draft Resolution}, supra n.4, art. 9(2).

\textsuperscript{245} See id., art. 9(4) (“States shall seek to avoid conflicts of jurisdiction by any other means at their disposal, such as self-restraint and consultations”); \textit{e.g.}, Conv. on Combating Bribery of Foreign Public Officials in Int’l Business Transactions, Dec. 18, 1997, art. 4(3), \textit{reprinted in 37 ILM} 1 (1998) (“When more than one party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”).

\textsuperscript{246} See \textit{Restatement (Third)}, supra n.16, § 421 (noting reasonableness standard when States exercise subject matter jurisdiction); McAlister, \textit{supra} n.4, at 467-68 (States are limited to “reasonable” exercises of extra-territorial jurisdiction); \textit{e.g.}, Noriega, 746 F. Supp. at 1513-15 (applying this standard). Reasonableness is understood to mean that asserting subject matter jurisdiction will “not conflict with another state’s significant interest.” \textit{Restatement (Third)}, \textit{supra} n.16, § 403 cmt. a.

\textsuperscript{247} Compare id. § 423 (treating universal jurisdiction as an exception to the reasonableness standard) \textit{with} Schachter, \textit{supra} n.211, at 240-42 (treating all forms of extra-territorial jurisdiction under reasonableness standard).

\textsuperscript{248} IIL, \textit{Draft Resolution}, \textit{supra} n.4, art. 9(1) (“Failing such [a territorial] link, the jurisdiction of the State most directly involved shall prevail.”).

\textsuperscript{249} See David M. Kennedy, \textit{et al.}, \textit{The Extradition of Mohammed Hamadei}, \textit{31 Harv. Int’l L.J.} 5, 6 (1990) (according to the U.S. Department of State, 30-35% of worldwide incidents over a then-recent period were directed against U.S. citizens and interests).

\textsuperscript{250} Donnelly, \textit{supra} n.111, at 599.
territoriality and active personality principles in its assertions of subject matter jurisdiction.\footnote{Id.}

Such federal statutes operate on several fronts to: (i) fill in legal gaps that had previously precluded U.S. courts from prosecuting such violators as a function of subject matter jurisdiction; (ii) exert greater pressure on host States either to extradite or prosecute such violators; (iii) influence federal judges to appreciate that Congress is amenable to the passive personality principle and thereby be more inclined to rule favorably on international extradition requests; and (iv) signal to actual or would-be terrorists that the U.S. is committed to bringing the full weight of its law enforcement machinery on them and in doing so deter such actions.\footnote{Heymann & Gershengorn, supra n.30, at 103, 142-45.} At the same time, the U.S. has supported the drafting and ratification of multilateral crime suppression treaties that authorize greater latitude for extraterritorial jurisdiction over transnational crimes to foster the practice of extraditions.\footnote{Boister, supra n.15, at 311.} One important consequence of this phenomenon is that “[a]s States make increasingly broad claims to extraterritorial legislative jurisdiction (and where those claims enjoy a degree of acceptance), of necessity it becomes more likely that more than one State will have potential judicial jurisdiction to try an offender.”\footnote{Colin Warbrick, Recent Developments in UK Extradition Law, 56 INT’L & COMP. L.Q. 199, 206 (2007).}

iv. **Contrast with Concurrent Jurisdiction**

To underscore the dynamics of *State* criminal jurisdiction while eliminating any potential confusion with the distinctive but widely known jurisdictional model known as “concurrent” jurisdiction, it is useful to draw a comparison with the rules and modalities governing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).
At times, a State is requested to surrender a fugitive to an international criminal tribunal that has levied charges against him.\textsuperscript{255} A half-century after the International Military Tribunal (IMT) at Nuremberg that litigated war crime claims against major Nazi officers arising out of World War II\textsuperscript{256} – the first modern-era court for international crimes of its kind\textsuperscript{257} – a number of others have sprouted up. For simplicity sake, we can classify them into three bundles. First, there are the two tribunals (ICTY and ICTR) established in the 1990s by the U.N. Security Council (UNSC) to address specific conflicts in the former Yugoslavia and in Rwanda, respectively. Second, there is the International Criminal Court (ICC), which was created by treaty in 1998, operates worldwide, and relies alone on the principle of “complementary” jurisdiction.\textsuperscript{258} Because

\textsuperscript{255} When an international criminal tribunal prosecutes an international law claim it is known as \textit{direct} enforcement. By contrast, when a State decides not to surrender a fugitive to an international tribunal in connection with an international offense, say, war crimes or genocide, but rather to prosecute him in its own domestic courts or transfer him to another State’s courts, it is called \textit{indirect} enforcement of international law. \textsc{Bassiouni, Introduction, supra n.223}, at 333.

\textsuperscript{256} That tribunal, along with its counterpart in Tokyo, the International Military Tribunal for the Far East (IMTFE), were distinct from today’s international criminal tribunals in that they were held on occupied territory in Germany and Japan, respectively, and the fugitives were surrounded by Allied forces. Consequently, those tribunals did not depend on other States to provide law enforcement cooperation as today’s do. See Kenneth J. Harris & Robert Kushner, \textit{Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution}, 7 CRIM. L.F. 561, 561-62 (1996).

\textsuperscript{257} \textit{See Andreas O’Shea, Amnesty for Crime in International Law and Practice} 104 (2002) (“The earliest known example would seem to be an international military tribunal established by the Holy Roman Empire in 1474 in Breisach, Germany, to try Peter von Hagenbach for crimes against ‘the laws of God and man’ consisting of raping, killing and pillaging the property of innocent civilians.”).

\textsuperscript{258} Under complementary jurisdiction national courts are accorded presumptive priority. As the late Professor Antonio Cassese summarized its operation, the international tribunal “must generally defer to national courts, except when these courts are not in a position to do justice in a proper and fair way, and in addition the case is of sufficient gravity to warrant the [tribunal’s] stepping in.” \textsc{Cassese, supra} n.71, at 353. The rationale behind this approach lies with respect for State sovereignty, concern for inundating the ICC with a worldwide caseload, and recognition that national courts can more readily locate and secure evidence and witnesses. \textit{Id.} at 351. Like other international treaties, the Rome Statute establishing the ICC applies only to States that have either ratified or acceded to its terms. Accordingly, when the ICC issues an order requesting that a State arrest and surrender a fugitive for the purpose of prosecution under Article 89, only States Parties are obligated to comply. \textsc{Geert-Jan Alexander Knoops, Surrender to International Criminal Courts: Contemporary Practice and Procedures} 15 (2002). An exception exists for the option of declaring the non-applicability of war crimes regarding one’s own nationals or on own territory for up to seven years after the Statute has taken effect with respect to that State. ICC Statute, supra n.188, art. 124. Per ICC, Article 89, failure to comply may result in a finding to that effect by the Court and a referral to the Assembly of States Parties (or, alternatively, to the UNSC to the extent that it referred the matter). Compliance entails taking immediate steps to arrest the subject and surrender him to the tribunal, unless it needs to consult with the Court first or another justifiable circumstance arises under Article 89 that is handled immediately. Where a State Party has not accepted the jurisdiction of Court regarding
complementary jurisdiction is heavily deferential to national courts, it is not so distinctive and therefore does not warrant elaborated treatment herein. Third, there are various \textit{ad hoc} or “hybrid” tribunals, including in Cambodia, Kosovo, Sierra Leone, East Timor, and Lebanon, that are limited to single countries or conflicts and are governed by domestic as well as international law and/or adjudicated by panels consisting of mixed domestic and international judges.\footnote{Duffy, supra n.178, at 103-06. International human rights tribunals, such as the European Court of Human Rights and Inter-American Court of Human Rights, are not relevant on this score because they are designed to judge the extent to which \textit{States} comply with their international obligations to uphold human rights standards, rather than to evaluate whether an \textit{individual} has committed a crime.}

The ICTY and ICTR are unique in that they were created as subsidiary judicial organs of the UNSC pursuant to its Chapter VII enforcement power under the U.N. Charter.\footnote{See, e.g., Statute of the Special Ct. for Sierra Leone, Aug. 14, 2000, art. 8, adopted by UNSC Res. 1315, \url{available at http://www.sc-sl.org/LinkClick.aspx?fileticket=UCnd1MleEw3D\& (last visited on Oct. 30, 2013) (SCSL has primacy over Sierra Leone’s domestic courts); Statute of the Special Tribunal for Lebanon, UNSC Res. 1664 (2006), Mar. 29, 2006, S/RES/1757, art. 4 \url{available at http://www.stl-tsl.org/en/documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon} (last visited on Nov. 18, 2013) (STL has primacy over Lebanese domestic courts).}

In essence, the UNSC determined that the situations in the former Yugoslavia and Rwanda constituted a “threat to international peace and security” and therefore took “measures . . . to give effect to [those] decisions”\footnote{Knoops, supra n.258, at 17; de Sanctis, supra n.201, at 542. Although not established as a subsidiary judicial organ of the UNSC, the Special Tribunal for Lebanon (STL), like the ICTY and ICTR, was formally created by the UNSC (by Resolution 1757 [2007]), after the speaker of the Lebanese parliament refused to convene the parliament to ratify the January 23, 2007, agreement struck between the U.N. and the Lebanese government, and subsequently a majority of Lebanese MPs petitioned the U.N. Secretary-General for the UNSC to establish the tribunal. Special Tribunal for Lebanon Website, Creation of the STL, \url{available at http://www.stltsl.org/en/about-the-stl/creation-of-the-stl} (last visited on Dec. 27, 2013).} by establishing courts that, in holding criminals publicly accountable, could help minimize the incidence of serious wartime violations by serving as a deterrent war crimes and where an extradition treaty is in effect, however, a State need not surrender a person to the ICC but then shall follow the \textit{aut dedere} principle of either extraditing to a pursuing State or taking steps toward prosecution in its domestic courts.

\footnote{U.N. Charter, supra n.23, arts. 39, 41.}
and restore peace. Notably, these tribunals do not constitute supranational bodies to which States have conceded or transferred criminal jurisdiction, but rather UNSC sub-organs with concurrent jurisdictional authority that can mandate cooperation to secure the presence of alleged offenders in furtherance of a treaty interest to restore and maintain international peace and security.

Consequently, when an ICTY or ICTR trial chambers issues an order to a State for a “natural person” to be identified and located, arrested and detained, and/or surrendered or transferred, or for any other form of prosecutorial assistance at any stage of the proceedings, that order is to be treated as an extension of UNSC enforcement authority and is to be acted upon “without undue delay.” (Although such an order is compulsory, a responding State may first

---


264 Although one could read the U.N. Secretary-General’s Report as making a Tribunal Order equivalent to the legal and moral authority of a UNSC resolution, it is questionable whether the UNSC could delegate its authority in this respect. A more reasonable reading is that the UNSC created a subsidiary organ as a Chapter VII enforcement measure. Kenneth S. Gallant, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, 5 CRIM. L.F. 557, 560-66 (1994). See also Knops, supra n.258, at 14-15 (the orders of the ICTY and ICTR are obligatory by virtue of the U.N. Charter, which is itself a treaty); Mark Brkljacic, Note, The Dangers of State Sponsored and Court Ratified Abduction, 5 J. INT’L L. & PRAC. 117, 131-32 (1996).

265 See Harris & Kushen, supra n.256, at 564-65 (U.N. member obligations to render assistance derive from Chapter VII of the U.N. Charter). It was an unprecedented UNSC move to authorize the exercise of jurisdiction in such cases; it assumed that by U.N. membership, States implicitly conferred their criminal jurisdiction to that body or, alternatively, that the exercise of criminal jurisdiction is not confined to States. Fox, supra n.18, at 435-36.

266 “Natural persons” in this context comprise not only nationals of U.N. member States, but also of non-member States and even of de facto entities exercising government functions, whether recognized as a State or not. Gallant, supra n.264, at 559 n.5. Although the UNGA did not permit the Federal Republic of Yugoslavia (FRY) to participate in U.N. organs (see UNGA Res. 47/1, U.N. GAOR, 47th Sess., Supp. No. 49, vol. I, U.N. Doc. A/47/49/vol. I (1992)), the FRY was still deemed to have undertaken the obligations of a U.N. member State according to customary international rules on State succession. Harris & Kushen, supra n.256, at 565 n.10.


268 Id. ¶ 126.

ensure the authenticity of the order or indictment, or reconfirm that the person arrested is the same one identified on the warrant. The ICTY and ICTR depend on such State cooperation because the tribunals themselves do not possess their own police forces to investigate and arrest accused persons.

The ICTY and ICTR authority to mandate State cooperation technically extends only to U.N. member States on account of several articles of the U.N. Charter, which variously require them to carry out decisions of the UNSC in general, to execute UNSC decisions specifically for the maintenance of international peace and security, and to meet such obligations even if duties under other international agreements should conflict with those under the U.N. Charter.

Accordingly, each of the 193 sovereign States that are U.N. members today (including the most recent addition of South Sudan in July 2011 but excluding the Vatican City, which has its own *sui generis* status) is subject to this duty. Although a non-U.N. member State or a non-State territory (such as Palestine) would not be legally obligated to comply with an ICTY or ICTR order, such a State or territory could still be penalized by the UNSC to the extent its non-cooperation were deemed to be a “threat to international peace and security.”

---

270 Gallant, *supra* n.264, at 586-87.
271 In the case of ICTY, in addition to reliance on State military forces, the Tribunal has relied heavily on SFOR. Susan Lamb, *Illegal Arrest and the Jurisdiction of the ICTY, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* 38 (Richard May, *et al.* eds. 2001).
273 U.N. CHARTER, *supra* n.23, arts. 25, 48, 49, 103. See also Gallant, *supra* n.264, at 560-66; Maogoto, *supra* n.272, at 167 (all U.N. member States are obligated to comply with ICTY and ICTR surrender orders).
274 U.N. CHARTER, *supra* n.23, Chapter VII and art. 2; KNOOPS, *supra* n.258, at 14-15.
U.N. member States that are dualist must adopt implementing domestic legislation, consistent with their constitutions, to give effect to these obligations.\textsuperscript{275} That legislation must prevail over any other national law, including those related to extradition or domestic prosecution, which could otherwise obstruct or impede such cooperation with one of the tribunals.\textsuperscript{276} Absent such required deference to the ICTY and ICTR, States would be far less likely to actively seek out and surrender fugitives who, in turn, might well continue to wield power or influence in that State whether because of their former positions and/or high-level contacts.\textsuperscript{277}

A prime illustration of such cooperation occurred in May 2007, when pursuant to an arrest warrant and surrender order, the Serbian government captured Zdravko Tolimir and transferred him to the ICTY. As a senior intelligence and security officer to the chief of staff of the Bosnian Serb military forces, who had been implicated in the killing of approximately 8,000 Bosnian Muslims in Srebenica in July 1995, Tolimir was regarded as the third highest-ranking fugitive in the Balkans.\textsuperscript{278} About a year later, in July 2008, the Serbian Government surrendered to the ICTY Radovan Karadzic, the former Bosnian

\textsuperscript{275} See Harris & Kushen, \textit{supra} n.256, at 567 (this requirement is based on UNSC resolutions (827, 955), the Statutes (Articles 28 and 29), and the Secretary-General’s Report). In fact, all States have promulgated some kind of pre-surrender procedure, most typically a judicial hearing. \textit{Id.} at 568. For dualist States like the U.S. and Germany, separate legislation to authorize the surrender of fugitives to these tribunals is required. \textit{See, e.g.,} 18 U.S.C. § 3181 et seq. (2012) based on legislation executed in February 1996. The U.S. approach was somewhat unconventional. In 1995, U.S. President Bill Clinton entered into an executive agreement with the ICTR, which provided that the U.S. “agrees to surrender to the Tribunal... persons... found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal.” Agreement on the Surrender of Persons, U.S.-ICTR, Jan. 24, 1995, art. 1(1), T.I.A.S. 12601. A year later, the U.S. Congress passed implementing legislation. National Defense Authorization Act for Fiscal Year 1996, § 1342, Pub. L. No. 104-106, 110 Stat. 186, 486 (1996) (with few minor exceptions, the provisions governing extradition treaties between the U.S. and other States are applicable to those between the U.S. and the ICTY and ICTR). The validity of this so-called “Congressional-Executive Agreement” was challenged as it authorized the surrender of individuals absent a treaty. \textit{See} \textit{Ntakirutimana v. Reno}, 184 F.3d 419 (5th Cir. 1999) (upholding constitutionality of Agreement), \textit{cert. denied}, 120 S. Ct. 977 (2000).

\textsuperscript{276} ICTY RPE, \textit{supra} n.269, Rule 58; ICTR RPE, \textit{supra} n.269, Rule 58 (“The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.”).

\textsuperscript{277} See Gallant, \textit{supra} n.264, at 564 (without this claim of paramount jurisdiction over individuals, it would be virtually impossible to bring human rights violators to justice against the wishes of states with a competing interest in shielding them.”).

Serb leader who had been indicted for genocide, crimes against humanity (CAH), and war crimes for “ethnic cleansing” of non-Serbs during the 1992-95 Bosnian War and had been a fugitive from justice for 13 years.  Other examples of such cooperation may include a State seconding prosecutors or judges to an international criminal tribunal, supplying evidence or intelligence, or offering financial rewards for information leading to the arrest of fugitives sought by a criminal tribunal.

Although under their statutes, the ICTY and ICTR “shall have primacy over national courts” and “may formally request national courts to defer to the[ir] competence,” the judge-made rules that fleshed out these pronouncements do not require all relevant cases to be tried by these tribunals and, indeed, even contemplate the tribunals turning over cases to national courts in appropriate instances. Accordingly, the ICTY may claim primacy over a national court in only three instances: (i) where a national court either intentionally or unwittingly devalues the seriousness of an international crime by treating it as an ordinary crime; (ii) where a national court appears to lack independence or impartiality or its proceedings otherwise are intended to “shield the accused from individual criminal responsibility;” and (iii) the case at issue is closely related to others under the jurisdiction of the tribunal or could have significant legal or factual bearing on other investigations or proceedings. A different standard applies to the ICTR.

---

280 See, e.g., Bruce Zagaris, U.S. Renews Rewards for the Arrest of Men Suspected of War Crimes During Rwanda Genocide, 24 IELR 335, 336 (2008) (discussing how the U.S. government renewed its rewards program in May 2008 by offering up to $5 million for information leading to the arrest of a fugitive wanted by the ICTR).
281 ICTY Statute, supra n.188, art. 9; ICTR Statute, supra n.263, art. 8.
282 ICTY RPE, supra n.269, Rule 11 bis; ICTR RPE, supra n.269, Rule 11 bis. In recent years, due to mounting workloads and a recognition of more efficient and less biased national courts, the Tribunals have been increasingly amenable to national court jurisdiction. CASSESE, supra n.71, at 351.
283 ICTY RPE, supra n.269, Rule 9.
284 ICTR RPE, supra n.269, Rule 9 ("Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State: (i) Are the subject of an investigation by the Prosecutor; (ii) Should be the subject of an investigation by the Prosecutor considering, inter alia: (a) The seriousness of the offences; (b) The status of the accused at the time of the alleged offences; (c) The general importance of the legal questions involved in the case; or (iii) Are the subject of an indictment in the Tribunal, the Prosecutor may
The dynamic involving a State’s surrender of a fugitive to one of these two international criminal tribunals can be distinguished in several respects from the extradition exercise carried out between States. To begin, as discussed above, States and the Tribunals do not operate on a level plane; the Tribunals have international legal primacy over States regarding prosecutorial access to fugitives in what can be characterized as a “vertical” relationship. In addition, such transfers are not based strictly on reciprocity; rather, transfers tend to move predominantly in the direction of the Tribunals. Moreover, surrenders to the ICTY and ICTR are subject less to legal technicalities and operate more informally in connection with the manner in which they are effected than is the case with inter-State extraditions.

Furthermore, the rules governing surrenders to the Tribunals dispense with any recognition of national sovereignty or prerogatives that could potentially thwart a fugitive’s surrender to one of these Tribunals. This point plays out in several respects. First, the aut dedere principle is inapposite, as a State has no choice regarding whether to transfer a fugitive or prosecute him in its own courts; the decision is mandatorily pre-struck in favor of transfer even while the Tribunals’ constitutive documents allow for “concurrent” domestic jurisdiction.

apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.”).

285 de Sanctis, supra n.201, at 542.
287 For example, the ICTY rejected a preliminary motion raised by a defendant that he had been unlawfully surrendered under the legislation of the host State, arguing that as the surrender request was issued to the FRY but was made by the Government of Serbia, and because the latter lacked the competence to carry out the transfer, there was an abuse of process. The Trial Chamber found that the defendant’s rights had not been “egregiously breached” and that the transfer had been handled consistent with the procedural provisions of the ICTY, which in any event prevail over any domestic legal impediment to the surrender of a fugitive. Prosecutor v. Milosević, Case No. IT-99-37-PT, ICTY Tr. Ch., Decision on Preliminary Motions, Nov. 8, 2001, available at http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm (last visited on Nov. 2, 2013).
288 The UNSC and tribunals have dispensed with the aut dedere formula as the model of sovereign equality and reciprocity is inadequate to deal with offenses within the tribunals’ subject matter jurisdiction, such as violations of International Humanitarian Law (IHL). “In many instances the crimes have been committed by persons working on behalf of state policy, in the name of state policy, or in the name of a group aspiring to state or government status. The requirement that a state prosecute if it does not extradite is insufficient where there is reason to
Second, as will be shown when discussing the nature of extradition in Chapter 4.d infra, whereas a State may inquire as to the merits of an extradition request, especially by independently insisting on *prima facie* (or another standard of) evidence, surrenders to the ICTY or ICTR adopt the so-called “rule of non-inquiry,” which amounts in effect to taking at face value the determination of a Tribunal judge.

Third, while a State contemplating extradition might rely on any number of discretionary substantive or procedural legal grounds to reject a request from another State, no such bases are relevant or acceptable in the ICTY/ICTR surrender context. For example, if a State might rule out extradition where its

suspect that such a prosecution will not be conducted in good faith. Without the support of a legal obligation to transfer defendants and without the muscle of the Security Council, neither the Tribunal nor the concerned states are likely to try many defendants charged with humanitarian crimes in the former Yugoslavia." Gallant, supra n.264, at 570.

For purposes of definition in the present context, the “rule of non-inquiry” refers to *a principle in which a State’s executive deems it inappropriate to ascertain the motive behind another State’s request for the custodial transfer of a fugitive or to examine another State’s legal standards or procedures for handling a fugitive post-transfer, and therefore is prepared to transfer a fugitive without scrutiny.*

Under the ICTY and ICTR Statutes and Rules, there is no requirement that the Tribunals transmit to the arresting State a statement of the evidence against the accused; at best, the warrant and confirmed indictment will be proof that a Tribunal judge has determined that a *prima facie* case exists. Harris & Kushen, supra n.256, at 586. Although no exceptions are facially permitted, it is up to the States themselves to minimize the risk of a clash between their domestic and international legal obligations by streamlining the surrender process and by imposing an evidentiary threshold lower than the usual national standard. MAOGOTO, supra n.272, at 169. Some States, however, have retained domestic evidentiary safeguards; e.g., the U.S. imposes a “reasonable basis” standard, and both Australia and New Zealand allow their respective Attorneys-General to refuse requests in exceptional cases. *Id.* at 171.

ICTY Statute, *supra* n.188, art. 29 (expressing the obligation of U.N. Member Parties to implement UNSC decisions); ICTY RPE, *supra* n.269, Rule 58 (“The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.”); ICTR RPE, *supra* n.269, art. 58 (same). *See also* MAOGOTO, *supra* n.272, at 167-68; *Third Annual Report of the Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, UN GAOR, 51st Sess., pt. 2, U.N. Docs A/51/292, S/1996/665 (1996), available at http://www.un.org/icty/rapportan/thir96tc.htm (last visited on Nov. 4, 2013); Klarevas, *supra* n.286, at 112-13 (many customary defenses can be raised in extradition proceedings that are barred in tribunal surrender proceedings); de Sanctis, *supra* n.201, at 542 (the State–ICTY relationship implies that “States are not allowed to rely upon such traditional clauses for refusing cooperation or extradition as double criminality, political offense, [and] nationality of the person requested for surrender”); Fox, *supra* n.18, at 436-37 (extradition safeguards are omitted in the “surrender” or “transfer” context, such as pleas of political offense or discrimination or discretion by extraditing State whether process is unjust or oppressive).
own national is the subject of the request,\textsuperscript{292} where domestic law applies a strict
time bar for a given crime,\textsuperscript{293} where human rights are a concern regarding
prospective treatment in the pursuing State,\textsuperscript{294} or where a charge appears to be
politically motivated,\textsuperscript{295} a State may not deny an ICTY or ICTR trial court order
for such reasons.\textsuperscript{296} Indeed, it was the express intention of the UNSC in creating
these Tribunals to overcome such domestic legal barriers to the transfer of
fugitives.\textsuperscript{297}

Finally, extradition and surrender also differ in principle in terms of the weight
of enforcement and political leverage they comparatively exert. States may
impose sanctions or exact other penalties on another for a failure to extradite a
wanted fugitive, as well as “jawbone” and engage in exchanges, but ultimately
States are limited in the muscle they can flex. By contrast, because the ICTY and
ICTR were established under UNSC auspices, the UNSC, at the behest of a
Tribunal President,\textsuperscript{298} may verbally condemn non-cooperation, offer economic
or diplomatic incentives to encourage cooperation, regarding an arrest and

\textsuperscript{292} KNOOPS, supra n.258, at 12 (constitutional prohibition of extradition of nationals does not
preclude surrender to the ICTY). \textit{But see} Jovan Kovacic, “U.S. Envoy Warns Serb President to Aid
Tribunal,” \textit{Boston Globe}, Nov. 8, 1996, at A2; Harris & Kushen, supra n.256, at 570-71 & n.22
(noting that the Bosnian Serbs nevertheless raised the nationality exception to extradition to
justify refusal to cooperate with the ICTY).

\textsuperscript{293} Harris & Kushen, supra n.256, at 573 (limitations of time do not apply to Tribunal
prosecutions and should not be a valid basis for denying a surrender request; indeed, the non-
applicability of such limitations to many violations of IHL is recognized as emerging customary
law, and is enshrined in the United Nations Conv. on the Non-Applicability of Statutory
Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, UNGA Res. 2391 (XXIII),
754 U.N.T.S. 73 (1968), \textit{available at} \url{http://www2.ohchr.org/english/law/pdf/warcrimes.pdf}
(last visited on Jan. 23, 2012).

\textsuperscript{294} Gallant, supra n.264, at 586 (“the state in which the accused is arrested has no authority
to protect his or her human rights, except to provide humane conditions of detention pending
transfer or surrender. All other protections of the accused’s human rights must occur, if at all,
under jurisdiction of the Tribunal.”).

\textsuperscript{295} Harris & Kushen, supra n.256, at 571-72.

\textsuperscript{296} U.S. Agreements with the Tribunals reflect this reality. \textit{See} MICHAEL ABBELL, EXTRADITION TO AND
FROM THE UNITED STATES 3-130 (2001 & Supp. 2007) (noting that U.S. agreements with the ICTY
and ICTR, while modeled on standard U.S. extradition treaties with other States, omit references
to the “nationality of requested person, political offenses, military offenses, specially, lapse of
time, non bis in idem, and dual criminality” as inapplicable); Harris & Kushen, supra n.256, at 585.

\textsuperscript{297} Harris & Kushen, supra n.256, at 573.

\textsuperscript{298} ICTY RPE, supra n.269, Rules 7 \textit{bis}, 59, 61; ICTR RPE, supra n.269, Rule 10, 59, 61 (within a
reasonable time after an arrest warrant has been transmitted to the State, no report is made on
action taken, this shall be deemed a failure to execute the warrant of arrest and the Tribunal may
notify the UNSC accordingly); \textit{see also} MAOGOTO, supra n.272, at 215 (if a State fails to surrender
an accused to a Tribunal, the President of the Tribunal is authorized to notify the UNSC of any
such refusal).
surrender order, or even intervene with the use of force or sanctions when a State fails to cooperate.\textsuperscript{299} Sometimes, the threat of such UNSC measures can be enough to prompt a State to comply with its obligations,\textsuperscript{300} but that threat has not been invoked often.\textsuperscript{301} (In addition, certain supranational bodies can foster compliance with Tribunal requests through the offer of incentives or disincentives,\textsuperscript{302} or through direct cooperation via a peacemaking mission.\textsuperscript{303}) Notwithstanding their powerful legal mandate for prompting States to arrest and surrender fugitives found within their territory, however, the ICTY and ICTR have not always fared well with regard to State cooperation.\textsuperscript{304}


\textsuperscript{300} See MAOGOTO, supra n.273, at 216 (in January 1995, several African states, including Kenya, agreed to hand over to the ICTR those who had taken part in the Rwandan genocide, but later on, Kenyan President Moi stated that he would refuse to cooperate with the ICTR and that he would prevent them from seeking out suspects in his country; ICTR Prosecutor Goldstone then sent him a letter warning him that his refusal would be regarded as a breach of Kenya’s obligations under international law and a matter for the UNSC to consider; President Moi soon retracted his statement).

\textsuperscript{301} See CASSESE, supra n.71, at 350 (“So far the two Tribunals have seldom relied upon their primacy”) (citing by way of example Germany’s prompt compliance with the ICTY surrender request in the Tadic case in November 1994).

\textsuperscript{302} For example, in 2006, on account of Serbia’s non-cooperation with the ICTY, the European Union (EU) stalled negotiations with Serbia over joining the EU as a Member State; Serbia’s interest in membership evidently helped prompt its arrest and surrender of Zdravko Tolimir, after which the talks were quickly resumed. Bruce Zagaria, \textit{Serbia Arrests and Surrenders No. Three War Crimes Suspect to ICTY}, 23 IELR 313 (2007). In another instance, Serbia surrendered Slobodan Milosevic on the eve of an international conference that was to determine whether that emergent State, now no longer part of Yugoslavia, would receive significant amounts of development aid or be subject to economic sanctions. Donna E. Arzt, \textit{The Lockerbie ‘Extradition by Analogy’ Agreement: ‘Exceptional Measure’ or Template for Transnational Criminal Justice?}, 18 Am. U. Int’l L. Rev. 163, 223 (2002).

\textsuperscript{303} See Evelyn Leopold, “UN Council Readies Resolution on New Bosnia Force,” \textit{Reuter EC Rep.}, Dec. 15, 1995; Harris & Kushen, supra n.256, at 562-63 n.3 (the NATO peacekeeping force in Bosnia (IFOR, later known as SFOR) was obligated to arrest and surrender Tribunal fugitives under the General Framework Agreement of 1995; NATO announced that it would detain indicted war criminals who came into contact with the peacekeeping force in the execution of its assigned tasks in order to assure the transfer of these persons to the Tribunal).

\textsuperscript{304} See Walter Gary Sharp, Sr., \textit{In Search of Peace and Justice: War Criminals at Large in the Former Yugoslavia}, 32 Int’l L. Rev. 489, 489-90 (1998) (ICTY has had difficulty apprehending many suspected war criminals due in large part to the international community’s unwillingness to actively search for and arrest war criminals within Yugoslavia); Bruce Zagaria, \textit{Rwanda Prosecutor Calls on Surrounding Countries to Cooperate with ICTR}, 21 IELR 32 (2005) (in October 2004, ICTR prosecutor Hassan Jallow urged countries still harboring 14 important genocide suspects to arrive and transfer them to the ICTR and fulfill their legal obligations to cooperate with the ICTR); Bruce Zagaria, \textit{International Criminal Tribunal for the Former Yugoslavia (ICTY) Focuses on Remaining Fugitives}, 23 IELR 437 (2007) (ICTY Office of the Prosecutor has maintained that the international community has not done enough to arrest key fugitive leaders, particularly Mladic and Karadzic and transfer them to the Tribunal); Colette Retif, \textit{By What
This chapter focused on subject matter jurisdiction as a critical ingredient for a pursuing State to bring a fugitive to justice. The next chapter turns to an examination of those circumstances in which fugitives come into the custody of a pursuing State due to sheer fortuity. Such scenarios are treated in the background context because beginning in Part II this dissertation addresses the wide variety of ways in which States can and do actively seek the custody of fugitives abroad.

CHAPTER 3

"SILVER PLATTER" SCENARIOS

As a final preliminary matter before examining the various ways States actively attempt to secure the custody of fugitives abroad, whether through extradition or one of its alternatives, it is essential to acknowledge that, on many occasions, a fugitive returns or is returned to pursuing State custody or control either effortlessly on the part of the pursuing State in his recovery (i.e., without any direct action or initiative) or adventitiously (i.e., even where the pursuing State has propounded an extradition request, the decision to return or be returned was driven by exogenous factors).

More specifically, such scenarios may occur: (i) based on an error or misunderstanding by the fugitive or by host State or international tribunal officials or agents, (ii) intentionally by the fugitive but in reliance on personal motivations unrelated to law enforcement measures or pressures, (iii) purposefully by the host State pursuant to its immigration laws when unaware of receiving State law enforcement interest in the fugitive or in reversing an initial extradition denial when prompted by external, non-law enforcement-related factors, or (iv) by private actors regardless of motivation. For purposes of this study, such instances are called “silver platter” scenarios because of the

---

1 Although a fugitive’s whereabouts also may be confirmed without any effort on the part of the pursuing State, that information, albeit welcome and deemed valuable, would not itself constitute a “silver platter” scenario, which requires the fugitive’s physical delivery to pursuing State custody or control.

2 This term may be more familiar to many in another criminal procedural law context, namely, when under U.S. law, evidence is admissible in a federal court even if obtained unlawfully so long as it was collected by a state police officer and no federal officer participated in or requested the search. This concept was rejected by the U.S. Supreme Court in Elkins v. United States, 364 U.S. 206 (1960). In an alternative guise, this term can refer to evidence seized by foreign governments and provided to federal agents without federal government participation, including as a joint venture, that would be deemed admissible and not subject to the exclusionary rule, United States v. Janis, 428 U.S. 433, 455 (1976); United States v. Mount, 757 F.2d 1315, 1317 (D.C. Cir. 1985), unless the circumstances surrounding the seizure were sufficient to “shock the
sheer fortuity with which a fugitive comes into pursuing State custody or control.

This chapter examines the character and legality inherent in each of these scenarios, which include: (i) actions by the fugitive himself, wittingly or unwittingly; (ii) actions by one or more private actors; and (iii) actions by the host State or an international tribunal. Such scenarios are worth addressing for at least three reasons. First, it is important to distinguish them from true alternatives to extradition (discussed in Parts IV and V infra), especially as they are often conflated with such alternatives in the international law literature. Second, States occasionally try to dress up undercover seizure operations to appear as if they fall within this category, and therefore it is essential to understand this motivation and its legal implications. Third, although these scenarios are relatively straightforward, they nevertheless give rise to a few significant lawfulness issues that warrant an examination, particularly related to the extent to which “private” actions may entail State responsibility and whether an accidental inter-State transfer can be reversed upon the request of the transferor State.

a. Action by the Fugitive

There are four basic ways in which a fugitive could return to pursuing State territory on his own accord via private (or other non-extradition) channels or arrangements. First, he could do so knowingly and voluntarily with the full expectation of prosecution or punishment upon his arrival at the pursuing State’s border or port. Second, he could be aware of a pending indictment and warrant for his arrest but nevertheless be willing to take the risk as a trade-off for some overriding potential benefit. Third, although aware of a pending charge, he may not have properly factored in the possibility of a stopover, planned or unplanned, during his private travel or pursuant to a deportation order in which he ends up in pursuing State territory. Fourth, he could return by virtue of an innocent mistake or based on misinformation, unaware that the
A pursuing State seeks his arrest for a crime he may or may not have committed.³
A pursuing State may lawfully arrest a fugitive who returns to its territory under
these scenarios.⁴

_A fugitive may knowingly and voluntarily return to the pursuing State to face
prosecution or punishment._ Some fugitives knowingly consent to return to
pursuing State territory in order to challenge any doubt regarding their
innocence;⁵ to face the apparently inevitable reality that they will be extradited
after their legal arguments contesting extradition have failed; to be tried in a
State where they understand the language, will be fairly treated, can expect
shorter prison sentences (either vis-à-vis the sentence length for the same
offense in the host State or because of the opportunity for a plea bargain based
on cooperation with law enforcement authorities), and/or better conditions of
incarceration; or to be closer to their families or friends or at least back in their
homeland. Such returns would be undertaken through private arrangements or
otherwise outside of the extradition context.

For example, in November 1964, Mordechai Luk, an Israeli national believed to
be a double agent for Egyptian and Israeli intelligence services, volunteered to
return to Israel to face military desertion and espionage charges (for which he
was ultimately convicted on six counts) after Egyptian agents unsuccessfully
attempted to transport him drugged in a specially fitted trunk to Cairo via

---

³ Excluded from this list would be scenarios, for example, in which a pursuing State sought to
conceal its interest in a fugitive through a secret indictment, tried to lure him under false
pretenses, or deliberately misinformed him of his fugitive status or whether the offense for
which he is wanted is extraditable. Each of these scenarios is discussed elsewhere.
⁴ Mark Brkljacic, Note, _The Dangers of State Sponsored and Court Ratified Abduction_, 5 J. INT’L L. &
⁵ See J. David Goodman, "Prosecutor Says Qaddafi Son May Turn Himself In," _IHT_, Oct. 29-30,
2011, at 5 (in indirect discussions with ICC prosecutors, Seif al-Islam el-Qaddafi, the ex-Libyan
dictator’s son, considered possibly turning himself in to prove his innocence) (but note that he
was ultimately captured by Libyan militia fighters in November 2011, Clifford Krauss & David D.
Kirkpatrick, "Libyan Fighters Catch Qaddafi’s Last Fugitive Son," _N.Y. Times_, Nov. 19, 2011,
islam-qaddafi-libya.html?pagewanted=all&r=0 (last visited on Dec. 31, 2013); and Niger
extradited him to Libya in March 2014, David D. Kirkpatrick, "Niger Hands Qaddafi Son Over to
aircraft from Rome. Under the circumstances, it is presumed he believed he would be more humanely treated by an Israeli court than by an Egyptian one. In another instance, Ronnie Biggs, the mastermind behind the 1963 “Great Train Robbery” in the U.K. who later escaped from prison and made a home for himself in Brazil, and who had withstood a U.K. extradition request only four years earlier, voluntarily returned to the U.K. in May 2001, claiming, “I am a sick man. My last wish is to walk into a Margate pub as an Englishman and buy a pint of bitter.”

**A fugitive may be aware of a pending indictment against him in the pursuing State but is nevertheless willing to risk capture by returning to that State’s territory.** Some fugitives choose to return well aware of the risk of arrest in order to visit with family or friends; obtain medical care; attend a wedding or funeral; join a government delegation; pursue a potentially lucrative business venture; or for other such reasons. For example, in October 2011, Joe Gordon, a Thai-born U.S. citizen living in Colorado who had translated part of a banned biography of Thai King Bhumibol Adulyadej (entitled *The King Never Sleeps* by Paul Handley) and then posted that translated text on an Internet blog in contravention of Thailand’s strict law against insulting the monarchy, was

---


8 To the extent a fugitive travels voluntarily but at knowing risk to *third State territory*, and law enforcement authorities monitor those movements and arrest him in that third State, such an approach would qualify as a fallback alternative to extradition, rather than as a "silver platter" scenario, and is discussed in Chapter 9.b.ii infra.

9 See n.6 in the Introduction *supra* discussing *lèse majesté* laws.
arrested when he voluntarily returned to Bangkok for medical treatment, bypassing any need for the Thai Government to request his extradition.10

A fugitive may be aware of a criminal charge against him but has not accounted for the fact that his travel may entail a stopover in pursuing State territory. A fugitive may be on business or personal air or sea travel, or is the subject of a deportation order, that entails an intermediate stop, scheduled or unscheduled, within pursuing State territory while en route to a third-State destination. To the extent that the pursuing State officials and agents can keep their border and port officers informed of this possibility (presumably through updated computer databases), arrests can be effected absent any directed effort on the part of the pursuing State to monitor movements or to prompt, entice, or encourage a fugitive's return. For example, in June 1994, the U.S. apprehended Jairo Trujillo, a narcotics trafficker, in Miami, Florida, during a stopover on an airplane trip from the U.K. to Colombia (his native country) following his deportation, where the U.S. had not requested extradition nor was there any express or implicit evidence that the U.S. had sought that particular routing in order to arrest him.11

A fugitive may be unaware of pending criminal charges against him in the pursuing State and returns to that State’s territory entirely innocent of the ensuing consequences. This lack of awareness may be a function of the fact that the fugitive has not actually committed a crime and is merely the victim of a case of mistaken identity, false witness testimony, or prosecutorial misconduct. In such a case, he might not think to determine whether there is an outstanding indictment or warrant for his arrest and innocently return to the territory of a State interested in his prosecution and be arrested upon his arrival. Alternatively, a fugitive who has committed a crime may not be aware that criminal charges have been lodged against him in the pursuing State (e.g., he may

10 AP, “U.S. Citizen Pleads Guilty to Defaming Thai King,” IHT, Oct. 11, 2011, at 4 (the defendant was sentenced to 5 years but it was halved to 2.5 years due to his guilty plea).
11 See United States v. Trujillo, 871 F. Supp. 215, 217-21 (D. Del. 1994) (finding additionally that Colombia had no standing to contest the terms of the U.S.-U.K. Extradition Treaty, even if it had been applicable).
not believe he was ever fingered as a suspect, may live as a recluse without
access to newspapers or television, or may be misinformed by family or friends
as to his fugitive status), or may innocently believe that, because of the lapse of
time, he is no longer on law enforcement’s radar screen or the statute of
limitations for his offense has elapsed.\textsuperscript{12}

\textit{A fugitive may be innocently misinformed about his non-fugitive status or
the extraditability or non-extraditability of his offense by pursuing State
officials and, on such a basis, chooses to return to pursuing State territory.}
This scenario could operate in one of two ways. First, pursuing State officials
could erroneously but innocently lead a fugitive to believe that he is not actually
a fugitive or that the offense for which he is wanted is non-extraditable \textit{(e.g., it is}
only a misdemeanor), and consequently he decides to return home. Second, a
fugitive could be unintentionally misinformed by pursuing State officials that the
crime(s) he is charged with committing \textit{is/are} extraditable, and based on that
false information, he could choose to waive his right to an extradition hearing in
the host State and return home voluntarily so as not to expend time, money, and
effort challenging his transfer if it seems largely inevitable anyway. In a case
arising out of such an innocent error, a U.K. court reasoned that such a return
was essentially voluntary and did not establish a basis either for illegality or for
finding that the court lacked personal jurisdiction over the defendant.\textsuperscript{13}

\textsuperscript{12} Another related class of cases would involve individuals who are not actually fugitives but
whose names appear on “no-fly” or other criminal suspect lists and/or are wanted as material
witnesses in criminal prosecutions. For example, in August 1989, when Ruben Zuno-Arce,
brother-in-law of former Mexican President Luis Echeverria, voluntarily flew from Mexico to San
Antonio, Texas, on a business trip, he was arrested some hours after his arrival at a supermarket
following surveillance. Notably, Zuno-Arce had not been charged with any crime; rather, he was
on a “special list of people believed to be drug traffickers” and was wanted as a “material
witness” in the 1985 murder of Drug Enforcement Administration (DEA) agent Enrique
Times}, May 7, 1990, at A1, A23; Henry Weinstein, “Man Seized in Camarena Case is Kin to Ex-
12/local/me-102_1_camarena-case} (last visited on Jan. 13, 2012).
b. **Action by Private Actor(s)**

In general, three types of private actors responsible for helping a State to secure the custody of a fugitive can be discerned: (i) paid individuals such as bounty hunters or private investigators who tend to work for bail bondsmen or creditors (the latter most likely in a case of financial fraud or embezzlement); (ii) unpaid volunteers whose assistance, whether by virtue of a physical return or a location tip-off, has a political, community security, principled, or other non-pecuniary motivation; and (iii) pursuing or host State officials acting *ultra vires* or in their personal capacities. These scenarios can raise the question of whether and to what degree private action falls within the purview of State responsibility.

*A bounty hunter or private investigator may capture and return a fugitive on behalf of a private entity.* These cases involve paid individuals who tend to work for creditors or, more likely, bail bondsmen who have posted bail on behalf of criminal defendants as a financial guarantee that they will not flee during

---

14 Sometimes the facts remain unclear as to whether a seizure was perpetrated by private volunteers or by paid agents of the pursuing State. In cases where an actor’s identity or status cannot be ascertained with any precision – a so-called indeterminate party – the law can do little else but treat him like a private individual, because it would not be fair to presume he was operating under the effective control of a particular State. For example, in July 1984, three Israelis and a Nigerian diplomat seized Umar Dikko, a Nigerian exile who was among his own government’s most wanted fugitives, at gunpoint near his London home. Dikko was drugged and placed in a shipping crate labeled diplomatic baggage at London’s Stansted Airport. The governments of Nigeria and Israel denied any involvement in the matter. The four men were arrested and charged with kidnapping. Jo Thomas, “Britain Charges Three Israelis and Nigerian in Kidnapping of Exile,” *N.Y. Times*, July 11, 1984, at A4.

15 Although no statistics exist, the use of bounty hunters to locate and retrieve fugitive abroad is believed “to occur with some frequency.” Michael Abbell, *Extradition to and from the United States* 7-21 (2001 & Supp. 2007).

16 See, e.g., Paul O’Higgins, *Unlawful Seizure and Irregular Extradition*, 36 B.Y.R.I.L. 279, 305 (1960) (Joseph Lamb was seized by agents of his creditors and hurried on board a British ship in Rotterdam and sailed back to England to face charges of embezzlement and fraudulent bankruptcy).

17 Simply because a fugitive is delivered on a “silver platter” by private actors does not necessarily mean that a pursuing State will accept the individual; in some cases, the fugitive will be returned back from where he came, perhaps to demonstrate that the receiving State itself was not responsible for an extraterritorial seizure. See “Abducted Rhodesian Freed; Returns from South Africa,” *N.Y. Times*, Sept. 3, 1964, at 6 (discussing how three white men had kidnapped Dennis Higgs, a British national living in Lusaka (then Northern Rhodesia, today Zambia), and brought him to a park in Johannesburg, South Africa, where he was wanted on charges of being an accessory to murder, and how South Africa returned him to Lusaka and indicated plans to seek his extradition through proper channels).
court proceedings.\textsuperscript{18} If and when a defendant does skip bail, the bail bondsmen must recover him or forfeit an often-substantial sum. For example, in September 1981, with the prodding of Florida state prosecutors, an insurance company that had posted bail hired two bounty hunters to seize Canadian businessman Sidney Jaffe from his home in Toronto and return him to Florida to face land fraud charges. Jaffe was taken against his will to Ontario, driven across the border at Niagara Falls, and then flown from a local airport to Florida.\textsuperscript{19} Similarly, in June 2003, American bounty hunter, Duane Lee “Dog” Chapman and two associates sought out and captured Andrew Luster, the (cosmetics company) Max Factor heir indicted for multiple rapes in California while living under an assumed name in Puerto Vallarta, Mexico.\textsuperscript{20} (Such cross-border seizure actions violate the domestic law of the host State, and individual bounty hunters can be either caught in the act by law enforcement officers\textsuperscript{21} or later sought by the host government via extradition on kidnapping charges, but these scenarios do not implicate either international law or State responsibility.)

\textit{One or more concerned citizens or politically motivated persons may tip off law enforcement authorities about a suspicious individual or take action directly into their own hands}. These cases are distinguished by the fact that the action in support of law enforcement is undertaken without a request for, or the receipt of, financial compensation. For example, in the spring of 1997, Mexican immigration officers received “two or three calls” from “tipsters” indicating that

\textsuperscript{18} See “Putnam County,” \textit{Time}, Aug. 8, 1983, at 58 (noting that in America’s Old West, bounty hunters acted as \textit{de facto} freelance deputies, collecting rewards for bringing back fugitives).

\textsuperscript{19} See \textit{Jaffe v. Boyles}, 616 F. Supp. 1371, 1373 (D.C.N.Y. 1985) (Accredited Surety & Casualty posted bail bonds totaling $137,000 to secure Jaffe’s release; when the trial was scheduled, Jaffe was residing in Canada and refused to return; attempts at his extradition failed; Accredited ordered two of its agents, Timm Johnsen and Daniel Kear, to kidnap Jaffe and return him to Florida); Kristofer R. Schleicher, \textit{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, 489 (1990).

\textsuperscript{20} See Bruce Zagaris, \textit{U.S. Detains Bounty Hunter on 2003 Mexican Kidnapping Charges}, 22 IELR 432, 432-33 (2006) (noting that upon his return to the U.S. with Luster, Mexican authorities arrested Chapman and charged him with “deprivation of liberty;” when he was released on bail, Chapman did not return for his scheduled court hearing in July 2003).

\textsuperscript{21} For example, in October 1986, American bounty hunters Jesse and Coantha Mendez tried to seize Jeffrey S. Clair, who was wanted on fraud charges in Houston, Texas, on behalf of a company that had posted a $50,000 bond to guarantee his appearance at trial, but because of an automobile accident in which they were involved during the operation, Canadian police discovered the seizure and arrested the bounty hunters. Howard Kurtz, “For U.S. Bounty Hunters, National Boundaries are Little or No Constraint,” \textit{Wash. Post}, May 15, 1987, at A23.
Ernesto López, an escaped murderer from a U.S. prison on the lam for 35 years, “was a foreigner apparently living illegally in Mexico” and consequently was captured and returned to prison.22 In another example in February 1963 French police received an anonymous tip from a person self-identified with the Organization of the Secret Army (OAS), a right-wing French terrorist organization that opposed Algerian independence, regarding the specific whereabouts in central Paris of Antoine Argoud, a former French Army colonel and active OAS member, who had most recently been in Munich. Based on the tip, Argoud, who had been charged with attempting to assassinate President de Gaulle, was promptly located roped up and bruised in the back of a van near French police headquarters.23

A host or pursuing State official could act ultra vires or in his personal capacity to deliver a fugitive. Precedent exists for law enforcement officers acting without their own government’s knowledge, authority, or direction, or possibly in direct contravention of official policy or instruction, in bringing or luring24 a fugitive to pursuing State territory or to assist another government by making an arrest on their home soil. In March 1920, for instance, entirely on their own (unofficial) initiative, a U.S. Department of Justice official and two Internal Revenue (tax) agents pursued and seized in British territorial waters Charles Vincenti, a U.S. citizen and the president of a Baltimore liquor company, for shipping large quantities of liquor to the Bahamas in anticipation of Prohibition,25 and returned him initially to Miami; the U.S. Government

---

24 Consider United States ex rel. Lujan v. Gengler, 510 F.2d 62, 63 (2d Cir. 1975) (discussing how the fugitive, after being lured from Argentina to Bolivia on the pretext of a business deal, “was promptly taken into custody by Bolivian police who were not acting at the direction of their own superiors or government, but as paid agents of the United States.”), cert. denied, 421 U.S. 1001 (1975).
25 The Prohibition Era in the U.S. took place during the 1920s and early 1930s during which the manufacture, sale, transportation, importation, or exportation of alcoholic beverages was prohibited due to social and health concerns about alcoholic consumption and intoxication. Prohibition commenced a year after the 18th amendment to the U.S. Constitution was ratified on
subsequently acknowledged that the arrest had been unlawful and released Vincenti.\textsuperscript{26} Similarly, in the early 1960s, without authorization, French government police helped seize from France and deliver to Morocco a prominent Moroccan politician named Mehdi Ben Barka.\textsuperscript{27}

In April 1990, among those responsible for seizing and returning to the U.S. Humberto Álvarez-Machain, a Guadalajara-based medical doctor accused of participating in the torture and murder of a Drug Enforcement Administration (DEA) agent in Mexico, were “two current policemen” in addition to civilians and some former military police officers who collectively were referred to as the Wild Geese acting in their personal capacity on behalf of the DEA.\textsuperscript{28} In another example, in January 2005, the Venezuelan Vice President announced that “five Venezuelan National Guardsmen and three police officers had been detained on suspicion of participating in the [December 2004] kidnapping” of Rodrigo Granda, a Venezuelan national and FARC leader who was taken across the border into Colombia.\textsuperscript{29}

Under international law, responsibility for unlawful conduct generally extends to government agents or others acting under color of law rather than to private volunteers.\textsuperscript{30} That is because international law is concerned primarily with

\begin{itemize}
  \item[\textsuperscript{26}] See 1 DIGEST OF INT’L LAW 624 (Green H. Hackworth ed. 1940); Michael H. Cardozo, \textit{When Extradition Fails, Is Abduction the Solution?}, 55 AJIL 127, 132 (1961) (the U.S. government apologized and explained that the officials had “acted on their own initiative and without the knowledge or approval of this government.”).
  \item[\textsuperscript{27}] See SHEARER, supra n.23, at 73 n.2 (noting that after Barka’s delivery, Morocco refused to return him to France, so France severed diplomatic relations with Morocco).
  \item[\textsuperscript{28}] CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 282-83 (2001).
  \item[\textsuperscript{29}] Bruce Zagaris, \textit{Venezuela Recalls Ambassador to Protest Kidnapping Colombian Rebel Leader}, 21 IELR 96, 96-97 (2005). This incident led to the recalling of the Venezuelan Ambassador to Colombia, the suspension of bilateral trade relations, and the demand of a public apology from the Colombian President. \textit{Id.}
  \item[\textsuperscript{30}] See SATYADEVA BEDI, EXTRADITION: A TREATISE ON THE LAWS RELEVANT TO THE FUGITIVE OFFENDERS WITHIN AND WITH THE COMMONWEALTH COUNTRIES 394 (2002) (State responsibility only arises through official complicity); Michael H. Cardozo, \textit{When Extradition Fails, is Abduction the Solution?}, 55 AJIL 127, 132 (1961) (“The rule that abduction is illegal under international law, however, does not operate unless the abductors were representing the prosecuting government in some way and were not \textit{bona fide} volunteers.”); Jeffrey J. Carlisle, \textit{Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping}, 81 CAL. L. REV. 1541, 1556
\end{itemize}
limiting State conduct, not that of individuals acting in their personal capacity, which is typically handled instead through domestic legislation.\textsuperscript{31} While generally no State responsibility obtains in instances involving conduct by a private actor, in cases where the State is found to have encouraged or sponsored the wrongful act, such as through posting a bounty for a fugitive’s capture;\textsuperscript{32} where a private individual has been empowered with authority of the State to act on its behalf;\textsuperscript{33} where the State has effective control over the actions of the private individual;\textsuperscript{34} or where governmental personnel do not take adequate measures to prevent certain actions, such actions can be imputed to the State.\textsuperscript{35}

\textsuperscript{31} See Perry John Seaman, Note, \textit{International Bountyhunting: A Question of State Responsibility}, 15 CAL. W. INT’L L.J. 397, 405 (1985); \textit{id.} at 408 & n.109 (discussing the case at supra n.19 and accompanying text, in which Florida state prosecutors prodded the bail bond company to bring the fugitive, Sidney Jaffe, back from Toronto to face trial); \textit{e.g., United States v. Caro-Quintero, et al.}, 745 F. Supp. 599, 609 (C.D. Cal. 1990) (a State-advertised capture reward can be deemed tantamount to State sponsorship, such as when U.S. DEA agents paid Mexican individuals $20,000 for their role in seizing Humberto Álvarez-Machain and returning him to the U.S. to face criminal charges) \textit{aff’d sub nom. United States v. Álvarez-Machain}, 946 F.2d 1466 (9th Cir. 1991), \textit{rev’d on other grounds}, 504 U.S. 655 (1992).

\textsuperscript{32} See ILC, \textit{Responsibility of States for Internationally Wrongful Acts with Commentaries} (Draft), Annex to UNGA Res. 56/83, Dec. 12, 2001, art. 5, UN GAOR 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), \textit{available} at \url{http://legal.un.org/ILC/texts/instruments/english/commentaries/9.6.2001.pdf} (last visited on Nov. 7, 2013) [hereinafter ILC, \textit{State Responsibility}] (State responsibility obtains when 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, provided the person or entity is acting in that capacity in the particular instance,” such as a privatized corporation that retains public or regulatory functions); Seaman, \textit{supra} n.32, at 406-07 (“Although a bounty hunter is not part of formal structure of state, his acts may be considered acts of the state since he is empowered by internal state law to exercise governmental authority to arrest; therefore, when he abducts pursuant to authority given him by the state, . . . the abduction is considered an act of the state for which it is directly responsible.”).

\textsuperscript{33} See ILC, \textit{State Responsibility}, \textit{supra} n.33, art. 8 (State responsibility obtains when “conduct of a person or group of persons if acting on the instructions of, or under the direction or control of, that State carrying out the conduct.”). Regarding the second part, the ILC Commentary stresses that “[s]uch conduct will be attributable to the state only if it directed or controlled the specific
In addition, even where not technically at fault, circumstances may dictate a State to accept political responsibility and return a fugitive taken by a private individual. For example, “in the Blair case, the abduction from the United States evidently was handled by a British private investigator not acting on government orders, and yet the victim was in due course returned to the United States.” Alternatively, the threat of force can yield the return of someone taken even though his seizure was not imputable to a State. While in Turkey, a gang of ruffians seized Martin Koszta, a Hungarian revolutionary sought by Austria, and took him on board an Austrian warship; the captain of a U.S. warship, who believed Koszta was entitled to U.S. protection because he had filed for U.S. citizenship, “demanded Koszta’s release and prevailed after threateningly swinging his guns in line with the Austrian vessel.” A third variation may obtain where a State opts to play it conservatively and not risk an international dispute. In connection with a West German government offer of a $25,000 reward for the retrieval 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.”

Because international law focuses on State conduct, a State may try to mislead others into believing that private volunteers perpetrated a legally questionable act when in fact the State was the force behind it. This occurred when Israel tried to initially justify the lawfulness of its seizure of Adolf Eichmann, a German Nazi SS officer and architect of the Holocaust, off a street in Buenos Aires in 1960 by claiming it had been the handiwork of private volunteers, although it was later shown that the true perpetrators, Mossad agents, had operated “with the

operation and the conduct complained of was an integral part of the operation.” Id. at 104. For further discussion on this point, see n.39 in the Introduction supra.

35 “Although private individuals are not regarded as state officials so that the state is not liable for their acts, the state may be responsible for failing to exercise the control necessary to prevent such acts. This was emphasized in the Zaffiro case between Great Britain and the U.S. in 1925. Earnshaw, et al. Claim (a/k/a Zaffiro Case) (Gr. Br. v. U.S.), General Claims Comm’n, 6 RIAA 160, Nov. 30, 1925. The Tribunal held the latter responsible for the damage caused by the civilian crew of a naval ship in the Philippines, since the naval officers had not adopted effective preventative measures.” Malcolm N. Shaw, Public International Law 789 (6th ed. 2008).

36 Cardozo, supra n.26, at 132.
37 Id. at 134.
connivance of the Israeli government." 

Likewise, in August 1973, to save face, South Korea initially claimed it had nothing to do with the seizure of Kim Dae Jung, spokesperson for South Korea’s opposition political party, from a Tokyo hotel room, but rather it had been privately and unofficially perpetrated by the then-First Secretary of the South Korean Embassy in Japan, Kim Dong Woon. 

In addition, it is even possible for unauthorized or ultra vires actions by government personnel to be imputable to the State, especially if the State fails to repudiate such actions or in effect ratifies or “acknowledges and adopts the conduct in question as its own.” 

One legal commentator has contended that “[e]ven though governmental action is not involved in the initial stage of such a kidnapping, the assertion of jurisdiction over the kidnapped person by a 

---

39 Bassiouni, supra n.31, at 126-27. See also Paul O’Higgins, Unlawful Seizure and Irregular Extradition, 36 B.Y.B.I.L. 279, 296 (1960) (“If in fact [volunteers] meant that [the captors] were private citizens acting on their own initiative Israel would not be liable for their actions; on the other hand, if the kidnappers were private citizens acting with the connivance of the Israeli authorities, or were Israeli officials who had volunteered for the particular assignment offered to them by the Israeli authorities, then Israel was internationally liable for their actions.”).


41 See ILC, State Responsibility, supra n.33, art. 7 (State responsibility obtains when “conduit of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority, if acting in that capacity, even if it exceeds its authority or contravenes instructions.”); Jean-Baptiste Caire Claim [Fr.-Mex. Claims Comm’n], 5 RIAA 516, 530 (1929) (officials “have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity”); Shaw, supra n.35, at 786 (“The state may also incur responsibility with regard to the activity of its officials in injuring a national of another state, and this activity need not be one authorised by the authorities of the state.”); James Crawford, Brownlie’s Principles of Public International Law 549 (8th ed. 2012) (“It has long been apparent in the sphere of domestic law that acts of public authorities which are ultra vires should not by that token create immunity from legal consequences. . . . Arbitral jurisprudence and the majority of writers support the rule that states may be responsible for ultra vires acts of their officials committed within their apparent authority or general scope of authority. An act of arrest by a police officer, in fact carrying out a private policy of revenge, but seeming to act in the role of police officer to the average observer, would be within this category.”).

42 See Frederick A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne 408 (Yoram Dinstein ed. 1989) (“a police officer whose acts are not repudiated by his government always acts as an agent of the state”).

43 ILC, State Responsibility, supra n.33, art. 11. See Michael Akehurst, Jurisdiction in International Law, 46 B.Y.B.I.L. 145, 148 n.1 (1972-73) (“Seizure by a private individual [of an individual in another State’s territory] is not a breach of international law, but the State ratifies the act and assumes responsibility for it by keeping the individual in its custody”).

125
[domestic court] plainly constitutes governmental ratification and adoption of
the abductor’s criminal acts.”


c. **Action by the Host State or an International Tribunal**
The host State or an international criminal tribunal could deliver a fugitive to a
pursuing State: (i) proactively absent a pending extradition request; (ii)
intentionally for reasons independent of an existing extradition request, or (iii)
accidentally as a function of error, confusion, or misunderstanding in response
to a standing extradition request. The most salient legal question under this set
of scenarios is whether the erroneous return of a fugitive is recognized as
reversible under international law.

*The removing State may remove a fugitive under its immigration laws
unaware that the receiving State has a law enforcement interest in the
fugitive.* A pursuing State may have yet to announce its law enforcement
interest in the fugitive, issue a Provisional Arrest Warrant (PAW), or request that
INTERPOL post a Red Notice for his arrest. The pursuing State simply agrees to
receive the fugitive pursuant to the host State’s removal laws.

*A host State or international criminal tribunal may propose without any
prompting to return a fugitive, whether through extradition, deportation, or
other form of lateral transfer.* Even before a State has requested a fugitive’s
return, the host State or an international criminal tribunal could conveniently
propose to turn the person over to a pursuing State. This is most likely to occur
for foreign policy reasons or to offload a politically problematic individual.

For example, in May 1976, Costa Rica offered to extradite Orlando Bosch (Avila),
a terrorist and anti-Castro militant who was suspected of involvement in a
number of assassinations, bombings, and attacks, to the U.S. where he was

---

regarded as a fugitive for at least a parole violation dating to 1974. Similarly, in the early 1980s, the U.S. reached out to and invited Israel, despite its initial reluctance, to seek the extradition under its Nazis and Nazi Collaborators (Punishment) Act of John Demjanjuk, a Ukrainian-born U.S. citizen living in Ohio then-believed to be the infamous “Ivan the Terrible” from the Treblinka Concentration Camp responsible for the deaths of thousands of Jews in 1942-43, for “crimes of murdering Jews,” rather than deporting him to the U.S.S.R.

In May 1997, after a U.S. trial court had earlier approved the extradition to Israel of Mousa Mohammed Abu Marzook, a Specially Designated Global Terrorist, and then Israel dropped its extradition request, the U.S. reportedly inveigled upon Jordan to take him; as a result, he was deported there. Furthermore, in September 2005, pursuant to Rule 11 bis of the Rules of Procedure and Evidence (RPE), the ICTY referred the case of Radovan Stanković to Bosnia and Herzegovina (B&H) authorities for trial by its national courts, and accordingly handed over the accused without B&H having to request his transfer.

---


48 Olympia Bekou, Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence, 33 FORDHAM INT’L L.J. 723 (2009), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2196&context=ilj&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rl%3Den%26q%3DICTY%26tBPE%2BRule%2B11%2BBis%26ie%3DUTF-8%26oe%3DUTF-8%26source%3Dhp%26tab%3DI%26sa%3DP%26ved%01T%2Bc%26biw%3D992%26bih%3D69 (last visited on Jan. 11, 2012).
A host State may respond favorably to a standing extradition request but only due to exogenous pressures. The host State may choose to extradite a fugitive only on account of third-party pressure to change its domestic laws otherwise impeding extradition. For example, Croatia, which had just joined the European Union in July 2013, and strictly in connection thereof had “amended its laws in line with the bloc’s standards,” was now in a position to reverse its initial denial of extradition to Germany of Josip Perkovic, “a ranking Yugoslav secret service official in the 1980s” wanted for “allegedly masterminding the murder of a Yugoslav dissident there in 1983.”49

A host State official acting under color of law may return or order the return of a fugitive by error, confusion, or misunderstanding. A government official (or private individuals or entities with delegated governmental authority50) may be unaware of the limits of his (or their) authority with regard to extradition, may not have heard about a controlling domestic court decision denying extradition, or simply may be confused about underlying circumstances or applicable extradition procedures. For example, in 1866, the Governor-General of Canada issued a warrant to transfer Monsieur Lamirande to France to face a forgery charge, which was promptly executed, unaware that a Canadian court was still reviewing his habeas corpus petition (and which a day later was in fact granted).51

In November 1970, officers of a U.S. Coast Guard ship, on orders from headquarters, unaware of a valid claim to U.S. citizenship by Simonas Kudirka, a Lithuanian radio operator working aboard a Soviet trawler, who had dramatically jumped across a 10-foot gap between the two vessels while in U.S. territorial waters to seek asylum in the U.S., was mistakenly returned to the

49 AP, “Court Orders Extradition of Ex-Spy Chief to Germany,” INYT, Jan. 9, 2014, at 3.
50 In a domestic U.S. case in May 2005, four days before Violet Armour and her daughter Deborah Castillo were scheduled to appear in a Florida court to challenge their extradition to St. Thomas, one of the U.S. Virgin Islands, to face charges of embezzlement and forgery, the Corrections Corporation of America (CCA), a private company authorized to manage the county jail, mistakenly released the pair into the custody of Virgin Islands Justice Department officials before the Governor of Florida had signed the warrant for their inter-state extradition. Bruce Zagaris, Florida County Jail Surrenders to USVI Detained Persons Fighting Extradition Without Hearing, 21 IELR 270, 270-72 (2005).
Soviet trawler on a Soviet assertion that he had stolen the equivalent of $2,000 from the ship’s purse.\textsuperscript{52} Likewise, in July 1991, the government of Jamaica sought an emergency \textit{writ of habeas corpus} to release Richard Morrison, who had been indicted on narcotics trafficking charges in Florida, after he had been extradited to the U.S. due to a clerical error while his appeal to the U.K. Privy Council was still pending. The U.S. federal district court ruled that the U.S. did not need to return him to Jamaica as the U.S. had done nothing unlawful and there was no violation of Jamaican law with respect to the extradition proceedings.\textsuperscript{53}

In such instances, the pursuing State is under no customary international law obligation to rectify the situation by transferring the fugitive back to the host State,\textsuperscript{54} unless possibly fraud or deception was used to induce the mistaken transfer.\textsuperscript{55} This principle was articulated by the Permanent Court of Arbitration (PCA) in the classic 1911 \textit{Savarkar Case}. In that case, a British Indian named Vinayak Damodar Savarkar escaped custody from a steamship while docked in Marseilles, France, during a voyage to India where he was to face prosecution for abetting a murder. Although the British Indian police from the ship gave chase, it was a French policeman who captured and returned him into British custody. While France subsequently requested his return, the tribunal found no basis in international law for such restitution. The tribunal reasoned as follows:

\begin{quote}
there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a
\end{quote}


\textsuperscript{54} \textit{Bedd}, supra n.30, at 398.

\textsuperscript{55} See O’Higgins, supra n.16, at 311 (“Thus, supposing the mistake [of surrender of a fugitive] is induced by the fraud or deception on the part of the requesting State, it would seem that an obligation would arise to return the person whose custody was thus unlawfully obtained. On the other hand, if the mistake is as to the existence of an obligation to surrender where no fraud or deception is practised to induce the mistake, there would seem to be no such duty to return the person mistakenly surrendered.”).
mistake committed by the foreign agent who delivered him up to that Power.\textsuperscript{56}

* * * * *

This chapter has addressed scenarios in which the fugitive returns or is returned into pursuing State custody due to fortuitous circumstances. In the vast majority of cases, however, such scenarios do not play out. In the sections that follow this dissertation identifies and evaluates the various ways in which States actively seek to secure the custody of fugitives, beginning with extradition.

PART II:

EXTRADITION

AND ITS IMPEDIMENTS
CHAPTER 4

EXTRADITION

Part II of this dissertation, which comprises this and the following three chapters, focuses on extradition.¹ The extradition process between States represents not only the most legally conventional and preferred method of rendition, but also the most ancient² and popular³ law enforcement cooperation modality.⁴ This chapter seeks a baseline understanding of extradition, its aims, legal status and classification, and mechanics. Doing so will shed light on its role and functionality in meeting intended law enforcement cooperation goals. This chapter also will assess extradition’s capacity to adapt to today’s changing needs and challenges, and examine its overall effectiveness and trend lines. Chapters 5, 6, and 7 will then explore this particular modality’s limitations.

¹ See Chapter 1.d supra for a definition and explication of this term.
² Extradition, which ranks as the world’s oldest vehicle for international cooperation in penal matters, IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 1 (2d ed. 2000), traces its origins to the Jewish scriptures when, in approximately 1350 BCE, the Bejaminite tribe refused to extradite men who had gang-raped a Levite concubine, which led to war between Israel and the Benjamite tribe. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 4-5 (6th ed. 2014) [hereinafter BASSIOUNI, U.S. EXTRADITION]. The first recorded extradition treaty occurred almost as far back, to the time of the Biblical Moses, in the mid-13th century BCE, when an Egyptian Pharaoh (Rames II) and a Hittite Prince (Hattushilish III; spelling varies widely) entered into a peace treaty following a war over control of Syria that also represented perhaps history’s oldest diplomatic document. That treaty notably contained a provision for the reciprocal return of criminals, although in reality, political enemies. Id. at 5; Theo Vogler, Perspectives on Extradition and Terrorism, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 391 (M. Cherif Bassiouni ed. 1975); Geoff Gilbert, Extradition, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 247 (John P. Grant & J. Craig Barker eds. 2007) [hereinafter Gilbert, Extradition].
⁴ For a list of other law enforcement cooperation modalities, see n.57 in Chapter 1 supra.
a. **Aims**

Extradition is premised on the underlying principles of reciprocity,⁵ sovereign equality,⁶ and comity (courtesy and good will).⁷ Extradition is not an end in itself but rather an important means⁸ to such specific ends as the following:

- Preventing impunity by disallowing actual or alleged criminals to avoid prosecution or punishment merely by fleeing to or remaining in another State;⁹

---


⁶ See Melanie M. Laflin, *Note, Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options*, 26 J. LEGIS. 315, 316 (2000) (the practice of extradition developed as sovereign entities grew to respect the territorial integrity of other nations); Gallant, *supra* n.5, at 567 (equality is a hallmark of extradition); Patrick M. Haggan, *Note, Government Sponsored Extraterritorial Abductions in the New World Order: The Unclear Role of International Law in United States Courts and Foreign Policy*, 17 SUFFOLK TRANSNAT’L L. REV. 438, 441 n.15 (1994) (a principal reason States execute extradition treaties is to protect their sovereignty); *Kindler v Canada*, 84 DLR (4th) 438, 488 (1991) (States respect each other’s differences).


• Strengthening law enforcement and crime prevention both in the pursuing State\textsuperscript{10} and the host State;\textsuperscript{11}

• Serving the interests of international cooperation and stability by promoting the use of agreements to transfer custody, and in so doing diminishing political tensions and, albeit to a lesser extent than in the past, the likelihood of territorial invasion or war;\textsuperscript{12} and

• Safeguarding the rights and privileges of an accused by ensuring that his transfer is to a State that possesses a competent and fair court system and that his treatment as a defendant follows certain basic protections,\textsuperscript{13} although not all variants of extradition necessarily serve this purpose.\textsuperscript{14}

\textsuperscript{10} See Ilias Bantekas & Susan Nash, International Criminal Law 179 (2d ed. 2003) (extradition aims to strengthen domestic law enforcement); Kyle M. Medley, Note, The Widening of the Atlantic: Extradition Practices Between the United States and Europe, 68 Brook. L. Rev. 1213, 1217 (2002-03) (prospect of punishment can help deter crime). To the extent that an individual is extradited to a territorial State (i.e., where the crime was committed), which generally has a greater national interest in the case and where most evidence and witnesses tend to be located, prosecution tends to be more rigorous. Williams & Castel, supra n.9, at 340.


\textsuperscript{12} See Bantekas & Nash, supra n.10, at 179; Mark Brkljacic, Note, The Dangers of State Sponsored and Court Ratified Abduction, 5 J. Int’l L. & Prac. 117, 117 (1996); Henning, supra n.11, at 350 (extradition helps to avoid bilateral tensions); United States v. Álvarez-Machain, 504 U.S. 655, 672 n.4 (1992) (Stevens, J., dissenting op.) (“Extradition treaties prevent international conflict by providing agreed-upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty.”), on remand, 971 F.2d 310 (9th Cir. 1992), reprinted in 31 ILM 902 (1992).

\textsuperscript{13} See Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in CODIFICATION AND IMPLEMENTATION 257 (1997); Gilbert, International Crime, supra n.9, at 5 (extradition plays role in protecting fugitives’ rights); Brkljacic, supra n.12, at 17; Ethan A. Nadelmann, COPS Across Borders: The Internationalization of U.S. Criminal Law Enforcement 398 (1993) [hereinafter Nadelmann, COPS] (because extradition procedures tend to be written and detailed, they allow “for both judicial evaluation and executive oversight of all requests”); e.g., In re Extradition Act and Application for a Writ of Habeas Corpus Ad Subjiciendum Between Samuel Knowles and the Government of the United States of America and the Superintendent of Prisons for the Commonwealth of the Bahamas, Commonwealth of the Bahamas in the Supreme Court, 2004/CR/hcs/00001 (individuals are to be protected in circumstances where their extradition could result in injustice or oppression).

\textsuperscript{14} De facto extradition and SOFAs, discussed infra, are but two examples.
The aims of extradition have changed significantly over time, reflecting a shifting focus on the international community’s criminal and political priorities. Typically, from ancient times stretching through the Middle Ages and the Age of Enlightenment, decisions to extradite amounted to gestures of courtesy or personal friendship or were driven by alliance-building interests between sovereign rulers and involved predominantly political and religious refugees, rather than being based on formal treaties with an eye to cooperation toward the suppression of common or international criminals, as is the case today. At the front end of this historical era, for example, the Agreement between Ancient Rome and Syria provided for the enforced return of Hannibal, and toward the back end, in the 17th Century, the Restoration government of England entered into treaties with European states to secure the return of those alleged of committing regicide.

Even until about the first half of the 19th Century, extradition continued to serve as an instrument for retaliating against political enemies and religious violators who had fled abroad or for repatriating military deserters in the aftermath of war. While a few exceptions existed, it was not until the 1830s that concern

---

18 STANBROOK & STANBROOK, supra n.2, at 3.
19 *Id.* at 4 (citing the Anglo-Danish and Anglo-Dutch Treaties of 1661 and 1662, respectively).
20 See Labayle, supra n.17, at 185 (“Extradition was by its nature a political tool, not an instrument of criminal law, for its aim was to repress political crime. It was not until the eighteenth century that common law crime came to be affected by its use. At the same time, as a result of what one might call ‘political romanticism,’ there evolved the contrary tendency – to be indulgent towards so-called political crime; from the nineteenth century onwards, a person would no longer be handed over for such offenses”); Yvonne G. Grassie, Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?,* 64 Wash. U.L.Q. 1205, 1207 (1986) (“Until the nineteenth century, states used extradition almost exclusively against political
was expressed to address common criminals and that an extradition treaty first treated political crimes (délit politique) as an invalid basis for extradition. 22 (Even then, only a year later, “Austria, Prussia, and Russia engaged [one another] to deliver up persons guilty of high treason, armed rebellion or acts against the security of the throne or the government.”23)

By this time, as the political refugee population had grown as a function of liberation movements and those fleeing “despotic regimes in Central and Eastern Europe,”24 coupled with the rise of common criminals due to increased trade, industrial production, and a greater accumulation of wealth, States began to appreciate the importance of distinguishing between political and all other types of “criminals” subject to extradition requests.25 Domestic extradition statutes based on the modern approach in international cooperation toward crime suppression correspondingly came to be embraced in the legislation of Belgium, France, Switzerland, and Britain in 1833, 1834, 1834, and 1870, respectively.26

---

21 These notably included: (i) a 1303 extradition treaty between England’s Edward I and the King of France focused on the criminal process rather than on political opponents, JONES & DOOBAY, supra n.17, at 5; and (ii) the 1794 Treaty on Amity, Commerce and Navigation between the U.S. and England, Nov. 19, 1794, 8 Stat. 116 (1795), 12 U.S.T. 13, T.S. No. 105 (more commonly known as the Jay Treaty after U.S. Secretary of State John Jay) that recognized only murder and forgery as grounds for extradition, but provided no specific procedure for extradition. Barnett, supra n.16, at 298. Interestingly, when the first reported case arose under the Jay Treaty – the 1799 case of Jonathan Robbins accused by the British of murder during the mutiny of a British ship (Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840)) – he was arrested and imprisoned without a hearing and turned over to the British despite his claim that he was a U.S. citizen who had been impressed into service in the British navy. This case generated much controversy because of a lack of his procedural and substantive rights. As a result, the Jay Treaty was allowed to lapse in 1807 and, until 1842 with the execution of the so-called Webster-Ashburton Treaty with Britain (formally entitled, “Boundaries, Slave Trade, Extradition,” Aug. 9, 1842, 8 Stat. 572, T.S. No. 119, 12 T.I.A.S. 82, reprinted in CHARLES I. BEVANS, 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 88 (1975)) that encompassed seven specified offenses, the U.S. had no extradition treaties in effect with any country. Benjamin N. Bedrick, Note, United States Extradition Process: Changes in Law to Address Constitutional Infirmitry, 15 DICKINSON J. INT’L L. 385, 387-88 (1997); Grassie, supra n.20, at 1206 n.7 (1986); STANBROOK & STANBROOK, supra n.2, at 4; Ethan A. Nadelmann, The Evolution of United States Involvement in the International Rendition of Fugitive Criminals, 25 N.Y.U. J. INT’L L. & POL. 813, 821 (1993).

22 Epps, supra n.15, at 376 (the 1834 Belgian-French Treaty was the first treaty to recognize this concept); STANBROOK & STANBROOK, supra n.2, at 5; CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 82 (2001).

23 Vogler, supra n.2, at 392.

24 STANBROOK & STANBROOK, supra n.2, at 4.


26 Vogler, supra n.2, at 392; STANBROOK & STANBROOK, supra n.2, at 5; SIR ROBERT JENNINGS & SIR ARTHUR WATTS, eds., 1 OPPENHEIM’S INTERNATIONAL LAW 954 & n.5 (9th ed. 1992); PYLE, supra n.22, at

---

136
From the mid-20th Century to the present, extradition treaties and statutes have introduced human rights as an additional priority, paying greater heed to the individual freedom from arbitrary arrest, maltreatment, and abuse of process. The ever-changing purposes of extradition have been concisely summarized as follows:

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.

b. Status

Under either customary international law (CIL) or general principles of international law, there is no inherent obligation on the part of a host State to extradite a fugitive, even in instances involving serious war crimes or crimes against humanity. Indeed, some treaties explicitly indicate that States are not...
obligated to grant extradition requests. The corollary is that a pursuing State has no a priori right to have an individual of interest extradited into its custody. Along these lines, a fugitive’s State of nationality is under no general duty to request his extradition.

Rather, extradition is based on the sovereign prerogatives of the States concerned, generally but not necessarily expressed through treaties. Thus, a host State is under no international legal duty to extradite a fugitive absent some affirmative commitment entered into with the pursuing State, although in most cases it may still do so on a voluntary basis through, say, comity or

---


33 For example, when 69 South African nationals held in Harare, Zimbabwe, sought their government’s intervention by insisting that South Africa request their extradition home, rather than allowing them to be extradited to Equatorial Guinea, where the men had already been convicted of crimes and were awaiting sentence, the Pretoria High Court (in June 2004) and the Constitutional Court of South Africa (in August 2004) each ruled that South Africa could not be forced to request their return, although South Africa was obligated to try to shield them from a potential death penalty and unacceptable conditions of detention through diplomatic representations. Kaunda and Others v. The President of the Republic of South Africa, Case CCT 23/04, Judgment, Const. Ct. of So. Afr., Aug. 4, 2004 (Chaskalson, C.J.), available at http://www.saflii.org/za/cases/ZACC/2004/5.pdf (last visited on Jan. 3, 2014). Seeking extradition, however, can effectively impose a duty on a prosecutor’s office to the extent that domestic “speedy trial” requirements demand a good faith effort to try to secure the custody of a fugitive through extradition, at least where it might be plausibly granted. E.g., United States v. Pomerooy, 822 F.2d 718, 720-22 (8th Cir. 1987) (dismissing indictment on speedy trial grounds where the U.S. knew of defendant’s whereabouts in a Canadian prison for two years but failed to seek his extradition and thereby bring him to trial in the United States even though Canada could ultimately have denied such a request).

34 See 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 172 (1992) [hereinafter Blakesley, COMPARATIVE STUDY] (when a State decides to extradite an individual, it can be seen as either exercising its sovereignty or conceding some part of it). Some have argued, however, that with the March 1992 decision by the UNSC to exhort “with more than rhetorical condemnation” Libya to extradite two intelligence officers, “sovereign authority within the extradition system is no longer absolute.” Christopher C. Joyner & Wayne P. Rothman, Libya and the Aerial Incident at Lockerbie: What Lessons for International Law?, 14 Mich. J. Int’l L. 222, 250 (1993).

35 See Blakesley, COMPARATIVE STUDY, supra n.34, at 186 (extradition is a function and manifestation of national sovereignty; it is a State’s prerogative to undertake extradition by way of a treaty, domestic extradition law, or comity); Brkljacic, supra n.12, at 130 (extradition occurs pursuant to a bilateral or multilateral treaty or other international agreement or on the basis of reciprocity or comity between the States concerned); HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 107 & n.180 (2005); Bantekas & Nash, supra n.10, at 179; Phillips, supra n.17, at 338 (States are willing to cede some of their sovereignty by formulating extradition treaties because they realize there is more to be gained by giving up some power than by allowing criminals to go unpunished).

36 Of course, States may be obligated to extradite as a function of domestic legislation.
reciprocity (discussed infra). Customary international law imposes limitations on a host State decision to extradite, however, to the limited extent that fundamental human rights could be violated.

Extradition defies straightforward legal categorization. In one sense it falls within the field of international criminal law, as extradition is a cooperative law enforcement mechanism for States to bring individuals to justice and figures into a wide range of treaties to that end, but it nevertheless occupies a unique, if uncertain, place within the sphere of public international law. Extradition decisions “are a combination of national and international law,” heavily influenced by any applicable treaties and by the status of diplomatic relations between the concerned States, but ultimately determined by the host State’s

---

37 The existence of an extradition treaty, while binding the States parties to transfer custody of fugitives “under certain circumstances,” “does not purport to limit the discretion of the two sovereigns to [extradite] fugitives for reasons of comity, prudence, or even as a whim.” United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), cert. denied, 479 U.S. 1009 (1986). That said, some States, notably including the U.S., have domestic laws that prohibit extradition absent a treaty obligation. See Paul Michell, English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain, 29 CORNELL INT’L L.J. 383, 389 n.18 (1996).

38 See 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, 173 (2002) (“customary international law contains no limitations on a State’s freedom to extradite, except for fundamental human rights” (quoting Ninth U.N. Congress Report (1995)); Kennedy, supra n.31, at 12 & n.35 (there is no obstacle to extradition under international law absent such a treaty except perhaps for some guarantees contained in international human rights law instruments); Duffy, supra n.35, at 107 (where a real risk exists that a fugitive would be subject to certain serious rights violations in the State requesting extradition, international human rights law imposes an obligation on States not to extradite (non-refoulement principle)). This restriction is discussed more extensively in Chapter 7.d infra.

39 See BANTEKAS & NASH, supra n.10, at 179 (classifying extradition law as a branch of international criminal law).

40 See Haas, supra n.9, at 193 (extradition is commonly treated as its own particular legal field).

41 Tsebe and Another v. Minister of Home Affairs and Others, (27682/10, 51010/10) [2011] ZAGPJHC 115 (Sept. 22, 2011), S. Africa: South Gauteng High Court, Johannesburg, ¶ 112, available at http://www.saflii.org/za/cases/ZAGPJHC/2011/115.html (last visited on Feb. 5, 2012). See also Daya Singh Lahoria v. Union of India and Others, India Sup. Ct., Apr. 17, 2001, (2001) 4 SCC 516, 125 ILR 530, 534-35 (E. Lauterpacht, et al., eds. 2004) (“The law of extradition, therefore, is a dual law. It is ostensibly a municipal law; yet it is part of international law also, inasmuch as it governs the relations between two sovereign States over the question of whether or not a given person should be handed over by one sovereign State to another sovereign State.”); Joanna Harrington, The Role for Human Rights Obligations in Canadian Extradition Law, 43 CAN. Y.B. INT’L L. 45, 45 (2005) (“While governed primarily within Canada by the terms of the Extradition Act and the Canadian Charter of Rights and Freedoms, extradition is also a matter of treaty law and of international law more generally, given that the act of surrendering an individual from one state to another is ultimately the sovereign act of a willing state.”); Haas, supra n.9, at 193.
domestic law and its political objectives.\textsuperscript{42} The Constitutional Court of the Republic of South Africa (RSA) elucidated this interplay between international and domestic law as follows:

An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many States have extradition laws that provide domestic procedures to be followed before there is approval to extradite.\textsuperscript{43}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{42} "Treaties may provide for the rendition of criminal fugitives between states, but it is for municipal law to determine whether the fugitive is to be surrendered in accordance with the extradition treaty." John Dugard & Christine van den Wyngaert, \textit{Reconciling Extradition with Human Rights}, 92 AJIL 187, 188 (1998). \textit{See also} Thomas E. Carboneau, \textit{The Provisional Arrest & Subsequent Release of Abou Daoud by French Authorities}, 17 VA. J. INT’L L. 495, 496 (1977) (extradition is ultimately a political decision to be made by the government of the requested state); Note, \textit{The Abu Daoud Affair}, 11 J. INT’L L. & ECON. 539, 559 (1977) (summarizing findings of a “conceptual framework” analysis conducted by Professor M. Cherif Bassiouni in 1969 in which of the key factors driving extradition decisions “national interest” was the most important); David Freestone, \textit{International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction, in Terrorism and International Law 45-46} (Rosalyn Higgins & Maurice Flory eds. 1997) (once a request is made by the authorities of one State to another, extradition becomes a matter of domestic law of the requested State).

  It is not uncommon that a State confronts the question whether domestic or international law prevails when the two are in direct conflict in the extradition context. Some States favor domestic law. Along these lines, the Israeli Supreme Court held that Samuel Sheinbein, a U.S. national who had committed murder and fled to Israel and claimed Israeli citizenship from birth through his father, should not be extradited to the U.S. to face prosecution, as Israel needed to honor its domestic law denying nationals from extradition even in the face a 1962 Extradition treaty with the U.S. and a long history of cooperation between the two countries. Jesse Haliel, \textit{The Sheinbein Legacy: Israel’s Refusal to Grant Extradition as a Model of Complexity}, 15 AM, U. INT’L L. REV. 667, 673-76 (2000). \textit{Contra} Ivan A. Shearer, \textit{Extradition in International Law} 115 (1971) ("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.")

  \textsuperscript{43} \textit{Harksen v. President of the Republic of South Africa and Others}, Const’l Ct. of South Africa, Mar. 30, 2000, ¶ 4, 2000 (2) SA 825, reprinted in 132 ILR 529, 557 (E. Lauterbach, \textit{et al.}, eds. 2008). One could draw an analogy between extradition and diplomatic immunities based on the way they operate between, and are jointly governed by, international and domestic legal authorities.
\end{itemize}
\end{footnotesize}
In addition, although extraditions have certain attributes of a criminal proceeding – e.g., the accused has been indicted and arrested, may be held in pretrial confinement or let out on bail, prosecutors are involved, and the liberty of the accused is at stake\textsuperscript{44} – extradition is not a criminal proceeding per se.\textsuperscript{45} Indeed, at extradition hearings in the United States, neither the U.S. Federal Rules of Evidence (FRE)\textsuperscript{46} nor the Federal Rules of Criminal Procedure (FRCrP)\textsuperscript{47} apply, and many of the protections associated with criminal proceedings (e.g., application of the hearsay rule and the opportunity to present affirmative defenses) are not followed.\textsuperscript{48}

c. Vehicles

Let us now consider the full range of extradition or extradition-like vehicles, some of which do not necessarily follow standard extradition procedures but nevertheless fall within the broad definition of “extradition” set forth in Chapter 1 supra,\textsuperscript{49} beginning with the most formal types and loosely progressing toward the least formal.\textsuperscript{50}


\textsuperscript{45} \textit{United States ex rel. Oppenheim v. Hecht}, 16 F.2d 955, 956 (2d Cir.) (“Extradition proceedings are not in their nature criminal, even if the relator is a criminal”), \textit{cert. denied}, 273 U.S. 769 (1927); \textit{United States v. Fernandez-Morris}, 99 F. Supp.2d 1358, 1366 (S.D. Fla. 1999); Dinstein, supra n.30, at 47 (“Extradition proceedings in the requested State have ‘decidedly criminal consequences,’ although they are not criminal proceedings in the technical sense. Such proceedings must not be confused with a trial culminating with a verdict as to whether the alleged offender is guilty or not guilty. The sole issue is whether or not the alleged offender should be surrendered to the requesting State for trial and/or punishment there.”). \textit{But see Blakesley, Comparative Study, supra} n.34, at 193 (an extradition hearing is a criminal proceeding as the accused will be incarcerated immediately, and if found extraditable will be sent to trial in requesting state).


\textsuperscript{47} \textit{FED. R. CRIM. P. 54(b)(5)}; \textit{e.g., Romeo v Roache}, 820 F.2d 540 (1st Cir. 1987) (per curiam).

\textsuperscript{48} \textit{See Quinn v. Robinson}, 783 F.2d 776 (9th Cir. 1984), \textit{cert. denied}, 479 U.S. 882 (1986) (admitting hearsay); Kester, supra n.44, at 1443-45; \textit{Blakesley, Comparative Study, supra} n.34, at 282 (alibi claims and defenses are irrelevant in an extradition hearing); \textit{e.g., Hooker v. Klein}, 573 F.2d 1360 (9th Cir. 1978) (insanity defense impermissible); \textit{Eain v. Wilkes}, 641 F.2d 504, 511 (7th Cir.) (“An accused in an extradition hearing has no right to contradict the demanding country’s proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that facts.”), \textit{cert. denied}, 454 U.S. 894 (1981).

\textsuperscript{49} To the extent certain of these vehicles are not technically forms of extradition, they nevertheless constitute arrangements that more closely satisfy the indicia of extradition than any of its alternatives.

\textsuperscript{50} A common misconception is that treaties provide the exclusive means by which an extradition can be authorized and effected. As this section will reveal, extraditions can be lawfully carried
The first and most common vehicle is the *bilateral extradition treaty*\(^51\) in which two States\(^52\) negotiate mutually agreeable and generally reciprocal terms governing the extradition of fugitives between them.\(^53\) Many States have entered into scores of bilateral extradition treaties, such as the United States (113 as of January 2012),\(^54\) while others have demonstrated less inclination, or have had less success, in doing so, such as China,\(^55\) Philippines,\(^56\) South Africa,\(^57\) and Thailand.\(^58\)

---


\(^{52}\) Exceptionally, in October 2009, the U.S. and a group of States – here, the European Union (EU) – ratified an extradition agreement that had been signed in June 2003, and thereby took a step toward modernizing the underlying bilateral extradition treaties the U.S. had with each of the EU’s 27 member States. *Digest of United States Practice in International Law* 2009, at 45-49 (Elizabeth R. Wilcox ed. 2009). Significantly, however, that treaty does not contemplate or allow extraditions between the U.S. and the EU per se. See n.55 in Chapter 1 *supra*.

\(^{53}\) *E.g.*, Extradition Agreement between South Africa and the Federation of Rhodesia and Nyasaland, Nov. 19, 1962, No. 6592, 458 U.N.T.S. 60 (1963). Bilateral extradition treaties can be supplemented by memoranda of understanding (MOUs) or protocols to build on the originally agreed provisions. For example, the U.S.-Australia Extradition Treaty added a 1990 Protocol obligating the U.S. to extradite for offenses that meet its criminality requirements and are punishable by imprisonment of more than 1 year in prison. Protocol Amending the Extradition Treaty, U.S.-Austl. of May 14, 1974, Sept. 4, 1990, 1992 A.T.S. No. 43 (1995). Notably, bilateral treaties do not have to take effect simultaneously; the timing depends on when the treaty is ratified and comes into effect in each State. Bassiouni, U.S. Extradition, *supra* n.2, at 95.

\(^{54}\) 18 U.S.C. § 3181 note (2012) (listing all U.S. extradition agreements current through January 3, 2012), comprising approximately 60 percent of the world’s States. This percentage figure is based on the 193 Member States of the United Nations. The number of estimated bilateral treaties worldwide is over 1,000, Bassiouni, *Introduction*, *supra* n.8, at 351 n.73, so the number of U.S. bilateral extradition treaties represents about 10 percent of all those worldwide. (No other State has so many. Kester, *supra* n.44, at 1489.) Notably absent from the list of U.S. bilateral extradition treaties include such major States as China, Russia, Indonesia, and Saudi Arabia.

\(^{55}\) By mid-2007, China had signed extradition treaties with 29 countries, mostly in the developing world, but also with Portugal, Spain, and France. David Lague, “China Urges Western Nations to Enter Extradition Treaties,” *N.Y. Times*, May 29, 2007, at A3. One major impediment has been fears in developed States about China’s death penalty and whether its judicial system would dispense fair rulings. *Id.*
While States are obligated to perform in good faith under any treaty to which they have ratified or acceded (per the principle of *pacta sunt servanta*), a host State may always choose at its prerogative to unilaterally waive a treaty right or entitlement to which it is due (at least none which would violate an international human rights law standard) and extradite a fugitive. In addition, international law, in principle, does not bar host and pursuing States from jointly agreeing to work outside the extradition treaty, or otherwise not in precise conformity with its terms, to effect the physical transfer of a fugitive, so long as they do not incidentally compromise any independent treaty right accorded a third State or a protected human right owed to the fugitive. 

Another advantage of the bilateral treaty approach is that States can tailor the terms and provisions to accord with their specific political relations, national interests, and criminal legal systems.

At the same time, however, bilateral treaties can experience a number of drawbacks, notably including the heavy investment of resources required to

---


57 See Harksen, 132 ILR at 557, ¶ 3 (“South Africa has been party to very few extradition treaties. Its withdrawal from the Commonwealth in 1961 resulted in the lapse of many of its extradition treaties with other Commonwealth States. In subsequent years, foreign States were reluctant to enter into any new extradition treaties with South Africa, largely because of its policy of apartheid. While this is no longer the case, South Africa, post-1994, has entered into few extradition treaties”). See also infra n.271.


59 Vienna Conv. on the Law of Treaties (VCLT), May 23, 1969, art. 26, 1155 U.N.T.S. 332, *reprinted in* 8 ILM 679. This principle has acquired customary international law (CIL) status and therefore applies equally to non-parties to the VCLT. Phillips, *supra* n.17, at 339.


62 Gilbert, *Extradition, supra* n.2, at 248-49; **BASSIOUNI, INTRODUCTION, supra** n.8, at 351-52; **NADELMANN, COPS, supra** n.13, at 410.
execute them,\textsuperscript{63} the fact that they bind only two States at a time,\textsuperscript{64} their lack of uniformity,\textsuperscript{65} the need to keep them periodically updated in line with new circumstances or contemporary legal standards,\textsuperscript{66} and complications that may affect their status that arise out of such political developments as severed diplomatic relations\textsuperscript{67} and State succession.\textsuperscript{68} Furthermore, it is not always clear whether a bilateral treaty would necessarily trump conflicting domestic law.\textsuperscript{69}

A second type of vehicle is the \textit{multilateral extradition treaty}.\textsuperscript{70} While no globally applicable extradition treaty yet exists,\textsuperscript{71} the United Nations has drafted

\begin{itemize}
\item \textsuperscript{63} BASSIOUNI, INTRODUCTION, supra n.8, at 351-52 (describing bilateral treaty practice as "lengthy, cumbersome and costly").
\item \textsuperscript{64} See Case Concerning Certain German Interests in Upper Polish Silesia (Merits) (Ger. v. Pol.), 1926 P.C.I.J. (ser. A). No. 7, ¶ 82 (May 25, 1925), available at http://www.worldcourts.com/pcil/eng/decisions/1926.05.25.silesia.htm (last visited on Jan. 20, 2014) ("A treaty only creates law as between the States which are parties to it").
\item \textsuperscript{65} YARNOLD, supra n.51, at 13-14.
\item \textsuperscript{66} Gilbert, Extradition, supra n.2, at 248-49.
\item \textsuperscript{67} E.g., Argento v. Horn, 241 F.2d 258 (6th Cir. 1957), cert. denied, 355 U.S. 818; reh'g denied, 355 U.S. 885 (1957).
\item \textsuperscript{68} E.g., Extradition (Jurisdiction) Case, Sup. Ct. of the Reich (in Criminal Matters), Germany, Aug. 13, 1936, reprinted in [1935-37] 8 ANN. DIG. & REP. PUB. INT’L L. CASES 348, 349 (No. 165) (H. Lauterpacht ed. 1941) ("The extradition treaties concluded between France and the German States are extinguished in consequence of the law of January 30, 1934, regulating the reorganisation of the German Empire, by virtue of which Germany has become a Unitarian State, while the German States have ceased to exist in their capacity as subjects of international law. There is no agreement between Germany and France to the effect that these treaties shall remain in force."). That said, in most instances, newly independent States inherit their extradition laws from their predecessors. See, e.g., Sabatier v. Dabrowski, 586 F.2d 866 (1st Cir. 1978) (Canada succeeding to 1842 U.S.-U.K. treaty); Bruce Zagaris, Dutch Tycoon Waives Extradition from Bermuda to Netherlands on Carousel Fraud, 22 IELR 470 (2006) (when the Netherlands sought the extradition of Dutch oil executive and banker John Deuss, his counsel argued there was no Netherlands-Bermuda extradition treaty, but the Bermuda Supreme Court held there was one).
\item \textsuperscript{69} Although as a general rule of international law, reliance on domestic law is not a legitimate defense to a breach of binding international obligation, SHEARER, supra n.42, at 195, some States treat their constitutions as superior to treaty law, MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 3-3 (2001 & Supp. 2007) (discussing U.S. law) and domestic law is sometimes accorded a priority over a treaty commitment. See, e.g., Geisser v. United States, 554 F.2d 698 (5th Cir. 1977), reprinted in 61 ILR 443 (1981); Royal Gov’t of Greece v. Governor of Brixton Prison, ex parte Kotronis, [1971] A.C. 250 (U.K.) (U.K. did not allow the extradition of Kotronis, based on statutory law, despite the wording of a treaty that required his extradition). See also n.66 in the Introduction and supra n.42 in this chapter.
\item \textsuperscript{70} As with the case of bilateral treaties, States can work out supplemental or clarifying provisions or protocols under a multilateral convention to govern the operation of extraditions between them, including between two States. For example, in November 2006, the U.K. and Russia executed an MOU to facilitate their extradition arrangements under the 1957 European Extradition Convention to which both were parties. The impetus for this MOU was to address Russia’s frustration with British court denials of Russian requests for high-profile nationals such as Boris Berezovsky (former oligarch) and Ahmed Zakayev (Chechen leader). In particular, the MOU enabled prosecutors to cooperate directly with each other with respect to extradition requests to ensure they are correctly prepared and include supporting evidence. Bruce Zagaris, \textit{Russia and U.K. Sign Agreement to Facilitate Extradition}, 23 IELR 17 (2007). See also Neil Buckley
\end{itemize}
a Model Treaty on Extradition that serves as a useful framework for the crafting of multilateral and bilateral extradition treaties alike. There are, however, a number of regionally- or sub-regionally-based extradition treaties or protocols in effect today, including (in chronological order below):

(i) the Arab League Extradition Agreement (1952);74

(ii) the European Convention on Extradition (1957);75

(iii) the Convention on Judicial Cooperation Among Certain African States (1961);76

---

71 The U.N. has yet to produce a multilateral convention on extradition. STANBROOK & STANBROOK, supra n.2, at 18. See also Gilbert, Extradition, supra n.2, at 249 (noting that the U.N. Model Treaty is the closest the international community has come to establishing a universal extradition treaty).


73 See BANTEKAS & NASH, supra n.10, at 192-93 (observing its similarity to the 1957 European Convention on Extradition); Roger S. Clark, United Nations Model Treaties on Cooperation in the Criminal Process, 18 COMMW. L. BULL. 1544, 1544 (1992) (describing the Model Treaty as “a kind of international formbook”); id. at 1545 (noting that the Model Treaty “captures the state of the art in drafting extradition treaties and is based largely on Australia’s recent extensive negotiating experience in this field”).

74 Arab League Extradition Agreement (1952), League of Arab States, Collection of Treaties and Agreements, No. 95 (1978). Notably, despite six signatory parties, only three States ever ratified the Agreement (Egypt, Jordan, and Saudi Arabia) and since August 1954 they remain to date the only ones bound by this agreement. BASSIOUNI, U.S. EXTRADITION, supra n.2, at 37.

75 Eur. Conv. on Extradition, Dec. 13, 1957, E.T.S. No. 24. The Convention, which has four additional protocols to date, was executed through the Council of Europe (CoE), and all of its 47 members are parties to the Convention. Gilbert, Extradition, supra n.2, at 250-51. The Convention represents the largest collection of States subscribing to a single extradition treaty and has yielded more extraditions than any other treaty of its kind. STANBROOK & STANBROOK, supra n.2, at 18; Thomas F. Muther, Jr., The Extradition of International Criminals: A Changing Perspective, 24 DENV. J. INT’L L. & POL’Y 221, 223 (1995). Non-CoE member States may accede to the Convention, few reservations have been introduced, and the Convention has provided model language for other bilateral extradition agreements. BASSIOUNI, U.S. EXTRADITION, supra n.2, at 23-24. Despite its remarkable success, this Convention has been largely superseded by the Council Framework Decision of June 2002 adopted by the Council of the European Union (EU) and the related European Arrest Warrant (EAW) (discussed infra), but as to States, like Switzerland, that have not signed on to the Council Framework Decision, their obligations under the European Convention remain in effect. Note, Swiss Delegation to Council of the European Union, “Article 95 of the Schengen Convention, European Arrest Warrant (EAW),” Apr. 20, 2009, available at http://www.libertysecurity.org/article2457.html (last visited on Nov. 9, 2013).

(iv) the Nordic Cooperation Agreement (1962), comprising Norway, Sweden, Finland, Iceland, and Denmark, and addressing extradition;\(^77\)

(v) the Benelux Extradition Convention (1962) consisting of Belgium, the Netherlands, and Luxembourg;\(^78\)

(vi) the Inter-American Convention on Extradition (1981);\(^79\)

(vii) the Extradition Treaty among the African States of Benin, Ghana, Nigeria, and Togo (1984);\(^80\)

(viii) the ECOWAS Convention on Extradition (1994);\(^81\) and

(ix) the Southern African Development Community (SADC) Protocol on Extradition (2002).\(^82\)

\(^77\) Agreement Concerning Co-operation (Fin.-Den.-Ice.-Nor.-Swe.), Mar. 23, 1962, 434 U.N.T.S. 145 (1962) ("Nordic Extradition Treaty"). This treaty is not self-executing but rather requires each State party to enact implementing legislation, and in 2005 the member States built upon this platform by establishing a Nordic Arrest Warrant modeled on the European Arrest Warrant. BASSOONI, U.S. EXTRADITION, supra n.2, at 40.


Multilateral treaties, which can stand alone, or replace or supplement existing bilateral treaties, have the benefits of encompassing a large number of States, resource efficiency, and consistency across State practice through harmonization across otherwise disparate bilateral arrangements and national laws. Their primary disadvantage lies in the fact that, to accommodate the interests of a number of diverse States, the terms of such treaties tend to be more generalized with greater dilution or more limited application. In addition, some States find their own legal systems are not compatible with a multilateral approach, and as is the case with their bilateral counterparts, it remains unclear whether multilateral extradition treaties or domestic law would trump in the event of a conflict. Multilateral conventions generally indicate in the text whether they defer to or trump conflicting provisions found in bilateral treaties.

A third vehicle available to States is to enter into bilateral or multilateral non-extradition treaties that nevertheless contain provisions expressly intended to authorize extradition on a surrogate basis where: (i) an extradition treaty does not otherwise exist between two States, and (ii) such a treaty is required by

visited on Feb. 5, 2012) (comprising 14 member States). It is noteworthy that nearly half (four) of the world’s (nine) regional or sub-regional multilateral extradition treaties concern Africa.

83 BASSIOUNI, U.S. EXTRADITION, supra n.2, at 22.
84 NADELLENN, COPS, supra n.13, at 410 (such treaties tend to settle on the lowest common denominator of cooperation).
85 The U.S., for instance, has largely steered clear of multilateral extradition agreements for additional reasons, including “the relative complexity of the U.S. legal system, with its common law traditions, federal distribution of jurisdiction, and highly intricate rules of evidence, none of which has been particularly well suited to multilateral extradition arrangements with the majority of foreign states in which civil law traditions dominate.” Id.
86 See supra n.69.
87 WHITEMAN, supra n.51, at 770. See, e.g., Eur. Conv. on Extradition, supra n.75, art. 28 (superseding existing bilateral treaties but permits future ones to supplement its provisions); Conv. for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, Mar. 10, 1988, art. 11(7), IMO Doc. SuA/Con/15/Rev.1, 27 ILM 668, 680 (“With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.”); Eur. Conv. on the Suppression of Terrorism, CoE, Jan. 27, 1977, art. 3, E.T.S. No. 90 (“The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention.”); Montevideo Conv. on Extradition, Dec. 26, 1933, reprinted in 28 AJIL 65, 69 (1934) (“The present convention does not abrogate or modify the bilateral or collective treaties” then in force, but “if any of the said treaties lapse, the present convention will take effect and become applicable immediately among the respective states” to the extent they have ratified the convention).
the host State to carry out an extradition. Examples include the Convention for the
Convention to Prevent and Punish Torture (1985);\footnote{Inter-Am. Conv. to Prevent and Punish Torture, Dec. 9, 1985, art. 13, OAS T.S. No. 67.} the Convention for the
Convention for the Suppression of Terrorism (2003).\footnote{Protocol Amending the Eur. Conv. for the Suppression of Terrorism (2003), May 15, 2003, art. 3(2), E.T.S. No. 190 (not yet in force).} These multilateral treaties, while providing a basis for extradition to proceed, including in instances

\footnotesize{\begin{itemize}
  \item Inter-Am. Conv. to Prevent and Punish Torture, Dec. 9, 1985, art. 13, OAS T.S. No. 67.
  \item Inter-Am. Conv. against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 14, 1997, art. XIX(3), O.A.S. Doc. A-63, available at http://www.oas.org/juridico/english/treaties/a-63.html (last visited on July 16, 2013) (“If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.”).
  \item Protocol Amending the Eur. Conv. for the Suppression of Terrorism (2003), May 15, 2003, art. 3(2), E.T.S. No. 190 (not yet in force).
\end{itemize}}

148
that might otherwise be barred on account of an outdated or scope-circumscribed bilateral extradition treaty,\textsuperscript{97} are often limited in their applicability and may contain lacunae.\textsuperscript{98}

Fourth, there are \textit{bilateral or multilateral non-extradition treaties or agreements that stipulate to extradition-like or custodial transfer arrangements between them}.\textsuperscript{99} These instruments may include wartime or post-conflict treaties, general law enforcement cooperation agreements, and other specialized conventions. Historic examples include: the U.S.-Japan Security Treaty (1951);\textsuperscript{100} the Havana Convention Relating to Consular Agents (1928);\textsuperscript{101} the Treaty of Versailles (1919) at the end of World War I;\textsuperscript{102} and the Treaty of

\textsuperscript{97} For example, in November 2011, Guatemala authorized the extradition to the U.S. of former Guatemalan President Alfonso Portillo (2000-04) on money laundering charges, but needed to rely on UNCAC rather than the Guatemala-U.S. Extradition Treaty, which dated back to 1903 and contained only a limited number of extraditable offenses, despite a 1940 supplement treaty that added narcotics offenses. Ignacio Martinez-Arrieta & Bruce Zagaris, \textit{Guatemalan President Authorizes Extradition of Former President to the U.S. on Money Laundering Charges}, 28 IELR 16, 16-18 (2012).

\textsuperscript{98} See Antonio Cassese, \textit{The International Community’s ‘Legal’ Response to Terrorism}, 38 INT’L & COMP. L.Q. 589, 593-95 (1989) (observing that few multilateral treaties disqualify terrorist-type acts from treatment as political offenses and thereby can be exempted from extradition); Kolb, \textit{supra} n.8, at 246-49; \textit{e.g.}, UNCAC, \textit{supra} n.95, art. 44(2) (obligating each signatory State to extradite a requested defendant but only with respect to transnational corruption offenses, and therefore not implicating simple domestic corruption crimes).

\textsuperscript{99} Excluded from this series are any custodial transfer arrangements that do not deal with persons who are sought for prosecution or punishment purposes, such as prisoners of war (POWs). See, \textit{e.g.}, Geneva Conv. Relative to the Treatment of Prisoners of War (GC III), Aug. 12, 1949, art. 12, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transatee Power to apply the Convention.”).


\textsuperscript{101} Havana Conv. Relating to Consular Agents, Feb. 20, 1928, art. 19, 155 L.N.T.S. 291, \textit{available at http://gberridge.diplomacy.edu/havana-conventions/} (last visited on Oct. 30, 2013) (obligates consuls “to deliver, upon the simple request of the local authorities” fugitives who have sought asylum in their consulates).

\textsuperscript{102} Treaty of Peace Between the Allied and Associated Powers and Germany [Treaty of Versailles], June 28, 1919, art. 228, T.S. No. 4, \textit{reprinted in} 11 MARTENS NOUVEAU RECUEIL (ser. 3d) 323, \textit{available at http://history.sandiego.edu/gen/text/versailles treaty/vercontents.html} (last visited on Feb. 2, 2013) (“The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.”).
Amiens (1802) among France, Spain, Holland, and Great Britain. Modern examples include the CARICOM Arrest Warrant Treaty (2008) and the "New Nikerie" ("Nieuw Nickerie") cooperation agreement concluded in May 2008 between neighboring States, Guyana and Suriname, intended to combat cross-border crime and address other law enforcement issues of common concern, including the apprehension of fugitives from justice, despite the absence of a bilateral extradition treaty.

Such instruments also include Status of Forces Agreements (SOFAs) and Visiting Forces Agreement (VFAs). Significantly, these instruments are not viewed as following, and do not in fact follow, standard extradition procedures, yet still

---

103 Definitive Treaty of Peace between the French Republic, his Majesty the King of Spain and the Indies, and the Batavian Republic (on the one Part); and his Majesty, the King of the United Kingdom of Great Britain and Ireland (on the other Part) [Treaty of Amiens], Mar. 25, 1802, available at http://www.napoleon-series.org/research/government/diplomatic/c_amiens.html (last visited on Feb. 2, 2013) ("It is agreed that the contracting parties, upon requisitions made by them respectively, or by their ministers, or officers duly authorized for that purpose, shall be bound to deliver up to justice persons accused of murder, forgery, or fraudulent bankruptcy, committed within the jurisdiction of the requiring party, provided that this shall only be done in cases in which the evidence of the crime shall be such, that the laws of the place in which the accused persons shall be discovered, would have authorized the detaining and bringing him to trial, had the offence been committed there.").


106 E.g., Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of U.S. Armed Forces in Japan, Jan. 19, 1960, art. XVII(5), available at http://www.niraikanai.wwma.net/pages/archive/sofa.html (last visited on Sept. 28, 2013) ("(a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."). In addition, the U.S.-Republic of China (Taiwan) executive agreement authorizes the extradition of military persons between them. See Starks v. Seamans, 334 F. Supp. 1255 (E.D. Wis. 1971).

107 Two of the major differences between SOFAs and extradition treaties are that the former neither entails a judicial determination before transfer or the possibility of a refusal by the executive based on discretionary grounds. M. Chérif Bassiouni, 2 INTERNATIONAL CRIMINAL LAW:
yield the return of a fugitive. Under a modern-day SOFA or VFA, it is generally incumbent upon a foreign military force (whether that of an individual State or a military alliance like the North Atlantic Treaty Organization (NATO)) to return one of its members indicted for an offense committed within host State territory to host State custody to face criminal prosecution.\textsuperscript{108} Even in instances where the individual serviceman finds his way back to his home country during criminal proceedings, upon host State request, the foreign military force is obligated to transfer him back to host State custody.\textsuperscript{109}

For example, in October 2011, the U.S. handed over a soldier from its Second Infantry Division stationed in the Republic of Korea (RoK) to South Korean authorities on charges of breaking into a woman’s motel room, raping her, and stealing her money; he was later sentenced to 10 years in prison.\textsuperscript{110} Likewise, in the 1972 U.S. landmark case of \textit{Holmes v. Laird},\textsuperscript{111} two U.S. Army servicemen

\textbf{MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS} 297-98 (3d ed. 2008) [hereinafter BASSIOUNI, ENFORCEMENT MECHANISMS].

\textsuperscript{108} North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), June 19, 1951, art. VII, 199 U.N.T.S. 67, 4 U.S.T. 1792, T.I.A.S. 2846 (authorities of 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 with jurisdiction). That said, during the pendency of the proceedings, a SOFA or VFA may allow the individual to remain in the custody of the foreign military force. \textit{See, e.g.}, Bruce Zagaris, \textit{U.S. Refuses Philippine Request for Marines Accused of Rape}, 22 IELR 94 (2006) (discussing case in the Philippines in which four U.S. Marines were charged in the rape of a 22-year-old Filipina but remained in U.S. custody in the course of the proceedings pursuant to the applicable VFA). Earlier SOFAs dating back to the 1940s or 1950s sometimes provided more expansive rights to the foreign military force. \textit{See, e.g.}, Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea [U.S.-ROK SOFA], July 9, 1966, T.I.A.S. 6127, available at \url{http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement_1966-67.pdf?AspxAutoDetectCookieSupport=1} (last visited on Nov. 24, 2013) (South Korea unilaterally waived criminal jurisdiction in certain limited cases); \textit{Smallwood v. Clifford}, 286 F. Supp. 97, 100 (D.D.C. 1968) (discussing change in jurisdiction of the U.S.-ROK SOFA).

\textsuperscript{109} Where a U.S. serviceman, being held in U.S. custody pending criminal proceedings by host country, is mistakenly transferred to the U.S. or returns to the U.S. without authorization and resists U.S. attempts to return him to the host country pursuant to SOFA obligations, courts consistently have held that the serviceman is to be returned, but not necessarily under formal extradition procedures. \textit{Abbett}, supra n.69, at 3-133 to 3-134; \textit{e.g.}, \textit{Williams v Rogers}, 449 F.2d 513 (8th Cir. 1971) (USAF Staff Sergeant Bernard Williams stationed at Clark AFB in the Philippines was inadvertently transferred to AFB in North Dakota in November 1969 during the pendency of a trial for the forcible abduction of a Filipino woman; the court ruled that he must be returned to the custody of the Philippines pursuant to the Military Bases in the Philippines Agreement, as amended), \textit{cert. denied}, 405 U.S. 926 (1972).


unsuccessfully contended that they should not be turned over to West German authorities, pursuant to the NATO SOFA, to face punishment based on convictions for attempted rape while stationed in West Germany, on the grounds that the trial procedures followed were unfair.\textsuperscript{112}

Fifth, States at times have resorted to \textit{case-specific treaty-based arrangements to authorize an extradition or other form of custodial transfer}.\textsuperscript{113} For example, in 2006, to compensate for the absence of a bilateral extradition treaty, the U.K. and Rwanda signed a time-sensitive MOU to authorize the transfer of four men accused of murdering and otherwise aiding and abetting the murder of Tutsis in Rwanda in 1994, who were the subject of an extradition request by the Rwandan government to the U.K.\textsuperscript{114} Similarly, in September 1998, the U.K. and the Netherlands executed a specialized, \textit{ad hoc} bilateral treaty that in effect authorized the physical transfer of two Libyan defendants to a Scottish court on Dutch territory that the Dutch government agreed could be used for the singular purpose of the \textit{Lockerbie} criminal trial (discussed \textit{infra}).\textsuperscript{115}

Sixth, certain States have also created \textbf{cooperative, non-treaty-based schemes to facilitate inter-State extraditions}. Perhaps the best known of these is the European Union’s (EU’s) Framework Decision that, while binding on member States, did not require ratification and therefore did not qualify as a treaty.\textsuperscript{116} The Framework Decision in June 2002 set up the system of European Arrest Warrants (EAWs) (discussed more extensively \textit{infra}) that operates much like

\begin{itemize}
\item \textsuperscript{113} This practice is more likely to be followed by common law States that, as a rule, do not extradite absent a treaty or some type of diplomatic correspondence. Shearer, supra n.42, at 28 (noting U.S. and Brirish Commonwealth countries as examples); Barnett, supra n.16, at 298 n.98.
\item \textsuperscript{114} Bruce Zagaris, \textit{U.K. Arrests Four Rwanda Genocide Suspects for Potential Extradition}, 23 IELR 89, 89-91 (2007).
\item \textsuperscript{115} Agreement Concerning a Scottish Trial in the Netherlands, Neth.-UK, Sept. 18, 1998, \textit{reprinted in} 38 ILM 926 (1999). One legal commentator (Professor Bert Swart) reportedly coined the expression: “extradition by analogy” to describe that arrangement. Arzt, supra n.38, at 178 n.54.
\end{itemize}
that of the physical transfer of a fugitive within a given State,\textsuperscript{117} “based on the principle of mutual recognition as opposed to that of mutual cooperation.”\textsuperscript{118} Similar to the Framework Decision, the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth of 1966 (that was subject to an interim overhaul in April 1990 and then renamed the London Scheme for Extradition within the Commonwealth in November 2002) also did not require ratification, and therefore does not technically have treaty status. Rather, it operates through the adoption of patterned domestic legislation based on guidelines propounded for the extradition between member States of the Commonwealth and its dependencies.\textsuperscript{119}

In addition, there are two well-known sets of special bilateral arrangements known as the “backing of warrants” between particularly close neighboring States with long histories of cooperation – in one case, the U.K. and the Republic of Ireland,\textsuperscript{120} and in the second, Australia and New Zealand.\textsuperscript{121} These arrangements provide for the presumptive issuance of an arrest warrant and extradition by a judge of the host State on behalf of the pursuing State (with no contemplated executive branch role) unless that judge finds that doing so would be unjust or oppressive. Significantly, these arrangements are based on reciprocal domestic legislation – not on treaties.\textsuperscript{122}

\textsuperscript{117} Gilbert, Extradition, supra n.2, at 251-52; Bassiouni, Introduction, supra n.8, at 350-51.


\textsuperscript{119} Gilbert, Extradition, supra n.2, at 252-53. This scheme has been characterized as being “based on the reciprocal legislation approach.” Bassiouni, U.S. Extradition, supra n.2, at 39.


\textsuperscript{122} See, e.g., In re Ellis and In re Gilligan (Applications for Writs of Habeas Corpus), Judgments, U.K. House of Lords, Oct. 5, 1999 (Lord Steyn), available at http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd991118/ellis-1.htm (last visited on Jan. 19, 2014) (“There is no extradition treaty between the United Kingdom and the Republic of Ireland. The process for rendition between the two countries of persons accused and convicted is modelled on the backing of warrants system long familiar to English law. Historically, magistrates in England only had local jurisdiction and a warrant was valid only in
Seventh, a number of States have fashioned *domestic laws that set forth available contingency arrangements, albeit without legal obligation, to authorize and process extraditions* in instances where no extradition treaty exists with the pursuing State.\(^{123}\) Examples include France’s Law of March 10, 1927,\(^{124}\) Australia’s Extradition (Commonwealth Countries) Act 1966 (but repealed in 1988),\(^{125}\) Switzerland’s Act on International Criminal Assistance of 1981 (IMAC),\(^{126}\) the U.K.’s Extradition Act of 1989,\(^{127}\) Thailand’s International Cooperation on Criminal Cases Act (1992),\(^{128}\) the Republic of South Africa’s Act 77 of 1996,\(^{129}\) and the Colombian Penal Code (2000).\(^{130}\)

Eighth, States sometimes proceed with extraditions barring a treaty, cooperative scheme, or domestic statute, based on the principle of *reciprocity*.\(^{131}\)
Reciprocity derives from sovereign equality and the principle that State A is willing to extradite to State B so long as State B is committed to extradite to State A under equivalent circumstances in the future. Reciprocity can be such an important factor in a State’s decision whether or not to extradite that failure to promise reciprocal treatment in the future can doom an extradition request. E.g., Italian National Re-Extradition Case, Fed. Sup. Ct. (Crim. Div.), F.R.G., Oct. 16, 1970, reprinted in 70 IRL 374.

For some States, such as Austria, Belgium, Japan, and Thailand, reciprocity is a required legislative condition for extradition absent a treaty or other written arrangement. In addition, reciprocity can operate on a case-by-case basis rather than under a blanket policy; for example, in 1929, the Guatemalan Ministry of Foreign Relations agreed to grant the extradition of a former German officer for his role in ordering the murder of a suspected infiltrator into a secret organization (the Black Army) where no extradition treaty existed between Guatemala and Germany but where “[t]he Government of Germany ha[d] offered reciprocity in cases which may occur in the future.”

circumstances the practice was to be governed by the applicable rules of international law.” Bassiouini, U.S. Extradition, supra n.2, at 8.

132 Kennedy, supra n.31, at 18 n.73. Reciprocity can be such an important factor in a State’s decision whether or not to extradite that failure to promise reciprocal treatment in the future can doom an extradition request. E.g., Italian National Re-Extradition Case, Fed. Sup. Ct. (Crim. Div.), F.R.G., Oct. 16, 1970, reprinted in 70 IRL 374.

133 Japan, Law of Extradition, Law No. 68 of 1953, art. 3(2), as amended, available at http://www.moi.go.jp/ENGLISH/information/loe-01.html (last visited on Nov. 3, 2013) (requiring that, absent a bilateral extradition treaty, the requesting State must assure “that it would honor a request of the same kind made by Japan.”).

134 Thai Extradition Act, § 9, available at http://thilaws.com/law/t_laws/thlaw0447.pdf (last visited on Nov. 3, 2013) (“The Government of Thailand may consider the extradition for legal proceedings or conviction according to the judgment [with regard to a] criminal offense . . . (2) If there exists no mutual treaty and the Requesting State commits to assist Thailand in the same manner when requested.”).

135 Other examples include Argentina, Peru, and Spain, and Switzerland, although in Switzerland’s case, a waiver can be granted in exceptional instances. Shearer, supra n.42, at 31-32 & n.1; In re Zahabian, Tribunal Fédéral Suisse, Mar. 20, 1963, reprinted in 32 IRL 290 (1966).

136 Rodrigo Labardini, Mexican Supreme Court Requires Extradition Reciprocity Assurances, 22 IELR 7 (2006). In response to that ruling, the U.S. sent Mexico a diplomatic note to satisfy the reciprocity requirement that otherwise was not reflected in the U.S.-Mexico Extradition Treaty. Id.

Finally, absent any of the above arrangements, host States may elect to extradite a requested fugitive on the grounds of **comity** – a courteous or good will gesture extended *ex gratia*, *i.e.*, with no legal obligation attached.\(^{138}\) States that extradite on the basis of comity typically do so pursuant to domestic law\(^{139}\) and tend to regard as criminal the underlying fugitive’s conduct.\(^{140}\) The extradition documentation requirements are generally the same as under a treaty but handled via a diplomatic note.\(^{141}\) A problem with reliance on comity is that many of the protections afforded the subject of an extradition under an extradition treaty do not necessarily apply.\(^{142}\) Another problem is that some States are less comfortable with a non-treaty approach to extradition and may criticize such methods, although, if need be, they can be remedied by the expedited adoption of an MOU or extradition treaty.\(^{143}\) Additionally, many States, including the U.S., do not endow their executives with the inherent authority to turn over a fugitive to another State, and so comity would not be an option absent legislative authorization.\(^{144}\)

---

\(^{138}\) Richard Downing, Recent Development, *The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil*, 26 Stan. J. Int’l L. 573, 577 (1989-90). For example, in 1956, U.S. military authorities in Germany requested the transfer for trial of Sgt. Frank Koveleskie who was charged in Frankfurt with armed robbery, assault with a dangerous weapon, false official statement, and desertion and was being held by Swiss authorities in Basel. Both the U.S. and Switzerland agreed that their bilateral extradition treaty did not apply under the circumstances, but nevertheless the Swiss transferred him under an act of comity. *Whiteman*, supra n.51, at 744-45.

\(^{139}\) Blakesley, Comparative Study, supra n.34, at 191; Roberto Iraola, *Foreign Extradition, Provisional Arrest Warrants, and Probable Cause*, 43 S.D. L. Rev. 347, 348 n.3 (2006); Jennings & Watts, supra n.26, at 955.

\(^{140}\) See, e.g., Fiocconi v. United States, 462 F.2d 475 (2d Cir.) (Italian government agreed to extradite two French citizens found in Italy via comity where narcotics crimes of which they were indicted in Massachusetts were not identified as extraditable under the U.S.-Italy Extradition Treaty, but where the offenses were regarded as crimes under Italian law), *cert. denied*, 409 U.S. 509 (1972), *reprinted in* 51 I.L.R. 272 (1978).

\(^{141}\) Blakesley, Comparative Study, supra n.34, at 191.


\(^{143}\) For example, in February 2007, faced with criticism for handing over 10 rebels of the Rassemblement du Peuple Rwandais (Assembly of Rwandese People) to Rwanda absent any legal instrument, Uganda quickly ratified an extradition treaty that had been signed in 2006. Bruce Zagaris, *Uganda Agrees to Sign Extradition Treaty with Rwanda*, 23 IELR 212 (2007).

\(^{144}\) E.g., Argento, 241 F.2d at 259.
d.  Mechanics
Having reviewed the vehicles used to grant extradition, this study will now examine how extradition operates as a procedural matter under State municipal law, policy, and practice.\textsuperscript{145} The key source for municipal extradition law is the statute, but pertinent constitutional provisions,\textsuperscript{146} human rights law obligations,\textsuperscript{147} or administrative rules otherwise applicable to criminal proceedings\textsuperscript{148} also can prove dispositive or provide supplementary guidance. Domestic statutes governing extradition are estimated to exist in only about half the States worldwide.\textsuperscript{149} Of those with extradition statutes, there is wide variety regarding almost every aspect of how States process extraditions, including, for instance, evidentiary standards imposed (\textit{i.e.}, the quantum of proof, if any, required), the application of specific human rights safeguards, whether an extradition treaty is required,\textsuperscript{150} and the interplay of decisionmaking between the executive and judicial branches of government.\textsuperscript{151}

With regard to the last point, while most States have a mixed system in which both the judiciary and the executive play a material role,\textsuperscript{152} a fraction of States

\textsuperscript{145} A State’s domestic extradition process is governed by its internal laws and policies. Laflin, supra n.6, at 317. International law affords States wide latitude in terms of determining which crimes to treat as extraditable and when to refuse extradition requests, at least when consistent with States’ treaty commitments. Jennings & Watts, supra n.26, at 957.

\textsuperscript{146} Some States, for example, have constitutional bars to the extradition of their own nationals. See Chapter 6.a, infra.

\textsuperscript{147} See Jennings & Watts, supra n.26, at 960 & n.6 (stressing that in some instances a State need not even be a party to a human rights convention and still be required to comply with its provisions where they are regarded as customary international law, such as respect for family life, or where a supranational human rights tribunal holds a State to a certain standard); e.g., Russell v. Fanning, In Sup. Ct., 1988, reprinted in 79 IRL 134 (1989); Soering, 11 EHR 439 (ruling that the U.K. could not extradite Jens Soering to Virginia to possibly face the death penalty for a double murder pursuant to Article 3 of the ECHR under a newly-fashioned legal theory labelled the “death row phenomenon”).

\textsuperscript{148} E.g., In re Alvarez, Sup. Ct., Chile, Aug. 26, 1959, reprinted in 30 IRL 390 (1966).

\textsuperscript{149} Bassiouni, Introduction, supra n.8, at 348.

\textsuperscript{150} For example, Japan may extradite a fugitive to a pursuing State even absent an extradition treaty, Tetsuya Morimoto, First Japanese Denial of U.S. Extradition Request: Economic Espionage Case, 20 IELR 288, 290 (2004), while the U.S. may not. 18 U.S.C. § 3184 (2012).

\textsuperscript{151} See Bassiouni, Introduction, supra n.8, at 348; Dugard & van den Wyngaert, supra n.42, at 188.

\textsuperscript{152} See Blakesley, Comparative Study, supra n.34, at 192 (observing that both branches are needed, given that State sovereignty, international cooperation, and individual liberties are all implicated and citing France and Austria as examples); Bantekas & Nash, supra n.10, at 179-80 (most States prefer a hybrid system, citing the U.K., Canada, and the U.S.). In some hybrid cases, the court’s opinion is binding if a person is declared non-extraditable, but if declared extraditable, the Executive can reverse the decision. This approach is followed by the U.S., the Commonwealth countries, and others. Matthew A. Muir, A Guide to the Law and Practice of
mandate that the executive exercise exclusive control, while others contemplate a mere advisory role for the courts. The executive need not always take the form of a minister, president, or prime minister; in the case of France, for example, the Conseil d’État (the Council of State) is that nation’s supreme administrative body (endowed with both administrative and court functions) for such purposes. It may also be the case that the executive takes liberties by effecting an extradition that is out of compliance with domestic law, as occurred when the government of Serbia decided to surrender Slobodan Milosević, the former Yugoslav president, to the ICTY, in defiance of a Serbian court order suspending the government’s decree to extradite him pending consideration of its constitutionality.

To complicate matters, a State’s practice may vary depending on its particular government counterparts, or its law may be in a state of evolution. Common law and civil law States traditionally have tended to divide along several fault lines, with the former generally requiring a treaty or at least

---


Although historically this was often the case, Shearer, *supra* n.42, at 198, few states still provide for exclusive executive control. Id.; Blakesley, Comparative Study, *supra* n.34, at 192 & n.89 (citing as examples Panama, Ecuador, Portugal, and some Eastern European countries).

See Blakesley, Comparative Study, *supra* n.34, at 192 & n.90 (citing Belgium as an example; indeed, it was the first State, in 1833, to require some form of judicial consideration in extradition proceedings); e.g., In re Garcia-Setien, Ct. of Cassation, Bel., Apr. 8, 1963, reprinted in 43 ILR 244 (1971); Shearer, *supra* n.42, at 198-99 (noting that Mexico and Peru likewise have no binding court effect).


For example, U.S. extradition treaties in the early part of the 20th Century sometimes barred the extradition of its own nationals and sometimes did not. See Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 7-8 (1936) (Hughes, C.J.) (noting that while extradition treaties with Great Britain (1794) and Italy (1868) allowed for the extradition of nationals, treaties with France (1909, the one at issue) and with the Netherlands expressly restricted such a practice).

French law is illustrative as it has morphed over the decades in phases, beginning with the Conseil d’État, which disallowed any reconsideration of a governmental decision based on a 1927 law, but today may reconsider any governmental decision regarding extradition. Haas, *supra* n.9, at 204-07.
legislative authorization to extradite, imposing a *prima facie* or probable cause evidentiary requirement (discussed more *infra*), and being freely willing to extradite their own nationals, while civil law States typically have adopted opposite positions. Despite the foregoing, as States’ domestic laws are becoming more standardized and courts often cite as persuasive authority other States’ domestic rulings, State practice divergences between common law and civil law traditions are increasingly less stark than they once were.

We now turn to the conventional mechanics of extradition – how it is requested, processed, and authorized. For illustrative purposes only, we will rely centrally on U.S. extradition law, which is governed by both applicable bilateral extradition treaties and federal statutes. While some variation exists across State municipal laws – and not all extraditions or extradition-like arrangements follow municipal law – the U.S. approach comprehensively outlines the general sequence of steps involved and can thereby provide a helpful and reasonably representative portrait of the step-by-step operation of extradition.

**Step 1: Pursuing State Prepares Underlying Materials.** When the U.S. is the pursuing State, the first step is for a state prosecutor (regarding a state crime) or the Office of the Attorney General (regarding a federal crime) to prepare a request in which all evidence must be duly certified and authenticated under the proper state or federal seal, respectively. The package is sent to the Office of International Affairs (OIA) within the U.S. Department of Justice (DoJ) where it is

---

160 Bassiouni, *Introduction, supra* n.8, at 350; Stanbrook & Stanbrook, *supra* n.2, at 5-6; Abbell, *supra* n.69, at 2-26 to 2-27.
161 Bassiouni, *Introduction, supra* n.8, at 348-49; Stanbrook & Stanbrook, *supra* n.2, at 6 (citing dual criminality and specialty as examples of increasingly common features found in domestic laws across a variety of States).
163 For a useful, step-by-step approach under U.S. extradition law, in particular see Abbell, *supra* n.69.
reviewed for legal conformity with the requirements of the applicable extradition treaty. Once approved (and, where appropriate, translated), the package is sent to the U.S. Department of State for dispatch to the U.S. Embassy in the host State with instructions to request extradition via a diplomatic note.165

**Step 2: Pursuing State Submits Request.** The pursuing State issues its extradition request, typically addressed via diplomatic channels166 (switching now to the U.S. as the host State) to the U.S. Secretary of State who heads the U.S. Department of State. In instances of urgency, flight risk, or concerns about a criminal investigation being compromised, a pursuing State may seek a provisional arrest warrant (PAW), directly or via INTERPOL, that would allow for the immediate arrest of a fugitive and his detention for a period of time (typically 45-60 days), pending preparation and submission of a formal request for extradition coupled with supporting evidence.167 (Only rarely will a pursuing

---


166 Diplomatic channels are the typical form of submission around the world, but some treaties dispense with this formality, such as the Benelux Conv. on Extradition and Mutual Assistance in Criminal Matters (Belg., Lux., Neth.), June 27, 1962, 616 U.N.T.S. 120 (1968).

State reconsider its interest in extradition after the fugitive, at its request, has been detained and temporarily imprisoned by the host State.168)

Step 3: Department of State Examines Request. The documentation accompanying the request must meet certain requirements to be considered complete: (i) a treaty authorizing extradition between the U.S. and the pursuing State must apply;169 (ii) an arrest warrant in the pursuing State exists; (iii) subject matter jurisdiction is established;170 (iv) any offenses identified in the arrest warrant are listed or treated as extraditable under the treaty; (v) sufficient evidence exists to prove (against a probable cause standard) that the individual named in the arrest warrant is the same person as is sought for extradition;171 and (vi) any offenses charged also would amount to a crime if they had been committed in the U.S. (a concept known as dual or double criminality and discussed more extensively in Chapter 5.a.ii infra).172 If upon its review, the Department of State deems the package incomplete, any treaty conditions are unfulfilled, authenticity questions arise, or there are any doubts that the evidence was obtained in good faith,173 the request is returned to the pursuing State via diplomatic note indicating the defects.174 If the package is satisfactory, it is forwarded to the U.S. Department of Justice (DoJ).175

---

168 See, e.g., "Militant Ejected by U.S. Meets with Jordan King," N.Y. TIMES, May 14, 1997, at A11 (describing how, for security reasons, Israel "dropped a request" for the extradition of Mousa Mohammed Abu Marzook, the political head of Hamas, after he had been imprisoned in Jordan at Israel’s request on "suspicion of terrorism").
169 As discussed in Chapter 7.a infra, the treaty requirement is not uniformly applied by other States.
171 ABBELL, supra n.69, at 2-24-25; BLAKESLEY, COMPARATIVE STUDY, supra n.34, at 193-94 & n.98 (comparing the character to that of a preliminary hearing). Unlike the U.S., many States do not insist on a probable cause standard.
172 See, e.g., In re Extradition of Platko, 213 F. Supp.2d 1229 (S.D. Cal. 2002); Kuzmanovic, supra n.162, at 159-60.
173 Accord In Re Saif [2001] 4 All ER 168 (English Divisional Court held it would be unfair and unjust to return applicant to India on the ground that the evidence supporting the extradition request appeared to have been obtained in bad faith).
174 See BLAKESLEY, COMPARATIVE STUDY, supra n.34, at 223-24 (incomplete filing); JENNINGS & WATTS, supra n.26, at 959 (unmet conditions).
**Step 4: Department of Justice Reviews Request.** DoJ undertakes a similar screening of the request and accompanying documentation. If any defects are detected, the package is returned to the Department of State and from there back to the pursuing State; if satisfactory, the package is forwarded to the United States Attorney for the federal district (e.g., Eastern District of Pennsylvania, Southern District of New York) where the fugitive has been found or is believed to be located.

**Step 5: United States Attorney Files Complaint.** After reviewing the extradition request, and assuming he or she concurs that the request is valid and extradition-worthy, the United States Attorney prepares and files a complaint regarding the offenses charged, seeking an arrest warrant from a federal judge or magistrate judge. That complaint must be made under oath and provide supporting evidence. In addition, the extradition subject generally is informed that an arrest warrant has been sought for him, unless a decision has been made to keep the indictment secret (discussed in Chapter 9.a infra).

**Step 6: Judge Grants Arrest Warrant, Arrest is Effected, Bail May be Granted, and an Extradition Hearing is Scheduled.** Upon the judge’s review of the complaint, he may then agree to issue the arrest warrant. Once the individual is arrested, an extradition hearing is scheduled, and the individual sometimes is granted bail. At times a fugitive may consent to extradition at this stage but generally does not.

---

176 The United States Attorney (U.S. Attorney) is the head of the prosecutor’s office for a given federal district, and is not to be confused with the U.S. Attorney General who heads the U.S. Department of Justice as the nation’s chief law enforcement officer.

177 Kuzmanovic, supra n.162, at 159-60.

178 Id.; MURPHY, U.S. PRACTICE, 1999-2001, supra n.175, at 332.

179 ABBELL, supra n.69, at 2-8 to 2-9.

180 Id.

181 See id. at 2-13-2-14 (traditionally, a federal judge could only issue an arrest warrant if the person of interest could “reasonably and in good faith” be found in the court’s jurisdiction, but by virtue of two amendments over the past quarter-century, Pub. L. No. 100-690, § 7087 (1988) and Pub. L. 101-647, § 1605 (1990), a U.S. judge can issue an arrest warrant even when the individual’s whereabouts in the U.S. is not known or if the person is believed to be shortly entering the U.S.).

182 Kuzmanovic, supra n.162, at 159-60; MURPHY, U.S. PRACTICE, 1999-2001, supra n.175, at 332.

183 While no statutory right to bail exists for persons facing extradition in the U.S., the U.S. Supreme Court recognizes that lower courts have the inherent power to release such persons on
**Step 7: Judge Holds Extradition Hearing.** A person may not be extradited without first having the benefit of an evidentiary hearing, as mandated by the due process clause of the U.S. Constitution, as a person’s liberty is at stake.\(^{185}\) That hearing is more akin to a preliminary hearing than a full-scale trial,\(^{186}\) and is not intended to adjudicate the individual’s guilt or innocence with respect to the underlying charge(s),\(^{187}\) but rather merely to determine whether the conditions spelled out in the extradition treaty have all been satisfied, particularly that the individual is who he is purported to be, that the charged offenses are extraditable, that there is probable cause to show that he committed those offenses, and that the same offenses are punishable under U.S. law.\(^{188}\) Issues may surface at this stage to challenge the court’s personal jurisdiction, question the admissibility of inculpatory evidence, and/or object to one or more charges on the grounds of specialty (discussed *infra*), but such efforts do not generally succeed.\(^{189}\)

---


185 *Caplan v Yokes*, 649 F.2d 1336 (9th Cir. 1981); Blakesley, Comparative Study, *supra* n.34, at 193.

186 *Merino v. United States Marshal*, 326 F.2d 5, 12 (C.D. Cal. 1963); Kuzmanovic, *supra* n.162, at 161 & n.42 (not a “full dress trial”).


“Although there is no explicit statutory basis for ordering discovery in extradition proceedings, the extradition court has the inherent power to order such discovery procedures as law and justice require.”190 Any documents and other evidence, including that which would ordinarily be deemed excludable, such as hearsay, are admissible to support extradition so long as they are authenticated;191 their reliability and weight are not a matter for the hearing judge to assess. Significantly, “self-incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing.”192 Although the extradition subject may be represented by private counsel in an extradition hearing,193 the subject may not introduce exculpatory evidence or rebut the government’s case.194 Under prevailing convention, the pursuing State’s interests are represented by the U.S. Attorney’s Office.195

Step 8: Judge Determines Extraditability, Certifies Findings to the Secretary of State, and Orders Individual to Prison. In the event the judge finds that the individual at issue may be extradited in compliance with U.S. law, including its treaty commitments, he then certifies that ruling, together with the produced evidence, to the U.S. Secretary of State.196 The judge then issues an order committing the individual to prison pending his extradition, unless the individual has been granted bail, which, as noted above, although not expressly

190 Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1407 (9th Cir. 1988).
191 18 U.S.C. § 3190 (2012); Kuzmanovic, supra n.162, at 161 & n.42; Fernandez-Morris, 99 F. Supp.2d at 1361; DYCUS, supra n.188, at 512; Lubet & Reed, supra n.187, at 7-9 (noting use of modified rules of evidence). Indeed, the government need not call any witnesses if it so chooses. Lubet & Reed, supra n.187, at 7 (observing that a case can be presented through “documents, depositions, and affidavits” alone).
192 Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984).
193 DYCUS, supra n.188, at 512-13; Sindona v. Grant, 461 F. Supp. 199, 204 (S.D.N.Y. 1978) (representation by private counsel permitted), rev’d on other grounds, 619 F.2d 167 (2d Cir. 1980). But notably the Sixth Amendment to the U.S. Constitution, which guarantees the right to the assistance of counsel in all criminal prosecutions, does not apply to extradition proceedings, because such proceedings are conducted under civil rules; indeed, [n]o jury will sit, no elements of the offense will be adjudicated in a speedy and public trial, the accused will not be confronted by the witnesses against them, jeopardy does not attach, . . and so on.” DeSilva v. DiLeonardi, 181 F.3d 865, 868 (7th Cir. 1999).
194 Fernandez-Morris, 99 F.Supp.2d at 1361 (evidence can be introduced that explains but not that rebuts the government’s evidence); Lubet & Reed, supra n.187, at 7-9.
195 Abbell, supra n.69, at 2-7 to 2-8 (noting that, by contrast, until the 1970s, such complaints were filed by foreign diplomatic consul).
196 Id. at 2-28.
authorized in federal statutes, has been known to occur.\textsuperscript{197} If, however, the judge does not find the evidence supports extradition, he will not so certify to the U.S. Secretary of State,\textsuperscript{198} and there is no opportunity for the U.S. government to appeal,\textsuperscript{199} although it may file a revised or supplemental extradition request at the behest of the pursuing State\textsuperscript{200} or submit a second extradition complaint seeking a \textit{de novo} hearing to relitigate issues of fact and law.\textsuperscript{201}

\textbf{Step 9: Individual May File a Habeas Corpus Petition and, if Denied, Seek an Emergency Order Staying Extradition.} Because a judge’s certification of extraditability does not qualify as a final order, the subject of the extradition has no legal right to appeal any part of the ruling.\textsuperscript{202} That said, he still has an opportunity to seek relief collaterally\textsuperscript{203} to the extent that he may petition for a writ of \textit{habeas corpus}, contending that he has been unlawfully detained,\textsuperscript{204} but such petitions are narrowly confined.\textsuperscript{205} If the petition is denied, an extradition subject may seek an emergency order to stay extradition.\textsuperscript{206}

\textsuperscript{197} \textit{Id.}
\textsuperscript{198} Kuzmanovic, \textit{supra} n.162, at 162.
\textsuperscript{199} ABBELL, \textit{supra} n.69, at 2-29 to 2-30.
\textsuperscript{200} Kuzmanovic, \textit{supra} n.162, at 162-63.
\textsuperscript{201} Such a \textit{de novo} hearing “is permissible and does not violate principles of res judicata or double jeopardy.” \textit{Ahmad v. Wigen}, 726 F. Supp. 389, 397 (E.D.N.Y. 1989) (citing \textit{Collins}, 262 U.S. at 429-30). \textit{See also Gusikoff v. United States}, 620 F.2d 459, 461 (5th Cir. 1980) (government may file another request).
\textsuperscript{202} \textit{Collins v. Miller}, 252 U.S. 364, 369 (1920). \textit{See also In re Extradition of Howard}, 996 F.2d 1320, 1325 (1st Cir. 1993) (ruling by extradition judge is not a “district court” decision as such, as he does not act in the capacity of an “Article III judge” under the Constitution); Kuzmanovic, \textit{supra} n.162, at 162-63; \textit{In re Extradition of Howard}, 996 F.2d at 1325. By contrast, under French law, a fugitive found to be extraditable does have the right to appeal certain aspects of the decision to the Conseil d’Etat but only those relating to the question of whether the decision to extradite was made under proper procedures and conditions. \textit{Blakesley, Comparative Study, supra} n.34, at 275. In addition, the French Minister of Justice may order judicial review of a decision to extradite “to assure the unity of decisions and the interpretation of extradition treaties and domestic law.” \textit{Id.}
\textsuperscript{203} “The sole mechanism for review of a magistrate’s order approving extradition is a collateral habeas corpus proceeding. There is no statutory provision for a direct appeal.” \textit{Ahmad}, 726 F. Supp. at 395 (citing \textit{Collins}, 252 U.S. at 369). \textit{See also Lubet & Reed, supra} n.187, at 7-9 (no direct appeal right, only limited review via \textit{habeas corpus}).
\textsuperscript{204} ABBELL, \textit{supra} n.69, at 2-29 to 2-30. Exceptionally, at least under Canadian law, \textit{habeas} petitions can also be used to defeat \textit{deportation} orders. \textit{See In re Shepherd and Minister of Employment & Immigration} (1989), 70 O.R. (2d) 765 (C.A.) (Canada), available at http://www.emp.ca/links/intlaw?cases/shepherd.doc (last visited on Nov. 3, 2013) (“Although \textit{habeas corpus} is normally resorted to where the detention is attacked, in the present case, as in most ‘immigration cases’, the real attack is not on the detention order but upon the deportation order.”).
\textsuperscript{205} \textit{Fernandez v. Phillips}, 268 U.S. 311, 312 (1925).
\textsuperscript{206} Kuzmanovic, \textit{supra} n.162, at 162-63.
Step 10: U.S. Secretary of State Makes Final Decision Regarding Extradition.

The ultimate call on whether an individual should be extradited lies with the Executive, specifically the U.S. Secretary of State, who is “not bound by the judicial record” and can therefore review the judicial determination de novo. That discretionary decision is based on an independent review and generally takes account of humanitarian and foreign policy considerations, such as the age and health of the individual, whether he would likely be tortured or suffer from inhuman or degrading treatment upon delivery, whether the request is intended as a ruse to try him for another crime, or whether he would likely be prosecuted or punished for his political beliefs or on other impermissible discriminatory grounds. Significantly, no habeas review is available to individuals who have been slated for extradition by the U.S. Secretary of State, including claims that they are likely to face torture in the pursuing State. (In

---

207 In a rare instance of deferral to the judiciary, in March 2010, the Jamaican Prime Minister Bruce Golding decided to let a court determine the extraditability to the U.S. of Jamaican national Christopher “Dudus” Coke following U.S. criticism directed at Jamaica’s handling of the case. Bruce Zagaris, Jamaican Prime Minister Will Allow Court to Decide U.S. Extradition Request, 26 IELR 225 (2010).

208 18 U.S.C. § 3184 (2012); Abbell, supra n.69, at 2-30 to 2-30.1; Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confined by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”). Notably, in 1995, a federal court judge ruled that the U.S. statutory scheme for international extraditions was unconstitutional to the extent it violated the separation of powers doctrine by “confer[ring] upon the Secretary the authority to review the legal determinations of federal extradition judges.” Lobue v. Christopher, 893 F. Supp. 65, 68 (D.D.C. 1995), vacated, 82 F.3d 1081 (D.C. Cir. 1996). That ruling was, however, struck down on jurisdictional grounds. The U.K. features a similar safeguard under its extradition law. See Bantekas & Nash, supra n.10, at 215 (key means to combat unfairness against a fugitive is the U.K. Secretary of State’s discretion to refuse to surrender the individual).

209 Lubet & Reed, supra n.187, at 7-9; e.g., In re Doherty, 786 F.2d 491, 499 (2d Cir. 1986). To be clear, where a U.S. court opines that an individual may be extradited, the U.S. Secretary of State may refuse to do so but would have to rationalize such a refusal; however, if the court has denied extradition, the Executive is bound not to extradite that individual. Blakesley, Comparative Study, supra n.34, at 280.

210 Lubet & Reed, supra n.187, at 7-9.

211 Abbell, supra n.69, at 2-30.1.

212 Borelli, supra n.27, at 333-34; e.g., Eain, 641 F.2d at 518 (“The determination in this case whether or not the request for extradition on common crimes amounts to a subterfuge by Israel to punish petitioner for a political offense is . . . a decision within the sole province of the Secretary of State.”).

213 See Mironescu v. Costner, 480 F.3d 664 (4th Cir. 2007) (holding that while a Secretary of State’s extradition decision is not foreclosed to habeas review on account of the rule of non-inquiry, it is barred based on the plain language of the Foreign Affairs Reform and Restructuring Act (FARR)
the event the determination is to deny extradition, nothing prevents the pursuing State from requesting extradition again.\textsuperscript{214}

\textbf{Step 11: U.S. Secretary of State Issues Extradition Warrant and the Individual is Extradited.} In rendering a decision favoring extradition, the Secretary of State may add conditions,\textsuperscript{215} such as that a new trial must be held rather than reliance on an \textit{in absentia} verdict, that the trial must be held in a civilian versus a military or extraordinary court,\textsuperscript{216} that the individual cannot be re-extradited or deported to a specific third State,\textsuperscript{217} or that upon conviction the individual must be returned to the U.S. to serve his sentence.\textsuperscript{218} At any rate, once the Secretary of State decides that the requested extradition should proceed, he then issues a warrant for extradition to the U.S. Marshals Service.\textsuperscript{219} The Secretary of State also will authorize the pursuing State to dispatch representatives to physically transfer the extradition subject out of the United States;\textsuperscript{220} failure to effect that transfer within the prescribed two-month timeframe could result in the subject’s release.\textsuperscript{221}

---

\textsuperscript{214} Blakesley, \textit{Comparative Study}, \textit{supra} n.34, at 280.

\textsuperscript{215} See, e.g., \textit{United States v. Kin-Hong}, 110 F.3d 103, 110 (1st Cir. 1997) (noting, by contrast, that the judiciary is not so authorized to attach conditions).

\textsuperscript{216} An example of a French court imposing extradition conditions occurred in the context of an individual sought by the Republic of San Marino for the attempted homicide of a member of a Communist cell in which the court granted extradition, despite an argument that his offense was “political,” provided that “the political motive of the crime would not be considered an aggravation of the offence, and that . . . the person extradited would not be tried by an extraordinary tribunal.” \textit{In re Giovanni Gatti}, Ct. of App. of Grenoble (Chambre des Mises en accusation, Fr.), Jan. 13, 1947, \textit{reprinted in} [1947] 14 ANN. DIG. & REP. PUB. INT’L CASES 145, 145 (No. 70) (H. Lauterpacht ed. 1951).

\textsuperscript{217} \textit{E.g., Emami v United States District Court}, 834 F.2d 1444, 1454 (9th Cir. 1987) (discussing how “the State Department alone has the power to condition the extradition of Emami on an agreement with Germany not to deport Emami to Iran.”).

\textsuperscript{218} Abbell, \textit{supra} n.69, at 2-32.

\textsuperscript{219} Dyckus, \textit{supra} n.188, at 512-13; Kuzmanovic, \textit{supra} n.162, at 162.

\textsuperscript{220} Lubet & Reed, \textit{supra} n.187, at 7-9.

\textsuperscript{221} 18 U.S.C. § 3188 (2012); Abbell, \textit{supra} n.69, at 3-79 (noting that nearly all post-1960s U.S. extradition treaties either authorize or mandate release in such circumstances). This issue is discussed further in Chapter 5.c \textit{infra}. 

167
Step 12: U.S. Government May Monitor Trial in Pursuing State Court If Specialty At Issue. Generally, once the individual has physically departed U.S. territory, the extradition process is over; however, one important exception exists. Under the recognized customary law principle known as “specialty” (discussed in Chapter 7.b.ii infra), which is addressed in virtually every extradition treaty today, a pursuing State may only try an extraditee for those offenses specifically set forth in its request\(^{222}\) and that therefore were the subject of review and approval by the host State.\(^{223}\) The extraditee may not be prosecuted for any other offenses that might later surface, typically in the context of a superseding indictment, at least without the express consent of the host State.\(^{224}\) In such instances, the U.S. may monitor trial proceedings in the pursuing State to ensure strict compliance with this condition and may request the fugitive be returned absent compliance.\(^{225}\)

e. Adaptability

For all of its standard procedural formality and ostensible cumbersome nature, the extradition process is not necessarily a slow, multi-phased, and regimented exercise. In fact, it possesses a number of notably flexible features that can

\(^{222}\) See United States v. Abello-Silva, 948 F.2d 1168, 1172-74 (10th Cir. 1991) (finding that specialty prohibits new offenses, as opposed to new facts, in a superseding indictment), cert. denied, 506 U.S. 835 (1992).

\(^{223}\) Borelli, supra n.27, at 336 (noting that specialty is designed to protect the rights of the extraditee as well as the rights of the host State).


\(^{225}\) An illustration of such post-extradition oversight can be found in a November 2005 case in which a Lisbon High Court granted extradition to India of a gangster Abu Salem on eight charges, including the 1993 Mumbai explosions. Once in India, Salem was additionally charged with making extortionary calls to a Delhi-based businessman; given that that new charge is a capital offense, and violated the principle of specialty (especially since India had given an “executive assurance” that it would not charge Salem with any crime that would entail more than 25 years or the death penalty if convicted), the Portuguese High Court in September 2011 ordered termination of the extradition and requested his return to Lisbon. “Portuguese Court Cancels Extradition of Abu Salem,” The Asian Age (India), Sept. 27, 2011, available at http://archive.asianage.com/india/portuguese-court-cancels-extradition-abu-salem-679 (last visited on Nov. 4, 2013).
facilitate and accelerate such inter-State custodial transfers. This section will examine a series of factors that contribute to this modality’s adaptability.

First, while an extradition often takes months or even years to ultimately certify and carry out, such a process can be expedited – sometimes known as a “simplified extradition procedure” or “summary extradition” – typically but not necessarily effected with the consent of (or waiver by) the detainee. The Convention on Simplified Extradition Procedure (1995) provides that where the individual of interest is informed of the simplified procedure and what it means, has access to counsel, and both he and the host State consent to extradition, formal procedures can be dispensed with and delays avoided.

The Inter-American Convention on Extradition (1981) likewise allows for such a procedure on one of two possible grounds: when domestic law does not proscribe it or when the detainee provides written consent after being informed of his rights. Such prompt transfer is also permitted under the U.S.-Mexico and U.S.-Romania Extradition Treaties, for example, so long as the detainee consents. A fugitive may wish to waive extradition proceedings rather than challenge an extradition order for such reasons as impatience to seek

---

226 See the definition in Chapter 1.d or in the Glossary.
227 See, e.g., Domingo Soapa Case, Sup. Ct., Arg., Mar. 1928, 150 Fallos 316, [1927-28] 4 ANN. DIG. PUB. INT’L L. CASES 347, 347 (A.D. McNair & H. Lauterpacht eds. 1931) (“the affected party could validly waive, for his personal advantage, as he has done, the requirements of that [extradition] proceeding, as such waiver does not affect the public order nor infringe upon the rights of third parties.”); Bruce Zagaris, Spain Arrests Isabel Perón on Argentinian Extradition Warrant for Crimes against Humanity, 23 IELR 87 (2007) (noting that Spanish law has a simplified extradition procedure whereby a detainee can waive extradition and be surrendered rapidly to the pursuing State).
229 Id.; BANTEKAS & NASH, supra n.10, at 195-96.
230 Inter-Am. Conv. on Extradition, supra n.79, art. 21.
232 E.g., Bruce Zagaris, Coke Waives Extradition to the U.S. After Jamaica Arrests Him, 26 IELR 352 (2010).
vindication on the merits of the criminal charges, not expend money on legal representation, being promptly reunited with his family in the pursuing State, avoiding continued detention in the host State, or seeking a reduced sentence for such cooperation pursuant to domestic law.

Albeit rare, expedited extradition can take place even absent a fugitive’s consent. One variant of summary extradition has been referred to as “conditional release.” Under this procedure the host State would release to a pursuing State “a suspect already under arrest in [the host State] on other charges. [In effect,] the suspect is "lent" to the [pursuing State] for prosecution on the condition that [he] will be returned for prosecution in [the host State] at the end of [any] sentence. This procedure is much faster than a formal extradition, and has proven so successful, that [U.S.] DEA sometimes designs operations to bring suspects to [a State receptive to this approach] so they can be arrested [there] and turned over to U.S. authorities quickly.”

For example, in April 2007, the U.S. Embassy in Panama City sent a diplomatic note to the Panamanian Ministry of Foreign Affairs seeking the “conditional release” of Jesús Ernesto Mondragón García and José Alfonso Núñez Gutiérrez, two Mexican nationals wanted for narcotics trafficking charges. Notably, while a U.S.-Panama Extradition Treaty existed, the U.S. did not specifically seek their extradition. Instead, the government of Panama acceded to the U.S. request for their “conditional release” and, upon a challenge from the defendants that the


234 See, e.g., Australian High Court Overturns Sentence Due to Non-Insistence on Rule of Specialty, 16 IELR 904, 905 (2000) (fugitive calling for resentencing in line with credit due to having waived extradition rights as to 39 charges).

physical transfer had occurred in contravention of the treaty, a U.S. federal
district court (M.D. Fla.) rejected the motion, ruling that Panamanian officials
presumably had determined that the extradition treaty provisions had been
satisfied when the defendants were released.236

Second, extradition proceedings can be held in secret.237 Such an approach is
most likely to occur in cases involving violent criminals with powerful
organizational connections. The concern with public disclosure in such cases
would be that their comrades or collaborators (e.g., from the Taliban, a drug
cartel, or a mafia family) might take precipitous action to break the detainee out
of prison, negotiate for his release, exert heavy pressure on the host government,
or otherwise try to scuttle his extradition. For example, in October 2005, Haji
Baz Mohammad, one of the world’s most wanted drug kingpins with alleged ties
to the Taliban, was transferred into U.S. custody after months of secret
extradition proceedings following his January 2005 arrest in Kandahar.238

Third, State judiciaries have pronounced that extradition provisions found in
treaties or municipal statutes ought to be construed liberally to serve the
purpose for which they were written. For example, the U.K. House of Lords, that
State’s highest court of appeal, adopted the view that its domestic extradition
statute should be interpreted generously to facilitate extraditions.239 Similarly,
U.S. courts, including the Supreme Court, have articulated the need to interpret
U.S. bilateral extradition treaties with an eye to transferring fugitives to face trial
or punishment for their actual or alleged crimes.240 A Belgian court ruled that it

236 Bruce Zagaris, U.S. District Court Denies Standing to Challenge Extradition from Panama, 24
IELR 49 (2008).
237 Exceptionally, a State (e.g., Portugal) may treat on a routine basis extradition proceedings
behind closed doors. Hatton, supra n.183.
B1. For much the same logic, governments may maintain secrecy regarding whether an
extradition actually took place, as demonstrated by the U.S. government’s unwillingness to
confirm whether Mexico had extradited Colombian drug trafficker, Harold Mauricio Poveda-
Ortega (known as “The Rabbit”) after being captured in Mexico City in 2010 following an
undercover investigation that infiltrated his operations and found that he had delivered about
150 tons of cocaine to Mexico since 2000, much of it intended for the U.S. Ginger Thompson, “To
240 Laubenheimer, 290 U.S. at 298; Villareal, 74 F.2d at 505.
had “no authority to review the regularity of an extradition granted by a foreign Government” in a case where the Netherlands extradited an individual to Belgium based on its request that occurred 16 days after his arrest despite a requirement in the applicable bilateral extradition treaty that such requests be made within two weeks of arrest.\textsuperscript{241} In addition, the Supreme Court of the German Reich in 1936 proclaimed: “There is no generally recognised principle of international law to the effect that extradition is unlawful if granted for acts for which prescription has taken place according to the law of the extraditing State as distinguished from that of the requesting State.”\textsuperscript{242}

Fourth, in some States, including the U.S., extradition treaties may apply retroactively.\textsuperscript{243} This means, unless expressly limited, their provisions may have effect even on crimes committed before the treaty came into force or while the treaty was suspended.\textsuperscript{244} It is possible, therefore, that while a crime would not have been deemed extraditable at the time it was committed, it may become so, even years later, by virtue of an extradition request under a presently operative treaty that recognizes such conduct as extraditable so long as the underlying conduct was deemed criminal under the municipal law of both States


\textsuperscript{243} For the United States, see \textit{Abbell}, \textit{supra} n.69, at 3-28 (noting that most pre-1970 U.S. bilateral extradition treaties are silent regarding retroactivity, but that U.S. courts have ruled that where they are silent, they are to be construed as having retroactive effect); e.g., U.S.-Rom. Extradition Treaty, \textit{supra} n.231, 2 CTIA at 371 (“This Treaty shall apply to offenses committed before as well as after the date it enters into force.”). For other States’ practices, see generally Bruce Zagaris, \textit{U.S. Efforts to Extradite Persons for Tax Offenses}, 25 \textit{LOY. L.A. INT’L & COMP. L. REV.} 653, 667 (2003), available at \url{http://digitalcommons.lmu.edu/llr/vol25/iss3/9} (last visited on Dec. 27, 2013) (citations omitted) (“Importantly, countries vary in the application of the treaty or national law provisions on retroactivity. The requested state may consider the case as if the crime had been committed in the requested state and apply its own statute of limitation to determine whether prosecution would be precluded. If prosecution is barred, the country will deny extradition. For example, the European Convention on Extradition provides that ‘[e]xtradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.’”).

\textsuperscript{244} \textit{Cleugh v. Strakosch}, 109 F.2d 330, 335 (9th Cir. 1940); \textit{Markham v. Pitchess}, 605 F.2d 436, 437-38 (9th Cir. 1979) (U.S. can enter into a treaty that applies to crimes already committed), \textit{cert. denied}, 447 U.S. 904 (1980); \textit{Argento}, 241 F.2d 258 (treaty suspension case); \textit{Gallina v Fraser}, 177 F. Supp. 856 (D. Conn. 1959), \textit{aff’d}, 278 F.2d 77 (2d Cir.), \textit{cert. denied}, 364 U.S. 851 (1960) (same). See generally \textit{Abbell}, \textit{supra} n.69, at 3-6 (distinguishing between treaty suspension and abrogation).
at the time of commission. As extradition treaties do not render conduct criminal, they do not violate ex post facto laws.

Fifth, extradition proceedings need not forestall prompt apprehension of the fugitive. Even before it submits an extradition request, a pursuing State can seek the host State’s cooperation in provisionally arresting the fugitive. This common feature of extradition treaties can help prevent a fugitive from hearing about a requested extradition and, while the various proceedings play out through diplomatic channels, take the opportunity to hide away or take refuge in another State.

Sixth, although in cases where a fugitive is charged with separate offenses under the laws of multiple States, extradition is generally granted sequentially following the completion of each sentence, State officials may permit the extradition of a fugitive for the temporary and limited purpose of standing trial for charged offenses in the pursuing State, even though he is still serving a criminal sentence in the host State. The benefit of such flexibility is that an accused can

---

245 *In re Colman*, Ct. of App. of Paris, Fr. (Chambre des Mises en Accusation), [1947] 14 ANN. DIG. & REP. PUB. INT’L CASES 139 (No. 67) (H. Lauterpacht ed. 1951) (“The offender cannot invoke the principle of the non-retroactivity of laws. He has no right not to be surrendered for facts which were not provided for, at the time of the consummation of the offence, by the Franco-Belgian Convention . . . as long as both French and Belgian law render criminal and punish the offences at the time when they were committed.”); BLAKESLEY, COMPARATIVE STUDY, supra n.34, at 276 (underlying conduct must already be criminalized in both States).

246 See n.50 and accompanying text in Chapter 1 supra.

247 E.g., *United States ex rel. Oppenheim v. Hecht*, 16 F.2d 955, 956 (2d Cir.), cert. denied, 273 U.S. 769 (1927); *Wright v. Court of Appeals*, Sup. Ct., Phil., 235 SCRA 346 (1994). While this principle may seem to run counter to the U.S. Constitution’s prohibition on Congress passing an ex post facto law, a treaty executed by the executive branch is not the same thing as Congress adopting a law. Also, the Constitution’s due process protections found in the 5th and 14th amendments (the former in the federal context, the latter in the state context) do not apply in the extradition context, at least to foreign nationals abroad, as the term “the people” or “persons” in those amendments refers specifically to U.S. citizens or those who have developed ties to the U.S., rather than to aliens outside U.S. territory. See *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (5th amendment analysis); *United States v. Verdugo-Urrutia*, 494 U.S. 259, 265 (1990) (14th amendment analysis).

248 See supra n.167.

249 See SHEARER, supra n.42, at 200-02.

250 See, e.g., London Scheme for Extradition within the Commonwealth in Nov. 2002, art. 16(2)(b)(i), LMM (90)32, available at http://www.oas.org/juridico/english/mesicic3_jam_london.pdf (last visited on Nov. 1, 2013) (authorizing “the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence”); MURPHY, U.S. PRACTICE, 1999-2001, supra n.175, at 329 (in September
be prosecuted while witnesses are still alive, their memories fresh, and other
evidence available, rather than risking a trial potentially years later with
insufficient evidence after the subject has fully served his sentence, especially for
an unrelated crime. In addition, if the fugitive was part of a criminal
enterprise, he may be willing to assist with the investigation or prosecution of
other enterprise members when returned to stand trial. In a recent example,
in September 2008, when indicted for involvement in terrorist attacks in
Casablanca in 2003, Hassan el Haski, a native Moroccan then serving a 15-year
prison sentence in Spain for his role in the Madrid terrorist bombings of 2004,
was temporarily extradited by Spain to Morocco.

Seventh, flexibility is also apparent with respect to seeking the extradition of
fugitives for crimes not expressly itemized or covered by the applicable
extradition treaty. To begin, how an offense is denominated is not normally
determinative; rather, courts tend to examine the underlying conduct itself and
query whether, for dual criminality purposes (discussed in Chapter 5.a.ii infra),
the two sets of domestic laws are “substantially analogous” and “directed at the
same basic evil.” In the U.S., for example, in trying to gauge whether a
particular conduct qualifies as a crime, a U.S. federal court may evaluate not only
the law of the individual state where the crime was committed, but also federal
law and the law of the majority of U.S. states. In addition, at times a host State
will agree to extradite a fugitive even when the crime at issue is not listed in the
extradition treaty but where it nevertheless exists at common law.

2000 the State Department lauded the virtues of such a provision in seeking Senate confirmation
of its extradition treaties with Belize, Paraguay, South Africa, and Sri Lanka, which contained
such a provision).

252 Id.  
253 Al Goodman, “Spain to Extradite Convicted Train Bomber,” CNN.com/Europe, Sept. 23, 2008,
Sept. 29, 2013).
254 Peters v. Egnor, 888 F.2d 713, 719 (10th Cir. 1989).
255 ABBELL, supra n.69, at 2-11 to 2-12.
256 See, e.g., Bruce Zagaris, Trinidad Magistrate Orders Extradition of Three Suspects to U.S. in JFK
Airport Terrorism Plot, 23 IELR 375, 375-76 (2007) (in August 2007, a Trinidad & Tobago (T&T)
magistrate judge ordered three men – Abdul Kair, Kareem Ibrahim, and Abdel Nur – extradited
to the U.S. on charges they conspired to sabotage jet fuel storage tanks and fuel lines at New York
City’s Kennedy International Airport, despite the fact that the T&T Extradition Act did not
Furthermore, simply because a crime is not itemized as extraditable in a treaty does not prevent States from mutually choosing to waive that particular provision and proceed outside the treaty context, say, as a matter of reciprocity or comity.\textsuperscript{257}

Eighth, in some States, including the U.S., a pursuing State can, under certain circumstances, renew an extradition request following a denial. For those States, “[t]here is no double jeopardy prohibition against such a renewed request, nor is a finding of non-extraditability res judicata to a second proceeding. Nevertheless, findings of fact made by a judge cannot be overturned by another judge of the same jurisdiction without new facts to support a different finding.”\textsuperscript{258} It is also true, however, that for most States, once an extradition request has been denied, a new submission may not be made with respect to the same offense(s).\textsuperscript{259}

Ninth, the validity of extradition treaties is generally upheld even when State status is in transition or when there is a radical or revolutionary change in the government of a State.\textsuperscript{260} Accordingly, municipal courts tend to confirm the applicability of extradition treaties to former colonies or territories of States parties to those treaties notwithstanding the fact that a concerned State’s

\textsuperscript{257} See page 143 supra.

\textsuperscript{258} BASSIOUNI, U.S. EXTRADITION, supra n.2, at 991 (citing, e.g., Hooker v. Klein, 573 F.2d 1360 (9th Cir.), cert. denied, 439 U.S. 932 (1978)).

\textsuperscript{259} See, e.g., Nicaragua, Extradition Procedures, art. 359 CPP. available at www.oas.org/juridico/mla/en/nic/en_nic-ext-gen-process.doc (last visited on Dec. 27, 2013) (“If extradition of a person is denied on its merits, the request may not be repeated for the same crime.”).

\textsuperscript{260} See, e.g., In re Escudero, Cámara Federal, Argentina, Sept. 4, 1939, 67 Jurisprudencia Argentina 797, reprinted in [1938-40] 9 ANN. DIG. & REP. PUB. INT'L. L. CASES 408, 408 (No. 155) (H. Lauterpacht ed. 1942) (an Argentinian court granted extradition to Spain pursuant to their bilateral extradition treaty notwithstanding a radical change of government between the Republican government that requested the extradition and the Nationalists who had since acquired control of Spanish territory and to whom the prisoner was delivered); Perlin v. Superintendent of Prisons, Sup. Ct. of Palestine, Nov. 16, 1942, 9 Law Reports of Palestine 683 (1942), reprinted in 10 ANN. DIG. & REP. PUB. INT'L. L. CASES 328, 329 (H. Lauterpacht ed. 1945) (It seems to be settled practice in International Law that treaties and international agreements are not affected by a change in government, or in the form of government of one of the contracting parties, and remain in force until denounced by the new government or they expire by effluxion of time. Thus, if a State changes its form of government from a monarchial to a republican one, treaties to which it was a party still remain in force.”).
independence has since been attained (e.g., Singapore, Lebanon, and India).

Extradition treaty validity likewise has been affirmed in cases involving States that are the legacy of a split-up (e.g., Czech Republic or Serbia) of the parent State that had been a treaty partner, as well as newly consolidated States (e.g., Yugoslavia after World War I) that succeed one of the predecessor States that had been an original treaty partner, particularly when both current States concerned can demonstrate (usually via an exchange of diplomatic notes) that they regard the treaty as being in effect. Furthermore, a U.S. appellate court found no objection to extradition where an individual charged with economic crimes in Hong Kong was to be transferred, in effect, to the People’s Republic of China (PRC) after Hong Kong was restored to the PRC on July 1, 1997, following the U.K.’s 99-year territorial lease.

Tenth, extradition can operate even during an international armed conflict between the parties to that conflict, and notwithstanding generally applicable restrictions to transfer a protected person, where such transfer is “in pursuance

---

261 ABBELL, supra n.69, at 3-3 & n.2; e.g., Shehadeh, et al. v. Commissioner of Prisons, Jerusalem [1947] ANN. DIG. 42 (No. 16) (Sup. Ct. Palestine) (Lebanon’s change from a Mandate to an independent Republic since its execution of an extradition agreement was no defense to an extradition request, given that Lebanon’s international obligations remained intact).

262 ABBELL, supra n.69, at 3-4 & n.1; e.g., Platko, 213 F. Supp.2d 1229 (upholding a decision to deny habeas relief for Jaroslava Lorie Kastnerova from a decision that she should be extradited to the Czech Republic to face fraud charges, despite the fact that the applicable extradition treaty was the one concluded in July 1925 between the U.S. and Czechoslovakia, where evidence existed that the U.S. and the Czech Republic both considered that treaty to be in effect).

263 See, e.g., Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954) (treating Yugoslavia as the successor-in-interest to Serbia with which the U.S. had entered into an extradition treaty in 1901, given that the U.S. and Yugoslavia, which had no direct extradition treaty between them, acted in such a manner to suggest their acceptance of the U.S.-Serbian treaty’s continuing effect).

264 The Court ruled that despite the fact that the fugitive defendant could not be tried and punished by the British Crown Colony before the reversion date, “the [U.S.] Senate was well aware of the reversion when it approved a supplementary [extradition] treaty with the United Kingdom in 1986 . . .; “[t]he [U.S.] President . . . recently executed a new treaty with the incoming government of Hong Kong [the HKSAR], containing the same guarantees . . . [as] the earlier treaties;” and “governments of [U.S.] treaty partners often change, sometimes by ballot, sometimes by revolution or other means, and the possibility or even certainty of such change does not itself excuse compliance with the terms of the agreement embodied in the treaties between the countries.” United States v. Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997). See also Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 993-94 (S.D. Fla. 1990) (no denial of extradition for kidnapping offense for which maximum penalty was life imprisonment in Hong Kong even though after it reverted to China during his prison term and Chinese law allows for death penalty in cases of kidnapping offenses).
of [an] extradition treaty] concluded before the outbreak of hostilities” with respect to “offences against ordinary criminal law.”

Finally, international human rights courts impose few restrictions on the manner in which States carry out their extraditions. Those tribunals neither mandate the circumstances under which extraditions may be authorized nor the procedures that must be followed. Rather, they essentially insist only that the concerned States freely cooperate with one another and that some underlying legal basis exist for the extradition order.

f. Developments
In recent years, substantial progress has been made to harmonize and improve the extradition process, as well as build greater reliance on its use. These critical developments, which “have helped enhance effectiveness, minimize arbitrariness, and safeguard essential human rights protection,” can be loosely categorized as follows: (i) the introduction of new or revised bilateral or multilateral treaties that address extradition; (ii) the streamlining of domestic legislation or constitutional amendments related to extradition; (iii) the liberalization of host State decisionmaking with respect to extradition requests; (iv) the advent of more effective regional extradition cooperation; and (v) the increase in the usage of extradition worldwide. Each of these will now be examined in turn.

---

267 BANTEKAS & NASH, supra n.10, at 192. With respect to the U.S., since 1970, “U.S. negotiators have sought to maximize the number of offences for which a treaty partner will extradite; to narrow as much as possible the ‘political offense’ exception, especially in negotiations with close allies; to accommodate the extraterritorial reach of U.S. and foreign criminal laws and jurisdictional notions; to persuade foreign governments to extradite their nationals, or else ensure vicarious prosecution at the request of the U.S. government; to reconcile U.S. capital punishment laws with the insistence of foreign governments that fugitives delivered by them not be executed; and, more generally, to clear up confusions and needless obstacles that have hobbled extradition relations under the older treaties.” NADELMANN, COPS, supra n.13, at 410.
268 DUFFY, supra n.35, at 108.
New or Revised Treaties. In recent years, a number of States have entered into bilateral extradition treaties. In 2006, African neighbors Uganda and Rwanda signed an extradition treaty (ratified in 2007); this was particularly significant because Uganda was the subject of an ICC investigation and Rwanda was the locus of genocide, and each had fugitives within its borders whom had fled from the other State.\textsuperscript{269} In addition, over the past decade, the People’s Republic of China (PRC) has begun to negotiate extradition treaties with Western States, beginning with Spain, Portugal, and France;\textsuperscript{270} and the Republic of South Africa has adopted a more proactive approach to extradition treaties.\textsuperscript{271} Plus, in July 2003, the U.S. and the EU entered into an extradition treaty – an unprecedented law enforcement cooperation treaty (along with an MLAT) between those two entities – intended to guide the revision of bilateral extradition treaties between the U.S. and individual EU members in the years ahead.\textsuperscript{272} Finally, in February 2012, the Russian Justice Minister and U.S. Attorney General met to discuss negotiating a first-ever Russia-U.S. extradition treaty.\textsuperscript{273}

In addition, some States, notably the U.S., have made a concerted effort to modernize their bilateral extradition treaties by streamlining procedures, enhancing efficiency, and facilitating transfers. Examples include: (i) in 2003, the U.S. and the U.K. revised their extradition treaty, replacing the 1972 baseline


\textsuperscript{271} As of August 2011, the RSA had ratified 13 bilateral extradition treaties, another two had been signed but not yet ratified, and seven more were in active negotiations. RSA, Department of Justice and Constitutional Development, “Extradition and Mutual Legal Assistance in Criminal Matters Treaties,” available at http://www.justice.gov.za/docs/emlatreaties.htm (last visited on Jan. 13, 2012) (data up-to-date as of Aug. 4, 2011).

\textsuperscript{272} Agreement on Extradition Between the European Union and the United States, Treaty Doc. 109-14, June 25, 2003, available at http://www.foreign.senate.gov/treaties/109-14 (last visited on Sept. 28, 2013). The EU-U.S. Extradition Agreement can be more accurately characterized as a “master-model agreement” or “framework agreement” that “removes the legislative and certification requirements and simplifies the documentation in order to expedite the extradition process.” Bassioumi, U.S. EXTRACTION, supra n.2, at 32.

treaty, as supplemented in 1985, that, *inter alia*, lowered the evidentiary standard required by U.S. extradition requests; 274 redefined more flexibly extraditable offenses, and eliminated any time bar; 275 (ii) in 1996, the U.S. executed virtually identical, updated extradition treaties with six former British colonies that now comprise the Organization of Eastern Caribbean States (OECS) – Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines – that had previously operated under U.S.-U.K. extradition treaties, particularly in order to improve cooperation in international narcotics-related law enforcement; 276 and (iii) in 2001 the U.S. executed extradition treaties with Belize, Paraguay, Sri Lanka, and South Africa that included, for instance, a provision allowing for the unrestricted extradition of nationals and a broader definition of dual criminality that no longer relied on itemized crimes in the treaty but on any crimes that were punishable by at least a one-year prison sentence in both States. 277

Furthermore, on the multilateral front, over the past 20 years States have executed new treaties or revised existing ones (whether through amendments or protocols) to promote or facilitate extradition, or to pursue ratification of signed treaties, sometimes with the encouragement of the U.N. Security Council. 278 Examples of such developments include the amended European Convention on Extradition (1996), 279 the Protocol amending the European

274 The resulting differential standard became the source of controversy in the U.K. Not only were the evidentiary requirements no longer reciprocal between the two States, but also the U.S. could now seek preventive detention abroad without first establishing sufficient evidence to justify a criminal charge in the U.S. This situation occurred, for example, in the case of Lofti Raissi, an Algerian national suspected of involvement in training the pilots from the September 11, 2001, attacks on the U.S.; he was held by U.K. authorities at the request of the U.S. but then was released after five months when the U.S. proved unable to muster the evidence necessary to support an extradition request. *Duffy*, *supra* n.35, at 135 & n.317.

275 Id. at 133 n.305; Bruce Zagaris, *Senate Foreign Relations Committee Holds Hearings on Four Treaties*, 22 IELR 38 (2006).


279 Conv. Drawn up on the Basis of Article K.3 of the Treaty on European Union, *supra* n.228. Under this amended Convention, States not party to the 1957 Convention became eligible to join, and the definition of an extraditable offense was liberalized to entail merely imprisonment of at
Convention on the Suppression of Terrorism (2003), and the Additional Protocol to the SAARC Regional Convention on Combating Terrorism (2004). States have also sought to foster extradition through non-extradition multilateral instruments; for example, even as far back as 1988, the U.N. Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances called upon Parties to “expedite extradition procedures” and to “simplify evidentiary requirements” related to extraditions.

**Streamlined or More Permissive Legislative or Constitutional Text.** In recent years, a number of States have sought to reform their domestic legislation or constitutional provisions governing extradition in order to streamline the process and allow for greater international cooperation in bringing fugitives to justice. Some prominent examples include:

- The U.K. revamped its Extradition Act (2003), which, *inter alia*, established a two-tiered system for evaluating requests and set up a simplified appeals process;
- Israel amended its Penal Act to close a domestic extradition law loophole, conspicuously exposed in a 1999 Supreme Court decision, that had permitted non-resident Israeli citizens to avoid extradition;

---

282 U.N. Conv. Against Drug Trafficking, *supra* n.91, art. 6(7).
284 In 1999, by a 3-2 decision, the Israeli Supreme Court reversed a lower court ruling that had granted a U.S. request for the extradition of an American teenager named Samuel Sheinbein for co-committing a violent murder in the United States. The case turned on the issue of Sheinbein’s citizenship. While he was a resident of Maryland, he was nevertheless deemed to have Israeli citizenship from birth through his Israeli father. The Supreme Court found that Israel’s 1978
• The Netherlands revised its domestic extradition law in 1988 to abandon its long-held prohibition against extraditing nationals and to insist, instead, that any such extradited nationals be returned to the Netherlands for the service of their sentence; 285

• El Salvador enacted a constitutional amendment in July 2000 to allow the extradition of its nationals; 286 and

• The Australian Attorney-General issued a Department Review paper in 2005 expressing the need for domestic legal reform to ensure that “Australia can extradite to and from a large number of countries and can grant extradition for a wider range of offences. The process must also be more responsive and streamlined in order to prevent lengthy delays and offer appropriate safeguards.” 287

Liberalized Host State Decision-Making. We also have recently witnessed the extradition of certain kinds of individuals who traditionally had been effectively off-limits from such international law enforcement cooperation. For example, it has been rare for former presidents or heads of State to be the subject of extraditions, primarily due to political considerations, insufficient evidence,
statutes of limitations, and immunity laws. Yet in October 2006, Mexico authorized the extradition to Guatemala of the latter’s former president Alfonso Portillo (2000-04) on embezzlement charges (although he was not actually transferred for two more years); and in September 2007, the Chilean Supreme Court ultimately decided to extradite former Peruvian President Alberto Fujimori (1990-2000) back to Peru to face corruption charges.

Another type of individual that generally has not been susceptible to extradition is a State’s own military officer; but in March 2006, Uruguay authorized the extradition to Chile of three Uruguayan military officers charged with participation in an assassination of a Chilean chemist who was prepared to testify at trial involving the homicide of a former Chilean diplomat. In addition, there has been a noticeable rise in the incidence of extraditions for individuals charged with transnational fraud, including in 2004 Spain’s extradition to Mexico of Jesus Rodolfo Guajardo Cerna and the U.S. extradition to the Czech Republic of Jaroslava Lorie Kastnerova.

---


289 Bruce Zagaris, Mexico Authorizes Extradition of Former Guatemalan President for Embezzlement, 23 IELR 19 (2007). Notably, however, when former President Portillo was put on trial, he was exonerated of all charges in May 2011 due to insufficient evidence and freed.


291 The historically low incidence of military officer extraditions is examined in Chapter 6.b infra.

292 Bruce Zagaris, Uruguay to Extradite Three Military Officials to Chile, 22 IELR 228, 228-29 (2006) (the officers were believed to be involved in the assassination of Chilean chemist Eugenio Berrios in the 1990s; Berrios had been taken from Chile in 1991 to avoid his providing testimony in the trial for the 1976 homicide of former diplomat Orlando Letelier).


294 Kastnerova v. United States, 365 F.3d 980 (11th Cir. 2004) (upholding a lower court decision denying a habeas petition to the Czech bodybuilder defendant).
Furthermore, within the past several years, some States have authorized extraditions that to date had been unprecedented under their respective domestic practice. Examples include: (i) in May 2007 the U.K. transferred its first individual – Syed Hashmi, a/k/a “Fahad” – on terrorism-related charges (namely, material support to a foreign terrorist organization, al-Qaeda) to the U.S.;\(^{295}\) (ii) in October 2005, Pakistan extradited for the first time Taliban fugitives to Afghanistan – a total of 14 including Taliban spokesmen Abdul Latif Hakimi – but only after repeated complaints by Afghanistan that Taliban guerrillas were using Pakistan as a staging ground for attacks;\(^{296}\) (iii) in January 2007, newly installed Mexican President Felipe Calderón authorized the extradition for the first time of top-level drug traffickers to the U.S., which was all the more remarkable because 15 of them were secretly delivered at once;\(^{297}\) and (iv) in April 2010, a Swiss court for the first time approved an extradition request arising out of tax evasion charges.\(^{298}\)

Other noteworthy cases that signal a greater tendency on the part of States to extradite despite competing national interests include the following: (i) while relatively few Colombians were extradited to the U.S. in the 1990s, under President Uribe’s tenure from 2002 until 2009, over 800 defendants were extradited to the U.S., including a record 208 in 2008 alone, mainly on drug trafficking charges, including heads of drug cartels such as Cali cartel leaders Miguel and Gilberto Rodriguez Orejuela as well as Diego Montoya and Luis Hernandez Gomez Bustamante;\(^{299}\) (ii) in November 2003, Mexico extradited to the U.S. David A. Garcia who had been charged with the homicide of a California state police officer; this transfer occurred without any assurances by the U.S. prosecutors that they would not seek the death penalty or life imprisonment.

\(^{296}\)Bruce Zagaris, Pakistan Extradites Pakistan Fugitives to Afghanistan, 22 IELR 6, 6-7 (2006).
\(^{297}\)Rodrigo Labardini, Mexico Extradites Fugitives to U.S. in ’Historic Delivery,’ 23 IELR 119 (2007) (noting by contrast that Mexico had extradited a total of only eight fugitives from 1978-1994, and only 13 on average per year from 1996-2000).
\(^{298}\)Bruce Zagaris, Swiss Highest Court Affirms Extradition to Germany for Tax Evasion, 26 IELR 277 (2010) (discussing extradition decision related to a German national indicted with evading value-added taxes (VAT) of the state of Hamburg).
even though the Mexican judiciary had shown a reluctance to authorize extraditions without such assurances;\textsuperscript{300} and (iii) in February 2007, Australia extradited Hew Raymond Griffiths to the U.S. on software piracy charges even though he was a British national and his crime had been committed entirely on Australian territory.\textsuperscript{301}

**Enhanced Regional Cooperation.** Perhaps the single most significant development over the past decade in terms of improved regional coordination on extradition and an increase in the rate of extraditions was the establishment of the European Arrest Warrant (EAW) system. Based on a binding Framework Decision of June 13, 2002 – authorized by EU ministers without vote or input from individual State parliaments and that entered into force on January 1, 2004\textsuperscript{302} – the EAW system dramatically altered the way in which extraditions are processed in Europe by effectively disregarding national borders and treating extradition requests on the basis of mutual recognition.\textsuperscript{303} The EAW system was designed to speed up and simplify the arrest and extradition process between fellow EU member States by making the procedures more flexible and uniform and by removing administrative and political functions, leaving warrants to be issued strictly by a competent judicial authority within each State.\textsuperscript{304} By April 2005 all 25 EU member States had passed domestic implementing legislation for the EAW.\textsuperscript{305}

Under this reformed system, extraditable offenses have been defined more broadly, the specialty principle and the extradition of nationals have been eliminated as grounds for denying a request, the vast majority of offenses are no longer subject to the dual criminality requirement (discussed in Chapter 5.a.ii


\textsuperscript{302} Framework Decision on the European Arrest Warrant, *supra* n.116.


\textsuperscript{304} BANTEKAS & NASH, *supra* n.10, at 195-200.

\textsuperscript{305} Mackarel, *supra* n.303, at 37.
and the extent to which States can block an extradition based on the political offense exclusion (discussed in Chapter 5.a.iv infra) has been minimized. In addition, documentary and evidentiary requirements have been pared down and prescribed timetables have been imposed for arresting and turning over requested fugitives: 60 days (with provision for up to an additional 30 days for non-consenting persons and 10 days for consenting ones).

Information is processed through INTERPOL or by SIRENE (the Supplementary Information Request at the National Entity), a database managed by an office in each member State to process and disseminate additional information on “alerts” regarding wanted persons. A European Commission study revealed in April 2011 that the average length of time it took to execute a warrant and extradite a person under the EAW system between 2005 and 2008 was 48 days (versus one year beforehand) for non-consenting fugitives and 14-17 days for consenting ones. Notably, the total number of extraditions made pursuant to arrest warrants executed in Europe between 2005 and 2009 was almost 12,000 (out of a total of 55,000 sought). Not surprisingly, as a new cooperative vehicle, the EAW has attracted some early implementation criticism, particularly with regard to the issuance of warrants for minor crimes and improper execution.

---

306 For 32 serious offenses (punishable for 3 years or more), extradition under the EAW does not require verification of double criminality. Michael Plachta, *Polish Constitutional Court Holds European Arrest Warrant Unconstitutional*, 21 IELR 351, 358 (2005).
311 See McCloskey, EAW, *supra* n.308.
312 *Id.*
In addition, the EAW served as the inspiration and model for two other regional initiatives to streamline extradition procedures. In December 2005, the Nordic States plus two non-EU member States entered into their own arrest warrant system, and in July 2008, 15 Caribbean Community (CARICOM) member States executed an Arrest Warrant Treaty that expressly seeks to reduce costs and delays in processing extraditions between them while improving the effectiveness of its law enforcement efforts targeted against transnational criminals. Although the CARICOM arrest warrant system has yet to come into force, it nevertheless represents an important development toward greater cooperation and harmonization on extradition matters.

**Increased Global Usage.** From an historical perspective, the frequency of extraditions from the U.S. has grown exponentially since World War II. From 1945 to 1960, the annual average was about nine, rising up to 40 total per year in the 1960s, to 100 annually by the late 1970s, and by 1995, more than 200 persons per annum were extradited in or out of the U.S. The watershed decade was the 1970s when a few key developments converged to spur a substantial increase in the extradition rate. To begin, there was considerable growth in the illegal transborder movement of people, goods, services, and money, due to improvements particularly in the transportation,
communications, and information processing industries.\textsuperscript{318} This, in turn, led to greater opportunities for criminals to seek refuge in other countries and to an increased willingness by States to cooperate with each other on law enforcement, including in the area of narcotics that had become a significant social problem in the U.S. and elsewhere in the West.\textsuperscript{319}

In addition, the U.S. entered into updated extradition treaties that significantly facilitated the prospect of extradition by, among other things, extending its extraterritorial jurisdiction over crimes, expanding the number and type of extraditable offenses, and clarifying ambiguous provisions that had inhibited extradition.\textsuperscript{320} Moreover, in 1979, the U.S. shifted primacy for extradition implementation from the Department of State to the Department of Justice, which with an institutional mission focused on law enforcement, elevated extradition as a governmental priority.\textsuperscript{321} Finally, by dispensing with the need for private representation of fugitives, and relying instead on government attorneys to perform that service, the cost incurred no longer operated as a deterrent.\textsuperscript{322}

Other States have experienced similar jumps in the rate with which they request and process extraditions. For example, the number of extraditions requested of the U.K. in 1963-65 ranged from 3-8 per year and only two annually during that period by the U.K. By the early 1970s (1971-73), the U.K. received 17-29 extradition requests per year and issued 11-14 annually of its own. By the late 1990s (1997-99), the U.K. was receiving 101-107 extradition requests per annum (transferring 38-45 per year of those) while requesting extradition of 44-64 individuals annually. Between 2004 and 2010, the U.K. extradited a total of 2,795 individuals under the EAW framework and another 24 to non-EAW States, while receiving 549 individuals altogether from other EAW States and an

\textsuperscript{318} ABBELL, supra n.69, at 1-12; BANTEKS & NASH, supra n.10, at 179.
\textsuperscript{319} ABBELL, supra n.69, at 1-12 to 1-13.
\textsuperscript{320} Id. at 1-13 to 1-16.
\textsuperscript{321} Id. at 1-17 to 1-18; NADELMANN, COPS, supra n.13, at 402 (viewing this as the single most important reason for an increase in extraditions).
\textsuperscript{322} ABBELL, supra n.69, at 1-18.
additional 20 from non-EAW States. In addition, while Colombia extradited few wanted persons to the U.S., since 2002, when President Álvaro Uribe assumed office, hundreds have been extradited.

* * * * *

This chapter has focused on extradition: what it is, how it operates, why it is valued, and where it appears to be headed. While extradition offers the international community an important and proven cooperative means to deter and punish crime, and while it possesses certain flexible features and continues to evolve as a mechanism, we now turn in the next three chapters to the various impediments that at times thwart or discourage extradition and prompt States to pursue other methods for securing the custody of a fugitive abroad.

---

CHAPTER 5

IMPEDEMENTS I: LEGAL STANDARDS AND PROCEDURES

This and the next two chapters comprehensively explore the rich panoply of limitations and impediments to extradition, or what one legal commentator refers to as the “field of defences, exceptions and exemptions.” Despite extradition’s adaptability and ever-improving effectiveness and efficiency, this cooperative law enforcement modality remains riddled with “formidable barriers” that impede its overall potential for success and its application in a variety of circumstances. The use of the term “impediments” is not intended to be pejorative, but to be viewed neutrally as those grounds relied upon for denying extradition, as many of these barriers actually reflect important societal values or afford significant protections to fugitives. In this chapter, the focus will be on the general legal standards and procedures governing extradition, including those related to the offense itself. In Chapter 6 the focus will shift to extradition bars based on individual status and circumstances, and Chapter 7 will concentrate on State relations and sensitivities that militate against extradition.

1 It has been observed that, despite all the significant change in extradition law and practice over the past century, three trends remain constant from debates held in this field dating to 1880: “the appropriateness of the nationality defence,” “the application of the ‘rule’ of non-inquiry,” and a still sharp divide on the “political offenses exception.” Nicholas Kasirer, Defenses, Exceptions and Exemptions to Extradition, 62 INT’L REV. PENAL L. 91, 91-92 (1991).
4 Such impediments can and do occur even when a valid extradition treaty exists with a friendly State. Philip B. Heymann & Ian Heath Gershengorn, Pursuing Justice, Respecting the Law, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW: DOCUMENTATION OF AN INTERNATIONAL WORKSHOP IN FREIBURG, MAY 1991, at 42 (Albin Eser & Otto Lagodny eds. 1992). However, where a court determines that extradition must not proceed on account of certain charges, that determination does not prevent the fugitive from being extradited on other non-barred grounds. See, e.g., Barapind v. Enomoto, 400 F.3d 744, 748-49 (9th Cir. 2005) (allowing extradition even though some charges disallowed as they were regarded as political offenses).
There are at least three purposes for cataloguing these constraints. First, it is essential to appreciate the vast variety of ways in which extraditions can be undermined, affording States a veritable potpourri of ready bases or rationalizations, as the case may be, for refusing requests. Second, this exercise underscores why alternatives to extradition have increasingly emerged on the scene. Third, the process of identifying and evaluating each of these impediments is tantamount in some sense to a lawfulness analysis for extradition itself.

This chapter examines four broad types of impediments that fall within the bailiwick of legal standards and procedures, namely: (i) the inherent nature and scope of the offense (e.g., dual criminality, prescription, and specified offense exclusions), (ii) evidentiary standards, (iii) procedural requirements (including filing and timing issues), and (iv) government processing. A fifth, catch-all type arguably exists in which States may choose not to extradite out of a general notion of fairness or due process, sometimes justified under the notion of “interests of justice” or on the ground of ensuring compliance with the public order ("ordre public"). In the vast majority of instances where States deny

---

5 Over this and the next two chapters, while a reference to the term "State" most often will signify a government’s executive branch, it also may denote its legislature or judiciary.
6 It should be stressed that extradition denials may have significant diplomatic consequences. For example, in July 2007, the Russian prosecutor general formally notified British prosecutors that Russia would not extradite Andrei K. Lugovoi, former KGB officer sought by the U.K. in connection with the murder of former KGB officer Alexander Litvinenko. In response, Britain expelled four mid-ranking Russian diplomatic officials unconnected to the Litvinenko case and stated it would temporarily cease talks aimed at streamlining visa applications for Russian citizens. A few days later, Russia retaliated by expelling four British diplomats and announced plans to tighten visa requirements on British government officials’ travel to Russia and to suspend counterterrorism cooperation. Andrew E. Kramer, "Russia Orders 4 British Diplomats Home in Poisoning Case,” *N.Y. Times*, July 20, 2007, at A10.
7 See Canada Extradition Act, art. 44(1)(a) (Canada may refuse extradition where it "would be unjust or oppressive having regard to all the relevant circumstances").
8 See Alan Travis, “Home Secretary Theresa May Overhauls Extradition Laws,” *The Guardian*, Feb. 6, 2013, available at [http://www.theguardian.com/politics/2013/feb/06/home-secretary-overhauls-extradition-laws](http://www.theguardian.com/politics/2013/feb/06/home-secretary-overhauls-extradition-laws) (last visited on Nov. 29, 2013) (“[U.K. Home Secretary Theresa] May has met the demands of extradition law reformers by tabling amendments to introduce a 'forum bar', which will allow British courts to block an extradition request if they believe it is in the interests of justice for the defendant to stand trial in the UK.”) (emphasis supplied).
9 See Germany, *Gesetz über den internationalen Rechtsverkehr in Strafsachen* [IRG or Statute on International Legal Cooperation in Criminal Matters], ¶ 73, available at [http://shvv.juris.de/englisch_irlg/index.html](http://shvv.juris.de/englisch_irlg/index.html) (last visited on Nov. 29, 2013) (“Co-operation in legal matters is unlawful if it were in contradiction to fundamental principles of the German legal order.”).
extradition in reliance on such language or logic, the actual basis is reasonably captured by one of the other grounds described in this Part, although occasionally there is a legitimate outlier.10

a. Inherent Nature and Scope of Offense

This section first examines the notion and significance of an extraditable offense and its close relative, the concept of dual (or double) criminality.11 That analysis will be followed by a discussion of statutes of limitations and discretionary time bars on the underlying crimes and by an outline of three specific types of exclusions commonly referenced in extradition treaties: those related to political, military, and fiscal offenses.

i. Extraditable Offense

To qualify as an extraditable offense, a State must both have criminalized the conduct at issue and recognize it as extradition-worthy. For conduct to be criminalized, it must appear in a State’s, or a sub-national entity’s,12 criminal code or be designated elsewhere as a criminal offense within the body of its domestic laws.13 This requirement derives in essence from the Latin maxim nulla poena sine lege14 – i.e., there can be no punishment absent an applicable

---

10 For example, the Federal Supreme Court of Brazil rejected an extradition request by Hong Kong on the grounds that the return of individuals immediately before the agreed date on which sovereignty transferred from the U.K. to the PRC (July 1, 1997) would subject them to a stiffer Chinese-based criminal justice system than warranted (i.e., the so-called “Hong Kong defense”). John Dugard & Christine van den Wyngaert, Reconciling Extradition with Human Rights, 92 AJIL 187, 194 (1998).
12 In federal systems, even if federal law does not criminalize certain conduct, state or provincial law may do so, and that is enough to meet the extraditable offense standard. E.g., Scott v. State of Israel, Sup. Ct. sitting as a Ct. of Crim. App., Isr., Jan. 29, 1970, reprinted in 48 ILR 188 (1975).
14 Boister, supra n.3, at 297 & n.57; ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 74 (2d ed. 2010); IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 20 (2d ed. 2000).
criminal law. It is not enough that the conduct has been criminalized only by another State (or other sub-national entities), or that it constitutes a civil wrong or contractual breach. There may also be limits on whether certain conduct can be properly criminalized; for example, many State constitutions or criminal codes prohibit the use of *ex post facto* legislation that would retroactively criminalize conduct.

The second prong requires that the criminal conduct at issue be regarded as warranting extradition. International law affords States maximum latitude in determining which crimes to designate as extraditable or as non-extraditable. Given the time and expense associated with extradition, the vast majority of States do not find it worthwhile to recognize crimes as extraditable when they are considered minor offenses (*i.e.*, those punishable by a *de minimis* prison sentence, typically under 12 months). In addition, an individual’s violation of the terms of parole, bail, or a court order, or his escape from prison, are generally considered non-extraditable offenses.

Furthermore, under some extradition statutes and treaties, where the lion’s share of the conduct constituting the extraditable offense occurs *within its own territory*, a host State

---


16 STANBROOK & STANBROOK, supra n.14, at 22.

17 E.g., Const. of the United States, Sept. 17, 1787, art. I, § 10, as amended, available at http://www.archives.gov/exhibits/charters/constitution_transcript.html (last visited on Nov. 3, 2013) (“No State shall . . . pass any . . . ex post facto Law”). For a State Supreme Court opinion regarding whether this principle constitutes a rule of customary international law, see Attorney General of the Government of Israel v. Eichmann, Isr. Dist. Ct. of Jerusalem, 1961, reprinted in 36 ILR 5, aff’d sub nom., Eichmann v. Attorney-General, Sup. Ct., Isr., May 29, 1962, reprinted in 36 ILR 277, 281 (E. Lauterpacht ed. 1968) (observing that this principle “in so far as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law.”). The Israeli Supreme Court went even farther, however, noting that *ex post facto* laws can arguably be validated where, for example, the statutory crimes are regarded “as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility.” Id. at 287.

18 SIR ROBERT JENNINGS & SIR ARTHUR WATTS, EDS., 1 OPPENHEIM’S INTERNATIONAL LAW 957 (9th ed. 1992); STANBROOK & STANBROOK, supra n.14, at 8; Valerie Epps, The Development of the Conceptual Framework Supporting International Extradition, 25 LOY. L.A. INT’L & COMP. L. REV. 369, 374 (2003). There is less consensus, but mounting pressure, with respect to granting extradition in instances where there are multiple offenses each of which individually fall short of the requisite penalty threshold for extradition but where, in combination, they exceed the requisite threshold. Boister, supra n.3, at 299.

19 BLAKESLEY, supra n.13, at 217; *e.g.*, United States v. Antonakes, 255 F.3d 714, 717-18 (9th Cir. 2001) (German government denied U.S. extradition request for a convicted individual on a charge of failing to appear at his sentencing hearing).
may treat the offense in question as non-extraditable. For example, until at least 1975, Sweden did not regard offenses that occurred within its national borders as extraditable.

Some additional examples of States’ failure to treat certain conduct as extraditable offenses may be illustrative. The U.S. did not recognize parental abductions of their own children as an extraditable offense until 1998. The U.K. did not treat as an extraditable crime until September 1988 acts of torture that took place outside its territory. In 2005, Japan released former U.S. chess champion Bobby Fischer from custody, despite an American extradition request, partially on the grounds that the trade sanctions violation for which the U.S. sought his custody did not qualify in Japan as an extraditable crime. In 1952, a

20 See, e.g., U.N. Model Treaty on Extradition, Dec. 14, 1991, art. 4(f), UNGA Res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A), at 212, U.N. Doc. A/45/49 (1990), reprinted in 30 ILM 1407, available at http://www.un.org/documents/ga/res/45/a45r116.htm (last visited on Nov. 10, 2013) [hereinafter U.N. Model Extradition Treaty] (citing as an optional ground for refusing extradition where “the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that State.”). This ground tends to be found in older extradition treaties or domestic statutes, and sometimes further requires that the locus delicti must have been pursuing State territory. Satyadeva Bedi, Extradition in International Law and Practice 175-78 (1968) (citing by way example the U.S.-RSA Extradition Treaty, Dec. 18, 1947, art. 1, 2 U.S.T. 884); República de Panamá, por la cual se Aprueba el Código Penal, Nov. 17, 1922, art. 11, reprinted in Gaceta Oficial, Número 4049, Dec. 8, 1922, available at http://docs.panama.justica.com/federales/leyes/6-de-1922-dec-8-1922.pdf (last visited on Nov. 26, 2013) (Spanish text)). It is also possible that a national court may find a particular offense non-extraditable absent such prohibitory legislation. In such instances, extradition may be denied on the grounds that it simply would be unjust to extradite under such circumstances. Clive Nicholls, et al., eds., The Law of Extradition and Mutual Assistance 106 (2d ed. 2007); e.g., Bruce Zagaris, Trinidadian Court Denies U.S. Extradition on Piacco Airport Case, 28 IELR 22, 22-23 (2012) (denial decision based on judgment that extradition to the U.S. would be “unjust, oppressive, and unlawful” as the appropriate forum to hear the claims was Trinidad & Tobago (T&T), in part because that is where the alleged crimes were committed and T&T was most affected by the underlying actions).

21 See Terry Richard Kane, Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold, 12 YALE J. INT’L L. 294, 333-34 (1987) (describing how Sweden rejected an extradition request from the Federal Republic of Germany (FRG) in 1975 for the surviving members of the Baader-Meinhoff Gang, a West German-based terrorist organization, after their lethal attack on the West German Embassy in Stockholm on the basis that the offense was non-extraditable).


24 Bruce Zagaris, Iceland Grants Bobby Fischer Citizenship and Japan Deports Him to Iceland, 21 IELR 186 (2005) (the U.S. trade sanctions were imposed because Fischer had accepted a $3.3 million fee to play an exhibition chess match in Yugoslavia in 1992; in March 2005, in lieu of his
Swiss court denied extradition to Italy of an Italian national for the crime of carrying arms without a license, which was not then recognized as an extraditable crime under Swiss statutory law.25

ii. Dual Criminality

The concept of dual (or double) criminality stands for the proposition that the pursuing and host States each must have criminalized the same or substantially similar conduct.26 In essence, dual criminality requires that the two States involved in an extradition find that the conduct at issue constitutes a criminal offense under their respective domestic laws. Although extraditable offenses and dual criminality are closely related concepts, and therefore at times are conflated or treated as interchangeable by courts and scholars, these concepts merit separate discussion because the former relates to the host State's own determination regarding which offenses are to be treated as extraditable under its domestic law27 while the latter focuses on the relationship of the two sets of laws to verify whether a proper identity can be established between them.

Accordingly, as reflected above, conduct may be regarded as criminal by both States, thereby satisfying the dual criminality requirement, but still not qualify as an extraditable offense to the extent, say, that it entails a de minimis punishment or involves a bail-jumping charge. At the same time, however, if the host State's law does not recognize certain conduct as unlawful (i.e., the crime is not extraditable), then if follows by logical necessity that dual criminality cannot

---

25 In re Nappi, Federal Tribunal, Switz., Jan. 23, 1952, reprinted in 19 ILR 375, 375 (1957) (the court did, however, grant extradition for the crime of robbery arising out of the same underlying facts).

26 Jennings & Watts, supra n.18, at 958 (noting at least “substantial similarity” between the offenses in both States); Stanbrook & Stanbrook, supra n.14, at 20; Boister, supra n.3, at 296. Of course, if the fugitive happens to flee to pursuing State territory and is arrested there, the dual criminality requirement no longer applies as extradition itself would become unnecessary. Boister, supra n.3, at 297.

27 This is true notwithstanding the fact that States sometimes agree in the context of a multilateral treaty to designate a certain act as an extraditable offense under their respective domestic laws. E.g., Conv. on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 10(1), reprinted in 37 ILM 1 (“Bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties”).
obtain. For example, in the celebrated case of Spain’s extradition request for General Auguste Pinochet, the U.K. House of Lords ruled that because “extraterritorial torture did not become a crime in the United Kingdom until . . . 29 September 1988 . . . all the alleged offences [of torture or murder or the conspiracy thereof] which did not occur in Spain were crimes for which [Pinochet] could not be extradited.”

Dual criminality is so fundamental to, and of such common usage in, extradition law that it is widely considered to be a rule of customary international law (CIL). As such, whether or not it appears in a particular treaty, States Parties are obligated to honor the principle as an implicit condition unless expressly waived. Under the conventional rule of dual criminality, to the extent that the two States’ laws themselves do not treat the conduct as essentially the equivalent crime – that is, the offense in the pursuing State is not treated on par with that in the host State as if the same conduct had been committed there – then the dual criminality requirement will not be met and extradition cannot proceed. Likewise, where the pursuing State’s law is deemed to be invalid, say, on account of its retroactive application, dual criminality would not be satisfied.

---

29 See Blakeley, supra n.13, at 224 (dual criminality “always required either by explicit provision or implicitly as part of extradition law in general”).
30 Stanbrook & Stanbrook, supra n.14, at 19-20; Duffy, supra n.11, at 136 & n.321.
33 Stanbrook & Stanbrook, supra n.14, at 20; Borelli, supra n.31, at 336.
34 Alternatively, and perhaps more dramatically, a conviction and sentence that was based on an extradition lacking dual criminality could be vacated. E.g., United States v. Anderson, 472 F.3d 662 (9th Cir. 2006).
35 See, e.g., Denmark (Collaboration with the Enemy) Case, Fed. Sup. Ct., Brazil, May 21, 1947, 4 Boletim da Sociedade Brasileira de Direito Internacional 128 (Jan.-June 1948), reprinted in 14 ANN. DIG. & REP. PUB. INT’L. L. CASES 146, 146-47 (No. 71) (H. Lauterpacht ed. 1951) [hereinafter Collaboration with the Enemy Case] (denying extradition request in part because Denmark’s treason law was enacted in June 1945 but was applied to offenses that occurred during German occupation before its enactment).
Traditionally, dual criminality was established by examining whether the extraditable offense at issue was set forth in a bilateral extradition treaty in “list” or “enumerated” form. Under this so-called “objective” approach to dual criminality, the determination would turn on the extent to which a one-to-one correspondence could be shown between the States’ laws with regard to the denomination and the specific elements of the offense. Where either a crime was not itemized or no such unity could be demonstrated, a State would be under no obligation to extradite.

Perhaps not surprisingly, that approach proved to be overly rigid and lost its appeal as definitions for the same crime sometimes diverged or proving a crime could hinge on even a single different element. In other cases, it might be unclear whether the nomenclature assigned to a given offense and the underlying conduct at issue were synonymous, and a host State would not necessarily be well-positioned to inquire into the substantive criminal law of the

36 See Michael Abbell, Extradition to and from the United States 3-7 to 3-8 (2001 & Supp. 2007) (in the U.S. until 1970 extradition crimes were defined in a list that grew from only two in the Jay Treaty of 1795 (murder and forgery, see n.21 in Chapter 4 supra) to more than 30 by 1970 (in, for example, the Treaty on Extradition, U.S.-N.Z., Jan. 12, 1970, T.I.A.S. 7035, 22 U.S.T. 1, available at http://newzealand.usembassy.gov/uploads/images/016y8MOyHWZLjTxaMpeQ/ExtraditionUSNZ.pdf (last visited on Oct. 1, 2013); e.g., Liansirisirprasert v. United States [1990] 2 All E.R. 866, 871 (P.C.), 1 A.C. 225 (discussing how the 1924 U.S.-Siam [now Thailand] Extradition Treaty did not contemplate extradition for narcotics offenses); United States v. Fiocconi, 462 F.2d 475 (2d Cir. 1972) (the U.S.-Italy Extradition Treaty of 1868, as amended, did not regard the conspiracy to import heroin as an extraditable offense).


39 See Stanbrook & Stanbrook, supra n.14, at 22 (“although equally abhorrent to and sometimes bearing the same name in both countries the offences may differ in one or more elements needed to prove them in each country”); In re Gerber, Apr. 11, 1957, Fed. Sup. Ct., FRG, reprinted in 24 ILR 493, 495 (H. Lauterpacht & E. Lauterpacht eds. 1961) (“It is generally recognized both in doctrine and in jurisprudence, that extradition is permissible in cases in which, according to German law, the breaking of the peace of a private home and causing damage to property are merely constituents of the offence of burglary, whereas according to Swiss law they are independent criminal offences”).

40 Stanbrook & Stanbrook, supra n.14, at 8.
pursuing State to confirm equivalency.\textsuperscript{41} In addition, as State criminal codes introduce new crimes or revise the definitions of existing ones, the bilateral extradition treaties could become obsolete, and keeping them current would entail frequent and onerous updating.\textsuperscript{42}

While the list system can still be found in some older bilateral extradition treaties, for the most part, beginning in the 1970s, States adopted a replacement methodology called the "no-list," "eliminative," or "minimum penalty" approach.\textsuperscript{43} This modern substitute eliminated the objective methodology, dispensing with a set of itemized offenses or the need for identical denomination of a crime, and introduced a dose of flexibility into the dual criminality calculus by assessing the general comparability of the underlying conduct.\textsuperscript{44} This new, "subjective" approach examines the character or gravamen of the offense to ensure that, labels and elements notwithstanding, the two States each had laws that criminalized equivalent conduct.\textsuperscript{45}

\textsuperscript{41} Banteke\& Nash, supra n.23, at 181.
\textsuperscript{42} Id.; Downing, supra n.38, at 576. For example, because until the early 1970s U.S. list-based extradition treaties did not include any reference to the crime of conspiracy to commit other extraditable offenses and to such inchoate crimes as aiding and abetting or attempt, Abbell, supra n.36, at 3-10 to 3-11, all pre-existing U.S. extradition treaties would need to be updated accordingly. See also Boister, supra n.3, at 298-99 & n.67 (noting the U.S. need to enter into a large number of bilateral extradition treaties to account for new or recently redefined crimes).

\textsuperscript{43} See Blakesley, supra n.13, at 212; Stanbrook & Stanbrook, supra n.14, at 8; Duffy, supra n.11, at 108 & n.187; Abbell, supra n.36, at 3-10. However, some earlier exceptions existed. E.g., Gallina v Fraser, 177 F. Supp. 856 (D. Conn. 1959) (extradited fugitive based on gravamen of offense, not on denomination of crime).

\textsuperscript{44} Duffy, supra n.11, at 108; see, e.g., United States v. Sensi, 879 F.2d 888, 893 (D.C. Cir. 1989) (mail fraud under U.K. and U.S. law was deemed close enough to satisfy dual criminality even though under U.K. law one must additionally show that an item was successfully stolen); In re Russell, 789 F.2d 801, 804 (9th Cir. 1986)(conspiracy under Australian and U.S. law regarded as analogous despite the fact that Australian law did not require an overt act); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986) (despite the fact that the Yugoslavian offense of "war crimes" has more elements than the U.S. offense of murder, dual criminality was deemed satisfied); Treaty on Extradition, U.S.-RSA, Sept. 16, 1999, art. 2(3), available at http://internationalextraditionblog.com/2011/06/10/south-africa-extradition-treaty-with-the-united-states/ (last visited on Dec. 15, 2011) [hereinafter U.S.-RSA Extradition Treaty] (offense shall be extraditable regardless of whether the two States "place the offence within the same category of offences or describe the offence by the same terminology"); Treaty on Extradition, U.S.-Jam., June 14, 1983, art. II(3)(a), available at http://internationalextraditionblog.com/2011/05/11/jamaica-extradition-treaty-with-the-united-states/ (last visited on Dec. 2, 2011) [hereinafter U.S.-Jam. Extradition Treaty] (noting irrelevancy for dual criminality purposes whether offense falls within same category of offences or is denominated by the same terminology).

\textsuperscript{45} Boister, supra n.3, at 297; Borell, supra n.31, at 337. See, e.g., Collins v. Loisel, 259 U.S. 309, 312 (1921) ("The law does not require 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
In general, this more functional approach additionally establishes a threshold based on the seriousness or gravity of a crime, most typically by assigning a minimum level of punishment a crime must yield.\textsuperscript{46} Most applicable treaties and municipal laws have set as a lower bound a crime that carries a one-year/12-month prison sentence;\textsuperscript{47} others have set the minimum sentence level for an extraditable crime higher\textsuperscript{48} or in certain circumstances dispensed with such a threshold altogether.\textsuperscript{49} (For those whose extradition has been requested to serve out the remainder of a sentence, rather than to face prosecution, a temporal threshold likewise often is set for the length of imprisonment left to be served, typically on the order of months.\textsuperscript{50}) Key advantages to this approach are

\textsuperscript{46} STANBROOK & STANBROOK, supra n.14, at B; ABBELL, supra n.36, at 3-12 to 3-13 & n.28.
\textsuperscript{48} E.g., Japan, Law of Extradition, art. 2(3) and (4), Law No. 68 of 1953, as amended, available at http://www.moi.go.jp/ENGLISH/information/loe-01.html (last visited on Nov. 3, 2013) (requiring offense for which extradition is requested to be punishable by death, by life imprisonment, or by a maximum term of three years or more by the laws of Japan and by the laws of the pursuing State); Inter-Am. Conv. on Extradition, Feb. 25, 1981, art. 3, OAS T.S. No. 60, reprinted in 20 ILM 723 (1981), available at http://www.oas.org/juridico/english/treaties/b-47.html (last visited on Dec. 7, 2011) [hereinafter Inter-Am. Extradition Conv.] (penalty must be at least 2 years).
\textsuperscript{49} Most U.S. extradition treaties since 1977 allow for the discretionary extradition of related offenses to one that is extraditable even if the related ones do not meet the minimum sentence term so long as all other requirements for extradition are met. ABBELL, supra n.36, at 3-13; e.g., U.S.-RSA Extradition Treaty, supra n.44, art. 2(7).
\textsuperscript{50} E.g., China Extradition Law, supra n.47, art. 7(2) (“period of sentence that remains to be served by the person sought is at least six months at the time when the request is made.”); Sweden, The Extradition for Criminal Offences Act (1957:668), Dec. 6, 1957, § 4(1), updated through 2003, available at http://www.regeringen.se/content/1/c6/03/79/09/f3917b5.pdf (last visited on Dec. 12, 2011) (“he may be extradited only if the sentence is deprivation of liberty for at least four months or other institutional custody for a corresponding period.”); EAW, supra n.47, art.
that extradition treaties do not require frequent updating, and they embrace a potentially far greater number of extraditable crimes within their fold.

Modern State practice with respect to dual criminality possesses other flexible features. Domestic law and international treaties may require that an inquiry be conducted to examine the partner State’s domestic law to verify dual criminality, but even in those cases, for the most part, a cursory confirmation is sufficient. In addition, States generally permit reformulated charges during proceedings so long as they also are extraditable crimes and are based on the same underlying facts. Furthermore, States often use multilateral treaty negotiations as an opportunity to bring broader international recognition for specified crimes, and when States cannot forge a workable international consensus on the meaning of a particular crime, such as “terrorism,” they rely

---

2(1) ("where a sentence has been passed or a detention order has been made, for sentences of at least four months"); Inter-Am. Extradition Conv., supra n.48, art. 3(3) (duration of sentence left to be served must be at least 6 months).

51 Boister, supra n.3, at 299.

52 Id.


54 See STANBROOK & STANBROOK, supra n.14, at 21 n.7 (such inquiry not required under the U.K. extradition law, except possibly to confirm that violation of the other State’s law calls for a minimum period of imprisonment).

55 Id. at 62; e.g., Ignacio Martinez-Arrieta, U.S. Seeks Singaporeans Extradition for Export Control Violations with Iran, 28 IELR 57, 58 (2012) (although the bilateral extradition treaty did not recognize export control violations as an extraditable offense, by reframing the charge as a “conspiracy to defraud,” the same result could obtain).


57 In 1938, the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism (CPPT), the first treaty that designated terrorism as an international offense. L. of N. Doc. C.546.M.383.1937.V., Nov. 16, 1937, reprinted in 19 League of Nations O.J. 23 (1938). Under the Convention, terrorism was defined broadly as “criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public, id., art. 1(2), but the Convention never entered into force. Since then, “efforts by the UN to draft a single broad definition of terrorism acceptable to all States, such as that found in the CPPT, have failed. See Theo Vogler, Perspectives on Extradition and Terrorism, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 391-92 (M. Cherif Bassiouoni ed. 1975) (no existing convention or internal law mentions “terrorism” as an extraditable offense in large part because of the difficulty distinguishing terrorist acts and political crimes (political delictum). But see EAW, supra n.47, art. 2(2) (treating “terrorism” as a punishable offense as defined by the host State’s law). A proposed convention that defines terrorism can be found at Int’l Law Ass’n (ILA), Draft Single Convention on the Legal Control of International Terrorism, ILA Report of the 59th Conference, art. 1(j), at 497-504 (1982). The late Judge and Professor Antonio Cassese concluded that, at least with respect to times of peace (versus armed conflict) “international law defines and regulates international terrorism” by the following five factors:
on surrogate violations of law undertaken incidentally, by terrorists or others, for which clear definitions exist, such as hostage taking, murder, arson, or sabotage.\textsuperscript{58}

Moreover, in recent years, some bilateral or multilateral extradition instruments have allowed for the concept's limited or discretionary application,\textsuperscript{59} which would allow a host State to grant extradition as a matter of discretion even if the offense charged by the pursuing State could not have been prosecutable under the host State’s own law.\textsuperscript{60} Furthermore, at least in the U.S. (a federal republic), even where dual criminality cannot be established through a federal law or law in the U.S. state of jurisdiction, dual criminality still can be satisfied if the conduct is generally recognized as criminal throughout the U.S. if found in a majority of state statutes.\textsuperscript{61}

Notwithstanding this flexibility, dual criminality can remain an impediment to extradition for one of three significant reasons. First, previously it was standard for States to insist on dual criminality effective on the date of the extradition request, but modern practice now generally imposes a stiffer requirement that

\textsuperscript{58} Jackson Nyomuya Maqguto, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror 58 (2005).

\textsuperscript{59} See EAW, supra n.47, art. 2(2) (no dual criminality required so long as offense is punishable by host State “by a custodial sentence or a detention order for a maximum period of at least three years,” as defined by the host State); UNCAC, supra n.56, art. 44(2) (dual criminality is not required if the host State’s domestic law allows for the granting of extradition for an offense recognized by a treaty even if the offense is not punishable under a State’s own law), id., art. 44(3) (allows for making related offenses extraditable even if not so based on the length of the maximum prison term assigned, so long as at least one offense covered under the treaty is extraditable); Blakesley, supra n.13, at 239 (recent U.S. extradition treaties specifically provide for discretion to extradite in the face of dual criminality requirement); CRYER, supra n.14, at 75 & n.25 (with respect to extradition among Nordic States, dual criminality is not required except regarding extradition of nationals and political offenses).

\textsuperscript{60} E.g., In re Assarsson, 687 F.2d 1157, 1163-64 (8th Cir. 1982).

\textsuperscript{61} See n.66 infra.
both States have their respective offenses on the books as of the date the criminal act was committed.62

Second, while States view many crimes through the same lens, some conduct does not satisfy dual criminality as the pursuing and host States may not classify the same or similar conduct as criminal. This may be a function of definitional conflicts over a particular type of conduct (such as terrorism),63 result from a decision by some States to address a particular social ill by reliance on administrative measures versus criminal punishment,64 arise out of a State’s interpretation of a domestic law at variance with its definition as set forth in a multilateral convention,65 or because some conduct defies a shared perception as to its degree of criminal seriousness, such as assisted suicide,66 euthanasia, abortion, homosexuality, adultery, marital rape, or computer hacking.67

62 See R. v Bow Street Metropolitan Magistrate and Others, ex parte Pinchot Ugarte (No. 3), 2 WLR 827, 837, 2 All E.R. 97 (1999) (finding that to satisfy dual criminality, the conduct at issue had to have been criminalized under both the law of Spain and the law of the U.K. as of the date committed, not merely on the date of the extradition request; since torture committed outside the U.K. was not regarded as a crime under U.K. law until Sept. 29, 1988, only conduct occurring after that date could be considered extraditable) (op. of Lord Browne-Wilkinson); Peters v. Egner, 888 F.2d 713 (10th Cir. 1989); Hackstetter v. State of Israel, Sup. Ct., Isr., reprinted in 51 ILR 331 (1972), 2 Isr. Y.B. HUM. RTGS. 344 (1972). But see Treaty on Extradition, Austl.-Ger., Apr. 14, 1987, art. 2(1), available at http://www.comlaw.gov.au/Details/F2004C00100 (last visited on Dec. 13, 2011) (laws must be effective at the time of the extradition request).

63 See supra n.57 (definition of terrorism); Vogler, supra n.57, at 391 (noting lack of a universally accepted definition of “terrorism”); e.g., Reuters, “Kuwait Has No Plans Now to Try Five Arab Hijackers,” N.Y. Times, Dec. 20, 1973, at 1; “Arabs Negotiate Over 5 Hijackers,” N.Y. Times, Dec. 23, 1973, at 3 (in December 1973, Arab terrorists attacked a Pan Am airliner at the Rome airport, killing 32 persons, then hijacked a Lufthansa plane and flew to Athens, where they demanded the release of two Palestinians imprisoned there, and finally flew to Kuwait. Despite extradition requests from Italy, Morocco, West Germany and the U.S., Kuwait refused to turn over the terrorists to any of the pursuing States, regarding the underlying acts of a “political character,” and instead transferred them to the Arab Liberation Movement).

64 See Boister, supra n.3, at 303 & n.97 (citing by way of example differences between the way neighboring Germany and the Netherlands treat possession and supply of marijuana, thwarting law enforcement cooperation between them on that score).

65 Robert Kolb, The Exercise of Criminal Jurisdiction over International Terrorists, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 270-71 (Andrea Bianchi ed. 2004); e.g., Royaume Belgique, The Act of June 16, 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and Their Additional Protocols I and II of 18 June 1977, reprinted in 0.J. at 17751-17755, Aug. 5, 1993, as amended by the Act of 10 February 1999 (allowing for prosecution of grave breaches of the Geneva Conventions in the Non-International Armed Conflict (NIAC) context despite the fact international treaties only recognize the prosecution of grave breaches in International Armed Conflicts (IACs)).

66 For example, in October 2007, a federal magistrate from a West Virginia court denied an Irish extradition request for George David Exoo pursuant to the 1983 U.S.-Ireland Extradition Treaty for assisted suicide on the ground that no such conduct was criminalized by federal law, by West Virginia state law, or by a majority of state jurisdictions (only 25 of 50; therefore, one short) to

201
Along these lines, a State may promulgate specialized criminal laws that simply lack counterparts elsewhere. For example, the U.S. over the years has had many requests for extradition rejected for such offenses as wire or mail fraud,68 perjury unconnected to a judicial proceeding,69 obstruction of justice,70 continuing criminal enterprise (CCE),71 “the use of a telephone to facilitate the commission of a drug felony,”72 “desertion of a naval vessel,”73 and “assault on a federal agent.”74 For example, in March 2008, the Appellate Commission of the U.K. House of Lords denied extradition to the U.S. of Ian Norris for conspiring to fix prices in the U.S. carbon industry, because the U.K. did not recognize participation in a cartel alone (absent aggravating factors) as a crime under either its statutory or common law.75

Third, in addition to establishing dual criminality with respect to the offense itself, the pursuing and host States also may need to mutually recognize the jurisdictional basis for the charged conduct, known as “special use” of dual

---

67 STANBROOK & STANBROOK, supra n.14, at 20 & n.3; BLAKESLEY, supra n.13, at 225. For example, Gary McKinnon, who was the subject of an extradition request from the U.K. to the U.S. for launching a series of cyber attacks against U.S. defense and space agency computers in 2001 and 2002, allegedly causing $900,000 in computer damage, had reasonably expected that, if convicted in Britain, he would face three or four years in prison while conviction in U.S. courts carried a prison sentence of as much as 70 years. Bruce Zagaris, House of Lords Upholds Extradition of Alleged Hacker to the U.S., 24 IELR 410, 410-11 (2008).
68 E.g., In re Lamar [1940] 1 D.L.R. 701, 706-07 (Alberta Sup. Ct.) (no wire or mail fraud equivalent recognized under Canadian law); Sensi, 879 F.2d 888 (D.C. Cir. 1989) (mail fraud unaccompanied by theft rendered it non-extraditable). To remove this obstacle, U.S. extradition treaties sometimes expressly indicate that proof of use of mails or interstate transportation, whose purpose is to establish federal jurisdiction, should not be a factor in determining whether dual criminality exists. E.g., U.S.-Jam. Extradition Treaty, supra n.44, art. 2(3)(b).
69 E.g., Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948) (Britain refused extradition to the U.S. because perjury was only cognizable as a crime in Britain when committed in the course of judicial proceedings).
70 E.g., United States v. Kashogi, 717 F. Supp. 1048 (S.D.N.Y. 1989) (Switzerland refused to extradite under the Racketeer Influenced and Corrupt Organizations (RICO) Act and obstruction of justice, but agreed to extradite him under other offenses).
71 Colombian drug traffickers have contended the CCE is uniquely American but U.S. courts have shown some leeway to prosecutors. E.g., United States v. Leher Rivas, 668 F. Supp. 1523 (M.D. Fla. 1987); Boister, supra n.3, at 297 n.61.
72 E.g., United States v. Khan, 993 F.2d 1368, 1372-73 (9th Cir. 1993).
73 Downing, supra n.3B, at 576.
74 Id.
Some extradition treaties, particularly of older vintage, require that, for dual criminality to obtain, the alleged offense must have taken place within the territory of the pursuing State. This principle also could surface where a host State does not recognize, say, the passive personality principle as a ground for extraterritorial jurisdiction, such that it would reject extradition to a State that had laid a jurisdictional claim to a fugitive on the sole basis that he had killed, injured, or otherwise wronged a pursuing State national.

For example, in 1985, a U.S. judge denied France’s extradition request for a fugitive on a narcotics conspiracy charge, despite both States having criminalized such conduct, where the U.S. did not find that France had sufficient territorial basis to claim subject matter jurisdiction as the fugitive “neither conspired with anyone in France nor performed any overt acts in France. There is absolutely no evidence to demonstrate that [he] intended to cause any detrimental effects in France. Under these circumstances it would be clearly unreasonable for a court in this country to exercise jurisdiction over [him].” In another instance a decade earlier, the U.S. was unwilling to extradite non-Germans to the Federal Republic of Germany (FRG) on charges that they had murdered German nationals aboard a non-German-flagged vessel on the high seas, as the U.S. did not then recognize State jurisdiction over non-nationals who allegedly committed a crime against another’s nationals outside of the victim’s

---

76 See Heymann & Gershengorn, supra n.4, at 137-38 (host State must recognize jurisdictional principle on which the request for a fugitive’s return is based); e.g., Model U.N. Extradition Treaty, supra n.20, art. 4(e) (citing as an optional ground for refusing extradition where “the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances.”).
77 Abbell, supra n.36, at 3-19 to 3-20. The same principle has been applied by some States in determining, as a function of municipal law, to bar extraditions. See supra nn.20-21.
78 In 1977, France justified its refusal to extradite to either West Germany or Israel Abu Daoud, who allegedly participated in the massacre of Israeli athletes during the 1972 Munich Olympics, on the grounds that at the time French law did not regard this conduct as a crime, even if French nationals had been the victims, as France did not amend its Penal Code to recognize passive personality jurisdiction until 1975 and the court was unwilling to apply that new basis for jurisdiction retroactively. Sidney Liskofsky, The Abu Daoud Case: Law or Politics, 7 ISRA. Y.B. HUM. RTS. 66 (1977) (discussing ruling of the Chambre d’Accusation of the Paris Court of Appeals, including its 20-minute hearing only four days after the accused had been arrested, and the decision to release him to Algeria where he was received as a hero).
State territory. In recent years, however, application of the special use rule appears to be receding.

iii. Prescription

Multilateral conventions, bilateral treaties, cooperative schemes, and municipal statutes alike generally bar extradition where prosecution or punishment is disallowed on account of the passage of time since the underlying crime occurred or the individual became unlawfully at large, respectively. Variation exists, however, as to the applicable law: the host State’s alone, the pursuing State’s alone, either, or both. Increasingly, no statute of limitations applies at all as a basis for denying extradition or is applied only on a

---

80 Blakesley, supra n.13, at 237; id. at 237-39 (noting the exceptional case of Assarsson, supra n.60).
81 Boister, supra n.3, at 298 & n.66 (citing the need to suppress transnational crime).
82 E.g., Inter-Am. Extradition Conv., supra n.48, art. 4(2) (“the prosecution or punishment [of a fugitive] is barred by the statute of limitations according to the laws of the requesting State or the requested State prior to the presentation of the request for extradition.”).
83 E.g., U.S.-RSA Extradition Treaty, supra n.44, art. 8 (“Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws in the Requesting State.”).
84 E.g., London Scheme for Extradition within the Commonwealth in Nov. 2002, art. 13(b)(iii), LMM (90)32, available at http://www.oas.org/juridico/english/mesici3_london.pdf (last visited on Nov. 1, 2013) [hereinafter London Scheme] (extradition barred where the competent authority [i.e., the host State] determines as much based on “the passage of time since the commission of the offence”).
86 For example, in July 1979, had West Germany’s parliament, the Bundestag, under international pressure, decided not to lift the State’s statute of limitations on murder, to encompass ordinary murder, genocide, war crimes, and crimes against humanity alike, Nazi war crimes would have been barred from prosecution in West German courts effective December 31, 1979. 2 INTERNATIONAL CRIME AND PUNISHMENT: SELECTED ISSUES 15-17 (Sienho Yee ed. 2004).
87 Blakesley, supra n.13, at 262. See generally Stanbrook & Stanbrook, supra n.14, at 148 (noting that statutes of limitations are designed “to protect an accused from dilatoriness or incompetence by the requesting state”).
88 Where applicable, typically if the statute of limitations has run under either State’s law, then extradition would be barred. Stanbrook & Stanbrook, supra n.14, at 141; Blakesley, supra n.13, at 262. In more historic U.S. extradition treaties, only the prescriptive law of the host State mattered, but examples exist of only the pursuing State’s law or both as well. Abbell, supra n.36, at 3-50 to 3-51.
discretionary basis where extradition would be deemed “unjust” and/or “oppressive” in light of the lapse of time.\textsuperscript{90}

Where statutes of limitations apply, the total number of years since the crime occurred may need to be recalculated to reflect any “tolling” of the time period based on relevant circumstances, such as wartime, the need to obtain foreign evidence, or a person’s flight from justice.\textsuperscript{91} States tend to apply the statute of limitations corresponding to the analogically closest substantive offense to the one for which the individual has been charged.\textsuperscript{92} There is persuasive authority that statutes of limitations should not apply to war crimes (WCs) or crimes against humanity (CAH), and thereby not alone bar extraditions in such cases.\textsuperscript{93}

\textsuperscript{90} In June 2007, a U.K. court denied extradition to the U.S. of Stanley Tollman, an hotelier charged with bank fraud and tax evasion, partly on the grounds that to do so would be regarded as “unjust and oppressive,” given the significant passage of time (approximately a dozen years) since the alleged commission of these offenses. Bruce Zagaris, \textit{U.K. Court Denies U.S. Extradition Request for Former Hotel Owner, Citing Prosecutors’ Delays}, 23 IELR 358, 358-59 (2007) (the U.K. court cited to § 82 of Extradition Act 2003, also finding that, if extradited, Tollman would be unable to continue caring for his ailing wife). See also \textit{Kakis v. Cyprus} [1978] 2 All E.R. 63, 1 WLR 779 (U.K.) (extradition deemed unjust where there was a prolonged delay since the commission of the crime); \textit{Stanbrook & Stanbrook}, supra n.14, at 140 (under U.K. law, no time bar is imposed on serious offenses with a few exceptions like sexual violations).

\textsuperscript{91} \textit{E.g.}, 18 U.S.C. § 3288 (2012) (warranty suspension); 18 U.S.C. § 3292 (2012) (allow prosecutors time to collect evidence abroad); 18 U.S.C. § 3290 (2012) (persons fleeing from justice). See also \textit{Bruce Zagaris, Court of Appeal Affirms and Overturns Extradition Request to Korea on Bribery Charges}, 24 IELR 269 (2008) (U.S. court tolled 5-year statute of limitations on bribery charge to authorize extradition to South Korea of Man-Sook Choe); \textit{Assarsson}, 687 F.2d at 1160-63 (finding that district court did not err in tolling the clock on the statute of limitations because, although fugitive had been living openly in Illinois with full knowledge of Swedish authorities, the relevant fact was that he had fled Sweden with the intent to avoid arrest or prosecution).

\textsuperscript{92} \textit{E.g.}, \textit{In re Requested Extradition of Suarez-Mason}, 694 F. Supp. 676, 686-87 (N.D. Cal. 1988) (Argentina charged accused with 24 counts of unlawful deprivation of freedom; kidnapping was found to be the closest analog, and applying the U.S. statute of limitations on kidnapping (5 years), per the terms of the treaty, extradition was barred as more than 5 years had elapsed since the charged had been filed).

To illustrate how such cases can play out, consider the following three examples. In December 1931, a Belgian Court of Appeal (Brussels) denied a request for extradition by Italy for a convicted Italian national because Belgium’s statute of limitations for the underlying crime had run, given the protracted nature of criminal proceedings in the Italian courts, and therefore no dual criminality was found.\textsuperscript{94} In November 1997, Brazil’s Supreme Court unanimously denied a U.K. request for the extradition of Ronnie Biggs, the main perpetrator of the 1963 “Great Train Robbery” (that constituted a record haul at the time), on account of the fact that his crime and his 1965 prison escape were time-barred under Brazil’s 20-year statute of limitations.\textsuperscript{95} And in November 2011, with respect to a convicted murderer named George Wright who had escaped from a New Jersey prison in 1970 and then been on the lam for 41 years, a Portuguese court refused to extradite him to the U.S. ostensibly, in part, because the Portuguese statute of limitations on murder had expired.\textsuperscript{96}

\textbf{iv. Specified Offense Exclusions}

We now turn to three types of offenses – political, military, and fiscal – that are frequently singled out for exclusionary treatment, and therefore, when recognized as such, extradition is generally denied.

\textsuperscript{96} Barry Hatton, “Portugal Refuses to Send US Fugitive Home,” \textit{AP}, Nov. 17, 2011, available at \url{http://news.yahoo.com/portugal-court-refuses-send-us-fugitive-home-164301468.html} (last visited on Nov. 4, 2013) (although the court proceedings were secret and therefore no judicial opinion is available, Wright’s lawyer represented that part of the judge’s rationale was that the Portuguese statute of limitations on murder had expired).
**Political Offenses.** A nearly universal provision found in municipal extradition statutes as well as in bilateral and multilateral extradition treaties97 (based on varying interpretations and with specified exceptions discussed infra) is an exclusion for “political offenses” – *i.e.*, conduct committed for political reasons or of a political character or otherwise connected thereto.98 This exclusion (sometimes referred to as an “exception”) is focused on the political nature of the *offense*, rather than on the political motivations for the capture of, or the expected politically prejudicial treatment by, the pursuing State of a political “offender,” such as a dissident, anti-government activist, or secessionist.99 (The latter concerns are treated as a human rights law matter and are addressed in Chapter 7.d.i infra.)

Despite its frequent usage, the political offense exclusion has yet to assume customary international law (CIL) status or emerge as a general principle of international law,100 but rather operates as a “reservation”101 that can be

---


98 The “connected” clause protects from extradition persons who support an act but may remain unaware of its underlying political purpose or nature. *Abbell, supra* n.36, at 3-63 to 3-64.

99 See, e.g., Bruce Zagaris, *English Court Denies Russian Extradition Request for Chechen Official*, 20 IELR 12 (2004) (discussing the U.K.’s refusal in November 2003 to extradite Akhmed Zakayev, a Chechen rebel leader, to Russia to face charges of false imprisonment and murder, among others, partly on the ground that the prosecution was viewed as politically motivated).

100 See Aimée J. Buckland, *Offending Officials: Former Government Actors and the Political Offense Exception to Extradition*, 94 CAL. L. REV. 423, 440 n.121 (2006) (noting that former Soviet bloc States do not include this provision in their extradition treaties); STANBROOK & STANBROOK, supra n.14, at 65 n.1 (opining that this provision is less a general principle of international law and more an exception to the general treaty obligation to extradite).

101 R. Stuart Phillips, *The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposal for Its Future*, 15 DICKINSON J. INT’L L. 337, 340 n.25 (1997) (noting that, as a technical matter, the political offense exclusion is a “reservation” as the detainee bears the evidentiary burden of bringing himself within its protective embrace); STANBROOK & STANBROOK, supra n.14, at 65 n.1 (describing it as “a reservation of the freedom which absent a treaty the territorial sovereign would in any case be able to exercise”). The use of the term “reservation” in this context is not to be confused with its meaning under the Vienna
invoked to deny extradition. As the exclusion suffers from a lack of an agreed definition, its provisions are typically generic (leaving it to courts to sort out its meaning based on the pertinent facts as evaluated against their national standards and policies), and while substantially similar, many contain express caveats or exceptions to ensure that it does not become over-inclusive.\textsuperscript{102} This exclusion is particularly relevant with respect to alleged acts of terrorism, as such offenses are frequently claimed to be politically motivated,\textsuperscript{103} and sometimes thwarts extraditions even between close allies with shared political systems and jurisprudential traditions.\textsuperscript{104}

The political offense exclusion evolved largely as a by-product of the French Revolution and democratic movements and popular political uprisings of the 19\textsuperscript{th} century that sought to bring down monarchies and oppressive rulers.\textsuperscript{105} With these winds of change, extradition law, which had until then been largely

\textsuperscript{102} Stipulated exceptions can be found, by way of example in the following conventions and domestic laws: Eur. Conv. on Extradition, Dec. 13, 1957, art. 3(3), CoE, E.T.S. No. 24 (excluding from political offense coverage the assassination or attempted assassination of a Head of State or a member of his family); U.N. Model Extradition Treaty, supra n.20, art. 3 & n.8 (allowing for discretionary exclusions, including for "serious offences involving an act of violence against the life, physical integrity or liberty of a person"); Extradition Act of Canada, Royal Statutes of Canada (R.S.C.) June 17, 1999, as amended, July 19, 2005, art. 46(2), available at Canadian Legal Information Institute Website, http://www.canlii.org/en/ca/laws/stat/sc-1999-c-18/latest/sc-1999-c-18.html (last visited on Nov. 3, 2013) (excluding murder or manslaughter; inflicting serious bodily harm; sexual assault; kidnapping, abduction, hostage-taking or extortion; using explosives, incendiaries, devices or substances in circumstances in which human life is likely to be endangered or serious bodily harm or substantial property damage is likely to be caused; and an attempt or conspiracy to engage in, counselling, aiding or abetting another person to engage in, or being an accessory after the fact in relation to, the conduct above).

\textsuperscript{103} Boister, supra n.3, at 300 & n.79.

\textsuperscript{104} Id. at 300 & n.75 (citing as an example U.S. refusal to extradite to the U.K. Irish Republican Army (IRA) individuals believed to have participated in terrorist acts in Northern Ireland); e.g., AP, "Escaped IRA Gunman Savors Liberty in Dublin," \textit{L.A. Times}, June 24, 1990, available at http://articles.latimes.com/1990-06-24/news/mn-624_1_northern-ireland (last visited on July 28, 2013) (discussing the Irish Supreme Court’s refusal to extradite Dermot Finucane, an IRA gunman who had escaped from a Northern Ireland prison while serving an 18-year sentence, holding in part that his weapons possession offense was politically driven because the IRA was fighting to unite Ireland).

\textsuperscript{105} See Phillips, supra n.101, at 340 (these revolutionary ideas curried sympathy with its protagonists and the exclusion was intended to protect them from retribution); Findlay, supra n.97, at 11 ("The political offense exception, which originated at the time of the American and French revolutions, was initially motivated by humanitarian concerns for the accused and the interests of states in remaining neutral in other states’ disputes."); Bassiouni, \textit{Political Offense Exception}, supra n.97, at 400.
focused on securing the custody of political (and religious) dissidents,\textsuperscript{106} came to recognize that such individuals had a right to actively pursue political change, even if it meant some arguably common criminal activity in the process.\textsuperscript{107} After all, many of the new liberal democracies of the 1800s had themselves only recently acquired power through rebellious conduct.\textsuperscript{108} Correspondingly, the law also needed to protect such individuals from States that, it was feared, sought their return in order to prosecute or punish them – possibly under unfair or discriminatory circumstances – for their anti-government actions, rather than for their commission of common crimes.\textsuperscript{109}

In addition, the political offense exclusion preserves the right of States to grant asylum for perceived political oppression (discussed in Chapter 6.c \textit{infra}),\textsuperscript{110} keeps States from interfering in others’ domestic political struggles through extradition,\textsuperscript{111} and affords States broad discretion over such potentially sensitive matters.\textsuperscript{112} In 1833, Belgium became the first State to introduce the political offense exclusion into its national law;\textsuperscript{113} the same year, Belgium and France

\textsuperscript{106} See supra pages 135-36 (Chapter 4).
\textsuperscript{107} See \textit{Quinn v Robinson}, 783 F.2d 776, 793 (9th Cir. 1986) (the exclusion is based in part “in a belief that individuals have a right to resort to political activism to foster political change.”) (citation omitted); \textit{Stanbrook & Stanbrook, supra} n.14, at 66 (noting that legal violations went hand-in-hand with standing up to tyranny and it seemed unfair to return those seeking political freedom to their oppressors); \textit{Duffy, supra} n.11, at 109; Yvonne G. Grassie, Note, \textit{Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?}, 64 WASH. U.L.Q. 1205, 1207 (1986).
\textsuperscript{108} Phillips, \textit{supra} n.101, at 341 & n.34 (discussing experience of liberal democracies but singling out Russia as the exception, which punished political offenders with death).
\textsuperscript{110} See \textit{Bantekas & Nash, supra} n.23, at 186; \textit{Stanbrook & Stanbrook, supra} n.14, at 7; \textit{id.} at 83 (citing to the example of an Italian court granting political asylum to the murderer of King Alexander of Yugoslavia in Marseilles in 1934). “It is possible for a person to have been declared as non-extraditable on the basis of the ‘political offense exception’ and to thereafter seek asylum. The latter may or may not be granted. The two determinations are made in different legal processes using different legal standards and having different review processes and standards.” M. CHERIF BASSIOUNI, \textit{INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE} 180 (6th ed. 2014).
\textsuperscript{111} DUFFY, \textit{supra} n.11, at 110; \textit{Bantekas & Nash, supra} n.23, at 186; Campbell, \textit{supra} n.109, at 586-87; \textit{e.g.}, \textit{Quinn}, 783 F.2d at 792-93.
\textsuperscript{112} \textit{Stanbrook & Stanbrook, supra} n.14, at 67.
\textsuperscript{113} Phillips, \textit{supra} n.101, at 340 (Belgian Extradition Act of 1833).
executed an extradition treaty that contained a “political offenses” provision;\textsuperscript{114} by the end of the 19th Century the notion had become widespread.\textsuperscript{115}

Political offenses essentially come in three varieties: (i) pure, (ii) relative, and (iii) indirect. The pure form consists of those prototypical political acts, including treason, sedition, subversion, espionage, and conspiracy to overthrow the government, which are directed exclusively at the State, do not entail violence or the commission of a common crime, and leave private interests unaffected.\textsuperscript{116} By way of example, such acts might involve delivering protest speeches, printing and disseminating subversive pamphlets, or surveilling government operations. Although exceptions exist (especially with a crime like espionage\textsuperscript{117}), there is broad international consensus that such pure offenses fall squarely within the exclusion and therefore should not be subject to extradition.\textsuperscript{118} Along those lines, the Brazil Supreme Court denied an extradition request from Denmark for Danish nationals who allegedly supplied German occupation forces during World War II with “used and new machines and boats,” partly on the grounds that “[t]he crime of assisting the enemy in time of war is a political one \emph{lato sensu} because it is a crime against the State in its supreme function, namely its external defence and its sovereignty.”\textsuperscript{119}

A relative political offense, by contrast, assumes a hybrid character, consisting of an act driven by a political agenda or occurring within a political context \emph{and} that manifests at least in part as a common crime affecting private interests.\textsuperscript{120} The hijacking of a commercial aircraft or the bombing of a popular hotel to cast greater international attention on the plight of a disenfranchised people, illustrates this variant. Finally, the indirect form (or \emph{delite connexe}\textsuperscript{121}) of a

\begin{footnotes}
\footnote{Stanbrook \& Stanbrook, supra n.14, at 66 (the treaty language referred to a “political offense or an offense connected with a political offense”).}
\footnote{Bassiouni, Political Offense Exception, supra n.97, at 398-99.}
\footnote{Phillips, supra n.101, at 342 \& n.42; Grassie, supra n.107, at 1207; Stanbrook \& Stanbrook, supra n.14, at 69-70; Bassiouni, Political Offense Exception, supra n.97, at 405-07.}
\footnote{Bassiouni, Political Offense Exception, supra n.97, at 406-07 (noting varying interpretations).}
\footnote{Phillips, supra n.101, at 342.}
\footnote{Collaboration with the Enemy Case, supra n.30, 14 Ann. Dig. \& Rep. Int’l L. Cases at 146-47.}
\footnote{Grassie, supra n.107, at 1208; Phillips, supra n.101, at 342-3; Bassiouni, Political Offense Exception, supra n.97, at 408.}
\footnote{Vogler, supra n.57, at 393.}
\end{footnotes}
political offense consists of a common crime not committed against the prevailing political order itself but rather in connection with or in support of an act that itself constitutes a political offense. This can be exemplified where a person steals money to help another to afford a truck that would be driven into an Embassy compound to protest that government’s policies.\textsuperscript{122}

Whether political offenses, particularly the relative ones, are exclusion-eligible turns largely on which of several judicial tests is applied to determine which offenses warrant protection for their political significance.\textsuperscript{123} The three major tests are: (i) the “political incidence” (or “political disturbance”) test, (ii) the “injured rights” test, and (iii) the “predominant motive” (or “mixed Continental”) test.

The U.S. and the U.K. are most closely associated with the first of these, the political incidence test,\textsuperscript{124} which purports to examine the extent to which a criminal act was committed by a member of a group that was: (i) part of a “temporally and spatially limited”\textsuperscript{125} political conflict, uprising, or disturbance “related to the struggle of individuals to alter or abolish the existing government in their country,”\textsuperscript{126} or to seek political asylum from governmental

\textsuperscript{122} Id.; e.g., Bourke v. Attorney General [1972], Ir. Sup. Ct., I.R. 36, [1973] I.L.T.R. 33 (accepting petitioner’s argument that he, a non-Communist, but who purely out of friendship assisted fellow inmate George Blake, a Soviet spy, escape from a British prison, should be subject to the political offense exclusion and therefore not be extradited back to the U.K. on the basis that his offense was connected to Blake’s “political offense”).

\textsuperscript{123} Another key factor turns out to be domestic political or foreign relations pressures, which can trigger invocation of the political offense exclusion, often on pretextual grounds. Heymann & Gershengorn, supra n.4, at 139; Abraham D. Sofaer, The Political Offense Exception and Terrorism, 15 DENV. J. INT’L L. & POL’Y 125, 128-29 (1986).

\textsuperscript{124} Buckland, supra n.100, at 441 (noting it is also referred to as the Anglo-American “incidence” test); Stephen Dycus, et al., Counterterrorism Law 514 (2007); Bassiouni, Political Offense Exception, supra n.97, at 414-15 (noting that many Latin American countries also subscribe to this approach).

\textsuperscript{125} Quinn v. Robinson, 783 F.2d 776, 817 (9th Cir. 1984), cert. denied, 479 U.S. 882 (1986).

\textsuperscript{126} Id. Notably, however, anarchist crimes are not covered. See, e.g., In re Meunier, 2 Q.B. 415, 419 (Div. Ct. 1894) (Gr. Br.), available at http://www.uniset.ca/other/cs4/18942QB415.html (last visited on Nov. 28, 2013) (extradition granted to France of an anarchist accused of detonating a bomb that killed two persons; the court reasoned that “there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other,” but anarchists did not have a party and advocated the absence of government); Treaty on Extradition, U.S.-Braz., Jan. 13, 1961, art. V(6)(b), 15 U.S.T. 2093, T.I.A.S. No. 5691 (exempting from political offense exclusion “[c]riminal acts which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organizations”).

211
oppression, and (ii) the act itself was incidental to or in furtherance of that conflict. Under this test, extradition is typically denied when the act – even including for such heinous crimes as murder, terrorism, or robbery – was undertaken in some measure while directly engaged in, or as part of, a political struggle. The exclusion generally has not been applied, however, in cases involving acts committed at a time of revolution but undertaken outside the specific context of that struggle, or when the acts were not directed against the State but against a political party in a time of peace.

127 See, e.g., Ex parte Kolczynski [1955] 2 Q.B. 540, 1 All E.R. 31, Dec. 13, 1954, reprinted in 21 ILR 240 (1954) (finding seven Polish nationals entitled to release from custody on the basis of the political offense exclusion where they had overpowered the captain and other crew members on a Polish fishing trawler in the North Sea and brought the vessel to an English port for the purpose of seeking political asylum in England).

128 Manuel R. Garcia-Mora, Crimes Against Humanity and the Principle of Nonextradition of Political Offenders, 62 Mich. L. Rev. 927 (1964); Yeckus, supra n.124, at 514; e.g., Van Duc Vo v. Benov, 447 F.3d 1235 (9th Cir. 2006).

129 In the leading British case establishing this legal test, England denied extradition to Switzerland of Angelo Castioni on a charge of murdering a member of the State Council of a Swiss canton; the court stated that “fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.” In re Castioni, 1 Q.B. 149, 166 (1890).

130 U.S. courts have famously refused to extradite IRA terrorists to the U.K. on political offense grounds. E.g., In re Mackin, 80 Cr.Misc. 1, 1988 U.S. Dist. LEXIS 7201 (S.D.N.Y. Aug. 13, 1981), appeal dismissed, 668 F.2d 122 (2d Cir. 1981); McMullen v. I.N.S., 658 F.2d 1312 (9th Cir. 1981), review denied, 788 F.2d 591 (9th Cir. 1986); In re Doherty, 559 F. Supp. 270 (S.D.N.Y. 1984), aff’d, 786 F.2d 491 (2d Cir. 1986). In In re Doherty, the court found that the ambush attacks by PIRA members against a British Army patrol, which resulted in the killing of Captain Westmacott, occurred “in a more sporadic and informal mode of warfare” that approximated the kind of political offense that would be covered by the exclusion had it “occurred during the course of more traditional military hostilities.” Doherty, 559 F. Supp. at 276. This impediment was notably addressed by a Supplemental Treaty between the U.S. and the U.K., “by excluding from the scope of the political offense exception serious offenses typically committed by terrorists, e.g., aircraft hijacking and sabotage, crimes against diplomats, hostage taking, and other heinous crimes such as murder, manslaughter, malicious assault, and certain serious offenses involving firearms, explosives, and damage to property.” Letters of Transmittal to the U.S. Senate, United Kingdom-United States: Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Acts of Terrorism, June 25, 1985, reprinted in 24 ILM 1104 (1985).

131 E.g., In re Ezeta, 62 F. 972 (N.D. Cal. 1894) (U.S. denying extradition to El Salvador of a number of individuals accused of murder and robbery “committed during the progress of actual hostilities between the contending forces” and were “closely identified” with the uprising in “an unsuccessful effort to suppress it.”).

132 The concept is flexible as it can be applied even when the underlying crime was regarded as a political offense even though the immediate basis for extradition is not. See United States v. Pitawanakwat, 120 F. Supp.2d 921, 931, 938 (D. Or. 2000) (denying extradition for the crimes of illegal weapon possession and endangering lives by discharging a weapon and of violating parole by leaving Canada without permission on political offense grounds because the accused was initially involved as part of a broader protest aimed at the Canadian government in support of sovereignty by native peoples, and therefore constituted a form of “relative” political offense).

133 E.g., Orenwas v. Ruiz, 161 U.S. 502 (1896) (in the only U.S. Supreme Court case to address the political offense exclusion, extradition to Mexico was authorized of Mexican bandits who had
More recent application of this test has not been consistent, as U.S. courts have adopted varying perspectives. The U.S. Court of Appeals for the Seventh Circuit and the U.S. District Court for the Southern District of New York (S.D.N.Y.), for example, have ruled that acts indiscriminately targeting civilians cannot be “political” (as the conduct must be directed against the State) while the Ninth Circuit disagrees.\textsuperscript{135} The Seventh Circuit has taken a narrow view that the political uprising must be limited to traditional military insurrections, a position rejected by the S.D.N.Y., while the Ninth Circuit has insisted that the uprising be undertaken by a group on its own land against its own government (as opposed to, say, cross-border operations by armies, criminal syndicates, or terrorists).\textsuperscript{136} While under this test a court may occasionally consider the political motivation behind the act, it cannot be the primary or sole factor.\textsuperscript{137} In addition, the U.S. Congress has carved out a number of exceptions to the political offense exclusion.\textsuperscript{138}

\textsuperscript{134} E.g., \textit{In re Campora}, Sup. Ct., Chile, \textit{reprinted in} 25 ILR 518 (1957) (allowing the extradition to Argentina of Guillermo Patricio Kelly and others for murder, robbery, and other offenses in connection with a raid perpetrated on a local Communist Party headquarters in Buenos Aires, rather than on the government of Argentina itself, and that took place during a time of tranquility).

\textsuperscript{135} \textit{Compare Eain v. Wilkes}, 641 F.2d 504 (7th Cir. 1981) (not applying political offense exclusion in the context of a PLO bombing in a crowded Israeli market that was not aimed at overthrowing a government) and \textit{Ahmad v. Wigen}, 726 F. Supp. 389 (S.D.N.Y. 1989) (granting extradition of Palestinian who firebombed a civilian bus as IHL prohibits violence directed at civilians) with \textit{Quinn}, 783 F.2d 776 (9th Cir.) (although ruling in favor of extradition, pronounced that civilian bombing tactics aside, the fact that insurgents are trying to change their government is what matters, so politically legitimate) (\textit{dicta}).

\textsuperscript{136} \textit{Compare Eain}, 641 F.2d at 519 (7th Cir.) (casting doubt on the existence of political conflict between the PLO and Israel as there were no "ongoing battles between contending armies" and the PLO is "dispersed in nature") with \textit{Doherty}, 599 F. Supp. at 275 (S.D.N.Y.) (rejecting "the notion that the political offense exception is limited to actual armed insurrections of more traditional and overt military hostilities.") with \textit{Quinn}, 783 F.2d at 813 (9th Cir.) ("the word ‘uprising’ means exactly that: it refers to a people \textit{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.") (emphasis in original).


\textsuperscript{138} \textit{See Abbett, supra} n.36, at 3-66 to 3-69 & n.47 (referencing such exceptions as "murder or attempted murder of a Head of State or member of his family," "offenses for which the U.S. has an obligation to prosecute or grant extradition pursuant to a multilateral convention," "specifically listed offenses and types of offenses: murder, unlawful detention, kidnapping, etc.," and "offenses specifically prohibited from consideration as political offenses by multilateral convention" (\textit{e.g., Conv. on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, reprinted in} 28 I.L.M. 763 [hereinafter Genocide Conv.]).
The second approach, known as the “injured rights” test, originated in French courts and maintains that political offenses are those that must directly harm the rights of a State’s political organization, regardless of any underlying political agenda or motive.\(^{139}\) Accordingly, where a crime adversely impacts only private, commercial, or minority political party interests, or where an individual commits an otherwise common crime but claims it was undertaken pursuant to a political objective, such offenses would not qualify as an exclusion to extradition under this test. For example, when German national Richard Eckermann had a suspected spy killed who was trying to join a secret, anti-Communist organization in Germany called the Black Army, and there was no detriment to the State government itself and the act was not aimed at changing the government, the Supreme Court of Justice of Guatemala (CSJ) ruled that the political offense exclusion was not satisfied and extradited him.\(^{140}\)

The third approach, known by several labels, including the “political predominance” and “predominant motive” test,\(^{141}\) was developed by Swiss courts\(^{142}\) and subsequently has been adopted by most continental European

\(^{139}\) See In re Giovanni Gatti, Ct. of App. of Grenoble (Chambre des Mises en Accusation, Fr.), Jan. 13, 1947, reprinted in [1947] 14 ANN. DIG. & REP. PUB. INT’L CASES 145, 145-46 (No. 70) (H. Lauterpacht ed. 1951) (“In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offence belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offender but from the nature of the rights it injures.”) (emphasis supplied) (granting extradition to the Republic of San Marino for one of its nationals who tried to murder a member of a communist cell); In re Colman, Ct. of App. of Paris, Fr. (Chambre des Mises en Accusation), reprinted in [1947] 14 ANN. DIG. & REP. PUB. INT’L CASES 139 (No. 67) (H. Lauterpacht ed. 1951) (“[I]n a country occupied by the enemy (in time of war), collaboration with the latter excludes the idea of a criminal action against the political organization of the state which characterizes the political offense.”) (permitting extradition to Belgium for crimes of collaboration with the enemy, including assassination). Belgian courts have taken this standard a step farther and held categorically that actions that endanger innocent people who are not involved in the political conflict do not qualify as political crimes. Phillips, supra n.101, at 348 n.100.

\(^{140}\) Bassiouni, Political Offense Exception, supra n.97, at 406.

\(^{141}\) Findlay, supra n.97, at 12-13 (labeling it the "predominance test"); Phillips, supra n.101, at 346 (referring to the "predominant motive" test).

States, including France,\textsuperscript{143} and evidently such Asian States as Thailand and South Korea.\textsuperscript{144} The thrust of this largely discretionary-based test is to assess whether the political dimensions predominate over the criminal dimensions of the offense, and, if so, it qualifies for the exclusion.\textsuperscript{145} Courts applying this test examine three factors: (i) whether the act was politically driven, (ii) whether the act and political ends were proximately related, and (iii) whether the political dimension of the act predominates over, or is proportionally greater compared with, its common crime dimension.\textsuperscript{146} The test also considers whether the means were disproportionate to the ends sought; in such cases the political offense exclusion is often deemed void.\textsuperscript{147} Thus, courts tend to reject the political offense exclusion where there is a taking of life and/or a more efficient alternative means was available to achieve the political objective sought.\textsuperscript{148}

\begin{flushleft}
(political offenses defined as “those acts which have the character of an ordinary crime appearing on the list of the extraditable offenses, but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion”).
\end{flushleft}

\textsuperscript{143} Phillips, supra n.101, at 348.

\textsuperscript{144} See AP, “Thailand Not to Extradite Vietnamese Dissident,” \textit{Pravda} (English version), Apr. 3, 2007, \textit{available at} http://english.pravda.ru/news/world/03-04-2007/88936-thai_vietnam-0/ (last visited on Nov. 28, 2013) (discussing Thai Appeals Court decision not to extradite Vietnamese dissident Ly Tong, a veteran of the South Vietnamese Air Force, on political offense grounds where he had violated Vietnam’s airspace by hijacking a twin-engine airplane and dropping 50,000 anti-Communist leaflets over Ho Chi Minh City); Choe Sang-Hun, “South Korean Court Rejects Extradition in Attack on Shrine,” \textit{N.Y. Times}, Jan. 4, 2012, at A6 (when a South Korean court opposed the extradition to Japan of Chinese national Lui Qiang who, in November 2012, had thrown a gasoline bomb at the Japanese Yasukuni Shrine in Seoul to protest the Japanese government’s refusal to apologize and compensate for wrongs committed against women sexual slaves during World War II, the thrust of the rationale for that ruling stemmed from the principle of not extraditing political prisoners).

\textsuperscript{145} Bassiouni, \textit{Political Offense Exception}, supra n.97, at 409; \textit{id.} at 411-12; BLAKESLEY, supra n.13, at 266.

\textsuperscript{146} See Bassiouni, \textit{Political Offense Exception}, supra n.97, at 424 (citing 1908 Swiss V.P. Wassilieff case (no official report exists) (extraditing individual who had murdered a local police chief at the behest of the Russian Revolutionary Socialist Party trying to overthrow the Czar); \textit{e.g.}, \textit{In re Kavic}, Bjelanovic & Arsenijevic, Trib. Féd. Suisse, Apr. 30, 1952, 78 Arrêts du Tribunal Fédéral Suisse 39 (1952), \textit{reprinted in} 19 ILR 371 (1957) (No. 80) (denying Yugoslavia’s extradition request on political offense exclusion grounds where three Yugoslav nationals while serving as crew members on a civilian aircraft restrained persons, endangered the safety of those on board, and wrongfully appropriated property in order to divert the aircraft to Switzerland to seek political asylum).

\textsuperscript{147} See \textit{Kirá v. Ministère Public Fédéral}, Trib. Féd. Suisse, 1961; \textit{reprinted in} 34 ILR 143 (the means employed must be the only means available to accomplish the end pursued); \textit{Stanbrook & Stanbrook}, supra n.14, at 77 (where pursue political ends but indiscriminately then exclusion not applied); Vogler, supra n.57, at 393-94 (means versus ends must be evaluated).

\textsuperscript{148} See, \textit{e.g.}, \textit{In re Peruzzo}, Trib. Féd. Suisse, 1951, \textit{reprinted in} 18 ILR 38 (murder of a fascist in Italy in December 1945 long after hostilities had ceased was not subject to political offense exclusion because the means used were not considered proportional to the end sought, namely, the suppression of fascism). \textit{But see In re Holder, reprinted in} 1975 Dlg. U.S. Prac. Int’l L. 168 (a
Despite the fact that in principle all official actions taken by current or former government officials are/were arguably political in nature while they were in power, such conduct only rarely qualifies in practice for the political offense exception, including with respect to cases of electoral fraud and political corruption. The logic lies primarily with: (i) their lack of an historic claim to the exclusion, which was fundamentally intended to benefit insurgents and dissidents outside the government against unfair or oppressive rule; (ii) the need to hold such individuals accountable for their offenses while representing, presumably in good faith, the people and their interests; and (iii) their access to other forms of protection, such as political asylum, petitioning the Home Secretary for a stay, non-refoulement, and reliance on non-discrimination provisions.

Although the political offense exclusion remains a significant barrier to extradition, due to increasing frustration over its inconsistent (if not at times arguably unjust) application, particularly with respect to acts of terrorism, its reach has been markedly circumscribed in recent years in a number of crime suppression treaties, U.N. documents, domestic extradition statutes, and extradition treaties. Specifically, the political offense exclusion has been withdrawn from such terrorism-related instruments as the 1977 European

---

French court denied a U.S. extradition request for two Americans who had hijacked a plane to Algeria and extorted $500,000 from the airplane; the court held that the exclusion applied because the hijackers had made passing reference to Angela Davis and Eldridge Cleaver, who were leaders of the Black Panthers, a Black empowerment and anti-government organization, and had been asked to be taken to Hanoi in Communist Vietnam).

149 Boister, supra n.3, at 300-01; Buckland, supra n.100, at 449; e.g., Ordinola v. Hackman, 478 F.3d 588, 598 (4th Cir. 2007) (dicta).

150 Non-refoulement is an international legal principle that prohibits the expulsion or return, including via extradition, of an individual to another State if he is expected to be mistreated there. See U.N. High Commissioner for Refugees, UNHCR Note on the Principle of Non-Refoulement, Nov. 1997, available at http://www.refworld.org/docid/438c6d972.html (last visited on Oct. 7, 2013) (citing U.N. Executive Committee Conclusion No. 25, ¶ (b); U.N. docs. A/AC.96/694, ¶ 21; A/AC.96/660, ¶ 17; A/AC.96/643, ¶ 15; A/AC.96/609/Rev.1, ¶ 5). The term lacks a uniform scope, but for present purposes it prohibits return in particular if the individual is likely to face torture; cruel, inhuman, or degrading treatment or punishment (CID); extrajudicial execution; enforced disappearance; or deprivation of freedom on improper grounds. This term is further referenced in Chapters 6.c, 7.d.i, and 10.d infra.

151 Buckland, supra n.100, at 425, 448, 450; e.g., Suarez-Mason, 694 F. Supp. 676.

152 See Duffy, supra n.11, at 109-10 & n.190; Grassie, supra n.107, at 1208; STANBROOK & STANBROOK, supra n.14, at 15 ("strict application could be highly inexpedient and unjust").

A similar eliminative dynamic on the political offense exclusion has played out regarding such other heinous crimes as genocide,158 torture,159 extrajudicial killings,160 war crimes and crimes against humanity,161 and assassinations or attempted assassinations of heads of State or members of their families (*clause d’attentat*).163 Furthermore, the 2003 U.K. Extradition Act,164 the 1999 U.S.-

---


158 Genocide Conv., supra n.138, art. 7.


162 This provision is also sometimes referred to as the “Belgian clause” as it was first set forth in Belgian legislation in 1856. S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 178 (1971).

163 See Phillips, supra n.101, at 341 (noting rise in activities of anarchists in 1890s that helped popularize this exception); e.g., Treaty of Extradition, U.S.-Venez., Jan. 19 and 22, 1922, art. 3, 43 Stat. 1698, T.S. 675, 49 L.N.T.S. 435, *available at* http://www.oas.org/juridico/mla/en/traites/en_traites-ext-usa-ven.pdf (last visited on Nov. 28, 2013); U.S.-RSA Extradition Treaty, supra n.44, art. 4(2)(a) (excluding from the definition of a political offence “a murder or other violent crime against a Head of State or Deputy Head of State of the Requesting or Requested State, or of or against a member of such person’s family”); *In re Pavelic* [1933–34], *reprinted in* ANN. Dig. No. 158 (Turin Ct. App. 1934) (involving assassins of King Alexander of Yugoslavia); STANBROOK & STANBROOK, supra n.14, at 82 (noting that the trend was extended to cover diplomatic representatives).
RSA Extradition Treaty, and the 2002 Framework Decision on the EAW have rolled back or dispensed altogether with a role for the political offense exclusion.

Military Offenses. The military offense exclusion permits a host State to withhold extradition on the ground that the offense for which extradition is sought is a pure military crime in the sense that it violates a State’s military law (or military code) for which no ordinary criminal law counterpart exists. The exclusion consists of any offense committed by a member of a State’s military (or an embedded civilian) that occurs on a military base or facility or that occurs in the course of his military service, but does not include any crime also cognizable under ordinary criminal law or any violation of international humanitarian law (IHL) or international criminal law (ICL). The most common examples include mutiny and desertion.

---

165 RSA Extradition Treaty, supra n.44, art. 4 (itemizing multiple exceptions to application of the political offense exclusion, including for murder, abduction, and hostage-taking, as well as for aiding and abetting, attempt, and conspiracy in relation to such offenses).
166 EAW, supra n.47.
167 BLAKESLEY, supra n.13, at 263 & n.412.
168 In September 2008, a Thai court denied the extradition to the U.S. of Iranian national Jamshid Ghassemi under the charge of attempting to purchase and export 12 accelerometers to Iran in violation of U.S. trade sanctions against Iran. While the court decision was not made public, one argument made by his counsel was under the military offense exclusion provision of the U.S.-Thai Extradition Treaty. His counsel had contended that Ghassemi, a military officer, acted under orders of a superior officer. Were that the actual basis for the extradition denial, it would be a misreading of the exclusion, as export control violations are decidedly within the scope of ordinary criminal crimes. "Thai Court Refuses U.S. Extradition Request for Export Defendant," ExportLawBlog, posted by Clif Burns, Sept. 25, 2008, available at http://www.exportlawblog.com/archives/398 (last visited on Dec. 15, 2011). More likely, however, the extradition was estopped on account of lack of dual criminality, as the U.S. was the only State that then had imposed trade sanctions against Iran.
169 For example, consider the case of accused Croatian war criminal Dragan Vasiljković who was accused of personally killing civilians and instructing others to commit murder during his tenure as commander of Serbian paramilitary forces and who was the subject of a Croatian extradition request to Australia. He contended that normal Croatian criminal laws did not apply during a war, that conduct that would be illegal during peacetime may not be unlawful during armed conflict, that his actions were intended to prevent POWs from escaping, and that his acts were not so grave as to violate the Geneva Conventions. An Australian Deputy Chief Magistrate rejected his arguments, ordering the extradition to proceed. To the extent he were considered a protected person under the Geneva Conventions, however, it could affect the events for which he were punished and the severity of the penalty; and his military rank (captain) would factor into the determination of command responsibility. Bruce Zagaris, Accused Croatian War Criminal Loses Effort to Block Australian Extradition Hearing, 23 IELR 54, 55 (2007).
This exclusion was irrelevant until about the 1970s when bilateral extradition treaties started to define extraditable crimes as those that were sufficiently punishable under the laws of both partner States; before then, when extraditable crimes were itemized, pure military offenses simply were not listed among them.\footnote{Charles Doyle, “Extradition To and From the United States: Overview of the Law and Recent Treaties,” C.R.S. Report for Congress, No. 98-958 A, Aug. 3, 2007, at 6; Abbell, supra n.36, at 3-73 to 3-74 (all U.S. extradition treaties after 1978 include a provision barring extradition for pure military offenses).} Although the exclusion is widely found in international extradition instruments, including the European Convention on Extradition,\footnote{Eur. Conv. on Extradition, supra n.102, art. 4 (“Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention.”).} bilateral extradition treaties,\footnote{U.N. Model Extradition Treaty, supra n.20, art. 3(c) (extradition shall not be granted “[i]f the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law”).} and the U.N. Model Treaty on Extradition,\footnote{See Douglas W. Jones & David L. Raish, American Deserters and Draft Evaders: Exile, Punishment, or Amnesty, 13 Harv. Int’l L.J. 88 (Winter 1972) (discussing non-extradition by Sweden and Canada of U.S. military deserters); David A. Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337 (1968).} not many cases arise under this exclusion and States are generally disinclined to extradite on this basis,\footnote{See Bantekas & Nash, supra n.23, at 189.} particularly in matters of desertion.\footnote{Bantekas & Nash, supra n.23, at 189.}

**Fiscal Offenses.** Traditionally, the idea of extraditing a fugitive to face charges in another State for such fiscal offenses as tax evasion, non-payment of customs duties, or currency or foreign exchange control violations, was disfavored.\footnote{Stanbrook & Stanbrook, supra n.14, at 9; Boister, supra n.3, at 301 & n.87; Keith R. Fisher, In Rem Alternatives to Extradition for Money Laundering, 25 Loy. L.A. Int’l & Comp. L. Rev. 409, 412 & n.17 (2003).} This view, which stemmed from a discomfort, in effect, with enforcing foreign fiscal or revenue laws\footnote{Bantekas & Nash, supra n.23, at 189.} – versus often related economic crimes such as currency counterfeiting, money laundering, and embezzlement – was manifested in a wide range of bilateral and multilateral extradition instruments, including, for
example, the 1990 U.S.-Switzerland Extradition Treaty\textsuperscript{178} and the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime.\textsuperscript{179} While some States, including Switzerland, continue to maintain this policy,\textsuperscript{180} there has been considerable movement in recent decades, generated in part by the growth in financial crime,\textsuperscript{181} to treat such offenses as extraditable.\textsuperscript{182} That said, as such fiscal offenses tend to be specialized, the rules governing dual criminality could continue to obstruct extraditions except for those States with close economic links\textsuperscript{183} or where treaties lack an express provision for such interpretative leeway.\textsuperscript{184}

b. Evidentiary Standards

One of the stiffest obstacles to extradition, at least among common law States, can be meeting the host State’s evidentiary standard\textsuperscript{185} to show the likelihood

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{178}] Treaty on Extradition, U.S.-Switz., Nov. 14, 1990, art. 3(a)&(b), S. Treaty Doc. 104-9, available at \url{http://www.gpo.gov/fdsys/pkg/CDOC-104tdoc9/pdf/CDOC-104tdoc9.pdf} (last visited on Nov. 29, 2013) (permitting host State to deny extradition for acts that are exclusively violations of currency, trade, or economic policy, or that are intended exclusively to reduce taxes or duties).
\item[\textsuperscript{180}] See, e.g., Swiss IMAC, supra n.23, at 189 (emphasizing drug-trafficking and money laundering).
\item[\textsuperscript{181}] See BANTEKAS & NASH, supra n.23, at 189 (hereinafter Second Add’l Prot.); Terrorism Financing Suppression Conv., supra n.155, art. 13 (“States Parties may not refuse a request for extradition ... on the sole ground that it concerns a fiscal offence.”); U.N. Conv. against Transnational Organized Crime, Nov. 15, 2000, art. 16(15), UNGA Res. 55/25, U.N. GAOR, 55th Sess., 62nd Plen. Mtg., Annex I, U.N. Doc. A/RES/55/25 (“States Parties may not refuse a request for extradition on the sole ground that the offense is also considered to involve fiscal matters.”); Inter-Am. Extradition Conv., supra n.48 (no provision excluding fiscal offenses as extraditable); London Scheme, supra n.84, art. 2(4)(a) (extraditable offence defined to include those of a purely fiscal character); Treaty on Extradition, Austl.-Mex., June 22, 1990, art. 4, 1991 A.T.S. No. 13 (1995) (permitting extradition for “offenses relating to taxation, customs duties, foreign exchange control or other revenue matters where the acts or omissions constitute an extraditable offense against the laws of both parties.”).
\item[\textsuperscript{182}] See ABBEll, supra n.36, at 3-17 to 3-18; Geoff Gilbert, Extradition, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 256-57 (John P. Grant & J. Craig Barker eds. 2007); e.g., Prushinowski v. Samples, 734 F.2d 1016 (1984); e.g., Second Additional Protocol to the Eur. Conv. on Extradition, Mar. 17, 1978, art. 2, CoE, E.T.S. No. 98, available at \url{http://conventions.coe.int/Treaty/en/Treaties/html/298.htm} (last visited on July 16, 2013) (hereinafter Second Add’l Prot.); Terrorism Financing Suppression Conv., supra n.155, art. 13 (“States Parties may not refuse a request for extradition ... on the sole ground that it concerns a fiscal offence.”).
\item[\textsuperscript{183}] For an example of such an express provision, see Second Add’l Prot., supra n.182, art. 2(2) (“Extradition may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs or exchange regulation of the same kind as the law of the requesting Party.”).
\item[\textsuperscript{184}] BANTEKAS & NASH, supra n.23, at 183-84.
\end{enumerate}
\end{footnotesize}
that the accused in fact committed the crime(s) for which he has been charged or that one sentenced in absentia actually committed the crime(s) for which he was convicted. Wide variety exists across States in this regard. Some States have adopted a “rule of non-inquiry,” and therefore do not deem it appropriate to examine other States’ legal standards or procedures, let alone ascertain the motive behind an extradition request. Most civil law States do not insist that any evidence be propounded in connection with an extradition hearing; instead, they may ask only for proof of a bona fide indictment or arrest warrant, of dual criminality, and of the fact that the person before the court is the same as the subject of the extradition request. Others, however, may leave themselves the option of requiring some degree of evidentiary proof of a crime.

---

186 See ABBELL, supra n.36, at 3-45 (“Most recent U.S. treaties require only an authenticated or certified copy of a sentence or judgment of conviction and proof that that the requested person is the person to whom the judgment refers”); Grassie, supra n.107, at 1206.

187 In cases of in absentia convictions, probable cause is not established merely by the fact that there has been a conviction; rather, the court must scrutinize the evidence carefully to determine at least a reasonable probability that the petitioner is guilty of the crime. E.g., United States v. Fernandez-Morris, 99 F. Supp.2d 1358, 1366 (S.D. Fla. 1999) (finding no probable cause to believe the U.S. national subject committed fraud, illegal association, and breach of trust in Bolivia as found when he was tried in absentia).

188 See BANTEKAS & NASH, supra n.23, at 180 (noting that States have adopted different rules with respect to the quality of evidence required to justify extradition).

189 Id.; e.g., Wigen, 910 F.2d at 1066-67 (‘The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States District Judge concerning the fairness of its laws and the manner in which they are enforced.’).

190 See Gilbert, supra n.182, at 261 (noting that such evidentiary standards are “alien to civil law states’ investigation-prosecution procedure”).

191 See BLAKESLEY, supra n.13, at 218 (citing France, a civil law State, as allowing extradition on a mere showing of two types of evidence: (1) a properly authenticated arrest warrant or similar document in case of person charged, or the official doc of sentence of conviction, and (2) evidence that the accused person standing before the court is one subject to the extradition documents); DUFFY, supra n.11, at 110-11 & n.195 (requirement is often for a judicial order accompanied by sufficient information to establish dual criminality rather than evidence as such). This approach is exemplified by the Eur. Conv. on Extradition, supra n.84, art. 12, which embraces a civil law approach and requires no evidence. That does not mean, however, that civil law States never reject an extradition request for lack of evidence. See, e.g., Steven Lee Myers, “Rebuffing Russia, Denmark Frees Chechen Envoy It Detained,” N.Y. Times, Dec. 4, 2002, available at http://www.nytimes.com/2002/12/04/world/rebuffing-russia-denmark-frees-chechen- envoy-it-detained.html (last visited on Nov. 29, 2013) (Danish Ministry of Justice denied a Russian request for Akhmed Zakayev, an alleged Chechen rebel leader, for lack of “sufficient credible evidence”).

192 See Gilbert, supra n.182, at 262 n.58 (citing by example Germany and Scandinavian countries).
By contrast, a number of States with common law traditions require that the pursuing State set forth sufficient evidence to meet a *prima facie*,\(^{193}\) or (slightly lower) probable cause,\(^{194}\) or (slightly lower still) reasonable probability, standard. These amount, in effect, to screening devices for a host State to ensure it has grounds to believe the extradition subject could well have committed the offense in question\(^{195}\) and not transfer him merely “on the word of a prosecutor, coupled with conclusory allegations and unsubstantiated, unreliable evidence.”\(^{196}\) Some common law States apply differential evidentiary standards depending on the identity of the pursuing State.\(^{197}\)

Few States anywhere demand evidence in cases where the accused freely consents to extradition.\(^{198}\) Some States may determine that despite ample

\(^{193}\) See *Jennings & Watts*, *supra* n.18, at 958-59; *Bantekas & Nash*, *supra* n.23, at 183-84; Gilbert, *supra* n.182, at 262 n.58 (citing Israel as an example of a State imposing a *prima facie* evidentiary standard); Boister, *supra* n.3, at 302 & nn.92-94; *e.g.*, *United States v. Sheppard*, Sup. Ct., May 5, 1976 (Canada), *reprinted in* 71 ILR 510 (1987). A *prima facie* standard is relatively high, as it calls for evidence sufficient to convict the individual for the crime charged. See American Law Institute (ALI), *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, May 14, 1986 (1987), § 476 cmt. b, available at http://internationalcriminallaw.org/Restatement(Third)_of_Foreign_Relations_Law/RSecs334.401-04.411.432.442.PDF (last visited on Nov. 9, 2013) (stating that while U.S. law and treaties require showing of probable cause, “[i]n Great Britain and states following the British model, the standard is stricter, equivalent to a prima facie case”).

\(^{194}\) *Duffy*, *supra* n.11, at 110 & n.195; *Blakeley*, *supra* n.13, at 217-18; *Jennings & Watts*, *supra* n.18, at 958 n.6 (noting that a number of U.S. bilateral extradition treaties contain “probable cause” evidentiary requirements); *e.g.*, *Argento v. Jacobs*, 176 F. Supp. 877 (N.D. Ohio 1959) (finding evidence insufficient to meet probable cause standard). Probable cause calls for evidence showing reasonable grounds to believe that the individual committed the crime but not necessarily enough to convict him of it. *Lindstrom v. Gilkey*, No. 98 C 5191, 1999 WL 342320, at *9 (N.D. Ill. May 14, 1999); *In re Extradition of Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996) (“A finding of probable cause is appropriate if the evidence supports a reasonable belief that [the fugitive] is guilty of the crimes charged.”).

\(^{195}\) *Duffy*, *supra* n.11, at 110-11 & n.195.

\(^{196}\) *Fernandez-Morris*, 99 F. Supp.2d 1358; accord *In re Extradition of Platko*, 213 F. Supp.2d 1229, 1237-41 (S.D. Cal. 2002); Bruce Zagaris, *Court of Appeal Affirms and Overturns Extradition Request to Korea on Bribery Charges*, 24 IELR 269 (2008) (discussing case in April 2008 where the U.S. Court of Appeals for the Ninth Circuit overturned an extradition order with respect to one of two bribery charges levied against Man-Sook Choe, a Korean citizen and resident of Los Angeles where an insufficient basis existed to establish probable cause in Korea’s request for extradition; the charge was that Choe paid off Mr. Hwang, a member of the National Assembly, to use his influence to win a contract bid for a particular company, but there was no evidence presented that Choe promised Hwang a reward, that Choe gave him anything, or even that they met – just conclusory allegations).

\(^{197}\) For example, Australia requires *prima facie* evidence from other Commonwealth countries, maintains a separate system with New Zealand, and may rely on reciprocity and mutual understanding with countries with which it has no extradition treaty. Matthew Groves, *Review of Australian Extradition Law*, 30 CRIM. L.J. 337, 338 (2006).

\(^{198}\) *e.g.*, U.S.-RSA Extradition Treaty, *supra* n.44, art. 19.
inculpatory evidence overall, where the evidence fails to meet one element of the
crime, the request for extradition may be rejected based on insufficient
evidence.\footnote{The March 2004 Tokyo High Court denial of a U.S. request for the extradition of Japanese
scientist Takashi Okamoto on economic espionage and related charges is illustrative. Although
Dr. Okamoto admitted to taking certain genetic material out of a disease research institute in
Cleveland, Ohio, he did so late at night, and had an accomplice who pled to a lesser charge, the
judge ruled there was no probable cause to believe he had intended to benefit his new employer,
the Institute of Physical and Chemical Research (RIKEN), a Japanese government-funded
institute – an essential element of economic espionage. Tetsuya Morimoto, First Japanese Denial
of U.S. Extradition Request: Economic Espionage Case, 20 IELR 288 (2004). In another facially
questionable case, Japan “felt that Peru’s 700-page extradition request [for Alberto Fujimori,
former Peruvian President] failed to provide sufficient evidence.” Renee Dopplick, “International
http://www.insidejustice.com/law/index.php/intl/2006/02/19/p59 (last visited on Oct. 8,
2013).} Evidence could be inadequate for any number of reasons, including,
for example, if witness statements are unsworn, there is no opportunity to cross-
examine their testimony, or if their statements are suspiciously identical.\footnote{See, e.g., Bruce Zagaris, U.S. Trial Court Denies Extradition Request on Murder Charges, 27 IELR 512, 513 (2011) (denying the extradition request of Argentina of Robert Guillermo Bravo for
murder and attempted murder charges based on inadequate evidence).} Fraud cases are notoriously challenging because it is often difficult to
demonstrate criminal intent, and therefore extradition requests can be denied
on that basis.\footnote{E.g., Bruce Zagaris, South African Court Rejects Zimbabwe Extradition Request, 27 IELR 966, 966-67 (2011).} Finally, of course, a reviewing State court may improperly
choose “to try the case instead of confining [itself] to ascertaining whether the
evidence submitted . . . was sufficient to justify the fugitive’s apprehension and
commitment for trial” and in so doing may reach the conclusion that the
evidence falls short of the applicable standard.\footnote{See Charles Cheney Hyde, The Extradition Case of Samuel Insull Sr. in Relation to Greece, 28 AJIL 307, 311 (1934) (discussing the exceptional 1932 case of Samuel Insull Sr. in which the
Greek Court of Appeals investigated the merits of the charges against him in a trial-like manner,
rather than merely determining if enough evidence existed, in contravention of the terms of the applicable extradition treaty) (quoting November 1933 letter from the U.S. Minister to Greece to
the Greek Minister of Foreign Affairs complaining about Greece’s unwilling to extradite Samuel
Insull Sr. on larceny-related charges).}

Significantly, an extradition hearing is not tantamount to even an abbreviated
criminal trial, as it does not purport to try an individual for his guilt or innocence
on the merits.\footnote{See supra page 163 (Chapter 4); JENNINGS & WATTS, supra n.18, at 958-59; DUFFY, supra n.11, at
WLR 117 (U.K.) (House of Lords held that since extradition proceedings are a type of criminal}

\footnote{See supra page 163 (Chapter 4); JENNINGS & WATTS, supra n.18, at 958-59; DUFFY, supra n.11, at
WLR 117 (U.K.) (House of Lords held that since extradition proceedings are a type of criminal
a domestic committal hearing,\textsuperscript{204} is merely to determine whether, under a host State’s municipal law, an individual can and should be extradited to a pursuing State to face prosecution or punishment. Much less evidence is required by host States, even under the most rigorous screening tests, than would be necessary to render a guilty verdict.\textsuperscript{205} Accordingly, pursuing States need not have completed their investigations into the underlying facts before deciding to seek extradition,\textsuperscript{206} and even may choose to withhold certain types of collected evidence for strategic reasons.\textsuperscript{207} In addition, the host State need not comply with the evidentiary rules applicable to criminal trials, and thus may permit the introduction, for example, of hearsay testimony,\textsuperscript{208} while affirmative defenses (such as entrapment\textsuperscript{209}) advanced by the accused are generally not considered relevant.\textsuperscript{210}

Despite such procedural flexibility,\textsuperscript{211} and a general trend toward a loosening of the standard,\textsuperscript{212} reliance on an evidentiary requirement undoubtedly can proceed, the committing magistrate was entitled to apply regular domestic rules of criminal evidence and procedure).

\textsuperscript{204} Gilbert, supra n.182, at 261.
\textsuperscript{205} Duffy, supra n.11, at 110.
\textsuperscript{206} Id. at 110-11 & n.195.
\textsuperscript{207} Id. at 110; M. Cherif Bassiouini, International Extradition and World Public Order 179-81 (1974) [hereinafter Bassiouini, World Public Order].
\textsuperscript{208} See n.48 in Chapter 4 supra; Jennings & Watts, supra n.18, at 958-59; Rice v. Ames, 180 U.S. 371, 375-76 (1901) (allowing the admissibility of hearsay evidence); U.S. Fed. R. Evid. 1101(d)(3) and accompanying Advisory Committee notes, available at http://www.law.cornell.edu/rules/fre/rule_1101 (last visited on Nov. 9, 2013) (U.S. Federal Rules of Evidence do not apply to extradition proceedings); e.g., In re Extradition of Marzook, 924 F. Supp. 565 (S.D.N.Y. 1996) (considering properly authenticated documents notwithstanding their hearsay content).
\textsuperscript{209} Under U.S. law, the government may rely on decoys to ensnare criminals and simply offering him an opportunity to commit a crime is not deemed sufficient to defeat a prosecution on an entrapment defense. Paul Marcus, Presenting, Back From the [Almost] Dead, the Entrapment Defense, College of William & Mary Law School Faculty Publications, 1995, at 243, available at http://scholarship.law.wm.edu/facpubs/581 (last visited on Feb. 14, 2012). Rather, something more is required. See, e.g., United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994) (“[a]n ‘inducement’ consists of an ‘opportunity’ plus something else – typically, excessive pressure by the government upon the defendant or the government’s taking advantage of an alternative, noncriminal type of motive”) (emphasis in original).
\textsuperscript{210} See, e.g., Bruce Zagaris, Trinidad Magistrate Orders Extradition of Three Suspects to U.S. in JFK Airport Terrorism Plot, 23 IELR 375 (2007) (discussing case in which Trinidad & Tobago ordered the extradition of Abdul Kair, Kareem Ibrahim, and Abdel Nur to the U.S. on charges that they conspired with a former airport cargo worker to sabotage jet fuel storage tanks and fuel lines at New York’s Kennedy International Airport over an objection that they were entrapped by a confidential U.S. informant into plotting the attack).
\textsuperscript{211} See, e.g., Bruce Zagaris, Colombian Supreme Court Inquires About Potential U.S. Violations of Extradition Terms, 21 IELR 222, 223 (2005) (U.S. prosecutors allowed to introduce pre-
confound an extradition request,\(^{213}\) which can be exacerbated in one of several scenarios. First, some cases require witnesses or physical evidence that is only available in another State and the transportation or shipment for hearing purposes can prove prohibitively expensive or logistically complicated.\(^{214}\) Second, in older cases, particularly those that date back decades, it can be challenging to even locate the requisite witnesses and physical and scientific data to meet the host State’s applicable evidentiary standard.\(^{215}\) Third, to the extent a host State court finds that certain inculpatory evidence was gathered unlawfully (e.g., through confessions or information elicited via duress or torture\(^{216}\) or data collected from an unauthorized wiretap), was the product of plea bargaining,\(^{217}\) is based primarily on unreliable witness testimony\(^{218}\) or on

---

\(^{212}\) See, e.g., EAW, supra n.47, arts. 58(3) and 91(2) (addressing surrenders to the ICC).

\(^{213}\) See BANTEKAS & NASH, supra n.23, at 183-84; Gilbert, supra n.182, at 261 (citing the Home Office, A Review of the Law and Practice of Extradition in the United Kingdom, Report of an Interdepartmental Working Party, Criminal Justice Department, Home Office, May 1982, ¶ 4.6, in which the British Government recognized that the most common cause of failure of applications under extradition treaties was the \textit{prima facie} requirement); Richard Goldberger, \textit{It's Just not Cricket: Is the Principle of Reciprocity Being Honored in the U.S.-U.K. Extradition Treaty?}, 29 CARDOZO L. REV. 819, 839 n.135 (2007) (noting that in 1978, the then-Anglo-Spanish extradition treaty lapsed because not a single Spanish request had been granted mainly due to the \textit{prima facie} requirement).

\(^{214}\) See Boister, supra n.3, at 302 & nn.92-94 (citing by example In re Reyat’s Application for a \textit{Writ of Habeas Corpus}, QB Div., CO/1157/88, MWC, Mar. 22, 1989 (unreported) in which Canada had to fly witnesses to Hong Kong from Japan to take evidence to establish a \textit{prima facie} case for extradition from the U.K.).

\(^{215}\) See BASSIOUNI, WORLD PUBLIC ORDER, supra n.207, at 179-81; e.g., Jacobs, 176 F. Supp. 877 (finding lack of probable cause in case where underlying crime occurred in 1922, an \textit{in absentia} conviction took place in Italy in 1931, and an extradition request was lodged in 1959); Bruce Zagaris, \textit{Canadian Supreme Court Denies Appeal of Extradition for WWII War Crimes}, 24 IELR 109, 109-10 (2008) (Canadian Federal Court Justice James O’Reilly expressed concerns more than six decades later about the sufficiency of the evidence that Michael Seifert had committed the atrocities alleged of him at the Bolzano prisoner camp during World War II).

\(^{216}\) See Bruce Zagaris, \textit{British Appellate Court Affirms Extradition of Radical Muslim Cleric to U.S.}, 24 IELR 314, 314 (2008) (summarizing British High Court ruling that while rejecting Abu-Masri’s counsel’s “arguments that there was evidence that torture had been used on some individuals in obtaining the evidence that led to the U.S. extradition request” and that a “U.S. trial would be illegal since [his client] would be tried ‘on the basis of the fruits of torture,’” nevertheless exemplify how such contentions are made and could prevail where evidence was more robust); Robert Jackson & Juanita Darling, “U.S. Judge Won’t Extradite Former Mexico Official,” \textit{L.A. Times}, June 23, 1995, at A1, A17 (denying Mexican request for extradition of Mexico’s former deputy attorney general on murder charges on the grounds that the witness statements against him were obtained via torture).

\(^{217}\) See, e.g., Shirley Christian, “Chile Indicates It Won’t Turn Over Two to the U.S. in Letelier Case,” \textit{N.Y. Times}, June 15, 1987, at A10 (“In 1979, the Chilean Supreme Court rejected the United
discriminatory intent,\footnote{See, e.g., Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 440 (7th Cir.) (probable cause evidentiary requirement not met where the testimony of the government’s chief witness was deemed unreliable and unpersuasive and the credibility of the second key government witness was questioned), cert. denied, 481 U.S. 1028 (1987).} or there are signs of bad faith or corrupt prosecutors or police,\footnote{In both 1998 and 2004, the Government of Israel denied Poland’s requests for the extradition of Salomon Morel, a naturalized Israeli citizen and Holocaust victim who had headed a Soviet prison camp at the tail end of World War II that allegedly brutalized Nazi and other German inmates, partly on the basis that the evidence against him was developed “during a time of virulent anti-Semitism, and directed against a Jewish citizen.” Letter from State of Israel, Office of the State Attorney, to the Government of Poland, June 6, 2005, found on Website of Poland’s Institute of National Remembrance, available at http://www.ipn.gov.pl/portal.php?serwis=en&dzial=2&id=71&search=1059 (last visited on Jan. 9, 2012).} that court may not treat the evidence as admissible and thereby find the evidentiary standard for granting extradition has not been satisfied. Fourth, some civil law States may be unwilling to submit their evidence to a common law State whose courts insist on a \textit{prima facie} or probable cause standard before agreeing to extradite a fugitive.\footnote{E.g., \textit{In re Saifi} [2001] 4 All E.R. 168 (unfair to return the applicant to India on the ground that the evidence supporting the request for extradition was obtained in bad faith).}

\textbf{c. Procedural Requirements}

Procedural expectations, particularly an improperly filed request or other paperwork and an array of timing issues, also can operate to scuttle a requested extradition.

\textit{Improper Filing and Paperwork.} The simple erroneous filing of an extradition request can result in a denial. A misfiling may arise when the request is not submitted in written form or through diplomatic channels, at least where an applicable extradition treaty so dictates.\footnote{Ivan A. Shearer, \textit{Extradition in International Law} 207 (1971).} In addition, treaty-based extradition procedures can be complex\footnote{Duffy, supra n.11, at 108.} and may entail specialized domestic requirements of which pursuing State officials are not necessarily aware.\footnote{See Shearer, supra n.222, at 207-08 & n.5 (citing to \textit{In re Ribeiro}, Sup. Ct. of Justice, Colombia, July 2, 1958, \textit{reprinted in} 26 ILR 525 (1963)) (extradition denied where pursuing State failed to state that the offense at issue was not time barred, as required under municipal law).} Moreover, an extradition request may need to be sufficiently specific regarding the nature of

226
the crime, the identity of the fugitive, and the underlying criminal offense, or it may be rejected.\textsuperscript{225} Furthermore, should a request be denied, for whatever reason, some States bar re-submission of that request for the same crime, either as a function of a treaty provision\textsuperscript{226} or under the \textit{non bis in idem} principle. Finally, the underlying arrest warrant had to have been issued by a pursuing State court with applicable subject matter jurisdiction and with the authority to enforce the warrant,\textsuperscript{227} and the arrest warrant itself on which the extradition request is based must be authentic\textsuperscript{228} and non-defective.\textsuperscript{229} (Even when the filing is proper and extradition proceeds, to the extent that arrest warrants are misplaced on the receiving end, fugitives may be released from detention.\textsuperscript{230})

\textbf{Timing Issues.} Late timing or excessive delays in meeting \textit{procedural} requirements, deadlines, or expectations,\textsuperscript{231} whether express or discretionory, also can obstruct an extradition. This can occur in one of several ways. First, a State may deny a request that is filed after a dispositive decision has been made to release or deport a fugitive, prosecute him domestically, or extradite him to a

\textsuperscript{225} \textit{E.g.}, \textit{Guy Malary v. Haiti}, Case 11.335, Report No. 78/02, Inter-Am. C.H.R., Doc. 5 rev. 1, at 682 (2002), ¶ 88, \textit{available at http://www1.umn.edu/humanrts/cases/78-02.html} (last visited on Nov. 29, 2013) (referencing the case of Emmanuel Constant, the leader and founder of the FRAPH, a right-wing paramilitary group formed in 1993, implicated in the murder of Mr. Malary whose extradition from the U.S. to Haiti was denied based on a “defective” factual submission).
\textsuperscript{226} \textit{E.g.}, Montevideo Conv. on Extradition, Dec. 26, 1933, art. 12, \textit{reprinted in} 28 AJIL 65 (1934) (“once extradition has been refused application may not again be made for the same alleged act”).
\textsuperscript{227} \textit{E.g.}, \textit{Sacribey v. Guccione}, 589 F.3d 52 (2d Cir. 2009) (treating the issue as a matter of first impression and resulting in a grant of the defendant’s petition for a writ of \textit{habeas corpus}).
\textsuperscript{228} \textit{E.g.}, Bruce Zagaris, \textit{Senegalese Court Denies Belgian Extradition Request for Habré}, 28 IELR 86, 86-87 (2012) (citing as one ground for the denial of extradition that the copy of the international arrest warrant supporting the request was not authentic).
\textsuperscript{229} \textit{See, e.g.}, H.R.S. Ryan, \textit{Ex parte John Anderson, 6 QUEEN'S L.J.} 382, 387 (1981) (discussing an historic case in Upper Canada in 1860, before the U.S. Civil War and the end of slavery in the U.S., in which the state of Missouri sought extradition from Canada under the Webster-Ashburton Treaty for the return of escaped slave John Anderson on the grounds of “willfully, maliciously and feloniously stab[ing] and kill[ing]” a woman, but how the failure of the warrant to indicate that this act was committed with “malice aforethought and thereby constituted murder” was deemed by the court to be invalid and the defendant was released from custody).
\textsuperscript{230} For example, after France extradited an ETA terrorist, Maite Aranalde, to Spain in August 2009, and the French Court of Appeals had “mislaid” the applicable arrest warrant, a Spanish High Court judge granted Aranalde’s release on bail. Bruce Zagaris, \textit{Spanish Judge Tries to Re-Arrest Missing ETA Terrorist After French Judicial Error}, 25 IELR 439, 439-40 (2009).
\textsuperscript{231} These constraints are to be distinguished from statutes of limitations (or prescription) of a \textit{substantive} character that foreclose prosecution in cases when the prescribed period of time for bringing a criminal action, if any, has passed as measured against the date of the underlying crime or its discovery (discussed supra).
third State. Such decisions may result from a communication breakdown or bureaucratic lapse on the part of a pursuing State in failing to timely seek extradition, or occur in politically sensitive cases where expedited dispatch of the matter (typically via release or deportation) by the host State evidently is favored over an interest in criminal law enforcement cooperation. In the latter scenario, for instance, in 1977 a Paris Court of Appeals found no criminal issue with Abu Daoud, a Palestinian alleged to have participated in the 1972 massacre of Israeli Olympic athletes in Munich, after a cursory 20-minute proceeding only four days after his arrest and so instead ordered his expulsion to Algeria, thereby thwarting West Germany’s extradition request on the grounds that it had not yet been verified via diplomatic channels.232

Second, extradition can be denied where a pursuing State fails to meet a treaty-based submission deadline,233 or takes excessive time post-indictment to invoke an extradition treaty and seek a fugitive’s return, at least where the pursuing State is aware of the fugitive’s whereabouts. The idea underlying this latter refusal is that it would be unjust and oppressive to delay progress on extradition once a decision has been made to charge an individual with a crime.234 For example, in United States v. McConahy, the U.S. Court of Appeals for the Seventh Circuit found that a five-year delay in filing a request for extradition was unjustifiably long where the fugitive was known to be in a foreign prison and had asked to be returned.235 Similarly, in June 2001, Spain denied a U.S. extradition request for a former U.S. automobile industry executive for

232 Liskofsky, supra n.78 (noting additionally that Algeria received Daoud with a hero’s welcome and that Israel had also sought his extradition but was denied for other suspect reasons). Notably, the chambre d’accusation did not elaborate on why it felt the case needed to be disposed of so promptly and was unwilling to wait perhaps a few extra days for the West German government to confirm its official request. Id.

233 In other cases, the failure to meet a filing deadline can prove inconsequential. See, e.g., Geldof v. Meulemeester & Steffen, Cour de Cassation, Belg., Feb. 20, 1961, Pasicrisie belge, 1961, Part I, at 674 [Fr.], reprinted in 31 ILR 385 (E. Lauterpacht ed. 1966) (The Netherlands government extradited the subject despite Belgium’s extradition request submitted two days after the deadline set by treaty).

234 Interestingly, although the Sixth Amendment to the U.S. Constitution grants to criminal defendants the right to a speedy trial, no such right exists to a speedy extradition hearing under either that Amendment or the Due Process Clause. SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 221 (2006).

235 505 F.2d 770, 773-74 (7th Cir. 1974). Accord Platto, 213 F.Supp.2d at 1234 (noting that a post-indictment delay in seeking extradition is an equitable consideration).
misappropriating trade secrets, in part due to “the fact that the United States took seven years to formulate the extradition request.” This dynamic applies a fortiori in instances where a pursuing State fails to formally request extradition after a host State has effected the provisional arrest of a fugitive on the pursuing State’s behalf, as the individual should not be held any longer than can be reasonably justified.

Third, even when an extradition request is timely filed with a host State, it still can be refused to the extent that sufficient evidence supporting that request is not presented within a prescribed or other reasonable period of time. A variant on that theme is when a host State is unwilling to entertain a pursuing State request for additional time to collect, prepare, or produce supplemental evidence, which sometimes occurs in cases that the host State attempts to dispose of quickly so as to avoid potential political embarrassment. For example, in the Eisler case, the British magistrate released Gerhart Eisler after only two weeks in custody in May 1949 while rejecting a U.S. request for more time to arrange for additional documentation to be submitted in support of his extradition.

Fourth, a host State’s domestic law may require a fugitive’s release if he is held beyond a certain time period pending extradition, regardless of the number of court appeals and their repeated failure.

Finally, once a host State has determined that a fugitive is to be extradited, should the pursuing State fail to arrange for his return within a specified time or

---

237 STANBROOK & STANBROOK, supra n.14, at 144-45.
238 Id.; for example, in November 2010, Spain released detained fugitive Carlos Vielman, alleged to have participated in the extrajudicial killing (EJK) of prisoners in Guatemalan jails, when Guatemala failed to supply a supporting document in connection with its extradition request. Bruce Zagaris, Spain Releases Former Minister After Guatemala Fails to Meet Deadline, 27 IELR 558 (2011).
239 Eisler, 170 F.2d 273; George A. Finch, Editorial Comment, The Eisler Extradition Case, 43 AJIL 487, 490 (1949).
240 Jack Ewing, “Financier, Free Again, Comes to Rest on Home Turf,” Int’l N.Y. Times, Aug. 4, 2014, at 1, 16 (discussing case of German financier Florian Homm who was released from prison in Pisa, Italy, in June 2014, despite a succession of failed appeals, but where his attorneys exploited this particular loophole in the Italian legal system).
without undue delay, the fugitive can request and obtain release from detention under some municipal legal systems.²⁴¹

d. Governmental Processing

Among the principal factors impeding or deterring extradition from the standpoint of governmental processing are: (i) ineffective or disempowered investigators, inept or incautious prosecutors, corrupt bureaucrats, and decision-shy judges; and (ii) the often excessive time, heavy expense, and ultimate uncertainty involved.

Investigators, Prosecutors, Bureaucrats, and Judges. The incapacity of a host State police force or other criminal investigative body to locate the whereabouts of a fugitive within its territory can ultimately prevent extradition, as such a transfer cannot occur, of course, without first finding and arresting the fugitive. Some host State law enforcement agencies, despite the best intentions, are simply not up to the task, lacking the requisite skills and resources to hunt down wanted persons.²⁴² A related concern is when a police force is not empowered or authorized to arrest a top-level political leader (e.g., General Manuel Noriega while serving as de facto leader of Panama).²⁴³ Prosecutorial misconduct can result in a scuttled extradition where, for instance, due process rights have been violated on account of a “breach of a valid prosecutor-defendant agreement.”²⁴⁴

In addition, some host States are hamstrung on account of corruption within their bureaucratic ranks (including executive and judicial branch personnel alike), which are susceptible to bribes, threats, payoffs, kickbacks, or favors, or simply harbor political sympathies.²⁴⁵ Examples abound of such behavior or reasonable concerns thereof and include the following:

²⁴² See Jonathan A. Gluck, The Customary International Law of State-Sponsored International Abduction and United States Courts, 44 DUKE L.J. 612, 613 n.8 (1994); Downing, supra n.38, at 576 (citing Lebanon as an example).
²⁴³ Downing, supra n.38, at 576.
²⁴⁵ Bassiouni, World Public Order, supra n.207, at 179-81; Melanie M. Laflin, Note, Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other
• In 1959 when West Germany finally sought the extradition from Argentina of Josef Mengele, the Nazi doctor responsible for conducting horrific scientific experiments on prisoners at the Auschwitz Concentration Camp, he disappeared before he could be arrested and resurfaced later in Paraguay, most likely on an inside tip from a sympathetic Argentine official.246

• In the 1970s, after fleeing the U.S. for the Bahamas, Robert Vesco, a Wall Street financier who had stolen hundreds of millions of dollars from mutual fund investors, bribed Bahamian officials into not extraditing him.247

• For years until 1997, narcotics traffickers paid Mario Ruiz Massieu, Mexico’s top anti-drug enforcement official and director of the Institute for Combating Drugs in Mexico (INCD), along with his agents, millions of dollars to allow illegal trafficking operations to proceed without interference.248

• In November 1990, in connection with announcing changes to help protect his nation’s judges from assassination, the Colombian Justice Minister reported that “250 judges and magistrates [had] been killed by drug traffickers and other criminals and that 84 percent of cases [were] dropped during the investigative stages, often when the judges ordering the investigations [were] killed or bribed.”249

---


246 Gary J. Bass, The Adolf Eichmann Case: Universal and National Jurisdiction, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law 87 (Stephen Macedo ed. 2004). Tellingly, throughout the post-World War II era, Argentina maintained a secret anti-Semitic order that, until it was acknowledged and repealed in 2005, barred Jews fleeing the Holocaust from entering Argentina. Monte Reel, “In South America, a ‘Last Chance’ to Hunt Down Nazi War Criminals,” Wash. Post, Dec. 6, 2007, at A20. It was the knowledge of Mengele’s escape that, a year later, led a Jewish West German prosecutor, Fritz Bauer, to provide Israel with information that Eichmann was in Buenos Aires because he feared that if he told the West German government, a Nazi sympathizer would tip off Eichmann or otherwise prevent his extradition. Bass, supra, at 80.


• “There is ample circumstantial evidence that an effort is underway to obstruct the extradition [in 1988] from the U.S. of CPT [Captain] Alvaro Rafael Saravia, the cashiered Salvadoran Air Force Officer charged with complicity in the March 24, 1980 assassination of Archbishop Oscar Arnulfo Romero,” including the apparent collusion of an administrative law judge.\footnote{250} Governmental processing impediments likewise can occur when judges are unwilling to rule on an individual’s extraditability based on an often-fabricated lack of justiciability. In November 2005, for example, a Senegalese court (the Chambre d’accusation of the Dakar Court of Appeal) ruled that it was incompetent to rule on a Belgian request to extradite Hissène Habré, Chad’s former leader, concerning charges of torture, war crimes, and crimes against humanity (CAH) during his political tenure (1982-90), on the grounds that Habré was subject to immunity for acts committed as head of State in the exercise of his official functions.\footnote{251} That ruling followed ones in July 200 and in March 2001 in which Senegal’s Court of Appeal and its Court of Cassation (\textit{i.e.}, its highest court), respectively, ruled that Habré could not be adjudicated in Senegal for acts allegedly carried out in Chad for the Courts’ lack of jurisdiction.\footnote{252}

\textbf{Time, Expense, and Uncertainty.} While a routine extradition request generally takes a number of months on average to process\footnote{253} – although in exceptional


\textsuperscript{251} Bruce Zagaris, \textit{Senegal Allows Habre to Stay Pending African Union Decision}, 22 IELR 59, 59-60 (2006) [hereinafter Zagaris, \textit{Senegal}]. That ruling, however, was rejected both by the African Union’s (AU’s) Assembly of Heads of State and Government by Decision 127 (VII) in July 2006, which mandated that Senegal prosecute him, and by the ICJ when it found in July 2012 that “the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.” \textit{Questions Relating to the Obligation to Prosecute or Extradite} (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), ¶¶ 23, 122(6), \textit{available at} \url{http://www.icj-cij.org/docket/files/144/17064.pdf} (last visited on Nov. 2, 2013) (basing decision specifically on text found in the Convention against Torture (CAT)).


\textsuperscript{253} See, e.g., Canada, Dep’t of Justice, “Federal Involvement in the Case of Ernest Fenwick Macintosh,” Oct. 25, 2013, \textit{available at} \url{http://www.justice.gc.ca/eng/rp-pr/other-autre/macintosh/p3.html} (last visited on Nov. 29, 2013) (“Over the past decade, most requests have taken between six and 20 months from the time the prosecutors have decided to seek an
instances, such as when the individual consents or when a particularly dangerous, well-networked criminal is involved, it may take only a matter of days\textsuperscript{254} – more legally complicated or politically charged cases can take significantly longer. Some extraditions can take two or three years to process,\textsuperscript{255} while others extend to 5-10 years\textsuperscript{256} or in extreme cases even decades.\textsuperscript{257} Such

\textsuperscript{254} E.g., Bruce Zagaris, \textit{Panama Extradites Alleged Colombia Drug Lord to the U.S.}, 20 IELR 89, 89-90 (2004) (in January 2004, only four days after a joint U.S.-Panamanian law enforcement operation captured Arcangel de Jesus Henao Montoya, an alleged Colombian drug lord and one of its most suspected cocaine traffickers to the United States, he was extradited).


\textsuperscript{257} E.g., Tomislav Z. Kuzmanovic, Note, \textit{The Artukovic Case: Do the Means Justify the End?}, 6 Wis. Int’l L.J. 155, 155 (1987) (Andrija Artuković, a Croatian politician known as the Himmler of the Balkans, because he set up and operated concentration camps and committed war crimes against
delay is a function of the multi-step process, described in chapter 4 *supra*, designed to protect national interests and individual rights alike. Extradition might require a series of hearings; the supplemental request for and evaluation of evidence; recurring diplomatic channel communications between the host and pursuing States; numerous motions, appeals and petitions, including in some instances the possible referral to a human rights tribunal for review;\footnote{For example, the ECtHR cleared Abu Hamza al-Masri’s extradition to the U.S. to face terrorist-related charges despite his potentially lengthy incarceration in a maximum security U.S. prison, if convicted. Alan Cowell & John F. Burns, “Britain Is Allowed to Send 5 Terror Suspects to U.S.,” *IHT*, Apr. 11, 2012, at 6.} bureaucratic reviews and in-fighting on strategic issues; and sensitive deliberation over discretionary calls.\footnote{See Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 B.Y.B.L.L. 77, 94 (1964) (“Delay [is] always present in a proceeding involving decision-making by various agencies – the extradition commissioner, the courts if the accused petitions for habeas corpus and appeals are taken, and the Secretary of State”); McAlister, *supra* n.256, at 475 n.197; Bassiouni, *World Public Order*, *supra* n.207, at 179-81; Downing, *supra* n.38, at 576 n.22; Evert Clark & Nicholas Horrocks, *Contrabandista!* 177-231 (1973). The Canadian justice system is notorious for offering a “protracted extradition process and lengthy appeals,” encouraging a number of fugitives to relocate there to “escape justice for years.” Doug Struck, “Fugitives From Other Places Go to Canada to Escape the Heat,” *Wash. Post*, Oct. 29, 2005, at A14.}

Sometimes, a pursuing State will submit successive extradition requests that over time, say, present more compelling inculpatory evidence, or seek to accommodate host State requirements about the nature of the trial or potential punishment awaiting an extraditee,\footnote{E.g., Bruce Zagazis, *Britain Agrees to Extradite Algerian to France on Terrorism Charges*, 22 IELR 58 (2006) (in 2001, the British High Court had ruled that Britain could not grant France’s request for the extradition of Rashid Ramda a/k/a Abu Fares, an alleged member of the GIA (Groupe Islamique Armé), the Algerian militant organization that has sought to overthrow the Algerian government and install an Islamic State, because he would be “subject to inhumane and degrading treatment” and a rigged trial in France; however, the British Home Secretary issued an extradition order in April 2005 on the basis that Abu Fares would receive a fair trial).} or attempt to capitalize on liberalized legal reforms in the host State (e.g., relaxed evidentiary standards) or changed factual circumstances in the pursuing State (e.g., reduced risk of persecution due to new political leadership). In addition, where international terrorism, piracy, or other such crimes are implicated, national intelligence services may want to interrogate the extradition subjects before they are transferred into the
jurisdiction and control of law enforcement, thereby delaying extradition.\footnote{See, e.g., Bruce Zagaris, \textit{Turkey Requests Iraqi Extradition of Two Islamists for 2003 Attack}, 21 IELR 356, 356-57 (2005) (noting that the Turks, Americans, Iraqis, and even Israelis may wish to obtain intelligence from Burhan Kus and Sadettin Aktas, Turkish Islamists detained by the Iraqis in 2005, that could potentially delay their extradition to Turkey on charges related to their participation in a 2003 terrorist attack in Istanbul).}
Delays not only postpone bringing fugitives to justice but can even operate to effectively deny an extradition to the extent the subject of the extradition dies or becomes physically or mentally incapacitated in the meantime, and thereby no longer becomes a candidate for prosecution or punishment in the pursuing State.\footnote{For example, Australian businessman Christopher Charles Skase, who fled to the Spanish island of Majorca, was sought throughout the 1990s by the Australian government on charges related to business improprieties in connection with the Qintex company he owned and managed, but in August 2001, while proceedings with Dominica (a State in which he become a citizen in 1998) were still underway, he died of stomach cancer and so succeeded in evading extradition. James Morton & Susanna Lobe, “Our Criminals on Parade,” \textit{The Australian}, Oct. 17, 2009, available at http://www.theaustralian.com.au/news/features/our-criminals-on-
\textregistered\de/story-e6frg6z6-1225787518918 (last visited on Nov. 29, 2013). This circumstance illustrates \textit{in extremis} the adage, “justice delayed is justice denied.”}

Beyond the temporal considerations that can discourage some States from \textit{pursuing} extradition, the costs associated with locating, arresting, detaining, processing, litigating, and ultimately transferring individuals can often be steep and thereby serve as a deterrent to host States. Unlike in the past,\footnote{Traditionally, all costs associated with apprehending, securing and transmitting a fugitive were to be paid by the requesting State. \textit{Abbett}, supra n.36, at 2-37 to 2-38. For example, “in 1939 [the U.S. state of] Nebraska asked the Department of State to withdraw its request for the extradition of a fugitive [Harry Fahrenbruch] from Mexico because of the expense to the State of maintaining an agent at the border for several weeks pending a decision as to whether the fugitive should be surrendered.” \textit{Evans}, supra n.259, at 95 & n.2 (1964).} host States today absorb these expenses, including legal fees and discovery, which can prove financially onerous.\footnote{See M. Cherif Bassiouni, \textit{Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition}, 7 \textit{VAND. J. TRANSNAT’L L.} 25, 63-64 (1973); \textit{Downing}, supra n.38, at 576-77 n.22 (costs include counsel hired for these proceedings and discovery expenses).} As a result, some States limit their extradition-related activity to strictly high-profile, criminally egregious, and/or politically significant cases.\footnote{See \textit{ETHAN A. NADELMANN}, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 460 (1993); \textit{Epps}, supra n.18, at 374 (“Petty criminals are not often subject to extradition, in part because extradition is an expensive process and application of a cost-benefit analysis reveals that petty criminals are not simply not worth pursuing.”).} Costs can mount especially when extradition subjects are wealthy and willing to pay for top-tier legal advocates to represent their interests and explore

\footnote{\textit{\footnotesize See, e.g., Bruce Zagaris, Turkey Requests Iraqi Extradition of Two Islamists for 2003 Attack}, 21 IELR 356, 356-57 (2005) (noting that the Turks, Americans, Iraqis, and even Israelis may wish to obtain intelligence from Burhan Kus and Sadettin Aktas, Turkish Islamists detained by the Iraqis in 2005, that could potentially delay their extradition to Turkey on charges related to their participation in a 2003 terrorist attack in Istanbul).\footnote{For example, Australian businessman Christopher Charles Skase, who fled to the Spanish island of Majorca, was sought throughout the 1990s by the Australian government on charges related to business improprieties in connection with the Qintex company he owned and managed, but in August 2001, while proceedings with Dominica (a State in which he become a citizen in 1998) were still underway, he died of stomach cancer and so succeeded in evading extradition. James Morton & Susanna Lobe, “Our Criminals on Parade,” \textit{The Australian}, Oct. 17, 2009, available at http://www.theaustralian.com.au/news/features/our-criminals-on-
\textregistered\de/story-e6frg6z6-1225787518918 (last visited on Nov. 29, 2013). This circumstance illustrates \textit{in extremis} the adage, “justice delayed is justice denied.”\footnote{Traditionally, all costs associated with apprehending, securing and transmitting a fugitive were to be paid by the requesting State. \textit{Abbett}, supra n.36, at 2-37 to 2-38. For example, “in 1939 [the U.S. state of] Nebraska asked the Department of State to withdraw its request for the extradition of a fugitive [Harry Fahrenbruch] from Mexico because of the expense to the State of maintaining an agent at the border for several weeks pending a decision as to whether the fugitive should be surrendered.” \textit{Evans}, supra n.259, at 95 & n.2 (1964).} See M. Cherif Bassiouni, \textit{Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition}, 7 \textit{VAND. J. TRANSNAT’L L.} 25, 63-64 (1973); \textit{Downing}, supra n.38, at 576-77 n.22 (costs include counsel hired for these proceedings and discovery expenses).\footnote{See \textit{ETHAN A. NADELMANN}, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 460 (1993); \textit{Epps}, supra n.18, at 374 (“Petty criminals are not often subject to extradition, in part because extradition is an expensive process and application of a cost-benefit analysis reveals that petty criminals are not simply not worth pursuing.”).}
every conceivable legal angle for as long as necessary to avoid extradition.\textsuperscript{266} Even after all the time, money, and effort expended on extradition, however, the final result cannot necessarily be predicted; such uncertainty itself can help dissuade would-be pursuing States from filing an extradition request in the first instance.\textsuperscript{267}

\begin{center}
\textbf{* * * * * * *}
\end{center}

This chapter has examined the first set of impediments to extradition with a focus on legal standards and procedures. The next chapter will assess impediments arising out of the fugitive’s individual status and circumstances.

\textsuperscript{266} See, e.g., David Henry, "Marc Rich, "Fugitive Commodities Trader in 1980s, Dies at 78," \textit{Bloomberg News}, June 26, 2013, available at \url{http://www.bloomberg.com/news/2013-06-26/marc-rich-fugitive-commodities-trader-in-80s-dies-78.html} (last visited on Jan. 3, 2014) ("Rich, who held U.S., Spanish and Israeli citizenship at various times, [and whose assets were estimated at over $1.5 billion], spent about two decades dodging a team of U.S. marshals and international executives who operated under the codename Otford Project. The group was tasked with bringing Rich back to the U.S.").

\textsuperscript{267} See Downing, \textit{supra} n.38, at 576-77 n.22.
CHAPTER 6

IMPEDIMENTS II:
INDIVIDUAL STATUS AND CIRCUMSTANCES

This chapter focuses exclusively on impediments to extradition arising out of a fugitive’s individual status or circumstances, and consists of the following four sections: (i) nationality or residency bars; (ii) immunities; (iii) special relationships; and (iv) personal circumstances.

a. Nationality or Residency Bars

An individual’s status\(^1\) in a given State could be as a national, whether born or naturalized, and whether maintaining one or plural nationalities.\(^2\) Alternatively, an individual could be a permanent or temporary resident alien,\(^3\) an illegal (or prohibited) alien,\(^4\) a refugee\(^5\) or an asylee.\(^6\) Although customary international law,

---

\(^1\) Curiously enough, there are cases when an individual’s nationality is indeterminate. *E.g.*, *Levinge v. Director of Custodial Services, et al.* (1987) 9 N.S.W. L. Rep. 546, 549 (N.S.W. Ct. of App.), July 23, 1987 (“The determination of whether or not the appellant was and is a citizen of the United States or Mexico is impossible to make on the materials before this Court.”).

\(^2\) See n.8 in the Introduction supra for a definition of the terms “nationals” and “nationality.”

\(^3\) “The term ‘resident alien’ is generally understood as referring to an alien who has been admitted to and has resided in the territory of a State for a period of time in accordance with the relevant national laws.” UNGA, *Expulsion of Aliens*, A/CN.4/565, July 10, 2006, at 99, available at [http://untreaty.un.org/ilc/documentation/english/a_cn4_565.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_565.pdf) (last visited on Feb. 23, 2012) [hereinafter *Expulsion of Aliens*]. A temporary resident alien is a non-national whose presence in that State has been authorized via a work permit or tourist visa.

\(^4\) “The term ‘illegal alien’ is generally understood as referring to an alien whose status is illegal as a result of failing to comply with the relevant national laws of the territorial State concerning the admission, the continuing presence, the permitted activities or the residence of aliens.” *Id.* at 98. This definition would encompass any aliens lacking proper documentation.

\(^5\) “Refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called ‘statutory refugees’); but also other often large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin (now often referred to as

---

237
in principle, imposes no restrictions on the extradition of a host State national, a
pursuing State national, or a third State national, a number of States have chosen
not to extradite their own nationals or, less commonly, their residents. In addition
to analyzing these two scenarios, this section examines concerns raised by third
States whose nationals are the subject of (typically non-treaty-based) extradition
between two other States.

Perhaps the single most common barrier to extradition is the unwillingness on the
part of many States, particularly those with a civil law tradition, to extradite their

‘displaced persons’ or ‘persons of concern’). In each case, it is essential that the persons in question
should have crossed an international frontier and that, in the case of the latter group, the reasons for
flight should be traceable to conflicts, or radical political, social, or economic changes in their own
country. With fundamental human rights at issue, the key remains violence, or the risk or threat of
violence, but only in certain cases; those who move because of pure economic motivation, pure
personal convenience or criminal intent are excluded.” Guy S. Goodwin-Gill, The Refugee in
International Law 29 (2d ed. 1996) (citation omitted).

6 “Asylum accorded by a State to persons in its territory is generally referred to as territorial asylum.
Asylum accorded in other places, most notably on the premises of an embassy or a legation, is
referred to as extraterritorial or, more particularly, diplomatic asylum. . . . A person enjoying asylum
may be referred to as an ‘asylee.’ He may or may not be a refugee in accordance with an accepted
definition in international or municipal law.” Atle Grahl-Madsen, Territorial Asylum, in 1
Encyclopedia of Public International Law 283-84 (Rudolf Bernhardt ed. 1992). An example of the
“diplomatic” variety occurred in May 2002 when three North Koreans entered the U.S. consulate in
Shenyang, China, seeking asylum. Elisabeth Rosenthal, “North Korean Migrants Pull U.S. into a
Diplomatic Mess,” N.Y. Times, May 12, 2002, at 4. Another example occurred when Ecuador granted
Wikileaks founder Julian Assange diplomatic asylee status in its embassy in London while he was the
subject of an extradition request by Sweden to face sexual molestation-related charges. Bruce
Zagaris, Ecuador Grants Asylum to Assange, 28 IELR 403, 403-05 (2012).

8 By contrast, this impediment generally does not apply to the surrender of fugitives to international
criminal tribunals. Helen Duffy, The ‘War on Terror’ and the Framework of International Law 110
(2005). But see Const. of the Repub. of Poland, Apr. 2, 1997, art. 55, as published in Dziennik Utsaw
on Nov. 3, 2013) [hereinafter Const. of Poland] (“Poland need not surrender a Polish citizen to an
international judicial body in connection with genocide, crimes against humanity, war crimes or
crimes of aggression”).

9 Neil Boister, The Trend to ‘Universal Extradition’ over Subsidiary Universal Jurisdiction in the
however, expressly prohibit this ground for refusal. E.g., Treaty on Extradition, U.S.-Rom., Sept. 10,
citizenship of the person sought.”).

10 See Boister, supra n.9, at 299 (citing Israeli, German, and Austrian law as examples); Michael
Abbell, Extradition to and from the United States 3-24 to 3-25 (2001 & Supp. 2007) (most post-
1960s U.S. extradition treaties with civil law countries “provide the power to exercise discretion in
the extradition of one’s own nationals”). By contrast, common law States generally have maintained
a policy of not denying extradition requests on nationality grounds. Melanie M. Laflin, Note,
own nationals to other States. This concept, which is based on a “strong notion of exclusive criminal jurisdiction over its own nationals,”\textsuperscript{11} effectively creates a safe haven for persons committing crimes overseas who manage to return to a State of their nationality before being arrested (at least to the extent the State in question chooses not to prosecute).\textsuperscript{12} This issue is more complicated than it may first appear

\textit{Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options}, 26 J. LEGIS. 315, 317-18 (2000); JENNINGS & WATTS, supra n.7, at 956 (the U.K. does not distinguish between its own and other nationals in making extradition decisions); \textit{Sayne v. Shipley}, 418 F.2d 679 (5th Cir. 1969), \textit{reprinted in} 51 ILR 281 (1969) (absent treaty provisions to the contrary, U.S. practice has been to surrender its nationals). The flexibility of the U.S. stance on this matter can be exemplified by 18 U.S.C. § 3196 (2012) (incorporated under the International Narcotics Control Act of 1990, Nov. 21, 1990, § 11(a), Pub. L. 101-623, 104 Stat. 3356) (“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 have been met.”).

\textsuperscript{11} Boister, supra n.9, at 299. Accord Beverly Izes, \textit{Drawing Lines in the Sand: When State-Sanctioned Abduction of War Criminals Should Be Permitted}, 31 COLUM. J. L & SOC. PROBS. 1, 5 (1997-98); e.g., \textit{In re Arevalo}, Sup. Ct. of Colom., Apr. 30, 1942, \textit{reprinted in} 10 ANN. DIG. & REP. PUB. INT’L L. CASES 329, 330 (No. 99) (H. Lauterpacht ed. 1945) (expressing concern about “grave dangers” to Colombian nationals in trials in other States and indicating statutory intention to prosecute such nationals in Colombian courts); Geoff Gilbert, \textit{Extradition, in The Harvard Research in International Law: Contemporary Analysis and Appraisal} 264 (John P. Grant & J. Craig Barker eds. 2007); Christopher L. Blakesley, \textit{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} 259 (1992); Zsuzsanna Deen-Racsmany, \textit{Modernizing the Nationality Exception: Is the Non-extradition of Residents a Better Rule?}, 75 NORDIC J. INT’L L. 29, 29-30 (2006) [hereinafter Deen-Racsmany, \textit{Nationality Exception}] (noting that it is “disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses”). This practice dates back to medieval times and is rooted in the notion that feudal subjects were “entitled not to be withdrawn from the jurisdiction of local courts (\textit{ius de non evocando}).” Laflin, supra n.10, at 317-18. In States that do not bar extradition on nationality grounds, this protection is offset by the \textit{prima facie} or probable cause evidence requirement. \textit{Ivor Stanbrook & Clive Stanbrook, Extradition: Law and Practice} 133 (2d ed. 2000).

\textsuperscript{12} In addition to possibly contributing to impunity, a State’s refusal to extradite its own nationals or otherwise prosecute such cases could well have evidentiary, diplomatic, and human rights implications. See Laflin, supra n.10, at 333 (noting that the State where the crime occurred generally has a stronger interest in prosecution); \textit{Bonnechaux v. Switzerland}, Appl. No. 8224/78, Eur. Comm’n of HR, Judgment, Dec. 5, 1979, 3 EHRR 259 (concerned about a French national’s release and his likely flight to France, a nearly three-year pre-trial detention of a 74-year-old was upheld). But although the purpose is to ensure a fair trial for the accused, it can prove “overprotective” in instances where the underlying crime is particularly horrific, such as genocide, in which case there is a more compelling need for accountability than insulation. Izes, supra n.11, at 6. For its first 30 years of Statehood, Israel had a policy of extraditing its nationals but in 1978, shifted gears and adopted the civil law approach of the non-extradition of nationals; by the mid-1990s, however, Israel recognized it was becoming a haven for Jewish criminals, so by 1999 it reverted to a policy of extraditing its nationals but with a caveat for those resident in Israel at the time the extradition request is lodged such that they need to serve any imposed sentence in Israel. Abraham Abramovsky & Jonathan I. Edelstein, \textit{The Post-Steinbein Israeli Extradition Law: Has It Solved the Extradition Problems Between
because States apply different domestic law definitions and forms to nationality; the legal source for the non-extradition of nationals may be constitutional or statutory;\(^\text{13}\) the nature of this practice can be applied in absolute terms or with exceptions, and in some instances can even be waived by the individual;\(^\text{14}\) and the domestic law on this matter across many States has changed in recent years. These dimensions warrant examination.

The constitutions of some States, such as the Russian Federation,\(^\text{15}\) Honduras,\(^\text{16}\) and Venezuela,\(^\text{17}\) contain blanket prohibitions regarding the extradition of their own nationals, assuming they can prove their nationality.\(^\text{18}\) Other national constitutions provide significant, albeit not categorical, extradition-related protection to their own nationals; for example, the current constitution of Brazil insulates all Brazilian-born nationals from extradition, but would permit the extradition of its naturalized

\(^{13}\text{DUFFY, supra n.8, at 110; Richard Downing, Recent Development, The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil, 26 STAN. J. INT’L L. 573, 576 (1989-90).}\)

\(^{14}\text{It is also possible that an accused can waive his right to such nationality-based protection as a condition of obtaining bail so as to avoid pre-trial confinement, as occurred in the case of then-IMF President Dominique Strauss-Khan. “Dominique Strauss-Kahn Waives His Extradition Rights,” The Telegraph (London), May 19, 2011, available at http://www.telegraph.co.uk/finance/dominique-strauss-kahn/8523574/Dominique-Strauss-Kahn-waives-his-extradition-rights.html (last visited on Nov. 4, 2013).}\)


\(^{16}\text{Const. of Honduras, Jan. 11, 1982, art. 102, as amended, available at http://www.honduras.com/honduras-constitution-english.html (last visited on Nov. 3, 2013) (Eng.) (“No Honduran may be expatriated nor delivered by the authorities to a foreign State.”).}\)


\(^{18}\text{Where an accused cannot prove he is a national, he is not so protected under a State’s constitution. See, e.g., In re Vasquez, Sup. Ct., El Salvador, 1938, reprinted in 43 Revista Judicial 304 (Spanish text) (granting extradition with respect to a person who could not prove Salvadoran nationality). In July 2000, El Salvador voted to amend its constitution to permit the extradition of its nationals. Bruce Zagaris, El Salvadoran Legislature Approves Constitutional Amendment to Allow Extradition of Nationals, 16 IELR 901, 901 (2000).}\)
citizens in two specified instances;\textsuperscript{19} the constitution of Germany would allow extradition of its nationals to only two types of destinations;\textsuperscript{20} the constitution of Colombia authorizes extradition of its “native-born” nationals but only in connection with crimes committed after December 17, 1997 (the effective date of the amendment), and only for offenses calling for a minimum prison sentence of four years;\textsuperscript{21} the constitutions of Lithuania, Georgia, and Italy bar the extradition of their

\begin{footnotesize}
\textsuperscript{19} Const. of Brazil, Oct. 5, 1988, art. 5, as amended, available at http://web.mit.edu/12.000/www/m2006/teams/willr3/const.htm (last visited on Nov. 3, 2013) (Eng.) (“No Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization, or in the case there is sufficient evidence of participation in the illicit traffic of narcotics and related drugs, under the terms of the law”). This constitutional provision supersedes the U.S.-Brazil Extradition Treaty that entered into force in 1964, allowing for the extradition of anyone accused or convicted of a crime carrying a sentence of one year or more. Treaty on Extradition, U.S.-Brazil, Jan. 13, 1961, 15 U.S.T. 2093, T.I.A.S. No. 5691 [hereinafter U.S.-Brazil Extradition Treaty].

\textsuperscript{20} Germany, Basic Law for the F.R.G., adopted May 8, 1949, art. 16(2), published as revised in the Federal Law Gazette Part III, classification number 100-1, last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944), available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (last visited on Nov. 29, 2013) (“No German may be extradited to a foreign country. The law can provide otherwise for extraditions to a member state of the European Union or to an international court of justice as long as the rule of law is upheld.”). The German constitution was amended in 2006 to implement the Rome Statute of the ICC and the EAW to allow for extradition of German nationals under certain conditions. Michael Plachta, \textit{Polish Parliament Amends Constitution to Accommodate European Arrest Warrant}, 23 IELR 48, 49 (2007). An earlier iteration of Germany’s constitution, which afforded no exception under art. 16(2), was interpreted to prohibit Germany from handing back a German citizen “to the country from which he had come in order that his extradition might be accomplished through the territory of a country other than Germany.” \textit{Extradition (Germany) Case}, Fed. Const’l Ct., F.R.G., Oct. 20, 1959, 10 B Verf GE 136, reprinted in 28 ILR 319, 319-20 (1963). When Florian Homm, a German financier wanted by the U.S. for defrauding investors, was released from prison in Pisa, Italy, in June 2014, he immediately took a train to Florence, where he contacted his lawyers who arranged for a car to “whisk him to Germany,” where he reportedly “let out a whoop of joy,” given Germany’s unwillingness to extradite one of its own nationals under the circumstances at play. Jack Ewing, “Financier, Free Again, Comes to Rest on Home Turf,” \textit{Int’l N.Y. Times}, Aug. 4, 2014, at 1.

\textsuperscript{21} Const. of Colombia, July 4, 1991, art. 35, available at http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last visited on Nov. 29, 2013) (“Native-born Colombians may not be extradited.”). This constitution was amended on December 17, 1997, to allow for extradition of its native-born nationals but only under the two identified conditions, thereby effectively barring the extradition of a number of drug cartel leaders for earlier committed crimes, and authorizing extradition only for a limited scope of offenses. \textit{Third Report on International Extradition}, supra n.17. In 1999, Colombia extradited a home-grown drug lord for the first time in nine years, Bruce Zagaris, \textit{Colombia Extralldes Suspected Drug Lord to the U.S.}, 16 IELR 556 (2000), and since then several native-born Colombians have been extradited to the U.S., including members of the FARC. Gilbert, supra n.11, at 268. Relatedly, in December 1986, the Colombian Supreme Court found the 1979 U.S.-Colombia Extradition Treaty, which had allowed the surrender of nationals to the U.S., to be invalid on the ground that the Treaty’s enabling legislation was defective; this occurred after a campaign of terror by the \textit{extraditables}, drug traffickers subject to extradition. Corrective enabling legislation, signed by President Barco, resolved matters for a brief interlude, until February 17, 1987, when the Supreme Court refused to rule on extradition given that
\end{footnotesize}
nationals unless an international treaty prescribes otherwise; and the constitution of Cyprus would permit extradition of Cypriot nationals to States operating under the Council Framework Decision of 2002 but otherwise only for crimes committed before July 26, 2006 (the effective date of the amendment).

In addition, many States have expressed through national legislation a policy position in refusing to extradite their own nationals, either wholesale, in principle, or under specified circumstances. Examples include Libya (absolute prohibition); Morocco (absolute prohibition); Sweden (absolute prohibition); the People’s
Republic of China (absolute prohibition);27 Namibia (absolute prohibition);28 Nicaragua (absolute prohibition);29 Japan (non-extradition of Japanese nationals in all cases unless an extradition treaty provides otherwise);30 Switzerland (maintaining right of refusal in principle not to extradite Swiss nationals, but may do so with individual’s written consent);31 Mexico (non-extradition of Mexican nationals unless “exceptional circumstances” apply);32 and the Dominican Republic (authorizing “the extradition of nationals for [serious] charges, including murder, kidnapping, sexual abuse of minors, as well as other [including narcotics] offenses”).33

Under most State laws, naturalized citizens receive the same preferential treatment as born citizens with respect to extradition.34 Accordingly, where an actual or

27 People’s Republic of China, Extradition Law, Order of the President No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People’s Congress, Dec. 28, 2000, art. 8 [hereinafter China Extradition Law] (China may refuse extradition request from a foreign State if: “(1) the person sought is a national of the People’s Republic of China under the laws of the People’s Republic of China . . .”).
31 As noted above, Japan has refused extradition to Peru of former Peruvian president Alberto Fujimori, partly on the grounds that he is a Japanese national and will not extradite its own citizens unless a treaty provides otherwise, as in the case with the U.S.-Japan Extradition Treaty. Tetsuya Morimoto, First Japanese Denial of U.S. Extradition Request: Economic Espionage Case, 20 IELR 288 (2004).
32 Switzerland, Federal Act on International Mutual Assistance in Criminal Matters [Act on International Criminal Assistance, or IMAC], Mar. 20, 1981, art. 7(1)&(2), as amended (updated to Jan. 1, 2010) (unofficial translation), reprinted in 20 ILM 1339 (1981) (“No Swiss national may, without his written consent, be extradited or surrendered to a foreign State for prosecution or execution of a sentence . . . [unless the matter involves] the transit or return of a Swiss national who is temporarily surrendered by a third State to the Swiss authorities.”).
34 See Joshua H. Warmund, Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic, 22 FORDHAM INT’L L.J. 2373, 2422-24 (1999) (discussing Dominican Republic’s Ley No. 278-98 del 29 de Julio de 1998 and noting how the D.R.’s prior law, Ley No. 489 (1969), had eliminated any discretion on the part of its Executive in terms of extraditing nationals and thereby had created a safe haven for D.R. nationals committing crimes abroad).
accused offender can obtain naturalized citizenship in a State that has a firm policy of protecting its own nationals from exposure to foreign legal systems, extradition can be thwarted. For example, in 1949, Herbertus Bikker, a Dutch national was served a life sentence by Dutch courts for committing war crimes in the Netherlands while acting as a German SS officer during World War II; in 1952 he managed to escape from prison and flee to West Germany, where, based on his SS membership, he was granted German citizenship. For years, Germany refused to extradite this naturalized citizen back to the Netherlands under its strict “non-extradition of nationals” law. Similarly, a Greek court refused extradition to Bulgaria in 1933 where a Bulgarian citizen had acquired Greek nationality after the offense that was the subject of the extradition but where the governing Greek statute categorically rejected the transfer of any Greek national to a foreign power. In addition, at times it appears that some States with such nationality-based exclusionary policies have intentionally expedited the naturalization process or otherwise promptly conferred citizenship to help shield certain persons from extradition.

When determining how to accommodate competing domestic laws in bilateral extradition treaties, the more restrictive law, whether constitution- or statutory-
based, often but not necessarily prevails,\(^{38}\) and in practice can obstruct the extradition of nationals even involving such egregious offenses as murder and torture.\(^{39}\) Even when such laws or policies that militate against the extradition of one’s own nationals do not operate to outright prevent the physical transfer of a fugitive to another’s State’s custody, they can nevertheless result in delays through additional legal process and/or effectively mitigate the severity of a national’s punishment. For example, a few months after fleeing North Carolina, U.S. Marine Corporal Cesar Laurean, the prime suspect in the murder of a pregnant Marine in that state, was arrested in Mexico where he also held citizenship. That status entitled him under Mexican law to receive an extradition hearing (rather than being immediately sent back to the U.S.) and expressly removed the prospect of the death penalty as a condition of extradition under Mexican law.\(^{40}\) In addition, some


\(^{39}\) See Arnd Dürker, The Extradition of Nationals: Comments on the Extradition Request for Alberto Fujimori, 4 GERMAN L.J. 1165, 1170-73 (2003) (discussing Peru’s request for the extradition of Alberto Fujimori who was accused of murder and torture); Robert Cryer, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 79 (2d ed. 2010). In November 2011, a Portuguese court denied a U.S. request for the extradition of George Wright, an American fugitive who had spent 41 years on the run following his escape from a New Jersey prison in 1970 for a murder conviction; although the court proceedings were secret and no judge decision was made available, Wright’s lawyer represented that the judge had accepted an argument that Wright (now known as Jose Luis Jorge dos Santos) was a Portuguese national (after marrying a Portuguese woman in 1991) as a basis of non-extradition. Barry Hatton, “Portugal Refuses to Send US Fugitive Home,” AP, Nov. 17, 2011, available at http://news.yahoo.com/portugal-court-refuses-send-us-fugitive-home-164301468.html (last visited on Nov. 4, 2013). In fact, by the terms of the U.S.-Portugal extradition treaty, Portugal was fully within its rights not to extradite on that basis. Conv. Between the United States and Portugal for the Mutual Extradition of Criminals, May 7, 1908, art. VIII, available at http://images.library.wisc.edu/FRUS/EFacs/1908/reference/frus.frus1908.i0038.pdf (last visited on Nov. 30, 2013) (“Under the stipulations of this Convention, neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects.”).

extradition treaties stipulate that, extradition is conditioned on a pursuing State’s assurance that if the fugitive is a host State national and is extradited, tried, convicted, and sentenced, he will be returned to the host State to serve out his prison term.41

States that desire not to extradite their own nationals can additionally rely on domestic laws that broadly define nationality status for extradition purposes.42 Such laws can expansively encompass, or can be judicially construed to encompass, other States’ nationals,43 persons sharing an ethnic bond,44 or those married to, or even having parents or children who are, nationals of the host State.45


42 STANBROOK & STANBROOK, supra n.11, at 134.

43 See Ilias Bantekas & Susan Nash, INTERNATIONAL CRIMINAL LAW 179, 190 (2d ed. 2003); Explanatory Report to Conv. Relating to Extradition between the Member States of the European Union, May 26, 1997, art. 7, reprinted in O.J.C. 191 (June 23, 1997), available at http://germarrudolf.com/wp-content/uploads/2012/04/ListPos23.pdf (last visited on Nov. 30, 2013) (“Declarations in this respect have been made by several Member States, i.e. Denmark, Finland and Sweden. These three Member States have defined nationals as [aliens domiciled in the territory of] the Nordic States (Denmark, Finland, Iceland, Norway and Sweden). . . . These declarations have been found to be too far-reaching. Therefore, within the context of this Convention, Denmark, Finland and Sweden, confirm, through the declaration annexed to the Convention that, in their relations with other Member States which ensure equal treatment, they will not invoke the definition of nationals made under the European Convention as a ground for refusal of extradition of residents from non-Nordic States.”).

44 See, e.g., In re Del Porto, Trib. Féd. Suisse, Mar. 6, 1931, reprinted in 6 ANN. DIG. PUB. INT’L L. CASES 307 (No. 167) (H. Lauterpacht ed. 1938) (Greek court refused to extradite to Albania an Albanian national who was of Hellenic ethnicity on grounds that such persons qualified as Greek nationals who could not be extradited).

The other way the term “national” tends to be flexibly interpreted is in the reading of the law by courts to ensure that a person’s naturalization took effect prior to the material event at which nationality is determined. A treaty or other multilateral scheme might indicate that a person’s nationality shall be determined as of the date of the underlying act for which extradition is being sought, the extradition request, the extradition decision, or even the physical transfer itself. Israel, which pursuant to its Law of Return, may confer citizenship on any legally Jewish person, has the unique practice of calculating whether one of its nationals was resident in Israel at the time the extradition request was submitted; if so, it will insist that the extradition be contingent on the person’s return, if convicted, to serve any sentence in Israeli prisons. When no legal guidance is supplied for identifying the material event, domestic courts generally side with granting such protection by construing the language prohibiting the extradition of nationals at any point in time, even as late as the extradition act itself.

Some States, including the Nordic countries, apply this nationality exception to resident aliens within their territory, refusing to extradite even persons who are not technically their own citizens. The logic undergirding this approach is that, as the

47 E.g., Eur. Conv. on Extradition, Dec. 13, 1957, art. 6(1)(c), CoE, E.T.S. No. 24, (naturalization must exist by the date of the extradition decision).
48 Abramovsky & Edelstein, supra n.12, at 3-4. The Israeli Knesset recognized in this distinction that a significant proportion of Israeli nationals do not have strong connections to Israel because, for example, they are recent arrivals. Id. at 59.
49 See Jennings & Watts, supra n.7, at 956 n.2 (citing In re A, Ct. of App. of Aix, Fr., Mar. 15, 1951, reprinted in 18 I.LR 324 (1951)).
world increasingly adopts a rehabilitative perspective on crime, residents as much as citizens would benefit from post-sentence reintegration into their community by virtue of non-extradition coupled with prosecution at home.\textsuperscript{51} This practice is well illustrated by both the London Scheme for the Extradition Within the Commonwealth and the EU Council Framework Decision (establishing the EAW) in which residents are treated synonymously with nationals for purposes of non-extradition.\textsuperscript{52}

Finally, nationality may surface as an issue not only when one’s own nationals (or residents) are the subject of an extradition request, but also when a third State’s nationals are being contemplated for an extradition between two other States, particularly in cases where less formal means are employed. Where comity, say, rather than a treaty, is the basis for extradition, third State governments may protest such transfers of custody, as criminal procedural and human rights protections ordinarily found in treaties may otherwise be bypassed.\textsuperscript{53} In such cases, a host State may either feel pressured by the third State, especially if incentives or disincentives figure into the mix, or may find the logic of the protesting State’s arguments compelling. Either way, the host State may reconsider its decision to extradite and stand down. This dynamic is exacerbated by the increasing incidence of dual nationals, as host States generally do not appear to pay deference to whether

\textsuperscript{51} Deen-Racsmány, \textit{Nationality Exception, supra} n.11, at 30.
\textsuperscript{52} London Scheme, \textit{supra} n.46, art. 15(3)(a) ("A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country."); CoE Framework Decision on the European Arrest Warrant & the Surrender Procedures Between Member States, June 13, 2002, art. 5(3), 2002/584/JHA, OJEC 1-20, L190/1 of July 18, 2002, \textit{available at} \url{http://www.homeoffice.gov.uk/publications/police/operational-policing/european-arrest-warrant1?view=Binary} (last visited on Feb. 2, 2013) ("where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.").
\textsuperscript{53} For example, in November 1962, the U.K. protested when Briton Greville Wynne was informally extradited from Hungary to the Soviet Union. \textit{JENNINGS \& WATTS, supra} n.7, at 952 & n.11.
a given pursuing State also has a nationality claim or to whether a third State’s nationality claim is stronger than that of the host State.54

b. Immunities

This section addresses a host State decision not to extradite on the ground that the individual at issue, by virtue of his office, position, or status, is shielded, wholly or in part, from prosecution (or other legal process) in another State on account of a legally recognized immunity. To that end, this section examines the various types of immunities found potentially applicable to sovereigns, heads of State, and heads of government; diplomatic and consular officers; legislators; armed forces personnel; international organization personnel; and members of special missions. In addition, a criminal offender may secure the functional equivalent of immunized protection from extradition by entering into a “plea bargain” or “plea agreement” with host State prosecutors.

Sovereigns and Heads of State/Government.55 As a general rule,56 while serving in office, a de jure monarch, other head of State (e.g., a president), or head of Government (e.g., a prime minister) enjoys “absolute” immunity57 from arrest or

54 See Stefan Oeter, Effect of Nationality and Dual Nationality on Judicial Cooperation, Including Treaty Regimes Such as Extradition, in RIGHTS AND DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS 59 (David A. Martin & Kay Hailbronner eds. 2003) (“The other nationality is not taken in perspective; the dual national is treated simply as a national, with a blind eye toward all other nationalities. Questions of the dominant or effective nationality have never been raised internationally in cases of extradition, it seems.”).

55 Immunity conferred on individual sovereigns or heads of State should not be confused with the related but distinct “Act of State” doctrine, “which presents no jurisdictional question but instead addresses the Court’s permissible scope of inquiry into certain governmental acts. It is more properly understood as an issue preclusion device than an immunity prohibiting prosecution.” United States v. Noriega, 746 F. Supp. 1506, 1521 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997). See also Riggs Nat’l Corp. v. Comm’r of IRS, 163 F.3d 1363, 1367 n.5 (D.C. Cir. 1999) (The Act of State Doctrine “does not operate by depriving courts of jurisdiction; rather it functions as a doctrine of abstention”).

56 “The general rule of the head-of-state immunity doctrine is that such a person is immune from the jurisdiction of foreign courts [but] the scope of this immunity is in an amorphous and undeveloped state.” In re Doe, 860 F.2d 40, 44 (2d Cir. 1988) (emphasis supplied).

57 STANBROOK & STANBROOK, supra n.11, at 124 & n.76.
prosecution\textsuperscript{58} in another State,\textsuperscript{59} regardless of the offense.\textsuperscript{60} This international legal protection that attaches to the person, known as \textit{immunity ratione personae},\textsuperscript{61} even extends to the subject individual’s family members and private servants who are regarded as part of his/her household.\textsuperscript{62} “The rationale behind the doctrine is to promote international comity and respect among sovereign nations by ensuring that leaders are free to perform their governmental duties without being subject to detention, arrest, or embarrassment in a foreign country’s legal system.”\textsuperscript{63} Such treatment would appear to apply to sitting ministerial-level individuals as well.\textsuperscript{64}

\textsuperscript{58} Such persons also are immune to civil lawsuits, \textit{Alun Jones & Anand Doobay, Jones and Doobay on Extradition and Mutual Assistance} 113 (2005), but such litigation lies outside the scope of this study. The present analysis involving law enforcement action by States is to be distinguished from that undertaken by international criminal tribunals, which based on statute and practice, do not recognize head of State immunity. \textit{See, e.g.}, Statute of the Int’l Criminal Tribunal for the Former Yugoslavia, adopted May 25, 1993, art. 7(2), as amended, U.N. Doc. S/25704, annex, \textit{available at} http://www.icl.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited on April 5, 2012) (“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 or mitigate punishment.”). The ICTY indicted Slobodan Milošević in 1999 while he was still head of State, as President of the Federal Republic of Yugoslavia (FRY), citing the SCSL decision denying immunity to Charles Taylor, the former Liberian president. Micaela Frulli, \textit{A Turning Point in International Efforts to Apprehend War Criminals: The U.N. Mandates Taylor’s Arrest in Liberia}, 4 J. INT’L CRIM. JUST. 351, 352 (2006). The ICTY has held that the principle that individuals are personally responsible for acts of torture, whatever their official position, is indisputably declaratory of customary international law. \textit{Prosecutor v. Furundzija}, No. IT-95-17/1-T, Judgment, ICTY Tr. Ch., Dec. 10, 1998, ¶ 140. \textit{See also Prosecutor v. Charles Ghankay Taylor}, Case No. SCSL-2003-01-I, App.Ch., Decision on Immunity from Jurisdiction, May 31, 2004 (rejecting immunity claim by former Liberian President Charles Taylor for war crimes, crimes against humanity, and other serious violations committed while he was sitting head of State).

\textsuperscript{59} \textit{E.g.}, \textit{Gaddafi, Arrêt de la Cour de Cassation} (Fr.), No. 1414, Mar. 13, 2001, \textit{reprinted in} 125 ILR 490 (applying absolute immunity to Moammar Gaddafi, as head of State in Libya in a case where he was indicted for complicity in an airplane explosion over Nigeria in 1989).

\textsuperscript{60} \textit{See ILC, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction} (Roman Anatolevich Kolodkin, Special Rapporteur), U.N. Doc. A/CN.4/631, June 10, 2010, ¶ 94(i), \textit{available at} http://ilmc.univie.ac.at/uploads/media/ILC_Report.pdf (last visited on Dec. 28, 2013) [hereinafter ILC, \textit{State Official Immunity}] (“Immunity ratione personae, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity”); \textit{id.} ¶ 94(j) (“Being linked to a defined high office, personal immunity is temporary in character and ceases when a person leaves office. \textit{Immunity ratione personae} is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction”).

\textsuperscript{61} \textit{Jones & Doobay, supra} n.58, at 113.

\textsuperscript{62} \textit{Noriega}, 746 F. Supp. at 1519.

Once a monarch, head of State, or head of Government, however, is no longer in office and no longer recognized as the legitimate ruler— for example, a deposed or exiled king or a resigned or replaced president— he retains only partial protection from law enforcement action against him in another State, to the extent of the “official acts he performed in the exercise of his functions,” known as immunity ratione materiae. Under this type of “relative” immunity, he may not be arrested or prosecuted in another State for any conduct (acts or omissions) performed in his official capacity, even involving allegedly criminal conduct except possibly for jus cogens violations, such as torture, hostage-taking, or crimes against humanity, although case law is concededly scarce on this matter.

2013 [hereinafter Arrest Warrant Case] (involving charges against the sitting Foreign Minister of the DRC, Abdulaye Yerodia Ndombasi).

65 Depending on the circumstances, it could be that a de jure sovereign in exile enjoys some immunity even while located abroad. Jones & Doobay, supra n.58, at 113. See, e.g., Lafortante v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (adhering to U.S. Department of State policy recognizing Jean-Bertrand Aristide as the legitimate President of Haiti and therefore eligible for head of State immunity despite his having been living in exile for more than two years).


67 ILC, State Official Immunity, supra n.61, ¶ 94(g) (“Immunity ratione materiae does not extend to acts which were performed by an official prior to his taking up office”).

68 See id. ¶ 94(b) (“State officials enjoy immunity ratione materiae from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself”); id. ¶ 94(f) (“Immunity ratione materiae extends to ultra vires acts of officials and to their illegal acts.”).

69 Compare Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte [1998] 3 WLR 1456, 1457, Dec. 11, 1998 (while the 1964 Diplomatic Privileges Act conferred former head of State immunity from criminal jurisdiction on Gen. Auguste Pinochet for official acts he performed while serving as Chile’s head of State, “the crimes of torture and hostage-taking fell outside what international law would regard as functions of a head of state” and so was not so immunized from extradition proceedings regarding those crimes committed after the date of the U.K.’s ratification of the CAT) with Arrest Warrant Case, supra n.64 (Foreign Minister of Congo’s jurisdictional immunity not removed in the face of a Belgian warrant for his arrest in connection with charges including crimes against humanity and breaches of the Geneva Conventions of 1949 with respect to official acts committed while in office). “According to Lord Hope of Craighead [in the U.K. House of Lords’ Judgment of March 24, 1999, in the Pinochet case], immunity depends on whether the acts performed were private acts or governmental acts done as a head of state, i.e. whether they were done for the own benefit of the head of state or to promote the state’s interests. Lord Hope of Craighead further argues that ‘the fact that acts done for the state have involved conduct which is criminal does not remove the immunity. Indeed, the whole purpose of the residual immunity ratione materiae is to protect the former head of state against allegations of such conduct after he has left office.’” Koivu, supra n.66, at 313-14. An exception, recognized by Lord Hope of Craighead, is where the conduct in question violated a jus cogens norm. Id. at 314. In the 6-1 House of Lords judgment ultimately authorizing the U.K. Home Secretary to extradite Pinochet to Spain (which was subsequently
That determination tends to turn on whether his conduct took place “under the
color of law or in the ostensible exercise of public authority,”71 also known as acta
jure imperii.72 Any other conduct, including offenses of a personal or private
character (acta jure gestionis), such as rape or embezzlement, could be subject to
criminal accountability.73 Such immunity, however, does not necessarily equate
with impunity to the extent that the State the individual served itself could still

---

70 See Andrea Bianchi, Immunity versus Human Rights: The Pinochet Case, 10 EUR. J. INT’L L. 237, 255
(1999) (“As rightly noted, [former head of State immunity] is an area of the law ‘which is in many
respects still unsettled, and on which limited state practice casts an uneven light.’”) (quoting Arthur
Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and
Foreign Ministers,” 247 RdC 9, 21 (1994)).
71 JONES & DOOBAY, supra n.58, at 113 (quoting Sir Arthur Watts). See also ILC, State Official Immunity,
supra n.61, ¶ 94(d) (“Classification of the conduct of an official as official conduct does not depend on
the motives of the person or the substance of the conduct. The determining factor is that the official
is acting in a capacity as such. The concept of an ‘act of an official as such,’ i.e. of an ‘official act,’ must
be differentiated from the concept of an ‘act falling within official functions.’ The first is broader and
includes the second.”).
72 For example, in late 2011, the Tunisian Prime Minister decided to extradite Al-Baghdadi Ali al-
Mahmoudi, the former Libyan Prime Minister under Muammar Gaddafi (2006-11) to face charges
arising out of the Libyan civil war. Andrew Baskin, Tunisia Will Extradite Gaddafi’s Prime Minister to
Libya, 28 IELR 21 (2012). Notably, some months later the Tunisian President Moncef Marzouki
criticized that decision based ostensibly on human rights treatment concerns if al-Baghdadi were
sent back to Libya, and indicated he might raise the case with the Tunisian Constitutional Assembly.
Bruce Zagaris, Tunisia President Rebukes Prime Minister for Extraditing a Former Libyan Official to
Libya, 28 IELR 330, 330-31 (2012). Al-Mahmoudi was extradited to Libya in June 2012. Ali Shuairb,
“Gaddafi’s PM Al-Baghdadi Ali al-Mahmoudi Is Extradited,” The Independent (U.K.), June 25, 2012,
available at http://www.independent.co.uk/news/world/africa/gaddafis-pm-al-baghdadi-ali-
almahmoudi-is-extradited-7879777.html (last visited on Sept. 7, 2014).
73 For example, in October 2008, absent any discussion of immunity, the Mexican government
extradited former Guatemalan President Alfonso Antonio Portillo Cabrera (Portillo) to Guatemala on
embezzlement charges ($15 million). Bruce Zagaris, Mexico Extradites Former Guatemalan President
to Guatemala, 24 IELR 478, 478 (2008). Contra Arrest Warrant Case, supra n.64 (adopting an
absolutist view by drawing no distinction between official and private acts committed by Ministers of
Foreign Affairs during their terms in office). Commercial acts are not necessarily of a private nature.
See ILC, State Official Immunity, supra n.61, ¶ 94(e) (“An official performing an act of a commercial
nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State”) (emphasis supplied). See also supra n.69 (Lord Hope of Craighead’s opinion).
detain or prosecute him\textsuperscript{74} or, alternatively, waive his immunity with respect to another State’s wish to prosecute him.\textsuperscript{75}

A critical prerequisite to this type of immunity is that the government official in question must be recognized under the applicable domestic constitution as a sovereign or head of State.\textsuperscript{76} Thus, for example, while Gen. Manuel Noriega was Commandante of the Panamanian Defense Forces and the country’s de facto leader, he was never actually elected to the presidency,\textsuperscript{77} “never served as the constitutional leader of Panama,” “Panama has not sought [his] immunity,” and the United States (which sought to prosecute him) continued to recognize Eric Delvalle as the legitimate leader of Panama for most of the time Noriega was in power.\textsuperscript{78}

**Diplomatic Officers.** The 1961 Vienna Convention on Diplomatic Relations (VCDR) with near universal State membership,\textsuperscript{79} together with customary international law, governs the issue of diplomatic immunity.\textsuperscript{80} A diplomatic agent, who is “the head of the mission or a member of the diplomatic staff of the mission,”\textsuperscript{81} may not be

\begin{itemize}
\item \textsuperscript{74} See Arrest Warrant Case, supra n.64; Van Schaack & Slye, supra n.69, at 872 (discussing how, upon Gen. Pinochet’s return to Chile following the U.K. Home Secretary’s decision not to extradite him to Spain to face torture charges, the Supreme Court of Chile stripped Gen. Pinochet of his immunity and he was placed under house arrest).
\item \textsuperscript{75} See Noriega, 746 F. Supp. at 1519-20 (noting that the “grant of immunity is a privilege which the [prosecuting State] may withhold from any claimant”).
\item \textsuperscript{76} See Kadic v. Karadzic, 70 F.3d 232, 248 (2d Cir. 1995)(head of State immunity is not applicable where the Executive Branch had not yet recognized the defendant as the head of State), cert. denied, 518 U.S. 1005 (1996).
\item \textsuperscript{77} See Frances Y. F. Ma, Noriega’s Abduction from Panama: Is Military Invasion an Appropriate Substitute for International Extradition?, 13 Loy. L.A. Int’l & Comp. L.J. 925, 933-34 (1991) (before the attack, the Panamanian government swore in Guillermo Endara as President; it was Endara’s reported electoral victory that Noriega had nullified a few months earlier).
\item \textsuperscript{78} See Downing, supra n.13, at 587 (the U.S. government did not officially recognize Gen. Manuel Noriega as the de jure leader of Panama, so did not accord him immunity from criminal jurisdiction).
\item To the extent that issues are not expressly addressed in the VCDR itself, the Convention defers to customary international law (CIL) for clarification. Vienna Conv. on Diplomatic Relations (VCDR), Apr. 18, 1961, Preamble, ¶ 6, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter VCDR]. Non-parties to the VCDR would not be bound by its terms except to the extent such provisions constitute CIL.
\item \textsuperscript{80} To the extent that issues are not expressly addressed in the VCDR itself, the Convention defers to customary international law (CIL) for clarification. Vienna Conv. on Diplomatic Relations (VCDR), Apr. 18, 1961, Preamble, ¶ 6, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter VCDR]. Non-parties to the VCDR would not be bound by its terms except to the extent such provisions constitute CIL.
\item \textsuperscript{81} VCDR, supra n.80, art. 1(e). Those persons employed by the U.N. but not representing their home State would not fall within the ambit of this definition. See, e.g., People v Leo, 407 N.Y.S.2d 941, 942
\end{itemize}
arrested or detained and “shall enjoy immunity from the criminal jurisdiction of the receiving State”[82] (including offenses against the receiving State itself[83]), unless expressly waived by the sending State.[84] The rationale for extending this immunity derives from three sources: (i) the diplomatic agent is the representative of the sovereign or State and should be treated accordingly; (ii) he is operating in space within receiving State territory regarded as a diplomatic enclave of the sending State; and (iii) the immunity is essential to the effective performance of the diplomat’s functions.[85] To enjoy this immunity, a diplomat must be duly notified to, and accredited by, the receiving State.[86] Mere possession of a diplomatic passport (or an A-2 visa) does not confer diplomatic status,[87] which generally requires the

(N.Y.S. 1978) (Tanzanian national found to be a U.N. employee in New York but was not eligible for diplomatic immunity where he held no position on behalf of the government of Tanzania, had not been issued a diplomatic passport, and resided in the U.S. on a G4 visa issued to international civil servants of the U.N.). In such cases, U.N. diplomatic immunities instead would apply. See discussion infra.

[82] VCDR, supra n.80, arts. 29, 31(1). Notably, such immunity, however, “does not exempt him from the jurisdiction of the sending State.” Id., art. 31(4). The “receiving State” refers to the State to which the diplomat is posted or assigned to work; the “sending State” refers to the State of which he is a national and on whose behalf he has been dispatched.


[84] VCDR, supra n.80, art. 32(1) and (2). Significantly in such matters, immunity rests with the sending State — not with the diplomat himself. If the sending State chooses to waive its immunity over a particular diplomat, it must be express — silence is not sufficient and the waiver may not be invoked on a blanket basis. The sending State has no obligation to waive immunity, however, even for a serious crime, and may instead recall the diplomat. If the sending State chooses neither to waive immunity nor recall him, the receiving State can choose to declare him persona non grata (PNG) and ask for his recall. If he is declared PNG and not recalled, the receiving State may deny him diplomatic immunities. B.J. George Jr., Immunities and Exceptions, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 114-15 (2d ed. M. Cherif Bassiouni ed. 1999).

[85] Id. at 107-08.

[86] JONES & DOOBAY, supra n.58, at 121; e.g., Regina v. Governor of Pentonville Prison, ex parte Teja [1971] 2 Q.B. 274, 2 All E.R. 11 (U.K.) (where the U.K. Secretary of State issued a letter stating that an Indian fugitive was not accredited to the Court of St. James, despite having been issued a diplomatic passport and possessing a letter designating him an economic adviser to the government of India, he was found to lack diplomatic immunity); United States v. Kuznetsov, 442 F. Supp.2d 102, 107-08 (S.D.N.Y. 2006) (holding that a U.N. employee indicted for conspiracy to commit money laundering was not entitled to diplomatic immunity even though he was a career Russian diplomat and a Russian delegate to a U.N. working group on budget issues, as he had not been accredited to the U.S. Department of State as a member of a mission, was on leave without pay from his post with the Russian Ministry of Foreign Affairs, and his U.N. assignment required that he not accept any instructions from a government).

[87] See, e.g., United States v. Kostadinov, 734 F.2d 905 (2d Cir.) (assistant commercial counselor in Bulgaria’s New York trade office, even with an A-2 visa and working in an office co-located with the Bulgarian Embassy, did not qualify him as a member of the foreign mission entitled to diplomatic immunity from prosecution for an espionage charge), cert. denied, 469 U.S. 881 (1984).
host government accepting that individual as a member of a foreign diplomatic mission, including him on a diplomatic register, issuing him a diplomatic identity card, or other such indicia of accreditation. 88

“The members of the family of a diplomatic agent forming part of his household” and “[m]embers of the administrative and technical staff of the mission, together with members of their families forming part of their respective households,” shall “if they are not nationals of the receiving State,” enjoy the immunity from arrest, detention, and criminal jurisdiction by the host State. 89 This form of immunity takes effect from the moment a protected person enters the receiving State’s territory (or if already on the territory, from the moment his appointment is notified to the appropriate government ministry) and ceases when he leaves the country (or within a reasonable period after his functions have come to an end). 90 Retired diplomatic agents retain their immunity only with respect to official acts undertaken while representing their State abroad but such immunity lasts indefinitely. 91

For an example of how diplomatic immunity may thwart, lawfully or pretextually, a request for a provisional arrest, let alone for extradition, consider the case of the infamous 1985 hijacking of the Italian cruise ship Achille Lauro that also entailed the targeted murder of an invalid American Jew, Leon Klinghoffer. After the hijacking, Mohammed Abbas, a member of the Palestine Liberation Organization (PLO) Executive Committee and the hijacking’s suspected mastermind, fled to Italy. The U.S. sought his provisional arrest subject to a formal extradition request, but the Italian authorities claimed they had insufficient evidence to detain him and, besides, he was entitled to diplomatic immunity as the official representative of the PLO (based on a non-State diplomatic passport he held in an assumed name). Abbas then flew to Yugoslavia. The U.S. again sought his provisional arrest until an extradition

88 Noriega, 746 F. Supp. at 1523-25.
89 VCDR, supra n.80, art. 37(1) and (2). More limited immunities also apply to the members of the mission’s service staff and private servants of the members of the mission, to the extent they are not nationals or permanent residents of the receiving State. Id., arts. 37(3) and (4).
90 Id., art. 39(1) and (2).
91 Jones & Doobay, supra n.58, at 121; George, supra n.84, at 116.
request could be prepared and submitted. Like the Italian government, the Yugoslavs denied that request on diplomatic immunity grounds, claiming that Abbas was a member of the PLO Executive Committee, and Yugoslavia recognized the PLO as the only legitimate representative of the Palestinian people.92

**Consular Officers.** The 1963 Vienna Convention on Consular Relations (VCCR),93 along with customary international law, controls the extent to which consular officers are entitled to immunity.94 The criminal law-related immunity provisions of the VCCR are substantially similar to those of the VCDR. Consular officers, who include all persons with responsibility for exercising consular functions within a foreign mission,95 may not be arrested or detained before a trial, except for grave crimes when determined by a competent judicial body.96 The head of the consular post must be designated by the sending State and accredited by the receiving State before any such immunity can attach.97 In addition, consular officers, as well as consular employees (i.e., those responsible for administrative or technical services at a consular post98), are “not amenable to the jurisdiction of judicial or administrative authorities of the receiving State in respect of acts performed in the

---

93 Like the VDCR, the VCCR is one of the most subscribed treaties in the world today with an equal number (189) of member States to date. U.N. Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en) (last visited on Oct. 6, 2013).
94 Vienna Conv. on Consular Relations (VCCR), Apr. 24, 1963, Preamble, ¶ 6, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. It is noteworthy that consular officers cannot exercise individual rights under the VCCR to support a private damage action. *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008).
95 VCCR, *supra* n.94, art. 1(d).
96 Id., art. 41.
97 Id., art. 10(1). In May 2009, a former U.S. consular officer assigned to the U.S. Consulate in Milan filed a lawsuit against the U.S. State Department, contending that it had failed to invoke consular immunity on her behalf in connection with the Italian indictment against her for participating in the CIA-organized “extraordinary rendition” of Abu Omar, a radical Muslim cleric, in February 2003. Some have speculated that the State Department’s reluctance to invoke the immunity is because it is limited to “acts performed in the exercise of consular functions” of which the alleged rendition would not qualify. Bruce Zagaris, *Former U.S. Government Employee Sues for Immunity in CIA Rendition Case*, 25 IELR 275, 275-77 (2009).
98 VCCR, *supra* n.94, art. 1(e).
exercise of consular functions," unless the sending State waives such immunity. Family members of a consular post member forming part of his household and members of private staff receive the same protection as consular officers. The applicable timeframe and post-service provisions for consular immunity are the same as under the VCDR.

Legislators. Unlike the case with diplomats and consular officers whose immunity is based primarily on broadly subscribed international conventions, national parliamentarians or legislators derive their jurisdictional immunity within their own States subject to legal process from the corresponding municipal law. The purpose of such immunity is to protect lawmakers from having their votes or positions influenced by the threat of prosecution and from distracting them from their work while engaged in litigation. Accordingly, to the extent a fugitive can attain and then capitalize on his legislator status, he may be immunized from extradition even beyond his tenure as a lawmaker. For example, Shmuel Flatto-Sharon, who was wanted for embezzling $60 million, fled from France to Israel in 1975, where he promptly sought a seat in the Knesset (Israeli parliament) in the hope of escaping extradition to France on account of legislative immunity; as it happened, he won election and consequently was not extradited. (This type of

---

99 Id., art. 43.
100 Id., art. 45.
101 Id., art. 53(2).
102 Id., art. 53(2)-(4).
prosecutorial immunity by another State must be distinguished from parliamentary action conferring *amnesty* on legislators to preclude any *domestic* liability.\(^{105}\)

**Armed Forces Personnel.** Immunity from prosecution sometimes attaches to armed forces personnel deployed abroad via Status of Forces Agreements (SOFAs), Visiting Forces Agreements (VFAs), or other military exchange treaties. In such instances, States are unable to avail themselves of extradition as a means to secure the custody of a serviceman who has committed a crime within its territory, at least to the extent covered by the immunity. Examples include: (i) the South Korea-Kyrgyzstan SOFA grants total immunity from criminal prosecution to South Korean servicemen by Kyrgyz authorities for any crime;\(^{106}\) (ii) the 2007 Trinidad & Tobago (T&T) VFA confers on visiting South Korean forces full immunity from the criminal jurisdiction of T&T with regard “to acts taken in the course of their official duties;”\(^{107}\) and (iii) under Article 10 of the 1996 U.S.-Mongolia Agreement on Military Exchanges and Visits, Mongolia has no criminal jurisdiction over acts by U.S. military personnel within Mongolian territory, although, at the discretion of the U.S., it can consider a Mongolian request to waive jurisdiction with respect to offenses unrelated to official duty.\(^{108}\)

Beyond such agreements, there are also circumstances in which crew members of warships docked in foreign harbors or ports commit crimes within that State’s territory. In such cases, such individuals generally enjoy immunity from host State

---

\(^{105}\) In perhaps the best-known example of legislative amnesty, former Chilean president Augusto Pinochet, who retired with the title, “Senator for life,” ensured that the legislature over which his military junta exercised enormous influence, passed amnesty laws during his tenure granting lifetime immunity to all members of parliament, including himself. However, Chile “rejected General Pinochet’s defense of amnesty in proceedings brought against him after he was returned from the United Kingdom in 2002.” *Van Schaack & Slye, supra* n.69, at 874.


criminal jurisdiction to the extent that their offenses were committed in the course of their official duties.\textsuperscript{109}

**International Organization Personnel.** The Convention on the Privileges and Immunities of the United Nations (1946) governs immunity from legal process for three sets of personnel: U.N. officials,\textsuperscript{110} U.N. Member representatives (whether to principal or subsidiary organs of the United Nations), and experts on missions on behalf of the United Nations.\textsuperscript{111} In all three cases, such personnel are immune from legal process of every kind with regard to all acts performed by them in their official capacities.\textsuperscript{112} In addition, the representatives of Members and the experts on missions are immune from arrest or detention, whether in the exercise of their functions or while traveling to or from a meeting.\textsuperscript{113} Because such immunities are accorded to ensure their independence while working for the U.N., they are not intended for the benefit of the individuals themselves, and therefore Member States have a duty to waive such immunity in the case of representatives (and the U.N. Secretary-General has a duty to waive such immunity in the case of U.N. officials or

\textsuperscript{109} Stanbrook & Stanbrook, *supra* n.11, at 132.

\textsuperscript{110} U.N. officials are designated by the U.N. Secretary-General and do not include employees who lack diplomatic status. *United States v. Enger*, 472 F Supp. 490 (D.N.J. 1978).

\textsuperscript{111} Conv. on the Privileges and Immunities of the United Nations, UNGA, Feb. 13, 1946, arts. IV, V, and VI, 21 U.S.T. 1418, 1 U.N.T.S. 16 [hereinafter Privileges and Immunities Conv.]. *See also* U.N. CHARTER, June 26, 1945, art. 105(2) (“Representatives of the Members of the United Nations and officials of the Organization shall similarly [as Members] enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.”).

\textsuperscript{112} Privileges and Immunities Conv., *supra* n.111, arts. 11(a), 18(a), and 22(b). Accordingly, where the criminal act at issue is of an entirely private or personal nature, such as resisting arrest at a location away from the U.N. office, no such immunity attaches. *Leo*, 407 N.Y.S.2d at 943. Likewise, espionage is an example of work that lies outside the scope of official duties. *E.g.*, *Enger*, 472 F Supp. at 502.

\textsuperscript{113} Privileges and Immunities Conv., *supra* n.111, arts. 11, 22. *See, e.g.*, *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights*, Adv’y Op., 1999 I.C.J. ¶ 56 (Apr. 29), available at http://www.worldcourts.com/ici/eng/decisions/1999.04.29Immunity.htm (last visited on Dec. 28, 2013) (“the Court is of the opinion that the [U.N.] Secretary-General correctly found that Mr. [Dato’ Param] Cumaraswamy [a Malaysian jurist, as the Commission’s Special Rapporteur on the Independence of Judges and Lawyers], in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention [i.e., the Convention on the Privileges and Immunities of the United Nations, *see supra* n.111] is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.”).
Experts on missions), where such immunity is believed to “impede the course of justice.”

Representatives and officials of non-U.N. international organizations, such as the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the Asia Pacific Economic Cooperation Forum (APEC), and the Organization for Economic Cooperation and Development (OECD), may also enjoy immunity from States’ legal process as set forth in their constitutive documents or establishment agreements, headquarters or host country agreements, and/or domestic implementing legislation. For example, Article 134 of the OAS Charter reads: “The representatives of the Member States on the organs of the Organization, the personnel of their delegations as well as the Secretary General and the Assistant Secretary General, shall enjoy the privileges and immunities corresponding to their position and necessary for the independent performance of their duties.” This tracks the nature and extent of immunity enjoyed by “diplomatic agents” discussed above, and has since been elaborated upon in a 1949 multilateral agreement as well as in a series of bilateral agreements with OAS member States.

---

114 Privileges and Immunities Conv., supra n.111, arts. 14, 20, and 23.
115 George, supra n.84, at 134. A distinction must be drawn between organizational immunity and immunity conferred on individual officers, employees, or representatives of that organization operating in an official capacity. Broadbent v. OAS, 628 F.2d 27, 35 (1980).
117 Pursuant to Article 135 of the OAS Charter, which provides that specific immunities are to be elaborated in treaties, a multilateral agreement ratified by 13 member States was signed in 1949 and since then the other member States have signed bilaterals granting functional immunities to the OAS general secretariat and its staff or diplomatic immunities to specific officers. William M. Berenson, Immunity for International Organizations? Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS, at 5-6, available at www.oas.org/legal/english/IMMUNITY_WB_111110.doc (last visited on Nov. 7, 2013). The OAS immunity provision was implicated in October 2010, when the Prosecutor General’s Office of Colombia requested the OAS to revoke the immunity of staff from the Inter-American Institute for Cooperation on Agriculture (IICA), a component of the OAS, for alleged criminal negligence in allowing wealthy landowning candidates proposed by the Colombian Ministry of Agriculture to receive government agricultural subsidies when the subsidy program was designed to help smallscale farmers. Linda Azodi, “Colombia asks OAS to Waive Diplomatic Immunity,” Colombia Reports, Oct. 27, 2010, available at http://colombiareports.com/colombia-news/news/12609-oas-immunity-subsides-colombia.html (last visited on Nov. 3, 2013).
Members of Special Missions. Immunity also may plausibly be accorded to Members of Special Missions, under the 1969 Convention on Special Missions, at least for those States party to the Convention (38 to date).\footnote{Conv. on Special Missions (CSM), Dec. 18, 1969, 1400 U.N.T.S. 231, No. 23431, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf (last visited on Feb. 23, 2012).} A Special Mission is defined as “a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task,”\footnote{Id., art. 1(a).} and the “Members of the Special Mission” are defined to include “the head of the special mission, the representatives of the sending State in the special mission and the members of the staff of the special mission.”\footnote{Id., art. 1(f).} Under this Convention, “[t]he representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.”\footnote{Id., art. 31.1.} This immunity was invoked by Khurts Bat, then head of the Office of National Security in Mongolia, in connection with a visit he made to the U.K. on official business for his government. Although the U.K. had signed but not ratified the Special Missions Convention, it took the view that the U.K., not Mongolia, needed to decide on its facts whether or not the visit constituted a special mission, and in this case found that it did not.\footnote{Bruce Zagaris, U.K. Appellate Court Upholds Extradition Despite Immunity Claims, 27 IELR 907, 907-09 (2011).}

Subjects of Plea Bargains. Sometimes admitted criminals negotiate with host State prosecutors to shield themselves from extradition (or even to avoid certain severe punishment in the host State itself) in exchange for their cooperation in identifying and testifying against other perpetrators and/or serving as an informant about important criminal organizations or their operations through so-called “plea bargains.”\footnote{See 3 U.S. Dep’t of Justice, U.S. Attorney’s Manual, § 9-15.800 (2d ed. 2007-3 Supp.), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm (last visited on Dec. 13, 2012).} In a recent example, in February 2012, an Indian court authorized
Indian prosecutors to indict David Coleman Headley, a U.S. citizen who had confessed in a U.S. court to “playing a major role in the [2008] Mumbai attacks, which killed at least 163 people.” U.S. federal prosecutors, however, had effectively immunized Headley from extradition to India (and from imposition of the death penalty in the U.S.) in exchange for information about Lashkar-e-Taiba (LeT), an Islamist terrorist organization operating in South Asia, of which he was an operative, and about other extremists, and for his ongoing role as an informant for the DEA.

\[125\]

c. **Special Relationships**

This section now turns to a type of discretionary political consideration that can result in the refusal to grant extradition, namely, when the host State wishes to protect or nurture a special relationship with the subject of an extradition request. Such relationships include individuals who are former political leaders; intelligence officers or agents; prisoners of war (POWs); asylees or refugees; those in receipt of amnesty, pardons, or witness protection; and prominent or locally popular figures.

**Former Political Leaders.** Former heads of State or government, while still enjoying immunity _ratione materiae_, might still be prosecutable in their home States for non-official-related felonies or misdemeanors. Such ex-leaders may seek refuge in other States to avoid such prosecution. Notwithstanding a pursuing State’s

---

Nov. 9, 2013) (Int’l Extradition and Related Matters) (“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.”); _e.g._, _Petition of Geiser_, 627 F.2d 745 (5th Cir. 1980). In addition, “[i]f the relator had negotiated a plea of guilty with respect to conduct which is the same or substantially the same as the one 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.” M. Cherif Bassiouni, **INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE** 787 (6th ed. 2014) [hereinafter Bassiouni, U.S. Extradition]. However, when the State agrees to immunize an individual from prosecution in exchange for testimonial cooperation, the effect is not to clean the slate in terms of criminality but rather only to bar prosecution; therefore, while the State could not share information collected under such an agreement with the pursuing State, such immunity from prosecution would _not_ impede extradition. _Id._


\[125\] _Id._

\[126\] See supra pages 251-53.
ability to satisfy all substantive and procedural requirements for extradition, a host State may choose to deny a request on discretionary grounds\textsuperscript{127} – sometimes expressly available by statute\textsuperscript{128} – although it may suffer political, diplomatic, or economic blowback for that decision. A State’s executive nevertheless may opt to exercise such discretion, say, as an expression of courtesy toward a foreign leader who maintained supportive and cooperative relations with the host State during his service in office, or with whom it shares a political ideological compatibility, or because he has contributed economically to the host State since his arrival.

For example, after being ousted from power in December 1990, Hissène Habré, Chad’s leader since June 1982, settled into a new life in Dakar, Senegal, which effectively treated him as a “guest of the State.”\textsuperscript{129} There he invested in real estate and other business ventures for a decade without legal problems until a Dakar regional court indicted him in February 2000 as an accomplice to torture and he was placed under house arrest. Later, Chad requested his extradition for alleged crimes he committed in the 1980s, including the killing of thousands of his own people, but Senegal suspended the extradition at the eleventh hour ostensibly out of concern that his human rights would be violated if returned.\textsuperscript{130}

\textsuperscript{128} E.g., 18 U.S.C. § 3186 (2012) (providing the subject of an extradition the opportunity to petition the U.S. Secretary of State for a stay of execution).
**Intelligence Officers or Agents.** Numerous instances exist in which host States have been unwilling to extradite their own current (or former) intelligence officers or the agents they run (or ran) to face prosecution elsewhere. Such reluctance typically stems from a concern about the potential disclosure of sensitive intelligence information that could compromise existing sources and methods of collection or otherwise expose historical espionage operations that could engender distrust or trigger the breakdown of inter-State relations. Such unwillingness to extradite one's intelligence personnel or assets also may derive from a sense of loyalty to such individuals and an appreciation for the personal risks they undertook on behalf of the State. Prominent examples include:

- In 2007, Russia refused to extradite former KGB agent Andrei Lugovoi who was charged in the U.K. with the November 2006 murder in London by radioactive poisoning of Alexander Litvinenko, a former KGB agent and vocal critic of Russian President Vladimir Putin.\(^{131}\)

- In February 2007, the U.S. State Department Legal Adviser announced that the U.S. government would not entertain a prospective request by the Italians for the extradition of 25 CIA operatives (and a U.S. Air Force officer) who were indicted nearly two weeks earlier for the alleged “extraordinary rendition” of Abu Omar, a radical Muslim cleric, from Milan in 2003.\(^{132}\)

- For years, the U.S. has refused to extradite Luis Posada Carriles to Venezuela, which has charged him with various terrorist attacks, including the bombing of a Cuban airliner in 1976, presumably


\(^{132}\) Bruce Zagaris, *State Department Legal Adviser Says U.S. Will Not Extradite CIA Defendants to Italy*, 23 IELR 181 (2007). Presumably on the basis of the U.S. State Department Legal Adviser’s public statement, German authorities announced they were unlikely to make a formal extradition request to the U.S. on arrest warrants issued for 13 CIA operatives allegedly linked to the December 2003 “extraordinary rendition” of German citizen in Macedonia (el-Masri). *Id.*
at least in part because of his reported work on behalf of the CIA, including participation in the 1961 CIA-led “Bay of Pigs” invasion.\footnote{Kevin Jon Heller, “The Strange Case of Luis Posada Carriles,” Feb. 9, 2006, available at http://lawofnations.blogspot.it/2006/02/strange-case-of-luis-posada-carriles.html}  

- Until the early 1980s, it has been alleged that the U.S. government failed to pursue the extradition and prosecution of former Nazi war criminals in part because it had recruited suspected war criminals as intelligence agents at the outset of the Cold War, including Klaus Barbie.\footnote{James W. Moeller, United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation, 25 Va. Int’l L. 793, 796-97 & n.16 (1985).}

**POWs.** The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, more commonly known as Geneva Convention III (GC III), governs how POWs are to be treated during and after periods of an international armed conflict (IAC).\footnote{Article 3 of GC III is the sole exception, as it applies specifically to “case[s] of armed conflict not of an international character,” Geneva Conv. Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III], i.e., to non-international armed conflicts (NIACs), such as civil wars, at least those in which no other States are engaged in support of the militia fighting against government forces.} While some provisions spell out clear obligations expected of member States, some ambiguity remains regarding how a POW is to be handled when more than one State seeks to hold him criminally accountable for actions unrelated to the armed conflict itself but while he continues to enjoy post-conflict POW status. Among the germane provisions are: Article 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”);\footnote{Id., art. 118.} Article 115 (“Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may [be released] before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.”);\footnote{Id., art. 115 (emphasis supplied).} and Article 12 (“Prisoners of war may only be transferred by the
Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”\textsuperscript{138}

The case that brought this challenging issue to the fore involved Gen. Manuel Noriega, former \textit{de facto} leader of Panama, who, beginning in 1992, served a lengthy criminal sentence in the U.S. for narcotics trafficking and conspiracy.\textsuperscript{139} France had sought his extradition from the U.S. on an \textit{in absentia} money laundering conviction upon his completion of that sentence, but Noriega’s lawyers had contended that their client was entitled to repatriation under Article 118 and that the U.S. had not complied with its obligations under Article 12.\textsuperscript{140} In April 2010, however, following 17 years in a U.S. federal penitentiary and another 2.5 years behind bars while battling to avoid extradition, the U.S. determined to extradite him to France.\textsuperscript{141} This case helped clarify States’ legal obligations under such scenarios, but POW status could still conceivably be treated as an impediment to extradition under different circumstances.

\textit{Asylees and Refugees.} The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol define a “refugee” as one who:

\footnotesize
\begin{itemize}
  \item[{\textsuperscript{138}}] \textit{Id.}, art. 12.
  \item[{\textsuperscript{139}}] Apart from the question of extradition, as a POW (confirmed in \textit{United States v. Noriega}, 808 F. Supp. 791 (S.D. Fla. 1992)), Gen. Noriega has been entitled to certain privileges compared with other inmates, including a very large cell with a study, the opportunity to exercise in private, and a sentence reduced from 40 to 30 years. Bruce Zagaris, \textit{U.S. Announces Parole Date for Noriega, Does Not Respond to Panama Extradition Request}, 21 IELR 484 (2005).
\end{itemize}
owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{142}

A bedrock principle of refugee law known as \textit{non-refoulement}, as articulated in the 1951 Refugee Convention, holds:

\begin{quote}
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.\textsuperscript{143}
\end{quote}

Because this principle, which covers extradition, is recognized under customary international law as well, it applies to \textit{all States} even if they are not parties to the 1951 Convention or the 1967 Protocol.\textsuperscript{144} The principle applies not only to refugees but also to \textit{political asylees} (who are legally equivalent to refugees but who requested and secured protection, once located on host State territory rather than

\begin{footnotesize}
\begin{footnote}
\end{footnote}

\begin{footnote}
\textsuperscript{143} Refugee Conv., supra n.142, art. 33(1). Accord Declaration on Territorial Asylum, Dec. 14, 1967, art. 3(1), UNGA Res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967), available at http://www1.umn.edu/humanrts/instree/v4dta.htm (last visited on Nov. 6, 2013) (no person seeking asylum from persecution "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.").
\end{footnote}

\begin{footnote}
\end{footnote}
\end{footnotesize}
from abroad, based on fear specifically of political persecution\(^\text{145}\) and asylum-seekers (whose status has yet to be formally determined).\(^\text{146}\) For example, where a U.S. federal appeals court suspected the government of Panama might hold a political vendetta against a former Panamanian minister, it remanded the case for a factual determination as to whether the subject had a well-founded fear of persecution if he were extradited back to Panama.\(^\text{147}\)

There is, however, an exception with respect to 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.”\(^\text{148}\) That exception, however, “must be construed restrictively,” in no instance may be invoked to return a person who is likely to face torture or inhuman or degrading treatment or

\(^{145}\) Asylum can be permanent or temporary. An example of the latter can be seen in the case of Edward Snowden, a former government contractor assigned to the National Security Agency (NSA) who publicly leaked U.S. intelligence information related to a surveillance program and who was granted asylum by Russia for one year only. Steven Lee Myers & Andrew E. Kramer, “Defiant Russia Grants Snowden Year’s Asylum,” \textit{N.Y. Times}, Aug. 1, 2013, available at http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html?pagewanted=all&_r=0 (last visited on Aug. 3, 2013). (Snowden was subsequently granted permission to reside in Russia for an additional three years, until 2017, but not as a political asylee. “Snowden is Granted Permit to Reside in Russia for 3 Years,” \textit{NYT}, Aug. 8, 2014, at 4.) A variant of temporary asylum is sometimes known as “parole” in which an individual is allowed to stay in the host State for a temporary period on a discretionary basis usually because of emergency humanitarian conditions or other compelling reasons of public interest, but such designation is not tantamount to an admission of an alien. \textit{E.g.}, 8 U.S.C. § 1182(d)(5)(a) (2012).

\(^{146}\) Kapferer, \textit{supra} n.144, ¶ 217. Diplomatic asylees are similar to political asylees, except that in the former case their request for protection must occur in a legation (i.e., a diplomatic mission, a residence of the Chief of Mission, or a dedicated premises for asylees), a military camp, war vessel, or aircraft of the non-territorial State. \textit{See, e.g.}, OAS Conv. on Diplomatic Asylum, Mar. 28, 1954, art. 1, OAS T.S. No. 18, available at http://www.oas.org/juridico/english/treaties/a-46.html (last visited on Oct. 30, 2013).

\(^{147}\) \textit{Nicosia v Wall}, 442 F.2d 1005 (5\textsuperscript{th} Cir. 1971). In addition, some States, like the U.S., provide for another category known as “restriction on removal,” which, by contrast with asylum, does not discretioneartily authorize an individual to remain permanently in the granting State, yet does bar his return to a State where he fears persecution. \textit{E.g.}, 8 U.S.C. § 241(b)(3) (2012).

\(^{148}\) Refugee Conv., \textit{supra} n.142, art. 33(2). Accord Declaration on Territorial Asylum, \textit{supra} n.143, art. 3(2) (“Exception may be made to the foregoing principle \textit{[non-refoulement]} only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.”).
punishment, and the OAU’s 1969 Refugee Convention,\textsuperscript{149} in particular, treats non-refoulement as an absolute prohibition.\textsuperscript{150} The principle of not extraditing a refugee or political asylee is now broadly embedded in domestic law. In a few States, this principle is manifested in national constitutions, such as Algeria and Switzerland, although in most cases it can be found in statute or in case law.\textsuperscript{151}

Once such refugee or political asylee status is conferred, extradition is almost always thwarted;\textsuperscript{152} indeed, asylum and extradition operate in direct opposition to one another.\textsuperscript{153} For example, the government of Panama announced that it would not extradite to Iran overthrown Iranian leader, Shah Mohammad Reza Pahlavi, who had been conferred political asylum for humanitarian reasons, given that capital charges had been leveled against him.\textsuperscript{154} Similarly, in the fall of 2003, the U.K. granted political asylum to Boris Berezovsky, a prominent Russian businessman with investment interests in the media, mining, and oil industries, as well as a vocal political opponent of Russian President Vladimir Putin; the granting of political asylum to Berezovsky promptly led to the dismissal of extradition proceedings against him.\textsuperscript{155} Likewise, in 2008, Russia refused to extradite to Serbia on charges of cigarette smuggling the widow (Mira Markovic) and son (Marko) of former Serbian leader Slobodan Milošević, to whom Russia had granted refugee status.\textsuperscript{156}

\textsuperscript{150} See Kapferer, supra n.144, ¶¶ 220 and 221 & n.398 (Convention characterizes the return to face torture or inhuman or degrading treatment or punishment as a \textit{jus cogens} or peremptory norm).
\textsuperscript{151} \textit{Id.} ¶¶ 226-28 & nn.401-06 (identifying specific provisions in a wide variety of States).
\textsuperscript{152} If asylum is granted before an extradition request, the asylum signals to the pursuing State that its request is likely to be denied, although the host State can always withdraw its grant of asylum; if asylum is granted after an extradition request has been issued, the host State can deny the request on political offense grounds or as an exercise of executive discretion. Bassioni, U.S. Extradition, supra n.123, at 184. \textit{See also} n.110 in Chapter 5 supra.
\textsuperscript{153} \textit{See id.} at 167 (discussing “competing international duties”).
\textsuperscript{154} “Panamanian Foreign Minister Says Shah of Iran Will Not Be Extradited,” U.S. Dep’t of State Cable, Panama 141355, Jan. 14, 1980 (declassified).
\textsuperscript{156} “Russia has no reasons to extradite them, which is stipulated by international conventions and agreements. We will not extradite them. They were granted refugee status in Russia,” the Federal Migration Service’s press secretary Konstantin Poltoranin was quoted as saying by Interfax. Reuters,
another case, in 2012, Niger was unwilling to extradite Saadi Gaddafi, son of slain Libyan leader Moammar Gaddafi, wanted by Libya for having “taken goods by force and intimidation when he led the Libyan football federation,” but whose political asylee status “on humanitarian grounds” persisted despite his violating its conditions by “predicting an imminent uprising in Libya” during a TV interview.\textsuperscript{157}

\textbf{Those Accorded Amnesty, Pardons, or Witness Protection.} Another type of person not susceptible to extradition on account of his status is someone who has been granted legislative amnesty or a presidential pardon, and thereby is effectively immunized from criminal action. “Amnesty is usually granted before prosecution or conviction, and in that respect it resembles a statute of limitations, while pardon is usually granted after a person is found guilty.”\textsuperscript{158} Some bilateral extradition treaties expressly proscribe extradition in cases of a presidential pardon,\textsuperscript{159} and certain domestic legislation treats any such impediment to prosecution or punishment likewise as a bar to extradition.\textsuperscript{160} In any event, “[a] state that has afforded amnesty to an individual may find it politically impossible to extradite that individual to another state, even notwithstanding an international obligation to do so under an extradition treaty.”\textsuperscript{161}

What about an instance in which a fugitive has been granted witness protection in one State but is wanted for a crime in another? This situation was addressed in a

\begin{itemize}
\item \textquote{Serbia Demands Extradition of Milosevic Widow, Son,} Feb. 28, 2008, \textit{available at} \url{www.alertnet.org} (last visited on Sept. 5, 2008).
\item BASSIOUNI, U.S. EXTRADITION, \textit{supra} n.123, at 796 (emphasis supplied).
\item \textit{E.g.,} Treaty on Extradition, U.S.-Austl., May 14, 1974, art. VII, \textit{reprinted in} IGOR I. KAVASS, 1 EXTRADITION LAWS AND TREATIES: UNITED STATES (2000 & Supp. 2004) (no extradition granted when a person of interest has been pardoned in the host State for offense for which extradition is sought).
\item BASSIOUNI, U.S. EXTRADITION, \textit{supra} n.123, at 1078 (citing by example U.K. and Turkey).
\end{itemize}
rare 1976 case in which the U.S. Court of Appeals for the Fourth Circuit found that a witness protection agreement with the U.S. Department of Justice to protect him from “underworld assassins” did not bar him from extradition to Sweden to face criminal prosecution, given that the agreement was not intended to protect him from legal criminal law proceedings abroad. That said, it is conceivable that such an agreement would have yielded an extradition denial under other State laws and/or in other specific circumstances.

**Prominent or Popular Figures.** At times, a State will choose to protect an individual from extradition simply because of his stature, local popularity, or the financial contributions he has made to the welfare of the host State. In one example, Jacob “Kobi” Alexander, former Chief Executive Officer of Converse Technology, invested in or contributed substantially to the Namibian economy and consequently was widely appreciated and protected from extradition. Likewise, Jamaican Prime Minister Bruce Golding “authorized the retention of a U.S. law firm – for a hundred thousand dollars per quarter – to lobby officials in Washington” to oppose a U.S. extradition request for Christopher (Dudus) Coke, “known as the country’s most powerful ‘don’” as the leader of a “garrison community” known as Tivoli Gardens in West Kingston, on narcotics and firearms trafficking charges. The military junta in Bolivia protected Klaus Barbie, the “Butcher of Lyon,” for years while he assisted Bolivian officials with repressive techniques. In July 2010, the

---


Swiss Justice Minister defended the denial of a U.S. extradition request for famed film director Roman Polanski in part on the grounds that he had been traveling to Switzerland in good faith for years.\footnote{\textit{Bruce Zagaris, Swiss Government Denies U.S. Extradition Request for Roman Polanski, 26 IELR 354 (2010).}}

\textbf{d. Personal Circumstances}

A State also may recommend that an extradition request be withdrawn or postponed or deny it outright under either express domestic law or via political discretion for humanitarian reasons in cases where an individual is of advanced age, suffering from poor physical or mental health, or facing other challenging personal circumstances.\footnote{\textit{ABBELL, supra n.10, at 3-77 to 3-78.}} The underlying rationale for such exceptional treatment varies and could include that: (i) certain physically or mentally disabled individuals could be unfit for trial,\footnote{\textit{Under section 25 of the U.K.'s Extradition Act of 2003, the test is not actually whether one is suffering from a mental illness, as he or she could presumably be properly cared for elsewhere under such a circumstance, but whether the individual is psychologically "unfit," say, because he stands a high risk of suicide. \textit{A Review of the United Kingdom's Extradition Arrangements}, Sept. 30, 2011, at 406-07 (citing \textit{Jasons v. Riga Dist. Ct., Latvia}, [2009] EWHC 1845 (Admin.)). Beginning in 2011 with the conviction of John Demjanjuk for his accessory role in the murder of tens of thousands at the Sobibor Concentration Camp in Nazi-controlled Poland, Germany renewed its interest after years of dormancy in seeking the extradition of Nazi criminals in the United States, but at this point many of those perpetrators are quite old, and this has ignited a controversy over whether they should be prosecuted and imprisoned at such an advanced stage of life, notwithstanding the gravity of their crimes. \textit{Eric Lichtblau, "A Retiree, 89, Is Held in Deaths at Auschwitz," \textit{N.Y. Times}, June 18, 2014, available at \url{http://www.nytimes.com/2014/06/19/us/johann-breyer-accused-of-working-at-auschwitz-and-buchenwald.html?r=0} (last visited on Aug. 16, 2014) (discussing conviction of 89-year-old Philadelphia resident Johann Breyer for his role seven decades earlier as a "Death's Head" guard at Auschwitz Concentration Camp in aiding and abetting murder).}} (ii) some could not physically manage the geographical transition between States, (iii) others could suffer disproportionately or would present a strong suicide risk due to their age or fragile state if convicted and sentenced,\footnote{\textit{See, e.g., "Gary McKinnon Extradition to US Blocked by Theresa May," \textit{BBC News}, Oct. 16, 2012, available at \url{http://www.bbc.co.uk/news/uk-19957138} (last visited on July 28, 2013) (discussing U.K. Home Secretary's decision to deny the extradition of a hacker into sensitive U.S. government computers on account of his having Asperger's syndrome, a form of autism, and the related human}} and (iv) in some instances third parties might be incidentally injured by an extradition or its timing.\footnote{\textit{\textit{I.$%)'%%$,=! =*3=-1<0$)12!}
Many States have incorporated such humanitarian factors into their domestic laws when rendering extradition determinations. In one case, France postponed the extradition of Helmet Elsner to Austria until February 2007 to allow the 71-year-old former Director-General of Ban für Arbeit und Wirtschaft (Bawag) indicted on charges of fraud, false accounting, and breach of trust, to undergo multiple treatments for a heart condition. In June 1987, an Israeli judge opined that the extradition of William Nakash to France on murder charges should be delayed for up to a year to permit Nakash to obtain a divorce and thereby keep his wife from becoming a “deserted woman,” a highly disreputable status under Jewish and Israeli law. More recently, the Belizean Minister of Justice denied a U.S. request for the extradition of Belize national Rhett Fuller for his alleged participation in the 1990 murder of a U.S. national in South Beach, Florida, noting as an important factor the adverse impact extradition would have on the Fuller family, as the subject is the

---


171 See, e.g., Slovak Republic, Criminal Procedure Act No. 141/1961, art. 403(2), as amended, available at http://legislationonline.org/documents/action/popup/id/3850 (last visited on Oct. 6, 2013) (Minister of Justice may refuse extradition if: “(c) taking into account the age and personal circumstances of the person whose extradition is sought, he would most likely be inadequately severely punished by extradition in proportion to the level of gravity of the criminal offence he allegedly committed.”); China Extradition Law, supra n.27, art. 9(2) (an extradition request may be denied if “extradition is incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought.”); U.K. Extradition Act of 2003, § 25(2) & (3) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117676/extradition-act-2003.pdf (last visited on Sept. 29, 2013) (can order the release of a person or temporarily adjourn proceedings where the physical or mental condition of an individual is “such that it would be unjust or oppressive to extradite him.”); New Zealand, Extradition Act 1999, Pub. Act 1999 No. 55, May 20, 1999, § 7(f) & (g), as amended, available at http://www.legislation.govt.nz/act/public/1999/0055/latest/viewpdf.aspx (last visited on Nov. 3, 2013) (barring extradition if a person has a mental disability or intellectual incapacity).

172 Bruce Zagaris, France Extradites Former Bank Head to Austria, 23 IELR 133, 133-34 (2007).

173 Naomi Hillel, A Digest of Selected Judgments of the Supreme Court of Israel, 23 ISR. L. REV. 506, 509 (1989).
father of an autistic child.  The U.S. is something of an exception in this regard, with no federal appellate court having ever denied extradition on humanitarian grounds based on an elevated legal standard requiring that the anticipated punishment or procedure awaiting a returned fugitive would be “antipathetic to a federal court’s sense of decency.”

Heads of State generally have the last call and can overturn an extradition decision on humanitarian grounds. In January 2000, for example, the British Home Secretary exercised his discretion not to extradite Senator Augusto Pinochet, former president of Chile, to Spain for charges related to crimes against humanity committed against Spanish citizens in Chile during his rule, finding that Pinochet’s poor physical health made him unfit to stand trial. Similarly, in October 2008, French President Nicolas Sarkozy refused to follow a French court order to extradite to Italy Marina Petrella, who had been convicted of murder and other terrorist crimes while part of the Italian Red Brigades terrorist group from 1977 to 1982, on the grounds that she had stopped eating and her overall health had severely deteriorated to the point where there was concern she would die if extradited.

This chapter has evaluated the second category of impediments to extradition related to individual status and circumstances. The next chapter will focus on the third category of impediments, which addresses State relations and sensitivities.

175 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, 658, 666 & n.92 (2006) (collecting cases through 2006, including Prasoprat in which a U.S. national was extradited to Thailand to face the death penalty for a non-violent drug offense).
176 Gallina v Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960).
177 Stambrook & Stambrook, supra n. 11, at 131.
CHAPTER 7

IMPEDIMENTS III:
STATE RELATIONS AND SENSITIVITIES

In this chapter, the discussion of impediments to extradition continues with a focus on State relations and sensitivities. Specifically, the following sets of obstacles or limitations will be addressed: (i) bilateral relations; (ii) justice system interplay restrictions; (iii) competing jurisdictional claims; (iv) international human rights concerns; and (v) peace, security, and foreign policy considerations.

a. Bilateral Relations

Many host States, particularly those with a common law tradition,\(^1\) refuse to extradite fugitives absent an effective bilateral extradition treaty with the pursuing State.\(^2\) That means that, unless an applicable treaty authorizing extradition exists, the host State applying such a law or practice generally will not entertain an extradition request even on the basis of reciprocity or comity.\(^3\)

---


\(^2\) M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT’L L. 25, 63-64 (1973) [hereinafter Bassiouni, *Unlawful Seizures*]. In other cases, a State may require at least a surrogate provision found in another bilateral or multilateral agreement, as discussed in Chapter 4.c supra, or some enabling municipal legislation. See, e.g., India, The Extradition Act, 1962, Act No. 34 of 1962, Sept. 15, 1962, § 3(4), as amended, as discussed in J.N. Saxena, *India—The Extradition Act, 1962*, 13 INT’L & COMP. L.Q. 116 (1964) ("Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention.").

\(^3\) See, e.g., Andreas F. Lowenfeld, *Ahmad: Profile of an Extradition Case*, 23 N.Y.U. J. INT’L L. & POL. 723, 723-24 (1991) (Venezuela refused to extradite to Israel Mahmoud El-Abed Ahmad (a/k/a
The United States, for example, has maintained such a restrictive domestic law,\textsuperscript{4} almost without deviation,\textsuperscript{5} throughout most of its history.\textsuperscript{6} Even today, with a single exception authorized in the mid-1990s,\textsuperscript{7} the U.S. criminal code provisions governing extradition state that they “shall continue in force” regarding the transfer of “persons who have committed crimes in foreign countries”\textsuperscript{8} “only

Mahmoud Abed Atta) after he fled Palestine for Venezuela following his attack on a West Bank bus carrying Israeli settlers in April 1986, because no extradition treaty existed between Israel and Venezuela); Stoichkov v. Bulgaria, Apnl. No. 9808/02, ECHR Judgment, First Section, Mar. 24, 2005, ¶ 19, available at http://www1.umn.edu/humanrts/research/bulgaria/Stoichkov-eng.pdf (last visited on Dec. 1, 2011) (in April 1990 Austria denied an extradition request from Bulgaria where their bilateral legal cooperation treaty did not provide for assistance in criminal cases); Bruce Zagaris, Uganda Tries to Obtain Custody of Former Minister on Bribery Charges, 24 IELR 93 (2008) (in early 2008, the U.S. denied Uganda’s request for the extradition of Zoe Bakoko Bakor, former Ugandan Minister of Gender, Labor and Social Development, on charges of abuse of office and bribery, because no extradition treaty existed between the U.S. and Uganda). At the same time, however, the lack of a bilateral extradition treaty is not grounds for challenging the validity of an arrest and detention effected pursuant to an extradition request. See, e.g., Bruce Zagaris, Accused Croatian War Criminal Loses Effort to Block Australian Extradition Hearing, 23 IELR 54, 55 (2007) (Croatian war criminal Dragan Vasilić successfully challenged the legality of Croatia’s extradition request of Australia on the ground that no extradition treaty existed between them).

\textsuperscript{4} For example, in January 1947, the Soviet Union requested that the U.S. turn over Kirill Alekseev, a former Soviet Trade Representative in Mexico, on the charge of embezzling public funds, should he be found on U.S. soil. The U.S. government responded by stating that the Executive Branch had no authority to extradite an individual absent an applicable treaty or other legislative authority, neither of which then existed. “Request for Extradition of Former Soviet Trade Representative Denied,” 16 Dep’t of State Bull. 212, 212 (1947) (as reflected in a letter from Thompson, Eastern European Affairs Division Chief, U.S. Dep’t of State, to Tarassenko, Counsellor, Soviet Embassy in Washington, D.C., Jan. 20, 1947).

\textsuperscript{5} A rare exception can be found during the U.S. Civil War in 1864, when, despite the absence of a bilateral treaty between the U.S. and Spain, U.S. President Abraham Lincoln’s Secretary of State authorized the extradition of a Cuban military official and accused slave trader, Col. Don Jose Augustin Arguelles, to Spain on the basis of comity. Barbara M. Yarnold, International Fugitives: A New Role for the International Court of Justice 14-15 (1991); Christopher H. Pyle, Extradition, Politics, and Human Rights 267 (2001); 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. & FOR. AFF. 77, 106 (2003).


\textsuperscript{7} See 18 U.S.C. § 3181(b) (2012) (incorporated under the Antiterrorism and Effective Death Penalty Act of 1996, Apr. 24, 1996, § 443(a), Pub. L. No. 104-132, 110 Stat. 1214 (1996)) (identifying exception as when persons other than U.S. citizens or permanent residents “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 offense been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and (2) the offenses charges are not of a political nature.”).

\textsuperscript{8} No extradition treaty is required, however, to extradite a fugitive who actually or allegedly committed one or more of several enumerated crimes in “any foreign country or territory, or any part thereof . . . occupied by or under the control of the United States,” who then fled to the U.S., and is the subject of a request for his return by the “military governor or other chief executive officer in control of such foreign country or territory.” 18 U.S.C. § 3185 (2012).
during the existence of any treaty of extradition" with such foreign government.\(^9\) Other States that insist on the existence of an operative extradition treaty to authorize an extradition include, by way of example, Canada\(^11\) and Singapore.\(^12\) Some other States (e.g., Colombia\(^13\) and Trinidad & Tobago\(^14\)) maintain a general but less absolutist approach to this extradition treaty requirement.

Whether based on national law, principle, or pretext, it is not uncommon for States to deny extradition on the basis that no treaty exists recognizing or contemplating extradition between the host State and the pursuing State. For example, in December 1974, the Bolivian Supreme Court rejected a French request for the extradition of Klaus Barbie, a former Gestapo official, on the ground that there was no extradition treaty between Bolivia and France.\(^15\)

\(^9\) It should be noted, however, that U.S. federal courts have recognized so-called congressional-executive agreements as tantamount to treaties and as a sufficient basis for extradition. Such treaties call for the concurrence of a simple majority of both Houses of the U.S. Congress (i.e., the Senate and House of Representatives) rather than the traditional, Constitution-based two-thirds supermajority “consent” of the U.S. Senate alone. Frederic L. Kirgis, “International Agreements and U.S. Law,” ASIL Insights, May 1997, available at [http://www.asil.org/insigh10.cfm](http://www.asil.org/insigh10.cfm) (last visited on Oct. 6, 2013); e.g., Williams v. Rogers, 449 F.2d 513, 521 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

\(^10\) 18 U.S.C. § 3181(a) (2012) (emphasis supplied). This law does not preclude the U.S. from seeking extradition from other States with which it lacks an extradition treaty. Christopher L. Blakesley, Extradition Between France and the United States: An Exercise in Comparative and International Law, 13 VAND. J. TRANSNAT’L L. 653, 661-62 (1980); Alona E. Evans, Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice, 40 B.Y.I.L. 77, 79 (1964) (“[M]any instances can be cited of requests by the United States for extradition on grounds of comity, but usually with the understanding that reciprocity in similar circumstances should not be expected.”).


\(^12\) Extradition Act, Act. 14 of 1968, § 4(1), as amended, available at [http://statutes.agc.gov.sg/aol/search/display/view.w3p?query=DocId%3A6a7ef250-75a5-4da8-ad13-07d2b2cd6e01%20%20Status%3Ainforce%20Depth%3A0;rec=0](http://statutes.agc.gov.sg/aol/search/display/view.w3p?query=DocId%3A6a7ef250-75a5-4da8-ad13-07d2b2cd6e01%20%20Status%3Ainforce%20Depth%3A0;rec=0) (last visited on Nov. 3, 2013).


another case, after terrorists sought refuge in Lebanon following their hijacking of TWA Flight 847 in June 1985, their extradition was rejected because no extradition treaty existed between the U.S. (the pursuing State) and Lebanon (the host State).\textsuperscript{16} In July 1994, Pakistan refused to extradite Agha Hasan Abedi to Abu Dhabi because no extradition treaty existed between Pakistan and the United Arab Emirates (UAE).\textsuperscript{17}

States may not have executed an extradition treaty for any number of reasons; it may have been the practice of one or both States not to rely on such legal instruments;\textsuperscript{18} or perhaps there has been no historical need for such a treaty, given little or no criminal intersection between their populations;\textsuperscript{19} or it may be a function of their simply being on unfriendly terms\textsuperscript{20} or suspicions by one about the other’s motivations.\textsuperscript{21} Such absence may also stem from one State perceiving such a treaty relationship to be largely one-sided and therefore disproportionately onerous.\textsuperscript{22}


\textsuperscript{17} \textsc{geoff} \textsc{gilbert}, \textsc{transnational fugitive offenders in international law} 47 n.95 (1998).

\textsuperscript{18} \textit{See Tetsuya Morimoto, First Japanese Denial of U.S. Extradition Request: Economic Espionage Case}, 20 IELR 288 (2004) (as of July 2004, Japan had only two extradition treaties in effect, one with the U.S. and the other with South Korea).

\textsuperscript{19} \textit{See}, \textsc{e.g.}, Richard Downing, \textit{Recent Development, \textit{The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil}}, 26 STAN. J. INT’L L. 573, 576 (1989-90) (the U.S. and Brazil did not execute an extradition treaty for about 50 years until 1964).

\textsuperscript{20} \textit{See}, \textsc{e.g.}, Bruce Zagaris, \textit{U.S. Court Frees Alleged Anti-Castro Terrorist as CARICOM Calls for Prosecution}, 23 IELR 262, 263 (2007) (enmity between the U.S. and Cuba has prevented the conclusion of an extradition treaty between them, turning Cuba into a haven for American fugitives).

\textsuperscript{21} \textit{See} Evans, \textsc{supra} n.10, at 93-94 ("[I]t was surmised in the [U.S.] Department of State in 1931, that Greek reliance upon the convenience of rendition by deportation was proving to be a deterrent to the conclusion of an extradition treaty with that country.").

\textsuperscript{22} \textit{See} AP, "Singapore Opposes Indonesia on Extradition," \textit{Wall St. J.}, Feb. 14, 2005, at A15 (Indonesia has long sought an extradition treaty with Singapore to obtain custody and prosecute Indonesian business tycoons who allegedly violated Indonesian law and brought their assets to Singapore; Singapore does not want to become Indonesia’s law enforcer and so has consistently refused such a request).
Alternatively, a bilateral extradition treaty may once have existed but has since lapsed or been suspended due to the passage of time, a break in diplomatic relations, or a current state of armed conflict; or because one State may be struggling to re-establish a functioning government. Although the lack of a bilateral extradition treaty alone will not always prove legally dispositive, one of the reasons cited above ultimately may explain a denial decision. Moreover, the absence of extradition treaties by a pursuing State can create vulnerabilities, as criminals may be able to ascertain and exploit “safe havens” to which to flee.

Even where an extradition treaty exists between two States, their relations with one another could complicate, if not quash, an extradition request, inter alia, because:

---


24 See, e.g., Evans, supra n.10, at 96 (“During the period of the revolution following the downfall of the Madero regime in 1913, the United States did not maintain diplomatic relations with Mexico and considered that the Extradition Treaty was suspended.”).

25 For example, during World War II a number of States abrogated or suspended their extradition treaties with Germany. Whether such treaties were reactivated after hostilities ended amounts to a question of fact in which courts looked to the political and diplomatic actions of the States, such as the exchange of notes. Argento v. Horn, 241 F.2d 258 (6th Cir. 1957). As a general rule, however, “it is now well settled that the outbreak of war does not necessarily abrogate treaties or treaty provisions. The test seems to be whether the treaty by its nature is so incompatible with a state of war as to be voided by the commencement of hostilities.” In re Extradition of D’Amico, 177 F. Supp. 648, 653 (S.D.N.Y. 1959) (finding that the U.S.-Italy Extradition Treaty relating to extradition of non-political criminals was not voided by the outbreak of war between the two States).

26 See Michael H. Cardozo, When Extradition Fails, is Abduction the Solution?, 55 AJIL 127, 133 (1961) (“In the Ker case, 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 did not use them, however, because he had no access to the proper Government of Peru, which was disorganized as a result of military occupation of the capital city by Chilean forces.”).

27 See Bassisouni, Unlawful Seizures, supra n.2, at 63-64. Namibia has been cited as an example of a fugitive-friendly destination, which has few extradition treaties and where extradition requests are infrequently granted, documents go missing, technicalities prevail, and corruption is widespread. Robyn Dixon, “Africa’s Land of Sand and Fugitives,” L.A. Times, Dec. 8, 2006 (where such fugitives as Jacob “Kobi” Alexander, Hans Juergen Koch, Wesley Snipes, and Vito Bigione all sought refuge from foreign prosecutors). One author has compared Namibia to the “remote desert planet of Tatooine [in the film series Star Wars], hangout for aliens, bounty hunters and dodgy fugitives from intergalactic justice.” Id.
(i) the treaty has been ruled unconstitutional or unenforceable by the host State’s judiciary;\textsuperscript{28}

(ii) as a successor State, the host State inherited an extradition treaty that it views as suspect or no longer binding;\textsuperscript{29}

(iii) the criminal act occurred on occupied territory;\textsuperscript{30}

(iv) the treaty was entered into decades ago and, given the vast changes to extradition law and practice in the interim,\textsuperscript{31} the host State does not regard it as any longer legitimate;\textsuperscript{32}

(v) the two States’ political or economic relations have deteriorated or are otherwise tense, rendering the host State less receptive to providing any form of assistance to the other;\textsuperscript{33}

(vi) the host State chooses to “pay back” the pursuing State treaty partner for the denial of

\textsuperscript{28} For example, in December 1986, the Colombian Supreme Court ruled the 1979 U.S.-Colombia Extradition Treaty (that entered into force in 1982) unenforceable because its domestic enabling legislation was invalid. Bruce Zagaris, \textit{Colombian Supreme Court Inquires About Potential U.S. Violations of Extradition Terms}, 21 IELR 222 (2005).

\textsuperscript{29} See, e.g., \textit{Heeralall v. Commissioner of Prisons}, Mar. 30, 1992, 1992 MR 70, 72-73 (the Mauritian Supreme Court ruled the extradition treaty between the U.K. and France as no longer binding on Mauritius after it gained independence from the U.K. in 1968 based on: (i) its express intention for the treaty to lapse two years hence unless considered still in effect under the rules of customary international law; and (ii) France evidently regarded the treaty as no longer in force between them); \textit{Artukovic v Boyle}, 107 F. Supp. 11, 33 (S.D. Cal. 1952) (determining that the U.S. government, following the surrender of the Central Powers in World War I and the repartitioning of Europe, regarded all previous treaties with those countries as no longer in force), \textit{rev’d Ivancevic v. Artukovic}, 211 F.2d 565, 574 (9th Cir. 1954) (noting “open recognition” of the treaty on the part of both the U.S. and Yugoslavia had in fact continued).

\textsuperscript{30} See, e.g., \textit{Neely v. Henkel}, 180 U.S. 109, 120 (1901) (the U.S. does not extradite from occupied territory to pursuing States even where an extradition treaty exists); \textit{U.S. v. Icardi}, 140 F. Supp. 383 (D.D.C. 1956) (U.S. unable to send accused back to Italy where charged with murder in Italian territory while it had been under wartime German occupation).


\textsuperscript{33} See, e.g., Vikas Bajaj & Hari Kumar, “India Allows Prosecutors to Charge U.S. Citizen,” \textit{IHT}, Feb. 20, 2012, at 3 (noting that “Pakistan has previously refused to hand over people whom India has accused of plotting the [2008] attacks” in Mumbai that killed at least 163 persons, as India has accused Pakistan, its neighbor and regional rival of complicity in the attacks).
an important extradition request of the host State’s own;

(vii) the host State has determined that aggressive actions by a pursuing State to recover another fugitive in breach of a third State’s sovereign territory suggest a lack of respect for sovereignty and international cooperation;\textsuperscript{34} or

(viii) the host State has an extremist agenda that involves material support to terrorists or the like and is therefore far less inclined to care about or honor its international legal commitments.\textsuperscript{35}

A mere change of government leadership or to the form of government by one of the contracting parties, however, is not considered sufficient to render an otherwise operative extradition treaty no longer in force.\textsuperscript{36}

In addition, while in principle the host and pursuing States could agree to an extradition outside the terms of a treaty, some States insist on strict reciprocity and will refuse to extradite absent such a commitment.\textsuperscript{37} As earlier noted, for example, the U.S. will only extradite under a treaty and thus to the extent it seeks extradition from a State with which it has no extradition treaty but that nevertheless demands reciprocity in its extradition practice, that State may well refuse to extradite.

\textsuperscript{34} See Michael Abbell, Extradition to and from the United States 7-15 (2001 & Supp. 2007) (in the mid-1990s, the Costa Rican Supreme Court declared that its 1991 extradition treaty with the U.S. was unenforceable due to perceived overreaching on the part of the U.S. in seizing Humberto Álvarez-Machain from Mexico and then the U.S. Supreme Court asserting personal jurisdiction over him, discussed infra).

\textsuperscript{35} See Jackson Nyomuya Maigoto, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror 65 (2005) (a requested State that “directs its agents or allied entities to attack diplomats abroad or to take hostages within its own borders obviously will not order the extradition or prosecution of these perpetrators.”).


\textsuperscript{37} See discussion on reciprocity on pp.153-54 in Chapter 4 supra.
b. **Justice System Interplay Restrictions**

Apart from how States relate to each other under bilateral treaty terms or through their foreign policies, there are three primary reasons why an extradition request may be denied or subsequently withdrawn in connection with the interplay between their criminal justice systems: (i) double jeopardy (alternatively referred to as *non bis in idem*\(^{38}\) or the *autrefois* rule); (ii) specialty (or speciality, as it is called in some European and British Commonwealth States); and (iii) pending or planned criminal proceedings by the host State of the same individual for the same offense.\(^{39}\)

i. **Double Jeopardy**

In the extradition context (versus under the narrower international human rights law standard\(^{40}\)), the principle of double jeopardy operates to prevent two States from each prosecuting or otherwise exposing a person to the risk of

---

\(^{38}\) See *United States v. Jurado-Rodriguez*, 907 F. Supp. 568, 580 (E.D.N.Y. 1995) (observing that the doctrines of double jeopardy and *non bis in idem* “relate[] so closely,” the same burden of proof should apply).

\(^{39}\) Other law enforcement interplay issues, such as whether the pursuing State already has convicted the individual at an *in absentia* trial and whether a special court is planned for prosecuting the extraditee, will be discussed *infra* under the section on international human rights concerns.

\(^{40}\) International human rights treaties prohibit prosecution twice for the same offense *but only by the same State*. See Christine van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box?*, in *INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 233 n.99 (John Dugard & Christine van den Wyngaert 1996) (“[i]nternational human rights instruments are silent on [whether States are obligated] to accept judgments rendered in third States; . . . they provide only a domestic *non bis in idem* rule, without mentioning that this rule should apply *erga omnes*. For example, the Human Rights Committee has declared any communication by a person who had been twice condemned for the same facts inadmissible because Art. 14(7) of the Covenant does not guarantee *non bis in idem* with regard to jurisdictions of two or more States . . . this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State”) (citation omitted); *A.R.J. v. Australia*, Commc’n No. 692/1996, Feb. 6, 1996, U.N. Doc. CCPR/C/60/D/692/1996, available at [http://www.1.umn.edu/humanrts/undocs/692-1996.html](http://www.1.umn.edu/humanrts/undocs/692-1996.html) (last visited on Nov. 1, 2013); *A.P. v. Italy*, Commc’n. No. 204/1986, Nov. 2, 1987, U.N. Doc. CCPR/C/31/D/204/1986, available at [http://www1.umn.edu/humanrts/undocs/html/204-1986.htm](http://www1.umn.edu/humanrts/undocs/html/204-1986.htm) (last visited on Nov. 1, 2013). Likewise, the double jeopardy principle under the U.S. Constitution, as found in the Fifth Amendment, does not apply when dealing with two States, but rather only with respect to prosecutions within the U.S. *See United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir. 2000) (double jeopardy clause of the Fifth Amendment to the U.S. Constitution “forecloses multiple prosecutions for the same offense by the same sovereign, but not ones by different sovereigns. . . . The exception for dual sovereignty flows from the understanding that every sovereign has the authority to punish infractions of its own laws.”), *cert. denied*, 533 U.S. 924 (2001).
punishment for the same offense (or, more rarely, for the same acts). In practice, that means that extradition generally will be denied to the extent that a “final judgment” has been issued, or (in some instances) where there has been an out-of-court settlement, or there has been a considered decision not to prosecute, or criminal proceedings have been terminated prior to completion regarding the same crime(s) allegedly committed by the same individual. This principle could potentially apply, therefore, under any of the following scenarios in which the person has been:

- tried, acquitted, and discharged;
- tried and convicted but no sanction imposed;
- tried, convicted, sentenced, and punished;
- tried, convicted, sentenced, and granted amnesty or pardoned (immediately or at some later point);
- not been tried based on a considered decision not to institute criminal proceedings; or

41 Since World War II, U.S. extradition treaties generally contain provisions prohibiting extradition in instances in which the “same offense” is at issue, but a few call for the “same acts.” ABBELL, supra n.34, at 3-53 to 3-55.
42 Some courts have drawn a distinction between the extradition itself (which would lead to a foreign trial) and a hearing to consider the merits of extradition, finding the former, but not the latter, barred by the double jeopardy principle. Courts in the U.K., for example, have considered that the principle does not apply to the extradition hearing itself. E.g., Rees v. Secretary of State for the Home Department [1986] 2 All E.R. 321, 1 A.C. 937 (U.K.).
44 ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 79 (2d ed. 2010).
• not been tried but where the claims had been satisfactorily settled out of court.\footnote{See Bert (A.H.J.) Swart, \textit{Refusal of Extradition and the United Nations Model Treaty on Extradition}, 23 \textit{NETH. Y.B. INT'L L.} 175, 209 (1992) ("Prosecution [after a case has been settled out of court] would be irreconcilable with the idea of \textit{ne bis in idem}. It seems only fair not to extradite the person claimed in such cases. However, as yet most extradition laws and treaties contain no explicit provisions with respect to this method of terminating proceedings, and neither does the UN Model [Treaty on Extradition].").}

Even where double jeopardy does not operate to thwart an extradition, its invocation can delay proceedings for years.\footnote{In a high-profile example from 2007, the U.S. sought the extradition of Mario Villanueva Madrid, former governor of the Mexican state of Quintana Roo, on charges of drug trafficking, money laundering, and racketeering, but as he had just served six years for money laundering in a Mexican prison, his attorney fought extradition under the double jeopardy principle, which tied up proceedings for several years. Bruce Zagaris, \textit{Mexico Arrests Former Governor on U.S. Extradition Warrant}, 23 \textit{IELR} 365, 365-66 (2007).} As an international legal concept, the double jeopardy principle is broadly captured in such diverse legal instruments as the U.N. Model Treaty on Extradition,\footnote{U.N. Model Treaty, \textit{supra} n.45, art. 3(d) & (e) (extradition shall not be granted if “there has been a final judgment rendered against the person in the requested State in respect of the offense for which the person's extradition is requested; [or if] the person whose extradition is requested has, under the law of either Party, become immune from . . . punishment for any reason, including . . . amnesty.”).} regional extradition conventions,\footnote{E.g., Eur. Conv. on Extradition, \textit{supra} n.45, art. 9 (“Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested.”); Inter-Am. Conv. on Extradition, Feb. 25, 1981, art. 4(1), OAS T.S. No. 60, \textit{reprinted in} 20 ILM 723 (1981), \textit{available at} \url{http://www.oas.org/juridico/english/treaties/b-47.html} (last visited on Dec. 7, 2011) (no extradition permitted “[w]hen the person sought has completed his punishment or has been granted amnesty, pardon or grace for the offense for which extradition is sought, or when he has been acquitted or the case against him for the same offense has been dismissed with prejudice.”).} domestic extradition-related legislation,\footnote{E.g., PRC, Extradition Law, Order of the President No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People’s Congress, Dec. 28, 2000, art. 8(2), \textit{available at} \url{http://english.gov.cn/laws/2005-09/22/content_68710.htm} (last visited on Nov. 3, 2013) [hereinafter China Extradition Law] (extradition request shall be rejected if “at the time the request is received, [a] judicial organ of the People’s Republic of China has rendered an effective judgment or terminated the criminal proceedings in respect of the offence indicated in the request for extradition”).} and bilateral extradition treaties,\footnote{E.g., Treaty on Extradition, U.S.-Austl., May 14, 1974, art. VII(a), \textit{reprinted in} Igor I. Kavass, 1 \textit{Extradition Laws and Treaties: United States} (2000 & Supp. 2004) (extradition shall not be granted “when the person whose extradition is requested . . . has been tried and discharged or punished, or has been pardoned, in the territory of the requested State for the offense for which his extradition is requested.”).} and is implicitly interpreted where it is not express.\footnote{STANBROOK \& STANBROOK, \textit{supra} n.43, at 137.}
For double jeopardy to obtain, a genuine risk of punishment must exist. Accordingly, double jeopardy would not be implicated under such circumstances as a prosecution that was terminated because of a legal technicality, thereby foreclosing a judgment on the merits; or a prosecution that was discontinued on meritorious grounds. In any event, the burden of proof lies with the accused to show that he had been through a prosecution or other deliberative process that ultimately could have yielded a punishment. Applicable prior legal proceedings undertaken by a third State may also bar extradition between two other States, although this may be a discretionary call on the part of the host State.

ii. Specialty

The rule of specialty presents another way in which extradition can be stymied, although in this case typically by insisting on its subsequent withdrawal

53 The Amanda Knox case presents a novel question regarding whether the U.S. Constitution's double jeopardy prohibition, see U.S. Const., amend. V, as also arguably reflected in Article VI of the U.S.-Italy Extradition Treaty, could thwart a prospective extradition request by Italy for Knox's return from the United States. She and her Italian boyfriend, Raffaele Sollecito, were first convicted in 2009 of the 2007 murder of Knox's roommate, Meredith Kercher, in Perugia, Italy, and after spending four years in prison, that conviction was reversed on appeal in 2011, at which point she returned to her hometown of Seattle, Washington. Then, in March 2013, Italy's highest court reversed that appellate ruling and called for a retrial, which yielded guilty verdicts by the appeals court in Florence of 28.5 and 25 years for the two defendants, respectively, in January 2014. While it remains unclear whether this latter conviction will be upheld by the Italian Court of Cassation in Rome, whether Italy will seek Knox's extradition, and whether the U.S. would be politically persuaded or otherwise inclined to grant the request, the constitutional issue ought to turn on the status of her prosecution under the Italian judicial system, namely, whether the original appeals court ruling was final or was simply a phase of the same, concededly drawn-out legal proceeding. See Merry Neal, "The Amanda Knox Case and the Politics of Extradition Law," LegalWeek, Feb. 10, 2014, available at http://www.legalweek.com/legal-week/blog-post/2327968/the-amanda-knox-case-and-the-politics-of-extradition-law?keepThis=true&TB_iframe=true&amp;height=650&amp;width=1000&amp;caption= (last visited on Aug. 16, 2014).

54 STANBROOK & STANBROOK, supra n.43, at 139.

55 E.g., Treaty on Extradition, U.S.-Jam., June 14, 1983, art. IV, available at http://internationalextraditionblog.com/2011/05/11/jamaica-extradition-treaty-with-the-united-states/ (last visited on Dec. 2, 2011) ("Extradition shall not be precluded by the fact that the competent authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested or have decided to discontinue any criminal proceedings which have been initiated against the person sought.").

56 Id. at 140.

57 See ABBE, supra n.34, at 3-56 to 3-57; Addl'l Prot. to the Eur. Conv. on Extradition, Oct. 15, 1975, art. 2, CoE, E.T.S. No. 86, available at http://conventions.coe.int/Treaty/en/Treaties/Html/086.htm (last visited on Oct. 31, 2013) (amending original art. 9) (identifying situations in which extradition would be refused on the basis of double jeopardy where a final judgment was issued by a third State).

58 The term derives etymologically from the French "specialité" meaning particularity.
rather than by denying it in advance. Specialty, a rule premised on international comity and one often raised in tandem with the principle of dual criminality, stands for the proposition that a pursuing State may not detain, try, or punish a fugitive for any offense committed before his extradition, except those that specifically were the subject of the extradition request and approval (consistent with the provisions of any applicable extradition treaty), unless the extraditing State lends its agreement or a lesser included offense arose out of the same underlying facts.

The purpose of specialty is both to safeguard the integrity of the judicial process of the host State after it has conceded its jurisdictional control over a fugitive and to protect the individual extraditee from potential human rights abuse

60 See United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam) (specialty is "a doctrine based on international comity. Because the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition."). cert. denied, 479 U.S. 1009 (1986).
61 To avoid conceptual confusion between these two rules, consider that while dual criminality requires correspondence between the laws of the host and pursuing States, specialty calls for a correspondence between the charges in the indictment and the offenses set forth in the extradition order. 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 250 (1992) [hereinafter BLAKESLEY, COMPARATIVE STUDY].
62 See Abbell, supra n.34, at 3-35; Stanbrook & Stanbrook, supra n.43, at 50 (distinguishing offenses committed after extradition has been effected); In re Albrand, Ct. of Cassation, Fr., Dec. 22, 1969, reprinted in 51 I.LR 269 (1978).
63 See Collier v. Vaccaro, 51 F.2d 17, 21 (4th Cir. 1931) ("We cannot assume that a friendly government [Canada], in violation of [a bilateral extradition treaty] would try the accused on any other charge than that for which he was surrendered to be tried."); In re Dilasser, Fed. and Cassation Ct., Venez., July 30, 1952, reprinted in 19 I.LR 377 (1957) (refusing to allow France to prosecute an individual for a crime for which he had not been properly extradited by Venezuela).
64 SIR ROBERT JENNINGS & SIR ARTHUR WATTS, EDs., 1 OPPENHEIM’S INTERNATIONAL LAW 961 (9th ed. 1992). But see Stanbrook & Stanbrook, supra n.43, at 51 n.22 (citing an exceptional case involving the prosecution of former Nigerian government ministers in February 1989, where the 1966 Nigerian extradition decree was trumped by a subsequent Nigerian decree empowering a special military tribunal to try public officials accused of any offense notwithstanding anything to the contrary in any other enactment, and thereby defeating the principle of specialty operating pursuant to the extradition treaty).
65 Eur. Conv. on Extradition, supra n.45, art. 14(1)(a); Abbell, supra n.34, at 3-35 to 3-36; Blakesley, Comparative Study, supra n.61, at 253; Stanbrook & Stanbrook, supra n.43, at 50; United States ex rel. Donnelly v. Muligan, 74 F.2d 220 (2d Cir. 1934).
(including no notice) at the hands of the pursuing State when tried for an offense that was not the basis for the extradition.\textsuperscript{67} Accordingly, specialty is a right conferred on the extraditing State, which can be invoked by diplomatic protest\textsuperscript{68} or waived at its discretion (possibly through acquiescence).\textsuperscript{69} Derivatively, the \textit{individual} also can consent to additional charges announced or contemplated by the pursuing State,\textsuperscript{70} or effect the same result by waiving the formalities of extradition,\textsuperscript{71} and in some jurisdictions can even raise a specialty claim on his own in the context of criminal proceedings.\textsuperscript{72} In any event, however, an

---

\textsuperscript{67} STANBROOK & STANBROOK, supra n.43, at 47-48; ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 184 (2d ed. 2003); Fiocco v. United States, 462 F.2d 475, 481 (2d Cir.) ("The ‘principle of specialty’ reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government, especially for political crimes."); cert. denied, 409 U.S. 509 (1972).

\textsuperscript{68} JENNINGS & WATTS, supra n.64, at 961.

\textsuperscript{69} See, e.g., United States v. Najohn, 785 F.2d 1420, 1422-23 (9th Cir.) (per curiam) (finding that the Swiss government waived specialty under its bilateral extradition treaty with the U.S., thereby allowing the U.S. to prosecute the appellant under a new set of charges); cert. denied, 479 U.S. 1009 (1986); Fiocco, 462 F.2d at 479-82 (although the narcotics charge brought by the U.S. after the fugitives were extradited from Italy, they were not released on the ground that the government of Italy had not affirmatively protested). \textit{But see United States v. Leherder-Rivas, 668 F. Supp. 1523, 1525 (M.D. Fla. 1987)} ("When the extraditing country does not expressly state an objection to a prosecution, as in this case, the Court must inquire whether the surrendering state would regard the prosecution as an objection as a breach.") (internal quotations omitted).

\textsuperscript{70} See, e.g., \textit{In re Arietto}, Italy, Ct. of Crim. Cassation, Feb. 7, 1933, 26 Rivista 267 (1934), reprinted in 7 ANN. DIG. & REP. INT’L LAW CASES 334, 334 (1933-1934) (No. 140) (H. Lauterpacht ed.) (1940) (pursuant to the Italy-France Extradition Treaty, which permitted additional charges to be brought upon the express and voluntary consent of the accused, the court found that the trial on the additional charges was proper where the accused consented thereto); \textit{In re Arton No. 2} [1896] 1 QB 509; Commonwealth Scheme for the Rendition of Fugitive Offenders, May 3, 1966, \¶ 15(5), as amended in 1990 and then renamed as London Scheme for Extradition within the Commonwealth in Nov. 2002, LMM (90)32, available at http://www.oas.org/juridico/english/mesicic3_lam_london.pdf (last visited on Nov. 1, 2013) [hereinafter London Scheme]; STANBROOK & STANBROOK, supra n.43, at 53-54 (noting that an individual may be anxious to have all charges against him handled at the same time so as to clear his name once and for all).

\textsuperscript{71} See, e.g., \textit{In re Tirptiz}, Ct. of Cassation, Belg., Feb. 8, 1937, reprinted in [1938-40] 9 ANN. DIG. & REP. PUB. INT’L L. CASES 401, 401 (No. 149) (H. Lauterpacht ed. 1942) (finding that the appellant, by “declare[ing] to the French authorities that he wished to waive all the formalities and guarantees provided for in his favour in connection with extradition,” he had “expressly consented to be tried for offences other than those for which his extradition was granted.”).

\textsuperscript{72} See United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991) (noting disagreement among legal authorities regarding whether a criminal defendant may raise a specialty claim absent an objection by the extraditing State, but finding that he may do so); cert. denied, 506 U.S. 835 (1992) (citing United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990); cert. denied, 498 U.S. 1049 (1991)); United States v. Martonak, 187 F. Supp.2d 117, 121-22 (S.D.N.Y. 2002) (observing “divided authority” on whether an individual has standing, noting that some courts have held that “the extradited individual may raise whatever objections the asylum state might have had,” and concluding that defendant in this case had standing to argue specialty absent any official declaration by the host State that no specialty issue existed); United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995) (allowing standing to an individual to raise specialty that host State might have asserted). This individual standing issue is discussed further in Chapter 13.a.ii infra.
individual cannot invoke the specialty principle as a means of preventing or limiting the admissibility of evidence against him at trial.\textsuperscript{73}

The rule of specialty has emerged as customary international law\textsuperscript{74} and today has almost universal application\textsuperscript{75} in extradition-related treaties,\textsuperscript{76} national legislation,\textsuperscript{77} and judicial practice alike, including in extraditions based on comity (versus treaty).\textsuperscript{78} The upshot is that an extradition can be nullified \textit{ex post facto} and the subject released in the course of criminal proceedings, or a criminal conviction in the pursuing State can be vacated, where the underlying extradition was found to violate the specialty rule. For example, in a 1993 case, the U.S. Court of Appeals for the Ninth Circuit opined that while Pakistan expressly agreed to extradite on one count of a U.S. superseding indictment related to conspiracy to import narcotics into the U.S., Pakistan’s extradition documents were silent as to a second count, and the failure to ascertain unambiguous agreement as to that second charge proved fatal on specialty grounds.\textsuperscript{79} Likewise, in 1934, Spain’s Supreme Court discharged a prisoner on a specialty challenge where the extradition request made of Portugal sought him for “falsification of a private document as a means of swindling” but where Spain tried and convicted him for the crime of “falsification of a mercantile document which did not cause property loss to anyone.”\textsuperscript{80}

\textsuperscript{73} \textit{E.g.,} \textit{Alvarez-Moreno,} 874 F.2d 1402 (11th Cir. 1989), \textit{cert. denied,} 494 U.S. 1032 (1990).
\textsuperscript{74} \textit{Bantekas & Nash, supra} n.67, at 184.
\textsuperscript{75} \textit{Blakesley, Comparative Study, supra} n.61, at 250 (referring to specialty as “virtually universal”); \textit{Stanbrook \\& Stanbrook, supra} n.43, at 47, 50 (universally recognized principle).
\textsuperscript{76} \textit{Jennings \\& Watts, supra} n.64, at 961 (most extradition treaties contain a specialty provision); \textit{e.g.,} U.N. Model Treaty, \textit{supra} n.45, art. 14.
\textsuperscript{79} \textit{United States v. Khan,} 993 F.2d 1368, 1373-75 (9th Cir. 1993). \textit{See also United States v. Rauscher,} 119 U.S. 407 (1886) (no prosecution allowed where the individual was extradited for murder but tried on the offense of cruelty under the same facts).
Traditionally, the rule of specialty has been strictly applied,\textsuperscript{81} and even the particular designation of the charge need not be determinative of whether the specialty rule will be triggered.\textsuperscript{82} Notably, modern-day usage has come to recognize certain specialized applications. The rule of specialty has been extended by domestic courts to two distinct contexts beyond the principal one concerning the \textit{nature} of the crime: Colombia has set restrictions regarding the temporal threshold for commission of an extraditable crime (\textit{i.e.}, no earlier than December 16, 1997) with regard to extraditions to the U.S.;\textsuperscript{83} and Venezuela has limited the maximum length of punishment imposed on an extradited person (to 30 years).\textsuperscript{84}

At the same time, certain exceptions to the general rule exist. Many extradition treaties and domestic laws require States to provide fugitives the opportunity to leave their territory within a specified number of days before they will prosecute those individuals under any offense that was not the subject of an approved extradition.\textsuperscript{85} In the same vein, if such an individual fails to take advantage of that window of time, or if he leaves transferee State territory but then returns or

\textsuperscript{81} \textit{But see United States v. Jetter}, 722 F.2d 371, 373 (8\textsuperscript{th} Cir. 1983) (in light of all circumstances, finding that Costa Rica intended to extradite for conspiracy charge, in addition to substantive offenses, despite the fact that a reference to conspiracy was omitted from the judicial order).


\textsuperscript{83} Under the U.S.-Colombia Extradition Treaty, U.S. authorities may not prosecute suspects for crimes committed before December 16, 1997, the day when the Colombian Constitutional Court authorized the resumption of extraditions, which had been barred since 1991. Bruce Zagaris, \textit{Colombian Supreme Court Inquires About Potential U.S. Violations of Extradition Terms}, 21 IELR 222 (2005).

\textsuperscript{84} \textit{See Benitez v. Garcia}, 449 F.3d 971 (9\textsuperscript{th} Cir. 2006) (per curiam) (unanimously holding that a California Superior Court has to honor a Venezuelan grant of extradition under the U.S.-Venezuela Extradition Treaty that Cristobal Rodriguez Benitez, a Mexican national, was to receive a punishment not exceeding 30 years, and consequently struck down an indefinite sentence of 15 years to life imprisonment).

\textsuperscript{85} \textit{E.g.}, Eur. Conv. on Extradition, supra n.45, art. 14(1)(b) (1957) (individual has 45 days to leave); Thailand Extradition Act, supra n.77, § 11(2) (allowing 45 days to leave the requesting State’s territory “after being free to do so”); Switzerland, Fed. Office of Justice, Int’l Mutual Assistance in Crim. Matters (IMAC): Guidelines (9\textsuperscript{th} ed. 2009), art. 38(2), \textit{available at} http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0093.File.tmp/wegl-str-e-2009.pdf (last visited on Nov. 10, 2013) [hereinafter IMAC] (allowing 45 days after conditional or final release); \textit{Abbett}, supra n.34, at 3-34 (most U.S. extradition treaties allow 10-60 days for individual to leave country before the pursuing State will prosecute for offenses for which extradited).
is returned, legal proceedings can be brought against him for charges that were not within the scope of the transferor State’s extradition authorization.  

iii. Concurrent Proceedings

In addition, when a host State is in the midst of a criminal proceeding against an individual, or is seriously contemplating or planning to undertake such a proceeding, his requested extradition by a pursuing State for the same offense may be denied or postponed pending final disposition of the host State case. In such an instance the host State is forced to choose between: (i) granting an extradition request by a pursuing State, and (ii) prosecuting a fugitive under one’s own criminal justice system for violation of its domestic law (possibly under an applicable aut dedere aut judicaret provision, as discussed in Chapter 9.c infra).

The European Convention on Extradition, at Article 8, frames the standard in representative terms: “The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.” Bilateral extradition treaties frequently speak to this point and domestic laws in such States as the PRC and Japan contain similar provisions, while others, like the

---

86 ABBELL, supra n.34, at 3-34; IMAC, supra n.85, art. 38(2)(b) (specialty rule no longer applicable if person returns or is returned by a third State after being released and left country); e.g., Novic v. Public Prosecutor of the Canton of Basel-Stadt, reprinted in 22 ILR 515 (1955).

87 BANTEKAS & NASH, supra n.67, at 190. This assumes, of course, that the fugitive has not already been arrested on charges by an occupying power in the host State; for example, U.S. troops had detained Turkish Islamists Burhan Kus and Sadettin Aktas at Baghdad’s Abu Ghraib prison on unrelated charges compared with Turkey’s underlying request for their extradition for a 2003 terrorist attack in Istanbul. Bruce Zagaris, Turkey Requests Iraqi Extradition of Two Islamists for 2003 Attack, 21 IELR 356, 356-57 (2005).

88 Eur. Conv. on Extradition, supra n.45, art. 8.


90 China Extradition Law, supra n.50, art. 9(1) (extradition may be rejected where the PRC has jurisdiction and “criminal proceedings are being instituted against the person or preparations are being made for such proceedings”); Japan Law of Extradition, Law No. 68 of 1953, art. 2(7), as amended, available at http://www.moj.go.jp/ENGLISH/information/loe-01.html (last visited on Nov. 3, 2013) (extradition precluded “[w]hen a criminal prosecution based on the act constituting an offense for which extradition is requested is pending in a Japanese court”).
United States, have more permissive provisions that defer to foreign extradition requests, assuming double jeopardy does not attach.\footnote{Under U.S. law, absent an issue presented by double jeopardy, federal or state prosecutors may dismiss the present charges in favor of those brought by the pursuing State. Abbell, supra n.34, at 3-55 to 3-56.}

An example of such a concurrent proceeding clash arose in the case of Egyptian jihadist Abu Hamza al-Masri, the first person detained under the 2003 amended U.S.-U.K. Extradition Treaty. After al-Masri was arrested in the U.K. in May 2004, the U.S. sought his extradition on 11 terrorist-related charges, but the U.K. decided to postpone a decision until it first prosecuted al-Masri for incitement and racial hatred offenses in violation of its own domestic law.\footnote{See Bruce Zagaris, U.K. Court Rules Abu Hamza al-Masri can be Extradited to the U.S., 24 IELR 1, 1-2 (2008) (Britain delayed al-Masri’s extradition by insisting that he be tried first in Britain; he is now serving a seven-year sentence in the U.K. for inciting murder and racial hatred).} In cases such as this, however, it generally takes years to conclude criminal proceedings and for the subject to serve out any assigned prison term in the host State before he potentially would be available for extradition.

c. **Competing Jurisdictional Claims**

Closely related to, but distinct from, concurrent proceeding scenarios between the host and a pursuing State is the situation in which two or more pursuing States simultaneously seek the extradition of a fugitive for alleged violations of their respective domestic laws, and a host State is not interested in prosecution itself (and does not entertain asylum for the fugitive), the host State can choose only one pursuing State, at least initially, for extradition.\footnote{A variation on this scenario can occur when the host State has no plans to prosecute an individual and must choose between, on the one hand, a State seeking extradition for an alleged or actual crime and, on the other hand, the State of the individual’s nationality aiming to shield him from prosecution or punishment. This fact pattern played out in July 2013 when Panama chose to return to the United States Robert Seldon Lady, an alleged former CIA station chief convicted in absentia of involvement in the kidnapping of Abu Omar from Milan in 2003, rather than extradite him to Italy to face prosecution. See Javier Cordoba & Deb Riechmann, “Panama Opt to Send ex-CIA Agent to U.S.,” Phila. Inquirer, July 20, 2013, at A3.} There is no customary international law that guarantees one State automatic priority over another based on the nature of their jurisdictional claims.\footnote{See supra pages 98-100 (Chapter 2).} Most treaties
likewise do not establish a hierarchy of claims, leaving host States to make a discretionary call. In such cases, States generally make their determination based on a totality of the circumstances, although some bilateral treaties and municipal laws identify criteria to help guide decision-making. Such criteria typically include, at a minimum, the relative dates on which the requests were made, the nationality of the fugitive, and the seriousness of the offenses. The host State may insist that as a condition of extradition to one State (State A), the individual must be extradited to the other (State B) after prosecution (and any related punishment) in State A have occurred.

95 See Joseph J. Lambert, Terrorism and Hostages in International Law 164 (1990) (no priority of jurisdiction established under 1979 Hostages Convention; nor can such priority be implied from the language of Article 5, or from any other provision of the Convention, or from its travaux preparatoires); Abbell, supra n.34, at 3-38.1 (noting that, by contrast, the earliest U.S. bilateral treaties, up to the 1950s, assigned priority to the first one received).

96 See, e.g., U.N. Model Treaty, supra n.45, art. 16 ("If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited."); U.S.-Mex. Extradition Treaty, supra n.89, art. 16 (where there is more than one request for extradition of same person, whether for the same or different offenses, the host State has the right to decide which request it will grant).

97 See Abbell, supra n.34, at 3-38.22 (noting that most post-1960 U.S. extradition treaties assign priority based on such factors as the place of commission of the offense, the relative gravity of offenses, the nationality of the requested person, the possibility of re-extradition, the order of receipt of the requests, and the provisions of the applicable treaties); e.g., India Extradition Act, 1962, Act No. 34 of 1962, Sept. 15, 1962, art. 30, available at http://www.advocatekhoj.com/library/bareacts/extra/index.php?Title=Extradition%20Act.%201962 (last visited on Dec. 7, 2013) ("[T]he Central Government may, having regard to the circumstances of the case, surrender the fugitive criminal to such State or country as that Government thinks fit.") (emphasis in original).

98 E.g., Inter-Am. Conv. on Extradition, supra n.49, art. 15 (requiring the requested State to give priority to the territorial State where there are two or more requests for the extradition of a person for the same offense; if two or more requests for extradition but for different offenses, extradition is granted to the State that seeks an offender for the crime punishable by the most severe penalty; if offenses are of equal gravity, priority is determined by the order in which the requests were received); IMAC, supra n.85, art. 40 (where same offense, priority given to State where the "offense was committed or principally committed; where different offenses, "the decision shall be made having due regard to all circumstances, especially the seriousness of the offenses, the place of commission, the chronological order in which the requests were received, the nationality of the person pursued, the better prospect of social rehabilitation and the possibility of extradition to another State."); Thailand Extradition Act, supra n.77, § 26 (relevant factors for determining to which State extradition shall be made include: (1) whether or not the Requesting State has an extradition treaty with Thailand; (2) the place where each offense was committed; (3) the severity of offense which affects Requesting State and penalty; (4) the order of request received from Requesting State; (5) the nationality of the offender; (6) the interest and readiness of prosecution; (7) other reasons with respect to international relation[s] according to the opinion given by the Ministry of Foreign Affairs."); T&T Extradition Act, supra n.14, art. 16(3) (shall take regard of all circumstances, particularly the relative seriousness of the offenses, the dates on which the requests were made, and the nationality of the person concerned).

99 See supra n.98.

The decision regarding which State’s jurisdictional claim takes priority matters, at least in part, because the State(s) not selected may not ultimately obtain custody at all. This could occur if, for example, the fugitive dies while serving a sentence in the selected State, or is not eligible for re-extradition (discussed infra) by the selected State on account of such factors as his becoming extremely unwell in the meantime, a nationality bar, exceeding the limits of prescription, or a lack of dual criminality. Even if another State does eventually obtain custody, there may be a lengthy wait while he serves out his initial sentence(s); and the prosecutorial case against him may be compromised by dwindling witnesses or lost physical evidence; and the punishment may prove to be abbreviated if, say, he is much older or sicker by the time his custody is transferred and his continued imprisonment can no longer be justified due to humanitarian reasons.

To illustrate how competing jurisdictional claims can play out, including how they may be manipulated to political ends, consider the following example. In October 2005, the Swiss Justice Ministry ruled to extradite Yevgeny Adamov, a Russian nuclear physicist, to the U.S. to face charges for financial crimes arising out his alleged diversion of $9 million in program funds into his personal bank account while directing a U.S. Government-funded nuclear research institute in the 1990s. He was arrested in response to a U.S. warrant, but promptly following his apprehension, Russia indicted him for fraud and abuse committed during his service as Minister of Atomic Energy of the Russian Federation (MinAtom) between 1998 and 2001, although many saw this move primarily motivated by concern that his prosecution in the U.S. potentially could reveal Russian state secrets. In December 2005, the Swiss Federal Court reversed the Justice Ministry’s decision and ruled that he be extradited to Russia. Although once extradited to Russia, given his nationality, he could not later be extradited to the U.S. (see chapter 6.a supra), the Swiss court favored the Russian petition because its extradition request had arrived first, Adamov was a Russian national, 

http://www.regeringen.se/content/1/c6/03/79/09/f391f7b5.pdf (last visited on Dec. 12, 2011) ("Where the requests relate to different offences, it may be stipulated that the person to be extradited to one state shall subsequently be extradited to another state, subject to conditions to be determined in accordance with Section 12.").
his alleged offenses had occurred in Russia, and Russian prosecutors agreed to investigate the U.S. charges against him.\footnote{Peter Finn, “Swiss Court Extradites Former Nuclear Head Back to Russia,” Wash. Post, Dec. 29, 2005, available at \url{http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122900536.html} (last visited on Jan. 10, 2012); Bruce Zagaris, \textit{Swiss Appellate Court Extradites Former Russian Official to Russia Rather than to U.S.}, 22 IELR 98 (2006).} Notably, while later convicted to a five-and-a-half-year prison term, his sentence was vacated less than two months later and he was set free.\footnote{“Adamov Given Suspended Sentence,” The Moscow Times, Apr. 18, 2008, Issue 3886, available at \url{http://www.themoscowtimes.com/news/article/adamov-given-suspended-sentence/362134.html} (last visited on Oct. 7, 2013).}

\textbf{d. International Human Rights Concerns}

A host State’s decision whether or not to extradite may turn on a human rights concern it may harbor regarding a particular pursuing State generally or its criminal justice system in particular, including its political independence, available punishment options, potential for abusive or discriminatory treatment, and/or actual or perceived procedural fairness.\footnote{Other human rights-related concerns are addressed by such provisions as those prohibiting extradition on the basis of political offenses, double jeopardy, and specialty; those matters are discussed supra.} Over the past quarter-century, human rights considerations have increasingly influenced extradition determinations, primarily building upon such seminal conventions as the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the 1950 European Convention for Human Rights and Fundamental Freedoms (ECHR), as well as corresponding provisions found in domestic legislation.\footnote{States tend to look to the text of human rights conventions for such guidance. John Dugard & Christine van den Wyngaert, \textit{Reconciling Extradition with Human Rights}, 92 AJIL 187, 205-06 (1998). “While doubtfull there is any rule of international law requiring extradition procedures to take account of general principles of human rights, in practice, many treaties impose procedural protections if surrender would lead to gross human rights violations.” \textsc{Bantekas & Nash}, supra n.67, at 205-06. Although since World War II, human rights has played a role in limiting extradition in individual cases on a discretionary basis, its role has become more prominent since 1989 with the European Court of Human Rights’ case of \textit{Soering v. U.K.}, Appl. No. 14038/88, ECHR Judgment, July 7, 1989. \textsc{Stanbrook & Stanbrook}, supra n.43, at 16.} Sometimes, fugitive defendants appeal to human rights forums, such as the European Court of Human Rights or the Committee against Torture, to try to enjoin a domestically authorized extradition from proceeding.
This section first examines substantive legal areas of concern – namely, abusive treatment, unfair trials, and excessive or discriminatory punishment – as these can be grounds for States and human rights bodies alike for precluding extradition. This analysis will then consider two procedural aspects in connection with evaluating the propriety of extradition determinations, specifically, the rule of non-inquiry and diplomatic assurances.

i. **Substantive Issues**

1. **Abusive Treatment.**

A major concern for many host States contemplating extradition is whether a pursuing State will torture or otherwise mistreat the subject individual once he is in its custody (or, alternatively, re-extradite the individual to a third State where such abuse is likely to occur). A pursuing State could, after all, request extradition as a pretext essentially to punish a person (for his political opposition) or intimidate him (with or without a subsequent trial that itself might be for show purposes only), or to make an example of that individual to dissuade others from acting similarly. Under such circumstances, the authorized host State official generally must make a discretionary decision

---

105 *See, e.g.,* China Extradition Law, *supra* n.50, art. 8 (a request must be rejected if: “(7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State”).

106 *See, e.g.,* Núñez Chipana v. Venezuela, Commc’n No. 110/1998, ¶ 6.4, U.N. Doc. CAT/C/21/D/110/1998, [available at](http://www1.umn.edu/humanrts/cat/decisions/110-1998.html) (last visited on Nov. 2, 2013) (“... the Committee [against Torture] received numerous allegations from reliable sources concerning the use of torture by [Peruvian] law enforcement officials in connection with the investigation of the offences of terrorism and treason with a view to obtaining information or a confession.”); *Alan v. Switzerland*, Commc’n No. 21/1995, ¶ 11.4, U.N. Doc. CAT/C/16/D/21/1995, May 8, 1996, [reprinted in 4 IHRR 66, available at](http://www.unhchr.ch/tbs/doc.nsf/0/Ba8f8da6cf2c1a480256701003a4fe0?Opendocument) (last visited on Nov. 1, 2013) (“the author’s counsel has stated that, according to the author’s wife, his house in Izmir had been under constant surveillance by the police, also after his departure, and that, in January 1995, the police questioned his former neighbours about the author. Furthermore, since the author left, his brother has been arrested on more than one occasion and his native village was demolished. As regards the State party's argument that the author could find a safe area elsewhere in Turkey, the Committee notes that the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a 'safe' area for him exists in Turkey.”).
whether to permit or deny extradition or to grant it conditionally.\textsuperscript{107} An affirmative call can sometimes be brought into question and overridden, however, by an international or regional human rights tribunal acting to prevent such abusive treatment from occurring under the terms of a treaty obligation.\textsuperscript{108}

The leading international legal instrument prohibiting extradition in the face of such a prospect is the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\textsuperscript{109} Its operative provision reads: "No State party shall expel, return (\textit{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."\textsuperscript{110} For purposes of the CAT, "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for such reasons as extracting information or a confession, punishment, intimidation or coercion, or discrimination.\textsuperscript{111}

\textsuperscript{107} \textit{E.g.}, 22 CFR § 95.3(b) (discussing U.S. Secretary of State’s options). Notably, the U.S. Secretary of State has the unfettered authority to make an extradition call in such circumstances, \textit{i.e.}, his decision is not reviewable by a U.S. court. \textit{See} Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), P.L. 105-277, § 2242(d), 8 U.S.C. 1231 note (2012), \textit{available at http://www.gpo.gov/fdsys/pkg/BILLS-105hr1757enr/pdf/BILLS-105hr1757enr.pdf} (last visited on Oct. 7, 2013) (judicial review only permitted with respect to a final order to remove pursuant to section 242 of the Immigration and Naturalization Act, 8 U.S.C. § 1252 (2012), which does not govern extraditions).

\textsuperscript{108} \textit{See}, \textit{e.g.}, ICCPR, \textit{supra} n.43, art. 7; Eur. Conv. for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 262, T.S. No. 71 (1953) [hereinafter ECHR] ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").


\textsuperscript{110} CAT, \textit{supra} n.109, art. 3(1). In its interpretation of this article, the Committee against Torture has indicated that the phrase “another State” refers not only to the State to which the person is being extradited or returned, but also to a State to which he may subsequently be extradited or returned. Office of the High Commissioner for Human Rights (OHCHR), CAT Gen. Cmt. 1, ¶ 2, Nov. 21, 1997, U.N. Doc. A/53/44, annex IX, \textit{available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13719ff169a8a4f78025672b0050eba17?OpenDocument} (last visited on Oct. 7, 2013).

When determining whether such grounds exist, the host State “shall take into account all relevant considerations\textsuperscript{112} including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.”\textsuperscript{113} The “substantial grounds” phrase has been construed to entail a risk that exceeds “mere theory or suspicion” but need not “meet the test of being highly probable.”\textsuperscript{114} The complainant must establish a “personal, present and foreseeable risk” of being tortured or otherwise mistreated should they be returned.\textsuperscript{115} Non-refoulement is an absolute condition in the face of torture, even where the host State cannot provide the fugitive refugee protection under its domestic laws.\textsuperscript{116}

To date, the treaty has broad global support with 154 States parties,\textsuperscript{117} but because its proscription against torture has assumed customary international law,\textsuperscript{118} if not jus cogens,\textsuperscript{119} status,\textsuperscript{120} non-party States as well are expected to

\textsuperscript{112} See, e.g., Alan, 4 IHRR 66, ¶ 11.3 (“In the instant case, the Committee [against Torture] considers that the author’s ethnic background, his alleged political affiliation, his history of detention, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return.”).

\textsuperscript{113} CAT, supra n.109, art. 3(2). This criterion refers only to “violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” OHCHR, CAT Gen. Cmt. 1, ¶ 3, Nov. 21, 1997, U.N. Doc. A/53/44, annex IX, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13719f169a8a4f78025672b0050eba17OpenDocument (last visited on Oct. 7, 2013). In addition, “the existence of a pattern of this nature does not in itself constitute a sufficient reason for deciding whether the person in question is in danger of being subjected to torture on her return to this country; there must be specific reasons for believing that the person concerned is personally in danger. Similarly, the absence of this pattern does not mean that a person is not in danger of being subjected to torture in her specific case.” Nunez Chipana, CAT/C/21/D/110/1998, ¶ 6.3.

\textsuperscript{114} See Committee against Torture, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (Article 3 in the context of Article 22), Gen. Cmt. 1, ¶ 6, U.N. Doc. A/53/44, annex IX, at 52 (1998). But see U.S. regulations incorporating the CAT, 22 CFR § 95.1(c) & 95.2(b), available at http://cfr.vlex.com/vid/95-1-definitions-19722601 (last visited on Oct. 7, 2013) (construing “substantial grounds” to mean “more likely than not”).


\textsuperscript{116} CAT, supra n.109, art. 33.


\textsuperscript{118} The prohibition of torture is absolute and applies even during times of armed conflict or when national security is threatened. CAT, supra n.109, art. 2 (no exceptional circumstances whatsoever may be invoked as a justification of torture). See also Silvia Borelli, The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation,
satisfy its legal obligations. The Committee against Torture, which is responsible for implementing the CAT, has prevented authorized host State extraditions from going forward on the ground that doing so would violate Article 3 of that treaty. In a case released in July 2011, *Ktiti v. Morocco*, the Committee found that Morocco’s planned extradition of Djamel Ktiti to Algeria would violate the host State’s treaty obligations under Article 3 because, *inter alia*, the Committee had received “many serious allegations” regarding “cases of torture and ill-treatment inflicted on detainees by [Algerian] law-enforcement officers;” an informant “underwent severe torture while in police custody in Algeria” to extract Djamel Ktiti’s name “as the leader of the drug-trafficking ring in question;” and Mr. Ktiti was secretly sentenced to life imprisonment *in absentia* based on that forced confession.121

Other international and regional human rights treaties and courts likewise stand behind the fundamental tenet that extradition must be barred when the

119 *Jus cogens* norms are preeminent customary international law norms that are universal, peremptory, and nonderogable; and cannot be preempted by treaty but rather only by an emergent norm of equal status. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939-40 (D.C. Cir. 1988).


individual at stake would likely be the subject of torture, persecution, or other serious mistreatment in the pursuing State. Mistreatment short of torture could include harsh interrogation techniques, public flogging, female genital mutilation (FGM), and inhumane incarceration or execution methods. Noteworthy cases from the Human Rights Committee (HRC) (interpreting and enforcing the provisions of ICCPR) and the European Court of Human Rights (ECtHR) (applying the provisions of the ECHR) involving challenged extraditions include:

- **Ng v. Canada.** The HRC found that Canada’s planned extradition to the U.S. of a man who, if sentenced to death, would foreseeably face gas asphyxiation, a method of execution held to produce “prolonged suffering and agony,” as it is not “carried out in such a way as to cause the least possible physical and mental suffering.”

---

122 See, e.g., CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, 2000/C 364/01, Dec. 18, 2000, art. 19(2), available at [http://www.europarl.europa.eu/charter/pdf/text_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited on Dec. 7, 2011) [hereinafter EU CHARTER] (“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to... torture or other inhuman or degrading treatment or punishment.”); *Hilal v. U.K.*, Appl. No. 45276/99, ECHR Judgment, Third Section, Mar. 6, 2001 (final on June 6, 2001), 33 EHRR 2, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59339#/%22itemid%22:[%222001-59339%22]) (last visited on Nov. 2, 2013) (parties to the European Convention on Human Rights are obligated to refuse a request for extradition where there are substantial grounds for believing a person would face a real risk of being subjected to torture or ill-treatment in the receiving State); Am. Conv. on Human Rights, Nov. 22, 1969, art. 5(2), OAS Official Records Serv. XVI/1.1 Doc. 65, Rev. 1, Corr. 1 (Jan. 1, 1970), 1144 U.N.T.S. 123 [hereinafter ACHR] (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”); Inter-Am. Conv. to Prevent and Punish Torture, Dec. 9, 1985, art. 13, AG/Res. 783 (XV-0/85), O.A.S. Gen. Ass’y, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. T.S. No. 67, *reprinted in 25 ILM 519* (1986) (“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger [or] that he will be subjected to torture or to cruel, inhuman or degrading treatment”). The two inter-American conventions, however, lack specific implementation mechanisms so there is no applicable case law.


- **Shamayev and Others v. Georgia and Russia.** Were Georgia to extradite Ruslan Gelgoyev, a Chechen rebel, to Russia it would violate Article 3 of the ECHR, given the documented treatment of other Chechen rebels by Russian authorities, including solitary confinement, no contact with lawyers, no information regarding their location to family members, as well as the persecution of Chechens lodging applications with the European Court.\footnote{Shamayev v. Georgia and Russia, Appl. No. 36378/02, Apr. 12, 2005 (final on Oct. 12, 2005), ¶¶ 362-68, ECHR Judgment, Former Section II, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68790#/%22itemid%22[001-68790%22] (last visited on Nov. 2, 2013).}

- **Soering v. United Kingdom.** The ECtHR found that if Jens Soering were extradited to Virginia for his role in a double murder, it was foreseeable that he would be convicted, sentenced, and committed to “death row,” which would most likely entail a lengthy detention in physically challenging conditions coupled with the constant specter of death hanging over him; the Court unanimously (18-0) ruled that such circumstances in combination, dubbed the “death row phenomenon,” amounted to inhuman treatment in violation of Article 3.\footnote{Soering v. U.K., Appl. No. 14038/88, ECHR Judgment, July 7, 1989, Series A, No. 161, 11 EHR 439, 462-78, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#/%22itemid%22[001-57619%22] (last visited on Nov. 2, 2013).}

- **Babar Ahmad and Others v. United Kingdom.** In April 2012, the ECtHR found that if the five alleged terrorists were extradited to the U.S. to face terrorism-related charges, and were incarcerated in a so-called “supermax” prison with maximum security conditions without parole that such detention conditions and the length of sentences would not amount to ill

---


treatment under Article 3 (inhuman and degrading treatment or punishment).\textsuperscript{128}

Concerns about torture and other maltreatment of extraditees, however, are not the exclusive domain of international and regional tribunals; domestic courts also may rule unfavorably on extradition requests based on human rights concerns deriving from their own national laws or human rights sensibilities. For example, in 1990, the Supreme Court of Ireland denied the extradition of Dermot Finucane and James Pius Clarke, two Irish Republican Army (IRA) militants wanted by the U.K. on weapons possession charges, partly out of a belief that Finucane “probably would be beaten by prison guards if returned to the jail from which he escaped in 1983.”\textsuperscript{129} Likewise, a U.K. court reversed a decision to extradite U.S. national Shawn Sullivan because the U.S. had not guaranteed that he would not have to participate in a “civil commitment” program for sex offenders\textsuperscript{130} in Minnesota as such a commitment would amount to a violation of Article 5 of the ECHR, which requires that one not be deprived of one’s liberty except under circumstances inapplicable to this case.\textsuperscript{131}

\textsuperscript{128} See Alan Cowell & John F. Burns, “Britain Is Allowed to Send 5 Terror Suspects to U.S.,” \textit{IHT}, Apr. 11, 2012, at 6. The maximum security conditions would include “concrete furniture, timed showers, tiny cell windows and no outside communications.” \textit{Id.}


\textsuperscript{130} See, e.g., Washington State, Dep’t of Corrections, “Civil Commitment of Sexually Violent Predators,” 2012, available at \url{http://www.doc.wa.gov/community/sexoffenders/civilcommitment.asp} (last visited on Dec. 28, 2013) (“Offenders, including those who pose a greater risk of harm to the community, cannot be held in confinement after they have served their court-ordered sentence for a criminal offense. But civil commitment laws allow a judge or jury to determine whether a sex offender who appears to meet the definition of a sexually violent predator should be released to the community following their confinement period or whether they should be placed in a secure [Department of Social and Health services]-operated facility for control, care, and treatment. Prior to release from state confinement, the [End of Sentence Review Committee] will request a forensic psychological evaluation to determine whether those offenders who appear to meet the definition of a sexually violent predator do in fact meet criteria for civil commitment.”).

\textsuperscript{131} Bruce Zagaris, \textit{UK Court Rejects US Extradition Request Due to Restrictive Treatment Program for Sex Offenders}, 28 IELR 331, 331-32 (2012).
2. **Unfair Trials.**

A host State also may refuse to extradite a fugitive in circumstances premised on how a pursuing State, upon delivery, is expected to adjudicate an individual.\(^{132}\) Consider the following four scenarios: (i) reliance on *in absentia* judgments; (ii) the use of special, military, or extraordinary courts; (iii) the lack of fundamental trial rights (*e.g.*, the availability of a public hearing and the presumption of innocence); and (iv) the prospect of prosecutorial discrimination or prejudicial influence. Some host State tribunals presume that the pursuing State court system must be able to deliver a fair trial or the two States would not have entered into a bilateral extradition treaty in the first place.\(^{133}\)

**In Absentia Judgments.** As a general matter, an *in absentia* conviction occurs when: (i) a criminal court holds proceedings resulting in a guilty verdict on one or more counts and then (ii) sentences a defendant who (iii) has not been effectively able to put forward his case either because he was not physically present in the courtroom or at least was not represented by legal counsel.\(^{134}\) This is true *unless* the defendant voluntarily waived (explicitly or tacitly) his right to be present at trial, having been served with a summons, given ample opportunity to attend, and yet intentionally chose not to appear or ask counsel to represent him.\(^{135}\) Civil law States more typically rely on *in absentia* trials than

---


\(^{133}\) See Bruce Zagaris, *Spain Orders Mubarak Crony and Son Extradited to Egypt on Corruption Charges*, 28 IELR 165, 165-67 (2012) (Spain’s National Court presumed that the Egyptian court system must be capable of dispensing justice given that they concluded an extradition treaty).


\(^{135}\) See *Crosby v. United States*, 506 U.S. 255, 260 (1993) (“where the offense is not capital and the accused is not in custody . . . if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present”) (quoting *Diaz v. United States*, 223 U.S. 442, 455 (1912)); *United States v. Reed*, 639 F.2d 896, 903 (2d Cir. 1981) (*in absentia* trial did not violate defendant’s constitutional rights to due process where absence was voluntary, knowing, and unjustified); *Stoichkov, supra* n.3, ¶¶ 51-59 (ruling that as the defendant was convicted *in absentia* on rape charges and never waived his right to appear and defend himself, it would violate the principle embedded in Article 6 (3)(c) (affording individual defendants the right to defend themselves in person or through legal counsel) if he were not granted a retrial in his presence on the merits; the fact that the Bulgarian Supreme Court of
do those with common law jurisdictions, 136 and tend to hold in absentia trials to help ensure that criminal proceedings take place while material evidence can still be garnered and while witnesses remain alive, can be found, and their memories are largely intact. If States wait until the defendant is captured and returned to face trial, which may entail many years, if it possible at all, they fear their chances of a successful prosecution will be hampered. 137

At the same time, however, in absentia trials can be perceived as disadvantageous to the accused, 138 who was not present to work with counsel on litigation strategy, make a positive impression on the judge and/or jurors, help counsel verify and respond to factual testimony, 139 or possibly take the stand himself. This matter is compounded in the extradition context to the extent that the host State is not familiar with the trial procedures used by the pursuing State and the extradition subject remains unaware of the extant conviction. 140 In practice, “[t]his defense [against in absentia trials] 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.” 141 Many courts inquire into the criminal evidence to determine whether a prima facie case or probable cause can

---

138 It is for precisely this reason that in absentia trials are not allowed by the ICTY or ICTR. The Tribunals’ Rules of Procedure and Evidence (RPEs), however, permit war crimes victims to be heard in proceedings in which the suspects are not present, but in such events, the purpose is to create a public record and no guilt or punishment is imposed. Brian T. Hildreth, Comment, Hunting the Hunters: The United Nations Unleashes Its Latest Weapon in the Fight Against Fugitive War Crimes Suspects – Rule 61, 6 Tul. J. INT’L & COMP. L. 499, 501-02 (1998).
139 See, e.g., Sejdovic, supra n.135, ¶ 92 (discussing the “need to verify the accuracy of [the defendant’s] statements and compare them with those of the victim . . . and of the witnesses.”).
140 JENNINGS & WATTS, supra n.64, at 948 n.10.
be established,\textsuperscript{142} as “extradition is not warranted simply by a showing of the in absentia conviction.”\textsuperscript{143}

Today, in the interest of fairness, many treaties (\textit{e.g.}, the Second Additional Protocol to the European Convention on Extradition\textsuperscript{144}), international arrangements (\textit{e.g.}, the Council Framework Decision on the European Arrest Warrant\textsuperscript{145}) and States under their respective municipal laws (\textit{e.g.}, the PRC extradition statute\textsuperscript{146}) grant extradition on the condition that, where an \textit{in absentia} conviction occurred, the verdict and sentence be set aside and the individual be given an opportunity to appear at a fresh trial (or at least a review or appeal amounting to a retrial) upon his return.\textsuperscript{147} As a result, a large number of initially denied extraditions on account of \textit{in absentia} trials are ultimately reversed based on diplomatic assurances regarding the willingness to offer the defendant a new trial.\textsuperscript{148}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{142} \textit{E.g.,} Arambasic v. Ashcroft, 403 F. Supp.2d 951, 962 (D.S.D. 2005).
\item \textsuperscript{144} Second Addtl Prot. to the Eur. Conv. on Extradition, Mar. 17, 1978, art. 3, CoE, E.T.S. No. 98, available at \url{http://conventions.coe.int/Treaty/en/Treaties/Html/098.htm} (last visited on July 16, 2013) (in the context of an \textit{in absentia} conviction, “the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognized as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence.”).
\item \textsuperscript{145} CoE Framework Decision on the European Arrest Warrant & the Surrender Procedures Between Member States, June 13, 2002, art. 5(1), 2002/584/JHA, OJEC 1-20, L190/1 of July 18, 2002, available at \url{http://www.homeoffice.gov.uk/publications/policy/operational-policing/european-arrest-warrant?view=Binary} (last visited on Feb. 2, 2013) (“where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered \textit{in absentia}, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment”).
\item \textsuperscript{146} China Extradition Law, \textit{supra} n.50, art. 8 (request must be rejected where: “(B) the request is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence.”).
\item \textsuperscript{147} See Stanbrook & Stanbrook, \textit{supra} n.43, at 150-51; \textit{e.g.}, Sejdovic, \textit{supra} n.135, ¶ 82 (“a denial of justice . . . occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself.”).
\item \textsuperscript{148} \textit{E.g.,} In re D’Amico, 177 F. Supp. 648 (S.D.N.Y. 1959); Bruce Zagaris, \textit{Canada Deports Anibalzinho to Mozambique on Murder Charges}, 21 IELR 93 (2005) (the Mozambican Supreme Court decision to allow retrial, following an \textit{in absentia} conviction with a 28-year sentence, was

\end{enumerate}
\end{footnotesize}
Nevertheless, extraditions may be refused or prohibited where a pursing State is unable or unwilling to retry the criminal “convict” or if for any reason a retrial itself were deemed inadequate. For example, applicable domestic law may not provide for retrials under the specific circumstances at play; the case files from the original proceedings may have become lost or destroyed in the interim; or the prospect of a retrial would be regarded as unjust, given the difficulty in resurrecting evidence and witnesses due to the passage of time and/or the commission of alleged offenses during a period of civil war.

---

149 For instance, in May 1979, the Indictment Division of the Limoges Court of Appeal in France disallowed the extradition of Italian national Lorenzo Bozano to Italy, where the Assize Court of Appeal in Italy had convicted and sentenced him in absentia to life imprisonment (ergastolo) for the abduction and murder of a Swiss girl in Genoa and the attempt at extortion for her return, as well as to four years’ imprisonment for indecent assault with violence against four women, given that the lack of adversarial proceedings were regarded as “incompatible with French public policy (ordre public)” and Italy did not provide for an obligatory retrial. Bozano v. France, Appl. No. 9990/82, Dec. 2, 1987, ¶¶ 12-18, ECtHR Judgment, Series A, No. 111, 9 EHRR 297 (1987), available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Bozano%207C%20v%20%7C%20France&sessionid=86526915&skin=hudoc-en (last visited on Feb. 14, 2012).

150 E.g., Steven Levy, “Getting Away With It,” Newsweek, Dec. 15, 1997, at 58 (discussing France's initial rejection of a U.S. extradition request for Ira Einhorn, an American fugitive wanted for murder, despite his having voluntarily waived his right to be present at trial and received a full trial with effective assistance of counsel, where Pennsylvania state law did not permit new trials under such circumstances). The Pennsylvania legislature, however, later passed a law to specifically allow for such retrials, but faced steep opposition that questioned the bill's constitutionality to the extent it allowed the legislature to overrule a court judgment in violation of the separation of powers doctrine, that enabled Einhorn’s extradition in 2001. Jacqueline Soteropolous, “Einhorn Requests a Ruling from Pa.: The Former Fugitive Wants the State’s High Court to Take Charge of His Case; He Also Formally Sought a New Trial,” Philly.com, Sept. 13, 2001, available at http://articles.philly.com/2001-09-13/news/25314032_1_buffy-hall-ira-einhorn-holly-maddux (last visited on Oct. 7, 2013). See also Sejdovic, supra n.135, ¶¶ 102-05 (concluding that neither remedy available to the individual under Italy’s Code of Criminal Procedure (CCP) – whether based on procedural irregularities leading to the judgment or a legal precondition for leave to appeal – would afford him “the opportunity to obtain a fresh determination of the merits of the charge against him”).

151 E.g., Stoichkov, supra n.2, ¶¶ 57-58 (discussing impossibility of retrial due to destroyed original case file, although not in extradition context).

Special/Military/Extraordinary Courts. A number of treaties and domestic laws make extradition expressly conditional upon the pursuing State not trying the individual in a special, military, or extraordinary court.\(^\text{153}\) Such reasoning derives from the fundamental human rights concern that a court must be genuinely independent\(^\text{154}\) — and military and special courts, by their very nature, tend to lack that attribute compared with their civilian judicial counterparts. Military courts, for instance, are comprised of uniformed officers serving the functions of judge, prosecutor, and defense counsel each of whom technically is part of, and accountable to, the executive branch.\(^\text{155}\) Special or extraordinary courts, by and large, are established on an ad hoc basis by the executive typically without legislative vetting or oversight, and their empanelled judges do not necessarily have the substantive knowledge or experience evaluating complex legal matters and they may even have been selected precisely because of their ideological leanings.\(^\text{156}\)

In November 2001, for example, Spain announced that it would not extradite to the U.S. eight alleged Islamic terrorists implicated in the attacks of September 11, 2001, unless they were subject to trial by a civilian court. Spain was reportedly concerned that if the adjudication were held before one of the newly established
Military Commissions as envisioned by President George W. Bush pursuant to his Order of November 13, 2001, the defendants would be unable to choose their own counsel, the hearings would be held in secret, and the military officers who sat as judges could be biased. 157 Likewise, in January 2003, in connection with the U.S. request for the extradition from Germany of Sheikh Mohammed Ali Hassan Moayad, adviser to the Yemeni Minister for Religious Foundations, the U.S. government “assured Germany that he would not be tried by military tribunal or any other extraordinary court” in order to satisfy Germany’s Constitutional Court that Moayad would receive a fair trial. 158 In another example, first a U.S. magistrate judge and later a U.S. district court judge expressed concern about the extradition to Israel of alleged Palestinian terrorist Mahmoud El-Abed Ahmad (a/k/a Mahmoud Abed Atta) to the extent he would face trial there before a military court. 159

**Lack of Fundamental Trial Rights.** Extradition treaties and domestic laws often make a fugitive defendant’s receipt of fundamental trial rights protections a condition for authorizing extradition. 160 The U.N. Model Treaty on Extradition,

---


160 See, e.g., *Al-Moayad v. Germany*, Appl. No. 35865/03, Feb. 20, 2007, ¶ 101, ECHR Decision as to Admissibility, Fifth Section, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79710#%22Itemid%22=[%22001-79710%22]) (last visited on Nov. 2, 2013) ("In the [European Court of Human Rights'] view, the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society . . . A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release."). See also Agreement Between the United States of America and the Government of Hong Kong for the Surrender of Fugitive
for example, prohibits extradition “if the person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the [ICCPR], article 14.”161 Some of the most important of these guarantees include: (i) “a fair and public hearing,” (ii) presided over by a “competent, independent, and impartial tribunal established by law,” (iii) the “right to be presumed innocent until proved guilty according to law,” (iv) to “have adequate time and facilities for the preparation of his defence,” (v) to “be tried without undue delay,” (vi) to have “legal assistance of his own choosing” or, where the defendant does not have sufficient financial means, to “have legal assistance assigned to him,” (vii) “[n]ot to be compelled to testify against himself,” and (viii) to have any conviction and sentence “reviewed by a higher tribunal according to law.”162 Many of these rights are widely regarded as non-derogable even during states of national emergency.163 These rights also tend to encompass a prohibition of summary trial proceedings as they almost necessarily compromise the fair trial rights of defendants164 as well as to criminal proceedings premised on ex post facto legislation in the pursuing State.165

Offenders, Dec. 20, 1996, art. 6(3)(c) available at http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc3/pdf/CDOC-105tdoc3.pdf (last visited on Dec. 6, 2011) (no extradition authorized where person sought is ‘likely to be denied a fair trial.’); e.g., Heerralall v. Comm’r of Prisons, Mar. 30, 1992, Sup. Ct., Mauritius, 1992 Mauritius Rep. 70, 74, reprinted in 107 ILR 169 (E. Lauterpacht, et al., eds. 1997) (“[I]f a question is raised as to whether a person who is proposed to be extradited by the courts in Mauritius would be deprived of the guarantees against forced interrogation and his right to silence, then our courts would be bound by the provisions of our Constitution not to extradite him since our courts would not be in a position to protect that person or to ensure that those guarantees are made available to him.”).

161 U.N. Model Treaty, supra n.45, art. 3(f).
162 ICCPR, supra n.43, art. 14. Accord ECHR, supra n.108, art. 6; ACHR, supra n.122, art. 8.
164 See, e.g., Bader & Kanbor v. Sweden, Appl. No. 13284/04, Nov. 8, 2005, ¶ 47, ECtHR, Judgment, available at http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/2572 (last visited on Nov. 2, 2013) (summary proceedings in Syria in which no oral evidence was taken, only prosecutor’s evidence was submitted, and neither defendant nor his counsel was present "must be regarded as a flagrant denial of a fair trial”).
165 E.g., In re Croissant, Conseil d’État, Fr., July 7, 1978, reprinted in 74 ILR 505.
In case applications, extraditions have been denied out of concern for a lack of specific fundamental trial rights. For example, courts in France,\textsuperscript{166} Finland,\textsuperscript{167} Germany,\textsuperscript{168} Switzerland,\textsuperscript{169} and the U.K.,\textsuperscript{170} among others, each rejected extradition requests by the Rwandan government to face charges of genocide and crimes against humanity in connection with its 1994 civil war because of concerns that the Rwandan courts would be unable to adequately protect defendants' fair trial rights, particularly their ability to call, examine, and protect supporting witnesses. In other instances, courts in the U.K. have ruled against extradition requests on "flagrant denial of justice" grounds where questions remained over whether evidence was procured lawfully for use at trial,\textsuperscript{171} or whether "potentially influential material" would be withheld from the defendant during the pursuing State's prosecution.\textsuperscript{172}

\textit{Prosecutorial Discrimination / Prejudicial Influence.} Fair trial rights consist not only of the fundamentals as discussed above, but also the absence of any prosecutorial discrimination toward a defendant on account of his race, religion,
nationality, or political opinion, as well as a lack of prejudgment due either to deep-seated ideological differences between the individual and the pursuing State or to widespread media coverage that can adversely influence a jury's mindset.

Treaties and domestic law frequently prohibit extradition where evidence reveals a discriminatory motive.\textsuperscript{173} During the Cold War, Western States were often disinclined to extradite to Soviet bloc States individuals who either embraced Western ideology or otherwise exhibited views or interests antithetical to those of the U.S.S.R. and its satellites because of a concern about the way they would be treated at trial or afterward.\textsuperscript{174} Even since the Cold War ended, certain residual ideological tensions can give a Western State pause to transfer an individual to an oppositional State, such as Cuba.\textsuperscript{175} More generally, at times a host State judge will come to recognize an extradition request as politically driven and pretextual based on the underlying circumstances rather than on the facial charges, and accordingly refuse to grant it.\textsuperscript{176}

\textsuperscript{173} See, e.g., Treaty on Extradition, U.S.-U.K., Mar. 31, 2003, art. 3(a), available at \url{http://www.statewatch.org/news/2003/jul/UK USA extradition.pdf} (last visited on Sept. 27, 2013) ("Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."); U.S.-Jam. Extradition Treaty, supra n.55, art. III(2)(c) (no extradition where it is believed the pursuing State will "not provide fair trial or punish or deprive personal liberty on account of race, religion, nationality or political opinion"); Malaysia Extradition Act 1992, Act 479, Feb. 21, 1992, § 8(c), available at \url{http://www.ago.gov.my/Akta/Vol%2010/Akt%20479.pdf} (last visited on Nov. 3, 2013) (no extradition permitted if person "might be prejudiced at his trial or punished or imprisoned by virtue of his race, religion, nationality, or political opinion").


\textsuperscript{175} See Bruce Zagaris, U.S. Court Frees Alleged Anti-Castro Terrorist as CARICOM Calls for Prosecution, 23 IELR 262 (2007) (discussing a U.S. immigration judge’s ruling in 2005 that the U.S. government cannot surrender Cuban exile militant Luis Posada Carriles to Cuba (or Venezuela) because of concerns that he could receive an unfair trial) (deportation case).

\textsuperscript{176} See, e.g., \textit{In re Mylonas}, 187 F. Supp. 716 (N.D. Ala. 1960) (U.S. judge denying extradition to Greece upon finding that charges had been pretextual against Greek national residing in Alabama after being convicted \textit{in absentia} of embezzlement, where despite full knowledge of his decision to move to the U.S., no one contested the move; he was not informed of the trial proceedings and was not represented by counsel; and he had led the City Council on behalf of the Anti-Communist Party for two years just prior to his departure and the next year the Communist Party came into power and its leaders lodged the claims against him); M. Cherif Bassiouni, \textit{The Political Offense Exception in Extradition Law and Practice, in International Terrorism and Political Crimes} 416 (M. Cherif Bassiouni ed. 1975) (citing the 1908 \textit{Rudewitz} case in which the U.S. Secretary of State
Concerns about adverse media attention, whether national or localized, particularly involving a high-profile defendant’s identity or affiliation, or a popularly despicable alleged crime, can contribute to a wave of influential public opinion that can potentially render a trial unfair to the accused, and that prospect can scuttle an extradition request. For example, reservations were raised about the negative media impact on a prospective criminal trial in the U.K. of Joseph Magee, a member of the Irish National Liberation Army (INLA) who had killed an Army sergeant in cold blood in Northern Ireland in 1993, influencing the Irish High Court the following year to dismiss the extradition request.177 Similarly, in June 2004, a Bahaman court granted a habeas corpus petition to Samuel Knowles, and thereby refused extradition to the U.S., on the grounds that the broad publicity surrounding his U.S. Presidential designation as a “narcotics kingpin” would predetermine his guilt among Florida jurors.178

3. Excessive or Discriminatory Punishment.

This section turns from the trial proceedings to the punishment phase following a criminal conviction; it examines three types of potentially applied sanctions in a pursuing State that have given many host States pause when contemplating whether or not to grant an extradition request: (i) the death penalty, (ii) a life sentence, and (iii) discriminatory punishment based on the defendant’s race, religion, nationality, political opinion, or possibly other criteria, such as age, gender, or sexual orientation.179

---

177 Magee v. O’Dea [1994] 1 IR 500, ¶¶ 510-13 (finding a “serious risk” existed that the “quality and extent of the media publicity” surrounding the accused would lead to an unfair trial). In a similar case in 1988, the Attorney General of Ireland would not authorize an extradition where the fugitive was alleged to have supplied weapons to the IRA in Northern Ireland as there was concern about finding neutral jurors to hear the case. Robin Oakley & Jamie Dettmer, “Ryan Decision ‘a Great Insult’ Says Thatcher,” The Times (London), Dec. 14, 1988, at 1.


179 Arguably a fourth category exists: excessive recidivism laws, such as California’s “three strikes” legislation in which, inter alia, upon conviction of any felony (including a so-called “wobbler” that lies in the gray area between a felony and a misdemeanor) following two serious
**Death Penalty.** Most States around the world have abolished capital punishment as a constitutional, legislative, or de facto matter. As a general rule, those “abolitionist” States negotiate provisions in their human rights treaties consistent with that sentiment. Protocol 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2002) (ECHR), which boasts 42 States Parties to date, provides for an absolute prohibition of condemning or executing anyone under the death penalty (i.e., no derogation or reservation is permitted). Likewise, the Protocol to the American Convention on Human Rights (1990) (ACHR) to Abolish the Death Penalty, to which 12 States have ratified or acceded to date, prohibits the application of the death penalty in all circumstances except in one narrow circumstance.

Because the death penalty is not currently regarded as a per se violation of international law, fully or de facto abolitionist States tend to incorporate or violent felony convictions over any stretch of time, one must receive a minimum sentence of 25 years to life. Such laws may conflict with international human rights standards governing arbitrary detention and inhuman or degrading punishment, as set forth in leading international instruments, and thereby could result in extradition denials. See Anne Goldin, The California Three Strikes Law: A Violation of International Law and a Possible Impediment to Extradition, 15 SW. J. INT’L L. 327 (2009).

---

180 See Hands Off Cain, The Death Penalty Worldwide: 2010 Report, Aug. 2010, at XIII-XIV, available at [http://www.eidhr.eu/files/dmfile/the-death-penalty-worldwide-report-2010_en.pdf](http://www.eidhr.eu/files/dmfile/the-death-penalty-worldwide-report-2010_en.pdf) (last visited on Dec. 7, 2011) (identifying as of June 30, 2010, 96 fully abolitionist States, eight abolitionist States for ordinary crimes, 44 de facto abolitionist States (i.e., those that have not executed anyone for at least 10 years or that have a binding obligation against its use), six retentionist States that have imposed an ongoing moratorium on executions, and 43 fully retentionist States (including some democratic ones, such as the U.S., Japan, India, and Indonesia) (note: the list includes several entities that do not qualify as UN member States, including the Cook Islands, Bermuda, Vatican City, Taiwan, and the Palestinian National Authority).


182 Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty, May 3, 2002, art. 2(2), E.T.S. No. 187. Accord EU CHARTER, supra n.122, art. 2(2) ("No one shall be condemned to the death penalty, or executed."); id., art. 19(2) ("No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty.").

183 Protocol to the Am. Conv. on Human Rights (ACHR) to Abolish the Death Penalty, June 8, 1990, art. 2, OAS T.S. No. 73, available at [http://www.oas.org/juridico/english/treaties/a-53.html](http://www.oas.org/juridico/english/treaties/a-53.html) (last visited on Jan. 4, 2014) (the single exception is when, upon ratification or accession, a State Party reserves use of the death penalty in wartime with respect to "extremely serious crimes of a military nature.").

184 Geoff Gilbert, Extradition, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 270 (John P. Grant & J. Craig Barker eds. 2007); United States v. Burns,
provisions in their domestic laws\textsuperscript{185} as well as in their bilateral extradition treaties and other arrangements\textsuperscript{186} with “retentionist” States, reserving the right to refuse the transfer of a person who could face the death penalty for an extraditable crime, barring satisfactory assurances that the death penalty will not be imposed. Retentionist States sometimes reflect contingency arrangements in their municipal laws to accommodate such scenarios,\textsuperscript{187} or, alternatively, choose not to pursue extradition at all in egregious cases where they are unwilling to compromise their values and accept something less than the worst-case punishment.\textsuperscript{188} In other instances, a State’s laws may not provide for the death penalty to be forsaken under certain circumstances, even in order to secure the custody of a fugitive through extradition.\textsuperscript{189}

Pursuant to existing treaty obligations, ministry officials or municipal courts from abolitionist States frequently deny extradition requests to retentionist

\footnotesize

\textsuperscript{185} See, e.g., N.Z., Extradition Act 1999, Pub. Act 1999 No. 55, May 20, 1999, § 30(3), as amended, available at http://www.legislation.govt.nz/act/public/1999/0055/latest/viewpdf.aspx (last visited on Nov. 3, 2013) (Minister may refuse to extradite if he determines that the individual of interest may be or has been sentenced to death and there are insufficient assurances that he will not be so sentenced or that capital punishment will not be imposed).

\textsuperscript{186} E.g., U.S.-Jam. Extradition Treaty, supra n.55, art. V (where the requested State is abolitionist but the requesting State is retentionist, the requested State may refuse to grant extradition on account of the death penalty but in such cases the requested State will give due consideration to assurances that the death penalty will not be imposed); Treaty on Extradition, U.S.-Switz., Nov. 14, 1990, art. 4, S. Treaty Doc. 104-9, available at http://www.gpo.gov/fdsys/pkg/CDOC-104tdoc9/pdf/CDOC-104tdoc9.pdf (last visited on Nov. 29, 2013) (similar to the above regarding discretionary refusal unless non-imposition assurances are satisfactory). See also London Scheme, supra n.70, art. 15(2)(a) (permitting refusal to extradite if “person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country”).

\textsuperscript{187} E.g., India, The Extradition Act, 1962, Act No. 34 of 1962, Sept. 15, 1962, § 34C, available at http://www.advocatekhoj.com/library/bareacts/extra/index.php?title=Extradition%20Act%201962 (last visited on Dec. 7, 2013) (“where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.”).

\textsuperscript{188} For example, the U.S. government decided not to seek the extradition of Moroccan national Mounir Motassadeq, who was charged with over 3,000 counts of accessory to murder in connection with the attacks on the U.S. of September 11, 2001, because of fear that any such request would be rejected by a firmly abolitionist Germany and where the U.S. would definitely have wanted to seek the death penalty. James Finstein, \textit{Extradition or Execution? Policy Constraints in the United States' War on Terror}, 77 S. CAL. L. REV. 835, 835-37 (2004).

\textsuperscript{189} See Bruce Zagaris, \textit{South Africa Denies Two Botswana Extradition Requests Due to Failure to Give Undertaking on the Death Penalty}, 27 IELR 1001, 1001-02 (2011) (discussing Botswana’s law).
States on death penalty grounds unless and until the requisite diplomatic assurances are secured.\textsuperscript{190} For example, in 1990, the Supreme Court of the Netherlands denied a U.S. extradition request for an American military officer, Sergeant Charles Donald Short, who, while stationed with a U.S. unit at a Dutch air force base, allegedly murdered his Turkish wife and cut her body into pieces. The court opined that the State’s international human rights commitments superseded its obligation to extradite, and consequently made extradition conditional on assurances that the accused would not be tried for a capital offense.\textsuperscript{191} Likewise, in November 1997, Mexican officials announced they would not extradite Jose Luis De Toro, a 21-year-old American national, to the U.S. to face murder charges in connection with the slaying of a mother of quadruplets in Sarasota, Florida, unless state prosecutors were committed to not pursuing the death penalty.\textsuperscript{192} Abolitionist State courts even have been known to invalidate grants of extradition after a person was turned over to a retentionist State where the host State was found not to have obtained the necessary assurances that the death penalty would not be imposed.\textsuperscript{193} Such assurances are often forthcoming as it proves necessary to bring fugitives to justice.\textsuperscript{194}

\textsuperscript{190} Duffy, supra n.43, at 111.


\textsuperscript{193} E.g., Finstein, supra n.188, at 861-62 (the South African Constitutional Court found that al-Qaida operative Khalfan Kamis Mohamed had been extradited to the U.S. in violation of his constitutional rights because South Africa had not obtained proper assurances that, upon conviction, he would not face the death penalty for his participation in the bombing of the U.S. Embassy in Tanzania in 1998).

\textsuperscript{194} For example, the U.S. government agreed not to seek the death penalty in order to permit the extradition from Germany of Mohammed Ali Hamadei, who had been arrested in Frankfurt and identified as one of two terrorists who had hijacked a TWA jet on June 14, 1985, between Athens and Rome, diverted it to Beirut, and killed a U.S. Navy diver Robert Stethem. Philip Shenon, “U.S. Will Not Seek Death in Hijacking: Agrees to a Term Set by Bonn for Extraditing a Lebanese Arrested in Frankfurt,” N.Y. Times, Jan. 19, 1987, at A5. Likewise, in 2006, the government of Rwanda agreed not to impose the death penalty on four men accused of participating in the 1994 Rwanda genocide if they were extradited from the U.K. and later convicted, in order to meet U.K.
Life Sentence. Capital punishment is not the only type of sentence that can trigger a State to refuse an extradition request; in some instances, States have expressed concern about the imposition of life sentences that, like the death penalty, can be viewed as unusual, extreme, or inhumane.\(^\text{195}\) Sometimes this manifests itself as a constitutional prohibition; for example, the constitutions of Brazil, Colombia, El Salvador, and Portugal expressly ban the extradition of anyone to a State, where, if convicted, he could be subjected to life imprisonment, unless binding assurances are provided that no such penalty will be imposed.\(^\text{196}\) In other instances it appears as a statutory provision.\(^\text{197}\) In still others, it can be issued as a domestic judicial ruling, as occurred with the Mexican Supreme Court in October 2001 when it found life imprisonment to be a form of “unusual or extreme” punishment, and therefore a violation of Article 22 of the Mexican Constitution.\(^\text{198}\)

This point of view is frequently embedded in multilateral\(^\text{199}\) or bilateral treaty\(^\text{200}\) provisions. In July 2010, partly on the grounds that Abu Hamza al-Masri, an Egyptian jihadist who allegedly attempted to help establish a terrorist training camp in Oregon and provided support to al-Qaida, could face life imprisonment


\(^\text{199}\) *E.g.*, Inter-Am. Conv. on Extradition, *supra* n.49, art. 9.

without the possibility of parole if extradited from the U.K. to the U.S., the ECtHR temporarily barred his extradition.\textsuperscript{201} The most typical consequence of such treaty provisions is that pursuing States accommodate those requirements by agreeing not to impose such sentences on anyone convicted following extradition;\textsuperscript{202} however, not only can this additional step cause processing delays, but also sometimes the problem remains irremediable, such as when the prosecution is unwilling to downgrade to charges that carry reduced sentences or that allow for parole.\textsuperscript{203}

**Discriminatory Punishment.** Various agreements proscribe the transfer of fugitives to pursuing States where evidence supports that an extraditee is likely to be punished disproportionately on account of his race, religion, nationality, political opinion, or possibly other grounds, such as ethnic origin, color, mental or physical disability, gender, sexual orientation, and/or age.\textsuperscript{204} Under the London Scheme for Extradition Within the Commonwealth, extradition is barred if it appears that the person at issue may be “punished, detained, or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.”\textsuperscript{205} Similarly, the Inter-American Convention on Extradition disallows transfers “[w]hen, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the


\textsuperscript{202} E.g., Bruce Zagaris, \textit{Colombia Extradites Rebel Woman Commander to the U.S. as Extraditions Since 1977 Reach 239, 21 IELR 185, 185-86 (2005) [hereinafter Zagaris, \textit{Rebel Woman Commander}] (in February 2005, the U.S. government signed a new diplomatic note to the effect that it would not impose a life sentence on any persons extradited from Colombia).

\textsuperscript{203} For example, in the case of Juan Manuel Casillas Jr., a Mexican national who was alleged to have murdered two teenage girls, the Los Angeles extraditions unit insisted on seeking an appropriately harsh penalty that, in their judgment required, at a minimum, life imprisonment. Vanessa Maaskamp, \textit{Extradition and Life Imprisonment}, 25 Loy. L.A. INT’L & COMP. L. REV. 741, 752 (2003).

\textsuperscript{204} For example, a U.S. trial court found that a PIRA fugitive’s extradition to Northern Ireland would run afool of the U.S.-U.K. Supplementary Extradition Treaty of 1986, as he likely would be punished because of his religion and political opinions both upon his return to prison and his later release into the population at large. \textit{In re Requested Extradition of Smyth}, 863 F. Supp. 1127 (N.D. Cal. 1994), rev’d, 61 F.3d 711 (9th Cir. 1995), amended, 73 F.3d 887 (9th Cir. 1995), \textit{cert. denied}, 518 U.S. 1022 (1996) (note: the trial court judgment was reversed on appeal).

\textsuperscript{205} London Scheme, supra n.70, art. 13(a)(ii).
position of the person sought may be prejudiced for any of these reasons.”

Some multilateral crime suppression treaties and domestic extradition laws of many States, including those as varied as Malaysia, Dominica, and Canada, echo this standard.

ii. Procedural Issues

Along with substantive human rights law, two procedural matters are also relevant when assessing the prospect of an extradition denial in the human rights context; these consist of the rule of non-inquiry and diplomatic assurances.

Rule of Non-Inquiry. When a host State court operates under the rule of non-inquiry in the present context, that court evaluates an extradition request by

---

206 Inter-Am. Conv on Extradition, supra n.49, art. 4(5).
207 E.g., Eur. Conv. on the Suppression of Terrorism, Jan. 27, 1977, art. 5, CoE, E.T.S. No. 90 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of . . . punishing a person on account of his race, religion, nationality or political opinion . . .").
208 Malaysia Extradition Act, supra n.173, art. 8(c).
210 Canada Extradition Act, supra n.11, art. 44(b).
211 Technically, a third procedural issue involves individual standing, as an extradition judge or magistrate may allow a fugitive in custody to contend that his prospective extradition to the pursuing State would violate his human rights. Individuals may exercise the right to petition directly before certain supranational courts or supervisory bodies for prospective (or past) injuries due to an alleged human rights treaty breach. Borelli, supra n.118, at 339; e.g., First Optional Protocol to the ICCPR, Dec. 19, 1966, art. 1, 999 U.N.T.S. 302 [recogniz[ing] the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”); ACHR, supra n.122, art. 44 ("Any person . . . may lodge petitions with the [Inter-Am. Comm’n on Human Rights] containing denunciations or complaints of violation of this Convention by a State Party.”); Int’l Conv. on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965, art. 14, UNGA Res. 2106 (XX), 660 U.N.T.S. 195, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last visited on Dec. 7, 2013) (same). In addition, some States even now allow individuals to cite to human rights treaty provisions in their domestic courts, including in extradition proceedings, in order to avoid being transferred. Borelli, supra n.118, at 339; Dugard & van den Wyngaert, supra n.104, at 191 (citing courts in Germany, The Netherlands, and Switzerland). One effect of international human rights law to empower individuals to challenge the propriety of extradition on human rights grounds is to impede extraditions. The issue of individual standing will be addressed in the post-return context in Chapter 13.a.ii infra.
212 The rule of non-inquiry surfaces in public international law in two distinct situations but the term is seldom distinguished. The rule of non-inquiry at issue here arises in the extradition context, is applied by a host State court, and is forward-looking, i.e., how the pursuing State is
refraining from any close examination of the pursuing State’s good faith or motivation for seeking physical custody of an individual, its judicial standards and procedures for prosecution, its likely treatment of the individual while in detention, or the fairness of any punishment that could be imposed upon conviction. While the host State court would still ensure, for example, that the crime was extraditable, that the dual criminality requirement was satisfied, and that no double jeopardy attached, the court, by and large, would leave such matters as the existence of any political motivation behind the request or human rights-related conditions of the pursuing State’s judicial system to the discretion of the executive branch.

The logic underlying this rule is essentially five-fold: (i) to avoid impugning or impinging upon the pursuing State’s sovereignty; (ii) to extend good will and respect to another State, especially given that an applicable bilateral extradition treaty is presumed to be based on mutual recognition as to procedural fairness; (iii) to help ensure criminals are brought to justice; (iv) to avoid

---

213 See In re Extradition of Muhammad Sacirbegovic, 2005 U.S. Dist. LEXIS 707 (S.D.N.Y. Jan. 19, 2005); Eain v. Wilkes, 641 F.2d 504, 516 (7th Cir.) (“the evaluations of the motivation behind a request for extradition so clearly implicate the conduct of this country’s foreign relations as to be a matter better left to the Executive’s discretion.”), cert. denied, 454 U.S. 894 (1981); Aimée J. Buckland, Offending Officials: Former Government Actors and the Political Offense Exception to Extradition, 94 CAL. L. REV. 423, 435 (2006).

214 See Tracey Hughes, Note, Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual, 9 B.C. INT’L & COMP. L. REV. 293, 310 (1986); Neil Boister, The Trend to ‘Universal Extradition’ over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime, 2003 ACTA JURIDICA 287, 304 & n.108 (2003); BANTEKAS & NASH, supra n.67, at 189-91 (noting that this rule reflects the traditional approach of State courts); Dugard & van den Wyngaert, supra n.104, at 189; e.g., Jihrad v. Farrandina, 536 F.2d 478 (1976). An exception to this rule in U.S. jurisprudence can be found when an individual has been accused of an arguably political crime. RESTATEMENT (THIRD), supra n.118, § 476(2); e.g., Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1983), cert. denied, 479 U.S. 882 (1986).

215 Hughes, supra n.214, at 303; e.g., Fernandez-Morris, 99 F. Supp.2d at 1370.


217 Hughes, supra n.214, at 305; BANTEKAS & NASH, supra n.67, at 191.
reciprocal scrutiny regarding one’s own judicial proceedings and record of human rights compliance;\textsuperscript{219} and (v) in recognition that “there is another branch of government [\textit{i.e.}, the Executive Branch], which has both final say and greater discretion in [extradition] proceedings, to whom these questions are more properly addressed.”\textsuperscript{220}

With the ascendancy of international human rights law, particularly since the 1980s, this traditional rule, which had once facilitated extraditions, has substantially eroded.\textsuperscript{221} States are obligated under various treaties not to extradite where substantial grounds exist for believing that an individual’s human rights potentially could be in jeopardy.\textsuperscript{222} In recent years, even courts in States like the U.K. and the U.S. where the rule has long been applied,\textsuperscript{223} increasingly have adopted a posture that is more actively protective of human rights.\textsuperscript{224} Courts in States that have not traditionally subscribed to the rule of

\textsuperscript{218} Parmenter, supra n.216, at 665.
\textsuperscript{219} \textsc{Stephen Dycus, et al.}, \textsc{Counterterrorism Law} 515 (2007); Bruce Zagaris, \textsc{Proposed France-China Extradition Treaty Raises Human Rights Issues}, 23 IELR 96 (2007).
\textsuperscript{220} \textit{United States v. Kin-Hong}, 110 F.3d 103, 111 (1\textsuperscript{st} Cir. 1997). Another way to express this point is that domestic courts are not as well-suited compared with their foreign affairs ministries to determine the conditions a fugitive likely would face upon return to another country. See Parmenter, supra n.216, at 665. In Japan, both the judiciary and executive branches are competent to inquire into the position of human rights in the pursuing State, but the Tokyo High Court has held it was more appropriate for the executive to make determinations related to predicting future events. Dugard & van den Wyngaert, supra n.104, at 191.
\textsuperscript{221} Duffy, supra n.43, at 111-12. In the U.S., the rule of non-inquiry experienced something of a shock wave when in a 1960 case, the U.S. Court of Appeals for the Second Circuit expressed “some disquiet” over the rule’s application. See Gallina, 278 F.2d at 78-79 (“We can imagine situations where the relaxer, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination of the [non-inquiry] principle”); e.g., Bruce Zagaris, \textsc{Finland Denies Extradition to Rwanda of Genocide Suspect}, 25 IELR 142, 142-43 (2009) (in February 2009, the Finnish government denied an extradition request for an individual accused of genocide and other offenses because of concerns that he would not receive a fair trial in Rwanda).
\textsuperscript{222} Inter-Am. Conv. to Prevent and Punish Torture, supra n.122, art. 13(4) (“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”); Conv. Relating to the Status of Refugees, July 28, 1951, art. 33(1), 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (“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.”).
\textsuperscript{224} See Gallina, 177 F. Supp. 856; \textit{Nicosia v. Wall}, 442 F.2d 1005 (5th Cir. 1971) (per curiam); \textit{Ahmad v. Wigen}, 726 F. Supp. 389, 405 (E.D.N.Y. 1989), aff’d, 910 F.2d 1063 (2d Cir. 1990), \textit{stay denied}, 111 S. Ct. 23 (1990); Quigley, supra n.129, at 418. At the same time, two notable departures from this trend can be seen under U.S. law. First, in March 2007, in an unprecedented

\textbf{Diplomatic Assurances.} As indicated above, the purpose of diplomatic assurances is to persuade a host State that the individual requested for extradition (or deportation or expulsion, as the case may be) will be treated in
compliance with its applicable legal standards. Such assurances most typically are sought in the following instances: (i) the pursuing State prosecutors will not seek or impose the death penalty (or a life sentence) in the event of conviction, (ii) the State authorities will not subject the individual to torture (or cruel, inhuman or degrading treatment or punishment) while in its custody, (iii) the State will afford the individual a retrial in the event of an in absentia conviction, and (iv) the State will ensure the individual receives a fair trial in a regularly established court with a full set of procedural guarantees.

Diplomatic assurances are far from a panacea, however, and in many instances this vehicle may not yield the desired result, leading to a denied extradition. To begin, a diplomatic assurance must be conveyed by an authorized government official, as opposed to, say, legal counsel, in order to carry the proper diplomatic authority. Along these lines, some assurances may not pass legal muster, if, for instance, they are provided by a prosecutor who promises action that lies within the prerogative of a judge, and where the executive and judicial branches are independent, the delivery of such an assurance cannot be guaranteed.

---

229 For example, in November 2006, the Queen’s Bench Division Court in the U.K. ruled that, absent strong contrary evidence, U.S. diplomatic assurances that alleged terrorists would neither be tried before a military commission nor designated as enemy combatants were sufficient to protect appellants’ human rights. Bruce Zagaris, U.K. Appellate Court Affirms Reliance on U.S. Diplomatic Note in Extradition Case, 23 IELR 85 (2007).


231 In the U.S., the Secretary of State’s determination as to whether diplomatic assurances are satisfactory is not reviewable. Abbell, supra n.34, at 3-77.

232 In federalist systems, this may require assurances by state or provincial prosecutors, at least in those cases where the charges were lodged at the state or provincial level, even if domestic law requires that such assurances be transmitted between governments at the federal level.

233 E.g., Regina v. Governor of Brixton Prison, ex parte Armah, supra n.230.

234 For example, in the case of Jesus Amezcua, an infamous amphetamines trafficker, a trial court in Mexico found that a U.S. diplomatic note assuring that prosecutors would not seek a life sentence was not adequate given that the executive and judicial branches are independent, leaving the judge to decide on a sentence notwithstanding prosecutor representations. Maaskamp, supra n.203, at 751. But see David Zapp, “Extradited Defendant Gets Life Sentence Despite Government’s Promise,” Legal Publications in Spanish, Vol. 1, No. 4, Mar. 19, 2007, at 1-2 (discussing how in 2002 Alex Restrepo was extradited to the U.S. to face life imprisonment notwithstanding diplomatic assurances by the S.D.N.Y prosecutor that he would not seek that penalty and, if the court nevertheless imposes it, the prosecutor will take action to have the sentence commuted to a term of years).
Some States are unwilling to provide the required assurances\(^{235}\) as, for example, reverting charges for a capital offense to a life sentence with the possibility of parole.\(^{236}\) Furthermore, an assurance may not be regarded as credible in cases where the pursuing State promises, say, not to engage in a certain offensive practice but has a long record that cannot easily be discounted.\(^{237}\) Moreover, under certain human rights treaties, a host State may have an ongoing obligation to monitor implementation of the promised conduct with the understanding that, should it fall short, the extradition could be recalled.\(^{238}\) Finally, in some instances the prospect of being inadequately able to monitor post-extradition implementation and/or hold the pursuing State accountable for a breach, including possibly by having the individual returned, could rule out the utility of a conditional extradition.\(^{239}\)

---


236 See, e.g., *In re Fidan*, Conseil d’État, Feb. 27, 1987, 1987 Recueil Dalloz-Sirey (D.S.) Jur. 261, 305 (Fr.) (barring extradition where Turkey, which sought extradition on charges of murder of Turkish national residing in France, failed to agree not to impose the death penalty).


239 Dugard & van den Wyngaert, *supra* n.104, at 206-08.
e. **Peace, Security, and Foreign Policy Considerations**

States also may choose to refuse an extradition request for any number of reasons related to the peaceful resolution of a conflict, national security concerns, or foreign policy interests.

**Conflict Resolution.** At times, in favor of restoring peace in its own or a neighboring country, a State may decide to at least temporarily suspend certain extraditions, albeit typically accompanied by conditions. For example, in 2003, to secure peace with domestic paramilitary forces, the government of Colombia extended a deal known as “Justicia y Paz” (Justice and Peace), pledging no extraditions and reduced prison sentences in exchange for their leaders surrendering, laying down their arms, and discontinuing any further criminal activity, such as narcotics trafficking, money laundering, and terrorist financing.\(^{240}\) Although the program ultimately broke down by 2008, President Álvaro Uribe effectively halted extraditions of paramilitaries during that five-year period.\(^{241}\)

In another case, as part of a peace plan to end violence in Liberia, Nigerian President Olusegun Obasanjo agreed, with the support of Western allies, to extend political asylum to then-Liberian President Charles Taylor despite an outstanding request for his surrender issued by the Special Court of Sierra Leone (SCSL). The political asylum was granted on a few conditions, namely, that Taylor relinquish control of the Liberian government, leave the country, and not interfere in its domestic affairs, while understanding that he would be returned

---

\(^{240}\) See Anne Kelsey, *Colombian Paramilitary Leader to Be Extradited to the U.S.*, 24 IELR 217 (2008) (distinguishing May 2008 Colombian extradition of paramilitary leader Carlos Jimenez (a/k/a Macaco) for drug trafficking, money laundering and terrorist financing charges on the grounds of his continuing involvement in paramilitary activities from his prison cell).

if and when Liberia wished to prosecute him for alleged crimes he committed in connection with Liberia’s 11-year civil war. While Taylor was eventually sent to Liberia – as he was found to be meddling in Liberia’s domestic affairs and Liberia’s new president requested his extradition and, in turn, to the SCSL at The Hague to undergo prosecution, the political asylum kept him from being brought to justice for three years (2003-2006).

**National Security Interests.** A host State might well refuse (or perhaps postpone) an extradition for various security-related reasons, such as fear of retaliation by terrorists or drug cartels, as a bargaining chip for the release of hostages, to afford an opportunity to interrogate an individual about foreign intelligence, or to set an example for crime suppression with the local population by holding the criminal proceedings at home.

Leading examples of States dodging an extradition request out of terrorist intimidation or retribution concerns include: (i) in 1985, fearing a violent PLO backlash, Italy refused to cooperate with an incipient U.S. extradition request for the PLO terrorists who had hijacked the *Achille Lauro* cruise ship, and even evidently helped Mohammed Abu Abbas, its alleged mastermind, escape to Yugoslavia; (ii) largely out of fear that terrorism would be directed upon French citizens, the *Chambre d’Accusation* of the Paris Court of Appeals in January 1977 rebuffed both West German and Israeli requests for the extradition of Muhammad Daoud Audeh (Abu Daoud), the Palestinian terrorist leader behind the seizing and slaying of 11 Israeli athletes during the 1972 Munich Olympics, and arranged for his release on questionable procedural

---


243 *Id.* at 272-74.

244 The issuance in December 2003 of an INTERPOL Red Notice in the Charles Taylor case, despite Nigeria’s conferral of amnesty, indicates that no amnesty is recognized for war crimes or crimes against humanity. Bruce Zagaris, *Interpol Issues ‘Red Notice’ Against Former Liberian President*, 20 IELR 53 (2004).

technicalities;\textsuperscript{246} and (iii) in April 1990, the day after “12 Colombian police officers were murdered, another eight were wounded, and a Colombian senator was kidnapped by cartel assassins,” President Virgilio Barco declared that Colombia would not proceed with the extradition of any Medellín drug cartel leaders, including the notorious Pablo Escobar, despite the fact that only seven months earlier, Colombia had extradited 15 alleged drug traffickers to the U.S.\textsuperscript{247}

States also may be prone to forgo extradition where doing so is viewed as the leverage needed to help release citizens taken hostage.\textsuperscript{248} For example, in January 1987, West German authorities in Frankfurt arrested Mohammed Ali Hamadei, who, in June 1985, along with fellow terrorists, had hijacked TWA Flight 847, forced the plane down in Beirut, murdered U.S. Navy diver Robert Stethem, and held 39 passengers and crew hostage; within eight days, two German citizens were kidnapped in Beirut, and West Germany was told that the hostages would be released partly on the condition that Hamadei was not extradited to the U.S., which was then busily preparing its official request. Due to concern about the safety of the German hostages, Chancellor Helmut Kohl ultimately decided not to extradite Hamadei but rather to prosecute him in a German court on the charge of kidnapping (an exercise of the \textit{aut dedere aut judicare} principle) and the hostages were released.\textsuperscript{249}


\textsuperscript{247} “World in Brief: Colombia: Barco Makes Offer to Drug Cartel Chief,” \textit{L.A. Times,} Apr. 5, 1990, at 1, available at \url{http://articles.latimes.com/1990-04-05/news/mn-839_1_drug-cartel} (last visited on Dec. 7, 2013); Michael R. Pontoni, \textit{Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives,} 21 CAL. W. INT’L L.J. 215, 216 (1990-91). \textit{See also} Laflin, supra n.245, at 319 (in 1986, the Colombian Supreme Court voided the law that enabled the U.S.-Colombian Extradition Treaty; most believe this decision was the result of fear and intimidation arising from the narco-terrorist response to extraditions to the U.S.).

\textsuperscript{248} Bassiouni, \textit{Unlawful Seizures,} supra n.2, at 63-64.

In another instance, in December 2004, Colombian President Álvaro Uribe announced that he was prepared to halt the extradition of FARC leader Ricardo Palmera (alias Simón Trinidad) to the U.S. in exchange for the leftist paramilitary group’s release of 63 hostages, including three Department of Defense (DoD) contractors. While the FARC did not accept those terms, the proposed bargain reflects how extradition can be used as leverage to manage hostage situations.\textsuperscript{250}

A State also may believe a person in its custody has valuable intelligence information – whether about a foreign State or an organized criminal enterprise, and whether about activities, policies, plans, resources, or networks – that could be extracted through effective interrogation. That State may therefore decide not to extradite (or at least postpone any transfer) in favor of exploiting this intelligence-gathering opportunity. For example, despite a February 2002 U.S. request for the extradition of Ahmed Omar Saeed Sheikh, the chief suspect behind the kidnapping and murder of American journalist Daniel Pearl, Pakistani law enforcement denied that request, reportedly at least in part to question Ahmed Omar about his terrorist ties.\textsuperscript{251}

Another national security-related reason provided for the denied extradition of Ahmed Omar Saeed Sheikh came from Pakistan President Pervez Musharraf himself: To ensure that “their punishment at home could serve as an example to those defying his crackdown on terrorism.”\textsuperscript{252}

**Foreign Policy Sensitivities.** A State’s foreign policy objectives, interests, and sensitivities also can drive efforts to thwart cooperation on, interfere with, postpone decision-making related to, or self-constrain the pursuit of, extraditions. More specifically, reasons might include:

(i) apprehension that extraditing a government official could lead to the identification of

\textsuperscript{250} Bruce Zagaris, *Colombia Extradites FARC Leader*, 21 IELR 52 (2005); Zagaris, *Rebel Woman Commander*, supra n.202, at 186.


more senior officials involved in the offense when he needs to defend himself at trial;\textsuperscript{253}

(ii) reservation about extraditing non-nationals who maintain a shared political ideology or worldview or like-minded abhorrence toward the alleged victims;\textsuperscript{254}

(iii) concern that an individual (other than one belonging to the State apparatus\textsuperscript{255}) with extensive knowledge about a State’s military or intelligence secrets, if extradited, potentially could disclose such information in the course of criminal proceedings in another State;\textsuperscript{256}

(iv) recognition that by seeking the extradition of a former leader of one’s State, where many of his government’s ministers or other senior political staff remain in power, the current government’s abuses could become exposed at trial as well;\textsuperscript{257}

\textsuperscript{253} See, e.g., Paul Lewis, “Sanctions on Libya Begin to Take Hold as Deadline Passes; U.N. Seeks Full Isolation,” \textit{N.Y. Times}, Apr. 15, 1992, at A1, A6 (“Diplomats assume Libya does not want to have its two officers tried for the explosion of the Pan Am 103 aircraft because the suspects might defend themselves by implicating other more senior government officials in the bombing”).

\textsuperscript{254} For example, for years after World War II, many South American States adopted a protective posture vis-a-vis Nazi war criminals. Josef Mengele, known as the “Angel of Death” for his ghoulish experiments at Auschwitz, spent most of his post-war life in Argentina but died in Brazil in 1979; and Edward Roschmann, the so-called “Butcher of Riga,” died in Paraguay in 1977. Monte Reel, “In South America, a ‘Last Chance’ to Hunt Down Nazi War Criminals,” \textit{Wash. Post}, Dec. 6, 2007, at A20. As referenced in Chapter 5, in 2005, Argentina finally acknowledged and repealed a secret order that prohibited Jews fleeing the Holocaust from entering Argentina. \textit{Id.}

\textsuperscript{255} A State’s own military and intelligence officials are discussed in Chapter 6.\textit{supra.}

\textsuperscript{256} For example, Russia, as a third party, applied pressure on the Thai government not to extradite Viktor Bout, a Russian arms trafficking suspect, to the United States, as well as on the U.S. government not to pursue extradition of Bout by threatening non-cooperation on arms control and the war in Afghanistan; some believe Russia was concerned that through interrogation, the U.S. could learn what Bout knew about sensitive Russian military or intelligence secrets. AP, “Suspected Arms Trafficker Flown to NYC,” \textit{CBS New York}, Nov. 17, 2010, available at http://newyork.cbslocal.com/2010/11/17/suspected-arms-trafficker-flown-from-bangkok-to-nyc/ (last visited on Nov. 3, 2013).

\textsuperscript{257} For example, Chadian justice minister Mahamat announced in January 1998 the intention of Chad to formally request the extradition of Hissène Habré under the 1960 justice cooperation convention with Senegal to face charges in Chad ranging from graft to murder; but no formal request was made, it is speculated, because at least three of Habré’s ministers served in his successor’s (Idriss Déby) cabinet, and the Déby government had a record of its own abuses it sought to protect from public exposure. Stephen P. Marks, \textit{The Hissène Habré Case: The Law and Politics of Universal Jurisdiction, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law} 136-37 (Stephen Macedo ed. 2004).
(v) unwillingness to contribute to a pursuing State’s propaganda efforts where extradition is perceived to be a vehicle to that end;\(^{258}\)

(vi) concern about potential political backlash or adverse publicity that could arise on account of extraditing a fugitive to a particular State;\(^{259}\) and

(vii) insistence on deferring to a broad-based political body, such as a regional organization, the decision whether to seek extradition, or how to respond to an extradition request.\(^{260}\)

* * * * *

The last four chapters focused on extradition and its diverse array of impediments. The next chapter, which alone comprises Part III of this study, analyzes what measures a pursuing State can take collaterally or remedially to secure a fugitive’s custody through extradition.

\(^{258}\) See, e.g., Matthew Lippman, The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems, 29 CAL. W. INT’L J. 1, 15 (1998) (attributing the U.K.’s refusal to extradite a number of alleged Nazi war criminals to the Soviet Union during the post-war period out of concern that such allegations were driven by propagandist interests).

\(^{259}\) See Laflin, supra n.245, at 326-27 (“Due to unstable political conditions and the spread of Islamic fundamentalism, some countries do not want to be viewed as a U.S. partner in bringing terrorists to justice; they can ill afford the publicity and attention that a formal extradition process would create.”).

\(^{260}\) For example, in November 2005, Senegal Foreign Minister Cheikh Tidiane Gadio announced that former Chadian leader Hissène Habré, who was wanted for crimes against humanity, war crimes, and torture, would be allowed to remain in Senegal until the African Union (AU) ruled on the Belgian extradition request in 2006; he believed it was the responsibility of the African continent to issue a collective ruling on demands that Habré be brought to account for his crimes. Bruce Zagaris, Senegal Allows Habre to Stay Pending African Union Decision, 22 IELR 59, 59 (2006). As it turned out, in July 2006, the AU’s Assembly of Heads of State and Government mandated that Senegal move to prosecute Habré. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), ¶ 23, available at http://www.icj-cij.org/docket/files/144/17064.pdf (last visited on Nov. 2, 2013).
PART III:

REMEDIAL AND COLLATERAL MEANS TO SECURE EXTRADITION
CHAPTER 8

REVISIONS, INDUCEMENTS, AND INTERVENTIONS

When the host State has initially denied a request for extradition, it has signaled a reluctance to grant extradition, or an apparent impediment to extradition otherwise exists, what recourse, if any, does a pursuing State have short of exploring alternatives to extradition? There are, in fact, various ways in which a pursuing State can try to secure the custody of a fugitive via extradition by revamping its approach, creating incentives or disincentives for the host State, or seeking external engagement. Such approaches may be categorized as follows: (i) those premised on legal procedures, (ii) those requiring bilateral diplomacy, and (iii) those entailing a third-party role.

a. Options Based on Legal Procedures

Appeal Decision Denying Extradition. Although rare, it is possible that, on appeal, a higher-level court (or arbitration panel, as the case may be1) could reverse a judicial or executive branch decision that refused an extradition request.2 In the U.S., this is especially difficult because extradition orders are generally not appealable under long-established law, and can only be challenged via a habeas corpus petition.3 Nevertheless, an example of an initially successful appeal occurred in a case implicating the 1985 Supplementary U.S.-U.K. Extradition Treaty that authorized a specific exception to the rule against

---

1 E.g., Charles Cheney Hyde, The Extradition Case of Samuel Insull Sr. in Relation to Greece, 28 AJIL 307, 312 (1934) (discussing an arbitration appeal under the U.S.-Greek Extradition Treaty in the case of Samuel Insull, Sr.).

2 Although ultimately unsuccessful, the U.S. sought a review by Portugal’s Supreme Court after it had denied the U.S. request for the extradition of American national George Wright. Bruce Zagaris, Portuguese Supreme Court Rejects U.S. Appeal on George Wright’s Extradition, 28 IELR 91, 92 (2012).

3 In re Metzger, 46 U.S. (5 How.) 176, 191 (1847) (the U.S. Supreme Court ruled that the Court lacked appellate review of a trial court’s extradition decision); In re Mackin, 668 F.2d 122, 125-30 (2d Cir. 1981). See also supra page 165 (Chapter 4).
extradition appeals. James Joseph Smyth, an IRA member sentenced to 20 years for the murder of an off-duty prison official in 1978, managed to escape from Northern Ireland’s Maze maximum security prison in 1983 and fled to the U.S., where, upon his arrest for use of a fraudulent passport in 1992, the U.K. sought his extradition to serve out the remainder of his term. While Smyth’s argument convinced the trial court judge that his return to the U.K. would expose him to disproportionate punishment because of his political views and his prior treatment both in and out of prison, the U.S. Court of Appeals for the Ninth Circuit overturned that ruling, finding that he was unable to support his claim by a preponderance of the evidence, and ordered that he be extradited.

**Modify Charges to Those Deemed Extraditable.** Although perhaps commonsensical, to the extent the host State does not recognize a particular charge as extraditable under its own law or denies extradition with respect to a specific offense, pursuing State prosecutors can reconsider their charges, even if they may not yield as significant a criminal penalty, so as to at least ensure extradition (and eventually prosecution) can occur. For example, when Germany sought the extradition of Uri Brodsky, a suspected Israeli intelligence officer, for involvement in the assassination of an Hamas leader in Dubai in January 2010, and Poland was unwilling to extradite him on espionage charges because Poland does not regard espionage against Germany as punishable under

---

4 Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Signed at London on 8 June 1972, June 25, 1985, art. 3(b), 24 ILM 1105 (1985), reprinted in S. Exec. Rep. No. 17, 99th Cong., 2d Sess. (1986) (a grant of extradition shall be immediately appealable “if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.”).


6 Id., 61 F.3d at 720.

7 Many bilateral extradition treaties stipulate that once a request for an individual’s extradition has been denied, a subsequent request is not allowed for the same offense. E.g., Treaty on Extradition, U.S.-Arg., Jan. 21, 1972, art. 20, 23 TIAS 7510 (1972).
Polish law, Germany reframed the request to seek Brodsky’s extradition for passport fraud in connection with the assassination.\(^8\)

b. **Options Requiring Bilateral Diplomacy**

_**Negotiate and Enter Into a Bilateral Extradition Treaty or Functionally Equivalent Agreement.**_ In some instances the host State will refuse to extradite absent a bilateral extradition arrangement with the pursuing State.\(^9\) In such instances, one option would be to expeditiously undertake to negotiate, execute, and (as necessary) ratify\(^10\) a bilateral extradition treaty or other law enforcement cooperation agreement, even on an _ad hoc_ basis, that could authorize the transfer of physical custody of a fugitive between the parties for prosecution or punishment purposes. Although that exercise normally can take months or even years to achieve, with the proper political will it could occur more quickly and, once in effect, such a legal instrument could be relied upon to formally seek extradition.

For example, in April 2004, promptly following high-level political discussions between Equatorial Guinea (E.G.) and Zimbabwe, the latter’s president, Robert Mugabe, agreed to change his nation’s extradition policy and execute a bilateral extradition treaty with E.G. in order to legally accommodate the transfer of 70 suspected mercenaries then in Zimbabwe charged with conspiring to overthrow the E.G. government.\(^11\) Sometimes, States may already be in the midst of

---


\(^9\) See _supra_ pages 275-77 (Chapter 7).

\(^10\) The ratification step would only be required for dualist States that do not treat the execution of an international treaty as becoming incorporated immediately and verbatim into its domestic law, as would monist States. See generally MALCOLM N. SHAW, _PUBLIC INTERNATIONAL LAW_ 131-32 (6th ed. 2008).

extradition treaty negotiations and a pending case triggers its rapid conclusion. This approach can be illustrated by the Najim case. Although U.S. intelligence knew the whereabouts of Eyad Ismail Najim, the alleged driver of the van that was carrying the explosives that were detonated in the underground parking lot of New York City’s World Trade Center (WTC) in February 1993, extradition could not be effected until an extradition treaty could be concluded with Jordan. As a result, the two States quickly finalized their negotiations, and within days of its completion, Najim was transferred aboard a U.S. government plane from Amman.12

Renegotiate Treaty Provisions Governing Bilateral Extradition to Address Impediments to Implementation. Where a pursuing State suffers repeated denials of its extradition requests from a particular host State, it may choose to renegotiate terms of that treaty, execute a treaty addendum or protocol, or enter into a separate but related treaty that seeks to rectify the problematic provision(s) or fill in the gap(s) responsible for the denials. A pursuing State might try to negotiate, for example, the overturning of a rule in an operative bilateral treaty prohibiting the extradition of nationals. In 1994, after it was discovered that neither the U.S.-Mexico Extradition Treaty of 1978 nor any other treaty between those two States specifically addressed cross-border seizures – and that such a practice had become a bone of contention and the basis for extradition denials – the U.S. and Mexico negotiated and signed a Treaty to Prohibit Transborder Abductions, which in exchange for the U.S. agreeing to discontinue any practice of State-sponsored abductions [i.e., SDOs], Mexico would be more amenable to extraditing its own nationals to the U.S.13

---


Propose that as a Condition of Extradition any Post-Prosecution Punishment of a Host State National Occur in the Host State. Some domestic laws require that any time a State extradites one of its own nationals for prosecution purposes, that individual must be returned to face punishment in its own criminal justice system.\textsuperscript{14} The European Arrest Warrant (EAW) also provides for such an arrangement on a discretionary basis.\textsuperscript{15} Even in cases where State laws are not strict on this point, the host State might be persuaded to extradite one of its nationals on the condition that he serve any imposed criminal sentence in his own country.\textsuperscript{16}

Offer Positive or Negative Inducements or Apply Diplomatic Pressure to Enhance Extradition Prospects. There are also a host of diplomatic “carrots” and “sticks” a pursuing State can employ to encourage the host State to extradite a given fugitive. A pursuing State could, for example, propose to increase its foreign aid appropriation to the host State in exchange for a favorable decision on its extradition request.\textsuperscript{17} A pursuing State also could agree to limit the


\textsuperscript{15} CoE Framework Decision on the European Arrest Warrant & the Surrender Procedures Between Member States, June 13, 2002, art. 5(3), 2002/584/JHA, OJEC 1-20, L190/1 of July 18, 2002, available at http://www.homeoffice.gov.uk/publications/policing/operational-policing/european-arrest-warrant1?view=Binary (last visited on Feb. 2, 2013) [hereinafter EAW] (“where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.”).


\textsuperscript{17} For example, in November 1996, the U.S. Assistant Secretary of State for Human Rights indicated to Serbian President Slobodan Milosević, who was then facing a war-ravaged economy, that international financial assistance depended on far more cooperation with the ICTY. Jovan Kovacic, “U.S. Envoy Warns Serb President to Aid Tribunal,” Boston Globe, Nov. 8, 1996, at A2. Sometimes, however, the dynamic operates in the opposite direction; a State sweetens the pot in order to dissuade a pursuing State from continuing to seek extradition. For example, in 1934, the U.S. government proposed to Mexico to return a fugitive named Lopez to Mexico, who had been seized by bounty-hunters Hernandez and Villareal, in exchange for Mexico dropping its
maximum prison sentence upon conviction for a fugitive to a level no higher than what would be imposed by the host State for the same offense. More often than not, however, pursuing States rely on disincentives, such as threats to impose economic sanctions on the host State; raise tariffs on its imported goods; cut off foreign development assistance or loans; reduce or cease law enforcement cooperation of one kind or another; or apply greater travel restrictions on its nationals to pursuing State territory. In addition, in the event the fugitive were a passenger on a flagged vessel at sea, the pursuing State could advise the master of the ship that failure to produce the fugitive would result in a forfeiture action against the ship for aiding and abetting the escape of an offender.

In July 1999, in an effort to goad Afghanistan’s Taliban leadership into ceasing refuge for and turning over Usama Bin Laden in connection with the August 1998 bombings of the U.S. Embassies in Kenya and Tanzania that killed 12 Americans and nearly 300 Africans while injuring thousands more, U.S. President Bill Clinton issued an Executive Order freezing all Taliban assets held


18 See, e.g., Bruce Zagaris, Brazil Extradites Alleged Colombian Cocaine Capo to the U.S., 24 IELR 432 (2008) (U.S. officials were willing to limit Juan Carlos Ramirez-Abadia’s maximum prison term to 30 years if convicted, the same level to which he had been sentenced earlier by Brazil for money laundering and other offenses, in order to encourage his extradition from Brazil). This type of inducement could also be made directly to the fugitive; such discussions are addressed in Chapter 12.b.i. infra.


21 See, e.g., Clifton Daniel, “Seizure of Eisler Assailed in London by Polish Embassy,” N.Y. Times, May 16, 1949, at 1, 3 (describing how such threats were communicated by the U.S. to the master of the Polish liner Batory).
in the U.S., barring all U.S. imports of Afghan products, and prohibiting the export of all U.S. goods and services to Afghanistan (except for humanitarian purposes). Likewise, in September 1972, after a Paraguayan court denied extradition to the U.S. of Auguste Joseph Ricord, a Corsican drug trafficker and a principal member of the “French Connection,” for conspiracy to smuggle narcotics into the U.S., a high-level U.S. State Department envoy threatened to cut off millions of dollars in U.S. foreign aid and American support for international development banks loans to Paraguay to encourage Paraguay to extradite Ricord; the pressure evidently proved pivotal as a Paraguayan Court of Appeals granted the extradition a week later.

Such diplomatic initiatives need not be confined to economic, commercial, or financial pressures; they also can threaten or undertake to create a foreign policy embarrassment for the host State or otherwise humiliate its government officials for their complicity in crimes or for other questionable conduct. For example, in the late 1980s, prior to his seizure by U.S. agents in 1988, “U.S. authorities reportedly threatened to name Honduran military officers tied to the drug trade in order to motivate Honduras to surrender Juan Ramón Matta-Ballesteros, one of most notorious drug traffickers in the world.” In June 2007, to spur the U.K. government into extraditing Boris Berezovsky, a Russian billionaire, critic of Russian President Vladimir Putin, and U.K. political asylee, on fraud charges, the Federal Security Service of the Russian Federation (FSB) opened a criminal investigation into allegations that Berezovsky and murdered ex-KGB agent Alexander Litvinenko were British spies. In a similar vein, there was speculation in 1998 that Russia might be willing to extradite Shahkin Musaev, former chief of the General Staff of the Armed Forces of Azerbaijan charged with being an agent of the GRU and plotting attacks against Azerbaijani

---

President Heidar Aliyev, as a *quid pro quo* for Azerbaijan not publicly exposing illegal Russian arms shipments to Armenia, a major source of embarrassment and sensitivity in their bilateral relations.26

**Dispatch a Prosecutor to the Host State or Hire a Local Lobbying Firm to Engage Host State Officials in Discussions.** To encourage host State officials to reconsider their resistance to extradition, the pursuing State prosecutor alone or as part of a delegation could travel to the host State and try to engage them in a dialogue to find a possible way forward. Such an approach was undertaken by Queens, New York, District Attorney John J. Santucci, together with U.S. Department of Justice (DoJ) officials, in connection with seeking the extradition, over Italian government objections, of Anthony Sciacca, a 27-year-old living in Sicily accused of killing a restaurant owner in Queens a decade earlier.27 A DoJ spokesperson noted “it was ‘not unprecedented’ for a local prosecutor to take part in discussions abroad about disputed matters involving fugitives fleeing criminal charges in the prosecutor’s jurisdiction.”28 Another tack of this kind would be for a pursuing State to hire a well-placed and influential lobbying firm in the host State’s capital to help yield a favorable executive branch disposition.29

**c. Options Entailing a Third-Party Role**

**Request Re-extradition of Fugitive.** A pursuing State (call it State C) can seek to have a fugitive transferred into its physical custody after he has first been extradited from the original host State (State A) to the intermediary State (now the new host State) (State B)30 with respect to the alleged or actual offenses committed prior to the initial extradition. Despite a surprising paucity of provisions governing re-extradition in multilateral and bilateral extradition

---

28 Id.
29 In a counter-example, in early 2010, Jamaican Prime Minister Bruce Golding hired a Washington, DC-based firm to influence the U.S. to back off its extradition request for Christopher “Dudus” Coke on narcotics and arms trafficking charges. Bruce Zagaris, *Jamaica PM Approves Extradition After Admission of Hiring U.S. Lobbyist to Oppose U.S. Extradition of Coke*, 26 IELR 268 (2010). That admission led to calls for Golding’s resignation. *Id.*
30 Re-extradition to State C is not permitted in instances where State B obtained physical custody of the fugitive by surrender from the ICC. *See Clive Nicholls, ET AL., EDS., THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE 58* (2d ed. 2007).
treaties and in domestic extradition law itself, the general rule is that before State B chooses to re-extradite the fugitive to State C, State B must first obtain the consent of State A, given that re-extradition is viewed as an exception to the specialty rule designed to protect the interests of the host State and the rights of the individual alike.

Departures from the general rule requiring State A’s consent may apply, however, such as when a fugitive fails to leave State B’s territory within a specified timeframe after his discharge, when he voluntarily returns to State B’s territory after leaving it, or when the fugitive volunteers to be re-extradited. Should concurrent requests for extradition be submitted by States B and C, State A ought to indicate whether it disapproves of re-extradition to State C when making its extradition decision to State B, or else it would forfeit any such right of control. Re-extradition may be possible even when State B finds no criminal culpability in the extradited individual following prosecution. For example, in a 1999 case, an English Divisional Court upheld the U.K.’s re-extradition of a fugitive named Johnson to Australia (State C) on a charge of conspiracy to defraud, based on a request by Australia submitted during U.K.

---

31 See IVOR STANBROOK & CLIVE STANBROOK, EXTRADITION: LAW AND PRACTICE 61 (2d ed. 2000); e.g., Eur. Conv. on Extradition, Dec. 13, 1957, art. 15, CoE, E.T.S. No. 24, The U.S. can re-extradite only with the consent of State A unless another exception to the specialty rule under the applicable treaty would permit State C to prosecute or punish the individual of interest for an offense other than for one for which he was originally extradited. MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 3-37 to 3-38 (2001 & Supp. 2007); United States ex rel. Donnelly v. Mulligan, 74 F.2d 220 (2d Cir. 1934); American Law Institute (ALI), RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, May 14, 1986 (1987), § 478, available at http://internationalcriminallaw.org/Restatement(Third)_of_Foreign_Relations_Law/RSecs334_401-04_411_432_442.PDF (last visited on Nov. 9, 2013).


33 E.g., Donnelly, 74 F.2d at 223 (ruling that prisoner has one month after gaining his liberty to return to France, which had extradited him to the U.S., or else the U.S. would be free to consider extraditing him to Canada based on its pending request).

34 See discussion pertaining to specialty in Chapter 7.b.ii supra.

35 E.g., Eur. Conv. on Extradition, supra n.31, art. 15; EAW, supra n.15, art. 28(2).

36 See, e.g., European Standards, supra n.32, at 38, but under the EAW, a Member State may notify the General Secretariat of the CoE that it has given its a priori open-ended consent to designated Member States for re-extradition. EAW, supra n.15, art. 28(1).
criminal proceedings and the confirmed consent to re-extradition by Austria (State A), notwithstanding the fact that the U.K. (State B) ultimately acquitted Johnson on similar fraud charges.37

Seek Independent Ruling that the Fugitive is Not a Host State National in the Hope of Foreclosing Extradition Denial on that Basis. Where the fugitive’s nationality is unclear but could serve as the host State’s basis for denying extradition, a pursuing State could seek some outside, neutral mechanism to confirm his proper nationality in the hope of a favorable determination. For example, Japan denied Peru’s extradition request for human rights violations allegedly perpetrated by Alberto Fujimori, former President of Peru, on the grounds that he was a Japanese national, and Japanese law bars the extradition of its nationals.38 Although Peru never challenged that decision, it is plausible an alternative dispute resolution (ADR) panel could have been sought and may have ruled otherwise.39

Invite Third-Party Mediator to Resolve Differences over a Requested Extradition. When the host State and a pursuing State are at an impasse over whether it would be proper under the governing authorities, including an applicable extradition treaty, any other relevant agreements, and domestic laws, to extradite a fugitive, the States could seek the intervention of a neutral third-party, as appropriate, such as the U.N., a regional body (e.g., the EU or the OAS), or another reputable institution or individual with international standing, to mediate the dispute. Such third-party mediation was contemplated by the U.S. and Jamaican governments when trying to determine whether Christopher “Dudus” Coke, a Jamaican national, should be extradited to the U.S. on narcotics

39 “Peru to Seek International Mediation for Fujimori’s Extradition,” available at www.chinadaily.com.cn, July 5, 2001 (last visited on Sept. 5, 2008) (“We could argue that Fujimori is Peruvian and not Japanese. Then, what should we do? We could resort to international mediation to determine what nationality Fujimori has,” said the Peruvian ambassador to Japan.”).
and firearms trafficking charges.\textsuperscript{40} “Such mediation would determine the legitimacy of the US assertions that it acted in accordance with the spirit and intent of the Extradition Treaty and the Memorandum of Understanding.”\textsuperscript{41}

\textbf{Ask the ICTY or ICTR to Direct the Host State to Extradite a Fugitive.} Under a 2006 amendment to Rule 11bis of their Rules of Procedure and Evidence (RPE), the UNSC-established ICTY and ICTR “can now direct a State which harbours an accused to extradite that person to another State, regardless of whether that accused is or has been in the custody of the Tribunal or whether he or she is a national of the requesting or requested State. This direction can be supplemented by an arrest warrant, and under Article 29 of the ICTY Statute and Article 28 of the ICTR Statute all UN Member States are obliged to comply with such an order, on pain of sanctions by the Security Council.”\textsuperscript{42} This approach would be limited, however, to those fugitives wanted by one of the two international criminal tribunals and only for the finite remaining period in which they continue to operate.

\textbf{Request a Ruling by the International Court of Justice.} When: (i) a pursuing State has had one or more extradition requests turned down by the host State, (ii) the host State has failed to indict the individual at issue or to pursue criminal prosecution in good faith based on any charges levied, (iii) a dispute has “crystallized” between the host and pursuing States;\textsuperscript{43} and (iv) both States recognize the competence of the International Court of Justice (ICJ),\textsuperscript{44} a pursuing State could seek to resolve such an impasse with the intervention of the U.N.’s

\textsuperscript{40} Desmond Allen, “Dudus’ Dispute Heading to UN?,” Jamaica Observer, Mar. 14, 2010, available at \url{http://www.jamaicaobserver.com/news/Dudus-dispute-headed-to-UN} (last visited on Dec. 31, 2013) (indicating that both governments were mulling over expert advice that they submit their dispute to mediation, possibly with the U.N.).

\textsuperscript{41} Id.


\textsuperscript{43} Robert Kolb, \textit{The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ}, in U.N. GENOCIDE CONVENTION: A COMMENTARY 447 (Paola Gaeta ed. 2009) (“[T]he dispute must in principle be crystallized at the time of the seizing of the ICJ. The filing of the request against another state does not \textit{ipso facto} create a dispute”).

\textsuperscript{44} Statute of the ICJ, Apr. 18, 1945, art. 36.
highest judicial body.\textsuperscript{45} A pursuing State may be particularly motivated in cases where enough time has elapsed that it has become concerned that potential victims and witnesses may no longer be available and/or has doubts about the host State’s genuine intentions to bring the individual to justice.

This situation occurred when Belgium, impatient with Senegal’s failure to prosecute (after more than 10 years) or extradite (denying or ignoring several of its requests since 2005) Hissène Habré, the former President of Chad (who allegedly killed up to 40,000 opponents and tortured many others, including Belgians, during his rule between June 1982 and December 1990), filed a request in February 2009\textsuperscript{46} for an ICJ decision to compel Senegal either to submit the matter for prosecution or to extradite him.\textsuperscript{47} In July 2012, the ICJ (by a 14-2 vote) found Senegal to have violated its obligations under the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) both by failing to immediately undertake a “preliminary inquiry into the facts” once Senegal had reason to believe that Habré, who was then on its territory, was responsible for acts of torture (under Article 6(2)), and by not submitting the case to its competent authorities once it had decided not to extradite Habré (under Article 7(1)), and ordered Senegal either to extradite or submit the case for prosecution without further delay.\textsuperscript{48}

\textsuperscript{45} A host State likewise may engage the ICJ to seek declaratory relief that its unwillingness to extradite is in compliance with its international legal obligations. This arose in the \textit{Lockerbie} case, discussed \textit{infra}.


In other instances, States may choose to threaten to bring their claims to the ICJ for adjudication. In June 2011, for example, after Brazil’s Supreme Court affirmed a decision not to extradite Cesare Battisti, who 30 years earlier had escaped from an Italian prison while awaiting trial on four counts of murder allegedly committed while he belonged to the Armed Proletarians for Communism, the Italian foreign minister threatened to seek action against Brazil before the ICJ.\footnote{Bruce Zagaris, \textit{Brazilian Supreme Court Upholds Denial of Extradition to Italy and Italy Plans to Bring Action in ICJ}, 27 IELR 829, 829-30 (2011).} In addition, reportedly in April 2005, “Peru had been planning to file suit against Japan before the International Court of Justice at the Hague to force the extradition of Fujimori from Japan.”\footnote{Dopplick, supra n.38.} Notably, in neither case was this threat actualized.

\textbf{Seek U.N. Security Council Intervention.} When the U.N. Security Council (UNSC) determines that “a threat to the peace, breach of the peace, or act of aggression” exists,\footnote{\textsc{Charter of the United Nations}, June 26, 1945, art. 39.} it is authorized under Chapter VII of the U.N. Charter (as an express exception to the prohibition against U.N. intervention “in matters which are essentially within the domestic jurisdiction of any state”\footnote{\textit{Id.}, art. 2(7).}) to address that situation either with measures “not involving the use of armed force”\footnote{\textit{Id.}, art. 41 (citing several examples, including "complete or partial interruption of economic relations").} or with the use of force “as may be necessary to maintain or restore international peace and security.”\footnote{\textit{Id.}, art. 42.} Such extraordinary situations are unlikely to arise in the extradition context; however, as occurred in the celebrated 	extit{Lockerbie} case (discussed below), a host State may be deemed unworthy of \textit{bona fide} cooperation, given its complicity in or interest to conceal an underlying heinous offense and/or because of a concern that more such unlawful conduct could occur absent rapid law enforcement effort to neutralize the alleged perpetrators.

On November 14, 1991, the U.S. and the U.K. independently charged two Libyan intelligence officers with responsibility for the explosion of Pan Am Flight 103 while \textit{en route} over Lockerbie, Scotland, on December 21, 1988, resulting in the
deaths of 270 airline crew, passengers, and villagers on the ground. A week later, the U.S. and U.K. governments requested extradition from Libya of the two alleged offenders, an admission of Libyan responsibility, payment of compensation, and access to evidence and witnesses. Pursuant to the aut dedere provision (Article 7) of the governing “Montreal Convention,” the Libyan government chose not to extradite but rather to try the two alleged offenders, consistent with its domestic legal prohibition against extraditing its own nationals.

The Libyan magistrate judge ordered the two men to be taken into custody, allowed U.S. and U.K. observers in the courtroom, and invited American and British government assistance in the investigation. Nevertheless, mistrusting Libyan intentions and doubting an impartial proceeding – and with the active support of France which by now had its own suspicions about Libyan government involvement in an airplane incident over Niger in 1989 – the U.S. and U.K. secured adoption of UNSC Resolution 731, which exhorted Libya “to provide a full and effective response” to the outstanding requests.

On March 3, 1992, Libya engaged the ICJ by seeking declaratory relief that it was in full compliance with its duties under the Montreal Convention and that the U.S. and U.K., which were also parties to that Convention, were improperly interfering with Libya’s treaty prerogatives. Libya also requested provisional measures to keep the U.S. and the U.K. from any further efforts to secure the

---

58 Provisional measures, which are sometimes referred to as "emergency measures" or "interim measures," are intended to "preserve the respective rights of either party" pending a decision on
release of the two accused. After ICJ hearings but before it had issued a ruling, the UNSC adopted Resolution 748,\(^5^9\) claiming Libya’s resistance to extradition constituted a threat to international peace and security, favoring extradition over domestic prosecution, and imposing sanctions (versus the threat or use of force) pending compliance. Those sanctions included various restrictions on international flights by, and the overseas office operations of, Libyan Airlines (its national flag carrier); the sale of aircraft, arms, and spare parts to Libya; and the movement of Libyan diplomats, in addition to limiting the size of Libyan embassy personnel.\(^6^0\)

On April 14, 1992, the ICJ rejected the Libyan request for provisional measures on the grounds that, although under the U.N. Charter, the Court was not authorized to evaluate the UNSC resolution for its validity, the resolution nevertheless trumped any obligations under an international treaty and therefore proved dispositive, and such provisional measures “would be likely to impair the rights which appear prima facie to be enjoyed by the United States by virtue of Security Council resolution 748.”\(^6^1\)

Ultimately, after years of stalemate, Libya agreed to submit the two alleged offenders to a trial in a special court subject to Scottish criminal law on neutral territory in a facility outside of The Hague. One of the men was found guilty and sentenced to life imprisonment; the other was found not guilty by reason of insufficient evidence. Some, however, have criticized the role of the UNSC in this regard, contending that “[t]he preference of the United Kingdom and the United States for coercion over negotiation, cooperation, and judicial settlement, against the backdrop of Libya’s stated willingness to cooperate with foreign criminal

---


investigators and its pledge to prosecute the two suspects in its custody, indicates how easily some of the more influential States may be provoked into shortsighted overreaction."62

Significantly, the Lockerbie case represented the first, but not the last, time the UNSC exercised its Chapter VII authorities to prod a State into extraditing fugitives to face prosecution elsewhere.63 In January 1996, the UNSC issued Resolution 1044, “[c]all[ing] upon the Government of the Sudan to comply with the requests of the Organization of African Unity [OAU] without further delay to:

(a) Undertake immediate action to extradite to Ethiopia for prosecution the three suspects shelter[ed] in the Sudan and wanted in connection with the assassination attempt [on the President of Egypt in June 1995 while visiting Addis Ababa] on the basis of the 1964 Extradition Treaty between Ethiopia and the Sudan.”64 Nearly three months later, via Resolution 1054, and with express reference to its Chapter VII authorities, the UNSC decided that:

all States shall: (a) Significantly reduce the number and the level of the staff at Sudanese diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain; and (b) Take steps to restrict the entry into or transit through their territory of members of the Government of Sudan, officials of that Government and members of the Sudanese armed forces; [while] 4. [c]all[ing] upon all international and regional organizations not to convene any conference in Sudan; [and] 5. [c]all[ing] upon all States, including States not members of the United Nations and the United Nations specialized agencies to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any licence or permit granted prior to the

63 Arzt, supra n.55, at 168. One author, Michael Plachta, has coined a variant on this concept – aut dedere aut transiere – to denote that rare circumstance when the UNSC mandates a State to transfer a fugitive to a third State to undergo prosecution. Boister, supra n.55, at 310.
entry into force of the provisions set out in paragraph 3 above;... 65

In a second instance, in October 1999, pursuant to its Chapter VII authorities, the UNSC adopted Resolution 1267, calling for Afghanistan to turn over Usama Bin Laden, the leader of Al-Qaeda, within a specified timeframe to the appropriate authorities of a State that could bring him to justice, or else the UNSC would impose a sanctions regime on Afghanistan that included denying landing rights to all Taliban-operated aircraft and freezing all Taliban assets abroad. 66

* * * * *

This Part has sought to identify a number of remedial or collateral means a pursuing State may wish to undertake to secure a fugitive’s custody via extradition even if the host State has already denied such a request or is presumptively or demonstrably predisposed to do so. These approaches are generally in compliance with international law standards, although the intervention of the U.N. Security Council has been contested by some due to the controversial invocation of Chapter VII powers in such circumstances. The next Part begins an examination of alternatives to extradition, when extradition has proven infeasible or undesirable for some reason.

---


PART IV:

FALBACK ALTERNATIVES

TO EXTRADITION
CHAPTER 9

PARTIAL OR REDIRECTED ALTERNATIVES

Having examined extradition, its operation and impediments, as well as various means available for securing a fugitive’s custody by extradition as a remedial or collateral matter, this analysis now turns to alternatives to extradition. Two types are identified in this dissertation: fallback alternatives and full-scale alternatives. The first will be addressed in this Part; the second will be discussed in Part V.

“Fallback alternatives to extradition” are defined herein as those partial or redirected means of bringing a fugitive to justice other than by extradition that, by virtue of a pursuing State’s inability to meet the functional end result of extradition—namely, securing the physical custody of a fugitive and prosecuting or punishing him under its own judicial system—reflects a second-order preference. More specifically, those alternatives consist of: (i) preliminary independent initiatives designed strictly to facilitate a fugitive’s capture or return or that call upon host State or third-party support merely to locate or arrest a fugitive overseas; or (ii) actions that result specifically in returning the fugitive to another State court or international criminal tribunal to face justice, rather than to the pursuing State’s own judicial system. This Part will catalogue fallback alternatives, illustrate how they work, and evaluate the extent of their lawfulness.¹

¹ Other options available for coping with fugitives abroad may not ultimately intend to prosecute or punish them, but instead seek to extract intelligence from them, retaliate against them, or simply neutralize them to minimize any further damage or harm they can cause. Examples include: (i) undertake a “targeted killing” (this amounts to a “premeditated act[ ] of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody.” CFR, Jonathan Masters, Targeted Killings, Nov. 7, 2011, available at http://www.cfr.org/intelligence/targeted-killings/p9627 (last visited on Jan. 17, 2012) (citing U.N.
a. **Independent Measures to Facilitate a Fugitive’s Capture or Return**

The following approaches can be undertaken by a pursuing State on a preliminary basis to facilitate a fugitive’s capture by host State authorities or his return to pursuing State territory.

**Arrange for a Sealed (or Secret) Indictment.** By sealing an indictment, the fugitive is less likely to discover that the pursuing State has a law enforcement interest in him and therefore may prove less circumspect about his travel (particularly to overseas destinations), communications, and business dealings, and thus more readily come to the attention of law enforcement authorities (including through

Special Report)); (ii) perpetrate a “disappearance” (this term appears to have originated in Argentina during the so-called “Dirty War” between 1976 and 1983 when non-returning family members were labeled “los desaparecidos” (the disappeared ones) and is defined as “when a person is secretly abducted or imprisoned by a State or political organization or by a third party with the authorization, support, or acquiescence of a State or political organization, followed by a refusal to acknowledge the person’s fate and whereabouts, with the intent of placing the victim outside the protection of the law.” JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 342 (ICRC 2005)); (iii) place a bounty on the fugitive’s head (this occurred, for example, in February 1989 in connection with Iran Supreme Leader Ayatollah Ruhollah Khomeini’s issuance of a fatwa (Islamic legal opinion or order) over Tehran Radio that Salman Rushdie, the Indian-born, award-winning author then living in London, must die for blasphemy Islam and its Prophet Mohammed, in his fourth novel entitled, *The Satanic Verses*, published in 1988; some days later, the government announced that a bounty on Rushdie’s head was set at US$2.6 million if Rushdie were killed by an Iranian and US$1 million otherwise; see William E. Smith, “Hunted by an Angry Faith: Salman Rushdie’s Novel Cracks Open a Fault Line Between East and West,” *Time*, Feb. 27, 1989, at 28-31; “Ayatollah Khomeini Personally Issued the Fatwa on Salman Rushdie,” *Iran Press Service*, Apr. 29, 2002, available at [http://www.iran-press-service.com/articles_2002/Apr_2002/rushdie_fatwa_29402.htm](http://www.iran-press-service.com/articles_2002/Apr_2002/rushdie_fatwa_29402.htm) (last visited on Jan. 19, 2012)); or (iv) engage in an “extraordinary rendition” (see definition in Chapter 1.c supra). These “repurposed” options are not regarded as bona fide alternatives to extradition; as such, they lie beyond the ambit of this study and, therefore, whether or to what extent they may be lawful is not evaluated herein.

2 Two additional independent measures that need little elaboration are when a pursuing State: (i) conducts surveillance of the fugitive to determine his whereabouts, daily or weekly routines, or intended travel plans or destinations, through human or electronic intelligence under its own auspices; and (ii) invests greater domestic financial resources in tracking fugitives. An example of the latter can be seen in March 2012, when a U.S. Senator introduced a bill in Congress that would direct $1-3 million each year to the Fugitive Extradition and Apprehension Trust Fund whose aim would be to improve fugitive apprehension efforts. The funds would derive from forfeited bail and appearance bonds and would fund the U.S. Marshal’s Service, the U.S. Attorney’s Offices (i.e., federal prosecutors), and the Justice Department’s Office of International Affairs. Gary Marx & David Jackson, “Durbin Pushes Reforms to Help Capture Fugitives,” *Chi. Trib.*, Mar. 12, 2012, available at [http://articles.chicagotribune.com/2012-03-12/news/ct-met-fugitives-durbin-20120313_1_border-crossing-fugitives-durbin-extradition-treaty](http://articles.chicagotribune.com/2012-03-12/news/ct-met-fugitives-durbin-20120313_1_border-crossing-fugitives-durbin-extradition-treaty) (last visited on Dec. 8, 2013).
surveillance or undercover operations). More specifically, he may invest less time and effort in developing a physical disguise, establishing an assumed name, cultivating a new persona, and/or keeping a low profile. As a result, he could be more easily identified and captured. This represents a lawful measure.

In August 1995, for example, a sealed indictment was filed against Eyad Ismail Najim, a Jordanian national believed to be the driver of the bomb-laden van that entered the underground parking lot of the World Trade Center (WTC) in February 1993 and whose explosion killed six persons and injured over 1,000 others. “The indictment had been sealed to ensure that Najim would not learn that he had been identified and try to flee again.” Another example can be found in the case of Baz Mohammad (a/k/a Haji Baz Mohammad), one of the world’s most wanted drug kingpins and allegedly linked to the Taliban; in December 2003, a sealed indictment in U.S. was returned against him, and by January 2005, U.S. and Afghan authorities had succeeded in arresting him.

---

3 See Colette Retif, By What Means Justice? The Acceptance of Secret Indictments in the United States and in International Law, 13 Pace Int’l L. Rev. 233, 234 (2001) (characterizing as “common sense” that public indictments can tip off fugitives); United States v. Davis, 598 F. Supp. 453, 456 (S.D.N.Y. 1984) (“The Government also reasonably believed that if [co-defendant] Lee learned that he had been indicted by a grand jury here, he would be more likely to keep to ground in Ireland.”).
4 For example, when Christopher “Dudus” Coke, a Jamaican national charged with gun and drug smuggling, was captured at a motor vehicle check point in June 2010, he had shaved his beard and was wearing a woman’s wig. Bruce Zagaris, Coke Waives Extradition to the U.S. After Jamaica Arrests Him, 26 IELR 352 (2010).
7 Id.
8 Bruce Zagaris, Afghanistan Extrادات Alleged Heroin Kingpin to the U.S., 22 IELR 36, 36-38 (2006). Likewise, in August 1999, based on the ICTY prosecutor’s sealed indictment, Gen. Momir Talic, Chief of Staff of the Army of Republika Srpska, who was charged with committing crimes against humanity in connection with the war in the Balkans, was evidently less cautious about attending a military conference of the National Defense Academy in Vienna, where he was arrested by undercover
Issue a "Silent Parole" to Permit an Unwitting Fugitive Temporary Entry into Pursuing State Territory. Where the fugitive is unaware that a pursuing State has indicted him and has attempted to return to pursuing State territory but has been impeded on account of a visa problem (e.g., he overstayed his last visit), pursuing State officials can issue a "silent parole" by which he would be granted a waiver and allowed temporary entry. This would amount to a subterfuge to facilitate his return to pursuing State territory. Indeed, this tactic was employed by the Multnomah County District Attorney in Oregon to secure the custody of Deniz Aydiner, a Turkish national charged with the 2001 sexual assault and murder of a college student in Portland. This deception was ruled lawful by the Court of Appeals of the State of Oregon, because the Court found that the tactic did not violate the U.S.-Turkey Extradition Treaty (which did not explicitly proscribe such methods), extradition was understood not to express the exclusive means available for securing an individual’s custody from the other party to that Treaty, and there was no violation of due process rights found as it was not proper to inquire as to how the defendant came before the Court. Merely enabling a fugitive who voluntarily wishes to enter pursuing State territory would not appear to breach any particular international legal standards.

Revoke a Fugitive’s Passport or Validate it Solely for Return to the Pursuing State. To the extent that the subject fugitive is a pursuing State national, the State of nationality could revoke his passport. Such a tactic can render an individual’s presence in another State unlawful and limit his mobility and thereby facilitate law


10 Id. (relying heavily on the 1992 U.S. Supreme Court opinion in Álvarez-Machain).
enforcement efforts to locate and arrest him.\textsuperscript{11} This scenario played out in December 2003, when the U.S. revoked chess champion Bobby Fischer’s passport to prompt Japan to remove him to his country of nationality to stand trial for violations of U.S. economic sanctions imposed on the former Yugoslavia when he played a 20-year anniversary exhibition match there in 1992. In August 2004, when Fischer tried to fly from Tokyo to Manila, Japanese authorities detained him for trying to depart Japan without a valid travel document.\textsuperscript{12} More recently, in June 2013, the U.S. revoked former NSA contractor Edward Snowden’s passport after he had publicly disclosed classified U.S. government information and had fled abroad.\textsuperscript{13} Some States, however, are reluctant to revoke their nationals’ passports, as they view them as more than travel documents and as “fundamental to an individual’s identity.”\textsuperscript{14} A variant of this tactic, where the opportunity arises, is to validate a fugitive’s passport exclusively for return to the pursuing State, assuming the fugitive is a national of the pursuing State.

\textsuperscript{11} After all, if the fugitive were to try to travel to another State, he could be discovered holding an invalid travel document. Notably, however, such a tactic does not affect the individual’s citizenship status.


\textsuperscript{13} David Trifunov, “U.S. Revokes Edward Snowden’s Passport, Urges Russia to Expel Whistleblower,” Globalpost, June 24, 2013, available at http://www.globalpost.com/dispatch/news/politics/130623/us-revokes-edward-snowdens-passport-focuses-anger-putins-russia (last visited on Dec. 31, 2013) (according to State Department representative Jen Psaki: "Persons wanted on felony charges, such as Mr. Snowden, should not be allowed to proceed in any further international travel, other than is necessary to return him to the United States").

**Seize or Freeze a Fugitive’s Financial Assets.** Where substantial financial assets of a fugitive happen to be held in accounts located in a pursuing State, that State could, domestic law permitting, confiscate or freeze all or some portion of those assets while he remains at large. In addition to isolating the fugitive and effectively penalizing him, this approach could encourage the fugitive to turn himself in or, more likely, to increase his exposure to law enforcement officials tracking him down. That is because some fugitives rely on such assets to pay for their security details, private jets, and/or safe houses. Without access to such funds, some fugitives could become more susceptible to capture. This technique is especially effective when dealing with money launderers. For example, the Swiss government froze millions of euros’ worth of German financier Florian Homm’s assets after “compile[ing] a thick dossier of testimony from former employees and associates of Mr. Homm or the hedge fund he founded” regarding his efforts to defraud investors and then hide those monies.

**Enter into a Settlement Agreement from Afar with a Fugitive over Financial-Related Charges.** Assuming a pursuing State can locate the whereabouts of a fugitive, it can try to negotiate a settlement agreement over bank, insurance, or securities fraud charges, for example, with that fugitive. To the extent such an agreement can relieve a fugitive of major outstanding charges against him, it might make him more susceptible to return to the pursuing State to face any remaining charges, especially if they are less substantial. This approach also might help

---


17 See Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering*, 25 Loy. L.A. Int’l & Comp. L. Rev. 409, 427 et seq. (2003). A variant on this approach would be to urge other States to join this effort in instances where the fugitive had multiple overseas accounts, but then this approach would be more properly categorized under one of the other sections in this Chapter.

restore injured parties and punish the fugitive from ill-gotten gains.\textsuperscript{19} For example, in November 2010, Jacob “Kobi” Alexander, co-founder of Converse Technology, Inc., agreed to pay the U.S. Securities and Exchange Commission (SEC) $53.6 million based on a stock options backdating scheme, as well as being willing to never serve again as a director or officer of a publicly traded company.\textsuperscript{20} At the same time, however, Alexander remains at large.\textsuperscript{21}

\textbf{b. Reliance on Others to Locate or Arrest a Fugitive Abroad}

A pursuing State may undertake any number of measures designed to locate or otherwise lead to the arrest of a fugitive that depend on the support or engagement of either the host State or a third party.

\textbf{i. Assistance From or Coordination with the Host State}

\textit{Request the Surveillance and/or Communications Interception of a Fugitive and/or the Fruits of Such Activities.} The host State may be willing to conduct physical surveillance or signals/electronic interception of a fugitive that might yield information about his location, plans, schedules, haunts, associates, and the like, facilitating his capture once an arrest warrant has been issued. For example, the Colombian National Police, “on [its] own initiative, obtained a court order to place a wiretap on [U.S. cocaine smuggler and prison escapee Harold] Rosenthal’s phone” in connection with an investigation into possible cocaine smuggling operations.\textsuperscript{22}

\begin{footnotesize}
\begin{itemize}
\item [\textsuperscript{19}] This approach is to be viewed as distinct from direct negotiations with a fugitive, discussed in Chapter 12.a.i infra, which are intended to bring a fugitive into pursuing State custody absent such intermediary or posture-softening measures.
\item [\textsuperscript{20}] Bruce Zagaris, \textit{Fugitive Kobi Alexander Agrees to $53 Million Settlement of Options Backdating Charges}, 27 IELR 553 (2011).
\item [\textsuperscript{21}] See "Fugitive Former CEO of Converse pays US$53 Million to SEC but Feds Want Him in Jail," \textit{TelecomTV One}, Nov. 25, 2010, available at \url{http://web20.telecomtv.com/comspace_newsDetail.aspx?n=46978&id=e9381817-0593-417a-8639-c4c53e2a2a10} (last visited on Dec. 31, 2013) (as the U.S. federal prosecutor stated: "Settlement of the civil proceedings against Mr. Alexander has no effect on the criminal proceedings against him. The moment he sets foot in the US, he will be arrested and brought to court. Our efforts to extradite Mr. Alexander from Namibia continue.").
\item [\textsuperscript{22}] \textit{United States v. Rosenthal}, 793 F.2d 1214, 1225 (11th Cir.) ("During one conversation, Rosenthal discussed murdering the Colombian Minister of Justice. Thereafter, the Colombian government became interested in expelling Rosenthal back to the United States."). \textit{cert. denied}, 480 U.S. 919 (1986).
\end{itemize}
\end{footnotesize}
host State may even be willing to share audio or video recordings, photographic images, or detailed physical descriptions with pursuing State officials, which can help track down and pinpoint the location of a fugitive or the individuals with whom he is in regular contact. This occurred, for instance, via a secret agreement between the U.S. DEA and the Jamaican Ministry of National Security, when the latter allowed the former to listen in on the intercepted phone calls of Christopher “Dudus” Coke, a powerful head of a garrisoned community in Jamaica who faced narcotics trafficking charges in the U.S.\textsuperscript{23}

\textbf{Request Authorization to Conduct a Criminal Investigation or to Collect Evidence Within Host State Territory.} In developing a criminal case that could lead to an indictment, a pursuing State might need to collect tangible evidence, interview witnesses, obtain judicial records, or undertake other investigatory measures within host State territory, as well as to exchange law enforcement information with the host State government. Sometimes these activities are authorized pursuant to a bilateral\textsuperscript{24} or multilateral\textsuperscript{25} Mutual Legal Assistance Treaty (MLAT) or Mutual Legal Assistance Agreement (MLAA),\textsuperscript{26} which, as a rule, however, do not apply to arrests,


\textsuperscript{26} Since the 1960s, the trend has been toward bilateral MLATs. M. CHERIF BASSIOUNI, \textit{Introduction to International Criminal Law} 353 & n.84 (2003) [hereinafter BASSIOUNI, ICL] (estimating the existence of fewer than 200 bilateral MLATs worldwide about a decade ago). MLATs, like extradition treaties, have requirements, exclusions, exceptions, and defenses and are substantively similar to their extradition treaty counterparts. \textit{Id.} at 353.
the enforcement of verdicts, or purely military offenses. Absent such an agreement, a pursuing State may request host State permission through the customary approach known as Letters Rogatory, but such correspondence can often take a year or more to process. A fascinating detour from this approach occurred prior to 1984, when the Republic of South Africa and the governments of Transkei and Ciskei (although not “independent” entities and therefore not recognized as States) reportedly entered into a secret reciprocal arrangement by which they agreed to permit one another’s police forces free rein to cross their common border to follow up on suspected criminal activity.

**Encourage the Host State to Assign Greater Priority to Locating or Arresting a Fugitive.** Where the host State appears reluctant to actively seek out or apprehend a fugitive, a pursuing State government can try to persuade its counterpart through diplomatic channels, or provide incentives or disincentives to encourage the host State to invest greater resources or take more seriously its interest in pursuing a given fugitive. In February 1985, for example, in a “Sense of the Congress” statement, the U.S. legislature urged Paraguay to step up its efforts in the search for Dr. Josef Mengele, a Nazi physician stationed at the Auschwitz Concentration Camp.

---

27 See, e.g., Eur. MLAT Conv., supra n.25, art. I. In September 2002, Brazil and Cuba signed an MLAT, which provides for such means as “(i) gathering of evidence and taking of personal statements; (ii) provision of information and data contained in criminal, bank, trade, phone and other records; (iii) location of individuals and belongings, including identification thereof; (iv) search, seizure, and apprehension of property; [and] (v) issuance of certificates or certified copies required in criminal actions.” Jorge Nemb & Monesola Guz, Brazil and Cuba Sign Mutual Assistance in Criminal Matters Treaty (Decree 6,462, of May 21, 2008), 24 IELR 364, 365 (2008).

28 This practice, which is premised on comity versus treaty law, and operates mainly in the civil versus criminal law context, occurs when a court in one State seeks the assistance of a court in another State for the purpose of collecting evidence. Bassioni, ICL, supra n.26, at 352. In the U.S., the relevant statute can be found at 28 U.S.C. §§ 1696 and 1782 (2012). Letters Rogatory were issued, for example, by Belgium to Senegal and Chad in September and October 2001, respectively, for the purpose of seeking judicial cooperation in connection with bringing former Chadian leader Hissène Habré to justice. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), ¶ 20, available at http://www.icj-cij.org/docket/files/144/17064.pdf (last visited on Nov. 2, 2013).


and generally referred to by his victims as the “Angel of Death.”

Although this approach did not eventually yield Mengele’s capture, it could prove beneficial in other contexts.

**Request the Host State to Cancel a Fugitive’s Travel Authorization.** A pursuing State can ask the host State to terminate an active visa or cancel a border-crossing card (as applicable in the U.S.-Mexico context) held by a fugitive. This tactic can be helpful in tracking down and arresting a fugitive by effectively limiting his travel opportunities. This approach has its challenges, however, as the border officials must possess updated information about each individual’s visa status.

**Share Intelligence Tips, Critical Information, Computer Software, or Tracking Devices to Help Host States Locate Fugitives.** If a fugitive is known to be in a certain State’s jurisdiction at a given time, whether it is a “safe haven” or while he is in transit, supplying the host State government with intelligence data could facilitate its capacity to arrest him. For example, in January 1987, at the Frankfurt airport, West German police greeted Mohammed Ali Hamadei, a Lebanese citizen and Hezbollah terrorist who had participated in the June 1985 hijacking of TWA Flight 847, while traveling on a false passport and carrying liquids explosives in his

---


33 For example, one of the college students (although not then a fugitive, let alone a suspect) arrested in the 2013 Boston Marathon bombing had been allowed to re-enter the U.S. from Kazakhstan despite the fact that his student visa was no longer valid and he was no longer in school. “Official: Arrested Student Azamat Tazhayakov Entered U.S. Without Visa,” wcvb.com (Boston), May 1, 2013, available at http://www.wcvb.com/news/local/metro/official-arrested-student-azamat-tazhayakov-entered-us-without-visa/-/11971628/19974038/-/1515exv/-/index.html (last visited on Dec. 31, 2013).

34 See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 436 (1993) (U.S. government officials “have provided foreign authorities with the tactical intelligence needed to find and arrest fugitives on their territory.”). Under U.S. law, the provision of “information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information.” United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976).
suitcase, “based on intelligence probably provided by the U.S. Government.”

Similarly, in April 1985, acting on a U.S. DEA tip, Costa Rican authorities located Rafael Caro-Quintero, a major Guadalajara-based drug trafficker and the primary suspect in the kidnapping and murder of DEA Special Agent Enrique Camarena Salazar and his Mexican pilot, Alfredo Zavala Avelar, on the outskirts of San Jose.

More recently, in January 2012, most likely based on “high alert” information provided by the U.S. Government in December 2011, Thai authorities arrested a Swedish-Lebanese terrorist suspect, Hussein Abris, believed to belong to the Shi'ite Muslim organization, Hezbollah, in connection with feared attacks against places in Bangkok popular with Americans and Israelis.

A pursuing State also can provide a host State with critical information, such as “DNA profiles, dactyloscopic data [fingerprinting] and certain national vehicle registration data,” as well as computer software that can facilitate the

---


38 See Bruce Zagaris, EU Justice and Home Affairs Progresses on Illegal Aliens, Cooperation to Prevent and Investigate Criminal Offenses, and Environmental Crimes, 24 IELR 330, 331 (2008). In June 2007, the Justice and Home Affairs Council of the EU agreed to the so-called Prüm decision to “improve the
identification of wanted individuals when they cross international boundaries. For example, the U.S. Department of State’s Terrorist Interdiction Program (TIP), which began in 2002, “helps foreign governments improve their border control capability through software for creating an automated terrorist screening system with fusion of names and relevant data. A benefit of TIP is that it provides immigration officials in selected countries with a computer-based, real-time system to verify the identities of travelers presenting themselves at border crossings.” In addition, supplying host State law enforcement officers with location tracking equipment like GPS devices may assist them in pinpointing the whereabouts of a fugitive.

**Coordinate on or Undertake Joint Investigations.** A pursuing State also can coordinate with the host State (or even with the assistance of a third party) in detective work or to carry out a joint investigation, which can ultimately lead to a fugitive’s location and arrest. For example, in 2005, Hong Kong and Singapore worked together to investigate a man wanted by Hong Kong on charges of theft who was also traveling to Singapore on multiple passports; he was eventually arrested at Singapore’s Changi Airport and extradited to Hong Kong. In another case, in 2004, a Diplomatic Security (DS) Special Agent (SA) assigned to the U.S. Embassy in Belize worked closely with Belize police to locate in Belize City Reinaldo Silvestre, a Cuban national wanted on multiple counts in connection with performing unlicensed exchange of information between authorities responsible for the prevention and investigation of criminal offenses,” including on the “conditions and procedure for the automated transfer” of key biodata and other identifying information. Id.


41 For example, EUROJUST is credited with having effectively coordinated the arrest operation undertaken by Dutch Special Forces and the Italian Carabinieri of fugitive A.D., nicknamed “Zio,” who was connected to a Naples-based organized crime group in July 2011. Bruce Zagaris, *Dutch Arrest Fugitive Italian Mafia Boss with Use of New EU Mechanisms*, 27 IELR 975, 975-76 (2011).

surgeries resulting in the permanent disfigurement of his patients. A more
generalized version of this approach is for a law enforcement agency in one State to
establish an office in another State to work closely together to fight certain kinds of
crimes or criminal organizations.

**Participate in Joint Sting/Arrest Operations.** Pursuing States can go further by
congducting joint “sting operations” in which agents of pursuing and host States
combine forces to capture a fugitive through an “undercover or hidden police officer
or surrogate, or some other form of deception.” The sting could be set in motion
by a unilateral undercover operation by pursuing State agents or by a coordinated
effort by agents of both the pursuing and host States. For example, in March 2008,
U.S. and Thai anti-narcotics officials joined together to lead a successful sting
operation to snag Viktor Bout, a major arms trafficker, which led ultimately to his
extradition to the U.S. in November 2010. Similarly, in January 2004, a joint U.S.-
Panamanian joint operation resulted in the arrest and eventual extradition of
Arcangel de Jesus Henao Montoya, an alleged Colombian cocaine trafficker to the
U.S. In addition, in October 1999, a joint operation between the U.S. FBI and South
African police yielded the arrest in Cape Town of Khalfan Khamis Mohamed, who

---

44 See Abraham Abramovsky, *Partners Against Crime: Joint Prosecutions of Israeli Organized Crime
FBI had opened offices in Moscow and Italy to operate jointly with their counterparts on
investigations).
46 For example, a U.S. DEA undercover agent posing as a cocaine buyer arranged for cocaine
suppliers, a pilot, and someone to help transport the cocaine, and then when they all met in Panama
City for the payment to be made, the DEA agent identified the four to Panamanian law enforcement
authorities as drug dealers, who were then arrested. *United States v. Cordero*, 668 F.2d 32, 35 (1st Cir.
had been indicted in the U.S. for murder and conspiracy in the August 1988 bombings of the U.S. Embassies in Kenya and Tanzania.49

In March 2011, a Foreign-Deployed Advisory Support Team (FAST), “a special commando-style squad[] that [the U.S. DEA] has been quietly deploying for the past several years to Western Hemisphere nations, including Haiti, Honduras, the Dominican Republic, Guatemala, and Belize, to battle violent, transnational drug cartels,” “assisted Guatemalan forces in [the] arrest of Juan Alberto Ortiz-Lopez, a top cocaine smuggler for the Sinaloa cartel.”50 Furthermore, in June 1997, U.S. officials acknowledged they had “negotiated an extraordinary diplomatic arrangement with another country” that needed to “remain secret to facilitate future law enforcement operations” in connection with the arrest of Mir Aimal Kasi, accused of murdering two CIA employees and injuring three others outside its Virginia Headquarters building in 1993.51

Sting operations, while generally upheld as a legitimate law enforcement technique,52 risk violating international (and possibly municipal) legal standards in one or more of three principal ways: (i) when government conduct is regarded as outrageous and violates due process;53 (ii) when foreign officials directly participate

---

53 A recent example occurred when U.S. Customs Service (USCS) and U.S. DEA officials requested that Belize police plant 45 kilograms of cocaine on a Belize Air flight from Belize to Miami in April 1991 as part of an investigation into narcotics shipments between Belize and the U.S. When the plane made an unscheduled stopover in Honduras, and drug-sniffing dogs detected the cocaine, the crew and
in an arrest (although they can mentor and train domestic officers and even accompany them on the operation);\(^54\) and (iii) when government conduct in constructing enticements overreaches to the point of unlawful “entrapment.”\(^55\)

**ii. Third-Party Support**

*Ask a Third State or Individual Close to the Fugitive to Supply Law Enforcement or Intelligence Leads.* It could prove helpful to a pursuing State to obtain information about a fugitive from States where he has family members, has resided or been imprisoned, or otherwise one that has taken a law enforcement interest in his activities. Such information, on its own or when combined with other pieces of intelligence, might help a pursuing State to track down a fugitive for use in requesting his arrest. A related approach is to ask individuals close to the fugitive,

---

passengers were detained “under abusive conditions” for almost a week. USCS and DEA agents had failed to coordinate this operation with the flight crew, the Honduran police, or the U.S. Embassy in Honduras. The U.S. Court of Appeals for the Eleventh Circuit affirmed a lower court ruling finding the U.S. government liable under the Federal Tort Claims Act (FTCA) for “injurious negligence and incompetence.” *Couzada v. United States*, 105 F.3d 1389 (11th Cir. 1997).


\(^55\) As one author explained the limits of lawful entrapment in the aftermath of the 1992 U.S. Supreme Court’s *Jacobson* decision, 503 U.S. 540 (1992), “agents may not be able to become so involved in the criminal enterprise that they, in essence, operate it. Officers may not be able to plant the idea of crime in the mind of the citizen and then ensure its fruition by a process of detailed instructions to that citizen. Moreover, the government may not be permitted to conduct an operation in which the individual is targeted over a very long period of time and then only solicited to commit a crime at the end of the extensive investigation.” Paul Marcus, *Presenting, Back From the [Almost] Dead, the Entrapment Defense*, College of William & Mary Law School Faculty Publications, 1995, available at [http://scholarship.law.wm.edu/facpubs/581](http://scholarship.law.wm.edu/facpubs/581) (last visited on Feb. 14, 2012). The two key criteria are: (i) existence of government inducement, and (ii) predisposition of defendant, prior to contact with government agents, to commit the offense charged. The major factor in determining entrapment is whether criminal intent originated with the defendant or the government agents. *United States v. Nations*, 764 F.2d 1073, 1079 (5th Cir. 1985); accord DON STUART, CANADIAN CRIMINAL LAW: A TREATISE 610 (5th ed. 2007) (discussing U.S. law). By contrast, U.K. law does not recognize entrapment as a defense, but it does authorize a judge “in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed.” *Regina v. Latif* [1996] 1 WLR 104, [1996] 2 Cr. App. R. 92, Feb. 2, 1996 (U.K.) (finding that the trial judge did not err in refusing to stay the proceedings). Canadian law is strikingly similar to U.K. law in this regard, permitting stays of proceedings when “compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency” or where the proceedings are “oppressive or vexatious.” STUART, * supra*, at 612 (quoting *Regina v. Young*, 40 C.R.(3d) 289, 329, 13 C.C.C.(3d) 1, 40 O.R.(2d) 520 (Ont. Ct. App. 1984) (Can.)).
e.g., parents, siblings, or former business associates, for any information they may be able to supply that could help locate the fugitive’s whereabouts, reveal his daily routines or travel plans, or identify his aides, among other types of tips. Such solicitations can rely on monetary payments, appeals to patriotism, or perhaps an exchange of favors. For example, shortly after Edward Snowden was identified as the person responsible for leaking classified U.S. intelligence information on the Internet, FBI agents sought intervention by his father, Lon Snowden, an ex-U.S. Coast Guard officer, to help coax his son home, but he was unwilling to travel to Moscow on such a mission once he learned his son was being viewed as a traitor.56

**Ask a Third State to Arrest a Fugitive Upon Entering Its Territory.** To the extent that: (i) surveillance of a fugitive uncovers the fact that he incautiously plans on his own to travel from a “safe haven” State to third State territory more amenable to bringing him to justice, or (ii) a fugitive is lured to such a third State (labeled herein as a “tactical” lure and capture operation57), or (iii) it is learned that the ship or aircraft on which a deported fugitive is a passenger has a scheduled stopover in such a third State, or (iv) it becomes known that the aircraft on which he is aboard will be flying through such third State airspace,58 a pursuing State could request that

---


57 This designation is intended to distinguish this variety of lure and capture operation (LCO) from one in which the destination of a lure operation is *pursuing State territory or within pursuing State custody elsewhere*, and, if so, is labeled herein as a “strategic” LCO. See Chapter 1.g supra. To the extent that the lure and capture operation (LCO) is intended to bring the fugitive to justice in the third State, this would properly qualify as a fallback alternative to extradition, but where the LCO is intended as merely an initial step toward delivering him to pursuing State territory, it would be more accurately denominated as an *intermediate rendition* (see Glossary). The lawfulness of tactical LCOs will be examined extensively in Chapter 12.c.i infra.

the third State authorities apprehend the fugitive once he enters its territory, most likely pursuant to an INTERPOL Red Notice or a Provisional Arrest Warrant (PAW). This is perhaps the most common method of arresting a fugitive who otherwise is non-extraditable from a “safe haven” State, and although examples are legion, not all such cross-border movements prove consequential from a law enforcement perspective. Ultimately, the aim of this approach is to seek the fugitive’s onward extradition, deportation, or other transfer to the pursuing State.

The case of Gary Lauck, a U.S. citizen residing in Nebraska and known as the “Farm Belt Führer” for his publishing and dissemination of anti-Semitic and other Neo-Nazi literature, illustrates this approach. In March 1995, after 20 years of failed attempts to win his extradition from the U.S. (due to constitutional “freedom of speech” objections), Germany finally obtained his custody when he traveled to Hundige, Denmark, and on an INTERPOL Red Notice was arrested by Danish authorities and

---

59 See U.S. Attorney’s Manual, supra n.29, § 9-15.620 (“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.”).

60 See n.82 in the Introduction. “An Interpol Red Notice is the closest instrument to an international arrest warrant in use today. Interpol . . . circulates notices to member countries listing persons who are wanted for extradition. . . . 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.” U.S. Attorneys’ Manual, supra n.29, § 611. For example, after Brazil was unsuccessful in winning the extradition of Italian citizen Salvatore Cacciola, a highly sought-after white-collar criminal in connection with bank fraud charges and who had taken refuge in Italy after skipping bail, he was arrested with INTERPOL’s assistance when he carelessly crossed into Monaco, whose courts eventually approved his extradition to Brazil in July 2008. Bruce Zagaris, Monaco Will Extradite Alleged Bank Defrauder to Brazil, 24 IELR 357, 357 (2008).

61 For instance, while he remained in Belgium, the U.S. was unable to proceed against Belgian national Wilfried Van Cauwenbergh for fraudulently inducing an American citizen to invest in a real estate partnership in Kansas City, but as soon as U.S. authorities learned that he was traveling on a short business trip to Geneva, the U.S. requested issuance of a Provisional Arrest Warrant (PAW) from Swiss authorities in November 1984, submitting its extradition request four months later in March 1985. United States v. Van Cauwenbergh, 827 F.2d 424, 424-25 (9th Cir. 1987).

62 For example, in the case of film director Roman Polanski, after skipping bail in California and fleeing to France, which refused his extradition to the U.S. for over 30 years, in 2009 Polanski traveled to Zurich to receive an award at a film festival and was arrested by Swiss authorities, but the Swiss government has yet to agree to extradite him to the U.S. Bruce Zagaris, Swiss Court Orders Bail for Polanski During His Fight Against the U.S. Extradition Request, 26 IELR 49, 50 (2010).
turned over to Germany, which had charged Lauck with inciting racial hatred and disseminating illegal propaganda.  

Likewise, in May 1949, British law enforcement officers arrested Gerhardt Eisler, a German-born U.S. Communist who had jumped bail during U.S. appellate proceedings and stowed away on a merchant ship flying under the Polish flag, while anchored in Southampton, in British national waters. The U.S., which sought his extradition on charges of contempt of Congress and false statements, had learned of his departure and wired to the British government asking for its assistance in his recovery, which was successfully provided. Similarly, in December 2007, on the authority of an outstanding arrest warrant, Trinidadian police arrested Jorge Hernan Ospina-Zuluaga, a fugitive from U.S. justice for 13 years, based on an indictment for conspiracy to launder drug trafficking revenues and for money laundering, when he traveled to Trinidad from Colombia, which did not then recognize the charged offenses under its domestic law.

In December 1995, at the request of the U.K., acting on behalf of its Crown Colony Hong Kong, U.S. authorities provisionally detained Lui Kin-Hong when he deplaned in Boston during a business trip and held him pending extradition proceedings; Kin-Hong, who was charged in Hong Kong with conspiracy to receive and receiving bribes, was aware of Hong Kong's law enforcement interest in him and consequently had not returned there since April 1994. Likewise, in 2013, when German financier Florian Homm, who was aware of U.S. and Swiss law enforcement interest in him for defrauding investors and had indeed lived “incognito in Colombia

64 See R.Y. Jennings, The Eisler Case, 26 B.Y.B.I.L. 468, 468 (1949) (The Polish government protested the arrest on the ground that Eisler was protected as a political asylee, but the British rebutted that “[t]he absence of any right to grant asylum on board merchant ships sprang from a universally recognized principle of international law that a merchant ship in the ports or roadsteads of another country falls under the jurisdiction of the coastal State.”); George A. Finch, Edit. Cmt., The Eisler Extradition Case, 43 AJIL 487, 487 (1949).
65 Bruce Zagaris, Trinidad Extradites Colombian to the U.S. on Money Laundering Charges, 24 IELR 266 (2008).
66 United States v. Kin-Hong, 110 F.3d 103, 107 (1st Cir. 1997).
[beginning in 2007] before resurfacing in 2012,” left Germany “to visit his ex-wife and son in Florence,” where he was monitored by “U.S. and Italian law enforcement authorities and arrested at the Uffizi Gallery.”67 In January 1985, the Australian Federal Police requested that the U.S. FBI help secure the arrest of Walter Alexander Levinge, who was wanted for a large number of “crimes of dishonesty,” during one of his regular ventures across the Mexican border into San Diego, California.68

As far as LCOs are concerned, the third State is not necessarily involved in the lure portion of the operation, but rather may cooperate with the pursuing State merely in the capture portion at its end. Some examples are illustrative. After the Netherlands refused to arrest one of its nationals, Stuart Artie Van Sichem, pending an extradition request to face drug charges in New York, the U.S. “arranged for him to be enticed into Belgium by an informant” and from there he was extradited to the U.S.69 Likewise, in 1982, former CIA agent Edwin Wilson, who had been charged with smuggling munitions to Muammar Qaddafi, “was duped by [undercover] agents of the government [the U.S. Marshal’s Service] who persuaded him to travel [from his safe haven in Libya] to the Dominican Republic. With the cooperation of [police] authorities there Wilson was placed on a commercial aircraft bound for the United States” during which he was arrested.70

In another case, in February 1977, a DEA agent induced a fugitive who had escaped from prison after only serving the first few years of his 10-year sentence for the interstate transportation of stolen securities, to fly to Panama City, where he was

68 Levinge v. Director of Custodial Services, et al. (1987) 9 N.S.W. L. Rep. 546 (N.S.W. Ct. of App.), July 23, 1987 (Austl.) (“[I]t is considered probable by the FBI agents that he commutes regularly across the Mexican border through Tijuana into San Diego where he is known to have a number of associates and therefore a decision has been taken at this time to allow inquiries to proceed along the present lines of attempting to secure . . . [his] arrest in the United States.”) (quoting Austl. Federal Police cable).
held for seven days before being put on an aircraft bound for Miami. Similarly, in January 2003, following a successful lure from Yemen to Germany by a U.S. confidential informant of Sheik Mohammed Ali Hassan Moayad, adviser to Yemeni Minister for Religious Foundations who was suspected of providing material support to al-Qaida and Hamas, on the promise of meeting a potential donor in Frankfurt am Main, Moayad and his secretary were arrested there, and then the U.S. requested his extradition, which was granted after challenges were denied.

This scenario also can play out where a pursuing State seeks the arrest and detention by a cooperative third State to which the ship or aircraft on which the fugitive is a passenger is directed, most typically via a planned stopover in connection with a fugitive’s deportation. Accordingly, in a case where: (i) the host State is prepared to deport a fugitive to another State, (ii) the deportation route consists of at least one stopover, (iii) an extradition treaty exists between a stopover State and the pursuing State, or at least they may ultimately be willing to enter into an extradition arrangement by way of comity or reciprocity, and (iv) the pursuing State is able to closely monitor the deported individual’s movements once he leaves the host State, the fugitive could be the subject of a PAW directed at the stopover State to be effected upon his arrival.

For example, William Robb, a British national, was deported from the Philippines and placed on a KLM flight en route to the U.K. first via Dubai (where he was not allowed to de-plane) and later via Amsterdam, where the U.S. DEA had arranged for him to be detained and later extradited by the Netherlands to the U.S. In another

---

73 Such monitoring can be accomplished, for example, through the use of paid informants, hired investigators, INTERPOL or foreign State information, photographic and recording devices, and possibly satellites.
instance, in 1963, France, in an effort to secure the custody of OAS leader Captain Curutchet, arranged for his passport and paid for his flight from Switzerland to Uruguay, and when the airplane made a scheduled stop at Dakar, "he was arrested by Senegalese personnel under the command of a French officer [and] taken to France."\textsuperscript{75}

This approach can also be effected through \textit{unscheduled} but circumstantially forced stops. In July 2013, Bolivian President Evo Morales’ plane needed to refuel in Austria after other European States refused the right of access to their airspace upon the request of the U.S., which suspected that Edward Snowden, the former NSA contractor who had leaked sensitive government information, was on board.\textsuperscript{76} While in that case Snowden was not on the flight and Morales was not charged with a crime, and so no one was arrested, that incident demonstrates how such a scenario might unfold.

\textbf{Request a Third State(s) to Exclude Refuge in or Territorial Admission to an Alien Fugitive.} Rather than ask a third State to arrest a fugitive, a pursuing State could request the virtually opposite favor: The denial of refuge in or admission to their territory at all. The logic behind this approach would be to foreclose potential destinations for an alien removed by another State, and thereby ensure that he, ultimately or by default, arrived in pursuing State or sympathetic third State territory. In the \textit{Soblen Case}, for example, the U.S. reportedly exorted both Greece and the U.K. to exclude Robert Soblen’s admission, as cities in those States constituted interim scheduled stops by the Israeli airliner transporting him to the U.S.\textsuperscript{77} Similarly, to compel Samuel Insull’s return from Greece to the United States, American authorities requested States neighboring Greece to exclude his

\textsuperscript{75} "Kidnapping Incidents", 32 \textit{Bull. of the Int’l Comm’n of Jurists} 24, 28 (Dec. 1967).
admission.\textsuperscript{78} Also, the U.S. reportedly asked Tunisia and Greece to disallow an aircraft carrying the four Palestinian hijackers of the \textit{Achille Lauro} cruise ship, as well as Abu Abbas and another PLO leader, from landing in their territory after the hijackers had departed Egypt in the hope of reaching a “safe haven.”\textsuperscript{79}

\textbf{Offer a Reward for the Capture of a Fugitive or for Information Leading to His Arrest.} When pursuing States have reason to believe private individuals could be motivated through sizable monetary payments to furnish valuable information regarding the whereabouts of a fugitive, governments may well choose to extend a reward.\textsuperscript{80} Examples include:

- In 1985 several million dollars, including $1 million from the Government of Israel and the World Zionist Organization, were offered for the capture of Dr. Josef Mengele, the Auschwitz Concentration Camp physician.\textsuperscript{81}

- In the same year, the U.S. posted a reward of $100,000 for information leading to the arrest of those responsible for killing six Americans in El Salvador.\textsuperscript{82}

- In June 1997, the U.S. offered $2 million for information leading to the capture of Mir Aimal Kasi,

\begin{flushright}
\textsuperscript{78} Alona E. Evans, \textit{Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice}, 40 B.Y.B.I.L. 77, 84 (1964).
\textsuperscript{79} See Jonathan Broder, “U.S. Enters New Phase Against Terrorism,” \textit{Chi. Trib.}, Oct. 13, 1985, \textit{available at} [link to article] (last visited on Oct. 9, 2013) (“The cooperation of Greece and Tunisia in refusing landing rights to the Egyptian plane also helped, the experts said. They suggested, however, that Greece’s anti-American posture and Tunisia’s anger over U.S. support for Israel’s Oct. 1 air strike on PLO headquarters in Tunis made their decision a question of realpolitik, not moral considerations.”).
\textsuperscript{80} “Rewards for information have been instrumental in Italy in destroying the Red Brigades and in Colombia in apprehending drug cartel leaders. A State Department program is in place, supplemented by the aviation industry, usually offering rewards of up to $5 million to anyone providing information that would prevent or resolve an act of international terrorism against U.S. citizens or U.S. property, or that leads to the arrest or conviction of terrorist criminals involved in such acts.” Perl, CRS Report, \textit{supra} n.39, at 18.
\end{flushright}
wanted for his shooting spree outside of CIA Headquarters building in 1993 that killed two and injured three persons.83

• In 2007, a collective bounty of over 300,000 euro was made available by the German and Austrian Governments together with the Los Angeles-based Wiesenthal Center for the capture of Aribert Heim, a Nazi physician at the Mauthausen Concentration Camp in Austria who was alleged to have killed hundreds of prisoners in operations without anesthesia.84

• Also in 2007, the U.S. Department of State, under its Narcotics Rewards Program, offered to pay up to $5 million for the capture of Diego León Montoyo Sánchez, a Colombian narcotics boss who appeared on the U.S. Department of Treasury’s Specially Designated National List.85

*Circulate Photographs of Fugitive Through the Media.* Sometimes, arrests are made possible by virtue of members of the public seeing pictures, artistic sketches, or other images of a fugitive as displayed in magazines, on television shows, and on Internet websites who then might contact law enforcement officers regarding the location of the fugitive’s residence or office, or other whereabouts. An example of this occurred in November 1988, when after escaping custody a decade earlier from Tennessee for two counts of rape and murder as well as aggravated assault of a police officer, Joseph Alan Shepherd fled to Ontario, Canada, under the name James Joseph Tripp, but was identified by a neighbor who saw his photograph on a U.S. television program called “Unsolved Mysteries” that featured those on the FBI’s

---

83 Thomas & Suro, *supra* n.51, at A1, A11 (the reward reportedly “played a significant part in motivating those who helped identify and locate [him]”).


85 Bruce Zagaris, *Colombia Arrests Alleged Head of Drug Cartel and Prepares to Extradite*, 23 IELR 441 (2007) (Montoyo was eventually arrested by the Colombian Army by a special forces unit in September 2007).
“Most Wanted” List. In another instance, Julian Tzolov, a former Wall Street broker accused of securities fraud and who was believed to have fled to Spain’s Costa del Sol in May 2009, was discovered, despite his use of false identities and bodyguards, after an international search that included Spain’s National Police circulating his photograph.

c. **Avenues of Recourse Under Another’s Judicial System**

The other type of fallback alternative to extradition available to a pursuing State is to ensure that prosecution of some kind proceeds against a fugitive, even if it does not take place in its own domestic judicial system. This approach tends to be followed in instances where a pursuing State has been rebuffed regarding an extradition request and has thereby lost faith it will ever obtain physical custody of the fugitive, or possibly believes another forum – whether the host State, a third State, or an international criminal tribunal – would be better suited to prosecute the case. In addition, a pursuing State may choose to support a prosecution elsewhere by offering to share material evidence or fact or expert witnesses.

Such *redirection* is generally a second-order preference because a pursuing State cannot be certain that an arrested fugitive will: (i) necessarily be prosecuted elsewhere, (ii) even if he is, that the most serious or all available charges will be lodged; (iii) even if they are, that he will be prosecuted zealously; (iv) even if he is, that he will be convicted; (v) even if so, that he will receive an appropriately long, rather than a diminished, prison sentence; and (vi) even if he does, that he will not

---


88 This fallback alternative relates only to prosecution, not punishment, as the operational aim.

89 Curiously, at times, if an extradition request is denied, the pursuing State and the host State may each elect to undertake criminal proceedings against the subject individual in parallel, which not only is an inefficient use of judicial resources but also can complicate the availability of witnesses and evidence for use in court. See, e.g., Bruce Zagaris, *U.S. Senator Introduces Legislation to Track Foreign Fugitives*, 28 IELR 164, 165 (2012) (discussing how Mozambique and South Africa undertook concurrent legal proceedings against the same alleged criminal (Mozambique national Chakoma Machaba) for the same offense (for his role in an attack on two individuals in South Africa)).
ultimately obtain a suspended sentence, an early parole, or be the beneficiary of a pardon, amnesty, or a prisoner exchange by another State.90

**Request the Host State Itself to Prosecute the Fugitive.** Where the host State is faced with a choice between extradition and domestic prosecution, and where it is legally prohibited from extraditing a given fugitive or where extradition (to any pursuing State candidate) is viewed as the politically or practically inferior option,91 a pursuing State could press the host State to undertake domestic prosecution, as that approach may hold out the best prospect of the fugitive being brought to justice. The host State may opt to prosecute on its own initiative92 under a recognized jurisdictional principle,93 but otherwise may be required to satisfy an express treaty obligation under the principle known as aut dedere aut judicare (abbreviated herein as aut dedere and introduced in Chapter 2.c.ii).94

---
90 See generally Heymann & Gershengorn, supra n.69, at 140-42.
91 Domestic prosecution can at times be a more effective means of ensuring a fugitive is appropriately punished, such as when the choice is to extradite him to a country in political chaos and where there is a risk that the pursuing State government will change hands and the person may not remain in jail for very long. For example, in January 2003 when an alleged human rights abuser, Carl Dorélien, was deported back to his native Haiti, which imprisoned him, he was released shortly thereafter in 2004 during an insurgency against President Aristide who had by then regained power. Simona Agnolucci, Deportation of Human Rights Abusers: Toward Achieving Accountability, Not Fostering Impunity, 30 HASTINGS INT’L & COMP. L. REV. 347, 356-58, 364 (2007).
92 For example, at a 1997 meeting, Justice and Interior Ministers of the G-8 countries stated that where extradition of nationals was not possible, the Ministers committed to conduct “effective domestic prosecutions in lieu thereof.” Meeting of the Justice and Interior Ministers of The Eight (G-8), Dec. 9-10, 1997, Communiqué, Wash., D.C., Dec. 10, 1997, available at http://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/documents/points%20of%20contact/24%208%20Communique_en.pdf (last visited on Nov. 7, 2013) [hereinafter G-8 Communiqué].
93 See Chapter 2.c supra.
94 Even apart from any applicable treaty obligations, it has been argued that an additional duty to prosecute may exist under the principle of legality. See Otto Lagodny, Legally Protected Interests of the Abducted Alleged Offender, 27 ISR. L. REV. 339, 342 n.13 (1993). The “principle of legality” has been defined as follows: “In its broadest sense, [it] encompasses the following in respect of criminal provisions: (1) the principle of non-retroactivity (nullum crimen, nulla poena sine lege praevia); (2) the prohibition against analogy (nullum crimen, nulla poena sine lege stricta); (3) the principle of certainty (nullum crimen, nulla poena sine lege certa); and (4) the prohibition against uncodified, i.e. unwritten, or judge-made criminal provisions (nullum crimen, nulla poena sine lege scripta). In sum, this means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.” Claus Kreß, Nulla poena nulla crimen sine lege, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, at 1, available at http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf (last visited on Dec. 31, 2013).
Examples of host States prosecuting fugitives in lieu of extradition include the following. Beginning in September 2009, after refusing to extradite François Bazaramba, a former Rwandan pastor, to face genocide and murder charges in Rwanda, the Finnish government prosecuted him in its own courts, ultimately finding him guilty of genocide and murder or incitement to murder of at least five persons.\textsuperscript{95} In another case, in 2007, the U.S. decided to prosecute Mexico’s former Deputy Attorney General Mario Ruiz Massieu who had fled to the U.S. in 1999 after being implicated in drug-related corruption and money laundering, despite Mexico’s attempt to have him extradited or deported.\textsuperscript{96} Similarly, although the government of the Netherlands was unwilling to extradite one of its nationals, Stuart Artie Van Sichem, to the U.S. to face drug charges, it was prepared to prosecute him under its own domestic laws.\textsuperscript{97}

As one of the most frequently cited examples of an extradition alternative in the literature, \textit{aut dedere} warrants a reasonably detailed examination.\textsuperscript{98} The purpose of

\begin{footnotesize}
\begin{enumerate}
\item Bruce Zagaris, \textit{U.S. Arrests Mexican Fugitive on Drug Charges}, 23 IELR 352 (2007). This decision to prosecute was driven by the fact that the U.S. Magistrate Judge (in Newark, N.J.) ruled that he would not allow Massieu to be extradited to Mexico because, as he stated: “In all good conscience, I cannot [grant extradition]. I find to be incredible and unreliable all of the statements taken from witnesses in this case. I will not sign a certificate to send a man to a country which has admittedly practiced torture in the questioning of suspects.” Robert L. Jackson & Juanita Darling, “U.S. Judge Won’t Extradite Former Mexico Official,” \textit{L.A. Times}, June 23, 1995, \texttt{available at http://articles.latimes.com/1995-06-23/news/mn-16346_1_ruiz-massieu} (last visited on Dec. 31, 2013).
\item Heymann & Gershengorn, \textit{supra} n.69, at 146.
\item By contrast with the other “fallback alternatives” described herein, which are uniformly available to a pursuing State, \textit{aut dedere} is a means available exclusively to the host State, although the approach still qualifies under the definition of an “alternative to extradition” and can be fostered or encouraged by a pursuing State. The leading ICJ case on \textit{aut dedere} is \textit{Questions Relating to the Obligation to Prosecute or Extradite} (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), \texttt{available at http://www.icj-cij.org/docket/files/144/17064.pdf} (last visited on Nov. 2, 2013).
\end{enumerate}
\end{footnotesize}
this principle is to suppress crime\textsuperscript{99} and hold perpetrators accountable by presenting the host State\textsuperscript{100} with a binary choice: either extradite the individual to a pursuing State\textsuperscript{101} or take good faith measures toward prosecution under its own judicial system. More pointedly, to the extent a State decides not to extradite and consequently is obliged under the language of most formulations to “submit the case to competent authorities in view of prosecution,”\textsuperscript{102} it is decidedly not a requirement to prosecute per se but rather to turn the case over to the appropriate domestic law enforcement agencies to determine in good faith whether prosecution is warranted.\textsuperscript{103} This phraseology recognizes the separation of governmental powers by preserving the prerogatives of the judiciary.\textsuperscript{104}

\textsuperscript{99} M. Cherif Bassiouni \& Edward M. Wise, \textit{Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law} 3 (1995). The aut dedere principle derives from the general interest of States in “upholding each other’s criminal laws whenever these laws’ protected social interests are the same.” Bassiouni, ICL, supra n.26, at 336.

\textsuperscript{100} To be subject to the obligation of aut dedere all conventions invariably require that the alleged offender be in the territory of the custodial or host State (\textit{judex deprehensionis}). Robert Kolb, \textit{The Exercise of Criminal Jurisdiction over International Terrorists, in Enforcing International Law Norms Against Terrorism} 268 (Andrea Bianchi ed. 2004).

\textsuperscript{101} A 2006 convention containing an aut dedere provision, for the first time, allowed for the physical transfer to another State in accordance with its international obligations or to an international criminal tribunal it recognizes. Int’l Conv. for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, available at \url{http://www2.ohchr.org/english/law/pdf/disappearance-convention.pdf} (last visited on Feb. 2, 2012). An apparent conflict would seem to exist under all other conventions between an obligation to “extradite” and surrendering a fugitive at the request of an international criminal tribunal. See Chapter 2.c.iv supra. In such a circumstance, there would be no issue with those courts like the ICTY and ICTR possessing concurrent jurisdiction as they have primacy, but with courts like the ICC that have complementary jurisdiction, it is unclear. See Claire Mitchell, \textit{The Scope and Operate of the Obligation (Part 2) of Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law}, IHEID, Graduate Institute Publications Online, 2009, ¶¶ 5-7, available at \url{http://iheid.revues.org/302#ftn2} (last visited on Feb. 28, 2012).


\textsuperscript{104} Bart DeSchutter, \textit{Problems of Jurisdiction in the International Control and Repression of Terrorism, in International Terrorism and Political Crimes} 386 (M. Cherif Bassiouni ed. 1975).

374
The term itself, while useful, is concededly inexact: (i) *dedere* means to surrender or deliver (the verb *extradere* did not exist in classical or medieval Latin, first appearing in the 18th Century in French and in the 19th Century in English);\(^{105}\) and (ii) *judicare* means to judge (by way of trial) even though the conventional requirement is only to take steps toward prosecution, so no full trial necessarily results and therefore the term *prosequi* (meaning to pursue or prosecute) arguably would be more precise.\(^{106}\) Notably, the “dedere” option, as understood today does not contemplate deportation or informal transfers, as the former would not always result in the fugitive’s prosecution or punishment, while the latter would not ensure the fugitive obtained certain human rights safeguards (such as specialty) afforded under extradition.\(^{107}\)

In this author’s judgment, *aut dedere* has yet to emerge as an affirmative obligation under customary international law; rather, its status as a duty remains contingent upon express treaty ratification.\(^{108}\) Despite the large number of international conventions that incorporate some *aut dedere* formulation,\(^{109}\) some significant

\(^{105}\) *Bassiouni & Wise, supra* n.99, at 4 n.7.

\(^{106}\) *Id. at 4 & n.5; Kolb, supra* n.100, at 263.


\(^{109}\) See *Mitchell, supra* n.101, ¶¶ 2, 11-13 (cataloguing at least 30 multilateral conventions and 18
conventions lack such a provision\(^{110}\) while the existing provisions are devoid of uniform phraseology.\(^{111}\) Moreover, States continue to prize their sovereign right to grant asylum,\(^{112}\) and resistance is still strong in practice among many States regarding whether to proceed with prosecution when extradition has been denied

regional treaties, including multilateral extradition treaties that contain some version of the *aut dedere* principle; Chatham House Briefing Paper, *supra* n.107, at 3 (noting the existence of “over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice.”). Professor Bassiouni has gone so far as to characterize *aut dedere* as the “cornerstone” of domestic law enforcement of international crimes today. *BASSIOUNI, ICL, supra* n.26, at 334.


\(^{111}\) Compare Conv. on Offences and Certain Other Acts Committed on Board Aircraft [Tokyo Hijacking Conv.], Sept. 14, 1963, art. 16(2), U.N. Doc. A/C.6/418/Corr.1, Annex II, 704 U.N.T.S. 219, 20 U.S.T. 2941, ICAO Doc. 8364, reprinted in 2 ILM 1042 (1963) (“nothing in this Convention shall be deemed to create an obligation to grant extradition”) and id., art. 9 (“The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.”) with Conv. on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 10(3), reprinted in 37 ILM 1 (1998) [hereinafter Combating Bribery Conv.] (“A Party which declines a request to extradite a person for bribery of a public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.”) with Int’l Conv. for the Suppression of the Financing of Terrorism, Dec. 9, 1999, art. 10(1), U.N. Doc. A/Res/54/109 (1999), reprinted in 39 ILM 270 (2000) [hereinafter Anti-Terrorism Financing Conv.] (“The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings 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.”).

\(^{112}\) See, e.g., Common European Asylum System, EC Website, Aug. 13, 2013, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm (last visited on Oct. 9, 2013) (“Asylum is a fundamental right; granting it is an international obligation, first recognised in the 1951 Geneva Convention on the protection of refugees.”); *id.* ("Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework.").

376
and jurisdictional grounds exist to prosecute. In short, the requisite State practice and *opinio juris* to constitute customary international law are simply missing. That said, there is a small chorus of voices that would label the concept an emerging principle of CIL – and therefore one that would apply notwithstanding any treaty obligation – and even some that would go so far as to denominate it a *jus cogens* norm, given its increasingly popular use.

As suggested above, the nature and strength of *aut dedere* provisions found in international and regional crime suppression treaties vary to some extent. In some, the focus is entirely on establishing a duty “to submit the case to its competent authorities” but only where extradition of a fugitive is barred on account of his being a national of that State. In some pre-World War II treaties, domestic

---

113 See Boister, supra n.108, at 309 & n.132 (citing by example the U.K.’s refusal to prosecute Gen. Augusto Pinochet after refusing to extradite him in 2000); Kolb, supra n.100, at 261-62 (even when jurisdictional bases exist, States “often display great reluctance to exercise their right of prosecution”).


115 See Mitchell, supra n.101, ¶¶ 64-85 (no general *aut dedere* obligation yet exists regarding international crimes writ large); Chatham House Briefing Paper, supra n.107, at 5-6 (“The state practice described above demonstrates that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes under international law has become part of customary international law. States’ implementation of this obligation seems to be primarily based on treaties to which they are parties. It is thus questionable whether state practice beyond treaties is sufficient to meet the requirements prescribed for the formation of customary international law.”).


117 See Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557, 567-68 & n.28 (1994) (aut dedere is a *jus cogens* norm based on the plethora of multilateral conventions that recognize it, including by ICJ Judge Weeramantry in his dissenting opinion in the *Lockerbie* case partly in reliance on Professor Bassiouni).

118 For one classification of treaty provision types, see Bassiouni & Wise, supra n.99, at 11-19 (segregating out extradition treaties according to three formulae based on the Counterfeiting Convention (1929), the Geneva Conventions of 1949, and the Hague Convention (1970)).

119 E.g., *Combating Bribery Conv.*, supra n.111, art. 10(3) (“A Party which declines a request to extradite a person for bribery of a public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.”); Eur. Conv. on
prosecution by the host State depends on two factors; first, that extradition is unavailable for reasons unrelated to the offense (which is a broad category that could include, for example, human rights concerns regarding prospective treatment by the pursuing State); and second, that the host State generally recognizes extraterritorial jurisdiction.\footnote{Extradition, Dec. 13, 1957, art. 6(2), CoE, E.T.S. No. 24 (“If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate.”); Montevideo Conv. on Extradition, Dec. 26, 1933, art. 2, 49 Stat. 3111, \textit{reprinted in} 28 AJIL 65 (1934) (provides that if host State refuses to extradite a national it shall itself prosecute the person claimed). An example in which domestic prosecution occurred because extradition was barred on account of the nationality of the individual of interest can be found in the case of \textit{In re Korosi}, Crim. Ct. of Cassation, Italy, Jan. 23, 1925, \textit{reprinted in} [1925-26] ANN. DIG. 309, 3 ILR 309 (1929). See also David Sharrock, “Israel Refuses to Hand Murder Suspect to US,” \textit{Guardian} (U.K.), Feb. 26, 1999, at 18, available at http://www.theguardian.com/world/1999/feb/26/davidsharrock1 (last visited on Dec. 8, 2013) (Israel prosecuted a dual U.S.-Israeli national, Samuel Sheinbein, after refusing to extradite him to the U.S. on nationality grounds).}

In still others, the host State is under no obligation to extradite but if the fugitive returns voluntarily or involuntarily to his State of nationality, then that State is required to prosecute him.\footnote{\textit{E.g.}, Conv. for the Suppression of Illicit Traffic in Dangerous Drugs, June 26, art. 8, 1936, 198 L.N.T.S. 299 (1939) (“Foreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realized—namely, that: (a) Extradition has been requested and could not be granted for a reason independent of the offence itself; (b) The law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule.”); Int’l Conv. for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 371 (1931).} In the vast majority of contemporary treaties, however, the \textit{aut dedere} principle employs unconditional terms requiring a host State either to extradite or, alternatively, to take steps toward prosecution or at least to assert criminal jurisdiction,\footnote{\textit{E.g.}, Conv. for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, art. 9, 96 U.N.T.S. 271.} regardless of the circumstances involved.\footnote{\textit{E.g.}, Inter-Am. Conv. to Prevent and Punish Torture, Dec. 9, 1985, art. 14, AG/Res. 783 (XV-0/85), O.A.S. Gen. Ass’y, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. T.S. No. 67, \textit{reprinted in} 25 ILM 519 (1986) (“When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law.”); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, art. 3(4), IMO Doc. Sua/Con/16/Rev.1, \textit{reprinted in} 27 ILM 685 [hereinafter Fixed Platforms Protocol] (“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}}
And in some it is additionally mandated, explicitly or implicitly, that there be no undue delay in proceeding with prosecution\textsuperscript{124} and/or that the investigation and proceedings shall be conducted as if the same offense had been committed in its own territory,\textsuperscript{125} thereby ensuring that it not be assigned an unduly low priority.

\textsuperscript{124} E.g., Montreal Conv., \textit{supra} n.102, art. 7 (“The Contracting State in the territory of which the alleged offender is found, if it does not extradite him, is obliged, \textit{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.”) (emphasis supplied); Int’l Conv. against the Taking of Hostages, Dec. 17, 1979, art. 8(1), UNGA Res. 34/146 (XXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/46 (1979), 1316 U.N.T.S. 205, T.I.A.S. No. 11081, \textit{reprinted in} 18 ILM 1456 [hereinafter New York Conv.] (“The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, \textit{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, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.”) (emphasis supplied).


\textsuperscript{125} E.g., Anti-Terrorism Financing Conv., \textit{supra} n.111, art. 10(1) (“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.”); Conv. on Cybercrime, Nov. 23, 2001, art. 24(6), CoE, E.T.S. No. 185 (“Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.”); Conv. to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, art. 5, O.A.S. Doc. A6/Doc.88 rev.1, corr.1, 27 U.S.T. 3949, T.I.A.S. No. 8413 (1976), \textit{reprinted in} 10 ILM 255, 256 (“When extradition requested for one of the
Examining the term itself, it is reasonable to inquire whether States Parties to international treaties generally tend to ascribe precedence to extradition or to prosecution by the host State's courts, or whether the two alternatives are placed on an equal footing. In the vast majority of provisions, due to logical sequencing, States are called upon to pursue prosecution if extradition is unavailable, but in a few other instances, States may elect to extradite in lieu of domestic prosecution. While arguments can be advanced in favor of each position—for example, as a teleological matter, the point of crime suppression treaties ultimately is to prosecute and punish offenders, but as a function of pragmatism, the State where the offense allegedly occurred (typically the pursuing State) is more likely to succeed in that prosecution—it seems that they are postured as equally

---

126 *E.g.*, U.N. Conv. against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], Dec. 10, 1984, art. 7(1), UNGA Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72, Annex (1984), 1465 U.N.T.S. 85, *reprinted in* 23 ILM 1027 [hereinafter CAT] (“The State Party in the territory under whose jurisdiction a person alleged to have committed an 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. (2) These 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.”).

127 *E.g.*, Geneva Conv. for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [GC I]; Geneva Conv. for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [GC II]; Geneva Conv. Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [GC III]; Geneva Conv. Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [GC IV] (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another high Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”). There is some question whether the *aut dedere* principle that appears in the Geneva Conventions of 1949 without express reference to the word extradition is suggesting that deportation would be a permissible method of turning a person over. Gallant, *supra* n.117, at 354. However, as Professor Robert Kolb points out, only extradition for trial would satisfy the conventional requirement, as expulsion would not ensure that prosecution ultimately occurred. Kolb, *supra* n.100, at 258.

128 *Id.* at 257-60.
acceptable counterparts,\textsuperscript{129} at least in the \textit{international} legal context.\textsuperscript{130} In any event, the key impetus behind these provisions is to encourage concrete action \textit{of some kind} toward bringing a fugitive to justice, although as a general practice, States tend to act more in line with \textit{realpolitik} than out of high-minded principle.

Operational aspects of \textit{aut dedere} also must be considered. To begin, neither the principle itself nor crime suppression treaty provisions articulating it tend to supply much in the way of meaningful implementation criteria.\textsuperscript{131} Indeed, the provisions are spare and appear to accept without question or caveat that any extradition or domestic prosecution will be handled according to proper and reasonable standards.\textsuperscript{132} Some limited exceptions exist, such as the requirement that a person may not be handed over to another State under any of the four Geneva Conventions of 1949 unless it is a High Contracting Party\textsuperscript{133} that has made out a \textit{prima facie} case

\textsuperscript{129} Id. at 257; \textsc{Bassiouni \& Wise, supra} n.99, at xii (order in which the terms appear is not meant to assign priority to extradition over prosecution); Mitchell, \textsc{supra} n.101, ¶¶ 15-16 (discussing a variety of formulations with some wording suggesting extradition as the default and others indicating prosecution). At the same time, however, “[m]ost of the treaties concerned impose an obligation to prosecute whenever the alleged offender is present in the territory of the state: the obligation arises as soon as that presence is discovered, regardless of any request for extradition. It is only when such a request is made that the alternative course of action – extradition – becomes available to the state.” Chatham House Briefing Paper, \textsc{supra} n.107, at 6. \textit{See, e.g., Questions Relating to the Obligation to Prosecute or Extradite} \textsc{(Belg. v. Sen.)}, Judgment, \textsc{[2012]} \textsc{I.C.J., Rep.} 422 (July 20), ¶ 95, available at \texttt{http://www.icj-cij.org/docket/files/144/17064.pdf} (last visited on Nov. 2, 2013) (“[I]f 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 [against Torture], 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.”).

\textsuperscript{130} Under \textit{regional} extradition treaties, there appears to be a preference for extradition over prosecution. Kolb, \textsc{supra} n.100, at 257.

\textsuperscript{131} Case law, however, supplies some guidance on this score. \textit{See, e.g., Questions Relating to the Obligation to Prosecute or Extradite} \textsc{(Belg. v. Sen.)}, Judgment, \textsc{[2012]} \textsc{I.C.J., Rep.} 422 (July 20), available at \texttt{http://www.icj-cij.org/docket/files/144/17064.pdf} (last visited on Nov. 2, 2013) (discussing the application of the \textit{aut dedere} principle in the context of the Convention against Torture (CAT), including with respect to the requirement of a Member State to undertake a preliminary inquiry to determine if torture was committed by a fugitive within its territory, that the decision to prosecute or extradite be taken without delay, and that internal legal or financial considerations do not supersede this international legal obligation).

\textsuperscript{132} \textsc{See Bassiouni, ICL, supra} n.26, at 344.

\textsuperscript{133} Examples of other treaties specifying that an accused can be extradited only to States Parties are the Fixed Platforms Protocol, \textsc{supra} n.122, art. 3(4); and Maritime Navigation Conv., \textsc{supra} n.122, art.
for criminal liability for a grave breach.\textsuperscript{134} Furthermore, little if any instruction is provided on how a State is expected to resolve conflicts that may arise out of its exercise of \textit{aut dedere} (\textit{e.g.}, when two or more States concurrently request extradition from the host State) beyond generally applying the principle of “good faith” in meeting State obligations\textsuperscript{135} and the concept of “wrongful conduct” as set forth in the ILC’s \textit{Draft Articles on State Responsibility}.\textsuperscript{136}

Most crime suppression treaties with \textit{aut dedere} provisions consist of language such as “the authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under \textit{the law of that State}.”\textsuperscript{137} That text is tantamount to a “national treatment” standard as opposed to an “international minimum” standard,\textsuperscript{138} thereby allowing States, say, to “rely on different factors in deciding whether to prosecute for a ‘political’ offence, rather than an ‘ordinary’ offence.”\textsuperscript{139} As that duty arises out of a treaty binding the interests of States to one another, rather than from language found in purely domestic legislation, arguably a State must additionally exercise due diligence to ensure there is no interference by the State’s political bodies to compromise its genuine consideration.\textsuperscript{140} In any event,

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item\textsuperscript{6(4).} To the extent that a treaty fails to specify whether the \textit{aut dedere} provision applies to States parties only or to any State, such a provision should be construed as applying to any State. Kolb, supra n.100, at 259 (noting that such important limitations cannot be presumed).
\item\textsuperscript{134} GC I, GC II, GC III, GC IV, supra n.127.
\item\textsuperscript{135} BASSIOUNI, ICL, supra n.26, at 344.
\item\textsuperscript{137} \textit{E.g.}, Int’l Conv. against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, art. 12, \textit{reprinted in} 29 ILM 91 (1990) (emphasis supplied); \textit{accord} New York Conv., supra n.123, art. 8(1). Sometimes, however, the duty to prosecute appears under slightly different phraseology as “in the same manner as in case of any ordinary offence of a serious nature under municipal law.” \textit{E.g.}, CAT, supra n.126, art. 7(1) (emphasis supplied).
\item\textsuperscript{138} Kolb, supra n.100, at 261. This position was reflected in a G-8 Communiqué in 1997, when Justice and Interior Ministers stated: “Those of us that conduct domestic prosecution of our nationals in lieu of extradition agree to pursue such extraditions with the same commitment of time, personnel and financial resources as are devoted to the prosecution of serious crimes committed within our own territory.” G-8 Communiqué, supra n.92.
\item\textsuperscript{139} Mitchell, supra n.101, ¶ 3.
\item\textsuperscript{140} Kolb, supra n.100, at 262; Melanie M. Laflin, Note, \textit{Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options}, 26 J. LEGIS. 315, 317 (2000) (noting that customary international law imposes a duty of due diligence and citing the
\end{itemize}
\end{footnotesize}
however, such decisions ultimately rely on prosecutorial discretion, which, in turn, typically accounts for such factors as the weight of evidence, the likelihood of conviction, the significance of the charges, the time and resources estimated to secure a conviction, and the opportunity cost of not pursuing other criminal cases.

For all of its positive features, however, aut dedere suffers from several drawbacks. First, its scope of application is limited, as only States that are parties to treaties containing aut dedere provisions are expected in good faith to apply that principle in specific agreed contexts, and only after any ratified treaty has entered into force with respect to that State, and only to the extent that any announced declarations, reservations, objections, or notifications do not further constrain that application.

Second, the aut dedere principle can be rendered ineffectual to the extent a State does not take seriously the antecedent responsibility to locate and arrest a fugitive within its territory, let alone if it actively assists the fugitive in evading capture.

General Claims Commission’s finding in the Jane’s Case that Mexico was liable for failure to exercise due diligence).

141 See Antonio Cassese, The International Community’s ‘Legal’ Response to Terrorism, 38 INT’L & COMP. L.Q. 589, 593 (1989) (“we have seen how the hijackers of a Kuwaiti aircraft have been allowed to escape owing to the fact that Algeria was not a party to the relevant [terrorism suppression] treaties and, accordingly, could not be compelled to ‘extradite or punish’ them.”). See also discussion supra at pages 375-77 regarding how aut dedere has not yet ascended to CIL status.

142 See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, [2012] I.C.J. Rep. 422 (July 20), ¶ 100, available at http://www.icj-cij.org/docket/files/144/17064.pdf (last visited on Nov. 2, 2013) (“The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.”). In that case, although Belgium had sought the prosecution of crimes by Hissène Habré during his tenure as Chad’s leader from June 1982 to December 1990, because the applicable convention (the CAT) had not entered into force vis-à-vis Senegal, the host State, until June 1987, any acts Habré may have committed before then were not under consideration. id. ¶¶ 19, 100.


144 Cassese, supra n.141, at 595.
Third, aut dedere does not guarantee that if extradition is denied or otherwise unavailable, the host State will necessarily prosecute the alleged offender. After all, the host State need only review the charges and evidence against the individual with an eye toward making a prosecution determination, while any number of factors may militate against moving forward. For instance, a State may choose to: (i) offer the fugitive amnesty in order to elicit cooperation in connection with a truth and reconciliation commission inquiry; (ii) protect sensitive national security information from possible public disclosure at trial; (iii) shield parties who, while allegedly perpetrating crime, incidentally provide certain critical social services to the population; or (iv) enter into a bargain where the subject is exchanged for hostages or prisoners or where he is freed from culpability by turning State’s evidence against more senior members of a criminal organization. In practice,

---

145 See Findlay, supra n.108, at 10 (formalities of process afford a number of opportunities for interested groups to bring political pressure to bear on the decision-maker).

146 It is unsettled law whether an amnesty or pardon is consistent with the aut dedere concept. On the one hand, a State should be allowed to exercise such authority under its own domestic law; on the other hand, an amnesty or pardon would seem to run counter to the notion of criminal accountability that lies at the heart of such a provision. See Mitchell, supra n.101, ¶ 4 (noting lack of State practice on this score while stressing how the “good faith” principle can be used to ensure proper reconciliation between these competing interests) (citing Kolb, supra n.100, at 264-65). See also Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties, promulgated in ANDREAS O’SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 330-36 (2004).

147 See Stefano Betti, The Duty to Bring Terrorists to Justice and Discretionary Prosecution, 4 J. INT’L CRIM. JUST. 1104, 1113-14 (2006). A possible example involves alleged terrorist Luis Posada Carriles, who was arrested in the U.S. on an immigration violation but his indictment was dismissed in May 2007. Since then, both Venezuela and Cuba have sought his extradition for his alleged role in the 1976 bombing of an Air Cubana plane that resulted in the death of 73 persons. To date, the U.S. has refused to grant either request due to concerns about his receiving a fair trial and treatment in those countries. At the same time, the U.S. has not undertaken a domestic prosecution under the aut dedere principle reportedly in part due to his association with the CIA in the 1960s and 1970s (based on declassified documents) as well as his involvement in the 1961 failed Bay of Pigs invasion of Cuba and in the 1986 Iran-contra scandal. Bruce Zagaris, U.S. COURT FREES ALLEGED ANTI-CASTRO TERRORIST AS CARICOM CALLS FOR PROSECUTION, 23 IELR 262 (2007).

148 See Betti, supra n.147, at 1113 (citing the protection of those associated with Hezbollah for the beneficial social services the terrorist organization furnishes the local population).

149 See id. at 1114-15 (citing the example of Germany releasing Shadi Abdalla, a Jordanian extremist, because he provided critical information on al-Qaida); New York Conv., supra n.123, art. 3 (a State may release a kidnapper in exchange for the release of hostages).
State court judges are “careful not to impinge with their decisions on their governments’ international policies and interests.”\textsuperscript{150}

Fourth, even when prosecution proceedings are initiated, the case often will need to overcome a number of logistical, financial, and evidentiary hurdles. Victims and witnesses, who generally are found in the State where the crime was committed, will need to be transferred to the host State to testify. Their travel and accommodation can prove difficult and costly, and they may well encounter language barriers.\textsuperscript{151} Plus, the admissibility or weight accorded evidence across States’ courts may vary considerably. In addition, at times multiple-count cases can be carved up in such a way that more than one court will adjudicate the charges, thereby complicating the availability of witnesses and physical evidence at trial.\textsuperscript{152}

Fifth, it is not always clear that host State judicial systems have the will and capacity to prosecute and punish an offender adequately.\textsuperscript{153} This concern has led particularly more powerful States to distrust the domestic prosecution option under aut dedere as exercised by others, especially those that are autocratic, have a reputation for political or judicial abuse, care little if at all about the specific case, or have an interest in protecting an accused with powerful contacts or an association

\textsuperscript{150} Eyal Benvenisti, \textit{Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts}, 4 EUR. J. INT’L L. 159, 161 (1993) (noting that this phenomenon occurs at three stages: (i) courts interpret narrowly those articles of their national constitutions that import international law into the local legal systems; (ii) they then interpret international rules so as not to upset their government’s interests, sometimes actually seeking guidance from the executive for interpreting treaties; and (iii) they use a variety of avoidance doctrines, like the Act of State doctrine, or standing or justiciability in ways that give their own governments an effective shield against judicial review).


\textsuperscript{152} See Rodrigo Labardini, \textit{Domestic Prosecution in Lieu of Extradition from Mexico}, 22 IELR 33, 35 (2006) (identifying as one reason among many why the U.S. government is not generally satisfied with domestic prosecution in lieu of extradition); Boister, \textit{supra} n.108, at 308 & n.128.

\textsuperscript{153} Host States are generally more inclined to take such prosecutions more seriously when the crime victims are among its nationals. \textit{See, e.g.}, Bruce Zagaris, \textit{U.S. and Ecuador at Odds Over U.S. Effort to Obtain Custody over Murder Suspect}, 27 IELR 782, 782-83 (2011) (discussing the case of Luis A. Guaman who was charged in the U.S. with murdering two Ecuadorians, but Ecuador was willing to undertake the prosecution).
with the host State government.\footnote{See Boister, \textit{supra} n.108, at 312; \textit{id.} at 307-08 & n.127 (the U.S. government has often been disappointed with the manner and speed of the Mexican judicial process); Gallant, \textit{supra} n.117, at 569-70 (crimes may have been committed by persons working on behalf of the State).} For example, instead of granting the U.S. request for the extradition of Pedro Miguel González-Pinzón for the first-degree murder of a U.S. Army sergeant and the attempted murder of another in an assault in Panama in June 1992, the Panamanian government held a trial in 1997, acquitting him of all charges.\footnote{Bruce Zagaris, \textit{Election of Panamanian Accused of Murdering U.S. Soldiers Clouds Prospects for Ratification of FTA}, 23 IELR 419, 419-20 (2007).} Notably, González-Pinchón had well-placed political contacts, as he was the son of a founding member of a leading political party in Panama who was also a friend of the father of the then-current President of Panama.\footnote{\textit{Id}. When the verdict was announced, the U.S. government expressed doubts about the legitimacy of the court proceedings, although it has yet been able to prove any underlying corruption. \textit{Id}. It is equally the case that when a criminal defendant is taken outside of his home country, and he is bereft of his power and influence, there is a greater likelihood of obtaining real justice. Accordingly, one of the most potent weapons the U.S. and Colombia have in their battle against the Medellín cartel for cocaine trafficking into the U.S. is to remove cartel members from their “untouchable” position in Colombia and place them on trial in the U.S. where their wealth and political power have less influence, particularly given how the cartel has corrupted and incapacitated the Colombian judiciary and the Colombian people in general have no desire to pursue, capture, and place traffickers on trial because of what this process will cost them and their homeland. Steven Y. Otera, \textit{International Extradition and the Medellín Cocaine Cartel: Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States}, 13 Loy. L.A. Int’l & Comp. L.J. 955, 1007 (1991).} Even when sentences are imposed, they can later be commuted or the convict otherwise released early,\footnote{Douglas Kash, \textit{Abducting Terrorists under PDD-39: Much Ado About Nothing New}, 13 Am. Univ. Int’l L. Rev. 139, 141 (1997-98).} as occurred in the case of Palestinian Omar Rezaq, who was freed after only seven years (of a 25-year prison sentence) by Malta ostensibly for “good behavior” allegedly due to Libyan government pressure.\footnote{“Terrorism in the Sky: Hijacking of Egypt Air Flight 648,” \textit{India TV News}, Dec. 31, 2013, \textit{available at} \url{http://www.indiatvnews.com/print/news/terrorism-in-the-sky-hijacking-of-egypt-air-flight-648-2713-98.html} (last visited on Dec. 31, 2013).}

In the \textit{Lockerbie} case profiled in Chapter 8.c \textit{supra}, while Libya contended it was fully justified in its straightforward application of the \textit{aut dedere} provision in the Montreal Convention, the case points out a major deficiency in that principle’s operation. Where, as there, the host State (Libya), which was then despotic and not known for an impartial judicial system, wished to prosecute two of its own government agents, the U.S. and the U.K. had a reasonable basis for objection in the
interest of justice. Whether the use of the UNSC as a vehicle to overcome the conventional obligation to pursue domestic prosecution was appropriate can be debated, but we must not overlook this Achilles’ heel of inadequate or unfair judicial systems when assessing the net utility of the aut dedere option.

**Promote Transfer of a Fugitive to a More Suitable Forum for Prosecution.** Where the host State A is unwilling to extradite to pursuing State B, and where State A’s domestic prosecution is deemed non-serious or unreliable, pursuing State B may choose to advocate, or serve as an intermediary, for the transfer of the fugitive to pursuing State C or to an appropriate international criminal tribunal instead. This would amount to a contingency option that would seek to maximize the likelihood that the fugitive would be brought to justice somewhere.

For example, in the *Lockerbie* case, after it was clear that Libya would not extradite its accused intelligence officers to either the U.S. or the U.K., the pursuing States agreed to have the two Libyan government defendants transferred initially to the Netherlands and then onward to Scottish custody to territory temporarily assigned to Scotland at Camp Zeist (a former NATO airbase) under a specialized U.K.-Netherlands agreement.\(^{159}\) Similarly, in March 2006, pursuant to Liberian President Ellen Johnson Sirleaf’s request for the extradition from Nigeria of the exiled former President of Sierra Leone, Charles Taylor, who was indicted by the Special Court of Sierra Leone (SCSL) in 2003 for war crimes and crimes against humanity during Sierra Leone’s civil war, Nigeria “transferred” him to Liberia, which promptly turned him over to the custody of the UN Mission in Liberia (UNMIL) and then to Sierra Leone and ultimately to The Hague where he was put on trial before the SCSL.\(^{160}\)

---

\(^{159}\) Agreement Concerning a Scottish Trial in the Netherlands, Neth.-U.K., Sept. 18, 1998, reprinted in 38 ILM 926 (1999). *See also* 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, 177 (2002). This arrangement should be distinguished from re-extradition in which prosecution or punishment occurs first and then the individual is forwarded to the next State. *See* treatment on re-extradition in Chapter 8.c supra.

**Provide Collateral Support to the Prosecuting State or an International Tribunal.** Apart from promoting or facilitating the *transfer* of a fugitive to another forum to face prosecution, a pursuing State could opt to *assist* that forum, whether a State court or an international tribunal, through the provision of material evidence or witnesses in the furtherance of justice. Thus, for example, after Greek Prime Minister Constantine Mitsotakis overturned a Greek Supreme Court ruling that had authorized the extradition to the U.S. of Mohammed Rashid, a Palestinian charged with planting a bomb on a U.S. commercial aircraft while *en route* between Tokyo and Honolulu in 1982, and Greece decided to prosecute domestically, the U.S. supplied both a key fact witness (a Rashid accomplice shielded under the Witness Protection Program (WPP)) and three expert witnesses (from the FBI) that proved instrumental in reaching a murder conviction.\(^{161}\) In another instance, in the spring of 2011, after Luis A. Guaman, an Ecuadorian national fled from Massachusetts to Ecuador after being suspected of the murder of his housemate and her two-year-old son, Ecuador offered to prosecute Guaman, as its constitution prohibited the extradition of its own nationals, and asked Massachusetts authorities to provide supporting evidence so that Ecuador could bring murder charges against him.\(^{162}\)

```
* * * * * * * * * *
```

This Chapter has evaluated what are termed herein as “fallback” alternatives to extradition. Seeking to merely locate or arrest a fugitive as a preliminary step to bringing him to justice (“partial” approach) or enabling another judicial system to undertake prosecution (“redirected” approach) constitute *bona fide* alternatives to extradition, yet they are not entirely satisfactory or complete from a pursuing State’s standpoint. In the next Part, this dissertation comprehensively explores those that meet all the key functional indicia of extradition.

---

Oct. 9, 2013) (noting that in May 2012 Taylor was sentenced to a 50-year prison term, but he has appealed that judgment).


PART V:

FULL-SCALE ALTERNATIVES

TO EXTRADITION
CHAPTER 10

ALTERNATIVE I:
RELIANCE ON IMMIGRATION LAWS

In Part V this dissertation pivots from a discussion of one set of alternatives to extradition ("fallback") to the other ("full-scale"). "Full-scale alternatives to extradition" are defined herein as *those non-extradition-related means of bringing a fugitive to justice that functionally approximate the end result of extradition; namely, securing the physical custody of a fugitive and bringing him within the pursuing State’s judicial system to be prosecuted or punished*. Full-scale alternatives are generally regarded as of a first-order preference as they completely satisfy the objectives of extradition. Three types of full-scale alternatives can be discerned:¹ (i) immigration law-based approaches (discussed in this chapter), (ii) informal law enforcement cooperation (covered in Chapter 11), and (iii) unilateral measures undertaken by a pursuing State (addressed in Chapter 12).² Such approaches are undertaken in circumstances where extradition is denied, is effectively unavailable, or is regarded as undesirable,³ but where retrieval of a given fugitive tends to be of priority importance.⁴

¹ It is not always clear which type of extradition alternative is employed in a given case or whether the fugitive may have even waived extradition. See, e.g., Bruce Zagaris, *Guatemala Arrests and Returns U.S. National Wanted in Prosecution of Poker Sites*, 27 IELR 838 (2011) (noting how Ira Rubin may have waived extradition, been deported, or been subject to an informal handover between law enforcement officials).
² By comparison, Harvard Law Professor Philip Heymann classified U.S. government options in a loosely similar fashion to include “cooperative methods” (e.g., via extradition, deportation, and other arrangements) and “unilateral methods” (by which he meant, e.g., abduction and arrest). Philip B. Heymann & Ian Heath Gershengorn, *Pursuing Justice, Respecting the Law*, in *PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW: DOCUMENTATION OF AN INTERNATIONAL WORKSHOP IN FREIBURG, MAY 1991*, at 136 (Albin Eser & Otto Lagodny eds. 1992).
³ See *SATYADEVA BEDI, EXTRADITION: A TREATISE ON THE LAWS RELEVANT TO THE FUGITIVE OFFENDERS WITHIN AND WITH THE COMMONWEALTH COUNTRIES* 396 (2002) (reliance on alternatives “either because of breakdown of the extradition mechanism or for expediency”); M. CHERIF BASSIOUNI, *INTERNATIONAL
While reliance on immigration law as a means to elicit delivery of a fugitive depends predominantly on the application of host State (or removing State) law, *pursuing State* (or receiving State) laws potentially can be implicated (e.g., to the extent a negotiated exchange of fugitive aliens is struck or an immigration action is the product of a cooperative arrangement⁵). *International* law also may come into play, say, where the pursuing State is found to have perpetrated a wrongful act through collusion or otherwise⁶ or with respect to how the fugitive alien is handled once in its control or custody.⁷ Before analyzing its legal dimensions, however, this Chapter will first review core immigration law terminology, analyze the comparative merits of reliance on immigration law versus extradition, and describe the general nature of operations in this arena.

---

⁴ See Heymann & Gershengorn, *supra* n.2, at 130 (noting that typically the circumstances consist of “a high-profile criminal or crime” and “a hostile government unlikely to provide extradition”).

⁵ When removing States arrange to deport a fugitive to a specific destination, the receiving State must concur and may even impose conditions. For example, when King Hussein agreed to let Mousa Mohammed Abu Marzook, the political leader of Hamas, into Jordan, he insisted that Marzook abide by Jordanian law “under a deal worked out with United States authorities.” “Militant Ejected by U.S. Meets with Jordan King,” *N.Y. Times*, May 14, 1997, at A11.


⁷ Minimum international legal standards would apply; this is discussed in Chapter 13 *infra*. 

---

EXTRADITION AND WORLD PUBLIC ORDER 132 (1974) [hereinafter BASSIOUNI, WORLD PUBLIC ORDER] (stressing the “length and formalism surrounding the extradition procedure as well as its exclusive dependence on decision making process of the state of refuge”).
a. **Immigration Law**

States possess an inherent sovereign right to control the admission of aliens\(^8\) (*i.e.*, non-nationals\(^9\)) into their territory;\(^10\) to extend visitor or residency privileges; and

\(^{8}\) *See* GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 201 (1978) (“The first and most general condition which is held to limit the power to expel is that its exercise should be confined to aliens. This limitation flows from the nature of the legal relationship which exists between the expelling State and the State of which the alien is a national.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).


to expel or remove them, as desired, subject to any limiting international legal obligations they may have undertaken. The main factors a State considers when


10 This rule applies even to returning, long-term resident aliens. Bassiouni, World Public Order, supra n.3, at 134 n.29 (citing by way of example Shaughnessy v. Mezei, 345 U.S. 206 (1953), in which a 25-year U.S. resident who had left the U.S. temporarily to visit his mother was permissibly excluded from returning, even without a hearing).

11 “Just as a State, in the exercise of its sovereignty, can admit, or deny entry to, an alien, the State can also expel or deport an alien. Such a right is essential for the protection of the State and for the maintenance of its public order, morality and public health.” Louis B. Sohn & Thomas Buergenthal (eds.), The Movement of Persons Across Borders, ASIL, STUds. in Transnat’l Leg. Pol’y, No. 23, at 89 (1992). E.g., Zambia Immigration and Deportation Act, 2010, No. 18 of 2010, § 17(1), available at http://www.embassyofireland.co.zm/uploads/documents/Lusaka%20EM/immigration%20and%20deportation%20act%202010.pdf (last visited on Jan. 23, 2012) (Minister of Home Affairs may direct that any illegal immigrant be deported from Zambia). Authority exists for the proposition that while States “possess[ ] the general right of expulsion,” such a practice must: (i) “only be resorted to in extreme instances,” (ii) “be accomplished in the manner least injurious to the person affected,” and (iii) entail an adequate justification for the expulsion “when occasion demands.” Boffolo Case (Italy v. Venez.), 10 RIAA 528, 537, Vol. X (1903), available at http://legal.un.org/riaa/cases/vol_x/528-538.pdf (last visited on Jan. 5, 2014). On this last point, see also Sir Robert Jennings & Sir Arthur Watts, Oppenheim’s International Law 943-44 (9th ed., 1992) (“While the failure of a state to advance any reason for the expulsion may not itself be a breach of any international legal obligation, the refusal to give reasons may lend support to a finding of arbitrariness in the expulsion.”) (citations omitted); Ggoodwin-Gill, supra n.8, at 231 (“Expulsion is a drastic measure which, by its very nature, presupposes substantial justification.”); id. at 233 (good faith requires justification or reasonable cause for State removal of alien). Because “many municipal systems provide that the authorities of a country may deport aliens without reasons having to be stated,” the customary international law on whether a State must provide a justifiable basis for an expulsion remains in conflict. Malcolm N. Shaw, Public International Law 826 (6th ed. 2008). Reference to applicable treaty law is therefore the most useful legal guidance available.

12 See Ggoodwin-Gill, supra n.8, at v (“While there can be no doubt that States do possess a broad competence in regard to foreign nationals generally . . . such competence is clearly limited and confined by established and emergent rules and standards of international law. On occasion it may be that such limitations operate only at the outermost edges of an apparently illimitable power, as is often the case where expulsion is ordered of an alien deemed to be a risk to national security.”); Bedi, supra n.3, at 400 (deportation and expulsion are inherent rights that cannot be challenged unless a State has limited its liberty through a treaty obligation); Chahal v U.K., Appl. No. 22411/93, ECHR Judgment, Nov. 15. 1996, ¶ 73, 23 EHRR 413 (1996), available at http://www.unhchr.ch/refworld/country,ECHR,IND_3ae6b69920.0.html (last visited on Nov. 2, 2013) [hereinafter Chahal Case] (“Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the [ECHR] to control the entry, residence and expulsion of aliens.”); e.g., Treaty Between Denmark, Finland, Iceland, Norway and Sweden on the Conveyance in Transit of Deported Persons, Dec. 3, 1965, 572 U.N.T.S. 105 (1966), available at http://treaties.un.org/doc/publication/UNTS/Volume%20572/v572.pdf (last visited on Nov. 1, 2013); Eur. Conv. on Establishment, Dec. 13, 1955, art. 3, E.T.S. No. 019, available at http://conventions.coe.int/Treaty/en/Treaties/Html/019.htm (last visited on Feb. 27, 2012) (mandating, inter alia, that “[e]xcept where imperative considerations of national security otherwise

393
deciding whether to deny an individual alien access, extend his visitor or residency status, or remove him from its territory include whether:

- he has been found to have entered the host State illegally across a border area without a checkpoint or otherwise;

- his passport was forged (possibly including the use of an alias), is out of date, or has been revoked by the issuing State;

---


14 This list is not intended to be exhaustive, as States frequently prohibit entry or authorize removal on a variety of other grounds. For example, Zimbabwe’s Immigration law, Immigration Act, Chapter 4:02, June 1, 1979, as amended, available at http://www.unhcr.org/refworld/country_NATLEGBOOZWE_3ae6b5b48_0.html (last visited on Feb. 16, 2012), denominates “prohibited persons” to include “any person who at the time of his entry into Zimbabwe is likely to become a public charge,” id., art. 14(1)(b); “any person is ‘deaf and dumb, or deaf and blind, or dumb and blind, or otherwise physically incapacitated,’” id., art. 14(1)(c)(ii); or “any person who is a prostitute or homosexual.” Id., art. 14(1)(f)(i).

15 In a rather dramatic case, Colton Harris-Moore, better known as the “Barefoot Bandit,” was deported to the U.S. after pleading guilty to crash-landing a stolen aircraft in Bahamian territorial waters. Bruce Zagaris, Bahamas Deports Barefoot Bandit After He Pleads Guilty, 26 IELR 351 (2010).

16 E.g., U.S. Dep’t of Justice, U.S. Attorney’s Manual, § 9-15.640 (2d ed. 2007-3 Supp.) (“The Department of State may revoke the passport of a person who is the subject of an outstanding
• his visa or residency permit has been falsified, he has overstayed the allowable period under the visa or permit,\textsuperscript{17} or has failed to meet any other specified conditions under the visa or permit (assuming the illegal alien has not been granted \textit{ex post} amnesty\textsuperscript{18});

• his citizenship application has been forged or contains material omissions or misrepresentations;\textsuperscript{19}

• prior to admission, he was convicted of a crime of moral turpitude\textsuperscript{20} or INTERPOL has issued an international warrant for his arrest (a “Red Notice”);

• once admitted, he commits certain kinds of crimes, poses a national security threat, engages in subversive activities, or his continued presence otherwise is deemed harmful or undesirable;\textsuperscript{21} or

\[\text{Federal warrant. Revocation of the passport can result in loss of the fugitive's lawful residence status, which may lead to his or her deportation.}^{	ext{}}\]

\textsuperscript{17} For example, in January 2008, the U.S. Immigration and Customs Enforcement (ICE) agency announced the removal of Carlos Alberto Fernandez-Mena, a Costa Rican citizen and former police officer, who had entered the U.S. as a visitor in February 2004 and illegally remained in the country; he was arrested based on an international arrest warrant on murder charges issued in October 2007. Bruce Zagaris, \textit{U.S. Surrenders to Costa Rica a Former Police Officer Wanted for Murder}, 24 IELR 134, 134-35 (2008).


\textsuperscript{19} This is an all too common occurrence with fugitives, who are keen on their visa applications to conceal their true identity and/or their previous commission or conviction of a crime.

\textsuperscript{20} \textit{See, e.g.}, 8 U.S.C. § 1182(a)(2)(A)(i) (2012) (inadmissible in U.S. if convicted of crime of moral turpitude). This provision has been extended a number of times with respect to specific types of individuals to authorize their inadmissibility or removal, including: (i) 8 U.S.C. § 1182(a)(3)(E)(i) (2012) (related to individuals who participated in Nazi persecution via the so-called Holtzman amendment of 1978); (ii) 8 U.S.C. § 1182(a)(3)(E)(ii) (2012) (related to aliens who had engaged in genocidal conduct); (iii) 8 U.S.C. § 1227(a) (related to those who committed, ordered, incited, arrested, or otherwise participated in the commission of torture or extrajudicial killing abroad under the color of law); and (iv) 8 U.S.C. § 1182(a) (2012) (related to foreign government officials who committed particularly severe violations of religious freedom).

\textsuperscript{21} \textit{See} Bedi, \textit{supra} n.3, at 399; Cohen, \textit{supra} n.8, at 103; \textit{e.g.}, 8 U.S.C. § 1227(a)(2) (2005); Bugajewitz v. Adams, 228 U.S. 585 (1913).
• he has just completed a domestic prison sentence.\textsuperscript{22}

The two\textsuperscript{23} primary types of immigration actions relied on by States to manage illegal or unwanted aliens are exclusions and deportations. An “exclusion” can be defined as the ejection of an alien by a State on account of security or other significant concerns when he is seeking admission or asylum at a border or other port of entry.\textsuperscript{24}

\textsuperscript{22} See, e.g., Zambia Immigration and Deportation Act, supra n.11, § 39 (deportation occurs, \textit{inter alia}, “at expiration of the [prison] sentence”). It is also possible that extradition can follow a prison term, for example, as occurred in the case of Gen. Manuel Noriega when, after completing his prison term in the U.S., he was extradited to France to face retrial based on an \textit{in absentia} conviction for money-laundering charges in 1999. Haroon Siddique, “U.S. Judge Approves Noriega Extradition,” \textit{The Guardian} (U.K.), Aug. 28, 2007, \textit{available} at \url{http://www.guardian.co.uk/world/2007/aug/28/france.usa/print} (last visited on Feb. 15, 2012).

\textsuperscript{23} A third immigration law method, known as “reconduction à la frontière” (or “droit de renvoi”), also exists under some national laws. “The practice of some states may also be distinguished, whereby destitute aliens, foreign vagabonds, suspicious aliens without identity papers, alien criminals who have served their punishment, and the like, are, without any formalities, arrested by the police and reconducted to the frontier. But although such reconduction is materially no different from expulsion, it nevertheless differs much from it in form, since expulsion is an order to leave the country, whereas reconduction is forcible conveying away of foreigners.” Jennings \& Watts, supra n.11, at 940 n.1. In addition, States may deny or withdraw a residency permit from an alien, in an act sometimes known as “refus de séjour,” as a precursor step to deportation, but because the act itself does not remove an individual from the host State, and because in many instances those aliens are afforded an opportunity to voluntarily depart from the State within a reasonable time period, such a mechanism is of little applicability to this inquiry. See Goodwin-Gill, supra n.8, at 253-254 (1978) (“Both the French and German systems employ the ‘refus de séjour’ as an intermediate stage between lawful residence and expulsion. The alien whose residence permit is refused or withdrawn comes under a duty to leave with due dispatch, although he is not at that time generally subject to police measures”). In addition, a State also can opt to punish directly an individual for violating its immigration laws. For example, Botswana convicted John K. Modise, a founder in 1978 of the Botswana National Front opposition party, and sentenced him to 10-months’ imprisonment for unlawful entry and being a prohibited immigrant, notwithstanding the fact that his father was a Botswanan citizen. John K. Modise v. Botswana, Comm’n No. 97/93, ¶ 4, African Comm’n on Human and Peoples’ Rights, 10\textsuperscript{th} Annual Activity Report 1996-97, Annex X, \textit{available} at \url{http://www1.umn.edu/humanrts/africa/comcases/97-93c.html} (last visited on Nov. 2, 2013) [hereinafter \textit{Modise Case}].

\textsuperscript{24} See Alona E. Evans, \textit{Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice}, 40 B.Y.B.I.L. 77, 77 n.1 (1964) (defining exclusion “in the sense of barring an alien from admission into the country”); Bedi, supra n.3, at 399 (noting non-access at border that also has no effect on an individual’s liberty to travel elsewhere); Cohen, supra n.8, at 103 (citing reasons for exclusion as including intentional misrepresentation of material facts, convictions of a crime of moral turpitude, and membership in a totalitarian party). For example, in October 1998, when Turkish national and Kurdish separatist leader Abdullah Öcalan was expelled from Syria where he had been living for many years, he tried to win admission to Greece, but was rebuffed at the border and within two hours was asked to leave and his application for political asylum was denied. Öcalan v. Turkey (Merits), Appl. No. 46221/99, Mar. 12, 2003, ¶ 4, ECtHR Judgment, 37 EHRR 10 (2003), \textit{available} at \url{http://www.echr.coe.int}.
It is sometimes hard to distinguish whether an individual has entered a State’s territory as a legal versus a factual matter;\(^{25}\) in such cases domestic immigration law tends to be determinative.\(^{26}\) Similar to, yet distinct from, exclusion, “deportation” can be defined as the expulsion by a State from its sovereign territory of an alien, even if only having been temporarily admitted, on the ground that he violated its immigration laws upon entering the territory, is otherwise illegally within the territory, or while present has proven to be a public menace or security threat.\(^{27}\)

Both exclusions and deportations\(^{28}\) can be labeled more broadly a form of “expulsion”\(^{29}\) or “removal.”\(^{30}\) As a matter of nomenclature in the present discourse, [hypertext link](http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200307/ocalan%20-%2046221jv.chb%2011032003e.doc) (last visited on Oct. 10, 2013).

\(^{25}\) See Brandon S. Chabner, Comment, The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law against Terrorist Violence Overseas, 37 UCLA L. REV. 985, 1011 n.123 (1990) (distinction between exclusion and deportation can be difficult to draw where the person has crossed a border but has not yet reported to a border station); Expulsion of Aliens, supra n.9, at 65 (“There are two categories of aliens who may be in such a position: (1) passengers who arrive by airplane or ship at an international transportation facility located in the territory of the State (other than transit passengers) and are denied admission; or (2) aliens who have crossed the border and entered the State without complying with the requirements for admission under its national immigration law.”).

\(^{26}\) Expulsion of Aliens, supra n.9, at 47.

\(^{27}\) See Bedi, supra n.3, at 399; Shearer, supra n.8, at 76; Clive Nicholls, et al., The Law of Extradition and Mutual Assistance 3 (2d ed. 2007). Deportation in this context when handling aliens is to be distinguished from deportation in the domestic resettling context or in the international criminal law context when used in reference to “the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” Robert Cryer, et al., An Introduction to International Criminal Law and Procedure 249 (2d ed. 2010) (citing to ICTY Statute, art. 7(2)(d) as a type of crime against humanity). Deportation and expulsion are often treated as synonyms. E.g., Mexico, Ley General de Poblacion [LGP], DOF, Jan. 7, 1974, as amended, art. 125 (“Expulsion” is the term used for deportation under Mexican law).


\(^{29}\) See Goodwin-Gill, supra n.8, at 201 (“The word ‘expulsion’ is commonly used to describe that exercise of State power which secures the removal, either ‘voluntarily’, under threat of forcible removal, or forcibly, of an alien from the territory of a State.”); Shearer, supra n.8, at 76 (“‘Deportation’ is not a term of art and is used synonymously with ‘expulsion’; it is the compulsory ejection of an alien from the territory of the deporting State, normally accompanied by threats of exclusion should the alien attempt re-entry.”) (citation omitted); M.G. Cowling, Unmasking ‘Disguised’ Extradition—Some Glimmer of Hope, 109 S. Afr. L. J. 241, 243 n.150 (1992) (“Although some writers
States that expel or remove an alien under their immigration laws are called “removing States,” while those accepting such aliens are called “receiving States.” Exclusions and deportations share several common traits. First, in both cases the ultimate determination and factual consequence is the same: an alien is not welcome in the State. Second, the State’s chief concern in both instances is to ensure the alien departs from the sovereign territory or entry point. Third, in neither case do these immigration actions punish an alien for any unlawful or undesirable conduct, wherever it may have occurred.

have attempted to distinguish between expulsion and deportation on the basis that the latter entails stipulating the final destination in the form of the state of which the deportee is a national, in my view this distinction is not recognized in international law. Hence the terms ‘expulsion’ and ‘deportation’ of aliens are interchangeable.”). But see Karl Doehring, Aliens, Expulsion and Deportation, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 109, 111 (Rudolf Bernhardt ed. 1992) (“[E]xpulsion means the prohibition to remain inside the territory of the ordering State; deportation is the factual execution of the expulsion order.”); Bensayah, supra n.8, ¶ 112 (noting that the applicability of the terms “expelled” and “expulsion” as used in the ECHR are “not limited to cases in which the applicant is the subject of ‘expulsion’ in accordance with domestic legal terminology” but that it “applies also in cases in which a person is deported, removed from the territory in pursuance of a refusal of entry order [exclusion] or handed over to officials of a foreign power.”). Cf. Expulsion of Aliens, supra n.9, at 50-52 (although a flagged vessel is generally treated as “floating territory” of the flagged State, the mandated departure of an alien from a foreign-flagged ship to a host State ship in its territorial waters most likely would not technically qualify as an “expulsion,” and accordingly would not be governed by international law related to the expulsion of aliens but rather by international maritime law).


31 See Nicholson, supra n.27, at 4 (the purpose of deportation is achieved when an alien leaves the State’s territory; unlike extradition, the destination of the deportee is irrelevant to the purpose of deportation); Shearer, supra n.8, at 90 (“The law of deportation exists to compel an alien, who, by law of the deporting State alone, is unacceptable as an immigrant, to quit its territory. The national interest is served so long as he is removed and does not attempt unlawful re-entry,” in contrast to the purpose of the law of extradition, which “exists to restore a fugitive criminal to a jurisdiction competent to try and punish him.”); Silvia Borelli, The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 338 n.27 (Andrea Bianchi ed. 2004).

32 See Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982) (“Deportation . . . is not a punishment; it is simply a refusal by the government to harbor persons whom it does not wish to harbor.”)(citing Bugajewicz, 228 U.S. at 591). Significantly, because removal operations do not constitute a form of punishment, a government may apply removal statutes retroactively. Id. (citing Marcellino v. Bonds, 349 U.S. 302, 314 (1955) (interpreting significance of the ex post facto clause under the U.S. Constitution).
But key differences between exclusions and deportations exist as well: (i) in exclusions the alien is at the gateway to State territory while with deportations he is already within the territory;\(^{33}\) (ii) exclusion decisions are based on conduct that occurred in other States whereas with deportations it is frequently about the alien’s behavior within the host State’s territory; (iii) unlike exclusions, which deprive aliens of a \textit{prospective} benefit, deportations deprive aliens of an \textit{existing} one, thereby constituting a form of direct negative response to some unlawful or undesirable conduct by the alien;\(^{34}\) (iv) under International Humanitarian Law (IHL), deportations alone are expressly proscribed with respect to militarily occupied territory;\(^{35}\) and (v) aliens may be accorded certain key procedural and substantive protections in a deportation hearing that they do not receive in an exclusion hearing.\(^{36}\)

Deportations, which are far more applicable to the present inquiry, can be classified into one of three types: formal, informal, and voluntary. A “formal deportation” is \textit{involuntary and undertaken through officially established channels while complying with the applicable conditions and requirements of a removing State’s laws}.\(^{37}\) (A State

\(^{33}\) Shearer, supra n.8, at 76; Chabner, supra n.25, at 1011.

\(^{34}\) Cohen, supra n.8, at 103. A deportation, by contrast with an exclusion, could effectively divest the (even non-naturalized) alien of certain acquired rights earned on account of his residence in the host State. \textit{Expulsion of Foreign National (Germany) Case, reprinted in} 32 ILR 255 (1961).


\(^{36}\) For example, under U.S. law, in deportation hearings, an alien is entitled to seven days’ notice of the charges against him; not so with exclusion hearings; and in a deportation, if the INS prevails, the alien may appeal to a U.S. court of appeals whereas an alien can challenge an order of exclusion only via a petition for a writ of habeas corpus. \textit{Landon}, 459 U.S. at 26. In addition, at exclusion hearings alone the alien may bear the burden of establishing his admissibility. John F. Murphy, \textit{Punishing International Terrorists: The Legal Framework for Policy Initiatives} 85 (1985) (citing to U.S. law). Under U.S. immigration law, “whether or not the alien is a permanent resident, admissibility shall be determined in an exclusion hearing” rather than in a deportation hearing. \textit{Landon v. Plasencia}, 459 U.S. 21, 28 (1982) (referencing 8 U.S.C. § 1225(a) (2012)).

legislature conceivably could even seek to amend its immigration laws specifically to accommodate a particular deportation.38) An “informal deportation” is also involuntary, undertaken through casual arrangements, and typically handled on an expedited basis.39 A “voluntary deportation” occurs when an alien freely consents to be deported to his home or a third State prior to a deportation determination by the host State.40 An alien may volunteer for any number of reasons, including a wish to avoid protracted removal hearings for which he is unlikely to prevail, a desire to be reunited without undue delay with his family, and/or avoidance of any punishment that may arise for any liability found under the removing State’s laws.41

The destination of a removed alien is determined by municipal law, which varies considerably:

(last visited on Jan. 24, 2012) (after stripping him of his citizenship in 1979, based on finding in a civil lawsuit that he had obtained U.S. citizenship by omitting reference to his position as a concentration camp guard, the U.S. government deported him to the Soviet Union in December 1984 after lengthy proceedings). Notably, three years after he was deported, Russia executed him. Felicity Barringer, “Soviet Reports It Executed Nazi Guard U.S. Extradited,” N.Y. Times, July 28, 1987, at A3. 38 See, e.g., R. Stuart Phillips, The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposal for Its Future, 15 Dickinson J. Int’l L. 337, 345 (1997) (citing to case of former pro-Nazi Croatian government minister Andrija Artuković, whose extradition to Yugoslavia was denied by a U.S. court out of concern over potential political persecution, the U.S. Congress amended its immigration laws in 1978 to allow for his deportation to stand trial for his complicity in executing some 200,000 Serbian prisoners). 39 See Michael Abbell, EXTRADITION TO AND FROM THE UNITED STATES 7-17 (2001 & Supp. 2007) (noting the absence of resort to formal procedures, the frequent use in narcotics cases, and the likelihood of occurring where a “close working relationship” exists between law enforcement officers of the two States involved). For example, in May 1979, Thai immigration authorities informally deported Steven Paul Valot to the U.S. by bringing him to the transit lounge of Bangkok’s International Airport, handed him over to U.S. DEA officials who took him on board a flight to Hawaii, where he was wanted for falsifying statements in his passport application. United States v. Valot, 625 F.2d 308 (9th Cir. 1980). 40 See U.S. Department of State, Foreign Affairs Manual, Vol. 7 – Consular Affairs, Other Extradition Matters, 7 FAM 1643.b., updated Feb. 18, 2011, available at http://www.state.gov/documents/organization/86816.pdf (last visited on Jan. 27, 2012) (“In most cases, the person whose deportation is sought has the choice of voluntarily departing the United States (presumably for a country other than the one in which the person is charged with or convicted of a crime) before the adjudication of deportability.”). 41 See Cowling, supra n.29, at 243 (“the alien [may] consent[ ] so as to avoid punishment by the host state following a criminal conviction there.”); R. v. Ayu [1958] 3 All E.R. 636. For the rules governing voluntary departures during a time of international armed conflict, see GC IV, supra n.35, art. 35 (“All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State.”).
National legislation may allow the alien to choose the State of destination, but may require that the latter be willing to grant the alien entry, or that the selection be limited to those States where the alien’s entry would be legal. A State may grant this choice as the primary option, an alternative primary option, or an alternative secondary option for selecting the State of destination. A State may place conditions on the choice of a contiguous or adjacent State, or select a State of destination if the alien’s choice is not made promptly or would prejudice the expelling State’s interests.\footnote{Expulsion of Aliens, supra n.9, at 314 (citations omitted).}

In principle, removing States should have little or no interest in the alien’s destination; the overriding purpose of removal, after all, is merely to keep unwanted or dangerous individuals outside of its territory.\footnote{See supra n.31. But see 4 DIGEST OF INTERNATIONAL LAW 30 (Green H. Hackworth ed. 1942) (while fully acknowledging this purposive distinction, the then-U.S. State Department Legal Adviser Green Hackworth acknowledged that “requests are sometimes made by governments for the deportation by other governments of fugitives from justice, and occasionally steps are taken – especially in the absence of an extradition treaty – to deport such persons.”).} By and large, State statutes tend to assign default priority to the alien’s home State or the State from which he last embarked for the host State,\footnote{Shearer, supra n.8, at 77-78; 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, 7 (1988). The destination need not be a State with a shared land border. See, e.g., Wallace v. State of the Netherlands, Hoge Raad (Sup. Ct.), Sept. 13, 1963, reprinted in Neth. Int’l L. Rev. Vol. XI (1964) 303, 304 [hereinafter Wallace Case] (under Article 9 of the Netherlands’ Aliens’ Act, which requires that expelled aliens be brought “across the frontiers,” “[i]t does not follow from this direction that the administration is forbidden to bring an alien who cannot legally enter a country having common frontiers with the Netherlands, to another country which he may legally enter, even if the territory of the latter country is separated from the Netherlands by extraterritorial spaces [such as the United States].”).} and international law obligates the State of his nationality to avail itself as a receiving State.\footnote{Shaw, supra n.11, at 827.} As noted above, the alien’s preference is generally honored\footnote{See Doehring, supra n.29, at 111 (“A duty of the expelling State to give the individual the possibility of choosing a receiving country is not recognized although this opportunity may be, and often is, granted.”); HRC, Gen. Cmt. No. 15, Apr. 11, 1986, ¶ 9, The Position of Aliens Under the Covenant, available at http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument (last visited on Nov. 6, 2013) (“Normally an alien who is expelled must be allowed to leave for any country that agrees to take him”); Christopher H. Pyle, EXTRADITION, POLITICS, AND HUMAN RIGHTS 208 (2001) (“Under U.S. law, aliens who have entered the country illegally have traditionally been able to choose
receive the alien,\textsuperscript{47} 	extit{refoulement} would not be at issue, and doing so would not be antithetical to the removing State’s national interests.\textsuperscript{48} However, candidate States may refuse receipt for the same concerns that prompt host States to call for removal in the first instance.\textsuperscript{49} and, indeed, it is possible that a removing State will not necessarily insist on the consent of a receiving State in every case.\textsuperscript{50} In any event, a removing State retains the ultimate discretion to choose the country destination.\textsuperscript{51} Once the destination is finalized, the alien is moved usually via commercial airline or chartered aircraft (for longer distances), via ground transportation (when crossing borders or for shorter distances),\textsuperscript{52} or via ship (if traveling across smaller bodies of water or if otherwise the most convenient means of passage).

\textsuperscript{47} Moeller, \textit{supra} n.8, at 814.

\textsuperscript{48} \textit{ABBELL, supra} n.39, at 4-130. The U.S. Attorney General is authorized to foreclose “deportation to such [alien-preferred] country [if it] would be prejudicial to the interests of the United States” (8 U.S.C. § 1253(a) (2012)) or would run afoul of the non-\textit{refoulement} provisions found at 8 U.S.C. § 1253(h) (2012). Examples of national interests scuttling an alien’s choice of destination upon deportation include such as high-profile cases as: (i) \textit{Regina v. Governor of Brixton Prison, ex parte Soblen} [1963] 2 Q.B. 243, 3 W.L.R. 1154, 3 All E.R. 641 (Q.B. Div. Ct. 1962) [hereinafter \textit{Soblen Case}] (the U.K. rejected Soblen’s desire to be deported to Czechoslovakia, a State willing to take him, because Czechoslovakia was then a Soviet satellite country and Soblen had been convicted and sentenced to life imprisonment in the U.S. as a Soviet spy in 1960 at the height of the Cold War); and (ii) \textit{Doherty v. INS}, 908 F.2d 1108 (2d Cir. 1990) (affirming the U.S. Attorney General’s rejection of Doherty’s designation of the Republic of Ireland as State to which he would be deported, and which was willing to receive him and where he would face a 10-year prison sentence, and ordered him deported to Northern Ireland where he would face a life sentence), \textit{rev’d sub. nom on other grounds, INS v. Doherty}, 502 U.S. 314 (1992).

\textsuperscript{49} See \textit{Shearer, supra} n.8, at 77 (citing by way of example \textit{In re Guerreiro}, Sup. Ct., Arg., Nov. 27, 1951, \textit{reprinted in} 18 ILR 315 (1951)).

\textsuperscript{50} \textit{E.g., Jama v. ICE}, 543 U.S. 335 (2005) (approving decision by U.S. immigration authorities to remove Keyse Jama, a Somali national, to his country of birth, even though Somalia then had no capacity, as a failed State, to consent to receive him; such consent is required only when an alien is to be removed to a country other than the one of his choice, one in which he is a citizen, or one in which he has a lesser connection).

\textsuperscript{51} See, \textit{e.g.}, \textit{Muller v. Superintendent, Presidency Jail, Calcutta & Others}, Sup. Ct., India, Feb. 23, 1955, [1955] A.I.R. S.C. 367, [1955] SCR (1) 1284, \textit{reprinted in} 22 ILR 497, 499 (1958), \textit{available at http://208.79.211.6/doc/1005538/} (last visited on Feb. 21, 2012) [hereinafter \textit{Muller Case}] (“In the case of expulsion . . . if a person is prepared to leave voluntarily he can ordinarily go as and when he pleases. But he has no right in that regard. Under Indian law, the matter is left to the unfettered discretion of the Union Government and that Government can prescribe the route and the port or place of departure and can place him on a particular ship or plane”) (emphasis in original).

\textsuperscript{52} See Bruce Zagaris, \textit{U.S. Congress Holds Hearings on Deportees in Latin America and the Caribbean, 23 IELR} 392 (2007) (citing the head of the Deportation and Removal Office (DRO), part of the Department of Homeland Security’s (DHS’s) Bureau of Immigration and Customs Enforcement (ICE)).
b. **Removal v. Extradition**

What are the similarities and differences between removals and extraditions\(^{53}\) and what are their respective advantages and disadvantages as vehicles?

**Similarities.** The most conspicuous similarity between removals and extraditions is that, once implemented, the subject individual is no longer present within host State territory; he has been transferred out. In addition, removals and extraditions are alike in the sense that both require some form of inter-State cooperation. Furthermore, as in the case of extradition, the international, regional, and domestic law governing removals provides certain basic human rights protections to the subject individual (discussed *infra*).

**Differences.** Notwithstanding the above, a number of key differences exist between removals and extraditions.

- With removals the State’s executive branch (in the guise of its immigration authorities) is generally the sole decision-maker\(^{54}\) while with extraditions it can be and often is a mix between the executive branch (foreign affairs ministry

---


\(^{54}\) David Freestone, *International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction, in Terrorism and International Law* 47 (Rosalyn Higgins & Maurice Flory eds. 1997). In the U.S., the executive branch immigration law authorities include administrative law judges who hold hearings on admissibility, but they are not part of the federal judiciary, and have broad discretion when admitting and evaluating evidence, as they do not follow the Federal Rules of Evidence (FRE). See *Rules of Practice for Administrative Law Judge Proceedings*, 20 C.F.R. 655.425, available at [http://www.law.cornell.edu/cfr/text/20/655.425](http://www.law.cornell.edu/cfr/text/20/655.425) (last visited on Oct. 10, 2013). But see *Shearer*, * supra* n.8, at 83 (discussing German immigration law in which deportation remains entirely within the province of the Executive, except when a violation of constitutional rights is alleged, in which case the matter falls within the jurisdiction of the Federal Constitutional Court).
and/or justice ministry) and the judiciary that determines the outcome.55

- In the case of removals, the non-host (receiving) State is typically a passive participant, whereas with extraditions, the non-host (pursuing) State is an active and initiating participant.56

- Removals generally deport or exclude only aliens while extraditions, unless a specific domestic legal prohibition applies, may involve host State nationals.57

- Removals are often the product of criminal or other undesirable conduct that occurs within host State territory, and so its main objective is to deport or exclude individuals primarily to safeguard a State’s own citizens where, by contrast, extraditions are driven by actual or alleged unlawful conduct abroad, and so its primary function is to transfer the individual for a law enforcement purpose.58

- In the case of removals, the individual conceivably may leave the host State as a free person (especially in the case of voluntary departures or exclusions) whereas with extraditions he necessarily departs in the physical custody of government officials.59

---

55 See supra pages 157-58 (Chapter 4) (discussing extradition decision-making)
57 See n.10 in Chapter 6 supra; e.g., Linnas v. I.N.S., 790 F.2d 1024, 1031 (2d Cir. 1986).
58 Doehring, supra n.29, at 110; Moeller, supra n.8, at 814; BEDI, supra n.3, at 399-400.
59 See Muller Case, supra n.51, [1955] SCR (1) at 1300-01 (although an alien subject to a deportation order “may be conducted to the frontier under detention he must be permitted to leave a free man and cannot be handed over under arrest. In a case of extradition, he does not leave a free man. He remains under arrest throughout and is merely handed over by one set of police to the next.”); SHEARER, supra n.8, at 87-88; Evans, supra n.24, at 94. As a practical matter, however, this distinction can be nullified, for example, by merely placing the removed alien on a flagged ship or plane of the State with a law enforcement interest in him, thereby allowing that State’s officials to promptly effect his arrest, or, alternatively, bringing him in custody to an international border crossing and then once
• Extraditees generally are entitled to certain “formalities,” including access to counsel and the right to challenge an extradition order, compared with those ordered for removal where such rights often are subject to strict limitations.\(^\text{60}\)

• Most extradition treaties contain a re-extradition provision restricting an individual’s transfer to a third State without the prior approval of the original host State; no such provision attends removal orders.\(^\text{61}\)

**Comparative Advantages of Extradition.** Assuming a particular alien is a candidate for either removal or extradition by a host State,\(^\text{62}\) in rendering a decision between them, the factors weighing in favor of extradition from the *host State’s perspective* could include: (i) assisting the international community in suppressing crime; (ii) winning the appreciation of, and potential reciprocity from, a particular pursuing State in bringing a fugitive to justice; and (iii) avoiding the need to first...
denaturalize a national where its laws otherwise prohibit the removal of nationals.63 Other extradition advantages that inure directly to the individual’s benefit, but which may nevertheless influence the decisions of some host States, include the fact that extradition generally affords individuals judicial review in addition to executive branch discretion;64 and an individual likely would receive such standard protections as the specialty rule,65 the prohibition against double jeopardy,66 and application of the political offense exclusion.67

Comparative Advantages of Removal. A host State conversely may prefer a removal operation to extradition for one of the following reasons. First, extradition may simply be unavailable as an option, say, because of a lack of an extraditable offense68 or the prospect of human rights abuse in the pursuing State,69 and yet the host State is not comfortable allowing the alien to remain within its territory. Second, even if extradition were legally possible, removal might be favored because the host State has a political conflict or diplomatic issue with the pursuing State and so would rather exercise the deportation option. Third, removal is widely viewed

63 See supra n.8; ABBELL, supra n.39, at 4-130 n.1 (discussing U.S. law).
64 Freestone, supra n.54, at 47.
65 ABBELL, supra n.39, at 7-17 (deportees receive no protection under the specialty rule unless a separate promise was negotiated); SHEARER, supra n.8, at 88; Paul O’Higgins, Disguised Extradition: The Soblen Case, 27 MOD. L. REV. 521, 525 (1964) (deportation lacks judicial hearings of extradition and smacks of a Star Chamber) (quoting H.G. Reuschlein, Provisional Arrest and Detention in International Extradition: A Survey of Practice and Procedure, GEO. L.J. 37, 77-78 (1934)).
66 See ABBELL, supra n.39, at 7-19 (no protection against double jeopardy once deported, based on conviction in removing State, including under ICCPR, supra n.8, art. 14(7), citing to United States v. Duarte-Acero).
67 See SHEARER, supra n.8, at 88 & 89 n.1 (citing the Greville Wynne case in which Hungary deported a British subject to the Soviet Union to face political charges).
68 E.g., Bruce Zagaris, Iceland Grants Bobby Fischer Citizenship and Japan Deports Him to Iceland, 21 IELR 186, 186-88 (2005) (discussing how after the U.S. government was unable to have former world chess champion Bobby Fischer extradited from Japan because Japan did not recognize a violation of economic sanctions as an extraditable offense, the U.S. attempted to have him deported on the ground that he was traveling on false documents).
69 See Foreign Affairs Manual, supra n.40, 7 FAM 1642.1 (“Formal extradition of a fugitive is not always feasible. The crime may not be an extraditable one, or the United States may not have a treaty at all with the country where the fugitive is located. In such situations, the United States may seek the person’s return by way of deportation or expulsion, particularly if the fugitive is a U.S. citizen.”).
as, and in fact often constitutes, the more expeditious and cheaper alternative compared with extradition.\footnote{See Shearer, supra n.8, at 86 (States generally “choose deportation as the more convenient and practical choice”); Isidoro Zanotti, Extradi\tion in Multilateral Treaties and Conventions xi (2006) (noting the speed of deportation compared with “cumbersome extradition procedures”); Geoff Gilbert, Responding to International Crime 12-13 (2006) (quoting Alona E. Evans, panel moderator, “International Procedures for the Apprehension and Rendition of Fugitive Offenders,” Apr. 18, 1980, 74 ASIL Proc. 274, 276 (1980) (in a study of 231 instances of rendition of persons charged with international terrorist offenses, only six of 87 extradition requests were granted while 144 terrorists were expelled by 28 States). But see Simona Agnolucci, Deportation of Human Rights Abusers: Toward Achieving Accountability, Not Fostering Impunity, 30 Hastings Int’l & Comp. L. Rev. 347, 364 (2007) (the removal process itself can often be onerous and time-consuming, cases sometimes taking 6-7 years of litigation once the individual has been apprehended and individuals may pursue repeated appeals to avoid deportation).}

c. Application

Having viewed removal from the standpoint of the host State, we now turn the analysis on its head and consider how removal would look from the perspective of the pursuing State, and more specifically how it might proactively proceed to seek removal as a full-scale alternative to extradition. This approach, however, offers no guarantee of success, given that a host State might elect not to deport for any number of reasons and, of course, deportation presumes that the fugitive at issue were an alien or a denaturalized citizen, rather than a national. Before assessing its operational facets, this section first briefly considers why a pursuing State would find removal an appealing option for securing the custody of a fugitive.

i. Why Removal Option Is Appealing

When no applicable extradition treaty exists and the host State’s law prohibits extradition absent such a treaty,\footnote{See Evans, supra n.24, at 93 (“Exclusion or expulsion of the alien offender from the United States has been used pending the conclusion of an extradition treaty with the requesting State”).} or when extradition has been denied\footnote{As an example, once U.S. federal courts determined after eight years that Joseph Doherty, an IRA guerrilla who had been convicted in Northern Ireland for the murder of a British soldier, could not be extradited on account that his offense was determined to be “political,” he was deported to Northern Ireland, so he ended up in British custody in any event. James Barron, “I.R.A. Fugitive Sent to Belfast from U.S. Jail,” N.Y. Times, Feb. 20, 1992, at A1. Notably, the British authorities refused to grant him “credit” for time served in U.S. prisons. “Stiff Term for IRA Man,” Wash. Post, Aug. 4, 1992, at A6.} or is regarded as a highly unlikely prospect, a pursuing State may choose to seek removal
of the fugitive alien from the host State as a contingency option.\textsuperscript{73} It is also possible that, while extradition is technically available, a pursuing State may find it to be undesirable (or at least relatively less desirable) than removal for reasons even beyond evidentiary factors,\textsuperscript{74} and in such cases, \textit{extradition} might be pursued as a second-best option.\textsuperscript{75}

In some instances, a State simply may be politically or pragmatically unwilling to wait for expected lengthy extradition proceedings to play out and want to bring a fugitive to justice without undue delay. Removal proceedings, while some can take years to complete,\textsuperscript{76} generally are shorter and quicker than those for extraditions.\textsuperscript{77} Relatedly, the longer extradition proceedings persist, the greater is the opportunity for a wealthy and/or well-connected fugitive (who has been denied bail) to bribe his way out of prison. This concern was evident, for instance, in April 1985, when

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{73}] For example, although the U.S. and Cuba do not have an extradition treaty, Cuba has demonstrated a willingness to cooperate with the U.S. through removal operations regarding specific violations where the two States share an interest in law enforcement. See Bruce Zagaris, \textit{Cuba Deports American Fugitive Wanted for Sexual Crimes against a Minor}, 24 IELR 315, 315 (2008) (Cuba, citing the grave character of the crimes at issue, arrested and deported Leonard Auerbach, a mortgage specialist from California, to the U.S., which had charged him with “sexually abusing a Costa Rican girl and possessing child pornography”).
\item[\textsuperscript{74}] As characterized by Professor Bassionin, there exists an opportunity for “law enforcement and prosecutorial officials to exploit the gap between [extradition and removal as processes] and the differences between their norms and evidentiary standards.” M. Cherif Bassionin, \textit{International Extradition: United States Law and Practice} 216 (6th ed. 2014). For example, when the U.S. sought custody of several Algerian-origin Bosnian citizens believed to have participated in the World Trade Center attack of September 11, 2001, it opted against extradition in favor of requesting that the Bosnian government deport them, following stripping them of their citizenship. Ian Fisher, “Qaeda Suspect’s Bosnian Wife Says He’s No Terrorist,” \textit{N.Y. Times}, Jan. 28, 2002, at A3.
\item[\textsuperscript{75}] For instance, in February 2002, appreciating the difficulty of obtaining extradition from the Namibian government, notorious for bribery, corruption, and denials, of German citizen Hans Juergen Koch, wanted for fraud, tax evasion, and falsifying documents in connection with his business activities in Germany between 1987 and 2000, Germany initially sought his deportation. See Bruce Zagaris, \textit{German Fraud Suspect Fights Extradition from Namibia}, 21 IELR 9 (2005) (when deportation was denied because, as a Namibian permanent resident, he could not be deported unless evidence existed that he had violated Namibian immigration laws, which he had not; extradition was pursued).
\item[\textsuperscript{77}] See supra n.70.
\end{itemize}
\end{footnotesize}
notwithstanding the existence of an extradition treaty between Costa Rica and Mexico, the U.S. DEA urged Costa Rica to deport to Mexico Rafael Caro-Quintero, a Guadalajara-based drug lord wanted in Mexico for the kidnapping and murder of a U.S. DEA agent, ostensibly because it was feared he could buy his way out of jail, as he had done once before.\footnote{Abraham Abramovsky, \textit{Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok}, 31 Va. J. Int'l L. 151, 161-62 (1991).}

\textbf{ii. How Removal Operates}

Removal operations manifest in one of three ways: direct, indirect, or via some kind of negotiated arrangement. The \textit{direct} route is by far the most common and consists of a pursuing State requesting or expressing interest in the removal to its territory of an alien, most typically in cases where the alien is a pursuing State national, and generally via diplomatic channels.\footnote{See, e.g., U.S. Attorney’s Manual, supra n.16, § 9-15.610 (“If the fugitive is not a national or lawful resident of the country in which he or she is located, the [DOJ] Office of International Affairs (OIA), through the Department of State or other channels, may ask that country to deport or expel the fugitive.”).} That option may be preceded by the revocation of the fugitive’s passport\footnote{See supra pages 351-52 (Chapter 9).} and notification of such to the host State, as most States treat the absence of a valid travel document as a violation of their immigration laws and grounds to remove aliens from their territory.

For example, in or about October 2000, Romania removed to the U.S., at the latter’s request, American citizen Michael Harvey who had fled in 1999 after being charged with multiple counts of sexual offenses with minors in three California counties.\footnote{Garvey v. U.S. Dept of Justice, E.D. Cal., 2007 U.S. Dist. LEXIS 15245 (Mar. 5, 2007), available at http://ca.findcase.com/research/wfrmDocViewer.aspx/xq/fac.20070305_0001942.ECA.htm/qx (last visited on Jan. 27, 2012) [hereinafter Garvey Case].} The U.S. request was made only after California prosecutors were advised that extradition was not feasible under the then-applicable 1924 U.S.-Romanian Extradition Treaty, which treated rape and “carnal knowledge of children under 12 years of age” as the only sexually-related extraditable crimes,\footnote{Treaty on Extradition, U.S.-Rumania, July 23, 1924, available at http://internationalextraditionblog.files.wordpress.com/2011/03/romania.pdf (last visited on Jan.} thereby leaving rape
offenses against Harvey’s teenage victims outside its ambit. Consequently, with FBI assistance, California state prosecutors initially sought a federal warrant based on a federal crime known as Unlawful Flight to Avoid Prosecution (UFAP), which sequentially triggered revocation of Harvey’s passport by the U.S. Department of State, his arrest for violation of Romania’s immigration laws, and finally his deportation.

One variant of the direct approach is for a pursuing State to arrange with a removing State (or otherwise to be aware of its plans) regarding the placement of an alien fugitive on a ship or airplane destined for a receiving State but routed through the pursuing State’s territory as a scheduled layover. For example, in 2006, after being acquitted on drug possession charges in Ecuador, Iranian national Mehrzad Arbane was deported to Iran but routed through Houston, Texas, where, during that intermediate stop, U.S. authorities arrested him on a charge of unlawful importation of cocaine and later (federally) removed him to Florida to face prosecution. A second variant is to “stack the deck” in the pursuing State’s favor. A pursuing State that is also the State of an alien’s nationality can engineer a decision by the host State to remove him to that State by validating his passport solely for return home, rendering it far more difficult for the alien fugitive to obtain admission to another State without proper travel documentation. Direct removals also have taken place in contravention of the host State’s own constitutional or statutory law or a

---


83 “If the fugitive is wanted on [U.S.] 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.” U.S. Attorney’s Manual, supra n.16, § 9-15.640 (regarding revocation of passports) (emphasis supplied).

84 Garvey Case, supra n.81.

85 Arbane, 446 F.3d at 1225 (the court judgment remains unclear as to whether or not this amounted to a coordinated plan between the Ecuadorian and U.S. governments). A pursuing State must be prepared, however, to cope with the same tactics when used against it. Thus, it must coordinate with all States to whose territories an individual will be routed as intermediary points. See Abbell, supra n.39, at 7-18 n.1 (many flights landed in third countries en route to the U.S., thereby requiring cooperation between U.S. authorities and the authorities of transit countries); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (transit through Venezuela).

86 See supra page 352 (Chapter 9); Evans, supra n.24, at 87 & n.2.
domestic judicial order, presumably in order to curry political favor with the pursuing State.87

The indirect approach to removal requires a cooperating third-party role. Here, the pursuing State obtains the fugitive’s custody, either through extradition, removal, or a simple transfer from an intermediary State, which is legally postured to receive the fugitive initially by removal from the original host State. For example, due to the lack of a bilateral extradition treaty between them, Venezuela was unwilling to extradite to Israel Mahmoud El-Abed Ahmad for his alleged role in attacking a civilian bus in the West Bank. In considering its options for bringing Ahmad to justice, Israel turned to the U.S. as a potential intermediary State, given that Ahmad was a Palestinian-American. In May 1987, the U.S. arranged to have Ahmad deported to his country of citizenship in response to his violating Venezuelan immigration laws and then, in turn, extradited him to Israel to face criminal prosecution there.88

A pursuing State can also enter into a bargained arrangement with the host State whereby the two agree to simultaneously or sequentially “exchange prisoners by deportation, a procedure which may subject those exchanged to criminal proceedings in their respective States of origin. The [U.S.] Department of State explicitly recognized this situation in 1941, in arranging for the deportation to the Soviet Union of Mikhail Gorin, convicted of espionage and later pardoned in anticipation of his being exchanged for two American nationals held by Soviet authorities: ‘In so far as Mr. Gorin personally is concerned, we are inclined to the belief that in view of his carelessness in permitting incriminating documents to fall


into the hands of the American authorities, he will receive after his return to the Soviet Union punishment at least as severe as the serving of his full sentence in the United States."\(^{89}\)

More recently, in 2003, there were press reports, denied by Iran, that it was willing to deport al-Qaida detainees wanted by the U.S. in exchange for "U.S.-held Iranian opposition figures."\(^{90}\) In another example, in December 1989, "the DEA was contacted by Mexican federal judicial police [MFJP] to discuss the possible exchange of prisoners" involving, among others, Humberto Álvarez-Machain, a medical doctor from Guadalajara charged with participating in the torture and murder of a DEA agent.\(^{91}\) Specifically, the U.S. was expected to deport Isaac Naredo-Moreno, who "was wanted for stealing $500 million from Mexican politicians" and the MFJP even proceeded to arrest and hold Naredo-Moreno in a safe house, but ultimately the DEA was unwilling to pay the MFJP commandante and his associates $50,000 in advance, so the deal broke down.\(^{92}\)

A variant of this approach would be to remove one or more individuals to another State as part of a swap for economic or trade benefits, a decision to drop an extradition request, or other desired ends. For example, in December 2009, two days after Cambodia deported 20 ethnic Uighur asylum seekers to China, the

\(^{89}\) Evans, supra n.24, at 88 (citing 1 Foreign Relations, 1941 at 937 (1958)). This scenario is distinct from its counterpart in which bargaining is waged for States’ own military, intelligence, or political officers incarcerated by another, rather than for an actual or alleged criminal from the perspective of the pursuing State. In addition, in such “political swaps,” the States need not rely on immigration laws; for example, when Colonel Rudolf Abel who had been convicted in the U.S. for espionage was traded for U-2 pilot Francis Gary Powers, also convicted of espionage for his over-flight of Soviet territory in May 1961. Tom Wicker, “Powers is Freed by Soviet in an Exchange for Abel; U-2 Pilot on Way to U.S.” N.Y. Times, Feb. 10, 1962, at 1, available at http://www.nytimes.com/learning/general/onthisday/big/0210.html#article (last visited on Oct. 10, 2013).


\(^{91}\) Heymann & Gershengorn, supra n.2, at 133.

\(^{92}\) PYLE, supra n.46, at 282.
receiving State extended 14 commercial deals to Cambodia valued in the aggregate at $1 billion, ostensibly as a quid pro quo.93

iii. Removal Considerations

Although the examples cited above may suggest that States are generally amenable to exercising their immigration laws to accommodate the express interests of a pursuing State, this alternative to extradition is not always so straightforward. Pursuing States may encounter roadblocks or factor in certain calculations when choosing to seek another State’s removal of an illegal or undesirable fugitive alien from its territory.94

To begin, removal requires that the individual of interest violated the removing State’s immigration laws and is not a national of that State.95 During World War I, German officer Werner von Horn planted a bomb on a Canadian railroad from still-neutral U.S. territory. He was later arrested in Maine, pled guilty, and was sent to a federal detention center in Atlanta. In 1917, the U.S. Department of Justice first contemplated deporting him to Canada, which sought his custody, but von Horn had not violated U.S. immigration laws, having entered the country lawfully. As a result, von Horn was not deported, but rather eventually extradited to Canada in 1918.96

In other instances, there may be political pressures that thwart a removal. The case of Orlando Bosch is illustrative. Bosch was a militantly anti-Castro Cuban exile who was implicated in dozens of terrorist attacks in New York, Miami, and in Latin America in the late 1960s and 1970s.97 In 1988 he entered Florida illegally, was

---

93 Forced Deportations, supra n.13.
94 This sub-section addresses only non-human rights-related considerations; a human rights analysis follows in section (d) infra.
95 Evans, supra n.24, at 86.
96 Grant W. Grams, Karl Respa and German Espionage in Canada During World War One, 8 J. MIL. & STRAT. STUD., Fall 2005, Issue 1, at 3.
97 In one instance, in 1968, he was convicted in the U.S. of firing a bazooka at a Havana-bound Polish freighter while docked in the Miami harbor, and sentenced to 10 years in prison. While on parole, he fled to Latin America, but was arrested by Venezuela in 1976 for his alleged role that year in the bombing of Cubana Air Flight 455 that killed 73 persons. After his conviction was reversed on
detained for his parole violation, and subjected to a deportation order. The U.S. Department of Justice claimed to have reached out to 31 States each of which refused to accept him, presumably given his significant criminal record. The U.S., however, refused to deport (or extradite) him to Cuba, where he was also wanted, ostensibly due to fair trial concerns. But the actual reason may have been politically driven. In July 1990, under pressure from his son Jeb who had close ties with the Cuban exile community in Florida, and possibly because of Bosch’s reported affiliation with the CIA, U.S. President (and former CIA Director) George H.W. Bush pardoned Bosch rather than continue to have him detained pending deportation.\(^98\)

There also may be reasons, such as concerns about perceived political bias or motivation, for a pursuing State on its own initiative to forgo attempts at seeking removal despite its legal availability and prospect of success. For example, between January 2008 and October 2009, the government of Uganda sought the custody of Zoe Bakoko Bakoru, its former Minister of Gender, Labor and Social Development, on counts of abuse of office and taking bribes in connection with her approval of a joint venture between a private company and the National Social Security Fund (NSSF) that resulted in a substantial financial loss for the workers’ pension scheme. Although the Ugandan government retained the option of revoking her passport and requesting her deportation from the U.S., where she was then residing (possibly because extradition was foreclosed absent a bilateral extradition treaty), any such move could have raised suspicions that Uganda was simply singling her out as a political target because of her ex-ministerial portfolio.\(^99\)

---


Finally, it may be the case that a third State has a special relationship with a fugitive and offers succor to him, and thereby undercuts any prospect of deportation. For example, Iceland, a country passionate about chess, extended citizenship to Bobby Fischer, a former world chess champion and U.S. fugitive,\(^{100}\) from Japan, where he had been residing. That offer effectively shut down the possibility of his planned deportation from Japan to the United States.

d. **Human Rights and International Humanitarian Law Protections**

A removal operation potentially implicates a number of internationally recognized individual rights and legal principles, which can serve as a significant barrier to its use.\(^{101}\) These are organized into three sets: (i) human rights protections to which the subject is entitled arising out of *removing* State conduct, such as procedural safeguards, private and family life concerns, and international humanitarian law-related considerations;\(^{102}\) (ii) human rights protections relevant to treatment by the *receiving* State, including, *inter alia*, fair trial rights and proper detention authority; and (iii) human rights protections related to the *method* of removal. This discussion and the one that follows related to “disguised extradition” together analyze the lawfulness of the immigration law alternative to extradition.

i. **Law Relevant to Removing State Conduct**

**Non-Discrimination.** A removing State is generally obligated to treat an alien as an equal before the law and not to unfairly or arbitrarily discriminate\(^{103}\) – either in the


\(^{103}\) “Discrimination is not synonymous with differential treatment. The concept of discrimination, as employed in international law, connotes distinctions which are unfair, unjustifiable, or arbitrary.”
enactment of facially discriminatory laws or in the discriminatory implementation of valid laws — against him in the context of a removal decision. The non-discrimination principle has been enunciated in the provisions of a number of human rights treaties, in General Comments by their implementing bodies, and in judgments by human rights tribunals, as well as in the U.N. Charter itself. The ICJ has even characterized non-discrimination as such a basic right that it gives rise to an obligation *erga omnes* to be extended to all States.  

For example, the ICCPR states: “[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour . . . national or social origin . . . or other status.” In its General Comment No. 15, the HRC addressed the rights of *aliens* against discrimination more specifically: “[T]he *general* rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,” and that even though in principle States choose who may enter and reside within their territory, “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when

---

Goodwin-Gill, *supra* n.8, at 78. “Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment.” Warwick MacKean, *Equality and Discrimination under International Law* 287 (1983).

104 Sohn & Buergenthal, *supra* n.11, at 17-18.

105 See Charter of the United Nations, June 26, 1945, art. 1(3) (identifying as a U.N. purpose “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”); id., art. 55(c) (U.N. “shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

106 See Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, [1970] I.C.J., Rep. 3, ¶¶ 33-34 (Feb. 5), available at [http://www.icj-cij.org/docket/files/50/5389.pdf](http://www.icj-cij.org/docket/files/50/5389.pdf) (last visited on Nov. 1, 2013) (“When a State admits into its territory . . . foreign nationals . . . it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them.”); id. (“In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.’’); id. (“Such obligations derive, for example, in contemporary international law, from . . . the principles and rules concerning the basic rights of the human person, including protection from . . . racial discrimination.”).

107 ICCPR, *supra* n.8, art. 26.
considerations of non-discrimination . . . arise.”

At the same time, however, the HRC could justify distinctions between citizens and aliens on grounds such as national security and public order (so long as legitimate aims and proportionate means were employed) and, in fact, has separately carved out citizen-specific political rights and the freedom of movement (at least for lawful aliens) in which States can permissibly differentiate between citizens and aliens.

Consistent with this principle, the Committee on the Elimination of Racial Discrimination has recommended that States parties adopt measures to “[e]nsure that laws concerning deportation or other forms of removal of non-citizens from [their] jurisdiction . . . do not discriminate in purpose or effect among non-citizens on the basis of race, colour, or ethnic or national origin.” That said, the Committee has recognized differential treatment based on “citizenship or immigration status” where the purpose of the discrimination is consistent with the objectives of the Convention, the methods are proportional to achieving those objectives, and do not run afoul of any special measures as set forth under Article 1(4).


110 E.g., ICCPR, supra n.8, art. 25 (only citizens have the right to vote or to “take part in the conduct of public affairs”); ACHR, supra n.8, art. 23(1) (same); Eur. Conv. for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 16, 213 U.N.T.S. 262, T.S. No. 71 (1953) [hereinafter ECHR] (High Contracting Parties may impose restrictions on “the political activity of aliens”). See also Rights of Non-Citizens, supra n.109, at 8.

111 E.g., ICCPR, supra n.8, art. 12 (“Everyone lawfully within the territory of a State, within that territory, have the right to liberty of movement”) (emphasis supplied); ACHR, supra n.8, art. 22(1).


113 Id. ¶ 4.
This principle was the subject of a 1996 case involving a Moroccan citizen who had resided in Belgium for 30 years but who had twice been criminally convicted and sentenced, and was now the subject of a deportation order for “seriously prejudic[ing] public order.”\(^{114}\) The ECtHR ruled that he was not a “victim of discrimination on the grounds of nationality and race” under Article 14 (the non-discrimination provision), as he had alleged.\(^{115}\) Rather, his deportation, which “amounted to less favourable treatment than was accorded to criminals who [were] nationals of a member State of the European Union,” was “based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has, in addition, established its own citizenship.”\(^{116}\)

**Procedural Safeguards.** Procedural protections ensure that aliens obtain due process to contest a decision to remove them\(^{117}\) before a competent national authority “in accordance with law”\(^{118}\) and that no arbitrary decision is made regarding their status. A robust formulation of such protections can be found at Article 13 of the ICCPR, which provides:


\(^{115}\) *Id.* ¶ 37.

\(^{116}\) *Id.* ¶¶ 37-38.

\(^{117}\) *See* Fitzpatrick, *supra* n.109, at 9 (“The right to challenge an expulsion is vital to the right to seek asylum and to the human rights bars to *refoulement*, as well as to fundamental fairness.”).

\(^{118}\) The notion of “in accordance with law” is not necessarily intuitive; it applies to all types of written and unwritten laws, whether constitutional, statutory, or administrative; must be both accessible and foreseeable such that citizens can properly regulate their conduct; and must contain mechanisms or control features to ensure a State cannot act arbitrarily or otherwise abuse individual rights. *See Malone v. U.K.*, Appl. No. 8691/79, Aug. 2, 1984, judgment, ECtHR, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533#{%22itemid%22:%22001-57533%22}) (last visited on Oct. 10, 2013). Indeed, this conventional phrase serves as the modern-day equivalent for the CIL principle of “prohibition against arbitrariness.” *See* JENNINGS & WATTS, *supra* n.11, at 940 (“while a state has a broad discretion in exercising its right to expel aliens, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.”); HRC, Gen. Cmt. No. 15, *supra* n.108, ¶ 10 (the purpose of requiring a removal order to be “in accordance with law” is “to prevent arbitrary expulsions”).
An alien *lawfully in the territory* of a State Party to the present Convention 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.\(^\text{119}\)

Notably, these safeguards, which include the right to counsel, do not apply to illegal aliens, and are, in any event, subject to a national security exception. That said, a “good faith” requirement exists both for a State: (i) to weigh the competing equities of ensuring public order against an individual’s various rights and interests\(^\text{120}\) in determining whether to remove an alien, and (ii) to implement a removal order with propriety.\(^\text{121}\)

The HRC found a violation under this provision in the case of Pierre Giry, a French citizen who in February 1985 after spending two days in the Dominican Republic (D.R.) went to the airport to purchase a ticket to Saint-Barthelemy, was taken by D.R. authorities to an airport office where he was thoroughly searched, and then forcibly boarded on a flight bound for Puerto Rico, whereupon “he was arrested and charged with conspiracy and attempt to smuggle drugs into the United States.”\(^\text{122}\) While the D.R. invoked the national security exception to Article 13 of the ICCPR by

\(^{119}\) ICCPR, *supra* n.8, art. 13 (emphasis supplied).

\(^{120}\) See *Goodwin-Gill, supra* n.8, at 262 (“The principle of good faith and the requirement of justification, or ‘reasonable cause,’ demand that due consideration be given to the interests of the individual, including his basic human rights, his family, property, and other connections with the State of residence, and his legitimate expectations. These must be weighed against the competing claims of ‘ordre public.’”).

\(^{121}\) See, e.g., *Ćonka v. Belg.*, Appl. No. 51564/99, Feb. 5, 2002, ¶ 42, ECHR Judgment, *available at* http://www.unhcr.org/refworld/docid/3e71dfb4.html (last visited on Feb. 27, 2012) (“even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5 [of the ECHR].”).

noting Giry's involvement in drug trafficking, the Committee ruled that the D.R. had failed to demonstrate that its removal decision was reached “in accordance with law” (despite several solicitations, the D.R. was unable to supply the text of a removal decision) and that the “author was not afforded an opportunity . . . to submit the reasons against his expulsion or to have his case reviewed by a competent authority.”¹²³

Other substantially similar procedural provisions contained in legal instruments include: (i) Protocol 7 to the ECHR at Article 1;¹²⁴ (ii) the Arab Charter on Human Rights at Article 26(2);¹²⁵ and (iii) UNGA Declaration A/RES/40/144 at Article 7.¹²⁶ In addition, while not providing as strongly worded a set of protections as those cited above, both the American Convention on Human Rights (ACHR) and the African Charter of Human and Peoples’ Rights (ACHPR) require that any alien lawfully within a State Party’s territory can be expelled only if based on a decision taken in “accordance with the law.”¹²⁷ At the same time, however, the more elaborate fair trial rights pertinent to a determination of one’s civil rights and obligations or of any criminal charge against him, as set forth in the ICCPR (Article 14) and ECHR (Article 6), have not yet been found applicable to the removing State’s proceedings under these conventions.¹²⁸ Finally, aliens are entitled to the right of

¹²³ Id. ¶¶ 4.3-4.4, 5.5.
¹²⁴ Seventh Protocol, supra n.60, art. 1; e.g., Lupsa v. Romania, Appl. No. 10337/04, June 8, 2006, ¶ 59, ECHR 2006-VII, [2006] ECHR 604 (2008) 46 EHRR 36, ECHR Judgment, Merits and Just Satisfaction (“the authorities failed to provide the applicant with the slightest indication of the offence of which he was suspected and that the public prosecutor’s office did not send him the order issued against him until the day of the one hearing before the Court of Appeal . . . [and] the Court of Appeal dismissed all requests for an adjournment, thus preventing the applicant’s lawyer from studying the aforementioned order and producing evidence in support of her application for judicial review of it.”).
¹²⁵ ARAB CHARTER ON HUMAN RIGHTS, supra n.8, art. 26(2).
¹²⁷ ACHR, supra n.8, art. 22(6); BANJUL CHARTER, supra n.8, art. 12(4).
¹²⁸ See Jennifer Tooze, Deportation With Assurances: The Approach of the UK Courts, [Apr. 2010] Pub. L. (U.K.) 362, 365, available at http://agt-wopac.agc.gov.my/e-docs/Journal/0000017411.pdf (last visited on Feb. 10, 2012) (“Deportation proceedings are public (not civil) law proceedings and the ECHR has repeatedly found that art. 6 of the Convention (fair trial) does not apply to them because they do not determine any civil right even where a person’s art. 8 family rights are indirectly affected.
consular notification and access, which is an especially important protection, given frequent linguistic and cultural differences and aliens’ unfamiliarity with judicial proceedings in a foreign State.

***Effective Remedy.*** Closely related to, but distinct from, procedural safeguards is the right to an effective remedy. Whereas procedural protections focus on the underlying removal proceedings, an effective remedy concerns itself with an opportunity to repair a breach of a convention, which typically amounts in the immigration context, to an appeal of a removal order. For example, per a recommendation by the Committee on the Elimination of Racial Discrimination, aliens must “have equal access to effective remedies, including the right to challenge expulsion orders, and [must be] allowed effectively to pursue such remedies.” As interpreted by the ECtHR, the term “effective” “does not depend on the certainty of a favourable outcome for the applicant,” need not be pursued in every instance through a judicial authority, and the remedy afforded must be “effective in practice as well as in law.” Furthermore, in cases implicating national security information, an effective remedy requires the following minimum elements:

---


130 CERD, Gen. Recom. 30, supra n.112, ¶ 25.

[T]he competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is some threat to national security where it finds it arbitrary and unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance.¹³²

The ICCPR at Article 2(3) provides that each State Party undertakes 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,” that any such claim for a remedy shall be determined by a “competent authority,” and that the competent authority shall enforce any conferred remedy.¹³³ In a 2003 case, the HRC found that Canada had violated Article 2(3) regarding its decision to deport U.S. citizen Roger Judge to face the death penalty for murder in Pennsylvania without first affording him an opportunity to exercise his right of appeal, given the government’s acknowledgment that the Court of Appeal could have reviewed the Superior Court’s judgment on the merits and that the government did not have to suddenly remove him “within hours” of the lower court ruling.¹³⁴

Similarly, the Committee against Torture found a violation of Article 3 (the non-refoulement provision in the face of a torture risk) in the case of Ahmed Agiza, an Egyptian citizen, who was removed by Sweden to Egypt in December 2001.¹³⁵ Initially, the Committee had to wrestle with the fact that Article 3 is silent as to a remedy; it reasoned that the article contains an implied remedy for a breach, which

¹³² Id. ¶ 137.
¹³³ ICCPR, supra n.8, art. 2(3).
otherwise would leave its protections “largely illusory.” The Committee then defined the appropriate remedy in this context as requiring “an opportunity for effective, independent and impartial review of the decision to expel or remove.” The Committee next observed that the ordinary mechanisms for reviewing a decision to expel, through operation of the Migration Board and the Aliens Appeals Board, were forsaken due to national security concerns, but as Article 3 allows for no exceptions, some form of effective, independent, and impartial review was warranted, even if adjusted to accommodate national security concerns, and yet none was provided.

The right to an effective remedy also has been honored under the African Charter on Human and Peoples’ Rights (ACHPR). Article 7(1) specifically calls for “[t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.” Unlike other conventions, the ACHPR does not strictly limit application of such a provision to criminal defendants. The African Commission has read it broadly to include even cases involving deportation. For example, in a 1996 case brought by a Senegalese based NGO on behalf of 517 illegal West African aliens expelled from Zambia in February 1992, the Commission pointed out that “none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation, thereby constituting a breach of Article 7.”

**Private Life.** Another legal basis for potentially barring a government-authorized removal operation arises from the deference paid by a variety of human rights conventions and implementing bodies to one’s private life. Although not an absolute

---

136 *Id.* ¶ 13.6.
137 *Id.* ¶ 13.7.
138 *Id.* ¶ 13.8.
139 **Banjul Charter**, supra n.8, art. 7(1)(a).
right, it is accorded considerable weight in determining whether a given removal order is permissible. Article 17 of the ICCPR, for instance, states: “No one shall be subjected to arbitrary or unlawful interference with his privacy,” and “[e]veryone has the right to the protection of the law against such interference.” The American Convention on Human Rights (ACHR) provides for virtually the same rights and protections as the ICCPR. The European Convention, at Article 8, likewise recognizes the general right “to respect for private . . . life,” but exceptionally allows for interference when “it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

An example of how private rights are addressed can be seen in the 2001 ECHR case of Abdel Bensaid, an Algerian national, who in September 1996, after a five-week visit to his home country, sought to re-enter the U.K. as a resident, based on his marriage to a U.K. citizen since 1993 and the government’s May 1995 grant of leave for him to remain in the U.K. as a foreign spouse. After determining that his marriage was a fraud and giving him a notice of removal, Bensaid sought review on the basis that he suffered from schizophrenia and that his return to Algeria would

142 ICCPR, supra n.8, art. 17(1).
144 ACHR, supra n.8, art. 11(2) (“No one may be the object of arbitrary or abusive interference with his private life”); id., art. 11(3) (“Everyone has the right to the protection of the law against such interference”).
145 ECHR, supra n.110, art. 8(1).
146 Id., art. 8(2). Both the ECHR and ACHR have been described as sources of customary international law. See, e.g., Filártiga v. Pena-Irala, 630 F.2d 876, 883-84 (2d Cir. 1980).
cause a relapse of this serious mental health condition otherwise generally held in check through medication.\textsuperscript{148} The European Court found no violation, reasoning that while such matters as gender identification, sexual orientation, and even mental health when associated with moral integrity, are all parts of private life protected in principle under Article 8, Bensaid’s removal to Algeria was not anticipated to significantly affect his moral integrity and, in any event, the U.K. had acted in full compliance with Article 8’s exceptions.\textsuperscript{149} While the ECtHR jurisprudence has recognized a possible breach “where there are sufficiently adverse effects on physical and moral integrity,”\textsuperscript{150} “it has so far not found any violation of [A]rticle 8 on the sole ground that the person will face a severe interference with his or her private life.”\textsuperscript{151}

**Family Life.** Linked to the right to private life and, indeed, often addressed under the same convention provision, is the well-established right to family life, which is concerned with family integrity and particularly the right of spouses, as well as parents and their children, to live together and associate as a family unit.\textsuperscript{152} As early as 1948, the Universal Declaration of Human Rights (UDHR) expressed: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State,”\textsuperscript{153} and “[n]o one shall be subjected to arbitrary interference with his . . . family.”\textsuperscript{154} Although this unanimously adopted UNGA declaration does not qualify as a treaty, its provisions broadly have been accorded customary

\textsuperscript{148} Id. ¶ 10-21.
\textsuperscript{149} Id. ¶¶ 47-48.
\textsuperscript{150} Id. ¶ 46.
\textsuperscript{152} “The concept of ‘family unity’, which has been adopted by major legal systems of the world, has found expression in numerous instruments concerning international protection of human rights. These instruments vary, however, in determining which categories of persons are to be considered members of the family. While there can be no doubt that a person’s spouse and minor children are to be so regarded, the practice is not uniform as regards the status of minor children of a spouse by a previous marriage, illegitimate children, aged parents and dependent relatives.” Sohn & Buergenthal, *supra* n.11, at 65.
\textsuperscript{153} UDHR, *supra* n.9, art. 23(1).
\textsuperscript{154} Id., art. 17(1).
international law status, which binds even non-signatory States.155 The nearly universal ICCPR, which aimed to codify the UDHR's civil and political rights, reiterates these provisions verbatim, adding only that family interference must also not be “unlawful.”156

Along these lines, the Committee on the Elimination of Racial Discrimination has advised that States Parties to the CERD must “[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life.”157 A judge in a 1989 ICJ advisory opinion recognized the right to family life’s customary law standing:

The integrity of a person’s family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from general principles of law recognized by civilized nations.158

Regional human rights treaties likewise have recognized this principle. The ECHR, at Article 8, provides that “[e]veryone has the right to respect for his . . . family life” but, as described above in the private life context, carves out exceptions for interference when “it is in accordance with the law and is necessary in a democratic society” in the furtherance of certain compelling State interests, such as public safety.159 The ACHR, at articles 11 and 17(1), express almost identical rights and protections as the ICCPR; and the Inter-American Commission on Human Rights, which adjudicates claimed breaches of the ACHR, has held that the right to family

---

155 See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 701, rep. note 6 (1987) (“[T]he Declaration has become the accepted general articulation of recognized rights.”).
156 ICCPR, supra 8, art. 17.
157 CERD, Gen. Recom. 30, supra n.112, ¶ 28 (emphasis supplied).
159 ECHR, supra n.110, art. 8(2).
life “is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances.”\textsuperscript{160}

In examining the case law arising from the ECtHR and the HRC to better understand how the right to family life has been applied in practice, it is apparent that these adjudicatory bodies insist, first, that the removal order be based on a legal process that is authorized by formal law, that the law itself is not arbitrary or unreasonable, and is characterized by procedural regularity, including notice, an opportunity to be heard, and the chance to present and challenge evidence at a hearing. But the right must also be evaluated according to the principle of proportionality, in which the removing State’s public interest in interfering with an alien’s genuine family ties via a removal order outweighs the hardship that interference imposes upon the alien and his family integrity.\textsuperscript{161}

The ECtHR conducted this balancing test in the case of Mohand Beldjoudi, an Algerian national residing in France who was ordered to be deported in November 1979 “on the ground that his presence on French territory was a threat to public order (ordre public).”\textsuperscript{162} Beldjoudi, who had been convicted and sentenced six times between 1969 and 1986 for such offenses as assault and battery, aggravated theft, and acquisition and possession of controlled weapons or ammunition, challenged the order for years under domestic law and ultimately claimed a breach of Article 8 under the ECHR as the deportation order “constitute[d] an excessive interference with his family life.”\textsuperscript{163} In its judgment, the European Court found that France had acted in accordance with its domestic law and its aim was legitimate in seeking to


\textsuperscript{163} Id. ¶¶ 12-13, 16, 27.
prevent crime or disorder, so the focus of its analysis lay with whether the deportation order was truly “necessary in a democratic society.”

To that end, the ECHR examined Beldjoudi’s family links to France: he was born in France of parents who were French; while a minor he lost his French citizenship when his parents neglected to make the necessary declaration affirming their French citizenship under the Evian Agreements once Algeria gained its independence from France in 1963, but then sought to recover it; he was declared fit for French military service; married a Frenchwoman; was educated in French (rather than Arabic); his parents and four siblings resided in France; and had no apparent links with Algeria apart from his nationality; he had lived his entire life (over 40 years) in France; and his deportation would entail his wife’s as well, which would cause a raft of transitional problems for her culturally and linguistically, but also potentially jeopardize their marital status. On balance, the Court concluded that deporting Beldjoudi would be disproportionate to the aim pursued and therefore the deportation order violated Article 8.

In 2001 the HRC ruled on a family life claim brought by Hendrik Winata and So Lan Li, both formerly Indonesian nationals (now Stateless) on their own behalf as a de facto married couple and that of their son, an Australian national by virtue of his birth there, to challenge an Australian government order for the parents’ removal to Indonesia on account of their overstaying the allowable limits under a visitor and

---

164 Id. ¶ 68-80.
165 Id. ¶ 77-78.
166 Id. ¶ 79. Other cases follow suit. E.g., Boulrif v. Switz., Appl. No. 54273/00, Aug. 2, 2001, ECHR Judgment, [2001] ECHR 493, available at http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/461 (last visited on Feb. 9, 2012) (concluding that an Algerian alien’s conviction for a “ruthless and brutal” robbery and the State’s corresponding concern about maintaining public order were not compelling enough to justify his removal from Switzerland, given that his Swiss wife of eight years, who had never lived in Algeria and had no ties to that country, could not be expected to follow her husband there).
student visa, respectively. The HRC concluded that Australia was in violation of its obligations under Articles 17(1) and 23 with respect to all three Winatas because of the “arbitrariness” of “a simple enforcement of its immigration law” in light of the fact that the authors had been in Australia for 14 years and, particularly, that their son who had been there for 13 years since birth, “attending Australian schools as an ordinary child would and developing [sic] the social relationships inherent in that.” This case underscores that, even when a State’s immigration law has been clearly breached, the right to family life and the premium accorded to family integrity can trump to prevent removal especially when a child’s interests are at stake.

IHL-Related Human Rights Considerations. “Like other forms of international transfer regulated by law, the rules concerning transfer in the context of armed conflict include protections against persecution: prisoners of war [POWs] may only be transferred to countries that will uphold their rights, and it is prohibited to transfer a protected person to a country ‘where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’” In addition to these protections, Article 49 of Geneva Convention IV categorically bars transfers of protected persons out of occupied territory, and Article 147 makes such transfers a grave breach of the Convention. Individuals who are not covered by these protections set out in Geneva Conventions III and IV must nonetheless be protected against transfer to a situation in which the fundamental guarantees set out in Article

168 Id. ¶ 7.3.
169 Margaret L. Satterthwaite, The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism, N.Y.U. Public Law and Legal Theory Working Papers, Paper 192 (2010), at 9, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1192&context=nyu_pltwp&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26q%3D%25252Binternational%25252Bin%25252Brendition%25252B%25252BNYU%25252BSchool%25252BLaw%252522%252526ie%3DUTF-8%26oe%3DUTF-8#search%22international%20rendition%20NYU%20School%20Law%22 (last visited on Nov. 30, 2013) (citing to GC III, art. 12, and GC IV, supra n.35, art. 45).
75 of Additional Protocol I to the Geneva Conventions, which reflects customary international law, would be violated.”

In addition, pursuant to a High Contracting Party’s (HCP’s) obligation to “respect and ensure respect” for the Fourth Geneva Convention of 1949 (GC IV), which includes specific civilian safeguards in the context of non-international armed conflicts (NIACs), must an HCP provide temporary refuge to an alien who is otherwise subject to deportation until the NIAC in his homeland ceases or he is otherwise resettled to a third State? An unambiguous answer to this query was provided in 1989 by a federal trial court in California in American Baptist Churches in the U.S.A. v. Meese in connection with the planned deportation of Salvadoran and Guatemalan aliens to their home countries then embroiled in internal armed conflicts. The U.S. federal court found that Article 1 of GC IV confers no rights upon private parties nor does it “impose any specific obligations on the signatory nations [or] . . . provide any intelligible guidelines for judicial enforcement,” and therefore held that the Convention grants no right of temporary refuge to aliens who would be removed to countries facing civil war.

---

170 Id. at 26.
171 See GC IV, supra n.35, art. 1, which also appears as Article 1 to GC I, II, and III, and therefore is known as Common Article 1.
172 GC IV pertains to the protection of civilians during armed conflict.
173 See id., art. 3 (prohibiting “violence to life and person” and “humiliating and degrading treatment,” among others); as this provision appears verbatim in all four Geneva Conventions, it is known as Common Article 3.
175 Id. at 770.
176 Id.
ii. **Law Relevant to Receiving State Conduct**

*Prospective Abusive Treatment.*  *Non-refoulement* is an international legal principle that aims to protect individuals from being returned, transferred, or otherwise *refouled* (i.e., “turned back”) to States where their rights to life, liberty, and security of person, particularly including the freedom from extrajudicial killing (EJK), enforced disappearance, torture, and other abusive treatment, are believed to be threatened.\(^{178}\) A number of international and regional human rights instruments (either express in the body of their text or as interpreted by their implementing bodies), as well as many domestic constitutions and statutes, have embraced this principle; these include, by way of illustration, the CAT,\(^{179}\) the ICCPR,\(^{180}\) the ECHR,\(^{181}\) the ACHR,\(^{182}\) the African Charter of Human and Peoples’ Rights (ACHPR),\(^{183}\) the

---

\(^{177}\) Although international law technically proscribes removal action by the *removing* State, because the underlying conduct of concern would occur at the hands of the *receiving* State, such matters are treated herein as a function of the latter’s conduct. In addition to the legal standards enumerated in this sub-section, a removing State must be reasonably satisfied that the receiving State will not expel or otherwise transfer the alien to a *third State* where he could be at risk of torture; cruel, inhuman, or degrading treatment or punishment; an unfair trial; or the death penalty. CoE, Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 2(3), Sept. 2005, available at http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf [last visited on Apr. 14, 2013] [hereinafter *Twenty Guidelines*] (citing the inadmissibility decision of *T.I. v. U.K.*, ECHR, Appl. No. 43844/98, Third Section, Mar. 7, 2000).

\(^{178}\) See n.150 in Chapter 5 supra.


\(^{180}\) ICCPR, *supra* n.8, art. 7; *see also* HRC, Gen. Cmt. No. 20, art. 7 (44th Sess., 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30, ¶ 8 (1994), available at http://www1.umn.edu/humanrts/gencomm/hrcom20.htm [last visited on Dec. 2, 2013] (“In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”). This view has been fortified by a General Comment construing States Parties’ Article 2 obligation to respect and ensure ICCPR rights for all persons within their territory to include that they not return or remove a person from their territory where substantial grounds exist there is a real risk of irreparable damage in the receiving State or any other State from which the person may later be removed. HRC, Gen. Cmt. No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on Mar. 29, 2004, ¶ 12, ICCPR/C/21/Rev.1/Add.13, available at http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256f600533f5f?OpenDocument [last visited on Feb. 2, 2012].

\(^{181}\) ECHR, *supra* n.110, art. 3.

\(^{182}\) ACHR, *supra* n.8, art. 22(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
CERD,\textsuperscript{184} and the relatively new International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED);\textsuperscript{185} the Constitutions of Switzerland,\textsuperscript{186} Costa Rica,\textsuperscript{187} and Mexico;\textsuperscript{188} and the immigration legislation of Italy,\textsuperscript{189} Guatemala,\textsuperscript{190} and Sweden.\textsuperscript{191} In addition, the concept is found in Geneva Convention IV of 1949 governing civilians in times of international armed conflict.\textsuperscript{192}

Because of its broad-ranging acceptance as a normative legal rule, the U.N. High Commissioner for Refugees (UNHCR) and a number of scholars maintain that non-

---

\textsuperscript{184} CERD, Gen. Recom. 30, \textit{supra} n.112, ¶ 27 ("Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment").

\textsuperscript{185} Int'l Conv. for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006 art. 16, \textit{available at http://www2.ohchr.org/english/law/pdf/disappearance-convention.pdf} (last visited on Feb. 2, 2012) ("No State Party shall expel, return ('refoul'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.").

\textsuperscript{186} Fed. Const. of Swiss Confederation, Apr. 18, 1999, art. 25(3), \textit{available at http://www.admin.ch/ch/e/rs/101/index.html} (last visited on Jan. 31, 2012) ("No one may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment.").


\textsuperscript{189} Testo Unico sull'Immigrazione, Legis. Decree No. 286/98, Italy, art. 19(1) (1998), as amended by Law 189/02 (2002).


\textsuperscript{191} Sweden, Act Concerning Special Control in Respect of Aliens (1991:572), May 30, 1991, § 3, Chap. 12 § 1, \textit{available at http://www.refworld.org/docid/38a65914.html} (last visited on Nov. 3, 2013) (unofficial translation) (expulsion order "may never be issued to a country where there is fair reason to assume that the alien would be in danger there of ... being subjected to corporal punishment, torture, or other inhuman or degrading treatment or punishment, or the alien would not be protected in the country from being transferred to a country where he would be in such danger.").

\textsuperscript{192} GC IV, \textit{supra} n.35, art. 45(4) ("In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.").
refoulement has achieved customary international law (CIL) status.\textsuperscript{193} If that is the case, then even non-States parties to treaties with non-refoulement provisions would be obligated to honor this principle, although the supporting evidence for this proposition is more extensive in the jurisprudence of supranational tribunals than in individual State removal decisions\textsuperscript{194} and the very term, while often described in undifferentiated terms, is in fact a concept with inherent variability. Sometimes the principle extends only to a particular class of people\textsuperscript{195} or a singular type of offense.\textsuperscript{196} At other times it is accompanied by express exceptions\textsuperscript{197} or the feared

\textsuperscript{193} UNHCR Note on the Principle of Non-Refoulement, Nov. 1997, available at http://www.unhcr.org/refworld/docid/438c6d972.html (last visited on Jan. 30, 2012) (“This view is based on a consistent State practice combined with a recognition on the part of States that the principle has a normative character. [T]he principle has been incorporated in international treaties adopted at the universal and regional levels to which a large number of States have now become parties. Moreover, the principle has also been systematically reaffirmed in Conclusions of the Executive Committee and in resolutions adopted by the General Assembly, thus demonstrating international consensus in this respect and providing important guidelines for the interpretation of the aforementioned provisions.”); Guy Goodwin-Gill, Non-refoulement and the New Asylum Seekers, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s, at 103 (David A. Martin ed. 1986).

\textsuperscript{194} Despite the robust non-refoulement perspective adopted by the international and regional human rights bodies and tribunals, decisions by individual State courts have sometimes reflected a contrary inclination. For example, in 1978, the U.S. Congress amended the Immigration Act of 1952, which had barred deportation of any person believed to face threatened persecution upon his return, to specifically exempt from that rule U.S. aliens associated with any Nazi government operating between March 1933 and May 1945 who had persecuted people because of their race, religion, national origin, or political opinion. Immigration and Naturalization Act-Nazi Germany, Pub. L. 95-549, 92 Stat. 2065 (1978), codified at 8 U.S.C. §§ 1182(a)(33), 1182(d)(3), 1251(a)(10), 1253(h), and 1254(e). As a direct result, Nazi war criminals living illegally in the U.S. became eligible for deportation back to States even where they had a reasonable fear of persecution. This included Andrija Artuković, a Croatian known as the “Himmler of the Balkans” during World War II, who had entered the U.S. illegally in 1948 and avoided deportation since 1951 partly on the ground that if returned to Yugoslavia, he would face persecution. Moeller, supra n.8, at 810, 838. Contra Spring v. Switz., Jan. 21, 2000, ¶ 4(c)(bb), Fed. Sup. Ct., Bundesgericht, Ct. Rep. 126 II 145 (holding that non-refoulement embodies “an inalienable human right” under current law); Erika de Wet, Jus Cogens and Obligations Erga Omnes, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 548 n.43 (Dinah Shelton ed. 2013) (“The Swiss Federal Supreme Court has asserted that non-refoulement in itself constitutes jus cogens”).


\textsuperscript{196} See, e.g., CAT, supra n.179, art. 3 (prohibiting refoulement specifically with regard to torture).

\textsuperscript{197} See, e.g., Refugee Conv., supra n.195, art. 33(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.”).
result must be based on one of several specified forms of persecution;\textsuperscript{198} and in still other instances it is applied unconditionally.\textsuperscript{199}

Furthermore, application of this principle is not limited to asylum seekers and refugees, with whom the principle originated and is most closely associated,\textsuperscript{200} but extends equally to persons subject to extradition and removal operations as a fundamental human rights safeguard.\textsuperscript{201} Accordingly, where refoulement is prohibited in the extradition context (see discussion of prospective abusive and discriminatory treatment in Chapter 7.d.i.1 supra), it is likewise unlawful with

\begin{footnotes}
\item[198] See, e.g., ACHR, supra n.8, art. 22(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.").
\item[200] The non-refoulement principle first appeared in 1951 in the Conv. Relating to the Status of Refugees, supra n.195, art. 33(1). Notably, the Refugee Convention did not allow reservations to this provision, id., art. 42, and did not require lawful residence in the territory of the host State to benefit from its protections. Id., art. 1. The 1967 Protocol to this Convention absorbed in toto the underlying Convention's non-refoulement provision. Protocol to the Conv. Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. Other examples of non-refoulement in refugee-related instruments include the Declaration on Territorial Asylum, UNGA Res. 2312 (XXII), Dec. 14, 1967, art. 3(1), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967), available at http://www1.umn.edu/humanrts/instree/v4dta.htm (last visited on Nov. 6, 2013) ("No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."); OAU Conv. Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. II(3), available at http://www.unhcr.org/45dc1a682.html (last visited on Oct. 6, 2013) ("No person shall be subjected by a Member State 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 the reasons set out in Article 1, paragraphs 1 and 2."); and the 2004 European Union (EU) Directive relating to refugees and other persons requiring international protection that enunciates the non-refoulement principle. EU, Directive 2004/83/EC, Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and for the Content of the Protection to be Granted, Apr. 29, 2004, art. 21(1), O J 2004 L 304/12.
\item[201] See Icelandic Human Rights Centre, “The Rights to Integrity,” available at http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights /therightsto integrity/ (last visited on Feb. 9, 2014) ("several human rights instruments forbid the return of a person who has reason to fear for his/her life or physical integrity in his/her country of origin.").
\end{footnotes}
respect to deportations and exclusions. An examination of specific cases will prove instructive to appreciate how this principle has been applied.

In the seminal 1996 case of Karamjit Singh Chahal, a Sikh from India’s Punjab region who had immigrated to the U.K. in 1971, the ECtHR found that the August 1990 U.K. Home Secretary’s decision to deport him back to India would constitute a violation of ECHR Article 3,\(^{202}\) which prohibits a removed person from being “subjected to torture or to inhuman or degrading treatment or punishment.”\(^{203}\) The U.K. decision was based on a concern that Chahal’s “continued presence in the United Kingdom was conducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.”\(^{204}\) As an activist leader in the U.K.’s Sikh community, Chahal had been detained twice as a suspect in politically-motivated murder conspiracies to advance the Sikh separatist cause in the Punjab, and had been convicted (although later acquitted) on assault charges.

Chahal, contended, however, that, if returned to India, he faced a “real risk” of being subjected to torture and other persecution at the hands of the Indian authorities.\(^{205}\) Chahal claimed to have been beaten to unconsciousness, electrocuted, and subjected to a mock execution by the Punjabi police in the spring of 1984 during a return trip to India, and evidence existed of human rights abuses by the Indian security forces.\(^{206}\) Rejecting the U.K. government argument that Article 3 contained an implicit national security-based limitation, the ECtHR held that the Article 3

\(^{202}\) Chahal Case, supra n.12, ¶¶ 12, 25, 107.

\(^{203}\) ECHR, supra n.110, art. 3. The ECtHR has provided some guidance as to what constitutes such prohibited treatment under Article 3: it must attain “a minimum level of severity and involve actual bodily injury or intense physical or mental suffering” and that “the suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.” Pretty v. U.K., Appl. No. 2346/02, Apr. 29, 2002 (final on July 29, 2002), ¶ 52, ECtHR Judgment, Fourth Section, 35 EHRR 1 (2002), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448#/%22itemid%22:[%2222001-60448%22]) (last visited on Nov. 2, 2013).

\(^{204}\) Chahal Case, supra n.12, ¶ 25.

\(^{205}\) Id. ¶¶ 23, 24, 72.

\(^{206}\) Id. ¶¶ 16, 18
prohibition is *absolute* – making no provision for exception regardless of how “undesirable or dangerous” the alien may be\(^{207}\) or for derogation even when a public emergency threatens the life of the nation\(^{208}\) – and fully applies in instances of deportation, given the Court’s well-established jurisprudence in closely related expulsion cases.\(^{209}\)

The Committee against Torture, which construes the provisions of the CAT, has taken a similar position. Consider the 1999 case of Sadiq Shek Elmi, a Somali national and a member of the small and unarmed Shikal clan, who arrived in Australia in October 1997 without valid travel documents.\(^{210}\) When the Government of Australia ruled in favor of his expulsion and after he effectively exhausted his domestic remedies,\(^{211}\) Elmi sought review under Article 3 of the CAT, which prohibits the expulsion or *refoulement* of an individual to a State where substantial grounds exist for believing he personally could be subjected to torture.\(^{212}\)

\(^{207}\) *Id.* ¶ 80.

\(^{208}\) This is in noteworthy contrast with the *non-refoulement* provision under ACHR, which allows for derogation “in times of war or other public emergencies that threaten the independence and security of the State party.” ACHR, *supra* n. 8, art. 22.

\(^{209}\) *Chahal Case, supra* n.12, ¶¶ 76-81. Likewise, the European court ruled that Turkey had not “meaningfully assess[ed]” the alleged risk that Mrs. Hoda Jabraa, an Iranian national who had committed adultery, could be stoned, flogged, or whipped upon her authorized return to Iran. *Jabari v. Turkey*, Appl. No. 40035/98, July 11, 2000, ¶ 40, ECHR Judgment, 9 BHRC 1 (2000), *available at* [http://www.unhcr.org/refworld/docid/3ae6b6dace.html](http://www.unhcr.org/refworld/docid/3ae6b6dace.html) (last visited on Dec. 8, 2011) (in light of the absolute nature of Article 3, States must undertake a “rigorous scrutiny of claims” that expulsion to a third country will expose that person to treatment prohibited by Article 3). *See also Saadi v. Italy*, Appl. No. 37201/06, Feb. 28, 2008, ¶¶ 124-49, ECHR, Judgment, *available at* [http://www.unhcr.org/refworld/docid/47c6882e2.html](http://www.unhcr.org/refworld/docid/47c6882e2.html) (last visited on Nov. 30, 2011) (ruling that deportation of Nassim Saadi, an accused terrorist from Italy to Tunisia would violate Article 3, given Tunisia’s documented record of torture and ill-treatment toward other accused terrorists).


\(^{211}\) *Id.* ¶ 2.7.

\(^{212}\) CAT, *supra* n.179, art. 3. The U.S. Senate ratified the non-self-executing CAT, subject to the understanding that the phrase “substantial grounds” would be interpreted to mean “if it is more likely than not that he would be tortured.” 136 Cong. Rec. 36 (Oct. 27, 1990) (incorporating Article 3 into U.S. law by § 2242 of the 1998 Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, 1999 U.S.C.C.A.N. (112 Stat. 2681) 871, *codified at* 8 U.S.C. § 1231 *et seq.* (2012)). As a result, under U.S. law, Article 3 of the CAT forbids the U.S. deporting an alien if he can show “a chance greater than fifty percent that he will be tortured if removed.” *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004).
The Committee found evidence, in fact, that Somalia has committed “gross, flagrant, and mass violations of human rights,” and that the area of Mogadishu to which Elmi would be returned was under the quasi-governmental control of the Hawiye clan that had previously targeted Elmi’s Shikal family (killing his father and brother, raping his sister, and forcing the others to flee) for refusing to provide “financial support and fighters for the Hawiye militia.” Additionally factoring in the publicity of his case that could result in his being “accused of damaging the reputation of the Hawiye,” the Committee concluded that his forcible removal “to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia” would violate Australia’s obligations under Article 3. This judgment is significant for at least three reasons: (i) it did not try to balance Australia’s immigration law equities against its Convention obligations – rather, it solely examined the record to determine whether an adequate prospective case of torture against the author could be established; (ii) it did not require establishing a nexus, such as race or religion, for the underlying cause of the torture; and (iii) it ruled out any indirect deportation scenario to Somalia via a third State.

213 Elmi Case, supra n.210, ¶ 6.6.
214 Under the CAT, torture is specifically defined as being committed by or with the consent of public authorities, CAT, supra n.179, art. 1; therefore, it is essential that the author of a Communication under the CAT fear torture from public authorities rather than, say, private gangs or organized criminal syndicates.
215 Elmi Case, supra n.210, ¶¶ 2.2, 6.7, 6.8. Factors that the Committee examines in such cases include the human rights record of the State to which the individual is being returned and any recent changes thereto, whether the author has been the victim of torture or abusive treatment in the recent past and any corroborating physical or medical evidence for such treatment, whether the individual has continued his political or other activities, and his credibility, including any inconsistencies in his claims. Committee against Torture, Gen. Cmt. No. 1, Communications Regarding the Return of a Person to a State Where There May be Grounds he Would be Subjected to Torture (Article 3 in the context of Article 22), Nov. 21, 1997, ¶ 8, U.N. Doc. A/53/44, Annex IX, at 52 (1998), available at http://www1.umn.edu/humanrts/cat/general_comments/CAT_C12X_MISC1.1997.html (last visited on Feb. 2, 2012).
216 Elmi Case, supra n.210, ¶ 6.8, 7.
217 In another example, in May 2011, the Committee found that “the complainants have established a personal, present and foreseeable risk of being tortured if they were to be returned to India” and so their deportation would constitute a violation of Article 3 of the CAT. Khalsa, et al. v. Switz., Commc’n No. 336/2008, May 26, 2011, ¶ 11.8, CAT/C/46/D/336/2008, available at http://www.worldcourts.com/cat/eng/decisions/2011.05.26_Khalsa_v_Switzerland.pdf (last visited on Nov. 1, 2013).
The jurisprudence regarding non-refoulement emanating from the international and regional human rights tribunals is not limited, however, to concerns about torture; the case law and implementing body commentary also have focused on inhuman or degrading treatment or punishment. Below are some indicative examples:

- In 1997, the African Commission on Human and Peoples’ Rights found Botswana to be in breach of its obligation under Article 5 of the African Charter (prohibiting “cruel, inhuman or degrading punishment and treatment”) when it deported Stateless John Modise, a leader of the Botswana National Front opposition party, to South Africa, where he was forced to live for eight years in the Bophuthatswana “homeland” followed by another seven years in a “no-man’s land” between Bophuthatswana and Botswana and away from his family, thereby exposing him to personal suffering and “inhuman and degrading treatment.”

- In the same year, the ECtHR ruled that a St. Kitts native, who had just completed a prison sentence for illegally importing narcotics into the U.K. but who in the interim had been diagnosed as being HIV-positive and a victim of AIDS, could not be deported to his home country without violating Article 3 of the ECHR (prohibiting inhuman or degrading treatment or punishment), given that his life expectancy in light of this terminal illness would be substantially curtailed on account of a lack of proper medication and hospital facilities in St. Kitts, and that he would be left to spend his final days in pain and suffering away from close family and any moral or social support they could provide.

---

218 *Modise Case, supra n.23.*

219 *D. v. U.K.*, Appl. No. 30240/96, May 2, 1997, ECtHR Judgment, reprinted in 24 EHRR 425 (1997), available at [http://www.bailii.org/eur/cases/ECHR/1997/25.html](http://www.bailii.org/eur/cases/ECHR/1997/25.html) (last visited on Dec. 15, 2013). The ECtHR, however, did not find a violation of Article 3 in the case of an Algerian man suffering from schizophrenia, as critical medication for this long-term mental illness would be available to him in Algeria, the risk of relapse was possible whether he was removed or remained in the U.K., and concerns regarding inadequate family support or care in Algeria were largely speculative. *Bensaid Case, supra* n.147, ¶ 32-41.
• In 2001, the HRC, in its report on compliance by the Netherlands with its obligations under the ICCPR, advised that States that returned women to countries where they were likely to be subjected to Female Genital Mutilation (FGM) would violate Article 7 of the Covenant (prohibiting cruel, inhuman or degrading treatment or punishment).

Consistent with such standards, since 2005, the U.K. has executed a series of Memoranda of Understanding (MOUs) with such States as Jordan, Ethiopia, Lebanon, and Libya to encourage the deportation of terrorists (or those who pose a threat of terrorism) to the State of their nationality, pursuant to domestic immigration laws and subject to a host of assurances that they will be treated in accordance with international human rights law standards. By contrast with extraditions, these so-called Deportation with Assurances (DWA) MOUs call for a State party to request the partner to receive a given individual under stipulated conditions and with foreknowledge regarding the receiving State’s prosecutorial or punishment intentions. To implement this policy, the U.K.’s Special Immigration Appeals Commission (SIAC) has adopted a general four-part test to ensure compliance with Article 3 of the ECHR: (i) terms must indicate that the individual will not be subjected to treatment contrary to Article 3; (ii) assurances must be given in good faith; (iii) there must exist a sound objective basis for believing the assurances will be followed; and (iv) the assurances as followed must be capable of being verified.

---

223 See Tooze, supra n.128, at 379.
**Prospective Unfair Trials.** A removing State may not causally contribute to an individual’s anticipated exposure to an unfair trial in the receiving State, pursuant to its obligations under a variety of international human rights instruments, including the ICCPR, ECHR, ACHR, ACHPR, and the Arab Charter on Human Rights. Thus, for example, if an alien were deported to a State that had convicted and sentenced him in absentia and was willing to provide diplomatic assurances of a retrial, but only under a special or military (versus ordinary) court or largely based on secret evidence unavailable to the defendant and his counsel, a State that removed an individual under such circumstances almost certainly would violate the applicable convention’s fair trial provisions.

Such a case arose in January 2012, when the ECtHR overturned a U.K. House of Lords (H.L.) decision to deport Omar Othman, better known as Abu Qatada, an influential jihadist cleric, to his birth country, Jordan, who had entered the U.K. on a

---

224 ICCPR, supra n.8, art. 14.
225 ECHR, supra n.110, art. 6.
226 ACHR, supra n.8, art. 8.
227 BANJUL CHARTER, supra n.8, art. 7.
228 ARAB CHARTER ON HUMAN RIGHTS, supra n.8, arts. 6, 7, 14, 16.
forged passport in 1993. While the Court found that Jordan’s diplomatic assurances based on the 2005 U.K.-Jordan DWA MOU (discussed supra) provided an adequate safeguard from his potential human rights abuse in Jordan (he allegedly was tortured twice by Jordanian authorities), the Court concluded there was a “real risk” that, upon his return, he would be retried based on witness evidence extracted through torture and that such evidence would be “of considerable, perhaps decisive, importance,” which would constitute a “flagrant denial of justice” in contravention of Article 6 of the ECHR. This ruling forced Jordan to accept the condition of furnishing diplomatic assurances to the extent that any evidence obtained through torture would not be used in a retrial against Abu Qatada. In July 2013, after the U.K. became satisfied with Jordan’s assurances, it agreed to deport Abu Qatada to face terrorism charges in Jordan.

Courts evaluate the prospect of an unfair trial using a variety of criteria and their rulings do not uniformly prohibit removal. For instance, an Iranian citizen who, as a crew member on an Iranian government-owned ship sold cannabis to an undercover Australian customs agent and was arrested on narcotics-related charges, applied for refugee status, contending that upon his return to Iran he would not receive a fair trial (and possibly be killed). In that case, the HRC found no

---

232 Id. ¶¶ 190-207.
234 Othman Case, supra n.231, ¶¶ 281-82.
violation of ICCPR Article 14(1) and (3) because he would have an opportunity to challenge his alleged violations in Iran, he would be allowed legal representation, the Iranian courts were deemed competent to examine his case, and any conviction and sentence received would be entitled to review by a higher court.\textsuperscript{237}

**Prospective Death Penalty Imposition.** Many States have abolished the death penalty and obligated themselves through international or regional treaties not to put a person at serious risk of being subjected to the death penalty by another State. As the HRC explained, even if a State does not itself impose the death penalty on an individual, “by deporting him to a country where he was under sentence of death, [a State] established the crucial link in the causal chain that would make possible the execution of the author.”\textsuperscript{238} For those abolitionist States, the removal of a person to a State where the death penalty appears plausible upon his return, absent diplomatic assurances to the contrary, typically will be barred either by domestic courts themselves or upon review by a supranational human rights tribunal under its “right to life” guarantee.

An example of a national court ruling in this context can be found in the September 2011 judgment concerning the proposed deportation to his home country of a Botswanan citizen named Jerry Ofense Pitsoe (“Phale”).\textsuperscript{239} Raising concerns about Botswana’s record of death penalty implementation,\textsuperscript{240} citing to several domestic and overseas cases in which extradition was barred on account of prospective death penalty imposition,\textsuperscript{241} and not finding a meaningful distinction in the present case


\textsuperscript{238} Judge Case, supra n.134, ¶ 10.6.

\textsuperscript{239} This was actually a litigation that consolidated two actions with largely similar claims and counter-claims; the plaintiff in the other action was Emmanuel Tsebe, also a Botswanan citizen but who died in November 2010 prior to the High Court’s hearing. Tsebe and Another v. Minister of Home Affairs and Others, (27682/10, 51010/10) [2011] ZAGPJHC 115 (Sept. 22, 2011), S. Africa: So. Gauteng High Ct., Johannesburg, ¶¶ 1-2, 12, available at \url{http://www.saflii.org/za/cases/ZAGPJHC/2011/115.html} (last visited on Feb. 5, 2012).

\textsuperscript{240} Id. ¶¶ 61-68.

\textsuperscript{241} Id. ¶¶ 115-17.
between extradition and deportation, the South Gauteng High Court in Johannesburg ruled that South African authorities were prohibited from deporting Phale “unless and until the Government of the Republic of Botswana provides a written assurance . . . that the applicant will not be subject to the death penalty in Botswana under any circumstances.”

In 2003, the HRC found a violation of the ICCPR’s “right to life” provision (Article 6) in connection with Canada’s deportation to the U.S. of Roger Judge, a U.S. citizen who had been convicted and sentenced to death in Pennsylvania for two counts of first-degree murder, but who upon escaping from prison, fled to Canada, was convicted there of two robberies and was ordered to be deported once he had served out his sentence. As to this violation, which arose out of Canada’s failure to seek assurances from the U.S. that the death penalty would not be imposed, the HRC concluded:

For countries [like Canada] that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove [including by deportation] individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

---

242 Id. ¶ 87-98.
243 Id. ¶ 130.
244 Judge Case, supra n.134, ¶¶ 1, 2.1-2.4.
245 Id. ¶ 5.2.
246 Id. ¶ 10.4. In November 2005, but only after this decision was rendered, Canada ratified the ICCPR’s Second Optional Protocol, which abolishes the death penalty in all circumstances with the single possible exception, that must be invoked upon ratification or accession, for “a most serious crime of a military nature committed during wartime.” Second Optional Protocol to the ICCPR, aiming at the Abolition of the Death Penalty, Dec. 15, 1989, arts. 1, 2.1, UNGA Res. 44/128, U.N. Doc. A/44/49 (1989). The Judge Case marked a substantial departure from Kindler v. Canada issued in July 1993, in which the HRC had found that the transfer of an individual from an abolitionist State to a retentionist State (i.e., one that retained the death penalty) was not a per se violation of Article 6. Kindler v. Canada, Comm’n No. 470/1991, ¶ 14.6, U.N. Doc. CCPR/C/48/D/470/1991 (1993), July 30, 1993, available at http://www1.umn.edu/humanrts/undocs/html/dec470.htm (last visited on Nov. 2, 2013). In distinguishing the jurisprudence, the HRC observed that over the prior decade there had been a “broadening international consensus in favour of abolition of the death penalty” and that the ICCPR “should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.” Judge Case, supra n.134, ¶ 10.3.
Similarly, in 2005 the ECtHR ruled that Sweden’s approved deportation back to Syria of Kamal Bader Muhammad Kurdi (“Bader”), a Syrian national for whom an *in absentia* conviction and death sentence had been imposed in 2003 for alleged complicity in a murder, would violate Article 2 of the ECHR (the “right to life” provision) to the extent that the death sentence, even if still permitted in principle, followed a summary criminal proceeding (in which only prosecutorial evidence was examined, no oral evidence was taken, and neither the defendant nor his counsel was present), which would constitute an arbitrary deprivation of life.\(^{247}\) The Court observed that because “the death sentence for serious crimes is enforced in Syria,” and the Swedish government had received no assurance that Syrian authorities would reopen his trial and that the death penalty would not be sought or imposed, he faced a real risk of being executed if deported to Syria.\(^{248}\)

Accordingly, municipal deportation decisions in the 1980s in the face of capital punishment effectively lost their precedential value. For example, in a Canadian deportation case involving an American citizen who had been convicted of murder by a U.S. court and where the jury had recommended the death penalty, and where a provision of the extradition treaty between the U.S. and Canada permitted Canada to deny extradition on the basis of prospective capital punishment in the U.S., an Ontario Court of Appeal opined: “[C]ourts should not in a case such as this take into account other possible consequences of deportation, such as the possibility of capital punishment for the respondent.” *MacDonald v. Kindler* (1987), 41 D.L.R. (4th) 78, 84-5 [1987] 3 F.C. 34, 32 C.R.R. 346 (Can.). *Accord In re Shepherd and Minister of Employment & Immigration* (1989), 70 O.R. (2d) 765 (C.A.) (Can.), available at http://www.emp.ca/links/intlaw7/cases/shepherd.doc (last visited on Nov. 3, 2013) [hereinafter Shepherd Case] [citing *MacDonald* and reaching the same conclusion regarding an American citizen, Joseph Arlan Shepherd, who had escaped custody pending trial in Tennessee following counts for rape, murder, and aggravated assault of a police officer and then taken up residence in Canada for a decade under an assumed name, James Joseph Tripp, and was then the subject of a deportation order back to the U.S.). *See also* Rodrigo Labardini, *Deportation in Lieu of Extradition from Mexico*, 20 IELR 239 (2004) (discussing Mexico’s decision in April 1989 to deport to the U.S. Ramon Salcido, a Mexican-born vineyard worker in Sonoma County, California, who on a rampage earlier that month killed his wife, two daughters, and four others, despite a provision in the applicable bilateral extradition treaty barring extradition where death remained a potential punishment).


\(^{248}\) *Id.* ¶ 44, 45, 48. Notably, although Sweden previously (in May 2002) had ratified Protocol 13 to the ECHR, which abolished the death penalty in all circumstances, the Court did not deem it necessary to reach a decision regarding the possible violation under this Protocol as it had already found a violation under Article 2. *Id.* ¶ 49.
Unclear Grounds or Improper Motive for Detention. A related human rights concern arises when a removing State fails to seek and obtain information regarding the express legal basis for the receiving State’s prospective detention of an alien. Failure to know the ground on which an individual is to be detained can constitute a breach of a removing State’s obligations to protect that individual against arbitrary detention by a foreign government under such provisions as Article 9(1) of the ICCPR, Article 5(1) of the ECHR, and Article 7(3) of the ACHR (all concerning the right to liberty and security of person). For example, in January 2002 the Human Rights Chamber for Bosnia and Herzegovina (B&H) found precisely such a violation of ECHR Article 5(1) in connection with the handover by B&H to U.S. forces of Belkasem Bensayah, who was believed to be a member of a terrorist cell that had attacked the U.S. Embassy in Sarajevo.249

A deportation also can be denied under various multilateral conventions when a motive exists to seek a fugitive’s removal for improper reasons, such as to interrogate him or to harass him into extracting a confession. For instance, in 2000, the Committee against Torture ruled that it was impermissible for France to remove Josu Arkaux Arana, a Spaniard of Basque origin, to Spain where the removal was sought not based on an indictment or to serve out an outstanding sentence, but rather evidently to be tortured or to elicit a confession related to ETA crimes.250

iii. Law Relevant to the Removal Method

Although human rights treaties do not expressly address removal methods,251 general standards of treatment nevertheless apply and have been interpreted in case law and expounded upon by secondary legal sources. The main areas that have been addressed in this regard are: (i) preservation of an alien’s self-respect and

249 Bensayah, supra n.8, ¶ 167-73.
251 OHCHR Discussion Paper, supra n.151, at 17.
sense of dignity; (ii) proportionate physical force and treatment exercised upon an alien; and (iii) deceptive tactics used to lure an alien to immigration authorities.  

Respect/Dignity for the Alien. In connection with methods of removal, the former Special Rapporteur on human rights of migrants stated: “the expulsion, deportation or repatriation of undocumented migrants should be carried out with respect and dignity.” The Council of Europe also has underscored the importance of protecting the dignity of the removed individual, while coupling it with safety considerations for those involved in his transport. Therefore, howsoever the removal operation is designed and implemented, it must not show disrespect for or otherwise humiliate the alien. In one illustrative application of this principle, the European Court of Justice (ECJ) recently opined that “any detention of third-country nationals ending their removal must, as a rule, take place in a specialised facility and can take place only on an exceptional basis in prison accommodation, the Member State then having to ensure that the third-country national is kept separated from ordinary prisoners.”

Physical Force and Treatment. Perhaps the most popular concern about the method of removal arises out of how the alien is physically treated and the extent to which force may have been unnecessary, restraints were excessive, or liberties were

\[252\] In addition to the factors enumerated, notification of the removal order itself should meet certain basic conditions, including that it should be provided in a language the alien understands, establish the legal and factual grounds on which the order is based, identify any available remedies and their corresponding deadlines, and indicate the consequences of non-compliance. Twenty Guidelines, supra n.177, Guideline 4. Removing States also should ensure that any aliens removed are medically fit to travel. Id., Guideline 16. Satisfactory conditions of pre-removal detention include clean and adequate accommodations and recreational opportunities; trained custodial staff; no co-location with prisoners; access to doctors, lawyers, and family members, and the right to file complaints. Id., Guideline 10.


\[254\] Twenty Guidelines, supra n.177, Guideline 17.

taken with respect to such measures as the administering of sedatives or the withholding of food and water while in transit. International law insists on certain minimum standards that do not tolerate unnecessary or disproportionate force or physical mistreatment.\footnote{See Migrant Workers Report, supra n.253, ¶¶ 221-28 (discussing the treatment of Gilbert Kouam Tamo during his forced repatriation at Zurich Airport in August 2003 to Cameroon; allegations of mistreatment included physical abuse, injections with a sedative, and food and water deprivation, but these were rejected by the Swiss authorities, who claimed proportional response regarding the physical treatment allegations and denials of the other claims); Medical Foundation for the Care of Victims of Torture [now called Freedom From Torture], Charlotte Granville-Chapman, et al., “Harm on Removal: Excessive Force Against Failed Asylum Seekers” (2004), at 18-32, available at http://www.freedomfromtorture.org/sites/default/files/documents/Harm%20on%20Removal%20-%20final2_0.pdf (last visited on Oct. 10, 2013).} For example, as the HRC observed in connection with Belgium’s treatment of aliens, “[p]rocedures used in the repatriation of some asylum seekers, in particular the placing of a cushion on the face of an individual in order to overcome resistance, entails a risk of life. The recent case of a Nigerian national who died in such a manner illustrates the need to re-examine the whole procedure of forcible deportations.”\footnote{HRC Concluding Observations on Belgium, Nov. 19, 1998, ¶ 15, CCPR/C/79/Add.99, available at http://www.unhchr.ch/tbs/doc.nsf/0/ae0e89f1ef67f93802566cd00544de770?opendocument (last visited on Dec. 15, 2013). See also HRC Concluding Observations on Belgium, Aug. 12, 2004, ¶ 14, CCPR/C/81/BEL, available at http://www.unhchr.ch/tbs/doc.nsf/[Symbol]/CCPR.CO.81.BEL.Fr?Opendocument (last visited on Dec. 15, 2013) (Fr.).}

In September 2005, the CoE’s Committee of Ministers adopted a document entitled “Twenty Guidelines on Forced Return,” which was intended to provide guidance to municipal governments. Guideline 19 addresses “means of restraint” and stipulates, in part, as follows: (i) restraints must be “strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him;” (ii) “restraints partially or wholly obstructing the airways are prohibited because they risk asphyxia;” and (iii) “medication is only to be administered on the basis of a case-by-case medical decision.”\footnote{Twenty Guidelines, supra n.177, Guideline 19.} A related claim sometimes invoked by aliens subject to removal is that the operation will aggravate their state of health. The Committee against Torture, however, has repeatedly held
that such arguments do not amount to cruel, inhuman, or degrading treatment or punishment (CID) as envisioned by CAT Article 16.  

**Deceptive Practices.** Immigration officials may choose to lure asylum seekers to a police station on a pretense with the actual intention of arresting and then deporting them. When such cases have been brought before the ECHR, a violation of Article 5(1) (the right to liberty and security) has been found. As one judgment stated: a “conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with article 5.”

**e. “Disguised Extradition”**

Even if a fugitive can be justifiably removed in reliance on a host State’s immigration laws, including by overcoming the vast array of human rights barriers discussed above, there may still be a legal impediment to such an operation to the extent it is viewed as constituting “disguised extradition.” As noted in Chapter 1.e *supra*, “disguised extradition” entails a purposeful circumvention of extradition laws or treaties by a host State to deliver a fugitive directly or indirectly to a State with a law

---


261 It is noteworthy that disguised extradition often dovetails with informal law enforcement cooperation (discussed in Chapter 11 *infra*). Where a host State expressly denominates the transfer of custody to another State as a *removal operation*, this study will treat it as such, notwithstanding the fact that it may also involve or otherwise possess attributes of informal law enforcement cooperation, such as when the custody of an alien fugitive is passed to pursuing State agents while still in host State territory or along a shared territorial border. For example, in the early 1970s, U.S. drug enforcement agents worked closely with special police units in Latin America to apprehend and “expel” more than 50 major drug traffickers to the U.S. without resort to formal extradition procedures under so-called “Operation Springboard.” Nadelmann, *International Rendition, supra* n.88, at 861.
enforcement interest in him, most typically via immigration laws. Specifically, to what extent, if any, are State obligations unmet or individual rights breached by virtue of a State relying on immigration laws, authorities, or procedures with the intent of delivering an alien fugitive to a State that has a law enforcement interest in him, whether or not a bilateral extradition treaty or other arrangement exists between them? To begin, the mere fact of removing an alien, without more, to a State prepared to prosecute or enforce a prior punishment does not generally constitute “disguised extradition.”

The record of lawfulness of “disguised extradition” is mixed and complex. There are some national laws expressly prohibiting “disguised extradition,” arguably a customary “good faith” obligation exists not to expel an alien from State territory for ulterior motives, and some legal authorities have opined on the practice’s unlawfulness. Nevertheless, much international and domestic case law supports

\[\text{\textsuperscript{262}}\] Such circumvention takes place when either the removing State: (i) desires to effect a fugitive transfer expeditiously and is therefore unwilling to let the typically more protracted extradition scenario play out; or (ii) relies on removal as a contingency option once extradition has been denied by its own domestic courts.

\[\text{\textsuperscript{263}}\] See Wallace Case, supra n.44, at 305 (“[T]he expulsion of an alien from the territory of the State of his residence will in fact bring him within the jurisdiction of a State in which he may anticipate prosecution or enforcement of a penalty, does not in itself legitimate the conclusion that the expulsion is identical with an extradition.”).

\[\text{\textsuperscript{264}}\] See Findlay, supra n.44, at 7 (Austria, Belgium, Brazil, France, Germany, and Italy have laws that prohibit use of deportation or exclusion in order to deliver fugitives to another State).

\[\text{\textsuperscript{265}}\] See James Crawford, Brownlie’s Principles of Public International Law 609 (8th ed. 2012); Goodwin-Gill, supra n.8, at 307-08. Such ulterior motives could include the confiscation of alien property, persecution, for an immigration officer’s personal gain, to foreclose an otherwise legitimate claim or cause of action, or to enable another State to prosecute the alien for a crime under its domestic laws.

\[\text{\textsuperscript{266}}\] For example, “[a] deportee who has taken refuge in a territory in order to avoid criminal prosecution may not be handed over, by devious means, to the prosecuting State unless the conditions for extradition have been duly met.” Expulsion of Aliens, supra n.9, at 280 (quoting Règles internationales sur l’admission et l’expulsion des étrangers, Institut de Droit Int’l, session de Genève, 1892, Résolution du 9 septembre 1892, art. 16); id. (“In certain instances, criminals have been expelled to a country which might otherwise have made a request for extradition, but that such expulsion procedure is arbitrary and therefore unsatisfactory.”) (quoting CoE, Parliamentary Assembly, Recom. 950 (1982) on Extradition of Criminals, Oct. 1, 1982, ¶ 8); 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 278-79 (1992) (it is “improper for one State to request another to deport or expel an individual as a means of circumventing extradition procedures”).
the practice. Indeed, while a number of court judgments pay lip service to the unlawfulness of “disguised extradition,” their holdings often are based on breaches of domestic law, are complicated to the extent they jointly address or co-mingle the removal operation with other international human rights violations that frequently occur in connection thereof at times misconstrue the true meaning of the term or embrace a varying interpretation, and may fail to cite to specific international legal sources or standards to justify its illegality, thereby adopting an essentially conclusory logic.

Consider, first, whether any international conventions expressly or impliedly prohibit the practice of “disguised extradition.” The most potentially applicable provisions are found at Article 13 of the ICCPR, Article 1 of the ECHR Protocol 7, and Article 22(6) of the ACHR, each of which provides general procedural safeguards regarding the removal of aliens lawfully in host State territory, but none addresses protections for illegal aliens. At the same time, however, these provisions mandate in all instances that decisions be made “in accordance with law”– and domestic legislation or regulations often identify eligible or prioritized destinations to which

267 See infra nn.294-315.
268 See, e.g., Khalfan Khalis Mohamed v. The President of the Republic of So. Afr., Case No. CCT 17/01, May 28, 2001, (2001) 3 S.A. 893 (CC), Const. Ct. of So. Afr. [hereinafter Mohamed Case] (implicating South Africa’s constitutional provisions); Mullen Case, supra n.6 (finding a breach of public international law based solely on domestic case law, in circumstance in which British authorities instigated and assisted the government of Zimbabwe in deporting an alien fugitive despite the existence of “extradition facilities” between the two States). Unless they happen to constitute customary international law or mimic treaty law, domestic legal violations as such do not also breach international law. See n.62 of the Introduction.
269 See, e.g., Bozano Case, supra n.61, ¶ 60 (“Depriving Mr. Bozano of his liberty in this way [cross-border transportation in an unmarked car sitting handcuffed between two police officers] amounted in fact to a disguised form of extradition designed to circumvent the negative ruling [denying extradition]”).
270 This tendency is reflected by definitions used by legal commentators, as found at n.92 in Chapter 1 supra.
an alien may be sent following a removal order, although they almost always provide for return to the alien’s country of citizenship, which, as it happens, is frequently the very State with a law enforcement interest in that individual.\textsuperscript{273}

To the limited extent, then, that:

(i) a deportee (versus an excluded alien) who was \textit{lawfully} resident within the removing State’s territory;\textsuperscript{274}

(ii) is delivered to a State in evident contravention of applicable domestic legal specifications;

(iii) the removing State is aware of an active law enforcement interest by the receiving State in the subject individual; \textit{and}

(iv) no other candidate States were approached in good faith about their willingness to receive the removed alien, or if they were, any others that were amenable were bypassed,\textsuperscript{275}

such a destination-directed removal likely would constitute a violation of international law, at least for those States Parties to the ICCPR, ACHR, or to Protocol 7 of the ECHR.\textsuperscript{276} This calculation becomes less certain, however, where a military \textit{junta} has suspended the State constitution or temporarily imposed martial law, or where a constitution confers an extraordinary breadth of power upon the Executive,

\textsuperscript{273} \textit{See} Shearer, supra n.8, at 88 (in most cases of disguised extradition “the deportee is a national of the receiving State.”); \textit{Expulsion of Aliens, supra} n.9, at 320 (“The State of nationality appears to be the most common destination for nationals who have been expelled from the territory of other States.”).

\textsuperscript{274} Notably, many of those subject to removal orders are expelled precisely because they have been found to have falsified or omitted material information related to filling out their immigration documents.

\textsuperscript{275} Where a State that genuinely but unsuccessfully sought to locate another State willing to accept the alien, leaving no choice for a deportation destination apart from the State with an express law enforcement interest in the individual, domestic law arguably could treat that as a reasonable exception to the general requirement. \textit{See} Shearer, supra n.8, at 90-91 (outlining “reasonable” principles to guide an immigration authority to include removal \textit{in lieu} of or following a denial of extradition so long as the alien is found to be removable under domestic law and “it is believed upon reasonable grounds that no State other than the requesting State will accept the alien.”).

\textsuperscript{276} There does not appear to be any evidence suggesting customary international law on this point.
such that it would be difficult to challenge the legality of a removal order even in the face of transparent cooperation with the receiving State.\footnote{For example, Chile’s 1980 Constitution at Article 24 vested in the President “[t]he government and the administration of the State” and “[h]is authority extends to all that aims at the preservation of the internal public order and the external security of the Republic, in accordance with the Constitution and the law.” Const. of the Repub. of Chile, Oct. 21, 1980, art. 24, available at \url{http://confinder.richmond.edu/admin/docs/Chile.pdf} (last visited on Mar. 1, 2012).}

Domestic law violations could be implicated in other ways as well. To the extent that any domestic removal laws were deemed to be inadequately “accessible” and “foreseeable” and therefore incapable of proper protection against an arbitrary State practice of reliance on removal orders to circumvent extradition procedures and protections, a State likewise could be found to have not acted “in accordance with law” under these Conventions.\footnote{\textit{See Sunday Times v. U.K.}, Appl. No. 6538/74, Apr. 26, 1979, ¶ 49, ECHR Judgment, Series A, No. 30, 2 EHRR 245, available at \url{http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57584#(%22itemid%22:[%22001-57584%22])} (last visited on Nov. 2, 2013) (defining the synonymous term “prescribed by law” as requiring these two elements; the first to ensure individuals are aware of the applicable law, and the second to ensure that it is precise enough to help individuals conform their conduct accordingly).} In addition, a State could be found to have effected a “disguised extradition” in direct contravention of its domestic law by, say, removing a national to a State with a law enforcement interest in him where the removing State’s constitution or legislation specifically proscribes the extradition of its nationals. In such a case, were such a transfer to be recognized as unlawful on that basis, its illegality would “only derive from municipal law and not from international law.”\footnote{\textit{See} Doehring, \textit{supra} n.29, at 110.}

International or regional tribunals also can examine whether the \textit{receiving} State complied with \textit{its} domestic law with respect to detaining or imprisoning an individual after a removal operation that bore the indicia of a “disguised extradition.” The European Commission on Human Rights\footnote{The European Commission, which was established in 1953, served as the gatekeeper to the European Court of Human Rights (ECtHR) by making admissibility determinations on its behalf; however, in 1998, with the restructuring of the Eur. Conv. on Human Rights (ECHR), \textit{supra} n.110, through the adoption of Protocol 11, the European Commission ceased to exist.} addressed this very
issue in *Altmann (Barbie) v. France*\(^{281}\) finding no arbitrariness in the French court ruling that the former Nazi Klaus Barbie had been detained lawfully, despite evidence of collusion between Bolivia (the removing State) and France (the receiving State) in effecting his removal in lieu of extradition.\(^{282}\)

As it turns out, many of the concerns raised by courts that address “disguised extradition” claims arise out of breaches of *municipal* law that become erroneously tangled up with *international* legal authorities or violations. For example, while in May 2001 the South African Constitutional Court cited to ECtHR cases and to Article 3 of the CAT in ruling that a deportation, characterized as a “disguised extradition,” was unlawful, the legal bases on which its judgment turned were exclusively domestic. That case involved Khalfan Khamis Mohamed, a Tanzanian national who: (i) based on a false passport and an assumed name, was issued a temporary residence permit in South Africa in the fall of 1998; (ii) was indicted in December 1998 by the U.S. for murder and other charges related to the August 1998 bombing of the U.S. Embassy in Dar es Salaam, Tanzania; (iii) was arrested in October 1999 by the Republic of South Africa (RSA) in a joint operation with the U.S. FBI for immigration violations; and (iv) within two days he was transferred into FBI custody in Cape Town and then removed to New York by a dedicated plane accompanied by FBI agents, a U.S. federal prosecutor, and a medical doctor, to stand trial for capital offenses.\(^{283}\)

The Court addressed Mohamed’s deportation as violative not of international law, but of two South African domestic laws. First, the deportation was made under so-

---


\(^{282}\) See id. at 235 (declaring the application inadmissible on the grounds that “it is sufficient to state that the Court of Cassation did not apply the law in an arbitrary manner and that there is no other ground for concluding that the detention had not been ordered ‘in accordance with a procedure prescribed by law’ or that it was not ‘lawful,’ within the meaning of Article 5(1)(c) of the Convention.”).  

\(^{283}\) *Mohamed Case*, supra n.268, at 898, 901, 906.
called Regulation 23 that identified all eligible destinations to which an alien could be removed, strictly limiting the options to countries where the alien held a passport, was a citizen, or had the right to domicile (in Stateless instances), and found that his deportation as a Tanzanian national to the U.S., therefore, was impermissible. Second, South African authorities were obligated under the RSA’s Constitutional Bill of Rights – which promotes and protects the rights to life, human dignity, and a prohibition on cruel, inhuman, or degrading treatment or punishment – to seek pre-removal assurance from the U.S. that it would not impose a death sentence on Mohamed in the event of a conviction, which it failed to do. Hypothetically, then, had Mohamed instead been a U.S. national (or a dual U.S.-Tanzanian national), and had the RSA sought diplomatic assurance that he would not be exposed to the death penalty upon the prospective conviction by a U.S. court, it is entirely plausible that this or any other South African court would have posed no legal objection to his deportation on “disguised extradition” grounds.

“Disguised extradition” cases can suffer from another source of confusion regarding the extent of its lawfulness; namely, that it often manifests in tandem with other, independent international law violations that are not technically components of “disguised extradition.” One example of this phenomenon is when a removing State, either as a function of a treaty commitment or under customary international law, fails to properly account for human rights concerns, such as an unfair trial or the

284 Id. at 906-09.
286 After Mohamed’s conviction but before the U.S. trial’s penalty phase, although the court did not preclude the prosecution from seeking the death penalty, it did allow Mohamed to submit a summary of the RSA Constitutional Court’s decision to serve as a mitigating factor. Bin Laden Case, supra n.285, at 371. Although “[t]here is no way to gauge the significance that the jury attached . . . to the decision of the Constitutional Court,” the jury was unable to reach a unanimous verdict on the death penalty. Id.
imposition of torture or cruel, inhuman, or degrading treatment or punishment, that are reasonably anticipated at the hands of the receiving State. Likewise, a removing State may be anxious to effect the operation quickly and with minimum complication and may therefore overlook the rights of the alien to access to counsel and an opportunity to challenge the removal order. While removal under any of these circumstances would almost certainly trigger a violation of international law, such breaches are not integral or necessary features of “disguised extradition,” and therefore should not figure into the latter’s legality calculus, although sometimes court opinions stress these elements in their reasoning.287

Perhaps the most common legal objection to “disguised extradition” is when removal is undertaken in the face of an extant extradition treaty or other arrangement, and thereby potentially deprives the individual concerned of substantive, extradition-specific protections, most notably the specialty rule, the dual criminality requirement, and/or the political offense exclusion (all discussed in Chapters 5 and 7 supra).288 The consequences could include that the alien would be: (i) subject to new criminal charges absent the removing State’s consent other than those contained in the arrest warrant (and extradition request, where applicable); (ii) tried for crimes unrecognized by, or for which the statute of limitations has already run in, the removing State, and would thus have been foreclosed per the provisions of an extradition treaty;289 and/or (iii) prosecuted for political offenses that otherwise would have been barred under the terms of an extradition treaty.290

---

287 Examples include: (i) the return to face torture (Arana Case, supra n.250), the death penalty (Mohamed Case, supra n.268), or unfair judicial proceedings (Bozano Case, supra n.61); or (ii) the denial of access to a judicial hearing (Mullen Case, supra n.6) or to counsel (see, e.g., Arana, supra n.250, ¶¶ 2.1, 11.5, 12).

288 See Paul O’Higgins, supra n.65, at 539 (“an evasion of the special statutory procedures laid down for extradition . . . ought to be unlawful.”); ILA, Report of the Comm. on Extradition and Human Rights, in ILA, REPORT OF THE SIXTY-SIXTH CONFERENCE 142, 164 (1994) (“[T]here is no rule which prohibits a state from deporting a suspected criminal to another state, particularly his state of nationality, to stand trial there. This practice is widely condemned as it deprives the deportee of the rights to which he would be entitled if he were extradited. In particular, it deprives him of the right to raise the political offence exception. Despite such objections the practice occurs in many countries.”).

289 For example, when Mexican officials located convicted murderer Ernesto Lopez who had escaped from a Texas prison in 1962 and had been living in Mexico for 35 years, they deported him back to the U.S. – via a hand-off to Texas prison officials along the Rio Grande border crossing – for entering
When “disguised extradition” occurs despite an active extradition treaty or arrangement, there need not be a breach of any protections guaranteed under that bilateral legal instrument, either because of the specific circumstances involved or because the States agree to cooperate by ensuring that such protections are still honored. For an example of the latter, in 1917, the U.K. issued a deportation order for the so-called Duke of Chateau Thierry, who was wanted in France for military desertion. As recounted by British legal scholar Paul O’Higgins, in this case “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.”

(Notably, as discussed in Chapter 5.a.iv supra, pure military offenses, such as desertion, are generally excluded from the scope of extradition, which may additionally explain in this case why no breach was found.)

Even if an extant extradition treaty or arrangement is bypassed in favor of removal, however, some States maintain that such a practice is permissible, given that the two approaches – extradition and removal – are complementary and neither has a priori supremacy. Indeed, case law exists for the proposition that a State should be given due deference in exercising its immigration authorities and that where a
removal order is valid on its face, a reviewing court should not second-guess its motives unless the order were conspicuously a “sham.” 293 This derives from the concept that governments generally should be accorded a “margin of appreciation” or broad discretion in such decisions, 294 as they tend to be driven by policy concerns about national security and the public welfare. Accordingly, courts are generally loath to scrutinize the claimed justifications for removal decisions, unless there is some facially powerful reason to do so, 295 and then the burden of proof would lie with the party trying to show such unlawful conduct. 296

293 See Regina v. Superintendent of Chiswick Police Station, ex parte Sacksteder [1918] 1 KB 578 (ruling in favor of the Home Secretary’s reliance on a deportation order to effect the return of military deserters to France).

294 Goodwin-Gill, supra n.8, at 262 (“In determining whether its interests are adversely affected by the continuing presence of the alien, or whether there is a threat to ‘ordre public,’ the expelling State enjoys under international law a fairly wide margin of appreciation.”); id. at 275 (“A full appeal on the merits, or even some special administrative tribunal which hears representations, may not be demanded, especially in political and security matters where the executive enjoys the widest margin of appreciation.”); Maroufidou Case, supra n.272, ¶ 10.1 (“It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly . . . under the Optional Protocol, unless it is established that they have not interpreted and applied in good faith or that it is evident that there has been an abuse of power.”) (articulating the eponymous “Maroufidou formula”); Barbie Case/Eur. Comm’n, supra n.281, D.R. 37 at 234 (“[T]he Commission has always considered that, in cases where the Convention refers to domestic law, it is primarily the responsibility of the national authorities to interpret and apply this law, but at the same time the Commission retains a limited power of control over the manner in which the national authorities have performed this task [to ensure it has not been arbitrary].”).

295 “If [a removing State] does give reasons, any scrutiny of them, and the evidence supporting them, is (unless it is a question of establishing that specific conditions laid down by treaty have been met) probably to be limited to establishing that they are prima facie sufficient to negate any presumption of arbitrariness: particularly where interests of national security are concerned, a meticulous scrutiny of the reasons for a state’s decision would be inappropriate.” Jennings & Watts, supra n.11, at 943-44. See also Regina v. Home Secretary, ex parte Hosenball, [1977] 1 W.L.R. 766, [1977] 3 All E.R. 452 (Ct. of App.), Mar. 29, 1977, available at https://groups.google.com/forum/#!topic/alt.lawyers/nA90mHFASio (last visited on Jan. 5, 2014) (“In my judgment, there being no allegation that the Secretary of State acted in bad faith, we are bound to accept that he is the person who must decide whether particular matters are fit for disclosure or not when national security is involved.”).

296 See Shearer, supra n.8, at 84 (overall, where case is a prima facie de facto extradition rather than blatant disguised extradition, attempts to have the order upset are likely to fail as the onus falls to an extent on the applicant to show that discretion was improperly exercised, if any judicial review can be obtained at all); e.g., Shepherd Case, supra n.246, 70 O.R. (2d) at 775-76 (indicating that a “heavy onus” is imposed on the party alleging that the removing government unlawfully exercised its power).
Furthermore, where a pursuing State expresses interest in securing the custody of a fugitive for law enforcement purposes, it appears there is no compelling reason in principle why a host State could not choose to remove an alien under its immigration laws rather than rely on an existing extradition treaty.

[Extradition treaties] tend to facilitate cooperation among States rather than to give additional rights to an accused person. It would be difficult to conclude from a treaty on extradition that a person who could be lawfully expelled to a certain country would be exempt from expulsion once the State of destination makes a request in view of submitting the same person to criminal proceedings.\(^{297}\)

The U.S. Supreme Court has gone a step farther, maintaining that “unless an extradition treaty contains an explicit provision making the treaty the exclusive means by which a defendant’s presence may be secured, extra-treaty seizures are permitted.”\(^{298}\) In almost every instance, extradition treaties do not expressly claim to be the only available mechanism by which a fugitive can be returned to a pursuing State, and therefore its provisions and even demonstrable circumvention would be of no consequence for courts holding such a view in evaluating the lawfulness of “disguised extradition.”

In a similarly styled ruling, the European Commission on Human Rights found no breach of the ECHR despite evidence of circumvented extradition on the ground that “the Convention contains no provisions either on the conditions under which extradition may be granted or on the procedure to be applied before the extradition may be granted.”\(^{299}\) Furthermore, as a practical matter, State decision-making on alien removals is difficult to challenge because, even if a court decides to peer behind the veil of a removing State’s decision-making calculus, there is a heavy burden of proof to show that the removal, while lawful, was primarily pretextual.


“[T]he principle of good faith in international law is advantageously presumptive, and it will never be very easy to establish *mala fides* on the part of the expelling State.”  

Not surprisingly, in instances where no extradition treaty exists, courts seem less concerned about evidence of apparent or possible inter-State collusion or the deprivation of extradition-related rights in connection with effecting the delivery of a fugitive for a pursuing State’s benefit. For example, in the *Barbie Case*, France’s Court of Cassation held that Bolivia and France’s joint effort in February 1983 to return the former Nazi to France by way of indirect removal\(^\text{301}\) (via French Guyana) was permissible because France could lawfully secure the custody of a fugitive beyond reliance merely on voluntary return or extradition arrangements, and that any collusion by State authorities was inconsequential given that no extradition treaty was circumvented.\(^\text{302}\) The Court insisted, however, that Barbie be entitled to a full set of rights and protections as a defendant in the course of his judicial proceedings.\(^\text{303}\) In addition, the Court allowed new charges related to crimes against humanity to be brought against Barbie absent any applicable rule of specialty (or statute of limitations for such offenses).\(^\text{304}\)

Another way in which “disguised extradition” *itself* would not violate international law but the specific manner in which it were executed could do so would be where a removing State transferred an alien to the receiving State in violation of his right to liberty and security of person. Such individual rights are protected under such broadly subscribed multilateral conventions as the ICCPR,\(^\text{305}\) ECHR,\(^\text{306}\) and ACHR.\(^\text{307}\)

---

\(^{300}\) *Goodwin-Gill*, supra n.8, at 206.

\(^{301}\) His deportation was premised on a violation of Bolivian immigration law arising out of his use of a false identity to obtain Bolivian citizenship. *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Ct. of Cassation (Crim. Chamber), Fr., Oct. 6, 1983, *reprinted in* 78 ILR 125, 125 (1988) [hereinafter *Barbie Case/France*].

\(^{302}\) *Id.* at 128.

\(^{303}\) *Id.* at 131.

\(^{304}\) *Id.* at 132-47 (discussing Court of Cassation judgments dated Jan. 26, 1984, and Dec. 20, 1985).

\(^{305}\) ICCPR, supra n.8, art. 9.

\(^{306}\) ECHR, supra n.110, art. 5.
Such a violation might arise in an instance where the alien was not allowed to leave the removing State’s territory as a “free man,” but rather in handcuffs or under other physical restraint and/or within the custody or armed escort of receiving State officials. A number of courts have issued judgments to this effect, including the Supreme Court of India, the U.K. Court of Appeal, the European Court of Human Rights, and the Human Rights Chamber for Bosnia and Herzegovina. At the same time, however, this notion of departure as a “free man” is fraught with significant logistical limitations, as the freedom experienced may be only momentary or otherwise short-lived, depending on the circumstances under which the alien physically leaves removing State territory and any foreknowledge a pursuing State has as to the routing of his outbound journey.

Further, because “disguised extradition” may involve an aggressive pursuing State, that practice can sometimes entail: (i) instigation (i.e., to provoke or incite the host State to arrest and transfer the alien fugitive); (ii) connivance (i.e., to feign ignorance or to otherwise intentionally fail to act when one should in the face of a wrongful act); or (iii) collusion (i.e., to enter into a secret agreement or understanding with the host State in violation of the law or to the detriment of a third party). Although such roles are not an essential ingredient of “disguised extradition,” when such

307 ACHR, supra n.8, art. 7.
308 E.g., Muller Case, supra n.51, [1955] SCR (1) at 1300-01 (while an alien “may be conducted to the frontier under detention he must be permitted to leave a free man and cannot be handed over under arrest.”).
309 E.g., Regina v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry, 1 K.B. 922, 937 (1917), Ct. of App. (U.K.) (lawful so long as the deportation order specified which ship the alien was to board rather than to a designated country).
310 E.g., Bozano Case, supra n.61, ¶¶ 23-26, 60 (finding a violation of ECHR art. 5(1)(f) as the alien was transported out of France in an unmarked car, wearing handcuffs, and bookended between two police officers).
311 E.g., Bensayah, supra n.8, ¶¶ 50, 171-73 (finding a violation of ECHR, art. 5(1) where the alien was handed off to U.S. forces at Butmir Base in Sarajevo, with the full knowledge that the alien was to be kept detained in U.S. custody on B&H territory until he was transported (the following day) to Guantánamo Bay, Cuba).
312 See, e.g., Muller Case, supra n.51, [1955] SCR (1) at 1300 (“It is true [the removed alien] may be apprehended the moment he leaves, by some other power and consequently, in some cases this would be small consolation to him, but in most cases the distinction is substantial, for the right of a foreign power to arrest except in its own territory and on its own boats is not unlimited.”).
activity occurs, some courts have found a violation of international law expressly on such grounds.

Neither instigation nor collusion was found in a 1997 case, where Norwegian border police inquired with their British counterparts about the status of two individuals traveling from the U.K. with forged and stolen documents and learned merely that they “were wanted in connection with criminal activities in England.” In that instance, a U.K. court concluded that British authorities had not “procured, influenced or colluded in the decisions to deport the applicants” and that therefore no abuse of process or violation of international law had occurred.\(^{313}\)

However, in the 1999 *Mullen Case*, the U.K. Court of Appeal found that the British Secret Intelligence Service (SIS) “took active steps to persuade the CIO [Zimbabwe’s Central Intelligence Organisation] that there existed grounds for deportation and provided evidence, including crucially, evidence of previous convictions, as well as draft documents recommending grounds for deportation;” and out of concern that if the appellant had an opportunity to challenge the deportation order in court or to express a preference to be sent to Ireland (his country of nationality), “the SIS recognized the need for stage-management of the timing of his detention by reference to an immediately available flight to London . . . and specifically considered and suggested to the CIO how to deal with any last-minute claim by the appellant to be deported to Ireland.”\(^{314}\) The Court held that by “initiat[ing] and subsequently assist[ing] in and procur[ing] the deportation of the appellant, by unlawful means, in circumstances in which there were specific extradition facilities between [the two States], “they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.”\(^{315}\)

---


\(^{314}\) *Mullen Case*, supra n.6, at 2049-50.

\(^{315}\) *Id.* at 2050. See also *Regina v. Bow Street Magistrates’ Court, ex parte Mackeson*, High Ct. of England (Div. Ct.), 77 ILR 336, 75 Cr. App. R. 24 (1981), June 25, 1981 [hereinafter *Mackeson Case*] (finding that through collusion between Zimbabwe-Rhodesia (Z-R) and British officials – although not with any conscious wrongdoing on the part of the British police officer who had merely informed the
At the same time, however, other courts have adopted a principled view that they have no power to inquire into the circumstances that brought a fugitive into its jurisdiction, and therefore have been unwilling to consider whether collusion over deportation, let alone forceful or fraudulent seizures, have occurred, and if so whether such conduct has breached international law. That Roman maxim, known as *male captus bene detentus* (Latin for “an unlawful apprehension may nevertheless give rise to lawful detention and prosecution”), maintains that the means by which he reached the courtroom is not relevant to whether the court has proper personal jurisdiction over the individual and whether he will receive a fair trial on the merits. This doctrine will be discussed more extensively in Chapter 13.a.i infra, but for present purposes, it is worth noting that it has been applied in “disguised extradition” cases.

For instance, in 1985, a U.K. court was unwilling to entertain allegations of “collusion” on that doctrinal ground in *Regina v. Plymouth Magistrates’ Court, ex parte Driver*, where U.K. police had informed Turkish officials that, if it was within their legal authority to deport a U.K. citizen wanted for murder, that would be helpful. Shortly thereafter, Turkey deported him by placing him on a plane headed for London and, upon arrival, he was promptly arrested and charged. Similarly, in *United States v Cordero*, the U.S. Court of Appeals for the First Circuit found no difficulty asserting personal jurisdiction over the defendants – Josephine Cordero and her pilot William Sorren, who were suspected of cocaine smuggling from Panama into the United States – where U.S. DEA officials simply requested assistance from a friendly government (Panama) to seize them, subject them to an

---

316 See the Glossary. This term occasionally has been referred to as “*male captus, bene judicatus*,” meaning essentially “wrongly captured but properly adjudicated.” See, e.g., Tineke Poort, Male Captus, Bene Judicatus: Disguised Extradition and Other Practices, 1 Leiden J. Int’l L. 65 (1988).
318 Id.
expulsion order, and put them on a plane to an intermediate destination (Venezuela) with which cooperation had also been obtained. In this way, the fugitives ultimately came into U.S. custody in Puerto Rico, notwithstanding the existence of an extradition treaty between the U.S. and Panama.\footnote{Pyle, supra n.46, at 271-72.}

Another possible legal issue could arise to the extent that the host State was under an aut dedere obligation and chose to exercise its immigration laws to remove an alien in lieu of extradition. After all, “[a] failure to either extradite or prosecute will result in an internationally wrongful act by the State, for which it will be responsible to the other State parties to the treaty.”\footnote{Claire Mitchell, The Scope and Operate of the Obligation (Part 2) of Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law, IHEID, Graduate Institute Publications Online, 2009, ¶ 13, available at http://iheid.revues.org/302#ftn2 (last visited on Feb. 28, 2012).} That said, to the extent that the host State could ensure that its removal of the individual ultimately resulted in his physical custody by a pursuing State – the functional end-result of extradition – without in the process being found collusive or otherwise in violation of international legal standards, there appears to be no reason in principle why removal could not fulfill that aut dedere obligation. Indeed, the French Cour de Cassation in the Barbie case in connection with his expulsion from Bolivia to France to face crimes against humanity charges, although technically no aut dedere provision was in effect, found that “the power to deport or expel is to be treated as coextensive with extradition.”\footnote{Id. ¶ 9 (citing Barbie Case, France, supra n.301).}

In instances where extradition has been refused for non-human rights law-based reasons (such as the fugitive is a host State national, no dual criminality has been established, or the extradition request has not been deemed timely), removal to the pursuing State can still be possible, given the differing purposes of extradition and removal operations. However, removal would be barred in instances in which extradition was refused on human rights grounds, such as concerns about torture or
the death penalty being imposed.\textsuperscript{322} The key permissible conditions in such instances, according to one expert European body, are that there is a valid basis in law for the removal and that all individual rights set forth in the applicable treaty are respected.\textsuperscript{323}

In sum, there is a wide-ranging and unsettled mix of international and domestic legal opinion on whether “disguised extradition” is lawful. When all non-essential yet co-mingled international legal issues are separated out, all related domestic legal concerns are removed from consideration, and the small handful of outlier tribunals that have found the practice to be either fundamentally lawful\textsuperscript{324} or unlawful \textit{in principle} are set aside,\textsuperscript{325} it appears that the vast majority of courts has taken a more nuanced position on the issue, by essentially examining whether the intent of the removing State was proper and limited in terms of strictly adhering to its domestic immigration laws, especially vis-à-vis the countervailing need to protect the fugitive’s fundamental human rights\textsuperscript{326} or, alternatively, was \textit{primarily} aimed at working in tandem with another State to bring a fugitive to justice.\textsuperscript{327}

\begin{flushleft}
\textsuperscript{323} \textit{Id.} at 4.
\textsuperscript{324} \textit{See}, e.g., \textit{Barbie/Eur. Comm’n}, supra n.275, D.R. 37 at 233 (“It follows that, even if the applicant’s expulsion could be described as a disguised extradition, this would not, as such, constitute a breach of the [European] Convention.”); \textit{Sitaram v. Superintendent Rangoon Central Jail}, High Ct., Burma, Feb. 15, 1957, [1957] \textit{Burma L. Rep.} 190, \textit{reprinted in} 28 ILR 313 (1963) (holding that Burmese courts need not examine the Executive’s decision to rely on deportation instead of extradition and the Executive need not provide any justification for its decision).
\textsuperscript{325} \textit{See}, e.g., \textit{Barton Case, supra} n.271, [1974] 131 C.L.R. at 483-84 (“It is an unsatisfactory practice, from an international as well as a domestic point of view, to employ a power of expulsion as such a substitute [for extradition]. Further, an executive, being bound by statute as to the occasions for and purposes of expulsion, cannot validly agree to employ that power as a general equivalent to a power to extradite, however much on occasions the expulsion may serve as an extradition in an individual case because of its circumstances.”).
\textsuperscript{326} \textit{See} \textit{Lülf v. State of the Netherlands}, Ct. of App., The Hague, Netherlands, June 17, 1976, \textit{reprinted in} 74 ILR 424 (“[T]here was no question of veiled extradition, because there had been no evidence that the State had influenced West Germany’s decision to withdraw the request for extradition, and the State reasonably felt obliged to hand over the West German to the West German border police since only West Germany was bound to admit him, and the State was justified in assuming that no other country would be willing to admit him since he had no valid travel document.”); \textit{Regina v. Guildford

464
Some courts have focused their intent-based inquiry specifically on such objective indicia as to whether: (i) the alien was expelled as a free person\(^{328}\) rather than directly transferred into the custody of officials or agents of the receiving State,\(^{329}\) (ii) extradition was previously requested\(^{330}\) or its procedures and protections were

---

\textit{Magistrates’ Court, ex parte Healy}, High Ct. of England (Div. Ct.), Oct. 8, 1982, \textit{reprinted in} 77 ILR 345, 348 (“[T]here is no ground whatever for supposing the police have tried to persuade the United States’ authorities to deport this applicant so that they could arrest him in this country and thus circumvent the provisions of the extradition treaty between the two countries.”); \textit{C. v. F.R.G.}, Appl. No. 11017/84, Mar. 13, 1986, Eur. Comm’n on Hum. Rghts., Decision on Admissibility, \textit{reprinted in} 46 D.R. 176, available at \url{http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionID=87367583&skin=hudoc-en&action=request} (last visited on Feb. 29, 2012) (denying admissibility of application under Articles 3 and 5 of ECHR by Yugoslav national who was ordered to be deported to Yugoslavia where he could face up to a 10-year prison sentence for his failure to perform military service) (no reference in judgment to any removal request by Yugoslavia); \textit{Rex v. Governor of Brixton Prison ex parte Sarno} [1916] 2 K.B. 742, 749 (K.B.D.) (U.K.) (misuse of deportation powers would be grounds for invalidating that immigration order); \textit{Shepherd Case, supra} n.246, 70 O.R. (2d) at 775-76 (maintaining that to succeed in a challenge on “disguised extradition” grounds a party would need to show that the Immigration Minister “did not genuinely consider it in the public interest to expel the person in question” but rather that the purpose was “to surrender the person as a fugitive criminal to a state because it asked for him”); \textit{Sánchez-Ramírez v. Fr.}, Appl. No. 28780/95, Eur. Comm’n on Hum. Rghts., June 24, 1986, D.R. 86.

\(^{327}\) See, \textit{e.g.}, \textit{Mackeson Case, supra} n.315 (finding that the U.K. and Z-R officials had colluded and sought “extradition by the back door”). See \textit{generally} \textit{Bedi, supra} n.3, at 402 (“If deportation order is made with improper intentions – not only to get rid of the asylum seeker but to assist a friendly country in procuring its fugitive offender thru disguised extradition – unlawful because while extradition provides for judicial hearings, deportation procedure lacks such safeguards and smacks of the Star Chamber, so courts are authorized to upset the deportation order.”).

\(^{328}\) See, \textit{e.g.}, \textit{Muller Case, supra} n.51, 22 ILR at 500 (“[T]he fact that a request [for extradition] has been made does not fetter the discretion of the Government to choose the less cumbersome procedure \textit{i.e.}, expulsion] of the Aliens Act when a foreigner is concerned, provided always that in that event the person concerned leaves India a free man.”). In such instances it bears repeating that States can still indirectly ensure that an alien is sent to a country destination of their choice by placing him on a designated ship. \textit{E.g.}, \textit{Papadimitriou v. Inspector General of Police and Prisons, et al.}, Sup. Ct. sitting as a High Ct. of Justice, Palestine, Aug. 3, 1944, \textit{reprinted in} 11 ILR 231 (1949).

\(^{329}\) \textit{E.g.}, \textit{In re Esposito}, Fed. Sup. Ct., Brazil, July 25, 1932, \textit{III Revista de Direito 73, reprinted in} [1933-34] 7 ANN. DIG. & REP. PUB. INT’L L. CASES 332 (H. Lauterpacht ed. 1940) (“If the petitioner, outside of our territory, were not left at liberty but were to be sent to Italy [where he was likely to be prosecuted for political offenses], there would really be carried out a true extradition which the Italian Government has not requested and which the Brazilian Government has not decided to grant.”).

\(^{330}\) \textit{E.g.}, \textit{Lopez de la Calle Gauna}, Conseil d’État, Fr., Apr. 10, 2002, \textit{available at} \url{http://www.easydroit.fr/jurisprudence/Conseil-d-Etat-2eme-et-1ere-sous-sections-reunies-du-10-avril-2002-234005-publie-au-recueil-Leh/138572/} (last visited on Dec. 15, 2013) (removal to State of nationality permissible where criminal charges pending so long as receiving State has not issued an extradition request); \textit{Stevenson v. United States}, 381 F.2d 142, 144 (9th Cir. 1967) (finding personal jurisdiction in case where Mexican immigration officials transported two Americans to the U.S. border and turned them over to Arizona sheriff’s deputies as “the evidence shows that the removal of the appellants from Mexico was not initiated by the United States,” that the arresting Mexican police officer was unaware that an extradition request had ever been made by the United States, and that “it
the object of deliberate circumvention, or (iii) no other State was willing to receive the alien. In any event, such judicial review is generally subject to only superficial scrutiny, with considerable deference paid to States, unless there is compelling evidence suggesting *mala fides* on the part of the removing and receiving States, and, as noted above, there are even some State judiciaries that pay no mind at all to how an individual came to be present within its jurisdiction.

* * * * *

This Chapter has explored the operational and legal dimensions of the first of the three types of full-scale alternatives to extradition: reliance on domestic immigration laws. We now shift in Chapter 11 to the second type of full-scale alternative: informal law enforcement cooperation.

---

Footnotes:

331 *E.g.*, *Residence Prohibition Order Case (2)*, Super. Admin. Ct. of Münster, FRG, Oct. 1, 1968, 61 ILR 433, 435 (1968) ("[E]xpulsion may not be ordered as a means of evading this prohibition against extradition. However, such expulsion is deemed inadmissible only where it has become evident that the intention of the authorities was to avoid the restrictive regulations on extradition.").

332 *E.g.*, *Wallace Case*, supra n.44, at 305 (finding no evidence of malintent on the part of Dutch immigration authorities in deporting Wallace to the United States while notably indicating that he was unable to identify any other State willing to receive him); *Linna*, 790 F.2d at 1031 (noting defendant’s "own failure to designate a country of deportation [after such an opportunity was granted him] lends credence to the immigration judge's finding that no country other than the Soviet Union would accept him").
CHAPTER 11
ALTERNATIVE II:
INFORMAL LAW ENFORCEMENT COOPERATION

This analysis now turns from immigration laws to bilateral cooperation where the physical custody of a fugitive is transferred not pursuant to treaties or statutes but through informal arrangements. This Chapter, which will address the second of the three full-scale alternatives to extradition, begins by discussing the nature and scope of informal law enforcement cooperation, then evaluates host State participation and acquiescence – its two forms of application – as well as host State motivation to engage in such cooperation. Next, this Chapter will consider the extent to which this full-scale alternative to extradition is lawful by examining general principles and specific legal grounds implicated by such scenarios, as well as by taking a close look at the landmark Öcalan case. These types of approaches underscore the resourcefulness of States in their effort to secure the custody of a fugitive abroad.

a. Definition, Nature, and Scope
In this study “informal law enforcement cooperation” is defined as a form of inter-State cooperation handled through non-conventional legal procedures or channels between law enforcement authorities (or other types of government officials acting in support of law enforcement) resulting in the direct or indirect rendition of a fugitive. Let us consider the various elements and dynamics underlying this concept.

• The law enforcement or other authorities must be current officers operating under the color of
law; they must not be: (i) private individuals,¹ (ii) law enforcement or other types of government officers acting in their personal capacity or ultra vires,² or (iii) immigration officials, as their involvement necessarily would imply the use of non-law enforcement-related authorities, motivations, and/or plans for the fugitive, but conceivably could involve military, customs, or intelligence officials serving a law enforcement support function.

• The host State must be aware of the operation and in one form or another and at one level of government or another support or permit it; if the host State has no foreknowledge of the operation or does not support it in advance in any manner or at any level, it would be more properly classified as a unilateral measure (discussed in Chapter 12.b infra);³ and if the host State mistakenly transfers the fugitive, even if based on an unintentional misrepresentation by the pursuing State, it would fall within the scope of a “silver platter” scenario (addressed in Chapter 3.c supra).

• The transfer of physical custody must be via non-conventional procedures, such that it does not emanate from an extradition treaty or other written agreement such as a SOFA, may not operate under formal extradition procedures even if the transfer is authorized via comity or

¹ To the extent private individuals, such as bounty hunters or private detectives, are engaged on the pursuing end, such an operation would more accurately constitute a “silver platter” scenario (see Chapter 3.b supra). An example of this can be found in the famous Ker case before the U.S. Supreme Court, Ker v. Illinois, 119 U.S. 436 (1886). “In the Ker case, 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 did not use them, however, because he had no access to the proper Government of Peru, which was disorganized as a result of military occupation of the capital city by Chilean forces. The latter assisted the American officers in forcing Ker to board a U.S. vessel.” Michael H. Cardozo, When Extradition Fails, is Abduction the Solution?, 55 AJIL 127, 133 (1961).

² See Chapter 3.b supra discussing, inter alia, support by host State law enforcement officials operating outside of their official capacity or in knowing contravention of policy, authorization, or instruction by their superior officers.

³ To the extent the host State only discovers the operation after the fact, its failure to protest may qualify as acquiescence, but the underlying action would be properly classified as a unilateral operation.
reciprocity, and the fugitive may not be provided any kind of legal process.

- The transfer of custody between the authorities of the two States may operate either directly or indirectly, including with the intervention of a third State (either as an intermediary destination or as an agent on behalf of the pursuing State’s authorities\(^4\)), and does not depend on whether an extradition treaty is in effect between the pursuing and host States.

- Informal law enforcement cooperation would stand regardless of whether the host State publicly conceals or denies its role in any such transfer of custody of a fugitive;\(^5\) and a host State’s *ex post factum* decision to repudiate or protest an operation that resulted in the fugitive’s transfer out of its territory would not negate the fact that such cooperation had occurred.\(^6\)

\(^4\) For example, “following the First World War there was apparently some thought of bringing Grover C. Bergdall back to the United States for trial on a charge of evading military service by having him forcibly removed from Germany by British agents.” Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 B.Y.B.I.L. 77, 92 (1964).

\(^5\) Given political sensitivities, especially if the subject individual is a host State national, many States wish to maintain a low profile and/or assert plausible deniability with respect to helping pursuing States bring, say, terrorists or narcotics offenders to justice. *See M. Chérif Bassiouini, International Extradition and World Public Order* 128-29 (1974) (stressing how difficult it is to document such cases as the governments tend to have little reason to share the details of their cooperation with the press or judiciary); Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 865 (1993) [hereinafter Nadelmann, *International Rendition*] (a DEA agent who had been prominently involved in Operation Springboard told Nadelmann that the Uruguayan interior minister had approved an irregular rendition plan only on condition that his consent would not be publicly revealed if anything went wrong); *e.g., United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990) (initially when the DEA approached Mexican officials about apprehending Dr. Humberto Álvarez-Machain, who was suspected of involvement in the torture and death of a DEA agent operating in Mexico, the Mexican officials reportedly wanted the arrangements to be made “under the table” to avoid upsetting Mexican citizens, but the deal broken down over the DEA’s unwillingness to pay them $50,000 in advance for “transportation expenses”), *aff’d sub nom. United States v. Álvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), rev’d, 504 U.S. 655 (1992).

\(^6\) *See* Nadelmann, *International Rendition*, supra n.5, at 865 (the Uruguayan interior minister indicated he would be among the first to publicly condemn the entire irregular rendition operation if any backlash resulted). An example of how such denials can play out in public once cooperation comes to light can be found in connection with U.S. anti-narcotics smuggling efforts in the Bahamas that implicated Bahaman government officials. *See* Reginald Stuart, “U.S.-Bahamian Relations are Straining Under Drug Investigations,” *N.Y. Times*, Sept. 28, 1983, at A21.
b. **Application**

This section examines the two forms of informal law enforcement cooperation by the host State government – (active) participation and (passive) acquiescence⁷ – but first it briefly explores the motivation of host State officials to offer their services or extend their consent.

i. **Host State Motivation**

In many such cases, the host State will share a law enforcement interest in the particular fugitive’s capture and removal.⁸ In addition or alternatively, the host State may be willing to participate in or acquiesce to an operation on its territory as a political favor or as a *quid pro quo* for something of comparable value, such as preferred trade treatment, political support on a key issue in a certain international or regional forum, or cooperation on a reciprocal law enforcement matter extended by the pursuing State.

At times, however, informal law enforcement cooperation also may occur at the local level in which case the motive to willingly assist or “turn a blind eye” may arise out of a personal friendship established over years of working together, a “professional understanding,” or even simple bribery, most typically in the guise of cash or ammunition.⁹ Indeed, there are instances in which only selected individuals

---

⁷ See Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain*, 29 Cornell Int’l L.J. 383, 421 (1996) [noting that abduction [SR]S can occur either through “active participation” or “tacit assistance” of the host State (citing to the *Valot, Lira, Cotton, Sobell, Insull*, and *Karoly* cases, all of which can be found in Appendix II).

⁸ Such common interest may be reflected in a bilateral or multilateral treaty. See, e.g., Inter-Am. Conv. Against Terrorism, June 3, 2002, art. 8, OAS Res. 1840 (XII-O/02), O.A.S. No. A-66, available at [http://www.oas.org/juridico/english/treaties/a-66.html](http://www.oas.org/juridico/english/treaties/a-66.html) (last visited on July 16, 2013) (“The states parties shall work closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offenses established in the international instruments listed in article 2.”).

⁹ Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* 444 (1993) [hereinafter Nadelmann, *Cops*]. See also Pete Axthelm with Anthony Marro, “The Drug Vigilantes,” *Newsweek*, Aug. 16, 1976, at 56, available at [http://ia700305.us.archive.org/25/items/globalconnection01unit/globalconnection01unit.pdf](http://ia700305.us.archive.org/25/items/globalconnection01unit/globalconnection01unit.pdf) (Exh. No. 14) (last visited on Feb. 13, 2012) (quoting a U.S. federal agent as saying: “Clearly we have paid for some of these people. It might not have been a specific ‘quid pro quo’ but we would give x dollars or x cases of ammunition to officials who helped get these people on planes.”); id. (DEA payoffs made
or offices within a given State’s government are aware of a planned cooperation, given the sensitivities involved, such as the prospect of a tip-off to officials sympathetic to the fugitive; concerns about foreign policy, international politics, or popular backlash; and the controversial character of the planned tactics. It is also possible that the host State may be willing to cooperate when “induced by fraud or deception on the part of the [pursuing] state agents to facilitate the surrender of the fugitive offenders.”

ii. **Host State Participation**

Perhaps the most common way in which the host State engages in informal law enforcement cooperation is by active participation, either by: (i) undertaking seizure/arrest activities exclusively or principally under its own auspices – including possibly in the capacity as a transit or intermediary State – and then delivering a fugitive to pursuing State officials through a physical handover, by means of deception, by dictating a targeted travel route; or via an indirect transfer; or (ii) carrying out a joint operation with pursuing State authorities.

**Physical Handovers.** When host State officers undertake an operation on their own with the intention of delivering a fugitive to their pursuing State counterparts, and do so directly, the handover tends to occur along their common land or water
to Senegalese police allegedly prompted their cooperation in the seizure and deportation to the U.S. of Dominique Orsini, discussed infra).

10 See Nadelmann, Cops, supra n.9, at 442-43.

11 See Satyadeva Bedi, Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries 396 (2002). This might occur, for instance, as a result of deliberately faulty or fabricated information provided by pursuing State officials to their host State counterparts. Such a situation, however, would present legal grounds for protest, whether publicly or privately communicated, as a function of bad faith at a minimum, if not also due to a contractual breach.

12 During the time a fugitive is located within the geographical boundaries of a given State, even temporarily during transit, that State qualifies as the host State. See definition of “host State” in Chapter 1.b. For example, in August 1975, while his flight between Buenos Aires and Nice stopped briefly for refueling in Dakar, Senegal, Dominique Orsini, who was wanted on narcotics conspiracy charges in the U.S., was arrested and detained by the Senegalese police at the behest of the DEA and then deported to the U.S. See United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), aff’d without opinion, 559 F.2d 1206 (2d Cir. 1977), cert. denied, 434 U.S. 997 (1977); Nadelmann, International Rendition, supra n.5, at 443, 866; Kyle M. Medley, Note, The Widening of the Atlantic: Extradition Practices Between the United States and Europe, 68 Brook. L. Rev. 1213, 1238 (2002-03).
border (if neighboring States), on a ship, or at an international airport, and is
effected absent any kind of legal proceedings or the fugitive’s access to an attorney.
The process of physically pushing fugitives across a border, sometimes literally
under a fence, into the waiting arms of pursuing State authorities, has been dubbed
“extradition Mexican-style” because this practice has occurred with notorious
frequency between the U.S. and Mexico.13 For example, in January 1934, four men
(including at least two positively identified as Mexicans) seized a U.S. citizen named
Lopez while in Nuevo Laredo, Mexico, who was then transported by car to the Rio
Grande (the river dividing Mexico and the U.S.) and forced to hold on to a tub while
two of the men towed him across the river to the U.S. side where he was arrested by
a U.S. Marshal.14

Until 1965, when informed about a fugitive on Irish territory, the local police would
locate and arrest the individual, take him to a place near the border without any
legal process, and physically thrust him over the frontier to U.K. law enforcement
officers.15 Similarly, in July 1988, a fugitive named Beahan “was taken by members
of the Botswana Police Force from Botswana and was handed to members of the
Zimbabwe Republic Police,” at the border where he was detained.16 Likewise, in
August 1994, Nepali police informally transferred custody of Yakub Memon, who
was the chief suspect in the Bombay bombings that killed 260 persons in March
1993, to their Indian counterparts along the border with Bihar.17

13 See NADELLENN, COX, supra n.9, at 437.
14 Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934). In addition, in or about January 1956, Mexican
law enforcement officers seized Emil Wentz, a U.S. citizen, in Mexico City and transported him by
auto to Laredo, Texas, where he was transferred into the custody of U.S. agents. Wentz v. United
States, 244 F.2d 172, 176 (9th Cir. 1957).
15 See IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 75 (1971). In 1965, the Supreme Court of
Ireland “declared such actions a contempt of court because it deprived the subject of his
constitutional right to seek habeas corpus” and regular extradition procedures were thereby
restored. Id. (adverting to The State (Quinn) v. Ryan [1965] I.R. 70, Ir. Sup. Ct.).
(Sup. Ct of Zimb., Sept. 4, 1991) (finding no violation of international law as there was no affront to
Botswana’s sovereignty).
(last visited on Jan. 6, 2014); Sheela Bhatt, “The Strange Case of Yakub Memon,” Rediff.com, Aug. 7,
Consider also the following examples in which a physical handover was effected in a non-border location, such as at a seaport or airport. In March 1934, after failed attempts to win the extradition (and later deportation) from Greece of Samuel Insull, a Chicago financier who had perpetrated a major fraud, the U.S. sought the intervention of the Turkish police to seize him while his Greek-flagged steamship was anchored in the Bosporus straits (Turkish territorial waters) to stock up on provisions. The Turkish police prevented the ship’s departure, boarded the ship, removed him to Istanbul and onward to Smyrna, where he was then taken on to the U.S.-owned S.S. Exilona and delivered to a U.S. government agent who took him into custody and sailed back to the United States. In a February 1911 case, after Vinayak Damodar Savarkar, a Hindu revolutionary who was in transit between England and India to face criminal charges, escaped while his ship was docked in Marseilles, a French port police officer, while on French-controlled territory, handed Savarkar over to the Indian Army military police guard responsible for escorting him.

In November 1973, after being lured from Argentina to Bolivia by a U.S. DEA informant, Julio Lujan, an Argentine pilot charged with heroin trafficking, was shortly thereafter placed on an aircraft bound for the U.S. without ever having been charged under Bolivian law. Further, in July 1993, at the request of the FBI and upon his orchestrated transfer from Ghana, Nigerian government officials denied the admission of Omar Mohammad Ali Rezaq, a Palestinian who had killed an American airline passenger during a hijacking in 1985, and turned him over at the Lagos Airport to FBI agents (who took him on a charter flight back to the U.S.) at a

18 United States v. Insull, 8 F. Supp. 310, 311 (N.D. III. 1934); Nadelmann, COPS, supra n.9, at 438.
time when such an activity would be easily overlooked during a period of political chaos in Nigeria.21

**Deliveries by Means of Deception.** Host State officials also can engineer the delivery of a fugitive *directly* to a pursuing State’s territory or flagged vessel22 by deceptive means, including through the use of lures or other inducements, rather than through physical force or manhandling. For example, in the case of the former Kurdish separatist leader Abdullah Öcalan (discussed more extensively *infra*), the Kenyan Minister of Foreign Affairs had misinformed the Greek Ambassador in Ankara (with whom Öcalan had been staying) that Öcalan would be put on a plane to the Netherlands, which had reportedly agreed to grant him political asylum, and instead placed him on a Turkish-registered aircraft where he was promptly arrested.23 That exercise qualified as a “surrogate” lure and capture operation because it was carried out solely by host State authorities on behalf of the pursuing State, to distinguish it from the other LCO varieties (unilateral, consensual, and joint) as defined in Chapter 1.g *supra*. (As the lawfulness analysis of LCOs is essentially uniform, regardless of type, it will be presented in Chapter 12.c.i *infra*.)

**Dictating a Targeted Travel Route.** In other instances, the host State can facilitate a pursuing State to secure custody of a fugitive by dictating a targeted travel route.

---


22 *See also* next sub-section, which addresses lure operations as a preliminary measure. To the extent deceptive techniques are used by the pursuing State to lure a fugitive to a cooperating third State as a final destination, that practice would qualify as a *fallback alternative to extradition*. Alternatively, where the LCO is used to bring a fugitive to third State territory as a preliminary step with the ultimate aim of delivering him back to pursuing State territory, that would constitute an *intermediate rendition/operation*. *See* Chapter 9.b.ii *supra*.

Specifically, when an airplane or ship carrying a fugitive arrives in a State’s territory, whether on a scheduled visit or for maintenance, refueling, or emergency stopover purposes, the (new/temporary) host State can exercise its jurisdiction to remove the individual from the incoming aircraft or ship (as necessary) and place him on one bound for pursuing State territory.\textsuperscript{24}

Such travel route determinations may follow tactical lure operations. For instance, in February 1977, after a DEA agent induced Anthony DiLorenzo, who had been convicted of securities violations and then had escaped from prison, to fly to Panama City, he was held there for a week before Panamanian officials placed him on an aircraft headed to Miami.\textsuperscript{25} Likewise, in June 1981, after former CIA agent Edwin Wilson, who had been charged with arms shipments to Libya, was lured out of Libya to the D.R., upon his arrival at the airport, local police detained him on the pretext that his customs papers were not in order and then proceeded to board him on a U.S. aircraft to New York during which flight a U.S. marshal arrested him.\textsuperscript{26}

\textbf{Indirect Transfers Via a Third State.} Sometimes the host State attempts to effect a fugitive's transfer to a pursuing State via a cooperating third State, that is, one willing to extradite, deport, or otherwise forward on the fugitive to the pursuing State once he reaches its territory. This type of transfer may involve the same operation as described just above (\textit{i.e.}, the targeted travel route), except that here the protagonist host State is the one where the fugitive \textit{begins} his travel rather than the intermediate State that sends him directly to pursuing State territory.

For example, in the 1920s a Hungarian national accused of embezzlement fled from Hungary to Egypt, where, absent an extradition treaty between the two States, the Hungarian Consul in Cairo requested the Egyptian police to seize the accused in

\textsuperscript{24} To the extent the fugitive were put on a vessel headed to a cooperating third State with no further intention of delivering him into pursuing State custody or control, that type of conduct would be more properly classified as a fallback, rather than a full-scale, alternative to extradition. \textit{See} Chapter 9.b.ii \textit{supra}.


Alexandria and transport him to Trieste, Italy, from where he could be extradited back to Budapest pursuant to a Hungary-Italy extradition treaty. Similarly, in July 1993, after completing a lengthy criminal sentence in Malta for an unrelated crime, Omar Mohammed Ali Rezaq, who had murdered a U.S. national in the course of an airplane hijacking in 1985, fled to Ghana, with whom the FBI arranged to have him shipped to Nigeria, as that State was willing to cooperate with the U.S. authorities in returning him to the United States under cover of a “political upheaval.” In another example, Italian law enforcement authorities, working through their D.R. counterparts, requested the arrest of D.R. permanent resident and fraud indictee Camillo Caltagirone and put him on a plane headed for Spain, where, at the Italians’ behest, he was then routed on another plane to Italy by Spanish officials.

**Joint Operations.** In many instances, pursuing State authorities join forces with their host State counterparts by providing on-the-ground support to help capture and transfer a fugitive to a pursuing State’s territory or to one of its vessels. Such exercises are labeled herein joint Seizure and Delivery Operations (SDOs) to distinguish them from the unilateral, surrogate, or consensual varieties outlined in Chapter 1.h supra. In many instances, such operations are undertaken in the hope that they will not be publicly disclosed due to political sensitivities. For example, during the Vietnam War at a time when the U.S. and Vietnam had no bilateral extradition treaty, the U.S. sought the custody of James Cotton; after dropping its own minor charges against him, Vietnamese officials drove him wearing U.S.-origin physical constraints to the Saigon airport, accompanied by a U.S. Navy vehicle, where he was greeted by Naval Criminal Investigative Service (NCIS) agents who

---


28 Kash, *supra* n.21, at 141.


30 See Laflin, *supra* n.23, at 326 (noting that Pakistan did not want to publicize the fact that it had contributed to suspected terrorist Ramzi Ahmed Yousef’s rendition to the U.S., discussed *supra*).

476
confiscated his passport and directed him to board a U.S. military aircraft bound for Hawaii where he was arrested upon arrival.\textsuperscript{31}

Similarly, in early 1988, “DEA and U.S. Marshal's Service agents worked discreetly with selected Honduran officials to devise a plan”\textsuperscript{32} whereby they could quickly seize and remove from Tegucigalpa, Honduras, Juan Ramon Matta-Ballesteros, “a cocaine chemist and intermediary in the Medellin cartel, [who] was wanted, among other things, for ordering [DEA Agent Enrique] Camarena's murder, but who was shielded not only by Honduras' Constitution that prohibited the extradition of its nationals but also by powerful allies in the government.”\textsuperscript{33} In April 1988, an “elite force” of 60 Honduran military police (known as the Cobras) seized Matta-Ballesteros when he returned to his home one morning and delivered him to U.S. Marshals who then handcuffed and hooded him and forced him into a Land Cruiser van driven by a U.S. Marshal “while two Honduran soldiers with stun guns guarded the prisoner” and was taken to the airport.\textsuperscript{34}

In another example, in February 1995, FBI agents and State Department Diplomatic Security officers, working discreetly together with Pakistani officials, arrested Ramzi Ahmed Yousef, who was suspected of involvement in the 1993 New York City World Trade Center bombing, and then the Pakistani officials turned him over to

\textsuperscript{31} United States v. Cotten, 471 F.2d 744, 746 n.4 (9th Cir. 1973).
\textsuperscript{32} Nadelmann, Cops, supra n.9, at 448.
\textsuperscript{33} Christopher H. Pyle, Extradition, Politics, and Human Rights 282 (2001) (adding that the “DEA had tried several times before without success to kidnap [Matta-Ballesteros] before turning to the Honduran military for help”).
\textsuperscript{34} Id. See also Matta-Ballesteros ex rel. Stolar v. Henman, 697 F. Supp. 1040, 1042 (S.D. Ill. 1988) (adding how Matta-Ballesteros' “van was surrounded by many military men with weapons in front of his home after returning from a visit to his lawyer" and how “among those present at his house were some Americans in civilian clothing”), aff’d, 896 F.2d 255 (7th Cir.), cert. denied, 498 U.S. 878 (1990). The U.S. first tried to fly him to the D.R. but he was turned away because he lacked a passport, so U.S. authorities placed him on a commercial U.S. plane bound for Puerto Rico at which point he was taken into U.S. custody. Bill McAllister, “Trap Set as Honduran Suspect Jogged; Americans Joined Raid at Home of Reputed Drug Czar, Lawyer Says,” Wash. Post, Apr. 7, 1988, at A8. In another case, “U.S. and Mexican officials working together forcibly seized and ejected [Campbell] from Mexico into the custody of a U.S. Marshal,” after Campbell had jumped bail. Ex parte Campbell, 1 F. Supp. 899 (S.D. Tex. 1932).
U.S. agents in Islamabad and he was transported to the U.S. the following day.\textsuperscript{35} In another instance, in November 1985, the DEA working in concert with Guatemalan non-uniformed security officers seized Angel John Zabeneh, a Belizean who had traveled to Guatemala City to pick up goods for his family’s fruit plantation. He was strip-searched, placed in a room in the airport overnight, and then placed on an aircraft headed for Houston, where he was formally arrested on marijuana smuggling charges, despite the existence of a U.S.-Belize Extradition Treaty.\textsuperscript{36}

\textbf{iii. Host State Acquiescence}

Apart from active participation (whether related to the investigation, seizure, arrest, or transportation of a fugitive), the other major way in which the host State can assist a pursuing State to secure a fugitive through informal law enforcement cooperation is by consenting or acquiescing\textsuperscript{37} (usually discretely) to law enforcement activities to be undertaken by the pursuing State on host State territory. Sometimes host State law enforcement officers will provide minimal logistical support or other backstopping but the thrust of the operation under this approach must be carried out by pursuing State officials or agents and, to the extent their operation succeeds, they maintain physical custody of the fugitive from the moment he is caught. In any event, such consent or affirmation must be made with foreknowledge; otherwise, the operation would properly constitute a \textit{unilateral} measure (see Chapter 12). Such exercises are referred to herein as \textit{consensual} renditions as opposed to joint, surrogate, or unilateral ones.

\begin{itemize}
\item[35] Lafin, \textit{supra} n.23, at 326.
\item[36] Jim Schachter, “Long Arm of Law Bends the Rules,” \textit{L.A. Times}, July 17, 1986, at 4. It is not entirely clear whether this was a cooperative operation between States’ law enforcement agencies or a unilateral operation in which Guatemalan agents working in their private capacity were engaged to assist.
\item[37] See Ian C. MacGibbon, \textit{The Scope of Acquiescence in International Law}, 31 B.Y.B.L.L. 143, 182 (1954) ("(1) Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which, according to the practice of States and the weight of authority, demand a positive reaction in order to preserve a right. . . . (6) Acquiescence may furnish an indication of an intention to abandon a right previously enjoyed or a claim previously asserted.")
\end{itemize}
Such consent is typically signaled by “a wink and a nod” or other form of informal agreement rather than by any kind of diplomatic or formal correspondence, as the point is to allow the activity to occur on host State territory without drawing any attention to such consent or so that any host State acquiescence has plausible deniability, as there are often countervailing domestic, regional, or international political pressures to such an effective waiver of one’s sovereign jurisdiction.\textsuperscript{38} Such acquiescence means that the host State does not interfere with the planned operation either before or during its execution, but the host State often will feel compelled to repudiate or protest the operation \textit{ex post facto} to the extent the operation is made public in order to “save face” with the relevant political constituencies.\textsuperscript{39}

A high-profile example of the host State waiving its rights to a foreign sovereign conducting a law enforcement operation on its soil can be found in the \textit{Kasi} case.\textsuperscript{40} Pakistani national Mir Aimal Kasi was responsible for murdering two CIA employees and wounding three others one morning in January 1993 outside the CIA Headquarters compound in Langley, Virginia, at an intersection while they sat in their cars waiting for the light to turn green. After an extended manhunt for the perpetrator, in June 1997, four FBI agents located and seized the fugitive from his hotel room in Pakistan. The U.S. agents applied physical restraints, immediately took him into U.S. custody, and, while “never [leaving] his presence,” confined him for two days in a Pakistani “holding facility” where they presumably interrogated

\begin{multicols}{1}
\textsuperscript{38} See Michael John Garcia, \textit{Renditions: Constraints Imposed by Laws on Torture}, C.R.S., Report No. 7-5700, Sept. 8, 2009, available at http://www.fas.org/sgp/crs/natsec/RL32890.pdf (last visited on Feb. 24, 2012) (“In some instances, a significant factor in a decision to allow rendition is a desire of the country with physical jurisdiction over the suspect to avoid any domestic political fallout or possible terrorist retaliation which may result from public extradition proceedings or domestic prosecution of the suspect.”).

\textsuperscript{39} See Abraham D. Sofaer, Letter to the Editor, “The Case For and Against Abducting Terrorists,” \textit{N.Y. Times}, Jan. 28, 1986, at A24 (observing that extraordinary cases may arise that entail “the host nation overtly objecting but silently cooperating or acquiescing in the endeavor”).

\textsuperscript{40} While Pakistan allowed the FBI to help with the investigation on its territory, when the first public announcements were made about Kasi’s arrest, neither the U.S. nor Pakistani made any reference to where the arrest had occurred, both “to protect the people who handed him over from possible vengeance of his kinsmen” and as a “matter of considerable political sensitivity in Muslim Pakistan to allow delivery of one of its citizens into the hands of the United States.” Thomas W. Lippman, “2 Governments Cloak Details of the Capture,” \textit{Wash. Post}, June 19, 1997, at A10.
\end{multicols}
him. Afterward they flew him back to the U.S. to face criminal charges. Although the White House was unwilling to disclose specifics regarding the operation, “many believe that the United States negotiated a highly unusual diplomatic agreement with Pakistan and thus enabled U.S. agents to enter its territory and abduct the Pakistani national.”

Arguably a variant of such consensual SDOs would be the agreement by the host State for pursuing State authorities to exercise the so-called “right of hot pursuit” within host State sovereign territory. It is permissible under international law for State law enforcement officials to continue their uninterrupted pursuit of an escaped convict or bail-jumping indictee, while “hot on his trail” into the territory, territorial seas, or air space over another’s territory or territorial seas, so long there is an express agreement by the State whose territory is at issue. This situation would arise, say, where pursuing State officials were closely monitoring a fugitive’s movements or they received a timely intelligence tip. This doctrine includes intercepting the passage of a sea-going vessel for the limited purpose of

---

42 Kash, supra n.21, at 141.
43 This doctrine can manifest in treaty form as well. For example, in May 2009, the U.S. and Canada entered into a framework agreement on integrated cross-border maritime law enforcement operations that provides, inter alia, for designated officers in urgent and exceptional situations to continue law enforcement operations on land adjacent to shared waterways, including to prevent “the immediate and unlawful flight of persons liable to detention or arrest.” Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations, U.S.-Canada, May 26, 2009, arts. 3(3) and 4, available at http://www.courthouselibrary.ca/training/stream/12-08-13/Tricky_Legislation_Integrated_Cross-border_Law_Enforcement_Operations_Act.aspx (last visited on Nov. 1, 2013). For an historical example, see Nicholas M. Poulantzas, The Right of Hot Pursuit in International Law 12-13 (2d ed. 2002) (citing the Treaty between the Free City of Danzig and Poland, art. 106(1), supplementing the Danzig-Poland Convention of Nov. 9, 1920, which provides: “The police officers and the members of the security services are permitted in case of imminent danger to pursue fugitive offenders – immediately after the commission of a crime, or immediately after the offenders have been surprised – from their territory and up to eight kilometres within the other territory and apprehend them.”) (translation provided by Poulantzas).
44 While the doctrine likewise applies to a criminal suspect during an ongoing crime, that scenario lies outside the scope of this inquiry.
45 See Poulantzas, supra n.43, at 346.
apprehending such a person up to the point of the territorial waters of another State.\footnote{Derek W. Bowett, \textit{Self-Defence in International Law} 40 (1958).}

While such a circumstance would not be expected to occur with any regularity,\footnote{One example occurred in August 1999 when an anonymous caller informed the Tribal Police Department that Kenneth Lazore, a fugitive for five years since failing to report to federal prison for a gun-running offense, was present on the American side of the Akwesasne Reservation that is bisected by the U.S.-Canadian border. A police officer walked toward his truck and called out his name, prompting Lazore to flee toward the border; eventually, the officer tackled and pinned down Lazore on the Canadian side of the border, arrested him, and transported him back to the U.S. side. \textit{United States v. Lazore}, 90 F. Supp. 2d 202, 203 (N.D.N.Y. 2000). To this author’s knowledge, the Canadian government never protested this cross-border incident.} and logically is not the kind of approach one can plan out in advance, it does represent one possible means of securing the physical custody of a fugitive through law enforcement consent or acquiescence.\footnote{For example, “[i]n May, 1836, the forces of the U.S. under General Gaines invaded Mexican territory in order to pursue marauding Indians who had crossed into U.S. territory from the Mexican border and there committed acts of murder, arson and plunder before fleeing into Mexican territory.” Bowett, supra n.46, at 38. The U.S. justified this incursion into sovereign territory based on the principle of self-defense and denied any intention to possess Mexican territory in the process. \textit{Id.} at 38-39. \textit{See generally} Mark Brkljac, Note, \textit{The Dangers of State Sponsored and Court Ratified Abduction}, 5 J. Int’l L. \\& Prac. 117, 129-30 (1996) (acknowledging permissibility of seizing a fugitive through the exercise of hot pursuit).} States are highly protective of their sovereign territory, so, unless a reciprocal agreement has been entered into, States tend to be sensitive about such others taking such liberties at their expense. For example, Kurdish and Iraqi officials have complained about Turkish ground forces chasing Kurdish separatists across the border into Iraqi territory, a practice that occurred as recently as October 2011;\footnote{Sebnem Arsu, “Hot Pursuit’ of Attackers near Iraq, Turkey Vows,” \textit{IHT}, Oct. 20, 2011, at 6.} in August 1986, Mexico rejected a U.S. request to fly aircraft across the Mexican border when in hot pursuit of drug traffickers;\footnote{AP, “De la Madrid Rejects U.S. ‘Hot Pursuit’ by Aircraft,” \textit{L.A. Times}, Aug. 15, 1986, at 17.} and in August 1974, the Canadian government protested U.S. officials pursuing a U.S. Army deserter across the border into Canadian territory and the U.S. agreed to return him.\footnote{See Brief for the Government of Canada as Amicus Curiae in Support of Respondent, \textit{United States v. Alvarez-Machain}, \textit{reprinted in} 31 ILM 919 (1992) and 60 U.S.L.W. 4523 (U.S. June 15, 1992) (No. 91-712) (describing the case of James Anderson who, after being identified as an Army deserter at a U.S.-Canadian border crossing ran back across the border into Canada, where he was pursued by U.S. officials, arrested, forcibly taken back across the border, and turned over to the FBI, but then returned to Canada later that month following a protest by the Canadian government).}
Finally, it is possible that the host State will allow a pursuing State’s law enforcement officers to arrest a fugitive within its sovereign territory, but then have doubts about its decision and seek to have the fugitive returned into its own custody. That scenario occurred, for example, in the 1863 *Aunis* case in which the Prefect of Genoa, Italy, requested the permission of the French consul in Genoa to board a French ship lying in the Genoa harbor and apprehend five suspected fugitives. The French consul assented and the fugitives were arrested and removed from the ship. The next day, the French consul changed his mind and sought the fugitives’ return, but the Italian government refused on the ground that the arrest was effected pursuant to French consent and therefore was consistent with international law.⁵²

### c. Lawfulness Analysis

This study will now examine various general principles and specific grounds under international law⁵³ implicated by informal law enforcement cooperation to ascertain whether and to what extent it can be considered a lawful practice.⁵⁴ With

---


⁵³ Some cases have found *domestic* legal violations in such cooperative scenarios, but those lie outside the scope of the present inquiry. *See, e.g.*, *The State (Quinn) v. Ryan* [1965] I.R. 70, Ir. Sup. Ct. (declaring that the cross-border handover of fugitives amounted to a contempt of court as it deprived the individual his domestic constitutional right to seek *habeas corpus* relief); *Bedi*, *supra* n.11, at 396; 6 BRITISH DIGEST OF INTERNATIONAL LAW 480-81 (Clive Parry ed. 1965) (noting a violation of municipal law when local policemen helped U.S. law enforcement agents return a fugitive from Liverpool, England, in the *Townsend* case). Notably, in such cases U.S. courts find no Constitutional violation under the Fourth Amendment’s “search and seizure” clause on the grounds that the Constitution is not construed as applying to U.S. government actions against aliens on foreign territory or in international waters. *Kast*, 508 S.E.2d at 63.

⁵⁴ Whether or not the cooperating State agents treated the fugitive outrageously during arrest, detention, or transfer is merely a collateral consideration to the lawfulness of the underlying approach to securing his custody. Nevertheless, sometimes a fugitive will plead such abusive treatment when challenging the court’s jurisdiction or seeking relief through *habeas corpus*. For example, Juan Ramon Matta-Ballesteros claimed that during his trip to the Tegucigalpa airport, he was repeatedly shocked and burned with a “double pronged electric” and on the first leg of his flight to the U.S., he was beaten on his head and shocked on his testicles and feet. *Matta-Ballesteros*, 697 F. Supp. at 1042. Despite a medical exam consistent with his claims, the U.S. federal court refused to
rare exception, the courts hearing allegations of legal violation tend to be those located in the pursuing State, as the nature and timing of such informal rendition operations do not provide the subject individual the opportunity to pursue legal recourse in the host State, and few such cases reach international or regional tribunals. When they do, the multilateral conventions at issue do not necessarily apply, as participating States may not be subject to them.

i. General Principles

No Presumed Restriction on States’ Freedom of Action. The Lotus case may be said to stand for the proposition that States may exercise their freedom of action unless a specific rule of international law prohibits as much, rather than requiring that they conform their conduct only to those actions expressly authorized under international law. The PCIJ reasoned as follows:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as

---

55 Indeed, it bears noting that the European Court of Justice (ECJ) recently ruled that “judicial authorities cannot refuse to execute a European arrest warrant [EAW] issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing [i.e., the pursuing] Member State before that arrest warrant was issued.” In re Ciprian Vasile Radu, Case C-396/11, ECJ, Grand Chamber, Jan. 29, 2013, ¶ 43, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=132981&pageIndex=0&doclang =EN&mode=lst&dir=&occ=first&part=1&cid=899466 (last visited on Aug. 23, 2014).

56 One prominent example of a regional court adjudication is the Öcalan case, profiled infra. In addition, as Dr. Rutsel Martha, former General Counsel of INTERPOL, has observed, the Savarkar case before the PCA “is probably the only case where a tribunal established under international law was called upon to settle an inter-State dispute concerning police cooperation.” RUTSEL SILVESTRE J. MARTHA, THE LEGAL FOUNDATIONS OF INTERPOL 16 (2010).

57 For example, when Illich Sánchez Ramirez claimed that he had been abducted, tied up, drugged, and hooded by the Sudanese police before being turned over to French officials who boarded him on a French military aircraft, the European Commission opined that it was not competent to assess the circumstances of his treatment by Sudan as that State is not a member party to the ECHR. Sánchez v. France, Appl. No. 28780/95, Comm’n decision of June 24, 1986, D.R. 86; Francesco de Sanctis, The Practice of National and International Courts on Transnational Seizure: Is a Fair Balance Between Human Rights and Accountability Possible?, 22 NETH. Q. HUM. RTS. 529, 550 (2004).

58 Much of this analysis of general principles tracks the structure found in MARTHA, supra n.56, at 18-38.

expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.\textsuperscript{60}

Accordingly, States are presumptively free to operate, including in cooperation with other States, so long as no international law restricts such conduct; and its corollary holds that, if one challenges that conduct, one would have to bear the burden of proof that a specific law had been violated.\textsuperscript{61}

**Flexible Form of International Agreement.** As Dr. Rutsel Martha maintains: “States must be presumed to be free to choose any form they would like for establishing international agreements, unless a rule of international law prescribes otherwise. Accordingly, it is generally accepted that international law itself prescribes neither form nor procedure for the making of international undertakings.”\textsuperscript{62} He then cites a series of examples in which “international legal acts [have taken] the form of oral communications, a telegram, a radio announcement, a telephonic communication, a symbolic act, tacitly, joint communiqués, minutes (procès-verbal) of a meeting, and in modern days, of course, e-mails.”\textsuperscript{63} Therefore, an exchange of notes or other less

\textsuperscript{60} Id. at 18. The notion that international law permits what it does not prohibit was echoed by the U.S. Supreme Court in \textit{Álvarez-Machain}, 504 U.S. 655, to the extent that since the U.S.-Mexico Extradition Treaty did not expressly forbid extraterritorial seizures, it was therefore permitted. Sherri L. Burr, \textit{From Noriega to Pinochet: Is There an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations?}, 29 DENV. J. INT’L L. & POL’Y 101, 102 (2001). But note that inter-State law enforcement cooperation over the apprehension and return of a fugitive is \textit{not} precisely comparable to one State asserting criminal jurisdiction over another State’s nationals as was the case in \textit{Lotus}, and even within this distinct and arguably more open-ended criminal jurisdiction context, in which the Court stated, “every State remains free to adopt the principles which it regards as best and most suitable,” \textit{Lotus Case}, \textit{supra} n.59, at 19, the passage in which this proposition is found has been the subject of criticism and subsequent Court departure. See MALCOLM N. SHAW, \textit{PUBLIC INTERNATIONAL LAW} 301 (6th ed. 2008) (citing, \textit{inter alia}, \textit{Nottebohm Case} (Liech. v Guat.), Second Phase, Judgment, [1955] I.C.J. Rep. 4 (Apr. 6), available at \url{http://www.icj-cij.org/docket/files/18/2674.pdf} (last visited on Nov. 2, 2013)).

\textsuperscript{61} MARTHA, \textit{supra} n.56, at 19.

\textsuperscript{62} Id. at 20 (citing ARNOLD McNAIR, \textit{THE LAW OF TREATIES} 6 (1961)).

\textsuperscript{63} Id. (citations omitted). \textit{See also Case Concerning the Temple of Preah Vihear} (Camb. v. Thai.), Merits, [1962] I.C.J. Rep. 15, 35 (June 15), available at \url{http://www.icj-cij.org/docket/files/45/4871.pdf} (last
formal type of agreement between the law enforcement officials of two cooperating States would not render invalid the transfer of a fugitive’s custody between them. It is noteworthy that “[c]ooperation is virtually unregulated by international convention.” Accordingly, informal means and methods of law enforcement cooperation should be gauged under this flexible standard.

**Attribution of Acts by a Domestic Police Officer to a State.** It has been contended, including by France in the *Savarkar* case, that the acts of domestic police officers performing their official law enforcement duties on the international scene cannot be imputed to their States, but rather that when they act in a bilateral cooperation context, they act on a personal basis. There is little merit to this argument, as the police officer is an agent of the State when carrying out his or her official functions. Indeed, the Permanent Court of Arbitration (PCA) found that the French gendarmerie was acting on behalf of France in *Savarkar*, and the State – not the individual officers – has been held accountable in other cases based on its officer’s actions. Therefore, the fact that individual police officers operating under the color of law agreed to cooperate with one another on behalf of their respective governments should be treated as a valid basis for State attribution.

**Non-exclusivity of International Cooperation Arrangements.** Some legal authorities maintain that if an extradition treaty exists between two States, no alternative means of transferring the custody of a fugitive can lawfully occur, as the specifically agreed terms and conditions of extradition set forth the comprehensive set of possibilities. But as Dr. Martha explains, “in the absence of any mandatory rule of international law or a previous legal undertaking that states otherwise, it is

---

visited on Dec. 28, 2013) (finding the inter-State frontier line as set forth by a stand-alone map relied upon by Thailand and Cambodia, although later confirmed to be erroneous, as determinative of the basis for their understood border, trumping the watershed line contained in a 1904 bilateral treaty).


for each State to determine in every individual case whether to assist [on law enforcement matters], and if so, on the nature of that assistance." 66 This position was upheld by the U.S. Supreme Court in the Álvarez-Machain case (1992) when the Court wrote:

[T]o imply from the terms of this [U.S.-Mexico Extradition Treaty] that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. 67

“What was true in 1910 in the case of Savarkar about the need for speedy, flexible and operationally oriented arrangements is still valid and perhaps even more relevant today.” 68

Voluntariness, Consent, or Acquiescence by One State Precludes the Wrongfulness of the Act of Another. When States choose to deviate from the procedures set forth in a bilateral extradition treaty and voluntarily coordinate on the transfer of a fugitive from one State to the other, international law recognizes no violation of either State's rights. 69 Acquiescence gives rise to the same vitiation of

66 MARTHA, supra n.56, at 24.
67 Álvarez-Machain, 504 U.S. at 669. Other U.S. federal and state courts have spoken with the same voice. See, e.g., Ex parte Campbell, 1 F. Supp. 899 (finding no violation under the U.S.-Mexico Extradition Treaty); Kasi, 508 S.E.2d at 60-61 (no prohibition of alternatives to extradition under the U.S.-U.K. Extradition Treaty, which governed U.S.-Pakistani extradition relations). Accord JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 180-81 (1999). But see Michael Abbell, The Need for U.S. Legislation to Curb State-Sponsored Kidnapping, in THE ALLEGED TRANSNATIONAL CRIMINAL: THE SECOND BIENNIAL INTERNATIONAL CRIMINAL LAW SEMINAR 89 (Richard D. Atkins ed. 1993) (quoting author’s congressional testimony on July 29, 1992) (“It cannot be emphasized too strongly that treaties are not negotiated in a vacuum. They are negotiated in the context of generally accepted principles and tenets of international law. . . . One of the most fundamental of those principles . . . is that every nation must respect the territorial integrity of every other nation with which it is at peace. . . .”).
68 MARTHA, supra n.56, at 25 (citing by way of example the advent of cybercrimes).
any potential unlawfulness, as expressed by the famous Harvard Research in International Law some 80 years ago:

It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a ‘recourse to measures in violation of international law or international convention.’ If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality.\(^70\)

The same principle applies to consent: “Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of the act in relation to the former State to the extent that the act remains within the limits of that consent.”\(^71\) It follows, then, that when States, through their officials acting on their behalf, agree to cooperate, or when the host State consents or acquiesces to an informal arrangement to effect a fugitive’s transfer to pursuing State custody, international law poses no objection.

**Due Diligence is Required of the Cooperating States.** Consistent with fundamental human rights principles, cooperation between the host and pursuing States (assuming their respective judiciaries are functional) should be based on a reasonable degree of pre-delivery scrutiny, such that any arrest or transfer of the fugitive has occurred only after: (i) the host State has duly considered whether the

\(^{70}\) Harvard Research in International Law, “Comment to Article 16 to Draft Extradition Treaty,” 29 AJIL 631 (Supp. 1935) (interior citations omitted). *Cf.* Extraterritorial Apprehension by the Federal Bureau of Investigation, 48 Op. Off. Legal Counsel 543, 549, U.S. Dep’t of Justice (Mar. 31, 1980) (“There may be, however, some precedent in international law for the argument that complicity of asylum state officials in the abduction robs the asylum state’s protest of its import under international law.”).

pursuing State has a legitimate basis for his requested prosecution or punishment, that his rights to a fair trial and other procedural protections will be honored upon delivery, and that no genuine risk of refoulement would attend the transfer; and (ii) the pursuing State has properly evaluated whether the host State, in carrying out the transfer, may be in violation of certain human rights obligations it owes the fugitive, as the pursuing State otherwise could be derivatively liable for facilitating his transfer. This standard, however, is premised entirely on soft law, and therefore enforceability is far from assured.

ii. **Specific Grounds**

*Violation of Territorial Sovereignty.* “It is a rule of international law that a State must not perform acts of sovereignty on the territory of another State. Hence the arrest of a fugitive criminal by the officials of one State in the territory of another is *prima facie* a breach of international law. But if the State of asylum [the host State] *acquiesces in the arrest*, as when officials of that State participate in the irregular apprehension, there is no breach of international law.”

---

72 Margaret L. Satterthwaite, *The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism*, N.Y.U. Public Law and Legal Theory Working Papers, Paper 192 (2010), at 20, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1192&context=nyu_pltwp&seiredir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26eq%3D%2521international%2Brendition%2522%2B%2522NYU%2BSchool%2Bof%2BLaw%2522%26ie%3DUTF-8%26oe%3DUTF-8%26sourceid%3Dchrome-instant%26ss%3Dpage%26espv%3D1%26site%3Dweb&hl=en (last visited on Nov. 30, 2013) (discussing the various applications of this principle to include: “torture or ill-treatment; persecution; enforced disappearance; and arbitrary deprivation of life”).

73 Id. at 16.

74 Id. (citing to ILC, *State Responsibility*, supra n.71, art. 16: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of would be internationally wrongful if committed by that State.”).

75 The lawfulness assessment of all kinds of LCOs will be discussed together in Chapter 12.c.i infra.

76 See Paul O’Higgins, *Unlawful Seizure and Irregular Extradition*, 36 B.Y.B.I.L. 279, 280 (1960) (emphasis supplied). See also Cardozo, supra n.1, at 132 (“One consistent thread runs through... all [abduction cases]: an abduction on foreign soil by officers of another government is a violation of international law, unless the government in control of the asylum country expressly or impliedly gives its consent.”); ALI, *Restatement (Third) of the Foreign Relations Law of the United States*, May 14, 1986 (1987), § 432(2), available at http://internationalcriminallaw.org/Restatement(Third).of.Foreign_Relations_Law/RSecs334_401-04_411_432_442.PDF (last visited on Nov. 9, 2013) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by officials authorized to do so.”); Mary Alice Kovac, *Apprehension of War Crimes Indictees: Should the
Holder echoed this principle when he remarked: “[T]he use of force in foreign territory would be consistent with . . . international legal principles if conducted, for example, with the consent of the nation involved.”

Ordinarily, then, a cooperative law enforcement activity is not regarded as a violation of territorial sovereignty, as the cooperating host State is viewed as voluntarily handing over the fugitive. This perspective is reinforced by the fact that the host State rarely objects to the engagement of pursuing State agents on its territory – and indeed often is not positioned to do so even if it wished – and thus it is justified under international law as a case of sovereign consent. For example, after news broke of the transfer into U.S. custody of Honduran national Juan Ramon Matta-Ballesteros, who was locally popular, a mob gathered around and set fire to the U.S. Embassy in Tegucigalpa and a few congressmen issued disapproving statement, but neither the President, the foreign ministry, nor the legislature of Honduras officially protested.

To the extent that host State law enforcement agents raid a third party’s flagged vessel anchored in the host State’s territorial waters in order to seize a fugitive, its lawfulness (absent evidence of consent) tends to turn on whether the vessel was merely passing through or was proceeding from or to the host State’s internal waters. Further, to the extent host State agents physically transfer a fugitive to a

---

U.N. Outsource Private Actors to Catch Them?, 51 CATH. U. L. REV. 619, 642 n.153 (2002) (“if a competent asylum [host] state official partakes in the arrest, even if this arrest is illegal under asylum [host] state law, this involvement is sufficient to constitute consent and to preclude any assertion of responsibility by the asylum [host] state”).


78 See Terry Richard Kane, Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold, 12 YALE J. INT’L L. 294, 333 (1987) (noting that evident collaboration of host State police “deprive[s]” that State “of any basis for complaint, even if it had wanted to raise an objection.”).

79 NADELMANN, COPS, supra n.9, at 448. This constituted strong implicit evidence that the Honduran government had colluded with U.S. law enforcement officers.

80 See Conv. of the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 19(2) and (5), 15 U.S.T. 1606, 516 U.N.T.S. 205 (the host/coastal State may only take steps to arrest a fugitive on board a flagged vessel while in territorial waters if that vessel has come from or is going into the host State’s
pursuing State’s registered aircraft sitting in an international zone at a host State airport, as was the case in the Öcalan case, that, too, has been found to be permissible, as the aircraft would be subject to the jurisdiction of the State of the flagged aircraft.\textsuperscript{81} In still other cases, the question of a territorial breach is dismissed as one better left to governments to resolve through diplomacy rather than for courts to rule on as a legal matter.\textsuperscript{82} At bottom, this author is not aware of a single case in which an international, regional, or domestic tribunal has ruled that such informal bilateral cooperation has been deemed a violation of territorial sovereignty.

\textit{Arbitrary Arrest and Detention.} The ICCPR provides that: “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.”\textsuperscript{83} In evaluating a claimed violation of this provision, the Human Rights Committee (HRC) examines whether there were any procedural irregularities found in the application of domestic law. Notably, the HRC found that in a joint operation between the Uruguayan police and U.S. DEA agents to arrest Edgar A. Cañón García, a Colombian national on drug trafficking charges, from a hotel lobby in Uruguay and return him to the U.S. in July 1987 was a violation of Article 9(1). The HRC observed that his arrest and detention had been “arbitrary,” given the “administrative and procedural irregularities” conceded by the host State government, which led to the fugitive’s maltreatment (\textit{e.g.}, he was held locked to a table and chair overnight without even a glass of water) and was denied requests for access to an attorney or the Colombian consulate after his \textit{Miranda} rights were read to him (which expressly

\begin{footnotes}
\footnote{cf. Bart DeSchutter, \textit{Problems of Jurisdiction in the International Control and Repression of Terrorism}, in \textit{INTERNATIONAL TERRORISM AND POLITICAL CRIMES} 382 n.10 (M. Cherif Bassiouni ed. 1975). Although the \textit{Samuel Insull} case (1934) follows these facts, it occurred two decades before the controlling treaty standard in effect today.}


\footnote{\textit{Ex parte Lopez}, 6 F. Supp. at 344.}

\end{footnotes}
includes the right to an attorney). The host State also could be found liable under international treaty law for holding a fugitive under administrative detention for an unreasonably long period prior to the delivery itself.

In such informal cooperation cases, however, the fugitive almost never receives any meaningful procedural due process by the host State, as he is transferred away quickly. This would seem to raise a potential claim that such fundamental rights were violated, but such allegations lodged before pursuing State courts, anyway, generally fall on deaf ears. Some courts deem it inappropriate to probe into the domestic matters of other States, while other courts simply see any such failure to provide adequate domestic procedural safeguards as outside their purview. For example, in Wentz v. United States, the U.S. Court of Appeals for the Ninth Circuit expressed no concern where an American national alleged that he had been detained by Mexican authorities in Mexico City and denied access to an attorney and any court proceedings there before being transferred to the U.S. The Wentz case is probably more representative than the Cañón García case in terms of how such claims tend to be adjudicated. Had Ecuador not overreached and acted more faithfully with its own “established law” in Cañón García, no violation of Article 9 likely would have been found. The violation appears to have been a function much more of excessive treatment under the circumstances than a repudiation of informal law enforcement cooperation as an extradition alternative itself.

**Bribery.** Informal law enforcement cooperation often can implicate bribery. Where law enforcement agents of the pursuing State pay bribes to their host State counterparts to win their assistance in securing custody, directly or indirectly, of a

---


85 See Satterthwaite, *supra* n.72, at 19 & n.97 (“Regarding the permissible duration of detention prior to transfer, although there is not a great deal of jurisprudence on the issue, existing norms suggest that an individual can only be held for a reasonable period needed to effect the transfer; detention in excess of this period or when transfer becomes impossible becomes arbitrary.”) (citing U.N. and ECHR sources).

86 244 F.2d 172, 176 (9th Cir.), cert. denied, 355 U.S. 806 (1957).
wanted fugitive, there appears to be no *international* legal ground that would prohibit such conduct.\textsuperscript{87} The closest such authority is the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, but that treaty’s express scope would not encompass bribes made in connection with State-to-State law enforcement cooperation.\textsuperscript{88} One might alternatively contend that the demonstrated bribery of individual agents meant that the host State government itself was not aware of an operation and had not positively sanctioned its execution, and any allegation to the contrary could be countered by a government statement.

**Vicarious Liability.** Another potential feature of informal law enforcement cooperation is that the host State’s police might have sole custody of the fugitive for a period of time before he is transferred to pursuing State authorities. In such a case, should the fugitive suffer maltreatment while in host State police custody, the fugitive is unlikely to prevail under a claim of vicarious liability against the pursuing State officials or their agents for having “created the opportunity” for such physical abuse. This idea was tested in *Di Lorenzo v. United States*, when although a U.S. DEA agent induced Anthony DiLorenzo to fly to Panama City and arranged for his arrest by Panamanian authorities, any maltreatment during his seven days in Panamanian custody prior to his deportation to the U.S. could not be imputed to the United States for having set this plan in motion.\textsuperscript{89}

**Others.** In addition, a number of international legal violations potentially could be found based on informal law enforcement cooperation, most notably including:

- *disguised extradition*, to the extent a tribunal found that the pursuing and host States had

\textsuperscript{87} There might very well be domestic legal prohibitions against such conduct.
\textsuperscript{88} Conv. on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 1(1), *reprinted in* 37 ILM 1 (bribery must be for purpose of “obtain[ing] or retain[ing] business or other improper advantage in the conduct of international business.”).
\textsuperscript{89} *Di Lorenzo*, 496 F. Supp. 79.
colluded in order to circumvent extradition and its attendant procedural requirements;\(^{90}\)

- **noncompliance with a treaty obligation**, at least for those courts that interpret bilateral extradition treaties to set forth the full universe of means available for the transfer of fugitives between them;

- **lack of security of the person**, as found in such international instruments as the ICCPR (Article 3) and the Universal Declaration of Human Rights (UDHR) (Article 3) in the sense that the State has an obligation to protect the physical integrity of its citizens from abuse by its official authorities; and

- **the opportunity to challenge in advance a transfer to pursuing State territory on non-refoulement grounds** before an “independent decision-maker with the power to suspend the transfer during the pendency of review”\(^{91}\) and to insist on certain core requirements in the event diplomatic assurances are provided to justify the transfer.\(^{92}\)

Given the paucity of case law to date regarding fugitive transfers via informal law enforcement cooperation, however, it is difficult to draw any meaningful generalized conclusions about this body of law. To provide some additional insight, let us now take a more concentrated look at one celebrated case.

---

\(^{90}\) See, e.g., Bennett, Petitioner [1994] SCCR 902, [1995] S.L.T. 510 (Scotland); Regina v. Hartley, Ct. of App. (Wellington), Aug. 5, 1977, 2 NZLR 199 (1978) (NZ) (finding that New Zealand police had sought to bypass extradition procedures by telephoning their Melbourne (Australia) counterparts to ask if a fugitive (Bennett – no relationship to the Scottish case of the same name cited above) could be placed on the next flight to New Zealand notwithstanding the absence of a warrant for his extradition).

\(^{91}\) Satterthwaite, supra n.72, at 28-29 (citing CAT, ICCPR, and ECHR sources).

\(^{92}\) Id. at 29-31 (referencing in particular the CAT standard: “(1) Assurances must be obtained using ‘clear’ and established procedures; (2) Assurances must be subject to judicial review; and (3) Assurances must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.”) (citations omitted).
iii. Case Study: Öcalan v. Turkey

Abdullah Öcalan is a Turkish national and former leader of the Kurdistan Workers’ Party (PKK) whose original objective was to create an independent Kurdish State but later sought co-existence within Turkey for Kurds as a free people. To pursue its objectives, beginning in 1978, the PKK wrought violence in Turkey through thousands of armed attacks, kidnappings, and targeted bombings. As a result, Turkey viewed Öcalan as a terrorist, charging him with trying to undermine the territorial integrity of Turkey and perpetrate serious crimes. Turkey’s courts issued multiple warrants for his arrest and secured an INTERPOL Red Notice. For many years, he resided in Syria, but after he was expelled in October 1998, he spent the next few months in search of a place to live; he unsuccessfully sought refuge in Greece (twice), Russia (twice), and Italy.

Eventually, on February 2, 1999, he arrived at the airport in Nairobi, Kenya, most likely accompanied by Greek security service agents, and was greeted by Greek Embassy officials and put up at the Greek Ambassador’s home. The Kenyan Ministry of Foreign Affairs later announced that it had learned of Öcalan’s secret arrival in which he had not gone through passport control while being escorted by Greek officials. Upset about the Greek Ambassador’s role, the security risk he had imposed on Kenya, and his initial denials that the subject individual was in fact Öcalan, the Kenyans sought the Ambassador’s immediate recall.

A day earlier than the recall request, the Kenyan Minister of Foreign Affairs had informed the Greek Ambassador that Öcalan was free to leave Kenya to the destination of his choice and that the Netherlands had agreed to admit him. On February 15, 1999, Kenyan officials retrieved Öcalan from the Greek Embassy to take him to the airport but would not allow the Greek Ambassador to join him. The

---

93 Sources for this section include Öcalan Case, supra n.81; de Sanctis, supra n.57, at 550-51; Ilias Banterkas & Susan Nash, International Criminal Law 221-22 (2d ed. 2003); Alun Jones & Anand Doobay, Jones and Doobay on Extradition and Mutual Assistance 99-100 (2005). This case study arguably could also fall within the scope of a removal operation (see Chapter 10) but as it more fundamentally implicates informal law enforcement cooperation, it has been selected for discussion in the present Chapter.
Kenyan official driving the car deviated from the convoy and took Öcalan to the airport’s international zone where a Turkish-registered aircraft together with Turkish officials were waiting for him. Upon boarding the aircraft, he was arrested and then flown to Turkey, where he was prosecuted and sentenced.

After exhausting domestic remedies in Turkey, Öcalan engaged the European Court of Human Rights, which issued a judgment in March 2003. His principal claims, apart from denying that he was a terrorist, included: (i) the arrest procedures did not comply with international or national standards and as a result he was unlawfully denied his liberty and security of person under Article 5(1) of the ECHR; (ii) Turkish officials had no jurisdiction to operate abroad and had violated Kenya’s territorial sovereignty; and (iii) he had not been made subject to extradition proceedings and had therefore been denied all substantive and procedural protections that ordinarily accompany such a transfer.

Turkey responded by arguing that: (i) Öcalan had been arrested and detained according to prescribed legal procedure, including by properly issued arrest warrants; (ii) Turkish officials had not breached Kenya’s sovereignty as Öcalan had been arrested by Kenyan authorities and handed over to Turkish officials cooperatively on non-Kenyan territory; and (iii) no extradition treaty existed between Kenya and Turkey and it was not “disguised extradition” because Kenya simply transferred him into their custody as he had been found to have entered Kenya illegally with false identity papers.

The E CtHR found no violation. It reasoned that Öcalan’s arrest had been valid. Not only had Turkish officials complied with domestic criminal procedure, acting on seven warrants for Öcalan’s arrest and an INTERPOL Red Notice, but he had been arrested by Turkish officials on a Turkish-registered aircraft while sitting in an international zone of the Nairobi Airport and therefore was clearly within Turkish jurisdiction for purposes of Article 1 of the ECHR. In addition, the Court found that the Kenyans had decided on its own volition to hand over Öcalan to the Turks and
that the transfer of his custody was therefore cooperative; significantly, it did not lead to any protests against the Kenyans (only the Greeks protested) or claims for redress or return by the Kenyans or any erosion of their bilateral diplomatic relations, and so there was no ground for addressing a violation of territorial sovereignty.94

In addition, the complainant was unable to show that the Turkish authorities had acted in a manner inconsistent with Kenya’s sovereignty. Moreover, the Court noted that the ECHR does not prohibit States from cooperating to remove fugitive offenders so long as the cooperative procedures employed do not violate any rights specifically protected by the Convention, and “disguised extradition” for the purpose of removal, as here, did not qualify as such a violation. Finally, because there was no extradition treaty in effect, one could not contend that its terms and conditions had not been followed.

Significantly, there are two key factors that, had either been different, may well have led to the opposite court judgment. First, as it turns out, the Kenyan authorities were conveniently able to rely on their immigration laws to justify Öcalan’s removal, but had he not entered Kenyan territory unlawfully, there is a reasonable chance the Court would have found his handover to the Turkish authorities impermissible. Second, had the Turks been less cautious about maintaining their registered aircraft in the airport’s international zone or not patiently waited for Öcalan to be brought into the plane (i.e., into Turkish jurisdiction) but rather met him on the tarmac or in the airport itself, the Court might have been less inclined to treat this transfer as lawful. Ultimately, it appears, courts will take a large number of considerations into account in determining whether or not to find such informal law enforcement cooperation lawful.

---

94 As characterized by N.Y.U. Law Professor Margaret Satterthwaite, “the European Court of Human Rights has accepted informal transfers in the counter-terrorism context when they are carried out with the consent of the host state and in conformity with the transferring state’s domestic law.” Satterthwaite, supra n.72, at 14.
This Chapter has explored the second of three types of full-scale alternatives to extradition specifically related to informal law enforcement cooperation. We now turn to the last of these alternatives, which addresses unilateral measures a pursuing State can take to obtain the custody of a fugitive abroad.
CHAPTER 12

ALTERNATIVE III:
UNILATERAL MEASURES

This chapter focuses on the last of the three types of full-scale alternatives to extradition: unilateral measures. Chapters 10 and 11 examined various approaches to retrieving fugitives by way of some form of consent, participation, or cooperation on the part of host State officials or agents. This chapter explores options where measures are undertaken exclusively by pursuing State officials or agents without the knowledge or acquiescence of the host State, in what many would label “self-help” measures. First we will look at the nature, scope, and impetus behind such unilateral operations, then describe and assess the various applications, and finally consider the lawfulness of each of these options.

a. Nature, Scope, and Impetus

The key ingredient comprising a “unilateral measure” in addition, of course, to it being for the purpose of prosecution or punishment1 is that it must be only pursuing State officials or agents involved in the operation. There can be no host State officials or agents – at least in their official capacity – participating in, cooperating with, or consenting to, the operation, nor can there be private volunteers, unless acting as agents of the pursuing State.2 While generally such measures tend to have an extraterritorial dimension and involve some form of

---

1 This point is stressed because at times extraterritorial seizures occur that are unrelated to criminal law enforcement. For example, in July 1952, Dr. Walter Linse, director of the Economic Department of the Investigation Committee of Free Jurists, whose job was “to collect economic information from underground workers throughout East Germany, was kidnapped from his home in West Berlin and taken into the Soviet Zone. He was not a wanted criminal but rather an important source of intelligence.” See “Anti-Red Abducted After Gun Battle in Western Berlin,” N.Y. Times, July 9, 1952, at 1.

2 To the extent there is any host State complicity, such an operation would be more properly classified as informal law enforcement cooperation (see Chapter 11), and to the extent private volunteers alone were engaged, it would most likely fit within a “silver platter” scenario (see Chapter 3.b supra).
overseas physical incapacitation of the fugitive, whether characterized as a seizure, capture, or arrest, these are not required features.

Four general varieties of unilateral measures can be discerned: (i) non-deceptive\(^3\) negotiations with the fugitive for his return; (ii) unilateral Lure and Capture Operations (LCOs), (iii) unilateral Seizure and Delivery Operations (SDOs) (peacetime or wartime),\(^4\) and (iv) interception or commandeering operations. The last three of these are referred to herein as “operational measures,” by contrast with negotiated return, which is not.

In addition, this analysis recognizes that extreme forms of unilateral operations also could be undertaken, but they will not be examined herein because they are so improbable, if not absurd, given their heavily disproportionate sacrifice and international political backlash for the limited purpose of securing an individual’s physical custody. A pursuing State, for example, could threaten to detonate the host State’s capital city if it failed to turn over a wanted fugitive. Another possibility might entail a pursuing State forcefully appropriating the host State’s territory where the individual of interest is located.\(^5\) In that way, the individual would no longer need to be transferred, as he would now be found within the pursuing State’s newly acquired sovereign, if disputed, territory.

A few preliminary notes are in order. First, while a unilateral LCO is often followed by physical delivery of the fugitive by the luring State, that is not always the case, and while a “capture” and a “seizure” are conceptually alike, LCOs and SDOs are distinct operations, as will be shown below. Also, it need not be law enforcement officers from the pursuing State who are involved in the operation;

---

3 Where deception is involved in a negotiated arrangement between a government official or agent and a fugitive, that measure would more properly be characterized as an LCO.

4 LCOs and SDOs are defined in Chapter 1.g and 1.h, respectively.

5 For a discussion of how States may acquire territorial sovereignty under modern international law, see Malcolm N. Shaw, Territory in International Law, in Title to Territory 79-88 (Malcolm N. Shaw ed. 2005), and Surya P. Sharma, Territorial ACQUISITION, Disputes and International Law 35-160 (1997). This approach also would be patently unlawful as it would violate the U.N. Charter, which states: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” CHARTER OF THE UNITED NATIONS, June 26, 1945, art. 2(4) [hereinafter U.N. CHARTER].
there could conceivably be military or intelligence officers instead, although they may not have the authority to effect an arrest per se. Indeed, the fact that a pursuing State may rely on its military to lure, seize, and/or help escort a fugitive from foreign territory does not imply that there is a military conflict underway; they could be discharged with such support duties in peacetime. In some States, like the U.S., there is a longstanding presumption against the military conducting law enforcement work, as reflected in the Posse Comitatus Act, but some exceptions apply and in a few instances the collateral involvement of U.S. military personnel in unilateral operations to recover fugitives has been upheld.

Why would a State be inclined to undertake a unilateral operation to retrieve a fugitive? Several possible reasons exist, but typically such conduct derives from

---

6 Military involvement may be sought to provide supplemental security when dealing with a particularly dangerous individual or someone who is part of a violent or well-armed organization. For example, “Army commandos helped escort Ricardo Palmera, the highest-ranking leader of the Revolutionary Armed Forces of Colombia (FARC), to a U.S. government plane near Bogotá when he was extradited to the United States.” Bruce Zagaris, Colombia Extradites FARC Leader, 21 IELR 52 (2005).


8 Act of June 18, 1878, ch. 263, 20 Stat. 152, codified at 18 U.S.C. § 1835 (2012). This Act expressly prohibits the Army and Air Force (the latter added in 1956 legislation) to enforce the law “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” This term was “[n]amed after a practice under which county sheriffs could impress citizens to aid in enforcement of civil authority.” Donesa, supra n.7, at 871. Although the statutory text does not apply to the Navy or the Marine Corps, “both services have adhered to its provisions as a matter of administrative interpretation and amendments have applied directly to those military branches, but no prohibition applies to the Coast Guard.” Id. at 872; see also Walden, 490 F.2d at 374-75. Under the Act, as amended, the military services may share information and intelligence, loan equipment, and provide training. Donesa, supra n.7, at 872 n.33.


10 See, e.g., United States v. Hartley, 796 F.2d 112 (5th Cir.) (holding that the U.S. military may use its assets to track a fugitive’s plane on behalf of a civilian law enforcement authority), cert. denied, 479 U.S. 839 (1986); United States v. Yunis, 924 F.2d 1086, 1093-94 (D.C. Cir. 1991) (finding no violation of the Act when Navy vessels and aircraft were used in connection with the apprehension of a Palestinian terrorist on the high seas).
the lack of viable or desirable alternatives, and therefore is often viewed as a last resort.\textsuperscript{11} Standard retrieval options, such as extradition and removal, would be regarded as hopeless or inapplicable;\textsuperscript{12} the host State would not be expected to prosecute the fugitive in good faith or to the fullest extent of the law; and informal law enforcement cooperation would be rejected either because of the strained state of political relations between the pursuing and host States\textsuperscript{13} or because of concerns about corrupt host State officials potentially tipping off the individual of interest or otherwise protecting him.\textsuperscript{14} Additionally, a pursuing State may wish to extract a fugitive as quickly as possible so as to deny the fugitive an opportunity to seek legal recourse from his own State\textsuperscript{15} where, depending on his influence and public image, he might be expected to receive special treatment.

Because of the risks frequently involved in the exercise of unilateral operational measures, a pursuing State is unlikely to elect such an approach unless the fugitive is of particularly high law enforcement priority.\textsuperscript{16} Despite recent

---

\textsuperscript{11} See Douglas Kash, \textit{Abduction of Terrorists in International Airspace and on the High Seas}, 8 FLA. J. INT’L L. 65, 85 (1993) [hereinafter Kash, \textit{Airspace}] (noting that “forms of self-help” should be used “sparingly,” given the negative political implications and strong public reactions, noting, for example, the mass riots in Egypt following the U.S. interception of the \textit{Achille Lauro} hijackers aboard an Egyptian aircraft).


\textsuperscript{13} Beverly Izes, \textit{Drawing Lines in the Sand: When State-Sanctioned Abduction of War Criminals Should be Permitted}, 31 COLUM. J. L & SOC. PROBS. 1, 9-10 (1997-98); Heymann & Gershengorn, \textit{supra} n.12, at 137.


\textsuperscript{15} Satyadeva Bedi, \textit{Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries} 393 (2002).

\textsuperscript{16} Not surprisingly, unilateral operations can take a heavy toll on foreign relations. Accordingly, in 1983, acting in the interest of not jeopardizing U.S.-Bahamian relations, the U.S. Ambassador to the Bahamas vetoed a planned unilateral LCO by FBI and DEA Agents to move Bahamian cabinet minister and suspected drug money launderer Kendal Nottage to the U.S. Reginald Stuart, “U.S.-Bahamian Relations are Straining Under Drug Investigations,” \textit{N.Y. Times}, Sept. 28, 1983, at A21. Consistent with that concern, in 1971, when the Panamanian chief of air traffic control, Joaquim Him Gonzalez, was lured into the Panama Canal Zone to play in a softball game,
developments on the international law enforcement cooperation front that have eroded the impetus for unilateral operations,\textsuperscript{17} where no other alternatives can be found for reining in hardened terrorists or narcotics traffickers\textsuperscript{18} and to “relieve pent-up frustration that might otherwise provoke truly rash action,”\textsuperscript{19} States still may be motivated to pursue this course of action.\textsuperscript{20}

b. Application

i. Negotiations for the Fugitive’s Return

To the extent a pursuing State can locate a fugitive abroad and arrange for direct or indirect communication with him,\textsuperscript{21} it can try to influence his voluntary decision to return to its territory through the use of “carrots” or “sticks,” thereby bypassing the need to cooperate with the host (or any other) State. In short, the idea is to induce the fugitive to return through offered incentives or disincentives, rather than through any form of deception. Such an approach

without the knowledge of the local U.S. Ambassador, and was arrested there by U.S. police and shortly thereafter flown to the U.S., Evert Clark & Nicholas Horrock, Contrabandista! 193-98 (1973), U.S.-Panamanian relations became tense for some time. Ethan A. Nadelmann, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement 445 (1993) [hereinafter Nadelmann, Cops].

\textsuperscript{17} There is an uptick in agreements on law enforcement and judicial cooperation; increasingly conventions are treating terrorist acts as either expressly extraditable or at least not subject to the political offense exclusion; and new extradition or law enforcement cooperation conventions customarily include an \textit{aut dedere} provision, which, at least in principle, should ensure some form of effective law enforcement. Silvia Borelli, The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation, in Enforcing International Law Norms Against Terrorism 362-63 (Andrea Bianchi ed. 2004).

\textsuperscript{18} See Heymann & Gershengorn, supra n.12, at 124 (citing U.S. Sen. Arlen Specter); Kash, PDD-39, supra n.14, at 153 (unilateral measures “may be the only method to effectuate an arrest and bring the suspect to court.”).

\textsuperscript{19} Heymann & Gershengorn, supra n.12, at 124 (citing N.Y. Times editorial).

\textsuperscript{20} In addition to helping bring fugitives to justice, such unilateral operations can have the added benefit of deterring cross-border movements by others who are similarly situated and who worry about being captured. Steven Emerson, “Should We Extradite Sheik Obeid?; Despite Legal Precedent Bush Is Slow to Act,” Wash. Post, Aug. 6, 1989, at B2 (“Following the arrest of [Lebanese hijacker Fawaz] Yunis, [discussed infra], American intelligence detected that international terrorists restricted their movements abroad.”). Another benefit can be to secure a detainee who can be traded for the release of individuals of interest to the pursuing State held by another party. For example, it has been surmised that “the overriding reason for [Israel’s seizure of Sheik Abdul Karim Obeid from Lebanon in September 1989] was to win release of three Israeli POWs.” David Halevy & Neil C. Livingstone, “Hostages: Lessons Learned: Short-Term Thinking May Hurt Israel,” Wash. Post, Aug. 6, 1989, at B1.

\textsuperscript{21} On high-profile cases, a pursuing State intentionally or incidentally may be able to communicate its willingness to negotiate through newsworthy statements made at public events. For example, in January 2014, U.S. Attorney General Eric Holder indicated at an event held at the University of Virginia that if Edward Snowden, the former NSA contractor who disclosed classified information about U.S. surveillance operations, were to plead guilty, the U.S. “would engage with his lawyers” to discuss the handling of his criminal prosecution. Steve Kenny, “U.S. Willing to Hold Talks if Snowden Pleads Guilty,” INYT, Jan. 25-26, 2014, at 5.
offers little promise, on average, in part because fugitives tend to be distrustful of pursuing State’s intentions and in part because the inducements are unlikely to be of a character sufficient to prompt the fugitive to leave a safe haven and risk arrest and punishment.

That said, a pursuing State could promise a fugitive that, if he returns to its territory, certain counts in the indictment would be dropped or a lesser punishment pursued;\(^2\) that upon his return he would retain all rights otherwise accorded under the applicable extradition treaty;\(^3\) or that, under certain equitable doctrines that bar fugitives from taking advantage of the judicial system while they remain fugitives, once he has abandoned his fugitive status, he would be able to lodge a civil suit that could be of considerable value to him.\(^4\) A pursuing State also could choose not to promise anything concrete at all, but merely the opportunity to negotiate with the fugitive or his lawyers.\(^5\)

Alternatively, a fugitive could be threatened with the revocation of his passport or be advised that an award to which he otherwise would be entitled will not be granted unless and until he returns. For example, in October 2011, the Basque Regional Government (within Spain) announced that, while Joseba Sarrionandia, a talented Basque essayist who had been convicted due to his membership in the separatist organization Euskadi Ta Askatasuna (ETA) and been at large for 25

---

\(^2\) Such inducements can sometimes take the form of reduced sentences in exchange not only for physically returning but also for providing sought-after criminal intelligence. *See*, e.g., Bruce Zagaris, *Brazil Extradites Alleged Colombian Cocaine Capo to the U.S.*, 24 IELR 432, 432 (2008) (Juan Carlos Ramírez-Abadía, the alleged leader of a Brazilian drug cartel known as Norte del Valle (NVC), was reportedly enthusiastic about the prospect of being extradited to the U.S. rather than face prison time in Brazil, where he would have faced a 30-year sentence, as he was believed to see a chance for a reduced sentence in the United States based on information he could supply to U.S. authorities).

\(^3\) E.g., Linda Friedman Ramírez, *District Court Finds Violation of Dual Criminality in Case of Extradition from India*, 24 IELR 434, 434-35 (2008) (Stefan Wahne, an Icelandic national, agreed to return voluntarily to the U.S. on the conditions that all rights otherwise covered under the bilateral U.S.-India extradition treaty would continue to apply).

\(^4\) For example, under U.S. law, the fugitive disentitlement doctrine generally provides that a fugitive from justice may not seek relief from the judicial system whose authority he or she evades. The rationale for this doctrine includes the difficulty of enforcing against one not willing to subject himself to the court’s authority, the inequity of allowing that fugitive to use the resources of the courts only if the outcome is an aid to him, the need to avoid prejudice to the non-fugitive party, and the discouragement of flights from justice. *See* *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam).

\(^5\) For an example, *see supra* n.21.
years since escaping from a San Sebastian prison, had won a top Basque language literary prize worth 15,500 British pounds, it would not be conferred upon him until he turned himself in and “regularize[d] his legal situation.”

Such cited motivators do not raise international or even domestic legal concerns; however, were a pursuing State to blackmail a fugitive into repatriating by threatening that his non-return could result in harm to a family member or close friend or additional criminal charges, those would not be legally permissible.

ii. **Unilateral Lure and Capture Operations**

Unilateral Lure and Capture Operations (LCOs) are to be distinguished from those that take place either: (i) with the sole participation of host State officials or agents at the behest of the pursuing State (“surrogate” LCOs), (ii) by pursuing State officials or agents with the acquiescence of the host State (“consensual” LCOs); or (iii) by both host State and pursuing State officials or agents working together (“joint” LCOs). Unilateral LCOs are conducted entirely by pursuing State officials or agents (including possibly with the assistance of paid police officers or military officials from the host State in their private capacity) but without the official knowledge or consent of the host State itself.

---


27 See, e.g., Alona E. Evans, Panel Moderator, "International Procedures for the Apprehension and Rendition of Fugitive Offenders," Apr. 18, 1980, 74 ASIL Proc. 274, 277 (1980) (citing as a “[l]ess obvious” form of “irregular rendition” the “resort to a repatriation program designed to [induce] (or blackmail) an individual to return to the country from which he has fled, the very flight itself being a criminal act in some states.”).

28 Blackmail, a form of extortion, is a practice broadly recognized as unlawful around the world, including when undertaken by government officials or agents.

29 See Chapter 1 supra.

Unilateral LCOs are made to pursuing State territory\textsuperscript{31} or otherwise to pursuing State custody or control ("strategic" LCOs) or, alternatively, either to some intermediary destination, including international waters or zones\textsuperscript{32} or other locations within the host State or to third States (but in any event without their participation or acquiescence) ("tactical" LCOs).\textsuperscript{33} LCOs can be effected from beyond host State territory via telephone, fax, or email,\textsuperscript{34} and then carried out through the use of a wide variety of vehicles, including train; bus; truck; automobile; or commercial, official, chartered, or private aircraft, even possibly flown by the fugitive himself to the extent he is a licensed pilot.\textsuperscript{35} LCOs often rely on confidential informants or agents who are known to, if not trusted by, the individual of interest.\textsuperscript{36} LCOs are frequently accompanied by secret indictments

\textsuperscript{31} E.g., David Johnston, "U.S. Arrests an Australian in Spying Case," \textit{N.Y. Times}, May 18, 1999, available at http://www.nytimes.com/1999/05/18/world/us-arrests-an-australian-in-spying-case.html (last visited on Oct. 13, 2013) (describing how in May 1999, upon his arrival at Dulles Airport in Virginia, Jean-Philippe Wispeleare, an Australian national who had worked briefly for the Australian Defense Intelligence Organization in Canberra where he had access to classified U.S. intelligence documents, was arrested after being lured by an undercover FBI agent posing as a foreign spy willing to pay $120,000 for over 700 classified documents); Jon Nordheimer, "U.S. Accuses Ex-Minister from Belize in Plot to Import Marijuana," \textit{N.Y. Times}, Apr. 9, 1985, at A15 (discussing how, in April 1985, a DEA undercover officer lured a former Belizian cabinet minister to Miami, where he was arrested for conspiracy to import marijuana into the U.S.).

\textsuperscript{32} E.g., David Johnston, "F.B.I. Arrests 2 Drug Suspects on High Seas," \textit{N.Y. Times}, Feb. 22, 1991, at A16 (recounting an FBI lure operation to a private yacht in international waters off the South American coastline of two suspected money launderers from Colombia who were then transferred to a USCG cutter and taken to Puerto Rico and eventually to Los Angeles for trial).

\textsuperscript{33} An example of a unilateral LCO to a third State but without its apparent participation or acquiescence involved Mordechai Vanunu, the Israeli technician who shared information about Israel’s nuclear capability to the \textit{London Times}. It has been reported that in September 1986 "he was tricked by a woman Mossad agent into traveling [on holiday from London] to [Rome,] Italy, where he was drugged and taken covertly to Israel . . . [where] he was convicted and sentenced to 18 years in prison [for treason and espionage]." \textit{Alun Jones & Anand Doobay, Jones and Doobay on Extradition and Mutual Assistance 90} (2005); see also \textit{AFP}, "How Israel’s Mossad Captured Nuclear Whistleblower Vanunu," Apr. 18, 2004, available at http://www.spacewar.com/2004/040418035553.1im1ibpc.html (last visited on Oct. 13, 2013).

\textsuperscript{34} Italy seems to have had no knowledge of the operation, as it subsequently launched an investigation into allegations that he had been unlawfully smuggled out of its territory. "Italian Judge Opens Inquiry into Charges of Israeli Abduction," \textit{N.Y. Times}, Dec. 25, 1986, available at http://www.nytimes.com/1986/12/25/world/italian-judge-opens-inquiry-into-charges-of-israeli-abduction.html (last visited on Jan. 6, 2014).


\textsuperscript{36} For example, in October 1973, Julio Lujan, a licensed Argentine pilot accused of heroin trafficking, was approached by a DEA informant about flying him to Bolivia to transact mining business there; upon arrival, Lujan was seized by local police officers acting as paid agents without their government’s knowledge or authority, and about a week later flown to the U.S. to face charges. \textit{Lujan v Gengler}, 510 F.2d 62, 63 (2d Cir.), cert. denied, 421 US 1001 (1975) [hereinafter \textit{Lujan Case}].

\textsuperscript{37} \textit{Eg., United States v. Yunis}, 681 F. Supp. 896 (D.D.C. 1988) (a friend of the fugitive who had been co-opted by the DEA and CIA lured Fawaz Yunis from Cyprus to a ship in the Mediterranean),
so that the individual of interest is not put on notice that he may be arrested if he leaves the host State. All LCOs, including those of a unilateral character, can be classified into one of three main categories based on the general nature of the deception: (i) law enforcement-related; (ii) commercial, professional, or non-law enforcement-related governmental activity; and (iii) social, personal, or recreational.

The first category includes those related to a law enforcement deceit of some kind (whether or not related to the fugitive’s actual or alleged underlying offense), such as a ruse to support a law enforcement activity or criminal prosecution; where the fugitive is made to believe he is a suspect in a criminal case and is given an opportunity to exculpate himself; or where he is afforded an opportunity to minimize his law enforcement exposure, including by a promise of political asylum, whether by a pursuing or third State. Notably, for purpose of this typology, the object of the ruse is determinative; therefore, where a procedural guarantee of safe passage is offered, there must also be a law enforcement-related end to the deceit, such as the fugitive’s providing testimony in another prosecution or lending assistance in a criminal investigation.

An example of a scenario fitting this first category is the case of Norbert Schmidt, a German national accused of importing cannabis into Germany, who was lured from Ireland by a police officer in England, who falsely represented over the phone to Schmidt and his solicitor that he was investigating a check fraud. The officer invited Schmidt to come to England to be interviewed in order to clear his name but that, if he refused, his name would be circulated as that of a suspect and he likely would be arrested the next time he tried to cross the border into England. When Schmidt arrived in London in November 1992 to meet the officer, he was promptly arrested. In another example, in the late 1990s, Abbas Gokal was lured from Pakistan to Germany as a stopover on his travel to the U.S.


to meet with Serious Fraud Office prosecutors who had sought his assistance regarding their investigation into the collapse of the Bank of Credit and Commerce International (BCCI); he claimed that the U.S. prosecutors had promised not to charge him and that he had been led to believe he would have safe conduct to the U.S.\textsuperscript{39}

A variant of such a law enforcement-related lure occurs when a fugitive is induced to “waive extradition” and voluntarily travel to pursuing State territory. There may be instances in which the fugitive’s whereabouts are known, and while extradition is either unavailable or undesirable between the pursuing and host States, the fugitive (presumably unaided by counsel) may not be aware that he is residing in a safe haven or otherwise appreciate the nature and extent of any extradition rights to which he could be accorded. A pursuing State official could approach the fugitive; claim that extradition papers have been filed; explain that such proceedings would be likely to succeed but prove protracted and expensive; and it would be in the fugitive’s self-interest simply to voluntarily return with or without the accompaniment of a pursuing State official or agent, at the pursuing State’s expense.\textsuperscript{40}

This category also captures LCO scenarios in which the fugitive’s job is of a law enforcement nature, such as serving as a police officer or customs official, and he is tricked into performing an activity that falls within the scope of his official duties. For example, in a case arising a remarkable four and a half centuries ago (1569) and thereby underscoring the long-established practice of lures, British law enforcement agents enticed Dr. John Story, who was suspected of plotting against the Queen, to come aboard an English ship in then-Spanish controlled Antwerp where he served as a customs officer checking ships for English goods, on the pretext that some English-origin blasphemous books had been found. Once on board, the ship headed off for England.\textsuperscript{41}

\textsuperscript{39} Regina v. Gokal, CA 9704132S2, Mar. 11, 1999 (U.K.) (unreported), summarized in Jones & Doobay, supra n.33, at 99 [hereinafter Gokal Case].

\textsuperscript{40} A similar LCO would involve a law enforcement officer deliberately misinforming a fugitive that he is not wanted for an offense or that his offense for which he is wanted is not extraditable and coaxing the fugitive to return to pursuing State territory.

\textsuperscript{41} Paul O’Higgins, Unlawful Seizure and Irregular Extradition, 36 B.Y.B.I.L. 279, 281-82 (1960).
The second category covers those deceits in which a fugitive is lured into engaging in or undertaking a commercial, professional, or non-law enforcement-related government activity. Such activities can be innocuous, such as attending an industry conference, delivering a lecture, or paying a ceremonial government visit. For example, in 1967 the Egyptian government invited a dozen members of the Yemeni government, including its Prime Minister, on “an official visit” to Cairo, where they were then arrested. In another case, a former CIA officer’s acquaintance pretended to be a representative of the U.S. National Security Council (NSC) and expressed an interest in consulting with the fugitive in the D.R. where he was assured he would be safe. Likewise, in December 1992, U.S. national Joseph Garfield Brown was lured from the Philippines to Virginia for espionage charges on the promise of a tae kwon do teaching contract at the CIA. In another case, in 1924, a German police officer invited a French police officer named Schneabele to attend a conference on border issues and promised him safe passage, but he was arrested upon his arrival.

Such lures also can exploit an offender’s predisposition to participate in illegal conduct by tempting him to engage in an unlawful enterprise. For example, in May 1999, undercover FBI agents lured from Bangkok Jean-Philippe Wispeleare, a former Australian Defense Intelligence Organization official who had stolen classified documents and was trying to earn money by selling them to an interested foreign government; he was arrested upon his arrival at the Dulles International Airport in Virginia. Similarly, in October 1987, an undercover DEA agent lured from Mexico Raul Lopez Alvarez, a former Mexican police officer who had boasted of helping to torture DEA agent Camarena, by posing as

---

42 “Kidnapping Incidents,” 32 Bull. of the Int’l Comm’n of Jurists 24, 27 (Dec. 1967) [hereinafter IC Bull] (noting, however, that they were later returned).
43 United States v. Wilson, 721 F.2d 967, 972 (4th Cir. 1983).
someone who wanted a U.S. Customs agent killed for $10,000; Alvarez was arrested at a restaurant in California.47 In another instance, in April 1985, a former Belize Cabinet minister, Eligio Briceno, was lured and arrested by undercover DEA agents under the guise that he would receive a $35,000 payout for helping to “arrange the smuggling of 5,000 pounds of marijuana a month by plane into the coastal area of North Carolina.”48

The third category involves lures of a social, personal (including self-promotional), or recreational nature. These can include such varying pretexts as an invitation to participate in an athletic competition,49 attend a party, engage in a romantic interlude (a/k/a a “honey pot” or “honey trap”),50 enjoy an all-expense-paid trip to the fugitive’s home country,51 or to publish a book about his life or to be the subject of a film.

### iii. Unilateral Seizure and Delivery Operations

Just as the case with LCOs, Seizure and Delivery Operations (SDOs) come in a variety of forms. Unilateral SDOs must be distinguished from their surrogate, joint, and consensual counterparts. The key attribute of a unilateral SDO is that it is undertaken by a pursuing State without reliance on an intermediary third State or on a participating or acquiescing host State; *i.e.*, it acts alone, although possibly with the assistance of private actors,52 including even host or third State officials operating in their *individual* capacity.

---

48 Nordheimer, *supra* n.31, at A15.
49 In 1971, the Panamanian chief of air traffic control, Joaquim Him Gonzalez, was lured into the Panama Canal Zone to play in a softball game. *Clark & Horrock, supra* n.16, at 193-98.
50 See *supra* n.33 (discussing an LCO undertaken by a female Israeli Mossad agent to entice Mordechai Vanunu from London to Rome for a holiday trip together).
51 See *ICJ Bull.*, *supra* n.42, at 25 (describing an apparent lure of South Korean students living in the FRG to travel to South Korea).
52 An example of this was seen in January 2005 when the Colombian government “admitted that it had paid an unspecified reward to bounty hunters to capture Rodrigo Granda, a leader of the [FARC from a subway station in Caracas, Venezuela], and take him across the border to the Colombian city of Cucuta.” Juan Forero, “Venezuela: Ambassador to Colombia Recalled over Captured Rebel,” *N.Y. Times*, Jan. 14, 2005, at A12. Venezuela detained five of its own National Guardsmen and three police officers on suspicion of participation. *Id.*
By far the most common manifestation of a unilateral SDO is a clandestine operation in which the fugitive is physically taken off the street, from a railroad platform, or from a home, office, or hotel, whether in broad daylight or under cover of darkness, and escorted by foot across a national border, or brought to an automobile, sea-going vessel, or aircraft waiting to whisk him away from host State territory, sometimes following initial questioning in a safe house or other secure location. An SDO can also occur where a fugitive is seized while on board a flagged or unflagged vessel on the high seas, in a host State’s contiguous zone, or in its territorial waters and then brought back to pursuing State territory.

Many examples exist, although arguably the two cases that have elicited the greatest volume of legal commentary involved: (i) Adolf Eichmann, who masterminded the systematic Nazi deportation and execution of six million Jews from Eastern Europe in the late 1930s and early 1940s, and (ii) Humberto Álvarez-Machain, a Guadalajaran medical doctor accused of keeping DEA Agent Enrique Camarena Salazar alive while he was tortured for information about DEA plans and operations in Mexico.

In May 1960, after learning of his whereabouts in Buenos Aires (where he was living under the pseudonym Richard Klement for a decade), Israeli intelligence (Mossad) officials stalked him and then plotted to seize him from a residential street during his daily office commute home from a neighborhood bus stop.

---

53 An example occurred in April 1935 when German officials, arriving by train, seized Herr Lampersberger, a German political refugee, from Czechoslovakia while he was waiting for a train at the Eisenstein Station, and then carried him across the border into Germany. Preuss, supra n.45, at 504.

54 Variations on this theme are also possible. For example, as curious as it sounds, in November 1964, Egyptian agents tried to return Moroccan-born Mordechai Luk, reportedly a double intelligence agent for the Egyptians and Israelis, to Egypt by packing and shipping him in a trunk, although it is unclear whether Egypt had charged him with any crime. AP, "Italy Balks Air Abduction of Man in a Trunk," N.Y. Times, Nov. 18, 1964, at 1.

55 The contiguous zone is discussed at n.73 in Chapter 2 supra.

After confirming his identity and interrogating him at a “safe house,” the Mossad agents transported him back to Israel on an El Al aircraft that had flown an Israeli delegation to celebrate Argentina’s 150th anniversary celebration.\(^{57}\)

With respect to Álvarez-Machain, in April 1990, the so-called “Wild Geese,” a group cobbled together by a DEA informant and consisting of “former military police officers, civilians, and at least two current policemen,” while “wearing federal police uniforms broke into Álvarez-Machain’s office, put a gun to his head, locked his secretary and a maid in a closet, and hustled the doctor away to a house in Guadalajara.”\(^{58}\) The next day, he was flown to El Paso, Texas, in a private plane where the DEA took custody of him.\(^{59}\)

A second type of SDO, albeit far less common, is when pursuing State personnel conduct peacetime military raids (whether or not in secret) or lead expeditionary forces to capture and retrieve one or more fugitives. For example, in February 1973, members of the Israeli Defense Force (IDF) launched an open raid to seize and bring back to Israel from a refugee camp 100 miles inside neighboring Lebanon to face criminal prosecution 11 suspected Palestinian militants, including 23-year-old Turkish national Falik Bulut, in large part because of their organizational affiliation with Al-Fatah.\(^{60}\) Likewise, in July 1989, 12 Israeli commandos, arriving in helicopters, swooped in to Jibchit, Lebanon, and seized Sheik Abdul Karim Obeid, the spiritual leader of the pro-Iranian (Shiite) Party of God (Hezbollah) who was alleged to have harbored terrorists as well as incited, planned, and materially supported terrorist attacks against Israel.


\(^{58}\) Pyle, supra n.14, at 282-83.

\(^{59}\) Jones & Doobat, supra n.33, at 91.

and its population. The raid also captured two men staying at Sheik Obeid’s home and killed an eyewitness neighbor during the operation.\textsuperscript{61}

In 1916, U.S. Brigadier General Jack Pershing led an expeditionary force into Mexico to capture and bring to justice Francisco (“Pancho”) Villa, who was a leader in a revolution-wrought and political dysfunctional Mexico and who had, among other things, robbed U.S. banks and murdered American citizens, but the expedition proved a failure.\textsuperscript{62} In addition, in December 1989, an hour before a military invasion was scheduled to launch to seize Commander-in-Chief of the Panama Defense Forces (PDF) and \textit{de facto} Panamanian leader Gen. Manuel Noriega from Panama and return him to the U.S. (see discussion \textit{infra}), “a snatch squad of Delta Force commandos raided one of his haunts, only to find that [he and his advisors] had just left.”\textsuperscript{63} Had that surgical military raid succeeded, it probably would have obviated the need for the invasion.

A third type of an SDO, but one that is particularly rare, occurs when a fugitive, whether a civilian, combatant, or even a political or military leader of the host State, is captured in the course of an international armed conflict (IAC) precipitated at least in part to retrieve an individual of interest.\textsuperscript{64} The latter scenario likely would only take place if the targeted fugitive were of critical law enforcement significance and no other means of his capture and retrieval were


\textsuperscript{62} NADELMANN, \textit{COPS}, supra n.16, at 456; PYLE, \textit{supra} n.14, at 266.

\textsuperscript{63} PYLE, \textit{supra} n.14, at 278.

\textsuperscript{64} As this Part of the dissertation is concerned with full-scale alternatives to extradition, it examines only measures that pursuing States can actually undertake to retrieve fugitives, rather than circumstances, such as warfare, that might arise entirely incidentally and which then can be exploited for law enforcement ends, including in instances of military occupation (see, \textit{e.g.}, \textit{Chandler Case} discussed \textit{infra}).
feasible. The only modern example of such a unilateral operation involved Gen. Manuel Noriega who ruled Panama from 1983 to 1989 and was wanted on narcotics trafficking, money laundering, and related charges in connection with protecting the Medellín cartel and their cocaine shipments to the U.S.

The U.S. government seized Gen. Noriega in early January 1990 after launching a military attack on Panama with approximately 25,000 troops in late December 1989 (called “Operation Just Cause”) with one of its express aims (if not its primary mission) to recover Gen. Noriega in order to criminally prosecute him in the U.S. Gen. Noriega managed initially to evade capture before seeking refuge in the Papal Nunciature (the Embassy of the Holy See in Panama City), after 10 days of which the Vatican envoy to Panama announced that his refuge would expire and Gen. Noriega had to choose between giving himself up to U.S. forces or to the Panamanian people. Although Gen. Noriega was received into the

---

65 As a de facto leader of Panama, it was “almost inconceivable that he would be brought to trial while he held power” to account for the crimes for which he had been indicted by two grand juries in February 1988. Heymann & Gershengorn, supra n.12, at 131. “Panamanian judges would have found [Gen. Noriega] immune from extradition both as their de facto head of state and as a Panamanian national (Panama’s constitution frownd on the surrender of its nationals); plus, a number of charges against him would not satisfy the rule of double criminality (racketeering charges, in particular, had no counterpart in Panamanian law).” Pyle, supra n.14, at 277. This case represented the first time a de jure or de facto leader of a sovereign State was the subject of a unilateral SDO to the U.S. to face criminal charges.

66 “No close precedent exists for the manner and circumstances in which Noriega was apprehended and brought to trial in the United States.” Nadelmann, COPS, supra n.16, at 457. From an historical perspective, there is at least one approximate precedent. See Pyle, supra n.14, at 267 (“The U.S. military conquest of [Spanish-controlled] East Florida in 1817 was triggered, in part, because the Mikasuki Seminoles refused to allow U.S. troops to recover fugitive slaves from their territory” who had escaped by the hundreds and were “stag[ing] cross-border raids, plundering white settlements and encouraging other slaves to join them”). In that case, however, it was not about a single fugitive but about a large group of them.

67 The only other national leader ever indicted by the U.S. while in office was Norman Saunders of the Turks & Caicos Islands (for narcotics-related charges for which he was convicted in 1985). Richard L. Berke, “Noriega Arraigned in Miami in a Drug-Trafficking Case; He Refuses to Enter a Plea; Claims of Coercion; He Surrendered for Fear of Losing Sanctuary, Lawyer Maintains,” N.Y. Times, Jan. 5, 1990, at A1, A10.


69 Pyle, supra n.14, at 278.


hands of a U.S. military general, he immediately was flown to a U.S. AFB in Panama where DEA officials arrested him and flew him to Florida.\footnote{See Sanchez, supra n.9, at 134; Ma, supra n.68, at 934. This has been accurately described as the "most ambitious snatch operation in history," given the number of troops involved and the fact that "26 Americans and more than 700 Panamanians, mostly civilians, died, and that property damage exceeded 1.5 billion dollars." PYLE, supra n.14, at 278.}

\textbf{iv. Interception or Commandeering Operations}  
Another means by which a pursuing State can unilaterally retrieve a fugitive overseas is by intercepting or commandeering an aircraft, ship, automobile, or other vehicle in which the fugitive is believed to be aboard. An “interception operation” is one that, through either force or the threat of force exerted from the outside of a transport vessel or vehicle, diverts its direction to, or ceases its movement at, a location where the identity of any suspected fugitives on board can be safely confirmed and, if so, apprehended. A “commandeering operation” is one that, through either force or the threat of force exerted from the inside of a transport vessel or vehicle, wrests its control and charts a course to a destination where the identity of any suspected fugitives on board can be safely confirmed and, if so, apprehended. Some examples can help illustrate this dynamic. Notably, however, while several instances in the literature address interceptions (of the aircraft variety only), no commandeering operations have been found, so these will need to be discussed through hypothetical scenarios.\footnote{An illustrative example of commandeering in a non-law enforcement context can be seen in the manner by which the hijackers of the Achille Lauro took control of the Italian cruise ship in 1985 not after boarding from another ship but from already being on the cruise ship itself. See Antonio Cassese, The International Community’s ‘Legal’ Response to Terrorism, 38 INT’L & COMP. L.Q. 589, 603 (1989) [hereinafter Cassese, Legal Response].} Not all such operations prove successful.

In chronological order, there are five documented instances of international aircraft interceptions,\footnote{In addition to actual interceptions, others have been considered. In the ICC context, for example, prosecutors reportedly “contemplated a mid-air interception [within the air space of a State Party] if Seif al-Islam el-Qaddafi, son of Col. Muammar el-Qaddafi and one-time heir apparent, tries to flee by plane to an African safe haven.” J. David Goodman, “Prosecutor Says Qaddafi Son May Turn Himself In,” \textit{IHT}, Oct. 29-30, 2011, at 5. The U.S. also reportedly considered interdicting Panamanian strongman Gen. Manuel Noriega’s aircraft over the high seas. PYLE, supra n.14, at 277.} all of which occurred over a three-decade period between 1956 and 1986, two perpetrated by Israel, and one each by France, the U.S., and Yemen. In the first of these, in October 1956, France forced down a
civilians in then-French-owned Algeria while flying over the high seas en route between Tunis and Morocco, in order to secure the custody of Ahmed Ben Bella (who later became President of Algeria) and fellow Front de Libération Nationale (Algerian Liberation Movement or FLN) leaders who were passengers on that flight. He and his associates were then arrested, taken to France, and imprisoned.\textsuperscript{75}

In the second instance, in August 1973, two Israeli fighter jets intercepted a civilian airliner (owned by Middle East Airlines but on charter to Iraqi Airways) carrying 74 passengers and seven crew members shortly after it took off from Beirut (but still over Lebanese territory) en route to Baghdad. The aircraft was forced to land on an Israeli military base and then everyone on board was instructed to disembark and subjected to questioning. After about two hours of detention, the passengers and crew were permitted to proceed on their airliner’s scheduled route. The purpose of the interception was to capture Dr. George Habash, leader of the Popular Front for the Liberation of Palestine (PFLP) and fellow Palestinian militants who were suspected of being on board. It turned out, however, that the Israelis confused flight 006 (which reportedly was carrying the individuals of interest) with flight 006A (which was the one intercepted), both of which coincidentally had a Beirut-to-Baghdad flight plan and departed at about the same time of day.\textsuperscript{76}

In the third case, in October 1985, four Palestine Liberation Front (PLF)\textsuperscript{77} gunmen hijacked an Italian cruise ship (the \textit{Achille Lauro}) carrying 545 passengers and crew 27 nautical miles outside of Port Said, Egypt, and killed one disabled American Jewish passenger (Leon Klinghoffer). After being denied admission in a Syrian port, the hijackers cut a deal with the Egyptian


\textsuperscript{76} Terence Smith, “Israeli Jets Over Lebanon Force Down Arab Airliner; Military Says it Diverted Wrong Plane in Search for Palestinian Guerrillas—81 are Freed after 2 Hours,” \textit{N.Y. Times}, Aug. 11, 1973, at 1, 6; Cassese, \textit{Legal Response}, supra n.73, at 601; Beck & Arend, supra n.61, at 174-75; Kash, \textit{Airspace}, supra n.11, at 91; George M. Borkowski, Recent Developments, \textit{Use of Force: Interception of Aircraft}, 27 HARV. INT’L L.J. 761, 764 n.35 (1986); Note, \textit{Israeli Precedent}, supra n.60, at 1088 n.4.

\textsuperscript{77} The PLF was then a faction of the PLO.
government through a PLO intermediary (Abu Abbas) to allow them safe passage to Tunis, the site of the PLO Headquarters, on an Egyptian government aircraft that carried the four gunmen, Abu Abbas, another PLO leader, five Egyptian diplomats, and 10 armed guards. The aircraft, however, was denied admission by Tunisia and (later) Greece (probably at the request of the U.S.) and, while returning to Egypt and upon U.S. President Ronald Reagan’s order (but without the knowledge of Egypt or Italy), four U.S. fighter jets from an aircraft carrier based in southern Europe intercepted the Egyptian plane near Crete and forced it to land at the Italian-NATO air base in Sigonella, Sicily. A 50-member U.S. Special Forces team, which had been tasked with putting the hijackers and PLO representatives on two U.S. transport aircraft that had landed about the same time and returning them to the United States, surrounded the Egyptian plane but they, in turn, were encircled by Italian troops. After tense discussions, and with the support of Egypt, Italy agreed to prosecute the hijackers if the U.S. would stand down; as a result, Italy took custody of the hijackers and the PLO representatives.78

In the fourth episode, in February 1986, two Israeli military aircraft intercepted a Libyan executive jet carrying a Syrian government delegation, two Lebanese militia officials, and three crew members on a trip from Tripoli (Libya) to Damascus (Syria). The interception occurred over the Mediterranean Sea east of Cyprus in international air space and the plane was forced to land in a northern Israeli airfield. As in the 1973 case, Israel mistakenly believed that those alleged criminals it sought to retrieve – in this instance, most likely Syrian-based Ahmed Jabril, leader of the PFLP–General Command (PFLP-GC), or Dr. George Habash (see supra) – were aboard and, just as before, allowed the passengers and crew to carry on to their destination after being detained for a period of hours.79

79 Judith Miller, “Qaddafi Orders His Jets to Intercept Israeli Airliners,” N.Y. Times, Feb. 8, 1986, at A3; Cassese, Legal Response, supra n.73, at 603; Borkowski, supra n.76, at 761; Michael J. Bazyler, Capturing Terrorists in the ‘Wild Blue Yonder’: International Law and the Achille Lauro and Libyan Aircraft Incidents, 8 Whittier L. Rev. 685, 694 & n.65 (1987); Kash, Airspace, supra n.11, at 90-91; Beck & Arend, supra n.61, at 176-77.
In the fifth instance, in August 1986, “two South Yemeni MIG fighters intercepted a Djibouti commercial airliner over the Red Sea and forced it to land at Aden airport in South Yemen. In Aden, the guards made the 59 passengers disembark and kept the Boeing 720 jet on the ground for 4 hours while they searched for political opponents, particularly supporters of deposed South Yemeni President Ali Nasser Hasani.”

Although initially the South Yemenis tried to detain one Hasani associate found on the aircraft, they ultimately “relented and allowed all the passengers . . . to depart.”

More recently, in a variation on this theme that might best be characterized as a “passive interception” operation, France, Spain, and Portugal all barred a private Bolivian aircraft carrying President Evo Morales from flying over its airspace on July 2, 2013, effectively forcing it to land in Vienna, Austria, to refuel. It appears the U.S. had requested its European allies to restrict the aircraft’s passing through their sovereign space because it was suspected that Edward Snowden, the NSA contractor who had publicly disclosed volumes of sensitive U.S. intelligence information, was on board. When the aircraft was being refueled, it was searched but Snowden was not found. The French government later apologized to Bolivia for having delayed the president’s journey by forcing it to divert its scheduled route and having to refuel in order to complete the trip.

As noted above, while there are no reported cases of commandeering, such operations could conceivably occur and therefore should not be discounted from this analysis. Such an operation could take place on an aircraft, ship, or automobile, where a gunman (or gunmen) either by force or threat of force seized control of the transport vehicle and determined its direction and/or destination. It could take place in international space or on sovereign territory. It could occur with or without casualties, but in any event absent the knowledge

---

80 Bazyler, supra n.79, at 695.
81 Id.
or consent of the owner and “pilot” of the aircraft, vessel, or vehicle involved. Such an operation could be challenging to execute in the sense that the transport vessel or vehicle in question might be well guarded and those carrying it out could face resistance during the seizure of control and/or at the point of destination.

c. **Lawfulness Analysis**

This section examines each of the three aforementioned unilateral operational types for their lawfulness, beginning with LCOs, followed by SDOs, and then interception or commandeering operations. Afterward, a number of cross-cutting justifications will be discussed.

i. **Lure and Capture Operations (All Kinds)**

Whether unilateral, surrogate, consensual, or joint in terms of involvement – and whether strategic or tactical with regard to intended destination – LCOs tend to be uniformly evaluated for their lawfulness. That is, the standards do not vary depending on the nature of the operation involved, although when the host State has participated in or consented to the operation, or the host State is not the fugitive’s State of nationality, States are far less likely to mount a protest after the fact.\(^\text{83}\) Because of this standardized approach, LCOs of all kinds are evaluated for their lawfulness in this section alone.

This lawfulness analysis focuses strictly on the substantive legality of carrying out an LCO by a government official or agent\(^\text{84}\) and independent of other related variables that courts often take into account when reviewing a case, such as

\(^{83}\) *E.g.*, *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (the government of the Bahamas “made no attempt to seek [Reed’s] return [after he had been lured by U.S. agents out of the Bahamas to the Florida coast] or to make any protest (probably in part because Reed was a U.S. citizen”).

\(^{84}\) The legality of lure operations carried out pursuant to governmental powers must be distinguished from those undertaken by individual citizens acting on their own, in which case a lure operation can be treated as a criminal offense. *E.g.*, Swiss Criminal Code, Dec. 21, 1937, updated to July 1, 2013, art. 271(2), available at [http://www.wipo.int/wipolex/en/text.jsp?file_id=270810](http://www.wipo.int/wipolex/en/text.jsp?file_id=270810) (last visited on Dec. 21, 2013) (“Any person who abducts another by using violence, *false pretences* or threats and takes him abroad in order to hand him over to a foreign authority, party or other organisation or to expose him to a danger to life or limb is liable to a custodial sentence of not less than one year.”) (emphasis supplied).
whether undue force or outrageous treatment was inflicted upon the fugitive incidental to the lure or capture,\textsuperscript{85} whether constitutional guarantees apply to the fugitive in a given instance,\textsuperscript{86} whether a court finds it lacks proper personal jurisdiction to hear a claim,\textsuperscript{87} whether the fugitive has standing to bring a claim alleging a violation of international law,\textsuperscript{88} or whether a fugitive's asserted defenses at trial ultimately prove successful.\textsuperscript{89} (Personal jurisdiction and individual standing will be addressed in Chapter 13 \textit{infra} as judicial process considerations.)

Many States, tribunals, and legal experts find such deceptive practices to be a violation of international and/or municipal law whether as a constitutional or procedural matter.\textsuperscript{90} A meeting of the International Penal Law Association (IPLA) has adopted a resolution that “enticing a person under false pretenses to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated . . .”\textsuperscript{91} Along those lines, the U.S. Attorney’s Manual, which is intended for use by federal prosecutors, states:

\begin{flushright}
\textsuperscript{85} E.g., Stephanie Carter, Note, \textit{Forcible Abduction of Fugitive in Foreign Country Does Not Violate Due Process}, United States v. Reed, 639 F.2d 896 (2d Cir. 1981), 6 \textit{SUFFOLK TRANSNAT'L L.} 357, 364 (1981-82) (“In defining what was necessary and reasonable in an ordinary arrest [following a lure operation] the \textit{Reed} court sanctioned the use of both physical and psychological force to some extent” (including holding a gun to the fugitive’s head)).
\textsuperscript{86} E.g., \textit{Yunis}, 681 F. Supp. at 917-18 (noting the preliminary question as to whether U.S. constitutional protections even apply to non-nationals overseas).
\textsuperscript{87} E.g., \textit{Wilson}, 721 F.2d at 972 (dismissing a claim that the court had no personal jurisdiction).
\textsuperscript{88} E.g., id. (holding that the defendant had no standing to raise a violation of international law “absent such protest or objection by the offended sovereign”); \textit{United States v. Cordero}, 668 F.2d 32, 37 (1\textsuperscript{st} Cir. 1981).
\textsuperscript{89} For example, during his prosecution, a fugitive arrested following an LCO potentially could assert the affirmative defense of entrapment. However, “[i]nternationally, there is limited interest in the entrapment defense. Until very recently, the entrapment defense was available only in the United States; it was not a feature in English common law, and no other industrialized nations traditionally recognized it. Entrapment’s absence from these other legal traditions is due partly to other devices in their legal systems for regulating police activity, such as outright criminal liability for government agents who overreach. A second possible factor is the cultural difference regarding privacy expectations, as Europeans seem to have a greater tolerance for more invasive government surveillance. Although some countries have begun to recognize the entrapment defense for the first time, they are generally far less judicious than U.S. courts in awarding the entrapment defense.” Paul W. Valentine, \textit{To Catch an Entrapper: The Inadequacy of the Entrapment Defense Globally and the Need to Reevaluate Our Current Legal Rubric}, \textit{PACE INT’L L. REV. ONLINE COMPANION}, Aug. 2009, at 22, 23.
\end{flushright}
[S]ome 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.\textsuperscript{92}

It also has been maintained that luring is a breach of the principle of \textit{good faith},\textsuperscript{93} to the extent it erodes or undermines cooperation, friendship, and trust between States;\textsuperscript{94} and/or violates existing treaty and other international obligations.\textsuperscript{95}

In July 1982, in the \textit{Case of X}, the Swiss Federal Court refused to authorize the extradition of a Belgian national to Germany on the grounds that he had arrived on Swiss territory after being lured by German authorities from Belgium.\textsuperscript{96} In addition, in a rare instance of a reported international arbitration case addressing the lawfulness of a lure operation, in 1933 the United States-Panama Claims Commission ruled that $500 in compensatory damages were owed by the U.S. (even after the fugitive’s return) when one of its police officers assigned to the Panama Canal Zone had deceived Guillermo Colunje, a Panamanian citizen, to enter the Zone for a softball game in order to arrest him.\textsuperscript{97} Pursuant to a claim by the Government of Panama, the Arbitration Commission reasoned as follows:

\begin{quote}
It is evident that the police agent of the Zone by inducing Colunje by false pretenses to come with him to the Zone with the intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama to the prejudice of a Panamanian citizen, who, as a result
\end{quote}

\textsuperscript{93} \textit{See} Shaw, \textit{supra} n.5, at 18 (listing good faith as a general principle of international law).
\textsuperscript{94} \textit{See} U.N. CHARTER, \textit{supra} n.5, art. 1(2) (one purpose of the U.N. is to “develop friendly relations”); \textit{id}, art. 1(3) (another purpose of the U.N. is to “achieve international cooperation”).
\textsuperscript{95} \textit{Brief for the Government of Canada as Amicus Curiae in Support of Respondent, United States v. Álvarez-Machain}, reprinted in 31 ILM 919 (1992) and 60 U.S.L.W. 4523 (U.S. June 15, 1992) (No. 91-712) [hereinafter Canada \textit{Amicus Curiae}]. \textit{See generally} Vienna Conv. on the Law of Treaties (VCLT), May 23, 1969, art. 26, 1155 U.N.T.S. 332, \textit{reprinted in} 8 ILM 679 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
\textsuperscript{97} \textit{Colunje Claim}, U.S.-Panama Claims Comm’n, June 27, 1933, \textit{reprinted in Annual Digest and Reports of International Law Cases 1933-34} (No. 96) at 250-51 (1940), 6 RIAA 342 (1933), U.S. Dep’t of State Arbitration Series, No. 6, at 733-49 (1934).
thereof, suffered the humiliation incident to a criminal proceeding. For this act of a police agent in the performance of his functions, the United States of America should be held liable.\textsuperscript{98}

In instances where a State’s \textit{nationals} have been lured out of third State territory, the reaction often is condemnatory. In September 1987, for example, after Lebanese national Fawaz Younis\textsuperscript{99} was lured from Cyprus into international waters and apprehended by the U.S., the Lebanese Minister of Justice vilified such conduct as “an act close to piracy” and an “aggression against the dignity of Lebanon.”\textsuperscript{100} It is, however, more noteworthy how States have reacted when \textit{non-nationals} have been lured out of their territory to face prosecution or punishment in a pursuing State. For example, the Spanish Ambassador twice requested that English national John Story be returned after he had been lured back to the U.K. from Spanish-controlled Antwerp in 1569;\textsuperscript{101} and in 1924 France demanded the return of German national Schnaebele after he had been enticed out of French territory across the German border by a German police official who had invited the fugitive to attend a meeting with safe passage.\textsuperscript{102}

At the same time, LCOs are not prohibited \textit{per se} under any international convention or even as a function of CIL.\textsuperscript{103} In addition, a number of courts have held LCOs to be permissible because they are viewed as fundamentally voluntary on the part of the fugitive (rather than coerced) or at least non-violent in nature. A U.K. court in 1990 plainly set forth the rationale on voluntariness as follows:

\begin{quote}
98 \textit{Id.}

99 The actual spelling of his name is Younis although the U.S. federal court labeled the case \textit{United States v. Yunis}. Accordingly, when referring to the individual, this dissertation uses “Younis” and when referring to the court case uses “Yunis.”


101 O’Higgins, \textit{supra} n.41, at 281-82 (the Spanish demand proved unsuccessful).

102 Selleck, \textit{supra} n.45, at 257 (Germany’s Prince Bismarck agreed to return him to France).

103 Indeed, as a general rule, domestic police forces are authorized to carry out deceptive practices, including undercover or sting operations, in order to capture suspected criminals, and there is a compelling international interest in bringing criminals to justice.
\end{quote}
In the present case the appellant [and his associate] came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not because of any unlawful conduct of the authorities but because of their own criminality and greed.\(^{104}\)

In addition, courts, including the U.S. Court of Appeals for the Fifth Circuit, in characterizing lure and capture operations as nothing more than “a nonviolent trick,”\(^{105}\) have stressed the fact that, absent force or violence, it would be unfair or unreasonable to regard such government conduct as overstepping legal bounds.\(^{106}\)

One upshot of such voluntary, non-forcible departure from host State territory is that LCOs generally are not regarded as infringing on or interfering with territorial sovereignty.\(^{107}\) For example, Slavko Dokmanović, a Croatian Serb and Mayor of Vukovar indicted for his complicity in a hospital massacre in Eastern Croatia in November 1991, claimed in 1997 that U.N. officials had violated Serbian sovereignty when he was lured into Croatia under what he believed to be a promise of safe conduct to attend a meeting with the Transitional Administrator of Eastern Slavonia ostensibly to arrange to compensate Dokmanović for property he had been forced to abandon. He voluntarily crossed the border and boarded a UNTAES vehicle in eastern Croatia, where he was driven to the town of Erdut, then arrested, read his rights, put on a UNTAES


\(^{106}\) E.g., Prosecutor v. Dokmanović, Case No. IT-95-13a-PT, ICTY Tr. Ch. II, Decision on the Motion for Release by the Accused, Oct. 22, 1997, reprinted in 111 ILR 458 (1997) [hereinafter Dokmanović Case] (rejecting defense claim that a lure operation, which tricked Slavko Dokmanović into entering a vehicle in Serbia that then carried him into U.N.-controlled territory in Croatia where he was arrested, was tantamount to “a forcible abduction or kidnapping” and that the deprivation of his liberty occurred in Croatia).

\(^{107}\) While not generally explicit in court reasoning, LCOs are not directed at the host State but rather at an individual, and the operation does not infringe on the host State’s territorial integrity or political independence, as its reliance on sovereign territory to effect the deceit tends to be incidental at most. Notable exceptions to this viewpoint include Switzerland and Germany. See Case of X, Belgian Citizen v. Swiss Justice and Police Dept, 10 Europäische Grundrechte-Zeitschrift (EuGRZ) 435 (1983), Judgment of July 15, 1982 (Fed. Sup. Ct.) (Switz.) (denying extradition to Germany based in part on the conclusion that Germany had violated Belgium’s territorial sovereignty when a Belgian national was lured to Switzerland); NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 233 (2012) (discussing Yemeni Citizens Extradition Case, BVerfG, 2 BvR 1506/03, ILDC 10 (DE 2003) (Ger.), Nov. 5, 2003)).
plane to The Hague and surrendered to the ICTY for prosecution.\(^{108}\) Dokmanović’s claim was rejected by the ICTY, as the operation was found to have neither violated international law nor the Federal Republic of Yugoslavia’s (FRY’s) sovereignty.\(^{109}\)

Some legal commentators have corroborated that view when assessing the lawfulness, for example, of the U.S. LCO of Lebanese national Fawaz Younis from Cyprus to international waters (i.e., beyond the 12 nautical mile point marking the end of a coastal State’s territorial sea\(^{110}\)) by finding that, absent any physical force or abduction, no valid claim can be made out for a breach of territorial sovereignty under such facts.\(^{111}\) A minority of commentators, however, focus instead on the fact that LCOs occur to some extent, however superficially or fleetingly, on host State territory\(^{112}\) and for them it arguably follows that the host State’s interests suffer on account of a deprivation of the fugitive’s legal rights.\(^{113}\)

Some courts have found that, in balancing the equities, LCOs have been neither too extreme nor disproportionate such as to constitute an “affront to the public conscience.”\(^{114}\) For example, in a case involving an undercover U.K. customs official who, in connection with an LCO, physically imported heroin into the U.K. after being handed a package pursuant to a drug deal with a suspected Pakistan-based narcotics smuggler, in order to establish evidence of criminal conduct and to set him up for an arrest when he was later invited to the U.K. by another

\(^{108}\) Dokmanović Case, supra n.106; Scharf, supra n.34, at 970-71.

\(^{109}\) Dokmanović Case, supra n.106.

\(^{110}\) See discussion of territorial waters in Chapter 2.c.i supra.


\(^{112}\) See, e.g., Edwin M. Borchard, *The Factor Extradition Case*, 28 AJIL 742 (1934) (noting that the deceit involved is “consummated” in host State territory).

\(^{113}\) See Frederick A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 408-09* (Yoram Dinsein ed. 1989) (international law violation occurs where “the State or its agent…induces him by fraud or other illegal means to leave the country of refuge and proceed to some other country where he is apprehended…In such circumstances…the wrong is committed in the foreign state [the host State], because the illegal means are used or have their effect there. A State, being sovereign, is not expected to tolerate acts that involve generally recognized illegality, though they are not performed by force. It is not necessarily the use of force, but the illegality, that constitutes the wrong done to the sovereignty of the State.”).

\(^{114}\) E.g., Gokal Case, supra n.39.
customs official who had secured an entry visa for him, the House of Lords found the conduct of the customs officer who imported the heroin “not so unworthy or shameful that it was an affront to the public conscience.”115 Similarly, in November 2003, “the German Federal Constitutional Court rejected a challenge by two Yemenis to their extradition to the US to face terrorism charges, who had been lured to Germany by an undercover US agent, on the [partial] basis that . . . the sovereignty violation of the state from which they were lured was proportional to the serious nature of the offences involved.”116

The international legal community remains divided on the extent to which an LCO can or should be considered unlawful where an operative extradition treaty was not invoked by the pursuing State. The difference of opinion generally turns on their view as to the underlying purpose of the extradition treaty. For some, an extradition treaty is regarded as a means simply to protect a State’s territorial sovereignty from infringement; accordingly, an LCO, which entails no use or threat of force nor is it directed against a State itself, would not generally be treated as a circumvention of that treaty.117 For others, an extradition treaty is recognized as the exclusive method by which fugitives are to be returned between States; an LCO, therefore, may well be seen as an abrogation of that understanding.118 This divide is complicated by the fact that sometimes the host State will not grant an extradition request for political reasons, but nevertheless consent sub rosa to a fugitive’s departure from its territory by other means, including via deception.119

Another way of gauging the lawfulness of deceptive practices for law enforcement purposes is to consult international humanitarian law (IHL)

---

116 *Boister*, supra n.107, at 233 (discussing *Yemeni Citizens Extradition Case*, BVerfG, 2 BvR 1506/03, ILDC 10 (DE 2003), Nov. 5, 2003, ¶¶ 53-62 (emphasis supplied)).
117 E.g., Laflin, supra n.111, at 326 (discussing *Yunis case*).
119 In those circumstances, some may contend such collusion amounts to “disguised extradition” (see lawfulness analysis in Chapters 10 and 11 supra).
standards by analogy. Ruses of war are expressly permissible\textsuperscript{120} and include
“acts which are intended to mislead an adversary or to induce him to act
recklessly, but which infringe no rule of international law applicable in armed
conflict and which are not perfidious because they do not invite the confidence
of an adversary with respect to protection under that law.”\textsuperscript{121} Cited examples
include “the use of camouflage, decoys, mock operations and misinformation.”\textsuperscript{122}
Unlawful acts of perfidy, by contrast, would include, by way of illustration: “(a)
the feigning of an intent to negotiate under a flag of truce or of a surrender; (b)
the feigning of an incapacitation by wounds or sickness; (c) the feigning of
civilian, non-combatant status; and (d) the feigning of protected status by the
use of signs, emblems or uniforms of the United Nations or of neutral or other
States not Parties to the conflict.”\textsuperscript{123}

Were this analogy to apply, the only scenario that arguably ought to be
proscribed is where government officials induce a fugitive to assist with a law
enforcement matter and/or promise safe passage, because doing so would
operate much like perfidy in unfairly inviting, and then betraying, confidence
with respect to the very set of laws that require protection. Although such an
analogy can be challenged on the ground that wartime and peacetime conduct
should not be assessed against the same legal standards, wartime conduct and
international criminal law enforcement actions are reasonably comparable in
that both involve oppositional forces and may entail violent methods, and
therefore each calls for careful line-drawing as mortality may hang in the
balance.

\textsuperscript{120} See Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian
Law 203 (ICRC 2005) (“Rule 57. Ruses of war are not prohibited as long as they do not infringe a
rule of international humanitarian law.”).

\textsuperscript{121} Additional Protocol to the Geneva Conventions of August 12, 1949, and Relating to the
A/32/144 (1977) Annex I, reprinted in 16 ILM 1391 [hereinafter AP I]. To the extent this
Protocol contains customary international law (CIL), even non-ratifying States like the U.S., are
expected to abide by such provisions, and this general rule is regarded as constituting CIL. See
Henckaerts & Doswald-Beck, supra n.120, at 203 (“This is a long-standing rule of customary
international law already recognised in the Lieber Code and the Brussels Declaration, and
codified in the Hague Regulations. . . . The rule permitting ruses of war is stated in numerous
military manuals. It is supported by several official statements and other practice.”).

\textsuperscript{122} AP I, supra n.121, art. 37(2).

\textsuperscript{123} Id., art. 37(1).
In the end, there appears to be no clear consensus under international law regarding the legality of lure and capture operations. Although no express prohibition exists in treaty law and there is no customary practice opposing its use (particularly in light of States’ not infrequent reliance on this method), there is considerable opposition to the use of LCOs, especially when one’s own national is the victim and, at a minimum, they remain controversial. In many instances, host States cooperate at some level on pursuing State-led LCOs, but in unilateral instances, offended States may choose to protest after the fact\textsuperscript{124} (and thereby try to have the fugitive returned), and sometimes a captured fugitive may be eligible to raise a claim before a pursuing State court to challenge its personal jurisdiction based on the way his physical custody was secured.

\textbf{ii. Unilateral Seizure and Delivery Operations}

When assessing the lawfulness of unilateral SDOs,\textsuperscript{125} there are a number of potential violations of international law\textsuperscript{126} to consider; most notably including: (i) a breach of territorial sovereignty, (ii) extradition or other treaty non-compliance; and (iii) the failure to observe certain international human rights standards. SDOs may implicate international law at any one of three phases: the physical apprehension, the post-apprehension departure from host State territory, or the treatment of the fugitive once in pursuing State custody.\textsuperscript{127}


\textsuperscript{125} Those SDOs that specifically involve the participation or acquiescence of the host State are discussed in Chapter 11 supra.

\textsuperscript{126} In addition, a State’s domestic legislation may prohibit its law enforcement officers from effecting an arrest overseas. See, e.g., U.S. Pub. L. No. 94-329, 90 Stat. 729, 22 U.S.C. § 2291(c)(1) (2012) ("Mansfield Amendment") ("No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law.").

\textsuperscript{127} It is worth noting on a preliminary basis that the U.S., which arguably has been the world’s most active contemporary exponent of unilateral SDOs, did not view such operations as lawful – and indeed publicly rebuked or protested against them – until as recently as the 1980s. See Pyle, supra n.14, at 267 ("Until the 1970s abductions [SDOs] were rare and those that came to the attention of the U.S. courts usually were carried out by private persons or local police. The reason is plain: federal executive did not believe that kidnapping [SDOs] was a legal or necessary law-enforcement measure."). "During the Cold War, American officials were infuriated by abductions carried out by East German secret police in the American sector of Berlin. The U.S. also objected when Soviet officials in New York tried to force two asylum-seeking teachers to return home." Id.; see also "Anti-Red Abducted After Gun Battle in Western Berlin," \textit{N.Y. Times}, July 9, 1952, at 1; "U.S. Rejects Soviet Charges Concerning Refusal of Two Russian Teachers to Return to Soviet Union," 19 \textit{Dep't of State Bull.} 251 (1948); Selleck, supra n.45, at 247 (citing to...
After reviewing the applicability and limits of each of these\textsuperscript{128} – including the extent to which they constitute violations as a general rule or qualify as recognized or arguable exceptions to that rule\textsuperscript{129} – we will then evaluate the merits of various justifications postulated for conducting such unilateral SDOs notwithstanding a \textit{prima facie} violation of international law.\textsuperscript{130}

\textbf{a. Territorial Sovereignty Analysis}

Perhaps the chief argument advanced for the unlawfulness of a unilateral SDO is the extent to which it violates the territorial sovereignty of the host State. This analysis first examines various types of territory to see how courts and commentators have evaluated the legal implications of an SDO, beginning with host State territory in one manifestation or another. Then it will look at more

\textsuperscript{128} Although the UNGA has considered whether to request the ICJ to render an advisory opinion regarding whether the use of forcible unilateral measures in securing the custody of an individual on foreign sovereign territory could be lawful, no such request ever has materialized. See Virginia Morris & M.-Christiane Bourloyannis-Vraillas, "Request for an Advisory Opinion from the International Court of Justice (item 148)," The Work of the Sixth Committee at the Forty-eighth Session of the U.N. General Assembly, 88 AJIL 343, 357-58 (Apr. 1994) (agreeing only to reconsider making such a request at the next session).

\textsuperscript{129} Contrary to many legal commentators, e.g., David Freestone, \textit{International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction}, in TERRORISM AND INTERNATIONAL LAW 45 (Rosalyn Higgins & Maurice Flory eds. 1997) (recognizing the legality of a fugitive's return only in instances of extradition, deportation, or voluntary submission), unilateral SDOs are not to be categorically regarded as unlawful, as there are several exceptional circumstances that may render such operations lawful, as will be shown below.

\textsuperscript{130} Once in a while the lawfulness of an SDO will not reach a court for evaluation as the fugitive-cum-criminal defendant and the prosecutor will reach a deal, known as a "plea bargain" in the U.S., that precludes any legal analysis. For example, in the international criminal law context, in \textit{Prosecutor v. Simić}, Case No. IT-95-9-T, ICTY Tr. Ch., co-defendant Stevan Todorović, who was indicted for the murder and rape of Croatian and Muslim civilians in Bosnia, alleged that a British Air Service team had seized him from Serbia and transported to Bosnia in September 1998 and then turned him over to Stabilization Forces in Bosnia and Herzegovina (SFOR), Tom Walker, "SAS Carried Out Serb Raid," \textit{Times} (London), Nov. 11, 1998, at 15, and subsequently to ICTY officials, but when the Trial Chamber asked SFOR to provide documents and materials relating to his arrest, a plea agreement preempted the issue. Francesco de Sanctis, \textit{The Practice of National and International Courts on Transnational Seizure: Is a Fair Balance Between Human Rights and Accountability Possible?}, 22 NETH. Q. HUM. RTS. 529, 543 (2004).
complex geographical scenarios, including failed State territory, militarily occupied territory, and non-sovereign territory/international space.  

**General Rule.** It is a well-established principle of international law that a pursuing State may not violate the territorial sovereignty of the host State in connection with an extraterritorial law enforcement action:

In public international law, territorial jurisdiction is one of the basic attributes of sovereignty. ‘By territorial jurisdiction is meant the jurisdiction of the State over individuals living on its territory, over things which are on this territory and over facts which occur there.’ In a normal situation – or more precisely in a classical situation – the territorial jurisdiction is exclusive and complete. This has two consequences: the positive aspect implies the exclusive right to exercise all state activities, and the negative explicitly excludes any other state jurisdiction within a given territory.  

International treaty law strongly supports this proposition. Several provisions of the U.N. Charter may be cited, including Article 1 (among the purposes of the U.N. are to “develop friendly relations among nations” and to “achieve international cooperation in solving international problems”); Article 2(1) (“The Organization is based on the principle of the sovereign equality of all its

---

131 It is also theoretically possible that an SDO could occur on territory that is the subject of disputed ownership or control where no single State has unambiguously recognized sovereignty. This author is not aware of any case law related to such an instance. How the law resolved such a situation would turn on the specific facts at play.

132 SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 7 (1971) (quoting ROUSSEAU, DROIT INTERNATIONAL PUBLIC, ed. 1953, no. 250) (interior quotation omitted). See also Michael Akehurst, Jurisdiction in International Law, 46 B.Y.B.L.L. 145, 148 (1972-73) (“There is abundant authority for the proposition that it is a breach of international law for the agents of one State to seize an individual . . . in the territory of another State,” provided the purpose was to “giv[e] effect to the sovereign powers of the seizing State.”); id. at 148-49 (simply because “[i]ndividuals who have been seized in the territory of another State are not usually allowed to plead this fact as a bar to their prosecution . . . . does not mean that the seizure is lawful under international law; the seizure is illegal”). This proposition was proffered as early as 1773 by the distinguished jurist Emmerich de Vattel: “We should not only refrain from usurping the territory of others; we should also respect, and abstain from every act contrary to the rights of the sovereign; for, a foreign nation can claim no right in it. We cannot, then, without doing an injury to a state, enter its territories with force and arms in pursuit of a criminal, and take him from thence. This would at once be a violation of the safety of the state, and a trespass on the rights of empire or supreme authority vested in the sovereign.” EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW GOVERNING THE BEHAVIOUR AND PRACTICE OF STATES § 93 (1773).

133 U.N. CHARTER, supra n.5, art. 1(2) and (3).
Members."); Article 2(4) (among the U.N. principles to be subscribed to include that all members shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); and Article 2(7) (enunciating the non-intervention principle).

In addition, various articles of the Charter of the Organization of American States (OAS) embrace these principles. Article 5(b) states: “International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;” Article 15 provides: “No State . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements;” Article 17 maintains: “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever;” and Article 21 holds that [n]o territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.\textsuperscript{134} Furthermore, article 1 of the Inter-American Treaty of Reciprocal Assistance (better known as the “Rio Treaty”) condemns the use or threat of force “in any manner inconsistent with the provisions of the Charter of the United Nations.”\textsuperscript{135}

The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at Article 2, articulates this principle as well: “The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States;” and “A Party shall not undertake in the territory of another Party the exercise of jurisdiction and


performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.”136 Other multilateral treaties, such as the 1933 Montevideo Convention on Rights and Duties of States,137 likewise endorse this precept.

Beyond international treaties, a number of UNGA and UNSC resolutions also have upheld this notion. These most notably include: (i) the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (1965);138 the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970);139 UNSC Resolution 138 regarding the seizure of Adolf Eichmann by Israel from Buenos Aires after the government of Argentina protested (1960);140 UNSC Resolution 579 condemning hostage-taking and abductions following a spate of such incidents (1985);141 and UNSC Resolution 638 relating to the seizure of Sheikh Obeid by Israel from Beirut after the government of Lebanon protested (1989).142

137 Montevideo Conv. on the Rights and Duties of States, 49 Stat. 3097, art. 5, Dec. 26, 1933, reprinted in 28 AJIL 75 (1934) (“The fundamental rights of states are not susceptible of being affected in any manner whatsoever.”).
140 Question Relating to the Case of Adolf Eichmann, UNSC Res. 138, June 23, 1960, S/RES/138 (1960), 15 U.N. SCOR (86th mtg.), U.N. Doc. S/INF/15/Rev.1/1960, available at http://www.refworld.org/docid/3b00f1cc74.html (last visited on Nov. 6, 2013) (“Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations . . . [and] noting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace . . . [the UNSC requests] the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.”).
Customary international law also lends support to this principle, as widespread and largely uniform evidence exists for such State practice (based on their actions, statements, and votes, for example) specifically taken out of a sense of legal obligation or *opinio juris* (versus, say, due to courtesy, convenience, or morality). Of particular note, “Canada undertook a survey of the policies and laws of some countries on the question of extraterritorial abduction [SDOs] by law enforcement officers. The 1992 survey received replies from Australia, Austria, Britain, Finland, Germany, The Netherlands, Norway, New Zealand, Sweden, and Switzerland. All countries indicated that that they would regard such abductions as a violation of their sovereignty and of international law. There was a clear acceptance of the principle that abducted persons must be returned to a nation when it protests the infringement of its sovereignty.”

In addition, the governments of Mexico and Canada each submitted *amicus curiae* briefs to the U.S. Supreme Court in connection with its adjudication of the *Álvarez-Machain Case* in 1992, which asserted this principle. Furthermore, States like Israel, Germany, and the Dominican Republic when they have

indeed, in the case of Sheik Obeid neither his name nor the role played by Israel is even mentioned – this can reasonably be viewed as a function of the political compromise required to reach unanimity rather than attributable to any reservations by the UNSC as to the merit of this principle.

Significantly, however, in June 1989, U.S. DoJ’s Office of Legal Counsel (OLC) issued an advisory opinion to the effect that the FBI could arrest an individual on foreign soil for a violation of U.S. law without that other State’s consent. The opinion reversed a position taken by the same office nine years earlier on the same issue. The thrust of the latter opinion was that the U.S. President was permitted under the U.S. constitutional system to take or direct actions in the national interest that departed from CIL. See Richard Pregent, *Presidential Authority to Displace Customary International Law*, 129 Mil. L. Rev. 77 (1990) (although the 1989 opinion was not publicly disclosed, Assistant AG William Barr testified about it before the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee of the U.S. House of Representatives on November 8, 1989).


In 1960, Israel evidently recognized that the SDO of Adolf Eichmann was unlawful (or at least would elicit broad international criticism), as they initially denied identifying where the apprehension had occurred and further claimed that the operation had been undertaken by independent volunteers. See Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction, in* Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law 86 (Stephen Macedo ed. 2004).
resorted to SDOs have rhetorically extended support to the principle in effect through denials, exceptions, or overriding justifications. Moreover, domestic courts that have found SDOs to be unlawful and/or insisted that fugitives be returned to the host State from which they were seized include \textit{State v. Ebrahim} (South Africa),\textsuperscript{150} \textit{Bennett Case} (U.K.),\textsuperscript{151} and \textit{In re Jolis} (France).\textsuperscript{152}

International jurisprudence advancing this principle can be found, for example, in such cases as the \textit{Lotus Case} (PCIJ, 1927),\textsuperscript{153} the \textit{Corfu Channel Case} (ICJ, 1949),\textsuperscript{154} and the \textit{Nicaragua Case} (ICJ, 1986).\textsuperscript{155} Soft law sources include the Sixth Committee (Legal Questions) of UNGA at its 48th Session;\textsuperscript{156} the

\begin{footnotes}
\footnote{147} "Following the West German Government's offer of a $25,000 reward for the recovery of Martin Borman, a government official was reported to have pointed out that if Borman were recovered by kidnapping, 'the reward would be paid only if the country of hiding later gave its approval.'" Alona E. Evans, \textit{Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice}, 40 B.Y.B.I.L. 77, 89 n.3 (1964) (quoting UPI, "Bonn Offers $25,000 for Borman's Capture," \textit{N.Y. Times}, Nov. 24, 1964, at 12).

\footnote{148} See id. at 90 ("[K]idnapping in such circumstances [as when Haitian police violated the diplomatic immunity of the D.R. Embassy in Port-au-Prince in April 1963 to prevent Haitian dissidents from obtaining asylum, see U.S. Dep't of State, Office of the Historian, \textit{Foreign Relations of the United States, 1961-63}, Vol. XII, Am. Republics, Doc. 378, note 2, available at \url{http://history.state.gov/historicaldocuments/frus1961-63v12/d378} (last visited on Dec. 22, 2013)] is likely to be justified by the territorial State on grounds that an embassy is not extraterritorial in the literal sense, consequently that such premises cannot be used as a haven for criminals.").

\footnote{149} As the ICJ has stated: "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." \textit{Military and Paramilitary Activities in and against Nicaragua} (Nicaragua v. U.S.), Judgment, [1986] I.C.J. Rep. 14, 98 (June 27), available at \url{http://www.icj-cij.org/docket/files/70/6503.pdf} (last visited on Nov. 2, 2013) [hereinafter \textit{Nicaragua Case}].


\footnote{153} \textit{SS "Lotus"} (Fr. v. Turk.) [1927] P.C.I.J. (Ser. A) No. 10 (Sept. 7, 1927), at 18, \textit{reprinted in ANN. Dig.} 153 (No. 98) (H. Lauterpacht ed. 1938) ("[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its powers in any form in the territory of another State.").


\footnote{155} \textit{Nicaragua Case}, supra n.149, at 106 ("the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers it part and parcel of customary international law.").

\footnote{156} The Committee generally agreed that: (1) "international law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has given its consent; (2) the use of unilateral
Restatement (Third) of U.S. Foreign Relations Law;\textsuperscript{157} the Harvard Draft Convention on Jurisdiction With Respect to Crime;\textsuperscript{158} Principle VI of the CSCE/Helsinki Accords;\textsuperscript{159} and the Inter-American Juridical Committee (IAJC) of the Permanent Council of the OAS.\textsuperscript{160}

The principle applies in general regardless of which form sovereign territory (actual or constructive) takes, including not only land territory within recognized borders, but also territorial seas, warships,\textsuperscript{161} flagged vessels or aircraft, diplomatic or consular missions, or authorized military bases on foreign soil.\textsuperscript{162} A few caveats, however, are in order, as the law is not as absolute on this measures, such as the abduction of a suspected criminal from another state for trial before the national courts of the abducting state, undermines existing mechanisms for international cooperation in the apprehension and prosecution of criminal offenders, as well as treaty obligations to prosecute or extradite such offenders.” Morris & Bourloynannis, supra n.128, at 357-58.

\textsuperscript{157} American Law Institute (ALI), \textit{Restatement (Third) of the Foreign Relations Law of the United States} (1987) and 2008 Ann. Supp., § 102 [hereinafter \textit{Restatement (Third)}] (States may not exercise sovereign functions in the territorial jurisdiction of other states); id. § 432(2) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state given by duly authorized officials of that state.”).


\textsuperscript{160} \textit{Legal Opinion on the Decision of the Sup. Ct. of the United States in the Álvarez-Machain Case,} Inter-Am. Juridical Comm., Perm. Council of the OAS, ¶ 9, CP/RES. 586, CP/Doc. 2302/92 (1992), \textit{reprinted in} 13 \textit{Hum. RTS. L.J.}, 395 (1992) and 4 \textit{Crim. L. Forum} 119 (1993) [hereinafter \textit{OAS Legal Op.}]. [”[T]he [Inter-American] Juridical Committee considers that it cannot be disputed or is not in doubt that the abduction in question [of Humberto Álvarez-Machain by the U.S. DEA] was a serious violation of public international law since it was a transgression of the territorial sovereignty of Mexico.”].

\textsuperscript{161} See \textit{Third U.N. Conv. on the Law of the Sea}, Montego Bay, Dec. 10, 1982, art. 95, U.N. Doc. A/CONF.62/122 & Corr.1-8, 1833 U.N.T.S. 3, \textit{reprinted in} 21 ILM 1261-1354, available at \url{http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm} (last visited on Feb. 23, 2012) [hereinafter Law of the Sea Conv.] (warships on the high seas are completely immune from the jurisdiction of any state except the flag state); \textit{SIR ROBERT JENNINGS & SIR ARTHUR WATTS, EDS.}, \textit{1 OPPENHEIM’S INTERNATIONAL LAW} 1167-69 (9\textsuperscript{th} ed. 1992) (9 citations omitted) (“A warship with all persons and goods on board, remains under the jurisdiction of her flag-state even during her stay in foreign waters. . . . No official of the littoral state is allowed to board the vessel without special permission of the commander. . . . Even individuals \textit{who do not belong to the crew} but who, after having committed a crime on the territory of the littoral state, have taken refuge on board, cannot be forcibly taken off the vessel; if the commander refuses their surrender, it can be obtained only by diplomatic means from his home state. As in other cases of jurisdictional immunity, the flag state of the warship may waive its privileges so as to allow the exercise of jurisdiction by the littoral state.”) (emphasis supplied).

\textsuperscript{162} “The military base or other premises of the members of the armed forces of a State in the territory of another State may be inviolable. In time of peace, the armed forces of a State may be
score as one might imagine. While under international law flagged vessels on the high seas are undoubtedly protected from an SDO, it is not so clear in instances where a flagged vessel is in a pursuing State’s territorial waters, or even in a pursuing State’s maritime contiguous zone (i.e., between 12 and 24 nautical miles from shore) to the extent the fugitive is accused of having violated the pursuing State’s “customs, fiscal, immigration or sanitary laws and regulations.”

In addition, vessels sailing on the high seas are not “subject to interference” unless the ship: “(1) is engaged in piracy, slave trade, or unauthorized broadcasting; (2) is without nationality [i.e., is unflagged, bears two or more State flags, or is not otherwise registered with a State]; or (3) though flying a foreign flag or refusing to show its flag, is in fact of the same nationality as the warship or law enforcement ship.” Moreover, where an “auxiliary ship of the Uruguayan Navy was serving in a commercial or merchant capacity, it was not entitled to sovereign immunity as warship and so law enforcement authorities

---

164 See n.80 in Chapter 11 supra.
165 See IAIN A. CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 94 (1994); Conv. on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 516 U.N.T.S. 205; e.g., United States v. Best, 172 F. Supp.2d 656 (D.V.I. 2001) (finding it impermissible for the USCG to seize individuals from a Brazilian-flagged ship 16 nautical miles from St. Croix without having sought or received the ship captain’s or the Brazilian government’s consent, where there was insufficient evidence to show that the individuals at issue had violated U.S. immigration laws for conspiracy to bring aliens into the U.S.), rev’d on other grounds, 304 F.3d 308 (D.V.I. 2002).
167 RESTATEMENT (THIRD), supra n.157, § 522(2). This legal standard would largely apply to an analysis of whether an SDO complied or failed to comply with maritime treaties restricting interference, such as the 1958 Convention of the High Seas, the 1958 Convention on the Territorial Sea and the Contiguous Zone, or the 1982 Third U.N. Convention on the Law of the Sea. To avoid redundancy, therefore, these treaties will not also be reviewed in the next section on treaty compliance.
were permitted to board the ship.” 168 Finally, under the doctrine of “hot pursuit,” when foreign State law enforcement officials briefly trespass on the sovereign territory of another State while pursuing a criminal in flight, such otherwise unlawful incursions can be permissible but essentially only if and to the extent authorized by the host State. 169

There are two generally recognized exceptions under international law, apart of course from host State consent (discussed infra), 170 to the principle prohibiting one State from effecting an arrest on another State’s soil in violation of its sovereignty and territorial integrity: (i) specific authorization by the UNSC pursuant to its Chapter VII powers under the UN Charter; and (ii) self-defense. These require some examination.

While the UNSC is well-known for passing resolutions objecting to violations of territorial sovereignty, as in the case of the Israelis seizing and delivering Adolf Eichmann from Buenos Aires in 1960, perhaps less widely discussed was the UNSC statement in May 1996 in which it “deplore[d] the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the [ICTY] against [certain] individuals . . . and call[ed] for the execution of those arrest warrants without delay.” 171 In November 1998, the UNSC followed up with a resolution that “[c]ondemn[ed] the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal . . . and demand[ed] the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals.” 172 Although the UNSC went no further, it could have done so, and

---


169 See supra pages 480-81 (Chapter 11).

170 Even in international waters, an SDO is authorized with the consent of the State in whose name the vessel is registered. See, e.g., United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006) (U.S. agents intercepted a Colombian-flagged fishing boat off the South American coast and, with Colombia’s consent, seized those aboard and took them to the U.S. to face prosecution).


thereby at least implicitly invited foreign forces to take action to address the fact that the FRY had not executed any arrest warrants. Indeed, presumably acting on the UNSC resolution, “NATO troops reportedly secretly entered the FRY in April 2000 and snatched former Bosnian Serb prison camp commander Dragan Nikolic from his home . . . just outside of Belgrade.”173

The other exception to this general principle is self-defense. As one legal commentator wrote: “a state’s authorities may justifiably engage in an unconsented apprehension in another state against terrorists which pose a continuing threat and which are being given sanctuary in the latter state. To the extent indicted war criminals located in the FRY or Croatia constitute a threat to the NATO or United Nations troops lawfully stationed in the territory of the former Yugoslavia, this could provide justification for abducting individuals from the FRY or Croatia for purposes of arrest.”174 This self-defense concept is explored in greater depth under “Cross-Cutting Justifications” infra.

**Failed State Territory.** A “failed State” is a controversial concept and no consensus definition exists. For purposes of this discussion, the oft-cited Fund for Peace concept has been adopted: “A state that is failing has several attributes. One of the most common is the loss of physical control of its territory or a monopoly on the legitimate use of force. Other attributes of state failure include the erosion of legitimate authority to make collective decisions, an inability to provide reasonable public services, and the inability to interact with other states as a full member of the international community.”175 In any event, a “failed State” is to be distinguished from a government that simply poorly serves its population through misguided policies or ineptitude.

In the case of a “failed State,” “conventional notions of sovereignty and territorial integrity do not apply.”176 No offense, in effect, has occurred, against a

173 Scharf, supra n.34, at 965 (discussing outside the State-to-State context).
174 Id.
sovereign, no consent or protest can be issued, and by default no responsibility inures to a pursuing State when it undertakes an SDO on that territory.\textsuperscript{177} For example, in the early 1980s, Lebanon was “divided into several tiny fiefdoms each controlled by a different armed force. The nominal government of Lebanon actually control[ed] only a tiny portion of the nation’s territory; most of the country [was] either occupied by Syrian or Israeli troops or controlled by the Phalange, Amal, Hezbollah, or Druze militias. Lebanon ha[d] no control over persons or things within its jurisdiction.”\textsuperscript{178} Therefore, to the extent a pursuing State undertook an SDO in Lebanon at that time, when there was no operating government in place to exercise jurisdiction, such conduct would not necessarily have breached international law.\textsuperscript{179}

\textbf{Militarily Occupied Territory.} There is ample authority for the proposition that when a State occupies foreign territory during war or through an armistice,\textsuperscript{180} the occupying power effectively has control over the territory for purposes of SDOs and may, from a legal perspective, treat such operations as an internal matter.\textsuperscript{181} The Allied occupation after World War II illustrates this point. “The Nuremberg and Tokyo trials were conducted in territory occupied by the Allies, who were entitled to occupy Germany and Japan pursuant to terms of unconditional surrender; thus, the Allies were in a position to apprehend and

\textsuperscript{177} See Michell, \textit{supra} n.166, at 421 n.195 (citing as supporting case law \textit{Ker, Tokyo Rose, Gillars, Chandler, Noriega,} and \textit{Afouneh}) (all cases can be found in Appendix II).

\textsuperscript{178} Id.

\textsuperscript{179} The State of which the seized individual is a national could, however, protest on the fugitive’s behalf, and the fugitive himself could challenge a pursuing State court’s personal jurisdiction on the grounds that his international human rights had been violated in the process of his seizure and delivery.

\textsuperscript{180} “The war occupation, or \textit{occupatio bellica}, is an occupation of an enemy territory during hostilities. It is primarily a factual situation but subject to the rules of war. It is essentially a provisional situation although its duration may be unlimited. It also confers on the occupying State very extensive powers but the sovereignty of the occupied State survives. The occupation could also be conventional, that is derived from a legal act (generally an armistice) defining the respective powers of the occupying authorities and of the authorities of the occupied State.” Lazareff, \textit{supra} n.132, at 8. There are two divergent schools of thought on jurisdiction with respect to peaceful military occupation: (i) the “law of the flag,” that gives extensive jurisdictional powers to the [external] force” and (ii) the sharing of jurisdictional power between the receiving and the sending State. “In fact, there is no example of full territorial sovereignty, that is of forces fully subject to all the laws of the receiving State.” Id. at 9.

\textsuperscript{181} See Evans, \textit{supra} n.147, at 88 (observing that, under such circumstances, “any irregularity in the acquisition of custody of the accused is obviated.”).
prosecute the offenders on the spot through the tribunals themselves or through thousands of subsequent trials in the occupied zones."\textsuperscript{182}

During the post-war U.S. occupation of Germany, U.S. military forces seized Douglas Chandler, a U.S. citizen charged with treason for broadcasting propaganda during the war, and returned him to the U.S. to face trial. As Germany had no effective control over its territory, there was no violation of its territorial sovereignty.\textsuperscript{183} Indeed, under the laws of war, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant,"\textsuperscript{184} the military governor becomes the competent authority to arrest or turn over a fugitive found in the occupied territory.\textsuperscript{185}

*Non-Sovereign Territory/International Space.* As referenced in the Introduction, the notion of non-sovereign territory/international space comprises any geographical space not belonging to an individual State, including the high seas, unclaimed islands outside of territorial waters, and Antarctica.\textsuperscript{186} Logically it follows, then, that an SDO conducted in such space would not implicate territorial sovereignty,\textsuperscript{187} *except* generally in the case of a properly flagged or registered foreign vessel on the high seas or in superadjacent airspace, as discussed above.

\textsuperscript{182} Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation 300 (1997); see also Kenneth S. Gallant, Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition, *in The Prosecution of International Crimes* 348-50 (Roger S. Clark & Madeleine Sann eds. 1996) ("both the Nuremberg and Tokyo tribunals gained their authority directly from the states that had created them, as an extension of the states’ own sovereign powers").


\textsuperscript{185} Charles Fairman, Comment, Ker v. Illinois Revisited, 47 AJIL 678, 685 (1953).

\textsuperscript{186} See n.52 in the Introduction *supra*.

Exceptions to the exceptions above – and hence where SDOs would not breach territorial sovereignty – would include instances of: (i) consent by the captain of the flagged vessel or by the State where the vessel is registered (see discussion infra); (ii) if the aircraft or ship were reasonably believed to be a pirate vessel, as "pirates are considered hostes humani generis – enemies of all mankind, and all states have universal jurisdiction to capture and punish them anywhere in the world,"\textsuperscript{188} or a slave vessel or one conducting unauthorized broadcasting,\textsuperscript{189} or (iii) arguably where a fugitive is being provided safe passage on an aircraft or vessel by a State that is in a common criminal enterprise with the fugitive and thereby not acting with proper State responsibility for bringing him to justice (discussed below).

b. Treaty Compliance Analysis

The lawfulness of SDOs also may be challenged on grounds of non-compliance with applicable international treaties.\textsuperscript{190} Although the principal type of treaty invoked in this context is the bilateral or multilateral extradition treaty that operates between the host and pursuing States, other treaties can be implicated, depending on the circumstances at play or the particular status of the fugitive, including treaties prohibiting the use or threat of force and those safeguarding internationally protected persons and premises.\textsuperscript{191}

It is essential to recognize from the outset that only those States that are parties to specific treaties are obligated to follow their provisions and then only to the extent that they did not introduce reservations or understandings at the time of ratification. Conversely, non-parties have no such duty unless and only to the extent that the treaty is (or applicable provisions are) deemed to constitute

\textsuperscript{188} Kash, Airspace, supra n.11, at 83-84. See also Findlay, supra n.176, at 18.
\textsuperscript{189} See supra n.166.
\textsuperscript{190} Some inevitable overlap exists between this analysis and those addressing a breach of territorial sovereignty (discussed above) and a violation of international human rights law (discussed below).
\textsuperscript{191} This analysis does not purport to be comprehensive in scope, but rather to represent the most significant types of treaties relevant to SDOs. Other treaty types could potentially apply in distinct circumstances, and to avoid redundancy, human rights treaties are treated in the following section.
customary international law (CIL). Where treaty law does not govern in a
given situation, by default, the States involved most likely would apply their
domestic law, CIL, and general principles of international law.

Extradition Treaties. Where a valid and operative extradition treaty exists
between the host and pursuing States, the question is whether reliance on an
SDO will somehow circumvent or breach the treaty. The critical issue is
whether, absent: (i) an express provision in an extradition treaty (or other
agreement authorizing extradition or its equivalent function) prohibiting SDOs;
(ii) an explicit understanding to that effect based, say, on party statements made
in connection with treaty ratification; or (iii) an articulated purpose set forth in
the treaty preamble that it would exclusively govern all forms of renditions, the
treaty should be construed implicitly to bar the use of SDOs, and so extradition-
related protections should continue to apply in operational contexts other than
extradition. Although there is much international opinion in support of this
proposition, there is no clear consensus and one can reasonably discern logic on
both sides.

This is concededly one of the most contentious issues in this field, as reflected by
the strong dissenting opinions and critical international reactions to the U.S.
Supreme Court’s 1992 ruling in the landmark Álvarez-Machain case. The
Supreme Court majority (5-4) ruled that the terms of the 1978 U.S.-Mexico
Extradition Treaty should not be interpreted as governing procedures for
securing the personal jurisdiction of a fugitive by any means other than
extradition, and that to do so would entail a considerable “inferential leap.”

The dissent observed that the majority had disregarded the purpose of the

http://www.humanrights.is/the-human-rights-
project/humanrightscasesandmaterials/humanrightconceptsandfora/theconceptsofhuma
nrightsanintroduction/alterationofhumanrightstreatyobligations/ (last visited on Oct. 19, 2013).
193 United States v. Álvarez-Machain, 504 U.S. 655, 669 (1992), on remand, 971 F.2d 310 (9th Cir.
States v. Alvarez-Machain, 86 AJIL 746, 748 (1992) (“Extradition treaties were never intended to
serve as catalogues of every right and obligation that exists between two states in all of
customary and conventional law”).
extradition treaty,\textsuperscript{194} applicable general principles of international law,\textsuperscript{195} and fundamental safeguards for fugitives that would be forfeited to the extent the extradition treaty was not honored.\textsuperscript{196}

It is noteworthy, however, that States need not rely on such implicitness; express terms or understandings regarding exclusive aims are always an option, particularly in light of the well-established historical record to date of SDOs. For example, in the aftermath of the Álvarez-Machain decision, Mexico insisted on a transborder abduction prohibition treaty,\textsuperscript{197} which makes clear that SDOs are not to be tolerated as a means for obtaining the physical custody over fugitives on the other’s territory.\textsuperscript{198} An example of an explicit understanding occurred in 1881, when U.S. Secretary of State James Blaine, in commenting on the then-U.S.-Mexico Extradition Treaty observed that it “prescribes the forms for carrying it into effect, and does not authorize either party, for any case, to deviate from those forms or arbitrarily abduct from the territory of one party a person

---

\textsuperscript{194} Álvarez-Machain Case, supra n.193, at 673-74 (Stevens, J., dissenting op.) (“From the preamble, through the description of the parties’ obligations with respect to offenses committed within as well as beyond the territory of a requesting party, the delineation of the procedures and evidentiary requirements for extradition, the special provisions for political offenses and capital punishment and other details, the Treaty appears to have been designed to cover the entire subject of extradition.”) (emphasis supplied); accord Report of the Working Group on Arbitrary Detention, U.N. Comm’n on Hum. Rghts., 50\textsuperscript{th} Sess., Agenda Item 10, U.N. Doc. E/CN.4/1994/27, at 138 (1993) [hereinafter Working Group Rep.] (finding that, despite the 1978 U.S.-Mexico Extradition Treaty’s failure to expressly prohibit abductions [SDOs], “the object and purpose of the Treaty [which was intended to improve law enforcement cooperation], and an analysis of the context, lead to the unquestionable conclusion that abduction for the purpose of bringing someone in Mexico or in the United States before a court of the requesting party is a breach of the 1978 Treaty.”).

\textsuperscript{195} OAS Legal Op., supra n.160, ¶ 12(c) (“By interpreting the U.S.-Mexico extradition treaty to the effect that it is not an impediment to the abduction of persons, the United States fails to consider the precept by which treaties must be interpreted . . . in relation to the applicable rules and principles of international law.”).

\textsuperscript{196} Álvarez-Machain Case, supra n.193, at 673. Accord ex parte Bennett, 3 All E.R. 138, 139 (“It was an abuse of power for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom”) (emphasis supplied); Woltring & Greig, supra n.144, at 123 (“[E]xtradition treaties contain certain safeguards for the individual, which are nullified by forced abductions. The ne bis in idem, specialty and dual criminality rules are prime examples.”); cf. Collier v. Vaccaro, 51 F.2d 17, 19 (4\textsuperscript{th} Cir. 1931) (in connection with an SDO by U.S. government agents of R.A. Price from Canada to the U.S., the court ruled that “[a] person may be carried out of the country to answer for crime . . . only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition”) (emphasis supplied).


\textsuperscript{198} Id.
charged with crime, for trial within the jurisdiction of the other.” In short, in executing an extradition treaty, States are free to specify that its aim is to exclusively govern all means for bringing fugitives to justice, as no rule or principle of international law would preclude their insistence on such a condition.

**Treaties Prohibiting the Use of Force.** Two of the most important treaties prohibiting the use of force are the U.N. Charter and the OAS Charter. Article 2(4) of the U.N. Charter calls upon all Members “to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Article 19 of the OAS Charter provides: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.” Article 22 of the OAS Charter further states: “The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.”

In assessing the lawfulness of an SDO under such treaties, one must first consider that these treaties focus on force in the specific context of *inter-State* relations. They are concerned, therefore, with measures that would challenge or undermine another State’s personality or its political or economic independence,

---

200 U.N. CHARTER, supra n.5, art. 2(4).
201 OAS CHARTER, supra n.134, art. 19.
202 Id., art. 22. Of course as treaties are binding only on ratifying States, all States outside of the western hemisphere at a minimum would not be obligated to fulfill these particular standards, unless they were deemed to have attained customary law status, which might well be the case here as the largely comparable provisions of the U.N. Charter are considered customary law. Muge Kinacioglu, “The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate,” *Perceptions*, Summer 2005, 15, 17, *available at http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf* (last visited on Oct. 20, 2013).
rather than where a specific individual has been targeted for seizure but where the host State itself has not been attacked and its integrity remains intact. As Ian Brownlie, emeritus law professor at Oxford University, observed a half-century ago, “actions specifically directed against individuals within the territory of a state do not violate the territorial integrity or political independence of that state.”203 A forceful seizure of a fugitive within another’s territory, after all, is not force directed against the State itself as much as against individual or private rights.204

A second consideration is how the use of force is defined in the UN context. Given that it is broadly understood to mean strictly armed force, as opposed to political, economic, or other physical force short of military means,205 a surgical operation that does not employ the use of armed force, such as one that physically manhandles a fugitive off the street or from his home, would not seem to violate the use of force prohibition, by contrast with a cross-border military raid or military invasion.206

With regard to a military invasion scenario with the intention of seizing and delivering a fugitive, the use of force treaties are of more direct significance. We begin with the general rule on this score set forth by Professor Michael Akehurst: “Entry of armed forces into the territory of another State without the latter’s permission is a clear breach of international law.”207 This rule is reinforced by UNGA Resolution 3314 in which States are to refrain from all acts of aggression,208 defined to include the “invasion or attack by the armed forces of

---

204 See United States v. Noriega, 746 F. Supp. 1506, 1533-34 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997); Kash, PDD-39, supra n.14, at 146 (“[T]he actions of espionage or law enforcement agents within a nation’s territory have never been considered a use of force under international law”) (citing Derek W. Bowett, Self-Defence in International Law 25 (1958)).
207 Akehurst, supra n.132, at 149.
a State of the territory of another State”\textsuperscript{209} and which qualify as a “crime against international peace”\textsuperscript{210} and that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”\textsuperscript{211}

It is worth evaluating the official U.S. justification for invading Panama in order to capture Gen. Noriega to determine their merit, if any, under international legal standards: “In conjunction with the 13,000 U.S. forces already present, military operations were initiated on December 20, 1989, to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988, and to ensure the integrity of the Panama Canal Treaties.”\textsuperscript{212}

The first asserted ground was to “protect American lives.” This appears to be a reformulation of a State’s customary right to self-defense, \textit{i.e.}, to exercise force “to protect the lives or property of nationals,” in addition to defending against an attack by another State.\textsuperscript{213} While some have made a case for such conduct under international law based on Article 51 of the U.N. Charter\textsuperscript{214} (and by extension Article 21 of the OAS Charter\textsuperscript{215}) and the underlying policy rationale,\textsuperscript{216} the better view is that Article 51 does not currently support that proposition. There are legitimate policy concerns about the potential for abuse and pretextual

\textsuperscript{209} Id., Annex, art. 3(a).
\textsuperscript{210} Id., Annex, art. 5(2).
\textsuperscript{211} Id., Annex, art. 5(1).
\textsuperscript{213} Kash, \textit{Airspace, supra} n.11, at 84-85 (citing Prof. Derek Bowett).
\textsuperscript{214} “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. CHARTER, \textit{supra} n.5, art. 51.
\textsuperscript{215} “The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.” OAS CHARTER, \textit{supra} n.134, art. 22 (in effect mimicking the U.N. Charter standard).
\textsuperscript{216} Derek W. Bowett, \textit{The Use of Force for the Protection of Nationals Abroad, in The Current Legal Regulation of the Use of Force} 40-46 (Antonio Cassesse ed. 1986).
interventions under such a rule.\textsuperscript{217} And, as a factual matter, an attack against a State’s nationals abroad would have to be tantamount to an attack against the State itself to fall within the scope of Article 51.\textsuperscript{218}

The White House claimed it was justified in attacking Panama in self-defense because of a “pattern of aggression” by Gen. Noriega’s government that included a declaration of war and the killing of a U.S. soldier.\textsuperscript{219} But the precipitating events – a declaration of war by Panama unaccompanied by any actual military preparations and a single, low-level incident involving one Marine death, another wounded, and a third beaten, while not trivial, do not begin to rise to the level of aggression justifying an armed attack.\textsuperscript{220} Moreover, under the circumstances, no colorable argument can be made to invoke the anticipatory self-defense doctrine,\textsuperscript{221} as there was no evidence of an imminent assault by the PDF and, in any event, the Bush Administration did not rely on such logic.\textsuperscript{222}

Even were such a use of force permissible, it is clear it would need to be exercised under CIL as a last resort and be undertaken on a limited and temporary basis to satisfy the elements of necessity and proportionality.\textsuperscript{223} The

\textsuperscript{217} See Int’l Development Research Centre, The Responsibility to Protect: Research, Bibliography, Background, Dec. 2001, Supplementary Volume to the Report of the Int’l Comm’n on Intervention and Sovereignty, available at http://www.idrc.ca/EN/Resources/Publications/openbooks/963-1/index.html (last visited on Aug. 17, 2014) (surveying 10 “episodes of nonconsensual military intervention that were conducted for claimed humanitarian purposes or that resulted in clear humanitarian benefits during the Cold War period, 1945-1989,” including the U.S. invasion of Panama, and “documents why controversy surrounds” those episodes); Christine Gray, International Law and the Use of Force 78 (2d ed. 2004) (“The US interventions clearly went beyond the protection of nationals that was claimed as one of the justifications for the intervention and the invitation was not enough to legitimate the intervention as far as a majority of states were concerned.”).

\textsuperscript{218} Stanimir A. Alexandrov, Self-Defense Against the Use of Force in International Law 188-204 (1996).

\textsuperscript{219} Nadelmann, Cops, supra n.16, at 455. The invasion was roundly viewed by the international community as a violation of international law and of the non-intervention principle. See id. (citing the seminal UNGA and OAS resolutions).

\textsuperscript{220} Although there is no clearly defined set of criteria to determine the existence of an adequate trigger for an “armed attack” under jus ad bellum, certainly more than a low-level of intensity, as here, is required.

\textsuperscript{221} While subject to ongoing debate, there are reasonably compelling grounds to doubt that Article 51 of the U.N. Charter countenances anticipatory self-defense. Brownlie, supra n.203, at 278.

\textsuperscript{222} See discussion infra regarding anticipatory self-defense.

\textsuperscript{223} Ved P. Nanda, \textit{et al.}, Agora: U.S. Forces in Panama: Defenders, Aggressors, or Human Rights Activists?, 84 AJIL 494, 496 (1990); Kash, Airspace, supra n.11, at 85 (noting that the host State also would need to be complicit); Alexandrov, supra n.218, at 202 (citing Waldock’s three-part
U.S. military invasion of Panama almost certainly did not meet those criteria; more precisely, while one U.S. Marine officer had been killed, diplomatic options to resolve inter-State differences had not been exhausted, the military invasion was disproportionate to the ends sought, and the U.S. remained in Panama long after the hostilities had ended. That said, a military invasion launched to safeguard the lives of nationals could conceivably do so, but only in the particularly narrow instance in which those lives endangered could not be readily evacuated or otherwise safeguarded, the number of forces was not disproportionately large, and the length of time spent on foreign soil was strictly limited to the protective mission, and even then this argument would be a close call at best.

The other asserted grounds by the U.S. government to defend the lawfulness of the military invasion of Panama are even more tenuous. As University of Denver law professor Ved Nanda has pointed out, “[n]o international legal instrument permits intervention to maintain or impose a democratic form of government in another State,” there was “no evidence that the [Panama] Canal or its operation faced any threat from Noriega’s forces requiring action to protect it,” and apprehending criminals does not warrant the use of force.

See Ma, supra n.68, at 939-40 (describing the number of troops employed, the sophistication of the weapon used, and the number of Panamanian deaths (3,000-4,000), the extent of property damage (an estimated 18,000 civilian homes destroyed), and the number of displaced civilians (over 50,000).

Id. at 933 & n.67.


At the same time, there still could be a valid claim that a State has the inherent sovereign right to protect its nationals outside the self-defense context, and indeed States that have sought to protect their nationals have not always invoked the self-defense ground. ALEXANDROV, supra n.218, at 204.

To the extent that article 3 of the Geneva Conventions of 1949 is cited as a basis for the Panama invasion’s unlawfulness insofar as it prohibits “violence to life and person” and “outrages upon personal dignity,” for example, Geneva Conv. Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (GC III), this is unfounded, as article 3 is limited to non-international armed conflicts (NIACs), such as civil wars, and not to international armed conflicts (IACs) between States, as here.

Nanda, supra n.223, at 498. See also Ma, supra n.68, at 940-43.

Nanda, supra n.223, at 501. See also Ma, supra n.68, at 943-44.
against another State under international law. In sum, although an SDO that entailed a military invasion as in Panama is difficult to square with international law, theoretically such an invasion could pass legal muster but only under an expansive definition of self-defense and then solely if applied as a last resort and in a strictly limited way.

**Treaties Protecting Internationally Protected Persons and Premises.** Some treaties expressly safeguard the rights of Internationally Protected Persons (IPPs) in connection with their apprehension by a pursuing State in host State territory. An IPP is defined as:

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him; (b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

The Vienna Conventions on Diplomatic and Consular Relations from 1961 and 1963, respectively, reinforce this type of protection.

---

234 Vienna Conv. on Diplomatic Relations, Apr. 18, 1961, art. 29, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter VCDR] (“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.”).
235 Vienna Conv. on Consular Relations, Apr. 24, 1963, art. 35(5), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR] (“In the performance of his functions [the Consular Officer] shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.”).
International privileges and immunities accorded by various treaties generally immunize from apprehension and legal process diplomats, consular officials, members of ad hoc or special diplomatic missions, international civil servants (including U.N. officials), as well as military officers and multinational forces stationed abroad.\footnote{UNGA, Expulsion of Aliens, supra n.162, at 26-33.} In addition, to the extent that individuals seek refuge in “inviolable” premises within host State territory, such as diplomatic missions,\footnote{VCVR, supra n.234, art. 22(1).} consular premises,\footnote{Conv. on Special Missions (CSM), Dec. 18, 1969, art. 25(1), 1400 U.N.T.S. 231, No. 23431, \url{available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf} (last visited on Feb. 23, 2012). It is noteworthy that this Convention only has 38 parties to date and has not been found to reflect customary international law by a U.S. court. \textit{See United States v. Sissoko}, 995 F. Supp. 1469, 1471 (S.D. Fla. 1997) (denying immunity to a special advisor to a special mission in the U.S. after pleading guilty to a charge of bribery).} special missions,\footnote{VCCFR, supra n.235, art. 31(1)-(2).} and intergovernmental organization premises,\footnote{Agreement Between the U.N. and the U.S. Regarding the Headquarters of the U.N., June 26, 1947, § 9(a)-(b), approved by UNGA, Oct. 31, 1947, 11 U.N.T.S. 11, No. 147, \url{available at http://avalon.law.yale.edu/20th_century/decad036.asp} (last visited on Feb. 23, 2012).} obtaining their custody for removal purposes likewise could be stymied. For example, more than a century ago, in a case where three German deserters from the French Foreign Legion who were under the protection of the German consul were arrested by French soldiers while being transferred to a ship by a German official, the arbitral tribunal held that it “was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate.”\footnote{Deserters of Casablanca (Fr. v. Ger.), PCA Award, 1 Hague Ct. Rep. (Scott) 110 (May 22, 1909) (translated from French), \url{available at http://www.pca-cpa.org/upload/files/DesertersofCasablancaEnglishAward%20edited.pdf} (last visited on Apr. 2, 2012).}

\section*{c. Human Rights Analysis}

The two international human rights standards most commonly implicated by SDOs are: (i) the prohibition against arbitrary arrest and detention; and (ii) procedural due process.\footnote{\textit{It may appear that “false imprisonment” should be treated as another legal ground, but this is a domestic law concept – not one recognized under international law. ICJ Bull., supra n.42, at 24.}}
**Prohibition against Arbitrary Arrest and Detention.** Perhaps remarkably, no stand-alone anti-kidnapping or anti-abduction treaty (other than one pertaining to children) exists under international law. Instead, the international community relies on restrictions against “arbitrary arrest and detention,” such as Article 9(1) of the ICCPR, which states: “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.” Similarly, Article 9 of the Universal Declaration of Human Rights (UDHR) provides: “No one shall be subjected to arbitrary arrest, detention or exile.” The U.N. General Assembly also passed a resolution in December 1988 along these lines that specifically provided: “Arrest, detention or imprisonment shall only be carried

---

245 See RESTATEMENT (THIRD), supra n.157, § 432, Rep. Note 1 (“None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law.”).
246 When the U.S. government ratified the ICCPR in 1992, it did so with five reservations, including one that the treaty would not be self-executing. Thus, until the U.S. legislature passes a law incorporating it as U.S. law, and to date it has not, no private right of action may arise out of this treaty. Accordingly, the U.S. Supreme Court found no basis under domestic law for Álvarez-Machain’s claim that he had been arbitrarily arrested and detained. *Sosa v. Álvarez-Machain*, 542 U.S. 692 (2004). That ruling only relates to *U.S. domestic law*; the U.S. is still bound by its ratification to the ICCPR under *international law*, at least to the extent of its reservations, understandings, and declarations.
248 Although the UDHR is not a treaty, its content is widely regarded as reflecting customary international law and to that extent all States are obligated to comply with its provisions. *Istituto Per Gli Studi Di Politica Internazionale*, Vojin Dimitrijevic, “Customary Law as an Instrument for the Protection of Human Rights,” Programma Diritti Umani, Working Paper 7 (2006).
249 UDHR, supra n.247, art. 9.
out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."\textsuperscript{250}

A U.N. working group on arbitrary detention in 1993 cited to each of these authorities in finding that the U.S. arrest and detention of Humberto Álvarez-Machain in Mexico had been arbitrary.\textsuperscript{251} In addition, the Human Rights Committee (HRC), a body of independent experts that monitors implementation of the ICCPR, has found that cross-border SDOs violate Article 9 of the ICCPR. For example, the HRC ruled that it was a violation of Article 9(1) of the ICCPR when, in November 1978, Uruguayan government agents working with two Brazilian police officials\textsuperscript{252} seized four individuals, including Lilian Celiberti de Casariego, in Brazil and returned them by car across the Uruguayan border where they remained in detention.\textsuperscript{253}

**Procedural Due Process.** The Inter-American Juridical Committee has observed "the incompatibility of the practice of abduction [SDOs] with the right of due process to which every person is entitled, no matter how serious the crime they are accused of, a right protected by international law."\textsuperscript{254} In the context of SDOs, procedural due process notably includes the opportunity to: (i) notify family members, an attorney, and a consular officer of one’s arrest and detention;\textsuperscript{255} (ii) "be promptly informed of any charges against him;"\textsuperscript{256} and (iii) be able to seek relief from a court without undue delay regarding the lawfulness of a criminal


\textsuperscript{251} Working Group Rep., *supra* n.194, at 139-40. *Contra Sosa*, 542 U.S. 692 (finding no arbitrary arrest in Álvarez-Machain in part because the UDHR does not impose a legal obligation on States and a rule as broad as its article 9 cannot properly be treated as binding customary law).

\textsuperscript{252} It is unclear from the reported facts whether the Uruguayan police officers were operating in an official or private capacity.


\textsuperscript{254} OAS Legal Op., *supra* n.160, ¶ 13.

\textsuperscript{255} E.g., *LaGrand Case* (Ger. v. U.S.), [2001] I.C.J. Rep. 466 (June 27), available at [http://www.icj-cij.org/docket/files/104/7736.pdf](http://www.icj-cij.org/docket/files/104/7736.pdf) (last visited on Oct. 21, 2013) (right to notify consular officer); UNGA, *Body of Principles, supra* n.250, Principle 16 (everyone who is arrested, detained, or imprisoned has the right to inform, or have the authorities notify, their family or friends).

\textsuperscript{256} E.g., ICCPR, *supra* n.247, art. 9(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.")

550
arrest or detention. The failure of a State to ensure any of these basic rights in carrying out an SDO is likely to lead to a finding of a legal violation, assuming a court is willing to hear such a challenge (see Chapter 13 infra).

iv. Interception or Commandeering Operations

Interception or commandeering operations implicate some of the same international legal standards seen in the LCO and SDO contexts, particularly violations of territorial sovereignty and breaches of international treaty provisions.

a. Territorial Sovereignty Analysis

Under international law, a violation of territorial sovereignty could be found in one of three ways: (i) by commandeering another State’s flagged aircraft or vessel anywhere; (ii) by intercepting or commandeering an aircraft over another’s sovereign territory (versus over one’s own territory or non-sovereign territory/international space); or (iii) by intercepting or commandeering a vessel in another State’s territorial waters (or in its contiguous zone for violations of immigration, fiscal, and other laws within its territory or its territorial seas).

To circumvent such potential legal liability, to date, all such operations have followed the same pattern: interception (not commandeering) of aircraft over the high seas. In that way, territorial sovereignty is not arguably violated, as no pursuing State official or agent actually ever has to enter the plane’s space to undertake an unauthorized activity. Indeed, when U.S. fighters intercepted the

---

257 E.g., id., art. 9(4) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”). See also John Quigley, Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists, 10 Hum. Rts. Q. 193, 198-205 (1988).

258 Flagged ships are treated here as a form of “floating” or constructive State territory. See n.77 in Chapter 2 supra.

259 The human rights analysis relevant to these operations tracks that applicable to SDOs.

260 A fourth possibility theoretically could occur to the extent that such an operation forced down a plane into a third State’s territory, either because of the need for an emergency landing or pilot navigational error, in which case that State might claim a breach of territorial sovereignty for an unauthorized landing and that likely would be compounded, political relations considerations aside, if the pursuing State officials began to interrogate the crew and passengers aboard once in that territory.
Egyptian airliner carrying the Palestinian hijackers of the *Achille Lauro* cruise ship, the U.S. defended its action in part by noting that the operation had occurred over international waters.\footnote{Borkowski, *supra* n.76, at 762.}

**b. Treaty Compliance Analysis**

The major types of treaty laws, apart from extradition treaties (see discussion *supra*), which potentially could be breached on account of an interception or commandeering operation include: (i) treaties prohibiting the unauthorized use or threat of force; (ii) treaties requiring that disputes should be resolved through means not endangering peace and security; (iii) aviation treaties; and (iv) hijacking and piracy suppression treaties. As noted above, not all States are subject to the same obligations under a treaty; it will depend on whether they are parties to a particular treaty (or are otherwise subject to CIL) and, if they are parties but not automatically obligated on account of CIL, whether they ratified a given treaty with express reservations or understandings.

**Treaties Prohibiting the Use or Threat of Force.** As discussed above, the U.N. Charter and OAS Charter are prime examples of treaties prohibiting the use or threat of force. It is unquestionable that an interception operation could be effected only through the use or threat of armed force\footnote{Although the U.S. government sought in part to justify its interception of the Egyptian airliner carrying the *Achille Lauro* hijackers by noting that no shots were fired, *id.*, U.S. officials did not, and could not, deny that the interception required the *threat of force* to succeed.} in order to compel a plane to land, and that, likewise, a commandeering operation almost necessarily would entail the use or threat of armed force to wrest direct control of an aircraft or vessel. It is less clear, however, that such an operation would have the effect of violating the flagged State's territorial sovereignty or political independence – which is also a required element of such legal standards. After all, the aircraft or vessel itself could remain intact (in the event of threat, anyway) and the purpose of the operation would not be to seize territory, undermine the integrity or independence of the State, or even take measures against the State itself.
In addition, to determine the lawfulness of such an operation, the merit of available defenses must be evaluated. Consider first Article 51 of the U.N. Charter, which represents the principal263 cognizable basis for justifiable self-defense under conventional international law.264 Under that article, a pursuing State possesses “the inherent right of individual . . . self-defence if an armed attack occurs against” that Member State.265 The U.N. Security Council voted unanimously to condemn Israel’s interception of a Middle East Airlines flight in August 1973, thereby rejecting its self-defense plea invoked to protect its nationals from prospective terrorist attacks.266 Many would argue that the threat of force through an aircraft interception could not be justified by self-defense under any scenario.267

Suppose, however, that State P (a pursuing State) had been the target of an armed attack by State H (the host State), and that the head of State, the head of government, or a senior military official of State H were on board an aircraft and that individual incidentally were the subject of an indictment issued by a State P court, one could see how the threat of force against such an aircraft in order to simultaneously meet self-defense and law enforcement needs could be justified. That is conceded a very narrow case. But here is another: State P might reasonably contend that an aircraft interception was lawful under a self-defense

---


265 U.N. CHARTER, supra n.5, art. 51.

266 Cassese, Legal Response, supra n.73, at 601; Beck & Arend, supra n.61, at 175.

rationale where agents or proxies of State H were known to be aboard a State H-flagged aircraft and where State H was known to be sponsoring and financing a series of terrorist "pin-prick" (low-intensity) attacks against the pursuing State's nationals and installations around the world through such agents or proxies, who, as a result, were wanted by law enforcement. The point here is that we must not to be too categorical in our judgments about the unlawfulness of such aircraft interception operations.

Furthermore, the prevailing notions of anticipatory self-defense would not apply so well mainly because of the requisite element of imminence. Although anticipatory self-defense remains a controversial concept and its lawfulness fundamentally indeterminate, "there appears to be a developing, but not yet fully accepted, international legal standard permitting States to launch anticipatory

---


269 See Kash, Airspace, supra n.11, at 92 (discussing Israel’s interception of a Libyan aircraft in Feb. 1986).

270 The very threshold for the nature, scale, and severity of an attack remains open to debate. “The International Court of Justice (ICJ) in the Nicaragua Case established that a certain level of ‘gravity’ was required, effectively ruling out ‘low-level warfare’. While its ruling made clear that the mere provision of weapons, frontier incidents, the boarding of flagged vessels, or the equivalent would not qualify as an ‘armed attack’ (as required to trigger the right of self-defense), the Court’s opinion left some room for interpretation and, in any event, has been the subject of considerable criticism.” Sadoff, Sensible Balance, supra n.268, at 471 (citations omitted); id. at 471 n.139 (citing Nicaragua Case, supra n.149, at 543 [Jennings, J., dissenting op.] (observing that the provision of arms coupled with other kinds of involvement could amount to “armed conflict”); Chatham House, Elizabeth Wilmshurst, Principles of International Law on the Use of Force by States in Self-Defence 6 (2005) (“An armed attack means any use of force, and does not need to cross some threshold of intensity.”)).

271 See Robert Y. Jennings, The Caroline and McLeod Cases, 32 AJIL 82, 89 (1938) (quoting the so-called Caroline standard enunciated by then-U.S. Secretary of State Daniel Webster as requiring “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”). The fact that a given interception operation exhibited the attributes of necessity and proportionality alone, based on a targeted attack against known perpetrators in which innocent civilians were left unharmed, would not be sufficient in and of itself to justify such a preemptive strike, although the U.S. government did note these as mitigating factors when explaining its legal logic for intercepting an Egyptian aircraft in 1985. Borkowski, supra n.76, at 762.
self-defensive strikes in inter-State conflicts.”

“Under the emerging norm, the more compelling the evidence of an imminent attack, the more complete the expected destruction, the more tailored the response, and the more dedicated the efforts made at averting armed conflict, the more likely an anticipatory strike taken in self-defense would be treated as lawful.”

Under that standard, although, again, such a scenario would be extremely unlikely to ever occur, an aircraft interception could be justified under international law where it was carrying the leader of a State who reasonably was believed to be poised imminently to launch a military strike against the pursuing State, and that individual was also charged with one or more crimes against the pursuing State.

Treaties Requiring that Disputes Be Resolved by Peaceful Means. Article 2(3) of the U.N. Charter provides that: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

One potential problem with interception or commandeering operations is that, even where the threat, rather than the use, of force is exercised, and where no weapons have been fired or lives lost, international peace and security could still be jeopardized were the aircraft pilot or sea captain to fail to comply with an instruction or even potentially if there were a miscommunication or other error incident to the operation. The counter-argument would stress that the law enforcement effort at issue is focused on a single individual, and therefore no underlying inter-State conflict exists to even trigger this provision; however, the unwillingness to engage constructively on a State-to-State basis (as an initial matter or following denied cooperation) for the delivery of the fugitive could be viewed as reflecting an underlying difference or tension, and consequently an interception or commandeering operation could be seen as a non-peaceful means of resolving it.

Aviation Treaties. Several conventions govern international aviation matters and they, too, can be implicated by an aircraft interception or commandeering

---

273 *Id.*
274 U.N. CHARTER, *supra* n.5, art. 2(3).
operation. The 1944 Convention on International Civil Aviation (the “Chicago Convention”), for example, expressly proscribes interceptions of “civil aircraft” rather than “State aircraft,” the latter defined to include military and police usage.\textsuperscript{275} In the cases of both the U.S. interception in October 1985 of the Egyptian aircraft, as it was used for a government purpose, and the Israeli interception in February 1986 of the Libyan “State” aircraft, the prohibition against interceptions of civilian aircraft, therefore, would not apply. However, in the cases of the Israeli interception of the Middle East Airways civilian aircraft in August 1973 and in the Yemeni interception in August 1986 of a Djibouti commercial airliner, such treaties were violated.

The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, more commonly known as the Tokyo Convention, also requires that in the event an aircraft is forced to land, the passengers and crew be allowed to continue their journey as soon as practicable, and the aircraft and its cargo be returned to those lawfully entitled to possession.\textsuperscript{276} Each of the interceptions described in this Chapter seemed to satisfy this particular requirement.

A third applicable aviation-related treaty is the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the “Montreal Convention”), which treats as an offense any act or attempted act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft.\textsuperscript{277} But as in the other conventions, State aircraft are not covered, and so while interceptions would ordinarily constitute a violation because of the threat of force involved, in three of the instances of interception,

\textsuperscript{275} Conv. on Int’l Civil Aviation [Chicago Conv.], Dec. 7, 1944, arts. 3, 5, 10, available at \url{http://www.icao.int/publications/Documents/7300_cons.pdf} (last visited on Feb. 23, 2012). In addition, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft denominates as an offense where the safety of a civilian aircraft or persons or property on the aircraft are jeopardized, but excludes from its scope of application State versus civilian aircraft. \textsuperscript{276} Tokyo Conv., supra n.275, art. 11(2).

as well as the “passive interception” operation, described above no violation would be found.

**Hijacking or Piracy Suppression Treaties.** When the U.S. fighters intercepted the Egyptian aircraft transporting the Palestinian terrorists in connection with the *Achille Lauro* incident, Iran, Poland, and the PLO criticized the act as aerial piracy or hijacking. A year later, during the U.N. Security Council debate following the Israeli interception of the Libyan executive jet in February 1986, 10 of 15 members voted affirmatively condemning Israel for aerial hijacking and piracy, with four members abstaining and only one member (the U.S.) vetoing. Under international law, however, hijacking and interception are mutually exclusive concepts.

According to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, “hijacking” is defined as the “unlawful seizure, by force or threat of force or any other form of intimidation, of an aircraft, committed while on board an aircraft in flight.” Therefore, an interception, which takes place wholly outside an aircraft (as opposed to a commandeering operation), cannot constitute a hijacking *per se*. Likewise, such interception operations, by definition, cannot possibly qualify as piracy, as piracy must be undertaken by “a private ship or a private aircraft” and “for private ends,” which would not

---

278 See *supra* page 517. At the same time, as in this particular instance a head of State (the President of Bolivia) was involved, as an IPP, “his official premises, his private accommodation or his means of transport . . . is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity,” and therefore there could well have been a violation of the Diplomat Convention of 1973 as the U.S. and the other States involved have all ratified that Convention. See *supra* n.233.

279 Borkowski, *supra* n.76, at 763.


282 Law of the Sea Conv., *supra* n.161, art. 101 (defining "piracy" as: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making
occur in connection with a law enforcement operation undertaken as an official matter by a pursuing State intended to capture fugitives and bring them to justice.

iv. Cross-Cutting Justifications
A number of justifications have been advanced to defend the lawfulness of some or all of the unilateral operations at issue and, as such, may be characterized as broadly applicable or “cross-cutting.” These include: (i) the host State and/or the State of the fugitive’s nationality express consent or impliedly acquiesce via silence before or after public revelation of a unilateral operation; (ii) the host State is unable or unwilling to address a recognized threat or, more seriously, is demonstrably in league with a criminal enterprise; (iii) a law enforcement imperative exists as there is no viable law enforcement alternative to deal with a fugitive; and (iv) the underlying crime is particularly heinous or loathsome.

Express State Consent or Implied State Acquiescence by Silence. The host State or the State of which the fugitive is a national may react ex post facto to a unilateral operation of any kind for a violation of one’s territorial sovereignty, treaty law, or of the fugitive’s human rights by consent, silence, or protest. This section examines the legal effect of consent or silence; Chapter 13.b.i infra considers the significance of an official protest.

Consent. Consent is a multi-faceted concept. Consent can be communicated formally, informally, or tacitly; it can be made in advance of or following a law
enforcement operation; it can be provided on a blanket, contextual,\textsuperscript{284} or \textit{ad hoc} basis; and it can occur purposefully, accidentally, under coercion, or via fraud.\textsuperscript{285} International law clearly recognizes that wrongfulness by a pursuing State that otherwise perpetrated a police action on the host State’s sovereign territory may be precluded by express, valid,\textsuperscript{286} and prior (or contemporaneous) consent granted by the host State to the pursuing State and where the police action did not exceed the limits of that consent.\textsuperscript{287} Where such consent is provided in advance, a reversal of consent \textit{ex post facto} does not affect the lawfulness of the operation.\textsuperscript{288} Where consent is only provided \textit{ex post facto}, however, it does not render the operation lawful, but rather effectively waives the right of the consenting State to seek reparations for the wrongful act.\textsuperscript{289}

**Silence.** When there is neither express consent nor protest, the question arises whether the international community should treat silence functionally as implied or tacit consent. Although there is a difference of opinion on this score,

\textsuperscript{284} An example of contextual consent occurred when the “British Royal Navy arrested four Russian fugitives from a Danish ship intercepted on the high seas and brought them to a British port to be searched for contraband under an agreement with Denmark to avoid danger and inconvenience of such a search being conducted on the high seas. The court did not treat this incident as though they had been arrested on the high seas or forcibly removed from a neutral vessel, but rather that they were arrested in a British port so no foreign sovereignty was violated; neither Denmark nor Russia objected.” O’Higgins, \textit{supra} n.41, at 287.


\textsuperscript{287} \textit{See ILC, State Responsibility, supra} n.30, art. 20; Michell, \textit{supra} n.166, at 420; Cardozo, \textit{supra} n.183, at 132 (“An abduction on foreign soil by officers of another government is a violation of international law, unless the government in control of the asylum country expressly or impliedly gives its consent.”); Jonathan A. Gluck, \textit{The Customary International Law of State-Sponsored International Abduction and United States Courts}, 44 DUKE L.J. 612, 622 (1994) (“If the asylum [host] state permits a foreign state to exercise its police powers in the asylum [host] state’s territory, then no issue of state responsibility arises.”).


\textsuperscript{289} Michell, \textit{supra} n.166, at 421. \textit{Contra Lujan Case, supra} n.35, 510 F.2d at 67 (“Thus the failure of Bolivia or Argentina to object to Lujan’s abduction would seem to preclude any violation of international law which might otherwise have occurred”).
the preponderance of opinion appears to be that consent or acquiescence may not be implied by silence. This position is captured not only by the International Law Commission (ILC), which makes clear that consent must be express,\(^{290}\) but also by Professor Frederick Mann who posited: “if the State does or says nothing, the illegality remains. It is impossible to infer consent from silence or inactivity. Even if the State declares that it does not require the return of the abducted person, it is at least arguable that it waives the remedy rather than the wrong.”\(^{291}\)

Professor Mann proceeds to suggest that the pursuing State should bear the burden of proving that the host State (from which the fugitive was seized) had given its consent.\(^{292}\) The contrary view is maintained by States like the U.S. that treat any failure to protest or object as acquiescence.\(^{293}\) Sometimes a State is not able to register a protest, even if it might wish to, because it is then under military occupation by a foreign power,\(^{294}\) or simply is constrained in doing so for political or diplomatic reasons.\(^{295}\) In any event, when a host State is silent, its

\(^{290}\) See ILC, State Responsibility, supra n.30, art. 20 cmt. 6 (“[Consent] must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.”). Consent could be implied, however, if a State had a legal duty to express its view in the face of an ostensible legal violation and chose to remain silent.

\(^{291}\) Mann, supra n.113, at 409; accord Michell, supra n.166, at 422 & n.197; cf. Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 AJIL 444, 489 (1990) (observing how difficult it is to tell when silence can legitimately be construed as consent).

\(^{292}\) Mann, supra n.113, at 409.

\(^{293}\) E.g., Lujan Case, supra n.35, 510 F.2d 62; Reed, 639 F.2d 896; United States v. Unverzagt, 299 F. 1015, 1017 (W.D. Wash. 1924) (finding no issue with lawfulness when U.S. officials forcibly transferred a U.S. citizen from Vancouver to Washington state, noting “Canada is not making any application to this court in his behalf or its behalf, because of any unlawful acts charged, and if Canada or British Columbia desires to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels.”). This position is reinforced by some legal commentators who view implied or tacit consent as precluding wrongfulness based on State practice. E.g., Gluck, supra n.287, at 622-24; Mary Alice Kovac, Apprehension of War Crimes Indictees: Should the U.N. Outsource Private Actors to Catch Them?, 51 Cath. U. L. Rev. 619, 642 n.153 (2002).

\(^{294}\) For example, Peru did not object to the seizure of Frederick Ker by a private U.S. agent with the assistance of occupying Chilean forces. Cardozo, supra n.183, at 133. Similarly, due to its then U.S.-occupied status, Germany did not protest when the U.S. seized Douglas Chandler from German territory following World War II. M. Cherif Bassiouni, Kidnapping and Hostage Taking, in 1 International Criminal Law: Crimes 416-17 (2d ed. M. Cherif Bassiouni ed. 1999).

\(^{295}\) See generally Lowenfeld, supra n.291, at 489 (“For one thing, the states that do not protest tend to be, if not client states, at any rate states that have various reasons not to make formal protests.”).
failure to protest should be viewed as a waiver of any relief or redress from the pursuing State rather than as a basis for precluding wrongfulness.296

The Host State is Unable or Unwilling to Address a Recognized Threat or is in Complicity with a Criminal Enterprise. Since the late 1980s, senior U.S. officials and classified U.S. policy, under Democratic and Republican (political party) administrations alike, have held that, pursuant to international law, a pursuing State could be justified in exercising force or engaging in a law enforcement operation on another’s sovereign territory to the extent that the host State were either not addressing a recognized threat or, worse yet, affirmatively protecting, harboring, or supporting an individual fugitive or group of fugitives. As recently as March 2012, the U.S. Attorney General Eric Holder announced: “[T]he use of force in foreign territory would be consistent with . . . international legal principles if conducted, for example, . . . after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”297

In addition, at the end of the 1980s, U.S. Assistant Attorney General William Barr testified before a congressional subcommittee as follows: “in appropriate circumstances we may have a sound basis under international law to take [law enforcement] action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise.”298 Furthermore, in June 1995, in what was intended as a classified U.S. policy document known as Presidential Decision Directive 39 (or PDD-39) addressing counter-terrorism, the U.S. adopted the position that “[i]f we do not receive

296 See BASSIOUNI, WORLD PUBLIC ORDER, supra n.60, at 174-75 (absent protest, “there is no consequence for the state that committed the violation”); Kovac, supra n.293, at 641 & n.145 (citing Ker, Argoud, and Ndhlovu cases) (all referenced cases can be found in the Bibliography); Michell, supra n.166, at 422 & n.198.
298 Prepared Statement of William P. Barr, Asst. AG, Office of Legal Counsel, U.S. DOJ, FBI Authority to Seize Suspects Abroad: Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, No. H521-45, 101st Cong., 1st Sess., at 20 (Nov. 8, 1989)). See also id. (“There may also be occasions when we are permitted to perform an extraterritorial law enforcement operation with the informal cooperation of representatives or departments of a foreign government while the government publicly withholds its formal consent.”).
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.”

Or, as a legal commentator, put it:

If a plane from country X is carrying terrorists who have committed, or organized and planned, an act of terrorism, then country X is assisting such terrorists in escaping and evading detection, abduction and/or prosecution, all nations, even those not victimized by the act of terrorism committed by those on board, may seize the aircraft and arrest its occupants.

This notion demonstrably has been embraced by Israel as well, but there is no international treaty law to support this justification. To find any cognizable international legal basis, one would have to turn to either the customary practice of self-defense (as arguably preserved within the context of Article 51 of the U.N. Charter) or the legitimate but narrowly confined measure known as “countermeasures” as a means of self-help. As one commentator opined:

[S]tates practicing self-help contend that a state which gives terrorists sanctuary and refuses to apprehend or prosecute them itself violates international law, not only by assisting the alleged criminal to evade prosecution, but also by encouraging similar terrorist attacks in the future.

---

300 Kash, Airspace, supra n.11, at 84.
301 For example, Israel chose to launch an SDO against Adolf Eichmann in part because the host State, Argentina, had made no attempt to prosecute or extradite him after 10 years of living in its territory. Izes, supra n.13, at 18.
302 A third arguable basis could be the Friendly Relations Declaration, which, inter alia, provides: “Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law. Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.” Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625, U.N. GAOR, 25th Sess. (Supp. No. 28), U.N. Doc. A/8028 (1971), Oct. 24, 1970, reprinted in 9 ILM 1292 (1970). Such obligations presumably would include not sheltering or supporting criminals.
Therefore, states that disregard their international obligations should not be able to invoke territorial sovereignty to frustrate efforts by offended states to exact retribution for attacks on their citizens.\footnote{Chabner, supra n.267, at 1018.}

The self-defense argument, as applied to Israel’s interception of the Libyan aircraft in February 1986, would require that Israel be able to show the following elements: “(1) that possible future acts of the terrorists sought could be properly attributable to Libya; [and] (2) the peril created by the future terrorism must be both grave and imminent.”\footnote{Kash, Airspace, supra n.11, at 92.} This is a highly controversial concept and would be difficult to prove.

The legal standard governing countermeasures, or non-forceful reprisals, allows a State to undertake such a measure against another State responsible for an internationally wrongful act in order to induce that State to comply with its obligations, but not to punish. A countermeasure must be limited to the non-performance for the time being of international obligations; can be undertaken only if all other peaceful means of dispute resolution have been exhausted; shall be taken as far as possible to permit the resumption of performance of the obligations in question; shall not affect a State’s obligation to refrain from the threat or use of force, the protection of fundamental human rights, reprisals, or peremptory norms of general international law; and must be proportionate with the injury suffered, provide advance notice, and cease as soon as the wrongful act has ceased.\footnote{ILC, State Responsibility, supra n.30, arts. 22 and 49-53.} As countermeasures must not involve the use or threat of force, aircraft interceptions would not appear to pass muster under this justification.

operation should be treated as legally tenable where a combination of certain factors exist: 
“(1) the [security] threat appears imminent and the opportunity for 
[a given unilateral operation] is fleeting; (2) the target nation is unwilling to 
extradite or prosecute; (3) the operation involves minimal threat to bystanders; 
(4) the territorial infringement is reasonably limited; and (5) the accused will 
receive humane treatment and a fair trial.”307

**No Viable Law Enforcement Alternative Exists.** Some have contended that 
where there is a law enforcement imperative to apprehend a particular fugitive 
but no feasible alternative exists, a unilateral operation can be justified under 
the doctrine of necessity, which is related to, but distinct from, the ground 
discussed immediately above. Under international law, necessity is a means to 
preclude wrongfulness when it is the only way for a pursuing State to safeguard 
an essential interest against a grave and imminent peril; the pursuing State 
cannot seriously impair an essential interest of the host State or another to 
which an obligation exists; and the pursuing State cannot have contributed to 
the situation of necessity.308 Necessity derives in part from the challenge posed 
by a host State’s assistance furnished to certain fugitives, which render it 
“virtually impossible” to secure their custody “using traditional means.”309

For example, when Israel wanted to secure the custody of Adolf Eichmann from 
Argentina, Israel had to consider the reality that: (i) the two States had no 
extradition treaty between them; (ii) even if they had such a treaty, any 
extradition request might have tipped him off (by a sympathizer within the 
Argentine government, much like had occurred with Josef Mengele who 
disappeared from Buenos Aires after an extradition request was issued for him 
in 1959 and he resurfaced safely in Paraguay); (iii) he had been living in 
Argentina for 10 years and the host State had made no effort to bring him to 
justice and it had failed to deport or extradite any other Nazi war criminals; and 
(iv) neither Germany nor Hungary had sought to exercise subject matter

308 ILC, *State Responsibility, supra* n.30, art. 25.
309 Kash, *Airspace, supra* n.11, at 85 (relying on the example of terrorism).
jurisdiction over him.\textsuperscript{310} Such a last resort approach has the added feature of imposing an effective deterrent against fugitives seeking a safe harbor in States unwilling to prosecute or extradite them.\textsuperscript{311}

At bottom, however, necessity requires that a “grave and imminent peril” exist and, as was the case with Adolf Eichmann, for all of his monstrous acts during World War II, he no longer posed any danger to Israel, imminent or otherwise. Therefore, this justification would fall short under these circumstances; however, were a different set of facts to apply, particularly one involving a fugitive who was still actively a threat to the pursuing State, it is conceivable that such a justification could pass legal muster.

**Heinousness of the Underlying Crime.** It is tempting for a pursuing State to try to treat its unilateral operation in the larger ethical context by arguing that, however improper its conduct may have been, it does not compare in severity with the underlying crime committed by the fugitive and thus is justifiable in morally relativistic terms. Such attempts at justifications tend to surface in such extreme cases as major war crimes, mass murder, piracy, or slave trade, in which the crime is regarded as *hostis humani generis* (an enemy of all mankind)\textsuperscript{312} or otherwise as being so heinous in nature so as to excuse the pursuing State for having taken law enforcement liberties that technically violated international law standards. This concept was recognized by a U.K. court in 1999 when it stated:

In arriving at this conclusion we strongly emphasize that nothing in this judgment should be taken to suggest that there may not be cases, such as *Latif*, in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant’s presence within the jurisdiction. In each case, it is a matter of

\textsuperscript{310} Bass, *supra* n.146, at 86-87; Izes, *supra* n.13, at 18.

\textsuperscript{311} Izes, *supra* n.13, at 24.

\textsuperscript{312} See Borkowski, *supra* n.76, at 770 (any State may capture and punish a criminal in the interest of and on behalf of all States).
discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged.313

This is sometimes labeled the “Eichmann exception” in reference to that former Nazi’s unconscionable conduct in orchestrating the Holocaust that systematically exterminated an estimated six million Jews in addition to countless others, including homosexuals, gypsies, and the physically disabled. In conducting its SDO operation in Buenos Aires in 1960 to bring Adolf Eichmann to justice, Israeli President David Ben Gurion “did not deny that Israel had violated Argentine sovereignty but apologized and asked the Argentine government to consider the wider moral context.”314 As one legal commentator astutely observed: “The U.N. took no punitive action against Israel for abduction. It was noteworthy because it could have taken this opportunity to set a powerful example concerning repercussions of state-sanctioned abductions. It almost tacitly approved Israel’s conduct by its weak response.”315

A particularly good example is piracy jure gentium, as that crime holds a special place in international law, as codified in the 1982 Law of the Sea Convention, given that it affords any State the privilege of arresting and prosecuting an individual for acts of piracy that occurred on the high seas.316 It is essential to recognize, however, that piracy has a limited definitional scope: (i) pirates must have seized goods or property for private ends (rather than acting with political motivations) (ii) from another vessel (not from one on which they are already aboard) and (iii) while on the high seas (versus from territorial or archipelagic waters317). International law is likely to be more permissive – and the international community’s reaction probably to be less critical – with respect to

314 Bass, supra n.146, at 86.
315 Izes, supra n.13, at 17.
316 CASSESE, VIOLENCE, supra n.78, at 68. This is a clear example of an erga omnes norm.
a pursuing State’s unilateral operation targeted against a pirate, and thereby mitigate against any unlawfulness found by the pursuing State.

Consider the reaction to the U.S. interception in October 1985 of the Egyptian aircraft carrying the PLO terrorists involved in the Achille Lauro hijacking. Most of the negative reaction emanated from Middle Eastern States, especially Egypt and Iran, but the criticism was notably muted, with Jordan and Syria declining to make any official comment on the incident and with Sudan characterizing the incident as “not productive” and “conflict[ing] with international norms and charters.”\(^{318}\) The chorus from Western and Eastern European States alike was generally supportive and, while some editorial commentators opined that the interception violated international law, they nevertheless assessed the action as being either necessary or morally justified.\(^{319}\) As one legal writer observed: “The effect of an incident on legal norms is ultimately a function of what relevant elites are willing to accept as legitimate.”\(^{320}\) But other examples exist, such as the case of Humberto Álvarez-Machain, of allegedly horrific conduct\(^{321}\) that did not elicit such forgiveness or understanding from the international community.\(^{322}\)

* * * * *

This Chapter has examined the third and final type of full-scale alternatives to extradition: unilateral measures. The next Part/Chapter addresses the implications – judicial, diplomatic, and policy-wise – when a pursuing State undertakes a full-scale alternative.


\(^{319}\) _Id._ at 172-73.

\(^{320}\) _Id._ at 172.

\(^{321}\) Dr. Humberto Álvarez-Machain allegedly was responsible for prolonging the life of a captured DEA officer through the infusion of drugs in order to elicit additional information about DEA operations in Mexico through torture. _See Álvarez-Machain Case, supra_ n.193, at 657.

PART VI:

POST-RETURN

REVIEW, RE COURSE, AND IMPACT
CHAPTER 13

JUDICIAL, DIPLOMATIC, AND POLICY DIMENSIONS

This final Part of the dissertation explores what may occur on account of a fugitive being brought back to face prosecution or punishment through the use of one of the full-scale operational alternatives to extradition examined. More specifically, this Part assesses the nature and circumstances of the return itself from three vantage points: (i) whether and how the judiciary evaluates claims of pursuing State unlawfulness; (ii) which diplomatic options, including legal remedies, are available to States from which a fugitive was rendered or to States of which the fugitive is a national; and (iii) which world public order and bilateral policy implications may arise out of the exercise of such alternatives to extradition. These considerations are important because they address the full range of reactions and consequences – judicial, diplomatic, and policy – in connection with a fugitive being brought to face justice via more aggressive or controversial means.

a. Judicial Considerations

When a fugitive is returned to pursuing State territory and a claim is brought by the transferor State, the State of the fugitive's nationality, or by the fugitive himself based on the manner in which his custody was secured (and possibly by the way in which he was treated during capture and/or in transit), a court must consider whether it has personal jurisdiction over the fugitive to hear the claim and, even if it does, whether it might choose not to exercise that jurisdiction. This section examines how courts make such jurisdictional determinations, followed by a
discussion of standing, as each could prove dispositive with respect to a court’s ruling.\(^1\)

\[\text{i. Personal Jurisdiction}\]

As discussed in Chapter 2, personal jurisdiction is a required element, along with subject matter jurisdiction, to enforce a State’s laws in court against any individual, including a fugitive. Although physical custody by the pursuing State is not essential – for example, the individual could be held by another State’s law enforcement authorities on the pursuing State's behalf – it is by far the most common means by which personal jurisdiction is established. A major issue facing a domestic criminal court in cases in which a fugitive’s physical custody is obtained through a full-scale alternative to extradition is whether personal jurisdiction may be vitiated on account of an abuse of process by the executive branch or, alternatively, whether the court may choose not to exercise that jurisdiction as a discretionary matter,\(^2\) thereby resulting in a stay of proceedings.

---

\(^1\) Apart from personal jurisdiction and individual standing, another factor bearing on the judgment of a court hearing criminal charges is the *applicable law*. Many States rely heavily in their case analysis on domestic law and doctrine at the expense of international law and standards. See Gregory S. McNeal & Brian J. Field, *Snatch-and-Grab Ops: Justifying Extraterritorial Abduction*, 16 J. TRANSNAT’L L. & CONTEMP. PROBS. 491, 519 (2007) (domestic courts addressing seizures abroad tend to base their decisions not on international law but rather on their own nation’s traditions and laws); Yvonne G. Grassie, Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U.L.Q. 1205, 1215 (1986) (“American courts, although recognizing constitutional due process guarantees in international kidnapping cases, largely overlook internationally protected human rights.”). It is telling, for example, that the U.S. Supreme Court majority opinion in *Álvarez-Machain* did not cite to a single foreign or international law source. As for international or regional adjudicative bodies like the HRC or the ECtHR, the instruments they apply notably do not regulate extradition or removal but rather only seek to ensure that specific rights are not infringed when they are undertaken. *Robert Cryer, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 86 (2d ed. 2010).

\(^2\) While another independent basis for which personal jurisdiction can be challenged is diplomatic or consular immunity, such grounds lie outside the scope of this inquiry. For one notable case in this regard, see *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.), cert. denied, 484 U.S. 965 (1987) in which a U.S. appellate court did not grant Ferdinand Marcos, former head of State of the Philippines, immunity from criminal prosecution because the immunity issue was deemed to be unsettled under U.S. case law and because immunity is founded on the need for comity among nations and respect for sovereignty of other nations and should only apply when it serves those goals, and therefore because Corazon Aquino, the new head of State of the Philippines, did not want Marcos to be treated with immunity, the U.S. government had no reason to grant it. Peter M. Sanchez, *The ’Drug War’: The U.S. Military and National Security*, 34 A.F. L. REV. 109, 135 (1991).
To probe this jurisdictional element, we begin with the “rule of non-inquiry,” more popularly known in this context by the Roman maxim “male captus bene detentus” (defined below), and then consider its scope, justification, and significance; the extent of its application (or non-application) by States’ courts, including recognized exceptions to the rule and modern trend lines; as well as the way in which the maxim’s typical application – a stay of proceedings – operates.

a. **Male Captus Bene Detentus**

Under this traditional legal maxim in its purest form, a domestic criminal court may not divest itself of personal jurisdiction over the fugitive defendant so long as he is physically within the territorial jurisdiction of the court, regardless of the means or circumstances by which the State’s executive branch may have secured his presence. The term, which effectively translates from Latin into “an unlawful apprehension may nevertheless give rise to lawful detention and prosecution,” stands for the proposition that a court must treat as immaterial for adjudicative purposes how a criminal defendant came before it. Stated otherwise, it is not the court’s business to inquire into essentially inter-State political differences or irregular procedures that might have arisen in connection with the fugitive’s delivery to the pursuing State. When viewed as a choice between honoring the

---

3 See Glossary; n.289 in Chapter 2 supra and accompanying text; n.189 in Chapter 5 supra and accompanying text; and supra pages 317-20 (Chapter 7).


5 See Gerhard von Glahn, Law Among Nations 315 (6th ed. 1992) (“Once a person is under the authority of a given court and has been properly charged in accordance with the local law, he may be tried and, if convicted, sentenced by that court regardless of the mode by which he was brought originally under the authority of that court.”).

rights of other States and the fugitives themselves versus permitting the prosecution of alleged crimes against one’s own State, this maxim favors the latter.\(^7\)

**Scope.** Examples of executive branch conduct that would not prevent a domestic criminal court from exercising personal jurisdiction under this rule, at least as it has been applied in *absolute terms*,\(^8\) include where: (i) a fugitive was the subject of a unilateral SDO, informal law enforcement cooperation, a fraudulent lure or inducement to waive extradition,\(^9\) or disguised extradition; (ii) the transferor State or a third State protested a physical transfer as a violation of domestic or international law;\(^10\) (iii) the fugitive was arrested without a warrant;\(^11\) (iv) the fugitive was delivered to pursuing State territory following physical maltreatment or unlawful confinement; (v) the fugitive was denied an extradition hearing or legal counsel to challenge his treatment in the transferor State; (vi) the means of delivering the fugitive breached municipal legislation;\(^12\) or (vii) the delivery of a fugitive was effected outside the context of an effective bilateral extradition treaty.\(^13\)

---


\(^10\) E.g., *United States v. Álvarez-Machain*, 504 U.S. 655 (1992), on remand, 971 F.2d 310 (9th Cir. 1992), reprinted in 31 ILM 902 (1992) (Mexico protested); *Attorney General of the Gov’t of Israel v. Eichmann*, Isr. Dist. Ct. of Jerusalem, 1961, reprinted in 36 ILR 5, aff’d sub nom., *Eichmann v. Attorney-General*, Sup. Ct., Isr., May 29, 1962, reprinted in 36 ILR 277 (E. Lauterpacht ed. 1968) (Argentina protested); *Gov’t of Jamaica v. United States*, 770 F. Supp. 627 (M.D. Fla. 1991) (Jamaica lodged an official protest on the grounds that the U.S. government had carried out an extradition prematurely in violation of its municipal law and, by extension, Article 8 of their bilateral extradition treaty, as the defendant had filed an appeal that had not been acted upon only because it had been misfiled; the U.S. court held that any such protest should be handled via diplomatic channels).

\(^11\) E.g., *United States v. Washington*, 253 F.2d 913, 916 (7th Cir. 1958).

\(^12\) E.g., *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir.) (discussing 18 U.S.C. § 1385 (2012) related to the Posse Comitatus Act), cert. denied, 411 U.S. 936 (1973); *People v. Pratt*, 78 Cal. 345 (Cal. Sup. Ct. 1889) (en banc) (personal jurisdiction not defeated when the California Governor arranged for the return of a fugitive from Japan when the U.S. had no extradition treaty with Japan, even though an extradition treaty was required under U.S. law).

\(^13\) E.g., *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981) (Panama and Venezuela); *United States v. Stevenson*, 381 F.2d 142 (9th Cir. 1967) (Mexico).
Justification. A variety of justifications have been advanced in support of the male captus principle. Courts claim with some strength of logic that the rule is sensible because: (i) executive branch liberties or irregularities in bringing a fugitive to pursuing State territory should not cancel out the underlying criminal offense perpetrated by the fugitive for which accountability is critical; (ii) the court has an obligation to try criminal cases that come before it;14 and (iii) the judiciary should not meddle in political disputes between States that should be resolved by their executive branches on the diplomatic plane.15

Weaker rationales include, first, that individuals are merely objects of inter-State relations, agreements, and proceedings, and that fugitives, therefore, have no stand-alone rights to assert, but as discussed below, individuals are protected under international human rights treaties and also may have rights arising out of an extradition treaty under domestic law (e.g., application of specialty, entitlement to an extradition hearing).16 Second, the maxim has been defended on the ground that courts are not authorized to second-guess executive branch conduct, but courts regularly exclude from proceedings evidence illegally seized by law enforcement

15 E.g., Ex parte López, 6 F. Supp. 342 (S.D. Tex. 1934) (holding that such questions should be left to the Executive branch, not the judiciary). This defense, however, has been challenged by one legal commentator as follows: “Although it must be readily conceded that the courts should not invade the province of the political department of the government, it cannot reasonably be doubted that matters relating to the abduction of fugitives in foreign countries are of a strictly legal nature and, thus, there is no justifiable reason why such questions should be transferred from the regulatory province of the law to the discretionary domain of politics.” 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, 438 (1957).
16 This difference of opinion reflects to an extent the respective historical views of those embracing “positive law” versus “natural law.” Positivists maintained that individuals are merely objects of international law and therefore only derive rights therefrom if States confer such rights on individuals, even if they somehow are incidental beneficiaries. Those adopting a natural law perspective held that individuals are subjects of international law due to its being a part of natural law and therefore derive enforceable rights from it. Kenneth E. Levitt, Note, International Extradition, The Principle of Specialty and Effective Treaty Enforcement, 76 Minn. L. Rev. 1017, 1021-22 (1992).
officers,\textsuperscript{17} and deny personal jurisdiction altogether in \textit{civil} cases where evidence exists that a person or property has been obtained via force or fraud.\textsuperscript{18} Further, but for such court intervention, extreme or unlawful executive branch activity would go unchecked.

The chief criticism aimed at the rule is that it appears to condone unlawful conduct, and thereby not only detract from the court’s integrity and reputation by serving as a kind of accomplice, while at the same time encouraging States to operate outside the law and the extradition regime confident that their unlawful conduct will not be a ground for setting aside the underlying prosecution.\textsuperscript{19}

\textbf{Significance.} To better appreciate the \textit{male captus} principle and its significance, it should be evaluated according to three key indices: (i) whether it has any status under \textit{international law}, (ii) to what extent its invocation reflects ratification by pursuing State courts in the underlying conduct of its executive branch, and (iii) how it stands up to a competing Roman legal maxim. As to the first index, domestic criminal courts have never characterized the \textit{male captus} principle as mandated by international law; in fact, it has always been treated as a domestic legal rule applicable mainly in terms of distinguishing the respective roles of the judicial and

\textsuperscript{17} \textit{E.g.}, \textit{Abel v. Smith}, 151 Va. 568 (Va. Sup. Ct. 1928); Andrew L.-T. Choo, Abuse of Process and Judicial Stays of Criminal Proceedings 86 (1993) [hereinafter \textit{Choo, Judicial Stays}] (discussing the “fruit of the poisonous tree” concept).


executive branches of government. Although one could contend, at most, that the rule constitutes a general principle of international law, given the large number of States’ courts that have embraced it, the principle certainly never has been accorded CIL status, as there is no \textit{opinio juris} (i.e., a sense of legal obligation supporting its predominant practice) and, increasingly, domestic courts are even deviating from this traditional norm (discussed \textit{infra}).

With regard to the second index, it must be stressed that in choosing to exercise jurisdiction over the fugitive and to carry out criminal proceedings against him, a domestic court has neither necessarily approved nor disapproved of the underlying executive’s conduct, but rather has approached the matter indifferently and as outside its authority. In short, it adopts an agnostic posture, and its jurisdictional determination should not be confused with ratification or validation by the court, as a branch of the pursuing State’s government, of the lawfulness of the underlying executive branch conduct.\footnote{See Satyadeva Bedi, \textit{Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries} 394-95 & nn.16-17 (2002); \textit{e.g.}, Matta-Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir. 1990) (“we do not condone government misconduct such as [the fugitive defendant] alleges”), cert. denied, 498 U.S. 878 (1990).} The U.S. Supreme Court’s opinion in the Álvarez-Machain case addressed this distinction clearly when it observed that the SDO used to bring the fugitive to the U.S. “may be in violation of general international law principles”\footnote{Álvarez-Machain, 504 U.S. at 669.} while, at the same time, finding no basis to reject personal jurisdiction.\footnote{Id.}

The third index challenges the validity of the \textit{male captus} rule by positing a competing substantive law maxim: \footnote{Emeritus DePaul University Law Professor M. Cherif Bassiouni introduces a second competing maxim known as \textit{nunquam decurrirt ad extraordinarium sed ubi deficit ordinarium} (i.e., never resort to the extraordinary until the ordinary fails), contending that the \textit{male captus} rule is extraordinary, and therefore that all ordinary procedural means must first be exhausted. \textit{M. Cherif Bassiouni, International Extradition and World Public Order} 143-44 (1974) [hereinafter Bassiouni, \textit{World}} \textit{ex injuria ius non oritur}, which in effect means

---


\footnotetext[21]{See Satyadeva Bedi, \textit{Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries} 394-95 & nn.16-17 (2002); \textit{e.g.}, Matta-Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir. 1990) (“we do not condone government misconduct such as [the fugitive defendant] alleges”), cert. denied, 498 U.S. 878 (1990).}

\footnotetext[22]{Álvarez-Machain, 504 U.S. at 669.}

\footnotetext[23]{Id.}

\footnotetext[24]{Emeritus DePaul University Law Professor M. Cherif Bassiouni introduces a second competing maxim known as \textit{nunquam decurrirt ad extraordinarium sed ubi deficit ordinarium} (i.e., never resort to the extraordinary until the ordinary fails), contending that the \textit{male captus} rule is extraordinary, and therefore that all ordinary procedural means must first be exhausted. \textit{M. Cherif Bassiouni, International Extradition and World Public Order} 143-44 (1974) [hereinafter Bassiouni, \textit{World}}
that a lawful result cannot arise from an unlawful act. This maxim would thus militate in favor of a State’s courts not being allowed to assert personal jurisdiction, and thereby not hearing the underlying charges against a fugitive defendant, in a case where his presence was obtained by breaking the law in the process, such as by breaching another State’s sovereignty.\footnote{See Margaret L. Satterthwaite, \textit{The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism}, N.Y.U. Public Law and Legal Theory Working Papers, Paper 192 (2010), at 12, \textit{available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1192&context=nyu pllwp&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26q%3D%2522international%2522%2522%2522%2522%2522%2522%2522%2522%2522%2522%2522%26ie%3DUTF-8%26oe%3DUTF-8#search%22international%20rendition%20NYU%20School%20Law%22} (last visited on Nov. 30, 2013).

\footnote{Id. at 144-45; Garcia-Mora, \textit{supra} n.15, at 446-47; Edwin D. Dickinson, \textit{Jurisdiction Following Seizure or Arrest in Violation of International Law}, 28 \textit{AJIL} 231, 236 (1934); \textit{e.g.}, \textit{Abel}, 151 Va. 568. Quite pointedly, however, when a fugitive defendant contended that his “body” should be excluded as evidence under the Fourth Amendment to the U.S. Constitution, the appeals court outright rejected it. \textit{Mattat-Ballesteros}, 896 F.2d at 262-63.} There is merit to this countervailing maxim, but because it is more abstract, the \textit{male captus} maxim arguably is the \textit{lex specialis} in this instance, and therefore should take precedence.

\subsection*{State Practice and Modern Trends}

The \textit{male captus} principle took hold nearly two centuries ago in Britain\footnote{\textit{Ex parte Susannah Scott}, 9 B. & C. 446 (1829).} and the U.S.,\footnote{\textit{In re State of Vermont v. Brewster}, 7 Vt. 118 (Vt. Sup. Ct. 1835) (“[I]t is not for us to inquire by what means, or in what precise manner, [the fugitive] may have been brought within the reach of justice.”).} and eventually gained wide application throughout the world. As the U.S. Court of Appeals for the First Circuit observed in 1981: “The vitality of the \textit{male captus} doctrine . . . is widely applied throughout the world,”\footnote{\textit{Cordero}, 668 F.2d at 36.} and in 1987, the American Law Institute (ALI) commented: “Nearly all states have followed the rule that, absent protest from other states, they will try persons brought before their
courts through irregular means, even through an abduction from another state in violation of international law.”\textsuperscript{30} This had been true not only of the Commonwealth States,\textsuperscript{31} but also of States with civil law systems such as Hungary\textsuperscript{32} and Belgium.\textsuperscript{33} Over the past few decades,\textsuperscript{34} however, increasing skepticism about the rationale underlying the rule has been expressed\textsuperscript{35} and court opinions setting aside the traditional principle have been issued, which will presently be explored.

\textbf{United States.} The seminal U.S. court case cited in support of the \textit{male captus} rule is \textit{Ker v. Illinois}, a Supreme Court case dating to 1886.\textsuperscript{36} In that case, a private (Pinkerton Company) detective named Henry Julian was tasked by a Chicago bank to bring back Frederick Ker, a former bank clerk who had fled Illinois to Lima, Peru, to evade larceny charges. Although Julian had obtained extradition papers in advance, the Peruvian government was then in such disarray on account of its military occupation by Chile that extradition proved infeasible. As a result, with the cooperation of the Chilean military but not with U.S. government authorization,

\begin{itemize}
\item \textsuperscript{30} \textit{Restatement (Third), supra} n.19, \S{} 432.
\item \textsuperscript{32} \textit{In re Károly R.}, No. B XXX, 2138/1925, Royal Hungarian Crim. Ct. at Budapest, Jan. 26, 1928, \textit{reprinted in} [1927-28] 4 ANN. DIG. PUB. INT’L L. CASES 345 (No. 236) (A.D. McNair \\& H. Lauterpacht eds. 1931) (“There is no rule of public international law according to which courts of a State have no right to conduct criminal proceedings against an accused who returned from abroad by any means other than extradition. The fact that the accused had been brought home otherwise than in the course of regular extradition proceedings can have no influence on the prosecution of the crime.”).
\item \textsuperscript{34} Even a half-century earlier, notably the Draft Convention on Jurisdiction with Respect to Crime proposed by the Harvard Research in International Law saw no basis for the \textit{male captus} rule when it wrote in 1935: “In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.” Draft Conv. on Research in International Law of the Harvard Law School, “Jurisdiction with Respect to Crime,” 29 AJIL 435, 442, art. 16 (Supp. 1935).
\item \textsuperscript{35} \textit{See, e.g., Restatement (Third), supra} n.19, Rep. Note 2; Borelli, \textit{supra} n.20, at 354.
\item \textsuperscript{36} \textit{Ker v. Illinois}, 119 U.S. 436 (1886). Many judges and legal commentators often refer to the so-called \textit{Ker-Frisbie} doctrine, the second case in reference to \textit{Frisbie v. Collins}, 342 U.S. 519 (1952), which was an intra-state seizure case between Michigan and Illinois that occurred well over a half-century after \textit{Ker} that stood for the same general proposition as \textit{Ker}.
\end{itemize}
Julian arranged to forcibly seize Ker and bring him back to Illinois. Ker challenged the Illinois trial court’s jurisdiction on the ground that both his rights under the specialty provision of the U.S.-Peru Extradition Treaty (as the charge had changed to embezzlement) and his due process rights had been violated.

The U.S. Supreme Court denied both claims, holding that since his transfer had not been effected as an extradition, no extradition treaty rights were implicated, and that so long as he was properly indicted and prosecuted in accordance with his constitutional rights, no due process violation had occurred. The trial court therefore could assert personal jurisdiction over Ker and hear the criminal charge of embezzlement against him. At the same time, the Supreme Court acknowledged that Peru could seek Julian’s extradition on kidnapping charges and that the proper remedy for any alleged breach of international law against Peru would be via diplomatic channels. Significantly, Peru never protested the SDO, but this may well have been due to the fact that its government was then not operating normally with Chilean forces in control.

Since Ker, U.S. courts have consistently upheld the *male captus* rule, including the relatively recent U.S. Supreme Court case of Álvarez-Machaín (1992), despite a number of material factual differences with the *Ker* case that potentially could have proven legally consequential. A case comparison is therefore instructive. Humberto Álvarez-Machaín, a Mexican national and medical doctor, was charged by the U.S. with a number of crimes in connection with the torture and murder of DEA agent Enrique Camarena-Salazar (and his in-country driver) in 1985. In April 1990, under

37 *Ker*, 119 U.S. at 444.
the leadership of the DEA, a team of five or six armed men were dispatched to Guadalajara, seized Álvarez-Machain from his medical office, placed him on a private plane, and flew him to El Paso, Texas, where he was arrested and then transferred to Los Angeles to face prosecution. The case drew extensive international criticism as well as a vocal protest from Mexico.

Key differences between the two cases include: (i) Ker was a U.S. national while Álvarez-Machain was not; (ii) while the Peruvian government did not protest, the Mexican government did – repeatedly and vehemently between April and July 1990; (iii) while the extradition treaty could not realistically have been invoked with the Peruvian government at the time to bring back Ker, nothing prevented the U.S. government in principle from requesting extradition from the Mexicans to obtain custody over Álvarez-Machain; (iv) while the Pinkerton detective in Ker operated on his own, the armed gunmen in Álvarez-Machain were tasked by the U.S. government; and (v) a special history existed between the U.S. and Mexico in which over the course of more than 100 years a strong opposition to SDOs from their respective territories had been expressed.

The U.S. Supreme Court found that one relevant difference between the cases was the involvement of the U.S. government in the SDO, and concluded that so long as there was no express or implied term in the extradition treaty prohibiting an SDO (whether based on the language of the treaty, the history of treaty negotiations, or

---


42 In 1881, U.S. Secretary of State Blaine informed the Governor of Texas that the U.S.-Mexico Extradition Treaty did not allow either party to abduct persons charged with crimes from the other territory. In 1887, U.S. Secretary of State Bayard protested as kidnapping the removal from Texas to Mexico of Francisco Arreasures by three Texas deputy sheriffs in collusion with a Mexican policeman. In addition, in 1987 and 1989, the U.S. and Mexico reaffirmed their opposition to abduction in treaties providing for mutual assistance and drug law enforcement. Pyle, supra n.40, at 293.
the States’ practice under the treaty), then the *Ker* standard applied, and as no such term existed, the rest of the treaty was of no matter since extradition was not followed. Although the Court also recognized that the cases differed on account of Mexico’s registered protest, the Court found that such matters are properly managed as a political, not a judicial, matter. The Court also rejected Álvarez-Machain’s due process argument, finding that all of his constitutionally guaranteed safeguards related to a fair trial had been observed. In addition, the Court did not believe CIL principles prohibiting breaches of national sovereignty were specific enough to apply in that case.

While alive and well in the U.S., the *male captus* principle is not categorical in its application, but rather is subject to two recognized, yet narrow, exceptions. First, as seen in Chapter 12, to the extent a treaty proscribes SDOs (or the equivalent conduct) as a means to secure the custody of an actual or alleged criminal from a treaty partner’s territory, or otherwise specifically prohibits other behavior that would violate the terms of an applicable treaty (e.g., a maritime or diplomatic immunity convention), an American court ought to take cognizance of such a provision. Significantly, however, even then, courts may choose to assert

---

43 Álvarez-Machain, 504 U.S. at 662-66.
44 *Id.* at 667-70.
45 “[D]ue process of law is satisfied when one present in court is convicted of crime after . . . a fair trial in accordance with constitutional procedural safeguards.” *Id.* at 661-62. Accord United States v. Marzano, 537 F.2d 257, 271 (7th Cir. 1976) (“It has long been held that due process has been satisfied when a person is apprised of the charges against him and is given a fair trial. The power of a court to try a person is not affected by the impropriety of the method used to bring the defendant under the jurisdiction of the court.”).
48 U.S. courts are generally disinclined to imply a provision that would defeat its jurisdiction. *E.g.*, United States v. Nafzger, 785 F.2d 1420 (9th Cir.) (per curiam), cert. denied, 479 U.S. 1009 (1986).
jurisdiction while regarding the treaty breach as a political matter for the executive branches to resolve.\textsuperscript{50}

Second, under the 1974 United States v. Toscanino\textsuperscript{51} standard, as refined a year later by Lujan v. Gengler\textsuperscript{52} and by subsequent appellate courts, a trial court must divest itself of personal jurisdiction when the means of seizure and delivery were of “a most shocking, and outrageous character,”\textsuperscript{53} or “would shock the conscience of the court.”\textsuperscript{54} Such instances are limited to torture, brutality, and similar outrageous conduct, and must be perpetrated directly by paid officials or agents of the U.S. government,\textsuperscript{55} such that the treatment would be regarded as a violation of the fugitive’s fundamental due process rights. To date, however, no U.S. federal court has ever found a set of facts that met this exceptionally high threshold.\textsuperscript{56}

**Great Britain.** England has a long history with the *male captus* rule dating to the 1829 case of *Ex parte Scott*.\textsuperscript{57} In that case, a British police constable traveled to Brussels to seize Susannah Scott (one of the rare appearances of a female fugitive), who was wanted on the charge of perjury. The police officer had a warrant for her

---

\textsuperscript{50} E.g., Sobell, 142 F. Supp. 515; United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976).


\textsuperscript{52} United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975).

\textsuperscript{53} Id. at 65.

\textsuperscript{54} Cordero, 668 F.2d at 37.

\textsuperscript{55} See United States v. Lara, 539 F.2d 495, 495 (5th Cir. 1976) (per curiam) (where U.S. government agents were found to have played no direct role in the torture allegedly administered by Panamanian authorities and there was no proof that U.S. agents were even present at the time, the *Toscanino* exception was inapplicable); United States v. Lira, 515 F.2d 68, 70-71 (2d Cir.) (rejecting application of *Toscanino* exception where no evidence existed that the U.S. representatives “participated or acquiesced in the alleged misconduct of the Chilean officials” or that “Chilean police were acting as agents of the United States in arresting or mistreating Mellafe or that United States representatives were aware of such misconduct.”), cert. denied, 423 U.S. 847 (1975); United States v. Fielding, 645 F.2d 719, 723-24 (9th Cir. 1981) (even outrageous treatment by foreign officials while in their custody where U.S. officials knew about it, would not vitiate rule’s application).

\textsuperscript{56} See United States v. Yunis, 681 F. Supp. 909, 919 (D.D.C. 1988) (“Although most circuits have acknowledged the exception carved out by *Toscanino*, it is highly significant that no court has ever applied it to dismiss an indictment.”) (emphasis in original); Jonathan A. Bush, *How Did We Get Here?: Forcible Abduction after Alvarez-Machain*, 45 STAN. L. REV. 939, 961 (1993) (“No claimant has ever prevailed under the *Toscanino* exception”).

\textsuperscript{57} See supra n.27.
arrest and possibly effected her apprehension with the cooperation of the Belgian authorities. In any event, he succeeded in returning her to England, but rather than argue lack of personal jurisdiction, Scott sought release under England’s *habeas corpus* statute. Precedent existed for no inquiry in felony cases but for an inquiry in civil actions, and perjury qualified somewhere in between as a misdemeanor. The court decided to treat her misdemeanor crime akin to a felony and determine only whether the warrant was valid without examining the lawfulness of the underlying seizure.\(^{58}\)

For about the next 150 years, until 1981, including the *Elliott* case (1949),\(^{59}\) in which British officers escorted an army corporal charged with desertion from Belgium to a British army base in Germany in a manner contrary to Belgian law,\(^{60}\) Britain continued to adhere without variation to the *male captus* rule. With *Ex parte Mackeson*\(^ {61}\) and *Ex parte Healy*,\(^ {62}\) two “disguised extradition” cases, the British courts changed course temporarily and inquired into whether there had been any pre-trial police irregularity in effecting the fugitive defendants return to the U.K. An abrupt reversal back to the no-inquiry rule, however, occurred in 1985 with another “disguised extradition” case known as *Ex parte Driver*.\(^ {63}\) The jurisprudential conflict between *Mackeson* and *Driver* remained unresolved until 1993\(^ {64}\) with the House of Lords’\(^ {65}\) judgment in *Ex parte Bennett*.\(^ {66}\)

---

58 Pyle, supra n.40, at 265; Jones & Doobay, supra n.38, at 79-80; Selleck, supra n.8, at 249-50.
60 Jones & Doobay, supra n.38, at 83-84; Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 Mich. L. Rev. 1087, 1106 n.104 (1974) [hereinafter Note, Israeli Precedent]. Such pure military offenses as desertion, however, are not generally subject to extradition treaties or domestic extradition laws. See Chapter 5.a.iv supra.
63 Regina v. Plymouth Magistrates’ Court and Others, ex parte Driver [1985] 2 All ER 681 (U.K.).
64 Courts during this interim period were evidently reluctant to break this impasse. E.g., Regina v. Bateman & Cooper, reprinted in [1989] Crim. L. Rep. 590 (U.K.) (expressly declining to resolve).
65 The House of Lords is the highest appellate judicial body in the U.K. University College London, Richard Cornes, Reforming the Lords: The Role of the Law Lords, June 1999, at 4, available at http://www.ucl.ac.uk/spp/publications/unit-publications/42.pdf (last visited on Aug. 23, 2013) ("With the old exception of Scottish criminal appeals, and the new exception of devolution disputes
Under *Bennett*, British police tracked to South Africa a New Zealand national who had fraudulently purchased a helicopter in the U.K. in 1989. Although no extradition treaty then existed between the U.K. and South Africa, under U.K. statutory law, “special extradition arrangements” could have been sought.\(^67\) Instead, on the pretense of deporting Bennett to New Zealand, South African authorities arranged with the connivance of their British counterparts to route his flight through London, where he was arrested.\(^68\) Overruling *Driver*, the *Bennett* court reasoned through the Lords’ collective opinions that the court must serve a supervisory role to foster the rule of law and human rights, that abuses of process must not be permitted, and that if illegally confiscated evidence is not admissible, by analogy, nor should unlawfully seized individuals.\(^69\)

As one legal commentator summed it up: “Under authority of *Bennett*, British courts have the discretion to refuse jurisdiction in any case of collusion or connivance by British authorities in the abduction of a fugitive aimed at circumventing established extradition procedures and nullifying the guarantees those procedures accord to the fugitive.”\(^70\) Although it was not immediately clear in the aftermath of *Bennett* whether the remedy of imposing a stay of proceedings (discussed *infra*) was compulsory or discretionary in such instances,\(^71\) U.K. case law has evolved to the point where, at present, courts effectively undertake a balancing test, as articulated by the *Latif* court (1996):

---

\(^66\) *Ex parte Bennett*, supra n.14, [1994] 1 A.C. 42.

\(^67\) Id. at 51.


\(^69\) *Ex parte Bennett*, supra n.14, [1994] 1 A.C. 42.


It is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies the means.\textsuperscript{72}

**Other States.** As for other States’ criminal courts, there is a broad range of practice. At one extreme, joining the U.S. in its tenacious allegiance to the *male captus* rule, are judiciaries in States like Scotland\textsuperscript{73} and Israel.\textsuperscript{74} At the other end of the spectrum are courts in States like Spain\textsuperscript{75} and Switzerland that believe there must be no personal jurisdiction in such cases whether because the underlying executive’s conduct has vitiated it or as a function of judicial discretion. With respect to Switzerland, in 1982, where German officials had seized a Belgian national from Belgium and brought him to Switzerland and from which Germany sought his extradition, the Swiss court declined the request on the ground that the fugitive’s presence had been secured via a violation of Belgian sovereignty and that the Swiss court did not want in effect to be an accessory to wrongful conduct.\textsuperscript{76}


\textsuperscript{73} See, e.g., *Sinclair v. H.M. Advocate*, 17 R. (J) 38, 41(1890) (“As regards the proceedings abroad and where the complainant was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal or Spain. . . . If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainant his remedy is to proceed against these Governments. That is not a matter for our consideration at all.”); *H.M. Advocate v. Vervuren*, 2002 S.L.T. 555 (2002) (refusing to inquire into underlying means by which fugitive defendant was brought to Scotland).


\textsuperscript{75} *Fiscal v. Samper*, 130 *Jurisprudencia Criminal* 694, Sup. Ct., Spain, June 22, 1934, reprinted in [1938-40] 9 ANN. DIG. & REP. INT’L. L. CASES 402 (No. 152) (H. Lauterpacht ed. 1942) (recognizing the individual right to protection afforded by a State in which a fugitive has sought refuge).

Along this continuum lie German courts, which have adopted the male captus rule in general, but with the important exception that if the State from which the fugitive was taken or removed complains and seeks restitution, the German courts need to stay proceedings;\textsuperscript{77} and the courts of Zimbabwe, which recognize the male captus rule unless there is evidence that pursuing State agents violated the sovereign territory of the transferor State.\textsuperscript{78}

Beginning in the late 1970s and extending into the 1980s and 1990s, many States that had once embraced the male captus rule began to question its merit and became amenable in principle to staying proceedings against, and releasing, fugitive defendants.\textsuperscript{79} This trend began in essence with the 1978 New Zealand case called \textit{Regina v. Hartley}.\textsuperscript{80} In that case, the court found that the fugitive, charged with manslaughter, had been forcibly seized in Australia and transferred by plane to New Zealand with the cooperation of New Zealand law enforcement authorities, and the court reasoned that it had the inherent power to determine if an abuse of process had been perpetrated.\textsuperscript{81} In neighboring Australia, in two cases arising in the late 1980s, courts asserted the right to stay proceedings where they found an abuse of process, such as an illegal extradition.\textsuperscript{82} South African jurisprudence represents another example of significant transition from a well-established male captus posture, as found in the \textit{Abrahams} case (1963)\textsuperscript{83} to a failure to find personal jurisdiction in \textit{Ebrahim} (1991).\textsuperscript{84}


\textsuperscript{79} de Sanctis, supra n.70, at 538.


\textsuperscript{81} \textit{Id}. Notably, only two years later, Judge Richmond, who had sat on the \textit{Hartley} appeal, switched his position, raising doubts about the “abuse of process” doctrine in staying proceedings based on pre-trial executive branch conduct. \textit{See} \textit{Moevalo v Dept of Labor} [1980] 1 NZLR 464.


\textsuperscript{83} \textit{Abrahams v. Minister of Justice and Others} [1963] 4 S.A. L. Rep. 542, 543 (So. Afr., Cape Provincial Div. 1963) (“Once a person is in lawful custody within the jurisdiction of a court, the Court will not
One noteworthy anomaly in this regard appears to be France, where for decades its courts had refused to exercise personal jurisdiction in cases in which French officials had violated international law in securing custody of a fugitive, but later embraced the *male captus* doctrine in *Argoud* (1964). Notwithstanding this exception, a general trend line can be discerned toward domestic courts declining to assert personal jurisdiction where the underlying circumstances reflect demonstrated unlawful action; however, that emerging approach cannot be said to have transformed yet into CIL, given both the variability that continues across national jurisprudence and courts’ frequent reliance on domestic legal principles (versus international law) in reaching their judgments.

**International Criminal Tribunals.** A case drawn from the ICTY docket can provide something of a roadmap for where domestic courts are, or could well be, headed, in terms of striking a prudent balance between competing public interests. In the 2003 *Nikolić case,* the fugitive was forcibly seized by unidentified persons in Serbia & Montenegro and taken to Bosnia & Herzegovina, where SFOR arrested and

---


85 Compare *Case of Nollet*, Cour d’appel de Douai (1891), *reprinted in* 18 JOURNAL DU DROIT INTERNATIONAL 1188 (France) (forgoing jurisdiction in seizure case as fugitive defendant would not be before the court but for a violation of Belgium’s sovereign territory by French government officials) and *In re Jolis*, Tribunal Correctionnel de’Avesnes, France, 1933, *reprinted in* [1933-34] 7 ANN. DIG. & REP. PUB. INT’L. CASES 191 (No. 77) (H. Lauterpacht, ed., 1940) [hereinafter Jolis Case] (forgoing jurisdiction because all proceedings that followed unlawful seizure were null and void) with *In re Argoud*, Ct. of Cassation (Crim. Chamber), France, June 4, 1964, *reprinted in* 45 ILR 90 (1972) [hereinafter Argoud Case] (“[T]he circumstances in which an accused person who is the subject of a lawful prosecution and has been apprehended on a lawful warrant for arrest and handed over to justice, even if they constituted an infringement of the criminal law or the traditional principles of our law, are not of a character – however deplorable they may appear – to entail of themselves the nullity of the prosecution.”).

86 See Selleck, *supra* n.8, at 251 (citing *Hartley* and *Mackeson* cases as evidence of an emerging rule).

87 For example, in the *Ebrahim* opinion, the Supreme Court of South Africa expressly referenced Roman-Dutch law as a principal source. See generally de Sanctis, *supra* n.70, at 537-38 (observing courts’ reliance on national rules and principles); Borelli, *supra* n.20, at 358 (same).

transferred him to The Hague to face prosecution. The ICTY’s appellate chamber was presented with the question of whether the trial chamber should have been permitted to exercise personal jurisdiction under the circumstances. After analyzing domestic case law involving similar facts, the appellate chamber applied the following standards: (i) in instances where universally condemned crimes, such as genocide and crimes against humanity, are at stake, these should outweigh in seriousness any limited territorial intrusion to secure the fugitive’s custody, and therefore jurisdiction should stand or it would disserve international justice; but (ii) in cases in which other, lesser crimes are at issue, jurisdiction should be dispensed with if either the fugitive’s human rights have been violated to an egregious extent (most likely one shocking to the public conscience89) or if a State complains that its sovereign territory has been breached,90

**Impetus Behind Anti-Male Captus Trend.** It is worth examining the logic followed by those courts that have chosen to divest themselves of, or otherwise not exercise, personal jurisdiction in cases where a fugitive’s delivery to pursuing State territory was conducted under unlawful or objectionable means. Although the rationale varies from court to court, in the aggregate it breaks down roughly into the following three types: (i) promoting healthy inter-State relations by respecting one another’s sovereign territory and treaty obligations and by not encouraging unlawful activity against others by virtue of declining to hold its own executive accountable; (ii) protecting the rights of fugitives not to be physically maltreated, to procedural benefits available to them under extradition treaties, and to safeguards afforded by “safe haven” State laws; and (iii) ensuring the sound administration of justice,91 in part, by insisting on the prosecuting State having “clean hands,” and by

90 *Nikolić Case, supra* n.88, ¶¶ 24-31.
91 As U.S. Supreme Court Justice Felix Frankfurter stated: the rule of law “inescapably imposes upon [the] court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notion of justice of English speaking peoples even toward those charged with the most heinous offenses.” *Malinski v. New York*, 324 U.S. 401, 416-17 (1944).
fostering the integrity and dignity of the judicial system so it does not become viewed as an accessory to the executive in perpetrating unlawful conduct. The upshot of divestiture generally is custodial release of the fugitive defendant; if the divestiture is made without prejudice, then the court can hear the criminal case again if the fugitive is later rendered to the pursuing State.

c. Abuse of Process and Inherent Supervisory Powers

Following the discussion of what the legal standard is and why it has come to develop that way, we now take a closer look at how doctrinally courts have reached this position. As noted above, particularly common law domestic courts traditionally felt compelled to recognize and exercise personal jurisdiction over fugitive defendants so long as they were in the custody of the prosecuting State. The courts believed they were not at liberty to second-guess the actions of their respective executive branches, that any such matters offending inter-State relations lay outside their purview, and that their job was simply to hear the underlying criminal suit against the fugitive defendant. Over time, however, courts have fashioned mechanisms for empowering or asserting themselves as a check against executive branch excesses, finding grounds to justify an absence or the non-exercise of personal jurisdiction, and determining the means by which proceedings, where appropriate, could be stayed or charges dismissed altogether.

There are essentially two judicial doctrines or vehicles through which domestic criminal courts have sought to address perceived over-reaching executive branch conduct in connection with a full-scale alternative to extradition. The first is the determination that an “abuse of process” has occurred, which generally deprives the court of personal jurisdiction and thereby tends to lead to a stay of the proceedings,

---

92 See Connelly v. Director of Public Prosecutions [1964] AC 1254 (holding that the court has discretion to stay criminal proceedings on account of an abuse of process where prosecution would threaten the moral integrity of the judicial process itself); Choo, International Kidnapping, supra n.68, at 629.
which may or may not eventually result in a dismissal of the indictment. The second is the exercise of a court’s “inherent supervisory powers,” which allows a court at its discretion not to invoke personal jurisdiction; such cases generally lead to a dismissal of the charges, an end to the prosecution, and the physical release of the fugitive defendant. Sometimes court judgments conflate or do not properly apply these doctrines, so they are not as clearly defined and distinguished as one might reasonably expect.

Abuse of Process Doctrine. To begin, it is essential to distinguish between: (a) due process concerns with regard to how a fugitive was treated by the executive branch in connection with his apprehension, detention, and transfer to the court’s jurisdiction, and (b) due process rights in the judicial “fair trial” sense of assistance of counsel, evidentiary standards, appellate rights, and an independent and impartial tribunal. The former (executive branch) type, which is of interest in this context, can vitiate personal jurisdiction, while the latter (judicial branch) type

---

93 While a stay is not legally equivalent to an acquittal, as a practical matter, it can yield the same result. Choo, Judicial Stays, supra n.17, at 7. For an example of how the two could vary in effect, see Toscanino in which the appellate court issued a stay and later remanded the case to the trial court for an evidentiary hearing at which the defendant had the burden of showing credible evidence that the actions alleged had been taken by or at the direction of U.S. government officials. Toscanino, 500 F.2d at 281.

94 See Michael ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 7-19 (2001 & Supp. 2007) (defendants may challenge prosecution on one or both of these grounds).

95 E.g., Ex parte Bennett, supra n.14, 3 All E.R. at 139 (“It was an abuse of power for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom and the High Court had power, in the exercise of its supervisory jurisdiction to inquire into the circumstances by which a person was brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures by a process to which the police, prosecuting or other executive authorities in the United Kingdom were a knowing party the court could stay the prosecution and order the release of the accused.”) (emphasis supplied); United States v. Reed, 639 F.2d 896, 903 (2d Cir. 1981) (discussing how the court could exercise its supervisory power to remedy abuses of a district court’s process); Levinge (1987) 9 N.S.W. L. Rep. at 556-57 (“Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court’s process.”) (emphasis supplied).

cannot, although a defendant can be set free if such procedural trial violations are sufficiently serious.

In Toscanino, the U.S. Court of Appeals for the Second Circuit held that: “a court [must] divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.”

Courts in the U.S. and elsewhere tend to establish similarly elevated thresholds for finding such abuse. Many courts also factor into their judgment of whether an abuse of process has occurred the egregiousness of executive branch conduct in comparison with the gravity of the underlying criminal offense charged, or the practical utility of clever or aggressive law enforcement techniques in combating crimes of an international character and bringing fugitives to face justice.

---

97 500 F.2d at 275. See also Álvarez-Machain, 504 U.S. 655 (no abuse of process found despite allegations that the defendant had been punched in the stomach, forced to lie facedown in a car, shocked with an electric prod, and injected with a drug during the seizure operation).

98 Reed, 639 F.2d at 902. See also Levinge (1987) 9 N.S.W. L. Rep. at 546 (“In circumstances where an accused was arrested in Mexico [by Mexican police officers] and taken to the United States of America in an illegal manner and subsequently lawfully extradited by the United States to Australia to face criminal charges in New South Wales, there being no evidence that the State or Federal prosecuting authorities were involved in any illegality or irregularity, no relief against criminal prosecution in Australia was available on the ground of abuse of process.”).


100 See, e.g., Liangsiriprasert v. United States [1990] 2 All E.R. 866, 871-72 (P.C.), 1 A.C. 225 [hereinafter Liangsiriprasert Case] (“As to the suggestion that it was oppressive or an abuse of process [to lure a Thai heroin smuggler to Hong Kong in order to have him extradited from there], the short answer is that international crime has to be fought by international co-operation between law enforcement agencies. It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red-letter day for the drug barons.”); Latif Case, supra n.72 (sometimes deception has to be used “otherwise the courts will not get to try this sort of offense [drug smuggling] against people who are seriously involved in it”).
Although a number of domestic courts have detected abuses of process in SDO, LCO, or deportation cases, such as Hartley (N.Z.), Bennett (U.K.), and Ebrahim (South Africa), LCO cases, as a general rule, tend to be found less legally objectionable in light of the deceptive conduct undertaken.\textsuperscript{101} For example, in the 1994 case involving Norbert Schmidt, the U.K. House of Lords found that the false story concocted by a Metropolitan police officer to entice a German national out of Ireland on the pretext that he had an opportunity to clear his name in a check fraud investigation was “not so grave or serious to have warranted intervention of the High Court on the grounds of abuse of process.”\textsuperscript{102} In addition, in Yunis, the D.C. Circuit court found nothing suggesting the “sort of intentional, outrageous government conduct” needed to divest it of jurisdiction, even though the lure operation and related apprehension and delivery were decidedly not “picture perfect,” and involved the breaking of the fugitive’s wrists during his arrest, placing him in metal leg irons, tranquilizing him, and putting him at sea incommunicado for several days.\textsuperscript{103}

Although in the U.S. the standard for staying a criminal proceeding on the grounds of “abuse of process” is extremely high, in many other States, including the U.K., Australia, and Canada, courts tend to engage in a balancing test. Among those elements considered are: (i) whether the rendition means employed featured significant rights violations or physical violence and the extent to which they were undertaken in bad faith (if so, this would favor a stay); (ii) whether the pursuing State’s law enforcement officials or agents were operating under exigent circumstances, such as to arrest someone planning a terrorist attack (if so, this would disfavor a stay); and (iii) the seriousness of the offense charged against the fugitive defendant (the more severe, the less likely it would favor a stay).\textsuperscript{104} At the other extreme, were stays to be deemed mandatory in instances of “abuse of

\textsuperscript{101} E.g., Liangsrirprasert Case, supra n.100 (upholding the legality of a lure operation as not an abuse of process).


\textsuperscript{103} Yunis, 681 F. Supp. at 912-13.

\textsuperscript{104} Choo, International Kidnapping, supra n.68, at 631.
process,” such a rule would not properly account for defendants like Adolf
Eichmann who committed heinous crimes or persons posing national security
threats to the adjudicating State.105

**Inherent Supervisory Powers.** Apart from finding an abuse of process and calling
for a stay of proceedings, a domestic criminal court can also dismiss a prosecution
where it does not want to foster serious pre-trial misconduct on the part of the
executive branch in bringing the fugitive to the court’s jurisdiction, while hoping to
preserve judicial integrity by not validating or signaling support for any unlawful
activity.106 Because this mechanism can result in a court dismissing a criminal case,
it tends to be used only sparingly and under strict conditions.107

Under U.S. law, for example, a trial court can exercise this power for one of only
three possible purposes: (i) to remedy violations of recognized rights; (ii) to shield
judicial integrity “by ensuring that a conviction rests on appropriate considerations
validly before the jury;” and (iii) to discourage unlawful law enforcement
conduct.108 While it may incidentally promote or protect an individual defendant’s
rights, this doctrine “is designed and invoked primarily to preserve the integrity of
the judicial system” and “to prevent the federal courts from becoming accomplices
to government misconduct.”109 “If, for example, [the court] were confronted with a
pure law enforcement effort in which government agents deliberately killed and
tortured individuals for the sole purpose of discovering a fugitive’s whereabouts in

105 See Choo, Judicial Stays, supra n.17, at 111-18.
106 Under some State constitutions, such supervisory powers also could be used by a court to
override a questionable executive decision, say, by the Secretary of State to extradite or deport a
fugitive under improper or irregular circumstances. See, e.g., Regina v. Secretary of State for the Home
Department, ex parte Lauder [1997] 1 WLR 864 (U.K.) (validating upon review that it was not
irrational for the Secretary of State to determine that no human rights ground existed for denying a
fugitive’s extradition to Hong Kong).
107 “As invocation of supervisory power to dismiss an indictment is a harsh remedy, it is reserved
only for flagrant or repeated abuses which are outrageous or shock the conscience.” United States v.
Noriega, 746 F. Supp. 1506, 1535 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997).
108 United States v. Hasting, 461 U.S. 499, 505 (1983). See also Matta-Ballesteros, 71 F.3d at 763
(applying the Hasting standard and finding that despite “disturbing” circumstances surrounding the
fugitive’s seizure, none of the grounds were satisfied).
(quoting United States v. Payner, 447 U.S. at 744 (Marshall, J., dissenting op.).)
order to secure his arrest, the Court would face a situation which properly calls for invocation of its supervisory powers."110

ii. Individual Standing

In addition to determining whether it must, may, or must not exercise personal jurisdiction involving a fugitive defendant who has been returned via a full-scale operational alternative to extradition, a domestic criminal court often will have to consider whether the fugitive defendant has standing (locus standi) to raise legal issues or claims on his own behalf, including to defeat the court’s personal jurisdiction.111 To begin, individual standing has three essential components under most domestic legal systems as represented by the U.S. standard: “(i) a party seeking relief must allege a sufficient personal interest in the controversy to ensure concrete adverseness in the presentation of the issues;” (ii) the complainant must be within the zone of interests sought to be protected by the law in question;” and (iii) “there must be a logical nexus between status asserted and the claim sought to be adjudicated to ensure that the litigant is the proper party to represent the interests involved.”112

In the post-return context, regardless of the means by which a fugitive defendant is brought before a domestic criminal court, the traditional rule on standing has been that an individual was regarded not as a subject, but only as an object, of international law, and consequently lacked standing to independently assert a claim alleging a State violation of a treaty obligation to his detriment.113 The underlying rationale for this rule is that States are the sole parties to a treaty and therefore they

---

110 Noriega, 746 F. Supp. at 1536.
111 Standing to challenge as unlawful an action by the transferee State against the fugitive defendant must be distinguished from his standing to file a private claim against government officials or agents for violating his civil rights. E.g., United States v. DiLorenzo, 496 F. Supp. 79, 82 (S.D.N.Y. 1980).
113 Malcolm N. Shaw, Public International Law 258 (6th ed. 2008); John Dugard & Christine van den Wyngaert, Reconciling Extradition with Human Rights, 92 AJIL 187, 189 (1998); Argoud Case, supra n.85, 45 ILR at 96 ("Individuals have no capacity to plead in judicial proceedings a contravention of international law. The putting in issue of international responsibilities concerns only the relations between State and State, without individuals being entitled to claim to intervene.")
alone are conferred enforceable rights and benefits under it,"¹¹⁴ even if their actions happen to have "a direct bearing on [an individual fugitive's] personal liberty."¹¹⁵

As a result, a fugitive defendant has no standing on his own to raise a substantive claim¹¹⁶ against a State under a treaty¹¹⁷ absent either: (i) an express treaty provision to that effect,¹¹⁸ or (ii) an official protest¹¹⁹ by one of the contracting State parties to the applicable treaty,¹²⁰ and then only on a derivative basis.¹²¹ This rule


¹¹⁶ Individuals have no standing to lodge procedural claims against a State party to a treaty. See, e.g., U.S. v. Antonakes, 255 F.3d 714, 720 (9th Cir. 2001) (“the appellant has no standing to raise in district court an alleged missed extradition deadline after Germany determined that the treaty provisions were fulfilled and extradition was proper.”).

¹¹⁷ For an individual to have standing under a treaty, it must be either a self-executing treaty or one that has been incorporated into the domestic law. Rayfuse, supra n.40, at 275. But even that alone may not be sufficient, as a self-executing treaty would not confer standing on a defendant to enforce its terms if, for example, the specialty provision expressly required the consent of the transferor State for the defendant to assert it. Mary-Rose Papandrea, Note, Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign, 62 U. CHI. L. REV. 1187, 1201-02 (1995).

¹¹⁸ See Extradition (Jurisdiction) Case, Sup. Ct. of the Reich (in Crim. Matters), Ger., Aug. 13, 1936, reprinted in [1935-37] 8 ANN. DIG. & REP. PUB. INT’L L. CASES 348, 349-50 (No. 165) (H. Lauterpacht ed. 1941) [hereinafter Germany Extradition Case] (“Extradited persons, being objects of extradition, cannot claim rights under extradition conventions nor contest the legality of their extradition, unless such a right has been expressly conceded to them by treaty.”); e.g., Shaw, supra n.113, at 258 (States also “may agree to confer particular rights on individuals which will be enforceable under international law, independently of municipal law,” as when five Central American States established the Central American Court of Justice in 1907 and allowed individuals to bring cases directly before it); Eur. Conv. for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, art. 34, 213 U.N.T.S. 262, T.S. No. 71 (1953) (granting individuals standing to bring suits against States parties).

¹¹⁹ “Absent the fact of an official protest, petitioner is without standing to assert the violation of any extradition treaty as grounds for the relief he seeks.” Matta-Ballesteros, 697 F. Supp. at 1044 (finding no official protest by the Honduran government based merely on a declaration submitted to the National Congress by seven congressmen, with no vote or approval by congress or adoption by the Executive Branch), aff’d, 896 F.2d at 260 (“Were we to conclude that Honduras protested Matta’s arrest in the absence of word from the Honduran government, we would be denying the sovereignty of the Republic of Honduras.”).

¹²⁰ Anthony D’Amato, National Prosecution for International Crimes, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 219 (2d ed. M. Cherif Bassiouni ed. 1999); Rayfuse, supra n.40, at 272-73; Garcia-Mora, supra n.15, at 436; Abraham Abramovsky & Steven J. Eagle, United States Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?, 57 OR. L. REV. 51, 70-71
generally applies no less with respect to alleged violations of an extradition treaty as it does to a complained-of breach of territorial sovereignty under the U.N. Charter, the OAS Charter, or other multilateral convention, as an individual remains decidedly outside the “zone of interests” in either instance.

(1977) (“American courts consistently have denied the individual the right to contest the legality of an extraordinary apprehension abroad. Standing in these instances has been restricted to the asylum state. Consequently, an assertion of their violation had to emanate from that state.”); Restatement (Third), supra n.19, § 902 cmt a; Reed, 639 F.2d at 902 (“[A]bsent protest or objection by the offended sovereign [appellant] has no standing to raise violation of international law as an issue”); Toscanino, 500 F.2d at 267; Yunis, 681 F. Supp. at 916 (absent an objection by either Lebanon or Cyprus to the circumstances under which Yunis was arrested, Yunis was precluded from raising his objections). Likewise, no non-contracting party may invoke that treaty to protest its unlawful application. E.g., United States v. Trujillo, 871 F. Supp. 215, 221 (D. Del. 1994) (Colombia has no standing to complain about provisions of U.S.-U.K. Extradition Treaty).

121 See Lujan, 510 F.2d at 67 (“Indeed, even where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that ‘any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.’”) (quoting ALI, Restatement (Second) of the Foreign Relations Law of the United States, § 115, cmt. e (1965)); Restatement (Third), supra n.19, § 477 cmt b; Brandon S. Chabner, Comment, The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law against Terrorist Violence Overseas, 37 UCLA L. Rev. 985, 1019-20 (1990) (“[W]hen extradition treaties are ignored and a nation protests a violation of its territorial sovereignty, courts have indicated that the abducted individual would have standing to protest his presence before the court as violating international law.”) (citing United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) and Reed, 639 F.2d at 902); Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989). The logic here is that if the affected State acquiesces by failing to protest, then any breach is effectively “cured” or waived, and the fugitive defendant would have no violation about which to complain. Selleck, supra n.8, at 247-48. An example where State protest opened the door to individual standing can be found in United States v. Caro-Quintero, et al., 745 F. Supp. 599 (C.D. Cal. 1990) (the Embassy of Mexico presented three diplomatic notes to the U.S. State Department protesting the arrest and prosecution of Humberto Álvarez-Machain), aff’d sub nom. United States v. Álvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev’d on other grounds, 504 U.S. 655 (1992).

122 See, e.g., Yunis, 681 F. Supp. at 916 (recognizing as a rule of PIL that “only sovereign nations have the authority to complain about violations of extradition treaties.”).

123 See Beverly Izes, Drawing Lines in the Sand: When State-Sanctioned Abduction of War Criminals Should be Permitted, 31 Colum. J. L & Soc. Probs. 1, 33 (1997-98) (observing that Panama’s new government had lodged no complaint concerning General Noriega’s seizure from Panama in January 1990, and absent a claim by an offended state that its sovereign territory has been violated, an individual cannot vicariously assert sovereign rights; therefore, General Noriega could not raise claims regarding Panama’s sovereignty); Argoud Case, supra n.85, 45 I.L.R at 97 (“[E]ven accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty, it would be for the Government of the injured State alone to complain and demand reparation. The accused has no capacity to plead a contravention of the rules of public international law . . .”).

595
Two possible exceptions to the traditional rule, each controversial, warrant mention.\footnote{Where customary international law (CIL) arguably has been violated, some have contended that, to the extent CIL is a constituent part of domestic law, an individual defendant should be entitled to plead such rights, quite independent of whether or not treaty law has been breached. Rayfuse, supra n.40, at 275-76.} The first exception takes the form of the specialty rule, discussed in Chapter 7.b.ii infra.\footnote{E.g., United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986).} Its central objective is to ensure that a fugitive is not prosecuted for a crime for which he was not specifically extradited. This rule serves the interests of both the fugitive and the transferor State, as each would be injured by non-compliance.\footnote{The State has an interest in ensuring that it act faithfully with regard to its own criminal legal standards and values, and “not be induced to return an individual under false pretenses,” Levitt, supra n.16, at 1025, while it would be unfair if an extradition treaty is bypassed for a fugitive defendant to be tried on offenses not recognized by the host State. Note, Israeli Precedent, supra n.60, at 1109.} There is a division among the U.S. Courts of Appeals (a so-called “circuit split”) regarding whether standing should be conferred upon an individual defendant to contest a specialty rule violation.\footnote{See Matorin, supra n.114, at 924-25 (noting how the Second, Fifth, and Sixth Circuits require State protest to convey an individual defendant’s standing so long as, in the court’s judgment, the transferor State might have raised an objection consistent with an interest it demonstrated or signaled in another context. Accordingly, as the U.S. Supreme Court reasoned as far back as 1886, although Great Britain had not \footnote{See Evans, supra n.38, at 211 & n.158; e.g., Antonakos, 255 F.3d at 720 (“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 person extradited to raise this type of treaty violation”). But see Germany Extradition Case, supra n.118, at 349-50 (“Even if extradition takes place in respect of a crime which is not provided for by the treaty, the extradited person is not entitled to object. It is the task of the authorities of the extraditing State, not that of the German courts, to watch over the correct application of foreign extradition law.”).}}

Under the second exception, some courts do not require that a State expressly protest to concede an individual defendant’s standing so long as, in the court’s judgment, the transferor State might have raised an objection consistent with an interest it demonstrated or signaled in another context. Accordingly, as the U.S. Supreme Court reasoned as far back as 1886, although Great Britain had not
protested fugitive William Rauscher’s prosecution for a lesser crime that had not been the subject of the U.S. extradition request, Great Britain’s disapproval could be inferred based on its previous refusal to transfer the fugitive absent a guarantee that the specialty rule would apply.\textsuperscript{129} As the U.S. Court of Appeals for the Ninth Circuit expressed this sentiment a century later: “the person extradited may raise whatever objections the rendering country might have.”\textsuperscript{130}

Furthermore, a number of legal commentators have questioned the merit of reliance on a State’s protest (express or otherwise) at all to confer standing to a fugitive defendant to challenge the court’s jurisdiction. As one commentator asserted: “There are simply too many reasons why a state may decline to assert the rights of an accused before the courts of another country to make the observance of international law in practice depend on such assertion.”\textsuperscript{131} A State’s decision not to protest could be influenced by politics as opposed to law or principle;\textsuperscript{132} States may have colluded with one another so the transferor State would have no incentive to protest; in other cases, a transferor State may not even realize that a fugitive has been seized from its territory;\textsuperscript{133} and even if a State chooses to protest, it may do so by seeking a remedy other than restitution (\textit{e.g.}, Argentina in the \textit{Eichmann} case).

\textsuperscript{129} \textit{Rauscher}, 119 U.S. 407.
\textsuperscript{130} \textit{Najohn}, 785 F.2d at 1422. \textit{Accord United States v. Jurado-Rodriguez}, 907 F. Supp. 568, 576 (E.D.N.Y. 1995) (“The defendant may raise whatever objection the surrendering country might raise, but only to the extent of the surrendering country’s wishes. The primary concern of international law is satisfaction of the requesting country’s obligations to the requested country.”); \textit{United States v. Puentes}, 50 F.3d 1567, 1572 (11th Cir. 1995); \textit{United States v. Diwan}, 864 F.2d 715, 721 (11th Cir.) (“The extradited individual, therefore, can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty.”), cert. denied, 492 U.S. 921 (1989). See generally Chabner, supra n.121, at 1020 (“While most cases have held to the contrary, certain courts have hinted that even absent a formal protest by the nation whose territorial sovereignty was violated, an abducted individual would have standing to argue that the United States failure to extradite according to the terms of an existing treaty should divest a court of its personal jurisdiction.”) (citing \textit{United States v. Thirion}, 813 F.2d 146, 151 (8th Cir. 1987)).
\textsuperscript{132} Dugard & van den Wyngaert, supra n.113, at 201; Evans, supra n.38, at 217.
\textsuperscript{133} Michell, supra n.18, at 437.
b. Diplomatic Remedies

This section turns from judicial to diplomatic matters. More specifically, it explores which types of diplomatic recourse, including legally sanctioned remedies, are available to an injured State, whether the transferor State or the State of whom the fugitive is a national, following his rendition via a full-scale operational alternative to extradition. Outside the scope of this analysis lie options that can be pursued by the injured State on its own, that is, without any inter-State communication or intervention, such as financially compensating the families of the fugitive or any other collaterally injured parties; calling for an investigation or inquiry to understand exactly what happened and to avoid such situations arising in the future; or exacting punishment on anyone within its jurisdiction believed to have participated in or otherwise facilitated the subject operation.

In broad terms, three forms of diplomatic recourse may be undertaken either in isolation or, more commonly, in some combination: (i) demands, (ii) retaliation, and (iii) engagement. Any diplomatic recourse typically would follow a registered protest of the offensive conduct issued via one or more diplomatic notes conveyed between one State’s ministry of foreign affairs and the other State’s embassy. In any event, such protests must be issued by the executive branch of the injured State – not by a surrogate State or entity or even by the host State’s legislature. Injured States are less inclined to protest “more routine treaty

---

134 See Paul O’Higgins, *Unlawful Seizure and Irregular Extradition*, 36 B.Y.B.I.L. 279, 293-94 (1960) (When in 1807 the British ship Leopard attacked an American frigate, the Chesapeake, in order to search for and arrest deserters from the Royal Navy, the British Government eventually agreed to . . . pay money compensation to those injured in the brief encounter’).


136 See O’Higgins, *supra* n.134, at 293-94 (discussing the 1807 Leopard-Chesapeake incident in which the British Government eventually took “disciplinary measures against the captain of the Leopard”).


138 Michell, *supra* n.18, at 424.
violations” because of their tendency to “create or heighten political tensions between the countries.”

i. Demands

A demand by an injured State is directed toward the transferee State and requests some specific action on its part. The four major types of demands include: (i) an official apology or acknowledgment of fault, (ii) repatriation of the rendered fugitive, (iii) extradition of any perpetrators, and (iv) monetary compensation or other reparation. A transferee State’s failure to meet an injured State’s demands can result in retaliation or other negative consequences.

It is possible that one demand can be bargained away for another, as when in 1935, the U.S. offered to return to Mexico a seized fugitive (López) in exchange for Mexico dropping its extradition request for Hernandez, one of the two government agents who had carried out López’s seizure. In addition, a demand may not always be necessary to solicit the desired response, as a transferee State may reconsider its action sua sponte and volunteer to make reparations, as occurred in 1967, when after South Korea had seized 17 of its own nationals from German territory, South Korea issued an official apology to the FRG and offered to facilitate the return of those Koreans who had been taken against their will and who wished to return.

139 Levitt, supra n.16, at 1038 n.96.
140 “It is a principle of international law that the breach of engagement involves an obligation to make reparation in an adequate form.” Chorzów Factory (Jurisdiction) (Ger. v Pol.), 1927 P.C.I.J. at 21 (ser. A) No. 9 (July 26, 1927).
141 For example, in 1989, then-U.S. State Department Legal Adviser Abraham Sofaer recognized that the U.S. government’s unwillingness to extradite its agents involved in an authorized mission to secure a given fugitive “could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.” Statement of Abraham Sofaer, The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities, Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 101st Cong., 1st Sess. at 14-15 (1989) [hereinafter Sofaer Testimony].
142 Villareal & Hernandez v. Hammond, 74 F.2d 503 (5th Cir. 1934).
**Official Apology or Acknowledgment of a Breach.** An injured State may demand the issuance of an apology or at least a public acknowledgment that the subject rendition was in breach of international law. Such a request was made by Argentina of Israel following the SDO of Adolf Eichmann from Buenos Aires in 1960.\textsuperscript{144} Israel’s apology to Argentina took the form of a joint communiqué in which Israel acknowledged that it had “infringed fundamental rights of the state of Argentina.”\textsuperscript{145} Although an apology may be appropriate and sufficient in some instances, in others where, say, an individual “has been subjected to prolonged detention or convicted and sentenced to severe penalties,”\textsuperscript{146} it would not.

**Repatriation of the Fugitive.** It is a precept of State responsibility that when a State has violated its international obligations, reparations should seek to the extent possible to restore the *status quo ante*, which in the case of a rendered fugitive, would entail his repatriation.\textsuperscript{147} At the same time, however, an injured State must specifically request the fugitive’s repatriation or return in its protest letter(s), as repatriation is not always sought\textsuperscript{148} and will not necessarily be assumed.\textsuperscript{149}

---

\textsuperscript{144} Argentina originally sought Eichmann’s repatriation from Israel, but in the joint communiqué, Argentina dropped that demand and sought only international censure and an apology. Michell, *supra* n.18, at 423-24.


\textsuperscript{146} *Chorzów Factory* (Indemnity) (Ger. v Pol.), 1928 P.C.I.J. at 47 (ser. A) No. 17 (Sept. 13, 1928) (“reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”); *Legal Opinion on the Decision of the Sup. Ct. of the United States in the Alvarez-Machain Case*, ¶ 10, Inter-Am. Juridical Comm., Perm. Council of the OAS, CP/RES. 586, CP/Doc. 2302/92 (1992), reprinted in 13 Hum. Rts. L.J. 395 (1992) and 4 CRIM. L. FORUM 119 (1993) (“Pursuant to the rules governing state responsibility in international law, any state that violates an international obligation must make reparations for the consequences of the violation. The reparation has the purpose of returning, to the extent possible, the situation to the way it was before the transgression occurred. Only to the extent that this would prove impossible, or that the aggrieved party would so agree, could there be room for any substitute reparation.”).


\textsuperscript{149} *Restatement (Third)*, *supra* n.19, § 432 cmt c; Matorin, *supra* n.114, at 928 (distinguishing between a “protest” and a “demand”); *Verdugo-Urruguez* Case, 939 F.2d 1341, ¶ 88 (“Mexico’s silence after a treaty violation will be construed as a waiver of its rights.”) (Browning, J., dissenting op.).
customary international law (CIL) authority supports the proposition that when an
injured State calls for the repatriation of a fugitive, the transeree State is expected
to return him.\textsuperscript{150} Examples from various jurisdictions include: the U.K. (\textit{Vincenti}
case\textsuperscript{151}); Germany (\textit{Jacob-Salomon case}\textsuperscript{152}); France (\textit{In re Jolis case}\textsuperscript{153}); Denmark
(\textit{The Red Crusader case}\textsuperscript{154}); Italy (\textit{Mantovani case}\textsuperscript{155}); the U.S. (\textit{Jaffe case}\textsuperscript{156}); and
South Africa (\textit{Higgs case}\textsuperscript{157}).

\textbf{Extradition of the Perpetrators.} An injured State may request that, pursuant to a
bilateral or multilateral extradition treaty, the transeree State deliver those
individuals who participated in a unilateral rendition on a charge such as
kidnapping or fraud. Mexico, for example, has sought such perpetrators from the
U.S. on multiple occasions, including in 1934 when it sought the extradition of
Villareal and Hernandez for their role in seizing López (discussed supra), in 1992
when it requested the extradition of two DEA agents who were believed to have

\textsuperscript{150} Michell, \textit{supra} n.18, at 427. \textit{Contra O’Higgins, supra} n.134, at 281-82 (discussing case in 1569 in
which, despite two demands by the Spanish ambassador to England for the return of Dr. John Story,
who was the subject of a lure operation out of Spanish-controlled Antwerp, England refused to return
him).
\textsuperscript{151} \textit{In re Vincenti} (1920), \textit{reprinted in 1 Green H. Hackworth, A Digest of International Law} 624
(1940); see also \textit{O’Higgins, supra} n.134, at 293-94 (“British practice is in accordance with the
principle that in case of apprehension in violation of international law there is an obligation upon the
arresting State to restore the person arrested.”).
\textsuperscript{152} See Lawrence Preuss, \textit{Settlement of the Jacob Kidnapping Case (Switzerland-Germany)}, 30 AJIL 123
(1936) (discussing how Berthold Jacob-Preuss, a Jew, was seized by the Nazis in Switzerland and
brought back to Germany, only to be later repatriated to Switzerland).
\textsuperscript{153} \textit{Jolis Case, supra} n.85.
761, 834-35 (1965) (discussing how following Switzerland’s protest of Italy’s seizure of an Italian
national from Lugano, Switzerland, the fugitive was returned to Swiss custody).
\textsuperscript{156} \textit{Jaffe v. Boyles}, 616 F. Supp. 1371 (W.D.N.Y. 1985) (involving a Canadian citizen, Sydney Jaffe, who
was charged by the state of Florida with land sale fraud, and after he fled to Toronto was seized by
state agents and returned to Florida to face prosecution); see also Brkljacic, \textit{supra} n.7, at 125 n.53
(upon Canada’s demand that Jaffe be repatriated, and with the support of the U.S. State and Justice
Departments, Jaffe was released back to Canada).
\textsuperscript{157} See Alona E. Evans, \textit{Acquisition of Custody over the International Fugitive Offender—Alternatives to
Sept. 3, 1964, at 3) (“In kidnapping of Dennis Higgs from Northern Rhodesia to Union of South Africa
in August 1964, the South African Government, which wanted him on charges of participation in a
bomb explosion, agreed to return him to Northern Rhodesia in view of the ‘unusual circumstances of
the case.”).
organized the SDO to bring Humberto Álvarez-Machain to the U.S.,\textsuperscript{158} and in 2003 when it called for the extradition of three bounty hunters for their role in seizing from Mexican territory a U.S. national previously convicted of raping three women.\textsuperscript{159} While it is highly unlikely that a transferee State would turn over its officials or agents involved in an “authorized mission,”\textsuperscript{160} a State likely would have little reluctance to transfer to an injured State for trial individuals like bounty hunters who operated without government authorization.\textsuperscript{161}

**Monetary Compensation or Other Reparation.** In principle, an injured State could also request monetary or other forms of reparation to compensate for a suffered injury.\textsuperscript{162} Such forms of reparation are rare, however, as reflected by the following observation:

> There seems to have been no case in which the United Kingdom has granted monetary compensation to the aggrieved State in addition to restoring to it the person unlawfully seized. Money compensation paid in the *Chesapeake* case was in respect of death and physical injury to the crew as a result of the unlawful attack.\textsuperscript{163}

That said, in one reported case almost 100 years ago decided by an arbitral tribunal, $500 in damages was awarded to Panama regarding the unlawful seizure of a man named Colunje from Panamanian territory who was lured to the U.S.-controlled Panama Canal Zone where he was prosecuted, but notably even there the reparation


\textsuperscript{160} Sofaer Testimony *supra* n.141, at 14-15.


\textsuperscript{162} See Michell, *supra* n.18, at 422 & n.199 (noting the possibility of financial compensation).

\textsuperscript{163} O’Higgins, *supra* n.134, at 296-97.
was not based on a demand by one State of the other.\textsuperscript{164} This author has not uncovered any other examples of monetary compensation in this context, but conceivably an injured State could request other kinds of “reparation” that could include, by way of illustration, most favored trade status, increased development aid, or support for its membership in the European Union.\textsuperscript{165}

\textbf{ii. Retaliation}  
A second option available to an injured State in the aftermath of a unilateral operational alternative to extradition is retaliation. Retaliation can manifest itself in any number of ways, but each can fit into one of two major categories: (i) negative actions, such as denial or disengagement, and (ii) proactive measures, including reciprocal operations and active hostility.

\textit{Negative Actions.} An injured State may seek to retaliate by cutting off diplomatic relations with the transferee State. This can occur by removing one’s ambassador from the transferee State and/or by expelling the transferee State’s ambassador from the injured State’s capital. Examples of this practice can be found in connection with the Eichmann and Luk seizures (discussed supra) from Argentina and Egypt, respectively. An injured State also may elect to withdraw from cooperation with the transferee State by disengaging from economic, trade, or law enforcement cooperation,\textsuperscript{166} including by not attending scheduled summits or

\begin{footnotesize}
\begin{enumerate}
\item Id. Monetary compensation is more common and appropriate when awarded to individuals than to States. In one such case, a financial sum was awarded to the widow of Colonel Ameekrane as part of a settlement arising out of the European Commission of Human Rights’ ruling, following an SDO carried out between Moroccan and Gibraltar authorities that led to his killing once he was brought back to Morocco, which had imposed the death penalty on him for his rebellious activities. \textit{See Ameekrane v. U.K.}, ECTHR, Appl. No. 5961/72, Eur. Comm’n of HR Decision, Oct. 11, 1973, 44 C.D. 101.
\item Another form of reparation found to be appropriate under ICJ jurisprudence, at least when an individual’s consular rights were violated, is for the violating State to “provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of the defendants involved. \textit{Avena and Other Mexican Nationals} (Mex. v. U.S.), 2004 I.C.J. Rep. 12, ¶ 153(9) (Mar. 31), available at \url{http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&PHPSESSID=910c3f12fe366a0bad0ec88e89326bddd&PHPSESSID=910c3f12fe366a0bad0ec88e89326bddd&case=128&code=mus&p3=4} (last visited on Aug. 24, 2014).
\item For example, in 1807, U.S. President Thomas Jefferson ordered a trade embargo on Great Britain after a British ship, the \textit{HMS Leopard}, attacked the \textit{USS Chesapeake}, and seized sailors from her crew,
\end{enumerate}
\end{footnotesize}
conferences.\textsuperscript{167} Another “negative” approach to retaliation would arise where an injured State (or one otherwise allied with or sympathetic to an injured State) refused to satisfy the transferee State’s requests for extradition in the future.\textsuperscript{168} Yet another countermeasure would be to suspend a bilateral treaty, most likely an extradition treaty, with the pursuing State.

\textbf{Proactive Measures.} An injured States can also retaliate through affirmative steps, including by taking reciprocal action, namely, by rendering a fugitive of its own from the territory of the transferee State by the same means perpetrated against it (e.g., via an LCO or SDO). For example, to retaliate for Israel’s 1986 interception of a Libyan aircraft, Libyan president Muammar Qaddafi threatened that any Israeli civilian aircraft detected flying in Libyan airspace would be forced down and its passengers searched for “Israeli terrorists.”\textsuperscript{169} Another approach would be to urge other States to refuse to cooperate in one way or another, including on extradition requests, with the transferee State. An extreme application, but unlawful under international law today, would be to launch a retaliatory military intervention. In 1861, during the U.S. Civil War, in reaction to a Union warship intercepting a British ship in international waters and removing two Confederate commissioners, Great Britain ordered the deployment of 8,000 troops to Canada in preparation for war,\textsuperscript{170} although this never materialized in an attack.

\footnotesize
\textsuperscript{167} Such disengagement need not be limited to the injured State; it also can be effected by third States offended by the transferee State’s underlying conduct or subsequent reaction. For example, in response to U.S. military intervention in Panama in 1989, Peru recalled its ambassador from the U.S. and opted not to attend a drug summit scheduled in February 1990 in Colombia. “Colombia Decrees Intervention; Peru Recalls Envoy; Guerrillas Ask for Role,” Wash. Post, Dec. 22, 1989, at A33.


\textsuperscript{170} Pyle, \textit{supra} n.40, at 266 (adding that, in response, U.S. President Lincoln agreed to release the two men).
iii. **Engagement**

Alternatively, an injured State might choose to: (i) engage the transferee State to deter such incidents from occurring by amending applicable bilateral treaty provisions, (ii) seek resolution or satisfaction through third-party intervention, and/or (iii) pursue longer-term improvements to the extradition regime through multilateral dialogue.

**Bilateral Treaty Relations.** An injured State could try to renegotiate the terms of an operative bilateral extradition treaty with the transferee State or otherwise enter into a protocol effectively amending the extradition treaty to avoid future offensive application. In 1988, a year after bounty hunters seized Sidney Jaffe from Toronto and returned him to Florida, Canada and the U.S. agreed to a protocol to their extradition treaty, the impetus of which was to ensure U.S. cooperation in preventing and punishing future bounty hunter-led SDOs in Canada.\(^{171}\) Similarly, in November 1994, shortly following the 1992 U.S. Supreme Court decision in Álvarez-Machaín, and at Mexico’s behest, the two States concluded a Treaty to Prohibit Transborder Abductions as a protocol to their extradition treaty,\(^{172}\) although to date the U.S. Senate has not ratified the protocol.

**Third-Party Intervention.** An injured State also could try to engage a third party, such as an arbitral panel, the UNSC, or the ICJ, to win leverage toward, or to obtain, reparations, or, alternatively, to seek satisfaction through a vote of condemnation or a declaratory judgment. Although rare, such approaches are not unprecedented. For example, in 1935, after German agents had seized a German national living in Switzerland, and the Swiss government objected, the two States agreed to submit


their dispute to arbitration, although before the tribunal could convene and presumably facing low prospects of success, the German government decided to repatriate the German national to Switzerland. In addition, in 1960, after Adolf Eichmann was spirited out of Buenos Aires by an Israeli intelligence squad, Argentina successfully sought a UNSC resolution condemning Israel for its violation of Argentina’s territorial sovereignty.

**Multilateral Dialogue.** Although not directly related to a given incident, an injured State nevertheless may find it constructive to engage with other States to address the conditions that may have given rise to an objectionable rendition. States could discuss ways to streamline extradition procedures, establish specialized international criminal tribunals that would not be subject to many of the impediments that can thwart inter-State extradition, develop ways to “stigmatize” those States that provide “safe havens” for criminals, fashion liberalized regimes for transferring fugitives modeled on the EU’s European Arrest Warrant, and so forth.

c. **Policy Implications**

Putting aside the policy benefit of bringing offenders to justice, when States pursue full-scale operational alternatives to extradition, especially when compounded by their courts exercising personal jurisdiction over the fugitive defendants, various adverse consequences for world public order reasonably can be expected, most notably the following: (i) promoting disrespect for international law, (ii) fostering

---

173 See Preuss, supra n.152 (discussing case of Berthold Jacob-Salomon).
175 Kovac, supra n.137, at 644 n.164.
177 Pontoni, supra n.6, at 242.
178 See Note, Israeli Precedent, supra n.60, at 1110 (observing that a court’s finding jurisdiction after a “forcible abduction may encourage internationally illegal abductions”).
179 See BASSIOUNI, WORLD PUBLIC ORDER, supra n.24; Evans, supra n.38, at 198-200. For more on the concept of “world public order,” see MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961).
retribution and reciprocity, and (iii) undermining the extradition regime and international law enforcement cooperation more generally.

**Disrespect for International Law.** The failure to comply with established international legal norms, standards, and procedures by breaching treaty provisions, violating territorial sovereignty, and/or trespassing on recognized human rights in order to bring an offender to justice demonstrates a lack of respect for international law.\(^{180}\) As the South African Supreme Court remarked: “Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.”\(^{181}\) When States flout international law, they undercut the long, hard work it has taken to lay those foundations and to create a stable, predictable, and trust-based system for inter-State relations. If States choose to ignore the law, it only “breeds contempt for the law” and “invites anarchy”\(^{182}\) and increases tensions. The more States that act without regard to the law and choose to circumvent it, the fewer remain to insist on its proper operation, as the violators lose standing and credibility to complain when legal liberties are taken.\(^{183}\)

**Retribution and Reciprocity.** As discussed above in the context of diplomatic recourse, injured States, as well as others offended by the way in which a fugitive was rendered from an allied or neighboring State, may choose to wreak vengeance on the transferee State either by reciprocating or by taking other retaliatory measures to express their disapproval. A number of courts and commentators have warned about such a reaction.\(^{184}\) As U.S. Supreme Court Justice Louis Brandeis expressed: “To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution.”\(^{185}\) A

---

\(^{180}\) Mann, supra n.4, at 420.

\(^{181}\) Ebrahim Case, supra n.84, 31 ILM at 898.

\(^{182}\) Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting op.)

\(^{183}\) Abbell, State-Sponsored Kidnapping, supra n.168, at 90 (quoting Abbell’s congressional testimony on July 29, 1992).

\(^{184}\) Mann, supra n.4, at 419 (noting that abductions [SDOs] could trigger reciprocal conduct).

\(^{185}\) Olmstead, 277 U.S. at 485.
U.S. Congressional Research Service (CRS) Report stated that the U.S. conducting SDO-type operations “raises prospects of other nations using similar tactics against U.S. citizens.”\(^\text{186}\) This is not just a theoretical possibility. For example, following the U.S. military intervention in Panama in December 1989, “the Sandinista government ordered troops and tanks to surround the US embassy” in Managua; and “[t]wo well-trained guerrilla movements – Colombia’s nationalist M-19 and Chile’s Manual Rodriguez Patriotic Front – offered to come to the aid of Panamanian forces or by attacking American interests outside the country.”\(^\text{187}\)

**Extradition Regime and International Law Enforcement Cooperation Undermined.** For all of its imperfections, the extradition regime is critical to the international community’s efforts to combat crime. It is only through cooperation that States can hope to bring fugitives to justice, as no single State or small group of States possess the resources and wherewithal to tackle this enormous task through unilateral measures alone.\(^\text{188}\) The extradition regime is not only essential for utilitarian reasons, but also because it reflects certain significant shared values and safeguards important human rights, both substantive and procedural.\(^\text{189}\) The extradition regime is undermined by the incidence of the more aggressive full-scale alternatives,\(^\text{190}\) because of the distrust it evidences in terms of the utility of existing treaties and procedures, as well as the prospect of negotiating new treaties or bringing into force those that have been signed but not yet ratified.\(^\text{191}\) And it is not only the extradition regime itself that will suffer, but also international law enforcement cooperation more generally. As Yale Law Professor Ruth Wedgwood explained: “It’s hard to have your cake and eat it too. If you are going to ask people


\(^{188}\) Abbell, *State-Sponsored Kidnapping*, *supra* n.168, at 90-91.

\(^{189}\) Note, *Israeli Precedent*, *supra* n.60, at 1112.

\(^{190}\) Mann, *supra* n.4, at 420.

\(^{191}\) Abbell, *State-Sponsored Kidnapping*, *supra* n.168, at 87 and 91 (quoting Abbell’s congressional testimony on July 29, 1992).
to cooperate with you in enforcing criminal law, and at the same time stick your finger in their eye by intruding on their territory, that’s not going to last.”\textsuperscript{192}

CONCLUSION

This study has attempted to build a new analytical framework, complete with a refreshed vernacular and a series of typologies, for understanding the panoply of operational means available to a State desiring to bring an international fugitive to justice, and also to evaluate the lawfulness and implications of those means. This Conclusion is divided into three parts. First, it summarizes the overall content of the dissertation; second, it posits several key observations about jurisdiction, extradition, and its alternatives; and third, it proffers a number of constructive recommendations to address or mitigate particular problem areas.

a. **Summary**

This paper began with a set of definitions of core terms, some new and others simply clarified and updated. It then discussed the concept of jurisdiction, which is central to criminal law, and in particular focused on the notion of subject matter jurisdiction, a critical component in bringing a fugitive to justice. Next, it attempted to isolate from the analysis of extradition and its alternatives those instances in which a fugitive finds his way to pursuing State jurisdiction or control by sheer fortuity (so-called “silver platter” scenarios) – whether by voluntary return, erroneous transfer, or involuntary delivery on the part of private/non-State actors. Those cases are not generally problematic from a legal standpoint and represent only a tiny fraction of the fugitive population, many of whom, to the contrary, actively seek out safe havens, adopt pseudonyms or new nationalities, pay off corrupt politicians or law enforcement officers, and/or surround themselves with bodyguards. The remainder of the paper focused on what affirmative steps States can take to secure the custody of fugitives and evaluated their legal and policy significance.
Extradition remains, at least in principle, the single best hope and most widely recognized and (positively) sanctioned mechanism worldwide for bringing fugitives to face justice. For all of its strengths, adaptable features, and ongoing liberalization, however, extradition is replete with impediments, which are set forth herein by way of a comprehensive typology. Those impediments may derive from legal standards or procedures, individual status or circumstances, or State relations or sensitivities. Extradition may be barred based merely on a fugitive’s nationality, advanced age, or frail health, and can entail a protracted, expensive, and uncertain process. Political factors cannot readily be separated from or discounted in extradition decision-making. It may still be possible to secure the extradition of a fugitive, even if at first rejected, via any number of remedial or collateral means, which are then discussed, ranging from court appeals to inducements to third-party intervention.

Because of the often formidable obstacles facing extradition, a State ultimately may choose to pursue an alternative means to extradition for securing a fugitive’s custody. Just as extradition has a long history (more than 3,000 years), so, too, do its alternatives,¹ and have been used with “unexpected frequency.”² Given their close contextual relationship, alternatives to extradition cannot be critically assessed without reference to extradition itself, much like the “death row phenomenon”³ cannot be properly evaluated divorced from the underlying context of capital punishment.⁴

---

¹ “[C]ircumventing extradition . . . is as old as extradition itself and will probably continue to exist as long as courts persist in their current refusal to consider the issue.” Christine van den Wyngaert, *Applying the European Convention of Human Rights to Extradition: Opening Pandora’s Box*, 39 INT’L & COMP. L.Q. 757, 778 (1990).


³ “The ‘death row phenomenon’ is a legal – not a clinical – term perhaps best generally defined as a ‘combination of circumstances to which a prisoner would be exposed if he were sentenced to death’ and placed on death row. The two key circumstances underpinning the phenomenon are the harsh, dehumanizing conditions of confinement and the prolonged period of detention an inmate may endure on death row.” David A. Sadoff, *International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 TUL. J. INT’L & COMP. L. 77, 81-82 (2008) (internal citation omitted).

⁴ See id. at 81 (“The death row phenomenon cannot realistically be detached from the death penalty itself; logically they are inseparable.”).
The alternatives to extradition are highly varied; some (those referred to herein as “fallback” alternatives) have limited objectives to locate and arrest a fugitive or to seek the prosecution of a fugitive in another judicial system; others specifically seek the custody of a fugitive with the intent of prosecuting or punishing him in its own judicial system. The latter set, labeled herein as “full-scale” alternatives, also are varied, and may rely on the host State’s immigration laws, entail informal law enforcement cooperation, or constitute unilateral options. The unilateral options include negotiated returns, lure and capture operations (LCOs), seizure and delivery operations (SDOs), and interception or commandeering operations. Because of their more controversial legal status, the full-scale alternatives give rise to a number of post-return judicial, diplomatic, and world public order policy implications, including personal jurisdiction, individual standing, injured State demands, and the health of the extradition regime and international criminal law enforcement generally.

b. Observations
This subsection covers four sets of general observations about this field: (i) the need for greater terminological and conceptual clarity; (ii) the nature and extent of developments occurring related to jurisdiction and extradition; (iii) some significant outstanding issues; and (iv) the state of play regarding the lawfulness of the full-scale alternatives to extradition.

**Terminological and Conceptual Clarity.** The existing terminology in this field can be a source of confusion, prove misleading, and even adversely influence how one assesses the lawfulness of certain actions. As reflected in Chapter 1, fundamental terms, such as “fugitive,” “extradition,” “surrender,” “deportation,” and “disguised extradition,” do not have uniform definitions and their usage is to some extent imprecise. In addition, while at times underlying facts remain publicly unknown, far too often even when information is fully adequate, deportations are mislabeled as extraditions and extraditions are mistakenly referred to as surrenders. Notably, such confusion can skew lawfulness determinations to the extent that certain transfers are improperly categorized and therefore subject to an erroneous legal standard. Likewise, certain terms
like “rendition,” “lure,” and “seizure” are applied generically when each can, and should, be differentiated for maximum clarity by sub-category according to their destination of custody or control (tactical v. strategic) and the nature of the operation itself (unilateral v. consensual v. cooperative v. joint).

In addition, use of the terms “asylum State” and “forum State” can be misleading when relied on to denote the States involved in a given operation to secure a fugitive’s custody. Those terms may prove helpful only after a fugitive has been located and delivered rather than when the subject of interest remains at large. Instead, the terms “host State” and “pursuing State” lend greater precision. Furthermore, terms like “abduction” and “kidnapping,” by definition, tend to prejudge the unlawfulness of certain activities whereas the newly coined term “seizure and delivery operation” more accurately and non-judgmentally describes the activity at issue, which may or may not ultimately prove to be a violation of international (or domestic) law.

Linked to the absence of terminological clarity is a lack of conceptual clarity. Frequently courts and legal commentators alike treat the male captus bene detentus rule, which is a neutral rule of non-inquiry, as if its application were tantamount to a court’s blessing the underlying law enforcement action that brought a fugitive within the court’s jurisdiction. It is not; rather, it simply stands for the proposition that the court should carry out its role in adjudicating criminal charges when it has personal jurisdiction over a fugitive defendant and does not believe it is its business to review inherently political decisions to be properly carried out by executive branch officials or agents.

It is also complicating that this field of law has two different types of due process, two separate rules of non-inquiry, two varieties of “concurrent jurisdiction,” two forms of jurisdiction in general (subject matter and personal) and two types of individual standing (pre-rendition and post-rendition) that are not always adequately distinguished. Likewise two closely related but distinct concepts, such as extraditable offenses and dual criminality, or concurrent jurisdiction and competing jurisdictional claims, are often treated as
synonymous when they are not. Other conceptual issues include the fact that “silver platter” scenarios, collateral or remedial means to secure extradition, and “extraordinary renditions” are often regarded as genuine extradition alternatives when none strictly qualifies. Moreover, conceptual clarity is lacking with respect to how cases are categorized and evaluated; for instance, many lump all “lure” cases together regardless of the participants involved, informal law enforcement operations may be classified as deportations, and some SDOs may be regarded as a form of informal law enforcement cooperation despite the fact that host State officials were acting in their personal capacity.

Recent Developments. As a field, international criminal procedure and cooperation has experienced a number of striking changes in the past few decades. Let us begin with jurisdiction. With regard to subject matter jurisdiction, the U.S., among others, has sought since the 1980s to extend its extraterritorial reach especially over terrorists and narco-traffickers, mainly by liberalizing the use of the passive personality principle to crimes committed against American nationals abroad. With respect to personal jurisdiction, there is a discernible inclination on the part of a number of States’ courts away from a strict male captus posture, at least to the extent that the gravest crimes are not involved and where either a State has complained that its sovereignty has been breached or evidence exists that police conduct was such that it would shock the conscience. Relatedly, States’ courts increasingly are granting individual standing to fugitive defendants to challenge criminal charges on specialty grounds.

As far as extradition is concerned, recent years have witnessed a number of States, including China, which traditionally did not rely on extradition treaties entering into new treaty arrangements for the transfer of fugitives. We also have seen domestic legislation or constitutional amendments introduced with the intention of facilitating extradition (including the elimination of nationality bars and simpler ways to satisfy the dual criminality standard) and States now granting extradition under circumstances that previously would have yielded denials. In addition to an overall uptick in the usage of extradition worldwide
and the advent of creative yet formal inter-State surrogates for extradition treaties, we have also observed new and improved mechanisms for regional extradition cooperation, most notably the European Arrest Warrant (EAW).

**Outstanding Issues.** For all the recent positive developments outlined, a number of significant unresolved or outstanding issues remain. To begin, *geography matters.*\(^5\) States vary considerably not only in their overall common or civil law complexion, but also in their extraterritorial jurisdictional reach, their faith in the extradition regime, their willingness to grant asylum or serve as a “safe haven” for fugitives, their handling of extradition requests, their predisposition to consider alternatives to extradition to secure the custody of fugitives, their tendency to rely on political versus legal bases for decision-making, and their inclination to exercise personal jurisdiction even in the face of an apparent abuse of process. Accordingly, the lack of consistent treatment renders certain States more extradition-friendly or –hostile than others, and therefore tends to influence where fugitives choose to move or reside, and where a fugitive is located may ultimately dictate the disposition of a given case.\(^6\)

Key issues that continue to divide the international community include whether and how to treat political offenses as an extradition exclusion, whether States should exempt their own nationals from extradition, how to detect “disguised extradition” and how to handle such cases, whether a lure and capture operation (LCO) should be considered unlawful when an operative extradition treaty was

---

\(^5\) *Timing* also matters, as there may well be, as reflected in examples seen herein, strong political pressures based on recent or pending circumstances (e.g., terrorist threats, extradition cooperation or failure to respect territorial sovereignty by the pursuing State, or the compelling need for trade or development opportunities) that may dictate a certain decision. Timing also relates to how new or old an applicable extradition treaty is, as the treaties of newer vintage tend to be more progressive, on average, than the historical ones.

\(^6\) *See generally* Am. Bar Ass’n, “Overcoming Legal Challenges in Extradition,” Charles A. Caruso, Asia Law Initiative, Undated, *available* at [http://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_charlescaruso_overcoming.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_charlescaruso_overcoming.authcheckdam.pdf) (last visited on Oct. 19, 2013) (“[M]uch of the legal regimen that now surrounds extradition is the result of the significance given to various recurring legal themes by the individual national judiciaries. Thus in discussing overcoming legal challenges in extradition, as with all things left to the disparate national judiciaries, we find differences as well as similarities between jurisdictions.”). At the same time, some States themselves maintain internally inconsistent case law in this arena, such as the U.S. particularly with respect to the political offense exclusion and the specialty rule. *See* discussions in Chapters 5.a.iv and 7.b.ii, respectively.
not invoked by the pursuing State, whether courts should assert personal jurisdiction in the face of unlawful pursuing police conduct, and whether courts should regard unilateral means of securing a fugitive's custody as falling outside the scope of an extradition treaty where no provision indicates that extradition is intended to be the exclusive means of securing a fugitive's custody.

**Lawfulness of Full-Scale Alternatives.** The overall record of lawfulness of the (operational) full-scale alternatives to extradition is inconsistent and unsettled. That said, by carefully and systematically classifying all such operations, at least the lawfulness analysis can come into sharper focus. While some international law exists in this arena, the majority of court opinions appear to be driven mainly by domestic law and political considerations, and consequently it is difficult to ascertain much by way of clear legal guidance of general applicability. At bottom, however, it is clear that little in this field is categorical, but rather can be more accurately characterized by various “nooks and crannies” that complicate any straightforward assessment of lawfulness.

With respect to reliance on immigration laws, putting aside the constraints arising out of human rights law that apply regardless of whether an alien is an individual of law enforcement interest, there is the issue of “disguised extradition.” While some national laws expressly proscribe its use, much international and domestic case law support the practice. In such cases, courts tend to pay considerable deference to States, unless there is compelling evidence suggesting *mala fides* on their part. The judicial holdings that address the issue tend to be based on breaches of *domestic* law, are co-mingled with other international human rights violations that frequently occur in connection thereof, and often fail to cite to any specific international legal sources or standards to justify its illegality. Most courts appear to take a nuanced position by essentially examining whether the intent of the removing State was proper and limited in terms of strictly adhering to its domestic immigration laws or, alternatively, was primarily aimed at working in collusion with another State to bring a fugitive to justice.
For the most part, operations undertaken in the guise of informal law enforcement cooperation are less vulnerable to international legal challenges for several reasons: the operations occur before the fugitive can seek to enjoin his rendition from the host State; they are carried out consensually so that the host State generally does not protest that its territory was violated or an applicable treaty was breached; and absent such an official protest, the fugitive defendant often is not granted individual standing to challenge the criminal court’s personal jurisdiction. Where challenges have arisen in the transferee State, although a few courts have found a violation on the ground of disguised extradition, collusion, and/or arbitrary arrest and detention, by and large, courts are not concerned by any due process violations that may have occurred in the transferor State so long as pursuing State officials or agents were not involved.

As for LCOs, whether undertaken to intermediate locations (tactical) or to pursuing State territory or custody (strategic), and whether conducted on a unilateral, consensual, surrogate, or joint basis, there appears to be no clear consensus under international law regarding their legality. Although no express prohibition exists in treaty law and there is no customary practice opposing its use (particularly in light of States’ not infrequent reliance on this method), there is measurable opposition to the use of LCOs (especially when one of its own nationals is the victim). To the extent this practice is tolerated, States cite to the fact that it is conducted without physical force, does not pose an affront to another’s territorial sovereignty, and does not offend the public conscience. States finding the practice unlawful tend to focus on it as fraudulent behavior, a form of infringement on one’s territorial sovereignty, and a circumvention of extradition to the extent an extradition treaty should be construed as providing the exclusive means available for returning fugitives.

As a general rule, SDOs – whether manifested as clandestine snatches, cross-border raids, or military invasions – represent clear violations of international law on three fronts: territorial sovereignty, treaty compliance, and human rights. To begin, there is virtually no legal justification for launching a military attack on another State to seize a fugitive, save possibly (and narrowly) on customary self-
defense grounds and then certainly under circumstances far different from those at play in Panama in December 1989. As for clandestine snatches and cross-border raids, in the context of territorial sovereignty, their only plausible legal ground would be consent or acquiescence on the part of the host State, a UNSC resolution authorizing such an operation (this has yet to occur), or customary self-defense (only to the limited extent recognized), assuming the operation did not occur on occupied territory, failed State territory, or non-sovereign territory/international space (in which case other exceptions could apply). The “efficient breach” or other identified cross-cutting justifications, while perhaps conceptually appealing, have not yet earned the support of the international community.

Treaty violations would vary according to the specific facts at hand (including who is a party to those treaties and any declared limits to such adherence), but any extradition treaty would be considered violated only by those States who view such a treaty as supplying the exclusive means for the rendition of a fugitive between its parties. A fugitive’s human rights would be breached to the extent of procedural due process and arbitrary arrest and detention, but these standards are only infrequently assessed because, absent protest by the transferor State for territorial or treaty violations, the fugitive defendant generally is not granted standing to raise the issue and many courts remain reluctant to invoke their supervisory powers or inquire into the underlying means by which personal jurisdiction was obtained.

As for interception operations (no commandeering ones have taken place to date), the lawfulness calculus is more nuanced. Aircraft interceptions tend to be carefully planned to occur over one’s own territory or non-sovereign territory/international space, and because there has been no trespass on the vehicle itself, even if flagged, arguably this technically avoids a breach of territorial sovereignty. Treaty compliance depends, of course, on whether the parties involved have ratified any applicable treaties (and that account for any declarations or reservations) and how those treaties are interpreted, as both Article 51 of the U.N. Charter and the scope of an extradition treaty, for example,
are subject to varying perspectives. That said, the threatened use of force to prompt an aircraft to land is generally frowned-upon within the international community. The human rights analysis for such interception operations is the same as for SDOs.

c. **Recommendations**

Mindful of the above observations, the most successful or promising extradition-related developments in recent years, and the international community's overall interests, the following constructive recommendations are proffered. Their objectives are to: (i) increase the use and effectiveness of extradition; (ii) render operational full-scale alternatives to extradition less necessary; (iii) render operational full-scale alternatives to extradition less desirable; and (iv) diminish the prospect of retaliation or reciprocity by an injured State in the event an operational full-scale alternative to extradition is undertaken.7

i. **Increase Use and Effectiveness of Extradition**

1. **Promote Execution of Bilateral Extradition Treaties or Arrangements.**

Many States today have entered into only a modest number of bilateral extradition treaties. As a result, there remains significant opportunity for the execution of more such instruments. For those States less inclined to follow the bilateral extradition treaty route, they could be encouraged to explore and consider ad hoc arrangements, non-treaty-based cooperative schemes, or the promulgation of domestic laws that would at least contemplate extradition in ways not currently available. One way to precipitate such movement could be to hold a regularly scheduled international criminal law cooperation conference, perhaps co-sponsored by UNODC and/or INTERPOL. Another way would be to more aggressively promote the adoption of the U.N. Model Treaty on Extradition.8

---

7 Consistent with this view, Purdue University Law Professor M. Cherif Bassiouni, arguably the most prolific living author on extradition, has expressed a distinct preference for streamlining the extradition system as opposed to relying on alternative means. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 184 (1974).

2. **Enhance Existing Bilateral or Multilateral Extradition Treaty Provisions.** States should seek to draft, ratify, and enforce bilateral or multilateral extradition treaties that contain more progressive and cooperative provisions that do not bar extradition except in compelling instances. Such treaties should, for example, be more forgiving with submission time limits and not require evidence sufficient to convict but rather only to show probable cause or impose even a lower evidentiary standard. To that end, such treaties should expressly indicate that the parties may jointly waive the provisions of those treaties whenever they like. To avoid confusion, such treaties also should expressly indicate whether or not they intend to operate exclusively of all other means of obtaining extraterritorial custody over a fugitive.

3. **Conclude More Regional or Sub-Regional Extradition Treaties.** Regional or sub-regional extradition treaties, such as the Inter-American Convention or that which exists among the Benelux countries, provide effective models for other regions or sub-regions to adopt, particularly in sub-Saharan Africa, North Africa and the Middle East, the former Soviet Republics, the Baltic States, and Southeast Asia. Such multilateral treaties have the distinct advantage of introducing a greater degree of uniformity and standardization of provisions compared with bilateral treaties, not to mention increased efficiency.9 Ideally, those treaties could be streamlined to allow for less impeded transfers along the lines of the EAW system, but to ensure that no abuse occurs, arrest warrants should only be issued when there is clear and convincing evidence against the fugitive and only when a speedy trial and proper legal representation can be guaranteed for the fugitive upon delivery to the pursuing State.10

---

9 See M. Chérif Bassiouni, *International Extradition: United States Law and Practice* 42 (6th ed. 2014) (describing bilateral extradition treaties as "the most cumbersome form that can be relied upon").

ii. **Render Operational Full-Scale Alternatives to Extradition Less Necessary**

4. **Encourage Reliance on Fallback Alternatives to Extradition.** Chapter 9 sets forth an array of options that could be employed short of a full-scale approach to securing a fugitive’s custody or otherwise seeking his prosecution by another judicial system or tribunal. Examples include seizing or freezing the fugitive’s financial assets; revoking his passport or requesting the host State to revoke his travel authorization; requesting a third State to arrest him upon arrival or, alternatively, to exclude him at the border; or offering a reward for information leading to his capture. These options may well satisfy a pursuing State’s basic objectives without, at the same time, risking international censure, foreign policy fallout, and possible retaliation through the employment of more aggressive full-scale alternatives.

5. **Agree to Adopt Aut Dedere Aut Judicare as the General Rule.** Aut dedere is already mandatory in a large number of international crime control treaties and is arguably close to becoming customary international law.\(^1\) States parties to those international conventions that do not currently make aut dedere compulsory could seek respective protocols to employ aut dedere in all cases in which host States that choose not to extend asylum, grant amnesty, or extradite a pursued fugitive pursuant to a legitimate extradition request would be obligated to consider prosecution in good faith.\(^2\) To ensure each convention’s effectiveness, the accompanying protocols could contain enforcement provisions that called upon the UNSC to insist on compliance under the threat of economic sanctions. To sweeten the deal, States parties could be asked to make annual contributions into a collective pot that could be used to assist the less well financially endowed among them in carrying out any prosecution in such circumstances. Such an agreement would have the added benefit of helping

---


\(^2\) Id., ¶ 39 (“[I]t seems that the duty to cooperate in the fight against impunity may be realized in the best and most effective way by the application of the principle of aut dedere aut judicare.”).
States eliminate any reputation they have established, fairly or unfairly, as “safe havens” for fugitives.

6. Establish Permanent UN-Based Tribunal for Prosecuting Selected Cases. Certain kinds of cases tend to be less prone to extradition approval. Among them are cases in which terrorist crimes are involved to the extent such underlying acts qualify under the political offense exclusion, cases in which the host State is concerned about human rights treatment in a pursuing State, and cases where host States refuse to extradite their own nationals. A permanent (versus temporary or ad hoc) U.N. tribunal, modeled to an extent on the concurrent jurisdiction of the ICTY and ICTR, could be established to handle such prosecutions, with decisions regarding in which States convicted fugitive defendants would be incarcerated. Such a court would ensure that criminals were brought to justice while overcoming many of the obstacles now encountered in the existing extradition regime and by providing a politically neutral forum with fair trial procedures. Such an approach may meet with some resistance by those States that opposed the International Criminal Court (ICC) and/or that remain skeptical regarding such a forum’s capacity for political even-handedness. In addition, experience with the ICTY and ICTR has not been altogether positive; many question their relative benefit in light of the high costs incurred, and “tribunal fatigue” may discourage others from this approach.

iii. Render Operational Full-Scale Alternatives to Extradition Less Desirable

7. Stay Criminal Proceedings in Discretionary Circumstances. As discussed in Chapter 13.a.i, some domestic courts will stay proceedings for lack of personal jurisdiction in instances where an abuse of process has been found, while others decline to do so. The former has been referred to as the “due process” model

---


while the latter as the “crime control” model. One middle-ground approach would be to stay proceedings on a discretionary basis solely to the extent that the court’s moral integrity would be compromised if it heard the criminal charges under the questionable or unlawful conditions in which the fugitive defendant came under the court’s jurisdiction. Alternatively, abuse of process could be established as the proper basis to stay proceedings except in cases where the underlying crime was particularly grave, such as war crimes, crimes against humanity (CAH), or slavery. If either of these approaches were adopted by States’ judiciaries, their respective executive branches might well be less inclined to undertake certain full-scale alternatives to extradition, particularly unilateral SDOs, knowing that the proceedings might be stayed and the defendant released due to the means used to secure custody.

8. Permit Fugitive Defendants to Challenge Rights Violations. With narrow exception, fugitive defendants are not presently conferred individual standing to challenge the court’s personal jurisdiction based on rights violations they allegedly experienced. A few courts permit a fugitive defendant to raise a specialty claim on his own, absent the transferor State’s protest, and others have recognized individual standing with respect to ill-treatment in connection with how he was physically transferred to the court’s jurisdiction. Were fugitive defendants allowed to raise such specialty and human rights claims, which are directly relevant to them (versus claims based on a violation of territorial sovereignty or a breach of an extradition treaty or other arrangement), this would seem not only fair to a potentially injured party, but also acknowledge that States must “recognize that sovereigns should represent the interests of

15 Andrew L.-T. Choo, Abuse of Process and Judicial Stays of Criminal Proceedings 87 (1993). One legal commentator has proposed applying the logic of declining jurisdiction over unlawfully seized individuals just as is done with illegally seized evidence. 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, 442 & n.84 (1957). This proposal would fall within the “due process” model and would, in this author’s judgment, go too far.
16 Choo, supra n.15, at 109.
17 See Rosalyn Higgins, Problems and Process: International Law and How We Use It 72-73 (1994). Alternatively, instead of staying proceedings, courts could adopt new sentencing guidelines where the length of prison terms is reduced based on the underlying harm caused.
their people”18 – not just the sovereign rights of other States. Furthermore, the prospect of such challenges ought to have a sobering influence on States contemplating an aggressive full-scale alternative to extradition.

9. Erect a Specific, High-Threshold Legal Standard for the Exercise of an SDO. Evaluating the lawfulness of an SDO bears some similarity to appraising the legality of an anticipatory self-defensive strike.19 Both sets of actions basically lie outside the international legal framework but both have been introduced into State practice out of a sense of practical necessity and at least under highly restricted circumstances arguably could pass legal muster. Both also rely on either soupy or disaggregated international legal standards. There is some merit in constructing a clear, sensible, balanced, and consolidated legal standard that could apply to SDOs that would help the international community assess a given operation’s compliance with international law.

Such a standard ought to set a high threshold and presumably would consist of such required elements as the following:

(i) the underlying crime should be significant and of an international character;

(ii) there should be strong, if not compelling, evidence of the underlying crime;

(iii) the pursuing State should have unequivocal extraterritorial jurisdiction under its domestic law to conduct the operation;

(iv) (a) the host State should have demonstrated an unwillingness or inability either to prosecute or extradite the fugitive or has brought him to a sham trial, (b) based on the historical record and current political realities, the host State would be virtually unlikely to extradite or prosecute, or (c) no feasible alternative

---

otherwise existed to obtain custody of the fugitive ("necessity");

(v) there should be limited infringement of territorial sovereignty, consistent with strictly meeting the operational objective, while posing a minimal risk of collateral damage or injury ("proportionality");

(vi) all practicable and reasonable efforts have been taken to protect and respect the fugitive’s human rights in the manner in which he was apprehended and transferred, including an opportunity for him to consult an attorney and contact his family and embassy; and

(vii) the host State reported the action, together with salient operational details, to the UNSC within a reasonable time after the operation occurred.

iv. **Diminish Risk of Retaliation Following Unilateral Operations**

10. **Promote Greater Reliance on Binding Arbitration to Resolve Disputes.** Contemporary extradition treaties and other agreements tend not to provide dispute settlement clauses, but, as we have seen, unilateral operations can trigger inter-State tension and result in retaliation or reciprocal actions. States should agree in their future bilateral or multilateral extradition treaties that, to the extent conflicts arise regarding the exercise of unilateral extraterritorial enforcement actions, they will submit to binding arbitration to resolve the dispute.20 Binding arbitration would be preferable to the existing systemic reliance on domestic courts (which may not inquire into the underlying executive branch actions) or even the ICJ (which has its own jurisdictional constraints).21 No substantive or procedural limitations necessarily would be imposed on the arbitral tribunal, and the arbitrators would operate without binding precedent but could draw freely upon judgments as persuasive authority from other tribunals as they saw fit.

20 See United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934); Charles Cheney Hyde, The Extradition Case of Samuel Insull Sr. in Relation to Greece, 28 AJIL 307 (1934).

21 Notably, Article 28 of Harvard Research suggested the PCA to be the default tribunal where pre-existing mechanisms were not in place to resolve inter-State differences arising out of extraterritorial enforcement actions. Draft Convention on Research in International Law of the Harvard Law School, "Jurisdiction with Respect to Crime," 29 AJIL 435 (Supp. 1935).
Arbitration is a proven mechanism, and has been used successfully in extradition alternative cases, including by the Permanent Court of Arbitration (PCA) and pursuant to bilateral treaties. One need only look to the increasing trend of "arbitralization" of the ICJ\textsuperscript{22} to confirm that States are generally amenable to this form of dispute resolution. Particularly muscular or weak States might, however, be more reluctant to enter into such an arrangement, there could be an issue of enforcing rulings, there would not necessarily be an opportunity to appeal an unfavorable judgment, and "[t]here is little, if anything, to support the primacy of \textit{restitutio in integrum} in international arbitral practice."\textsuperscript{23} Nevertheless, this approach holds promise, and would help defuse tensions, while offering a constructive means to resolve post-return differences by avoiding outright hostility.

*  *  *  *  *  *

Crime, like death and taxes, is an inevitable feature of our world, and appears in a wide variety of guises. Those who commit, or are alleged to have committed, crimes may be located, whether by choice or happenstance, in territory other than that of a State that has charged or convicted them of a crime. In such instances, the challenge posed to individual States and the international community at large is to find reasonable and appropriate ways to bring those alleged or actual criminals to face justice (and, in the process, deter others from committing offenses) without, at the same time, compromising our cherished principles and values, including the rule of law, human rights, due process, territorial sovereignty, and the integrity of the judicial system itself. It is, in a fundamental sense, a matter of striking a delicate balance. In undertaking this exercise, it is clear that States must not stoop to the level of those they

\textsuperscript{22} See Georges Abi-Saab, \textit{The International Court as a World Court, in Fifty Years of the International Court of Justice} (Vaughan Lowe & Malgosia Fitzmaurice eds. 1996).

\textsuperscript{23} CHRISTINE D. GRAY, \textit{JUDICIAL REMEDIES IN INTERNATIONAL LAW} 13 (1987). The term, \textit{restitutio in integrum} means the "re-establishment of the situation which would in all probability have existed if the illegal act had not been committed. That is, it does not expressly involve an order for specific performance, and it goes further than specific performance in that it may involve the rectification of harm already caused by the illegal act." \textit{Id.} at 12-13
themselves find repugnant and seek to prosecute or punish. As U.S. Supreme Court Justice Oliver Wendell Holmes wrote nearly a century ago: “I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”24

24 Olmstead v. United States, 277 U.S. 438, 470 (1928) (separate op.).