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## Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights

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# Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights

Kai I. Rebane

## **Abstract**

This Note argues that nations, in their zeal to prosecute terrorists and pursue fugitives, are trampling on the same fundamental human rights they espouse in the international forum. Part I traces the history of extradition and its safeguards. Part II analyzes problems in modern extradition law and explores the arguments for and against the development of an international standard. Part III argues that current extradition practices violate international law and proposes that an International Criminal Court be established to provide a neutral forum for extradition hearings that will protect rights established by international law. This Note concludes that extradition procedures conflict with international human rights and that only an International Criminal Court can guarantee that individual rights are respected.

# EXTRADITION AND INDIVIDUAL RIGHTS: THE NEED FOR AN INTERNATIONAL CRIMINAL COURT TO SAFEGUARD INDIVIDUAL RIGHTS

Kai I. Rebane\*

## INTRODUCTION

Extradition law<sup>1</sup> and practice have not kept pace with the expanding rights of individuals under international law.<sup>2</sup> Extradition involves the surrender, by one nation to another, of an individual who has been accused or convicted of an offense outside the territory of the former and within the jurisdiction of the latter.<sup>3</sup> Extradition law focuses on the role of the individual in the process of rendition.<sup>4</sup> Until recently, international law addressed only the actions of states<sup>5</sup> and individuals had no standing to allege a nation's violation of international laws.<sup>6</sup> The minimal protection given the individual in the extradition process

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1. Kristin Berdan Weissman, Comment, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 459, 467 (1994). Extradition law refers to a formal process, governed by treaty or custom, through which one nation surrenders an individual to another nation. *Id.*

2. *Report of the Task Force on an International Criminal Court of the American Bar Association*, A.B.A. INT'L L. & PRAC. 1, 46 (1994) [hereinafter *A.B.A. Report*]; see John Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights On Extradition Law*, 15 N.C. J. INT'L L. & COM. REG 401, 415 (1990) (noting extradition law developed long before human rights law). International law concerns the conduct and relations of nations and, to some extent, of individuals. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1990) [hereinafter RESTATEMENT].

3. RESTATEMENT, *supra* note 2, at § 475; JOHN BASSETT MOORE, 1 TREATISE ON EXTRADITION AND INTERSTATE RENDITION ¶ 1 (1891); BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

4. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 572 (1974) [hereinafter WORLD PUBLIC ORDER]. Rendition refers to the formal process of extradition through a treaty. Weissman, *supra* note 1, at 467. Irregular rendition, such as abduction, evolved from the concept of reprisal and occurs outside of a treaty. *Id.* at 465.

5. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 538 (1993). "The traditional concept of international law was one of law between nations." *Id.*

6. WORLD PUBLIC ORDER, *supra* note 4, at 564. "[T]he individual is still not considered a full-fledged subject of international law, and hence, no practical means for the implementation of human rights have been developed which would allow individual redress of wrongs against a given state . . . ." *Id.*

derived from traditional limitations on state power, namely extraterritoriality,<sup>7</sup> and internal mechanisms, such as specialty,<sup>8</sup> dual criminality,<sup>9</sup> and the political offense exception.<sup>10</sup>

Within the last fifty years, however, various international agreements have propelled the importance of individual rights to the forefront of international law.<sup>11</sup> International agreements, including the Universal Declaration of Human Rights<sup>12</sup> ("UDHR") and the International Covenant on Civil and Political Rights<sup>13</sup> ("ICCPR") recognized the individual's standing to assert violations of her rights.<sup>14</sup> The modern trend is to expand

7. *Id.* at 204 n.1. Extraterritoriality is the right of a nation to control everything that occurs within its borders. *Id.*

8. *Id.* at 352-53. Under the doctrine of specialty, an individual may only be tried by the extraditing country for those crimes specified in the extradition request. *Id.*

9. *Id.* at 313. Dual criminality means that the crime alleged must be illegal in both the requesting and asylum state. *Id.* Dual criminality is also called double criminality. IVAN A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 138 (1971).

10. SHEARER, *supra* note 9, at 168. No clear definition of what constitutes a political offense exists. *Id.* It is commonly left up to the courts and commentators to determine what constitutes a political offense. *Id.* Under the generally recognized political offense exception, the requested state may deny extradition if it considers the crime to be politically motivated or connected. Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 656 (1986). "[T]he political offense exception was created to protect individuals from unjust persecution for political beliefs and acts . . ." *Id.*

11. Richard B. Bilder, *An Overview of International Human Rights Law*, in *INTERNATIONAL LAW* 894, 895 (Barry E. Carter & Phillip R. Trimble eds., 1995) [hereinafter *INTERNATIONAL LAW*].

12. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]. "Everyone has the right to recognition everywhere as a person before the law." *Id.* art. VI, at 73.

13. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR]. "Everyone shall have the right to be recognized everywhere as a person before the law." *Id.* art. 16, 999 U.N.T.S. at 177, 6 I.L.M. at 373.

14. Bilder, *supra* note 11, at 900. As individuals acquired rights under international law, they also gained access to the means to vindicate those rights. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 11 (1982) (noting modern ability of individuals to bring claims under international law). The Optional Protocol to the Covenant on Civil and Political Rights requires its signatories to acknowledge the right of individuals to complain of rights violations under the agreement. P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 170 (1992); see Optional Protocol to the Covenant on Civil and Political Rights, Dec. 16, 1966, 1977 Gr. Brit. T.S. No. 6 (Cmd. 6702), 6 I.L.M. 383 (1967). The European Convention for the Protection of Human Rights ("ECPHR") created a commission to receive petitions from any individual or group of individuals alleging a rights violation under the ECPHR by a contracting nation. European Convention for the Protection of Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5; Menon,

human rights and to eliminate traditional barriers to individual standing.<sup>15</sup> The recent narrowing of the political offense exception<sup>16</sup> in extradition law and the circumventing of proper procedure, at a time when human rights is experiencing unparalleled growth, represent grave threats to individual rights.<sup>17</sup>

This Note argues that nations, in their zeal to prosecute terrorists and pursue fugitives, are trampling on the same fundamental human rights they espouse in the international forum. Part I traces the history of extradition and its safeguards. Part II analyzes problems in modern extradition law and explores the arguments for and against the development of an international standard. Part III argues that current extradition practices violate international law and proposes that an International Criminal Court be established to provide a neutral forum for extradition hearings that will protect rights established by international law. This Note concludes that extradition procedures conflict with international human rights and that only an International Criminal Court can guarantee that individual rights are respected.

### I. *THE BIRTH OF INTERNATIONAL HUMAN RIGHTS AND EXTRADITION LAW*

As extradition law developed, international law recognized the importance of protecting the individual.<sup>18</sup> Naturalism<sup>19</sup>

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*supra*, at 171-72. Various other characters and conventions create similar forums for the individual. *Id.* at 172-74 (outlining American Convention of Human Rights and African Charter On Human and Peoples' Rights).

15. Bilder, *supra* note 11, at 900; Darin A. Bifani, Comment, *The Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence*, 41 *BUFF. L. REV.* 627, 695-99 (1993) (discussing formation of international individual rights and raising questions about impact of extradition on those rights).

16. See *supra* note 10 and accompanying text (defining political offense exception).

17. *A.B.A. Report*, *supra* note 2, at 46. "Use of these measures has raised allegations of violations of U.S. Constitutional law, international human rights law, and fundamental U.N. Charter norms . . ." *Id.* "The safeguards of extradition itself . . . and of its consequences . . . are non-existent . . ." CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* 62 (1980).

18. Menon, *supra* note 14, at 153-54.

19. Douglas J. Sylvester, Comment, *Customary International Law, Forcible Abduction, And America's Return to the "Savage State,"* 42 *BUFF. L. REV.* 555, 608 (1994). Natural law believes that all law derives from natural sources, is generally applicable, and limits sovereignty. *Id.*

slowly replaced positivism<sup>20</sup> as the dominant theory of international law.<sup>21</sup> Extradition procedure also changed, becoming more formalized and developing various exceptions and limitations.<sup>22</sup> Recently, nations have begun to circumvent extradition law in response to modern crimes and frustrated law enforcement.<sup>23</sup>

#### A. *International Law and the Increasing Importance of Individual Rights*

International law derives from two sources.<sup>24</sup> Customary law<sup>25</sup> arises from the practice of nations<sup>26</sup> and judicial opinion.<sup>27</sup> Conventional law<sup>28</sup> derives from treaties and conventions.<sup>29</sup> Two main schools of thought exist regarding individual rights in international law.<sup>30</sup> The traditional, or "positivist,"<sup>31</sup> approach claims that individuals only have rights as expressly provided in

20. *Id.* at 609. In positivist theory, law derives from the practice of states and the conduct of international relations through treaty and custom. *Id.*

21. Menon, *supra* note 14, at 153-54.

22. Bifani, *supra* note 15, at 658.

23. See Brigette Belton Homrig, Comment, *Abduction as an Alternative to Extradition - A Dangerous Method to Obtain Jurisdiction Over Criminal Defendants*, 28 WAKE FOREST L. REV. 671, 677 (1993) (discussing use of abduction to obtain jurisdiction).

24. *Id.* at 694.

25. Joseph G. Starke, *Introduction to International Law*, in INTERNATIONAL LAW, *supra* note 11, 141, 142. Customary law is a practice that has obtained the force of law through repetition and usage. *Id.*

26. *Id.* The practice of nations refers to diplomatic relations, the practice of international organs, the laws of nations, decisions of national courts, and national military or administrative practices. *Id.* Customary international law is shaped by non-action as well as positive action. Homrig, *supra* note 23, at 702. A custom need not appear in writing if its existence is taken as a matter of course. *Id.* "A state need not have an explicit treaty or document to recognize a custom." *Id.* "The absence of abductions may indicate an international practice to refrain from illegal abductions." *Id.* Custom also refers to the general principles of law as recognized by nations. INTERNATIONAL LAW: CASES AND MATERIALS 40-41 (William W. Bishop, Jr., ed., 1971) [hereinafter INTERNATIONAL LAW: CASES].

27. Starke, *supra* note 25, at 144. Courts examine the sources of law and determine whether a practice is sufficiently established as to be considered a custom. *Id.*; Homrig, *supra* note 23, at 694.

28. INTERNATIONAL LAW: CASES, *supra* note 26, at 33. Conventional law may embody custom but it also may include provisions that are not established but which the contracting parties agree to. *Id.* Since 1945, most international law has been codified and now falls under the rubric of conventional law. Sylvester, *supra* note 19, at 608.

29. INTERNATIONAL LAW: CASES, *supra* note 26, at 37. Treaties and conventions are adopted in order to codify international relations. *Id.*

30. JAMES L. BRIERLY, THE LAW OF NATIONS 49-56 (1963); Homrig, *supra* note 23, at 697-98.

treaties and by nations.<sup>32</sup> The “natural law”<sup>33</sup> approach, however, asserts that certain rights derive from the natural order of things and that these rights are universal and perpetual, existing outside the framework of laws.<sup>34</sup>

### 1. Pre-World War II: The Positivist School

Historically, the positivist view dominated international law.<sup>35</sup> Individuals were denied standing under international law to allege violations of their rights.<sup>36</sup> Although some individual rights in international law existed in practice, they were extremely limited.<sup>37</sup> The positivist school argues that standing for individuals is a privilege, only available under an express treaty provision.<sup>38</sup> Positivists oppose the theory that standing is a naturally granted right.<sup>39</sup> Nations are the only subjects<sup>40</sup> of international law, according to positivists, and the individual obtains benefits by virtue of her nation’s rights, not her own.<sup>41</sup>

Until World War II, individuals were not subjects under international law.<sup>42</sup> To be a subject in international law meant having international rights and duties.<sup>43</sup> Any right or injury an individual had under positive law, however, was derivative of the rights of her nation.<sup>44</sup> The individual, deprived of any standing on her own, was forced to rely on her nation to sponsor any

31. Sylvester, *supra* note 19, at 609; *see supra* note 20 and accompanying text (defining positivism).

32. Homrig, *supra* note 23, at 697-98; *see* Sylvester, *supra* note 19, at 608-09 (stating that international law exists only so far as nations allow).

33. Sylvester, *supra* note 19, at 608; *see supra* note 19 and accompanying text (defining naturalism).

34. Sohn, *supra* note 14, at 17.

35. *Id.* Positivism rose to supremacy during the eighteenth and nineteenth centuries. Sylvester, *supra* note 19, at 608.

36. Sohn, *supra* note 14, at 9. Until 1945, except in cases of special international agreement, an individual could benefit only to the extent allowed by her state. *Id.*

37. Bifani, *supra* note 15, at 696.

38. Sohn, *supra* note 14, at 9.

39. *Id.* at 18.

40. Menon, *supra* note 14, at 152. “According to text-book writers, a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.” *Id.*

41. *Id.* at 155. “Thus, the State has the right and the individual is the object of that right.” *Id.*

42. Sohn, *supra* note 14, at 9.

43. Menon, *supra* note 14, at 152.

44. *Id.* at 155.

cause she may have had in international court.<sup>45</sup>

## 2. Post-World War II: The Naturalist School

After World War II, naturalism became the dominant theory in international law.<sup>46</sup> Unlike positive law, which argues that a nation can give and take away individual rights, the individual rights guaranteed by natural law are both permanent and universal.<sup>47</sup> International law now embodies a number of human rights and recognizes the importance of the individual in the international system.<sup>48</sup>

### a. The Reemergence of Naturalism

The United Nations and the current world trend both view human rights in the light of natural law.<sup>49</sup> These natural individual rights include the right to life, the right to self-determination, freedom from torture or cruel and unusual punishment, and freedom of thought and conscience.<sup>50</sup> Several international documents adopted these and other key individual human rights in their provisions.<sup>51</sup> These rights are asserted by the U.N. Charter,<sup>52</sup> listed in the UDHR,<sup>53</sup> defined in the ICCPR,<sup>54</sup> and adopted by approximately fifty additional declarations and conventions on specialized issues, such as genocide and terrorism.<sup>55</sup>

45. Sohn, *supra* note 14, at 9. If the nation failed to pursue the individual's claim, she had no recourse. *Id.*

46. Menon, *supra* note 14, at 153-54.

47. Sohn, *supra* note 14, at 18.

48. Barton & Carter, *supra* note 5, at 539-40.

49. Sohn, *supra* note 14, at 17. All human beings have and will always be entitled to rights granted under natural law. *Id.* *But see* Sylvester, *supra* note 19, at 608 (claiming positivism still dominates current international law).

50. Sohn, *supra* note 14, at 18.

51. *See, e.g.*, ECPHR, *supra* note 14, 213 U.N.T.S. 221, Europ. T.S. No. 5; American Convention on Human Rights, Nov. 22, 1969, Pan-Am. T.S. 36, 9 I.L.M. 673 (1970); African Charter on Human Rights, June 26, 1981, O.A.U. Doc. Cab/Leg/67/3/Rev. 5, 21 I.L.M. 59 (1982).

52. U.N. CHARTER art. 2, ¶ 4. "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 manner inconsistent with the Purposes of the United Nations." *Id.*

53. UDHR, *supra* note 12, at 71.

54. ICCPR, *supra* note 13, 999 U.N.T.S. at 171, 6 I.L.M. at 368.

55. Sohn, *supra* note 14, at 11-12; *see, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 1970 Gr. Brit. T.S. No. 58 (Cmd. 4421); International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; European Convention on the Sup-

The universal adoption of individual rights revolutionized the status of the individual in international law and provided clear, enumerated individual entitlements.<sup>56</sup>

#### b. Two Examples of Modern Application of Individual Rights

Rights emerged from a complex and constantly changing blend of international practice and documents, statutes, and constitutions.<sup>57</sup> The growth of individual rights has been slow but steady during the latter half of this century, beginning with the UDHR after World War II.<sup>58</sup> Individual rights were further expanded by the ICCPR and subsequent interpretations of these, and other, documents.<sup>59</sup>

##### i. The UDHR

The UDHR,<sup>60</sup> which interprets the U.N. Charter and contains a list of human rights, is considered a basic component of customary international law.<sup>61</sup> It was followed by a stream of international declarations<sup>62</sup> and covenants<sup>63</sup> which, whether binding outright or via customary international law, reshaped the status of the individual.<sup>64</sup> The principles of the UDHR, while not

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pression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90, 15 I.L.M. 1272 (1976) [hereinafter Terrorism Treaty].

56. See Menon, *supra* note 14, at 168-74 (translating conventions and treaties into enumerated rights).

57. Bifani, *supra* note 15, at 700.

58. Sohn, *supra* note 14, at 11-12. According to the author, individual rights growth developed through the assertion of international concerns about human rights in the U.N. Charter, followed by their listing in the UDHR, their elaboration in the ICCPR, and finally their adoption by additional, specialized agreements. *Id.*

59. See Menon, *supra* note 14, at 168-71 (tracing expansion of individual rights through various United Nations-related documents); see, e.g., U.N. CHARTER arts. 55, 56 (obligating Members to promote universal recognition of human rights and fundamental freedoms); UDHR, *supra* note 12, at 71 (declaring fundamental human rights); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 14, 660 U.N.T.S. 195, 230, 5 I.L.M. 352, 361 (1966) (granting individuals right to complain of human rights violations).

60. UDHR, *supra* note 12, at 71.

61. Sohn, *supra* note 14, at 17.

62. William D. Auman, *International Human Rights Law: A Development Overview and Application Within the U.S. Criminal Justice System*, 20 N.C. CENT. L.J. 1, 8 (1992). A declaration is simply a general statement of intent or principle declared by a group or organization. *Id.*

63. *Id.* at 8. A covenant is legally binding on those nations that sign and ratify it. *Id.*

64. *Id.* at 6 (discussing "International Bill of Rights" formed through U.N. conven-

legally binding, are considered implicit in U.N. membership.<sup>65</sup> The UDHR represents a consensus of U.N. Member States and forms part of customary law.<sup>66</sup> The UDHR prohibits arbitrary arrest, detention, or exile of individuals by nations.<sup>67</sup> The UDHR allows individuals to seek asylum from persecution,<sup>68</sup> and draws a distinction between political and non-political crimes.<sup>69</sup> The declaration entitles the individual to a fair and public hearing by an impartial tribunal to determine her rights and any charges brought against her.<sup>70</sup>

## ii. The ICCPR

The ICCPR<sup>71</sup> makes specific and binding the obligations assumed under the UDHR.<sup>72</sup> As a covenant that is legally binding on those nations that sign and ratify it, the ICCPR differs from the UDHR, which is a non-binding declaration.<sup>73</sup> Because the ICCPR is an international treaty, it forms part of conventional international law.<sup>74</sup> The ICCPR is designed to protect individuals from arbitrary government action, specifically arbitrary arrest and detention.<sup>75</sup> The U.N. Human Rights Committee,<sup>76</sup> which interprets the ICCPR, has declared that irregular rendition violates the agreement.<sup>77</sup> The ICCPR also guarantees the right of

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tions and declarations). The various human rights declarations and conventions, beginning with the U.N. Charter and gradually becoming more specialized, forms a codification of human rights law sometimes referred to as an international bill of human rights. Sohn, *supra* note 14, at 11-12.

65. Auman, *supra* note 62, at 8.

66. WORLD PUBLIC ORDER, *supra* note 4, at 160-61.

67. UDHR, *supra* note 12, art. IX, at 73.

68. *Id.* art. XIV, at 74.

69. *Id.* art. XIV, ¶ 2, at 74.

70. *Id.* art. X, at 73.

71. ICCPR, *supra* note 13, 999 U.N.T.S. 171, 6 I.L.M. 368.

72. Auman, *supra* note 62, at 9. These obligations include the freedom from arbitrary deprivation of life, from torture, from cruel, inhumane, or degrading punishment, and other rights previously referred to in the Universal Declaration of Human Rights ("UDHR"). *Id.*; see UDHR, *supra* note 12, at 71 (listing fundamental human rights).

73. Auman, *supra* note 62, at 8. Simply signing a convention is not enough to bind a nation; ratification is also required. *Id.*

74. WORLD PUBLIC ORDER, *supra* note 4, at 160-61.

75. Sohn, *supra* note 14, at 22; ICCPR, *supra* note 13, art. 9, ¶ 1, 999 U.N.T.S. at 175, 6 I.L.M. at 371; Sylvester, *supra* note 19, at 579.

76. ICCPR, *supra* note 13, art. 28, 999 U.N.T.S. at 179, 6 I.L.M. at 376. The U.N. Human Rights Committee is composed of eighteen members, chosen for their high moral character and competence in human rights. *Id.*

77. Sylvester, *supra* note 19, at 579.

all people to political self-determination.<sup>78</sup>

### B. *The Creation and Development of Extradition Law, Practice, and Safeguards*

Extradition law and practice evolved over more than thirty centuries.<sup>79</sup> International law placed certain limitations on the power of the sovereign,<sup>80</sup> such as respect for the territorial integrity of other nations, which resulted in a formal process to recover wanted fugitives.<sup>81</sup> The evolution of exceptions aimed at protecting individual rights in recent times, however, such as judicial review<sup>82</sup> and the political offense exception,<sup>83</sup> increased the protection afforded to individual rights within the context of extradition law.<sup>84</sup>

#### 1. Pre-1834: The History of Extradition Law

The practice of extradition has existed for over three thousand years.<sup>85</sup> During this period, treaties and custom slowly formalized the extradition process and placed limitations on the pursuit of fugitives.<sup>86</sup> The basic tenet of international law, respect for the territorial sovereignty of other nations, both en-

78. ICCPR, *supra* note 13, art. 1, 999 U.N.T.S. at 173, 6 I.L.M. at 369.

79. WORLD PUBLIC ORDER, *supra* note 4, at 3.

80. David H. Herrold, Comment, *A New Emerging World Order: Reflections of Tradition and Progression Through the Eyes of Two Courts*, 2 *TULSA J. COMP. & INT'L. L.* 143, 145 (1994). The sovereign nation has the ability to create boundaries and select a form of government. *Id.* Sovereign nations also maintain the right to order their internal and external affairs without interference. *Id.*

81. *Id.* at 145. The purpose of restricting sovereignty through treaties is:

Extradition treaties confer upon the contracting States a greater degree of control over certain citizens of the States with which they contract. They set forth particular guidelines by which a transfer of nationals may occur, thus putting into place a means by which a State may lawfully, and with respect for the sovereignty of the other, exercise jurisdiction over a particular national of the other State.

*Id.*

82. Bifani, *supra* note 15, at 640. Judicial review in extradition refers to the certification by a court that a particular crime or individual is extraditable. *Id.*; see SHEARER, *supra* note 9, at 197-200 (discussing various approaches to involvement of judiciary in extradition proceedings).

83. WORLD PUBLIC ORDER, *supra* note 4, at 505.

84. See Bifani, *supra* note 15, at 658 (finding that affirmative defenses to extradition imply that individual rights exist internationally and challenging judicial reasoning to contrary).

85. WORLD PUBLIC ORDER, *supra* note 4, at 1.

86. SHEARER, *supra* note 9, at 7-19 (tracing formalization of extradition).

couraged extradition treaties and discouraged irregular rendition.<sup>87</sup>

### a. The Roots of Extradition

The practice of extradition originated in the ancient middle- and far-eastern civilizations as a matter of courtesy and good will between sovereigns.<sup>88</sup> The earliest recorded extradition treaty dates to 1280 B.C., between Ramses II, the Pharaoh of Egypt, and King Hattusli III of the Hittites, and provided for the mutual return of criminals.<sup>89</sup> The first, similar provision appeared in western Europe in 1174 A.D., between Henry II of England and William the Lion, King of Scotland.<sup>90</sup> Over the following centuries, however, extradition remained an ad hoc arrangement between sovereigns, performed as a need arose.<sup>91</sup>

During the seventeenth to nineteenth centuries, the Chinese Qing State extradited criminals from neighboring Korea, Vietnam, and Burma on the basis of reciprocity.<sup>92</sup> The Chinese authorities extended their control over the rendition process by instructing the returned individual's government as to the proper method of punishment.<sup>93</sup> In general, ancient treaties for the surrender of criminals targeted what today would be considered political offenses.<sup>94</sup> As late as the end of the seventeenth century, political offenders were not granted any special protec-

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87. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1454 (1988).

88. WORLD PUBLIC ORDER, *supra* note 4, at 1.

89. *Id.* at 3; Santo F. Russo, Comment, *In Re Extradition of Khaled Mohammed El Jessem: The Demise of the Political Offense Provision in U.S. — Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1321 n.28 (1993).

90. MOORE, *supra* note 3, at ¶ 6.

91. *Id.* ¶ 10 (noting that between 1174 and 1802, no permanent arrangements for rendition of common criminals existed).

92. R. Randle Edwards, *Imperial China's Border Control Law*, 1 J. CHINESE L. 33, 40 (1987). No formal agreements were signed; instead, the parties acted on the basis of tacit understanding with respect to reciprocity. *Id.* Under reciprocity, two nations agree to consider and process extradition requests from each other. SHEARER, *supra* note 9, at 33.

93. Edwards, *supra* note 92, at 55. If Chinese authorities doubted whether the offender would be properly punished if returned to her state, they would either try her in China or return her along with specific instructions to her ruler. *Id.*

94. MOORE, *supra* note 3, at ¶ 10; see *Harvard Research in International Law, Draft Convention on Extradition*, 29 AM. J. INT'L L. 1, 108 (Supp. 1935) [hereinafter Draft] (explaining motivations behind earlier extradition treaties).

tion from extradition.<sup>95</sup>

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### b. Extraterritoriality and Irregular Rendition

Extraterritoriality, the right of nations to control activity within their own territory,<sup>96</sup> is the principal, historical limitation on extradition.<sup>97</sup> Respect for the territorial sovereignty of nations forms a basic tenet of international law.<sup>98</sup> While unilateral action to obtain jurisdiction over a fugitive in the form of kidnaping or collusion is occasionally accepted and even approved,<sup>99</sup> historically, self-help has been condemned by the international community.<sup>100</sup> Nations stringently guard their rights and any nation that infringes on or flouts those rights presents a threat to the international system's integrity.<sup>101</sup> When one na-

95. MOORE, *supra* note 3, at ¶ 7. Two treaties made by Charles II of England with Denmark in 1661 and with the States-General in 1662 were specifically aimed at the surrender of regicides. *Id.* at ¶ 6.

96. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 204 n.1 (1987) [hereinafter *INTERNATIONAL EXTRADITION*].

97. Kester, *supra* note 87, at 1454 (noting that international law limits extraterritorial arrests and demands respect for territorial integrity).

98. *Id.* "[T]he doctrines of international law . . . include limitations of extraterritorial arrests and respect for the territorial sovereignty of the states." *Id.*; see Jonathon A. Gluck, Note, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 *DUKE L.J.* 612, 614 (1994) (stating international law prohibits exercise of sovereignty by one state in another's territory).

99. Herrold, *supra* note 80, at 146-48 (discussing instances of abduction and international responses). The abduction of Adolf Eichmann, for example, was accomplished by so-called "private persons" without the official acknowledgment of the Israeli Government, and the international outcry was muted in light of the crimes with which he was charged. 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, 442 n.18 (1992); Jianming Shen, *Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension*, 23 *DENV. J. INT'L L. & POL'Y* 43, 51-2 (1994) (discussing abduction and trial of Adolf Eichmann).

100. Herrold, *supra* note 80, at 146. "Forced extradition and kidnaping under color of law have been considered violations of state sovereignty and territorial integrity." *Id.*; see generally Shen, *supra* note 99, at 44 (condemning abduction as violation of international law).

101. Shen, *supra* note 99, at 44. Criticizing United States action in *Alvarez-Machain*, the author states:

A State that conducts, authorizes, supports, or sponsors extraterritorial abduction violates a well established principle of international law. When one State exercises its police power in the territory of another State, it exceeds its sphere of jurisdiction permitted under international law, and it violates a fundamental tenet of international law, the respect for the sovereignty and territorial integrity of States.

*Id.*

tion utilizes unilateral methods to capture a fugitive, international pressure forces that nation not only to return the individual to his or her asylum nation, but the offending nation also suffers additional fines and reprimands.<sup>102</sup> The theory behind such severe treatment is that the violation of this basic tenet of international law, the inviolability of a sovereign nation's territory, is a greater crime than that committed by any individual.<sup>103</sup> That few nations have turned to abduction, and that the response to illegal rendition has been public and vociferous protest, indicates that abductions are not permitted under international law.<sup>104</sup>

## 2. The State of Modern Extradition Law and Practice

Modern extradition law derives from formal agreements, namely bilateral and multilateral treaties, which began to gain prominence in the late nineteenth century.<sup>105</sup> Both common and civil law nations developed formal extradition procedures, with some variation between the two.<sup>106</sup> Extraterritoriality remains a limitation on rendition.<sup>107</sup> In addition, dual criminality,<sup>108</sup> specialty,<sup>109</sup> and a political offense exception<sup>110</sup> developed as defenses to extradition.<sup>111</sup>

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102. *Id.* at 53-54. The International Court of Justice ("ICJ") is authorized to order the return of the abducted individual and also any necessary reparation. *Id.* Generally, before an abducted individual would be returned, however, the asylum state was required to protest the abduction. Gluck, *supra* note 98, at 630.

103. Gluck, *supra* note 98, at 614; Shen, *supra* note 99, at 58.

104. Homrig, *supra* note 23, at 702 n.319; Gluck, *supra* note 98, at 633-44 (listing United States, Mexican, Canadian, and European practices regarding abductions).

105. Draft, *supra* note 94, at 41.

106. INTERNATIONAL EXTRADITION, *supra* note 96, at 32.

107. Dea Abramschmitt, Note, *Neighboring Countries, Un-Neighborly Acts: A Look at the Extradition Relationships Among the United States, Mexico and Canada*, 4 J. TRANSNAT'L L. & POL'Y 121, 127 (1995) (indicating that entering into treaties protected norm of territorial inviolability).

108. WORLD PUBLIC ORDER, *supra* note 4, at 313; *see supra* note 9 and accompanying text (defining dual criminality as requirement that alleged crime be illegal in both requesting and asylum nations).

109. WORLD PUBLIC ORDER, *supra* note 4, at 352-53; *see supra* note 8 and accompanying text (defining specialty as prohibition against prosecuting extraditee for any crime other than that charged in request).

110. SHEARER, *supra* note 9, at 168; *see supra* note 10 and accompanying text (defining political offense exception).

111. Bifani, *supra* note 15, at 645-47.

a. The Formalization of Extradition Through Treaties

The formalization of extradition took place through bilateral, multilateral, and regional treaties and agreements.<sup>112</sup> Common features and procedures also developed.<sup>113</sup> Although differences arose between civil and common law practice and provisions, the basic form of extradition agreements was the same.<sup>114</sup>

i. The Development of Multilateral and Bilateral Agreements

Most current extradition treaties are bilateral.<sup>115</sup> The growth of bilateral treaties began in the 1800's, as several countries established bilateral treaties that defined extradition laws.<sup>116</sup> During this same period, countries also formed regional agreements aimed at replacing, supplementing, or complementing already existing bilateral treaties.<sup>117</sup> These regional agreements took the form of conventions, whereby nations arranged to adopt reciprocal national legislation modeled after an agreed formula.<sup>118</sup>

Countries who are signatories to multilateral treaties are

112. See William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L.J. 88, 91-93 (1992) (citing several bi- and multilateral attempts at cooperation); see, e.g., International Agreement for the Suppression of the 'White Slave Traffic,' May 18, 1904, 1 L.N.T.S. 83, 35 Stat. 1979 (allowing extradition of fugitives sought under this agreement); Convention on Extradition and Optional Clause, Dec. 26, 1933, 162 L.N.T.S. 45, 49 Stat. 3111 (stating general regime for extradition).

113. Nancy M. Green, Comment, *In the Matter of the Extradition of Atta: Limiting the Scope of the Political Offense Exception*, 17 BROOK. J. INT'L L. 447, 452-54 (1991) (describing standard extradition procedure).

114. See INTERNATIONAL EXTRADITION, *supra* note 96, at 11, 32 (discussing form of extradition process and noting differences in process between civil and common law nations).

115. *Id.* at 12; see Charles D. Siegal, *Individual Rights Under Self-Executing Extradition Treaties — Dr. Alvarez-Machain's Case*, 13 LOY. L.A. INT'L & COMP. L.J. 765, 766 (1991) (discussing U.S. treaty history and its extensive system of bilateral extradition treaties).

116. Draft, *supra* note 94, at 42 n.3. By 1868, the United States had 13 bilateral extradition treaties, Great Britain, after a slow start, had 13, and France, between 1844 and 1860, had concluded an additional 41 agreements. *Id.*

117. WORLD PUBLIC ORDER, *supra* note 4, at 19 (using Arab League Extradition Agreement and European Extradition Convention as examples of regional cooperation).

118. *Id.* at 19 (using Nordic Treaty Nations as example of reciprocal conventions). Regional extradition treaties indicate cooperation among the signatories, although not all of the signatory powers have ratified the treaties and the arrangements' impact is only local. INTERNATIONAL EXTRADITION, *supra* note 96, at 25-30 (summarizing eight then-existing regional agreements).

bound to honor the extradition implications of those agreements.<sup>119</sup> Multilateral treaties provide a basis for extradition from countries whose extradition laws require a treaty, and justify extradition from those countries that rely on international law.<sup>120</sup> Nations made various attempts to create a general, comprehensive convention on extradition.<sup>121</sup> Conflicting legal systems, divergent political interests, and national jealousies, however, frustrated these efforts.<sup>122</sup>

## ii. Common Features in Civil and Common Law Extradition Treaties

Extradition treaties generally contain certain common features including a list of specific crimes for which extradition will be granted,<sup>123</sup> a clause pertaining to the extradition of nationals,<sup>124</sup> various rights safeguards,<sup>125</sup> and a political offense exception.<sup>126</sup> The United States and most common law nations today base their bilateral treaties on reciprocity.<sup>127</sup> Under reciprocity, a nation grants an extradition request only in exchange for the extradition or promise of future extradition of an individual it seeks from the requesting country.<sup>128</sup> Reciprocity may bind a na-

119. INTERNATIONAL EXTRADITION, *supra* note 96, at 12; *see id.* at 13-22 (listing several conventions and agreements containing extradition provisions); *see, e.g.*, Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 8, 24 U.S.T. 564, 571, 974 U.N.T.S. 177, 182 (requiring extradition).

120. *Id.* at 13.

121. SHEARER, *supra* note 9, at 14 (documenting multilateral extradition failures).

122. Draft, *supra* note 94, at 47-48; SHEARER, *supra* note 9, at 14.

123. *See* Draft, *supra* note 94, at 72-77 (tracing evolution of extraditable crimes). Many treaties, for example, contain a clause against double jeopardy, which is the prosecution of an individual more than once for the same crime. *Id.*

124. *Id.* at 123-27.

125. *See id.* at 145-51 (discussing safeguards generally).

126. Antje C. Peterson, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 772 (1992). A "generic" extradition treaty contains a political offense exception, which prevents extradition for a crime committed in the context of a political incident or if the request for extradition is made to prosecute a person for an offense of a political character. *Id.* at 772-73.

127. INTERNATIONAL EXTRADITION, *supra* note 96, at 32. In *Factor v. Laubenheimer*, the United States asserted that "the principles of international law recognize no right to extradition apart from treaty." 290 U.S. 276, 287 (1933). For this reason, while the United States has occasionally obtained the extradition of fugitives as an act of comity from foreign nations, the United States has been unable to reciprocate. INTERNATIONAL EXTRADITION, *supra* note 96, at 60; *see supra* note 92 and accompanying text (defining reciprocity).

128. INTERNATIONAL EXTRADITION, *supra* note 96, at 32.

tion, if the nation's constant practice of reciprocity transforms it into customary law.<sup>129</sup>

Civil law jurisdictions demand less formal extradition provisions, and reciprocity and comity<sup>130</sup> often provide the bases for extradition.<sup>131</sup> Extradition under reciprocity is a matter of discretion governed by international law.<sup>132</sup> Comity represents a particular request, not a general practice, and therefore does not create binding custom under international law.<sup>133</sup> Treaties, comity, and reciprocity, however, only govern the external extradition practice of legislation.<sup>134</sup> The internal rendition process remains dependent upon multiple unique, domestic factors.<sup>135</sup>

### iii. The Process of Extradition in Common and Civil Law Systems

The extradition practices of common law and civil law nations differ widely.<sup>136</sup> A typical extradition procedure requires that a formal extradition request be made to or through the executive, who then sets in motion, or allows the requesting nation to begin, judicial action.<sup>137</sup> In most common law nations, the executive has the authority to decide whether to extradite,<sup>138</sup> although the judiciary often certifies that the crimes charged satisfy the particular extradition treaty's provisions.<sup>139</sup> In the United States, the Secretary of State renders the final decision to extradite after a reviewing court certifies that sufficient evidence

129. *Id.* at 32. "In substance if not in form it would appear to have the same effect as a treaty." SHEARER, *supra* note 9, at 33.

130. SHEARER, *supra* note 9, at 33; *see supra* note 92 and accompanying text (defining reciprocity). Comity refers to the accommodation of one nation's wishes by another sovereign nation, wholly on the basis of their mutual sovereignty, as a gesture of goodwill and cooperation. WORLD PUBLIC ORDER, *supra* note 4, at 1.

131. INTERNATIONAL EXTRADITION, *supra* note 96, at 11. Extradition in these cases is a matter of discretion, with the rules of international law filling in for a treaty. *Id.*

132. *Id.*

133. *Id.* at 32.

134. WORLD PUBLIC ORDER, *supra* note 4, at 502.

135. *Id.* "[T]reaties seldom, if ever, prescribe internal procedural rules . . . ." *Id.*

136. *See id.* at 7-8 (examining differences between civil and common law extradition).

137. WORLD PUBLIC ORDER, *supra* note 4, at 505.

138. *Id.* Until the nineteenth century, the decision to extradite was purely the decision of the head of state. *Id.* at 504-05. Until 1815, the King's right to expel aliens did not require a treaty. *Id.*

139. MOORE, *supra* note 3, at ¶ 2 (comparing treaty to contract).

exists to extradite.<sup>140</sup> In the United Kingdom, however, a secretary of state decides whether to issue a warrant of surrender after a special magistrate reviews the request.<sup>141</sup> While several civil law countries still retain exclusive executive control,<sup>142</sup> most now require at least minimal judicial review of the extradition process.<sup>143</sup> In addition, common law countries require that the requesting country meet a threshold test of establishing probable cause.<sup>144</sup> Civil law countries, on the other hand, consider the formal request *prima facie* evidence sufficient to grant extradition if all other treaty obligations are satisfied.<sup>145</sup>

### b. Exceptions and Limitations

Extraterritoriality continues to limit extradition law and practice.<sup>146</sup> Two additional limitations, dual criminality<sup>147</sup> and specialty,<sup>148</sup> developed during the nineteenth century as extradition law was formalized.<sup>149</sup> The most recent exception, the political offense exception,<sup>150</sup> originated in the political revolutions

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140. 18 U.S.C. § 3184 (1994); see *United States v. Robbins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,1675) (permitting extradition of alleged U.S. citizen accused of murder led to formal extradition statute). *But see* *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995) (holding that involvement of both executive and judicial branches in extradition process violates separation of powers doctrine).

141. MOORE, *supra* note 3, at ¶ 2.

142. WORLD PUBLIC ORDER, *supra* note 4, at 505. Spain, Ecuador, and Portugal's executives retain exclusive control over the entire extradition process. *Id.*

143. *Id.* In France, the President issues an extradition decree after a judge certifies the request. Mary-Rose Papandrea, Comment, *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, 1192 (1995); MOORE, *supra* note 3, at ¶ 2. The judiciary in certain civil law jurisdictions, such as Italy, interpret civil codes and judicial renderings in addition to treaty language. INTERNATIONAL EXTRADITION, *supra* note 96, at 10-11.

144. WORLD PUBLIC ORDER, *supra* note 4, at 508.

145. *Id.* Belgium emerged at the forefront of extradition law, passing a law, in 1834, that required all extradition cases to be submitted to judicial, albeit non-conclusive, review. *Id.* at 505.

146. Abramschmitt, *supra* note 107, at 127.

147. WORLD PUBLIC ORDER, *supra* note 4, at 313; see *supra* note 9 and accompanying text (defining dual criminality as requirement that alleged crime be illegal in both requesting and asylum nations).

148. WORLD PUBLIC ORDER, *supra* note 4, at 352-53; see *supra* note 8 and accompanying text (defining specialty as prohibition against trying extraditee for any crime other than that in extradition request).

149. HENRY CHARTRES BIRON & KENNETH E. CHALMERS, *THE LAW AND PRACTICE OF EXTRADITION* 28-30 (1903).

150. 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, 296 (1986)

of the eighteenth and nineteenth centuries, and the Enlightenment of the post-Industrial Revolution.<sup>151</sup> Newly democratic nations were unwilling to extradite free-thinkers and political ideologists forced from their homes and persecuted because of their beliefs.<sup>152</sup>

### i. Dual Criminality

Dual criminality is a requirement of reciprocity, and can be found in the municipal laws and judicial practices of most nations.<sup>153</sup> The offense charged must be a crime in both the requesting and the asylum nation.<sup>154</sup> Most treaties clearly list extraditable crimes and assure that the language or description of one nation's crimes is consistent with its bilateral partner's definition of the crimes.<sup>155</sup> Even if the wording occasionally differs, the crime is deemed extraditable if the acts complained of would sustain a charge in the requested nation.<sup>156</sup>

### ii. Specialty

The requirement of specialty prevents an extraditing country from prosecuting an individual for crimes other than those specified in the extradition request.<sup>157</sup> The doctrine gradually formed through a series of judicial pronouncements in the late

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(tracing origin of political offense exception). The first exception for political offenders appeared in an extradition treaty between Belgium and France in 1833. *Id.*

151. Draft, *supra* note 94, at 108-09; see Peterson, *supra* note 126, at 773-78 (sketching development of political offense exception).

152. Gregory Chadwick Perry, Comment, *The Four Major Western Approaches to the Political Offense Exception to Extradition: From Inception to Modern Terrorism*, 40 *MERCER L. REV.* 709, 715-16 (1989).

153. *WORLD PUBLIC ORDER*, *supra* note 4, at 325.

154. *SHEARER*, *supra* note 9, at 137.

155. See Draft, *supra* note 94, at 81-86. *But see, e.g.*, Treaty on Extradition, Jan. 12, 1970, U.S.-N.Z., 22 U.S.T. 1, T.I.A.S. No. 7035 (omitting requirement of dual criminality); Treaty on Extradition, Dec. 10, 1962, U.S.-Isr., 14 U.S.T. 1707, T.I.A.S. No. 5476 (omitting dual criminality).

156. *WORLD PUBLIC ORDER*, *supra* note 4, at 327. It is not necessary that the crimes be identical because:

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

*Id.* at 332 (citing *Collins v. Loisel*, 259 U.S. 309 (1922)).

157. *Id.* at 352-53.

eighteenth to nineteenth centuries in Western Europe.<sup>158</sup> Many countries now hold that the specialty doctrine applies, regardless of whether it is explicitly mentioned in an extradition treaty.<sup>159</sup> This exception protects the individual against prosecution on additional charges only to a limited extent, however, since no remedy may exist should the requesting country breach its promise.<sup>160</sup>

### iii. The Development of a Political Offense Exception

The political offense exception has three, basic purposes.<sup>161</sup> First, the exception recognizes the legitimacy of political dissent.<sup>162</sup> Second, it guarantees the rights of the accused.<sup>163</sup> Third, the political offense exception protects the interests of both the requesting and the asylum nation.<sup>164</sup> There are both pure political offenses, which only affect the structure of the nation,<sup>165</sup> and relative political offenses, which are inseparable from the political element.<sup>166</sup> Pure offenses are easily identi-

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158. BIRON & CHALMERS, *supra* note 149, at 28-30

159. *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 419 (1886) ("It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party.")

160. Quigley, *supra* note 2, at 431.

161. Michael R. Littenberg, Comment, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1196 (1990).

162. Green, *supra* note 113, at 452. The political offense exception was born out of the ideals of the Enlightenment, and therefore embraces that movement's belief in self-determination and freedom of thought. *Id.* In response to the growing concern for the political offender, brought on by political theories based on individualism and the right to self-determination, nations began explicitly excluding political offenders from their extradition treaties. *Id.*

163. *Id.* at 470. The exception enables the asylum nation to protect the rights of the accused by reviewing her possible treatment if she is returned to the requesting nation and by assuring that she will have a fair trial. *Id.*

164. Littenberg, *supra* note 161, at 1198. The rights of the involved nations rest on the principle of neutrality. Green, *supra* note 113, at 470. "If the requested state had to review the extraditability of a pure political crime, it would be making a valuation of the internal political structure of the requesting state. . . ." *Id.* By embracing a clear political offense doctrine the asylum nation may refuse extradition without passing judgment on either the requesting nation's system or the accused's acts. *Id.* Another possible basis for the exception is the desire to protect world public order. *Id.*; Sapiro, *supra* note 10, at 658.

165. INTERNATIONAL LAW, *supra* note 25, at 814. Sedition and treason are examples of pure political offenses. *Id.*

166. *Id.* Murder and assault in the course of a rebellion or demonstration are examples of relative political offenses. *Id.*

able in treaty form and are rarely extraditable.<sup>167</sup> Most claimed political offenses, however, fall into the second category of relative offenses, combining political goals with common, usually extraditable, crimes.<sup>168</sup> The only crimes clearly excluded from relative political offenses are crimes "contre la personne du chef d'un gouvernement étranger,"<sup>169</sup> known as the clause Belge or *clause d'attentat*.<sup>170</sup>

Because no clear definition of relative political offense exists, three main tests for identifying legitimate political crimes have developed.<sup>171</sup> The first, the "political-incidence test,"<sup>172</sup> examines whether criminal acts were part of or incidental to a political purpose or struggle, such as a war, revolution, or rebellion.<sup>173</sup> Subsequent modifications added a "two-party struggle" requirement,<sup>174</sup> and required that the offense claimed be directed against the requesting nation.<sup>175</sup> The second test, the "political motivation test,"<sup>176</sup> balances the ideological motive of the offender<sup>177</sup> against her acts in proportion to the political

167. Littenberg, *supra* note 161, at 1198-99; Sapiro, *supra* note 10, at 660. Even if they are not expressly excluded by the treaty, pure political offenses are generally recognized as non-extraditable. *Id.*

168. Littenberg, *supra* note 161, at 1199.

169. VAN DEN WIJNGAERT, *supra* note 17, at 15. "[A]gainst the person of a foreign head of state." *Id.*

170. Hughes, *supra* note 150, at 296 n.34; Peterson, *supra* note 126, at 774-75. The clause Belge disqualifies assassinations of heads of state from political crimes within the meaning of the exception and has been incorporated into most modern extradition treaties. *Id.* at 775; see, e.g., European Convention on Extradition, Dec. 13, 1957, art. 3(3), 359 U.N.T.S. 173, 178, Europ. T.S. No. 24, at 3 [hereinafter European Convention] (including a clause Belge).

171. WORLD PUBLIC ORDER, *supra* note 4, at 388.

172. *In re Castioni*, 1 Q.B. 149 (1891) (Eng.). The British courts created the political incidence test in a case where the extradition of a Swiss national was sought for the shooting death of a government official during a canton uprising. 1 Q.B. at 149. The United States adopted this test in *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894), but narrowed its interpretation to consider only the act and not the motivation of the actor or the requesting nation. Perry, *supra* note 152, at 725.

173. *Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir. 1981).

174. *In re Meunier*, 2 Q.B. 415 (1894) (Eng.).

175. *Ex parte Cheng v. Governor of Pentonville Prison*, 1973 App. Cas. 931 (1973).

176. WORLD PUBLIC ORDER, *supra* note 4, at 402. The second test developed in early twentieth century civil-law Europe as a response to the political incidence test. *Id.*

177. *Id.* at 402. Three facts must be shown to consider the offense politically motivated: (1) that the offense was committed to further the success of a purely political purpose; (2) that a direct connection exists between the crime and the purpose of a party to modify the social or political organization of the nation; and (3) that the political component of the act outweighs its ordinary criminality. *Id.* at 402-03.

gains sought.<sup>178</sup> The greater the degree of violence involved, the more closely related the political goals must be to the means used.<sup>179</sup> A third test, the "injured rights test,"<sup>180</sup> excepts only those offenses that directly threaten the nation.<sup>181</sup> A political crime affects only the political organization of the nation, in contrast to a common crime that affects rights other than those of the nation.<sup>182</sup> Under this approach, only those individuals accused of pure political crimes could obtain relief, because any relative crime would, by definition, affect rights other than those of the nation.<sup>183</sup>

### 3. Modern Attempts to Circumvent Extradition Law

Modern transportation and communications have made it easier for criminals to seek refuge from countries seeking their prosecution.<sup>184</sup> Recent attempts to combat terrorism through the use of multilateral agreements<sup>185</sup> and judicial decisions permitting terrorists to claim a political offense exception defense to extradition<sup>186</sup> have led to increasing revisions of bilateral treaties<sup>187</sup> and a narrowing of the political offense exception in gen-

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178. *Id.* at 402.

179. Perry, *supra* note 152, at 720. Not only must the means be proportional to the threat of injury, but also the means must be the only ones available to achieve the desired goal. *Id.*

180. In re Giovanni Gatti, S. Jur. II 44 (Cour d'appel, Grenoble 1947), 14 Ann. Dig. 145 (Ct. App. Grenoble, Fr. 1947).

181. Perry, *supra* note 152, at 722.

182. Littenberg, *supra* note 161, at 1201.

183. *Id.* "Relative political offenses . . . could not be classified as offenses of a political character since private rights were always injured." *Id.*; see Perry, *supra* note 152, at 722 (stating that under French test, nation must be affected target). The French courts subsequently experimented with the scope of its objective test by considering not only the nature of the affected target, but also the means used in proportion to the outcome desired. *Id.*

184. Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 315 (1987); WORLD PUBLIC ORDER, *supra* note 4, at 1.

185. See Peterson, *supra* note 126, at 779 (analyzing impact of European Convention on Suppression of Terrorism on political offense exception).

186. See McMullen v. I.N.S., 788 F.2d 591 (9th Cir. 1986) (bombing of British barracks part of political uprising); United States v. Mackin, 688 F.2d 122 (2d Cir. 1981) (murdering British soldier furthered political purpose of Irish Republican Army)

187. See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: EXTRADITION — United States-Federal Republic of Germany Supplementary Treaty*, 81 AM. J. INT'L L. 935, 936 (1987) (exploring modern trend in extradition as reflected by U.K. Supplementary Treaty).

eral.<sup>188</sup> Individual rights become secondary to policy interests, and the nation's court system reinforces this by interpreting the extradition process as one which protects the nation, not the individual.<sup>189</sup> Various incidents since 1960<sup>190</sup> demonstrate that countries are seeking ways to subvert the extradition process, thereby eliminating the few safeguards it provides the individual.<sup>191</sup> Countries ignore the civil liberties of a defendant in favor of pursuing terrorists or drug offenders.<sup>192</sup>

#### a. Irregular Rendition

Irregular rendition devices fall into three categories.<sup>193</sup> First, the practice includes the abduction of an individual from one nation by agents of another nation.<sup>194</sup> Second, irregular rendition includes the informal surrender of an individual by one nation to another without formal or legal process.<sup>195</sup> Third, irregular rendition occurs when nations use immigration laws to realize rendition.<sup>196</sup> Although the latter two methods of irregular rendition circumvent the process of extradition, they do not violate sovereign rights and are in fact undertaken in cooperation with the agents of the other nation.<sup>197</sup> Extraterritorial ab-

188. *Id.*

189. Bifani, *supra* note 15, at 630. "Under the comforting auspices of cooperation and the claimed common interest in ending illicit narcotics activities, anti-drug efforts have swung the balance in favor of policy and enforcement objectives at the expense of individual rights and liberties." *Id.*

190. Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander*, 11 *CONN. J. INT'L L.* 1, 10-11 (1995). In 1960, Israeli "volunteers" abducted Nazi war criminal Adolph Eichmann from Argentina and, despite official protest over this procedure, tried and convicted him. *Id.* at 10. In 1963, the leader of a military revolt against President DeGaulle was kidnaped from Munich, Germany and sentenced in France to life imprisonment. *INTERNATIONAL EXTRADITION*, *supra* note 96, at 191-92 n.5. In 1964, Egyptian agents attempted to kidnap an alleged Israeli agent from Italy by shipping him in a trunk to Egypt. *Id.* at 192 n.7. In 1985, United States military aircraft forced down an Egyptian aircraft over international waters in order to obtain custody of terrorists suspected in the Achille Lauro hijacking. Beres, *supra*, at 11.

191. Beres, *supra* note 190, at 10-11.

192. Homrig, *supra* note 23, at 677. "The decision to abduct a defendant involves a balancing of the societal interest in eradicating drugs with the civil liberties that should be accorded all defendants." *Id.*

193. *WORLD PUBLIC ORDER*, *supra* note 4, at 121-22.

194. *Id.* at 121.

195. *Id.*; see SHEARER, *supra* note 9, at 72-93 (detailing abduction, deportation, and immigration as rendition devices).

196. *WORLD PUBLIC ORDER*, *supra* note 4, at 121-22; SHEARER, *supra* note 9, at 91-93.

197. *WORLD PUBLIC ORDER*, *supra* note 4, at 127-28.

duction, however, violates another nation's territorial integrity and, therefore, violates international law.<sup>198</sup>

b. Narrowing of the Political Offense Exception

The principal justifications for the political offense exception remain the desire to obtain a fair trial for the defendant and the desire to appear neutral in another country's domestic conflicts.<sup>199</sup> The relationship between the rights of the individual and the political offense exception, however, is not clear.<sup>200</sup> The exception, in its purest form, makes no distinction between the statesman advocating change through words, and the terrorist inciting change through bombs.<sup>201</sup>

Recently, nations have narrowed the political offense exception to weaken the shield available to terrorists.<sup>202</sup> Various bilateral agreements have further narrowed this exception.<sup>203</sup> The United States and United Kingdom both continue to follow the political incidence test, as do many Latin-American courts.<sup>204</sup> In

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198. Weissman, *supra* note 1, at 486. The most recent, and most controversial violation, was the *Alvarez-Machain* incident. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). In *Alvarez-Machain*, the U.S. Drug Enforcement Agency ("DEA") authorized and sponsored the kidnaping of a Mexican doctor, suspected in the death of a DEA officer, from his office in Guadalajara, Mexico. *Alvarez-Machain*, 504 U.S. at 657. The United States undertook this action despite the existence of a valid extradition treaty between the United States and Mexico. *Alvarez-Machain*, 504 U.S. at 658.

199. Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135, 155 (1991). The author claims that:

There are two modern justifications for the political offense exception to extradition: (1) the humanitarian concern for a fugitive who might not get a fair trial in cases of offenses that have political overtones, and (2) the desire to avoid taking sides in another state's domestic conflicts (the neutral rationale).

*Id.* A third justification, the protection of revolutionary uprising, does not apply to the issues at hand. *Id.*

200. Kane, *supra* note 184, at 317. "After all, a state may surrender an accused political criminal without offending any rule of international human rights law . . . [the] offenders may be extradited by a state for foreign policy reasons." *Id.*

201. *Id.*

202. *See, e.g.*, Terrorism Treaty, *supra* note 55, Europ. T.S. 90, 15 I.L.M. 1272. The Terrorism Treaty represented the most recent attempt to counter terrorism through multilateral cooperation. *See generally* Peterson, *supra* note 126 (detailing how exceptions to exception undermine its purported *raison d'être*).

203. Peterson, *supra* note 126, at 783 (discussing U.S. antiterrorism policy as influenced by U.K. pressure internationally). "After 1986, therefore, the [U.S.] administration opted to subordinate the acknowledged values of a political offense exception per se to the interests of fighting terrorism with procedural means." *Id.*

204. WORLD PUBLIC ORDER, *supra* note 4, at 389-91; *see* Peterson, *supra* note 126, at 775-76 (discussing U.S. application of test). The tendency to apply the test mechani-

the wake of cases such as *McMullen v. I.N.S.*<sup>205</sup> and *United States v. Mackin*,<sup>206</sup> however, countries have begun to narrow the exception, excluding such crimes as murder, manslaughter, malicious assault, kidnaping, specified explosives offenses, and conspiracy or attempt to commit any of the foregoing offenses from qualifying as political acts.<sup>207</sup> The U.S.-U.K. Supplementary Extradition Treaty<sup>208</sup> ("U.S.-U.K. Supplementary Treaty") is one example of bilateral cooperation intended to reduce the amount of protection afforded terrorists by the political offense exception.<sup>209</sup> The U.S.-U.K. Supplementary Treaty restricts the political exception to non-violent acts,<sup>210</sup> although it maintains a provision preventing extradition if there is reason to believe the extradition request is based solely on political opinion.<sup>211</sup> As long as the sole basis for extradition is a violent crime, regardless of motive, the reformed exception returns the decision of whether to extradite to the executive by transforming extradition into a policy decision.<sup>212</sup> Pursuant to this type of treaty, courts can no longer look to the motivation behind the act itself, but only to whether the prosecution is based on the accused's political belief.<sup>213</sup> Instead of looking at the politics of the extraditee, the asylum country considers only policy concerns of the requested and requesting

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cally has produced conflicting decisions, and the response has been legislation which severely curtails the exception. Kane, *supra* note 184, at 326. "Rigid adherence to the political uprising requirement has produced conflicting results and, for the most part, has reduced the analysis of individual cases to a formalism that has impeded the development of political offense law in the United States." *Id.*

205. 788 F.2d 591 (9th Cir. 1986).

206. 688 F.2d 122 (2d Cir. 1981).

207. Leich, *supra* note 187, at 936. See Peterson, *supra* note 126, at 778 (discussing U.S. attempts to balance fighting terrorism with dealing out justice). The United States updates its outstanding extradition treaties with the new political offense provision, emphasizing its link with the suppression of terrorism. John Patrick Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1527 (1988). Article 1 of the treaty, in effect, removes from judicial consideration the applicability of the political offense doctrine with regard to the nature of the act committed. Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., art. 1, 24 I.L.M. 1105, 1106-07 [hereinafter U.K. Supplementary Treaty]; Groarke, *supra*, at 1527.

208. U.K. Supplementary Treaty, *supra* note 207, 24 I.L.M. at 1005.

209. See Peterson, *supra* note 126, at 778-85 (discussing U.K. Supplementary Treaty thoroughly).

210. U.K. Supplementary Treaty, *supra* note 207, art. 1, 24 I.L.M. at 1106-07.

211. *Id.* art. 3, 24 I.L.M. at 1107.

212. Groarke, *supra* note 207, at 1527.

213. *Id.* at 1529.

nations.<sup>214</sup>

Although the 1957 European Convention On Extradition<sup>215</sup> incorporates the proportionality test,<sup>216</sup> modern European practice has failed to bring about uniform results.<sup>217</sup> The decision to extradite remains fact-dependent, with each nation adopting variations of the test.<sup>218</sup> In two examples of narrow tailoring, Italy and Germany prosecuted and convicted accused terrorists, in the *Achille Lauro*<sup>219</sup> and *TWA flight 847*<sup>220</sup> cases respectively, despite a political crimes defense.<sup>221</sup> In the case of a Yugoslav aircraft that was hijacked by several crew members, however, a Swiss court held that the political motive and the means used to escape were sufficient to excuse the act.<sup>222</sup> This case modified the

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214. *Id.* "Whereas in the past, the judiciary could establish criteria for determining the scope of the exception based on a concern for the accused, the executive can now make that decision on the basis of political expediency." *Id.*

215. European Convention, *supra* note 170, 359 U.N.T.S. 273, Europ. T.S. No. 24.

216. *Id.* art. 3, 359 U.N.T.S. at 278, Europ. T.S. 24, at 3. "Extradition shall not be granted if the offence in respect of which is regarded by the requested Party as a political offence or as an offence connected with a political offence." *Id.*

217. WORLD PUBLIC ORDER, *supra* note 4, at 408. In Denmark and the Netherlands, the courts take a subjective approach and determine the nature of the interests affected by the act and the motives of the actor. *Id.* at 408-09. The Italian Penal Code and case law require a magistrate to determine whether the motivation was purely or only partially political. *Id.* at 408. Switzerland, Germany, France, and Belgium require that the political motive outweigh any non-political intent. *Id.* at 409.

218. *Id.* at 408. One common factor which has emerged, however, the *clause d'attentat*, first authored by Belgium, which excludes all forms of assassinations from the exception, is now found in a slew of multilateral conventions, as well as many bilateral treaties. *Id.* at 409-10; Peterson, *supra* note 126, at 774-75; see, e.g., European Convention on Extradition, *supra* note 215, art. 3, ¶ 3, 359 U.N.T.S. at 278, Europ. T.S. 24, at 3 ("The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.").

219. M. Cherif Bassiouni & Christopher Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 167 (1992). The passengers and crew of an Italian vessel, the *Achille Lauro*, were taken hostage by members of the Palestine Liberation Organization. *Id.* After one U.S. passenger was killed, the ship docked in Egypt and the terrorists were captured. *Id.* While the terrorists were being flown to Tunis for trial, the United States, not believing a trial would occur, sent military aircraft and forced the terrorists' airliner to land in Italy. *Id.* After an extended diplomatic crisis, the defendants were turned over to Italian authorities to face trial in Italy. *Id.*

220. *Id.* at 167-68. Two individuals accused of hijacking TWA Flight 783 were held by Germany, despite U.S. demands for their extradition. *Id.*

221. *Id.*

222. In re Kavic, 19 INT'L L. REP 371 (Swiss Federal Tribunal 1952), cited in SHEARER, *supra* note 9, at 182.

test to account for totalitarian<sup>223</sup> nations, attributing political character to acts required to escape from oppression, as opposed to requiring acts to relate to a struggle for power.<sup>224</sup>

The injured rights test has become a complicated tangle of French judicial decisions and statutes.<sup>225</sup> In two cases, *In re Croissant*<sup>226</sup> and *In re Winter*,<sup>227</sup> the French courts expanded the political offense exception to incorporate a "gravity" threshold which precludes relief if the charged offense is sufficiently serious.<sup>228</sup> Unlike the preceding two tests, however, the French approach recognizes the political legitimacy of offenses not committed contemporaneously to a rebellion.<sup>229</sup>

### C. *Extradition Treaties*

Extradition treaties include articles dealing with procedure, political offenses, extraditable crimes, and other common features.<sup>230</sup> Two recent U.S. extradition treaties are the 1976 U.S.-U.K. Treaty<sup>231</sup> ("U.S.-U.K. Treaty") and the 1978 U.S.-Mexico Treaty<sup>232</sup> ("U.S.-Mexico Treaty"). Both treaties updated previous extradition arrangements<sup>233</sup> and strengthened international cooperation.<sup>234</sup>

#### 1. The U.K. Treaty

In 1972, the United States undertook the task of updating

223. *Id.* at 183.

224. *Id.*

225. Kane, *supra* note 184, at 56. The French have nearly abandoned this stance after the case of Holder. *In re Holder*, Judgment of April 14, 1975, Cour d'appel Paris (unpublished), cited in Littenberg, *supra* note 161, at 1201-02.

226. Judgment of Nov. 16, 1977, Cour d'appel, Paris, T.A.C.P. 349.

227. Judgment of Dec. 20, 1978, Cour d'appel, Paris, T.A.C.P. 344.

228. Littenberg, *supra* note 161, at 1203.

229. *Id.* at 1235. "[I]t recognizes the political legitimacy of offenses which are not contemporaneous to a rebellion." *Id.* While the injured rights test examines motivation and gravity, there is no requirement that an uprising exist. *Id.*

230. Homrig, *supra* note 23, at 674-76.

231. Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter U.K. Treaty], as amended by U.K. Supplementary Treaty, *supra* note 207, 24 I.L.M. 1105.

232. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059, T.I.A.S. No. 9656 [hereinafter U.S.-Mexico Treaty].

233. 122 CONG. REC. 16,796-822 (1986); 125 CONG. REC. 34,198 (1979).

234. See 122 CONG. REC. 16,796-822 (1986) (conveying Presidential letter to Congress); 125 CONG. REC. 34,198 (1979) (conveying Presidential message).

its 1935 Extradition Treaty with the United Kingdom.<sup>235</sup> At the time the U.S.-U.K. Treaty<sup>236</sup> passed the U.S. Senate it included provisions and exceptions typical of most similar treaties.<sup>237</sup> Less than ten years after its signing and ratification, however, the U.S.-U.K. Treaty became the focus of a major congressional debate.<sup>238</sup>

#### a. Relationship and Formation

The presidential letter that accompanied the U.S.-U.K. Treaty to the Senate floor noted that the Treaty updated extradition relations with the United Kingdom.<sup>239</sup> The letter noted that the Treaty now included various narcotic and terrorist offenses previously not listed.<sup>240</sup> With the President's recommendation that the updated treaty would significantly contribute to international cooperation in the fight against drug trafficking and aircraft hijacking, the Senate passed the treaty unanimously.<sup>241</sup>

#### b. Exceptions

The U.S.-U.K. Treaty was a bilateral, reciprocal agreement between the United States and United Kingdom.<sup>242</sup> The Treaty established the procedure for requesting extradition and listed the circumstances under which the charges could be expanded.<sup>243</sup> The U.S.-U.K. Treaty listed, in a schedule, all offenses for which extradition would be granted and added that extradition was also available for any offense punishable by both nations by imprisonment of over one year.<sup>244</sup> The Treaty stated, however, that extradition would not be granted if the offense for which extradition is requested is regarded by the requested party as one of a political character.<sup>245</sup>

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235. 122 CONG. REC. 2129 (1976).

236. U.K. Treaty, *supra* note 231, 28 U.S.T. 227, T.I.A.S. No. 8468.

237. *Id.*

238. See 132 CONG. REC. 16,796-822 (1986) (debating supplementary treaty).

239. 122 CONG. REC. 2129-30 (1976).

240. *Id.*

241. *Id.* The Senate vote was 88-0, with 12 Senators abstaining. *Id.*

242. U.K. Treaty, *supra* note 231, art. 1, 28 U.S.T. at 229, T.I.A.S. No. 8468, at 3.

243. *Id.* art. 7, 28 U.S.T. at 231-32, T.I.A.S. No. 8468, at 5.

244. *Id.* art. 3(a), 28 U.S.T. at 229, T.I.A.S. No. 8468, at 3.

245. *Id.* art. 5(1)(c)(I), 28 U.S.T. at 230, T.I.A.S. No. 8468, at 4.

## 2. The U.S.-Mexico Treaty

The U.S.-Mexico Treaty<sup>246</sup> contained provisions similar to several other, recent treaties.<sup>247</sup> It contained a provision referring to the extradition of nationals<sup>248</sup> and placed the decision to extradite in the hands of the requested nation's executive.<sup>249</sup> The President presented the U.S.-Mexico Treaty to the Senate as a method that would aid U.S. law enforcement agencies in apprehending criminals.<sup>250</sup> Twelve years later, problems in its application would lead to a major, international incident.<sup>251</sup>

### a. Relationship and Formation

The U.S.-Mexico Treaty was touted in the Senate as necessary to aid in the apprehension of international fugitives.<sup>252</sup> The new treaty contained an expanded list of extraditable offenses, including narcotics offenses, aircraft hijacking, and obstruction of justice.<sup>253</sup> Recognizing that increased mobility made law enforcement difficult, the President asked the U.S. Senate to approve the updated U.S.-Mexico Treaty.<sup>254</sup> When the U.S.-Mexico Treaty came before the Senate on November 30, 1978, it was unanimously ratified.<sup>255</sup>

### b. Exceptions

The U.S.-Mexico Treaty listed several exceptions to extradition such as specialty<sup>256</sup> and a political offense exception.<sup>257</sup> Extraditable offenses were listed in the appendix to the Treaty and included acts which fell within one of those categories and acts not mentioned but which both countries punished by imprison-

246. U.S.-Mexico Treaty, *supra* note 232, 31 U.S.T. 5059, T.I.A.S. No. 9656.

247. 125 CONG. REC. 34,198 (1979) (comparing U.S.-Mexico Treaty to several modern extradition treaties).

248. U.S.-Mexico Treaty, *supra* note 232, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656, at 7.

249. *Id.* art. 5, 31 U.S.T. at 5063-64, T.I.A.S. No. 9656, at 5-6.

250. 125 CONG. REC. 34,198 (1979).

251. *Alvarez-Machain*, 504 U.S. 655.

252. 125 CONG. REC. 34,198 (1979).

253. *Id.*

254. *Id.*

255. *Id.* at 34,199-200.

256. U.S.-Mexico Treaty, *supra* note 232, art. 17, 31 U.S.T. at 5072-73, T.I.A.S. No. 9656, at 13.

257. *Id.* art. 5, 31 U.S.T. at 5063-64, T.I.A.S. No. 9656, at 5-6.

ment of over one year.<sup>258</sup> In the U.S.-Mexico Treaty, however, the determination of what constitutes a political offense is specifically left up to the executive of the requested party.<sup>259</sup> In addition, while the U.S.-Mexico Treaty details the extradition procedure for the requesting party in Article 10,<sup>260</sup> it provides that the legislation of the requested country will govern the processing of that request.<sup>261</sup>

Certain other treaty features are included in the U.S.-Mexico Treaty such as a *clause d'attendat*<sup>262</sup> and a provision permitting the non-extradition of nationals.<sup>263</sup> Even if the offense is committed outside the territory of the requesting party, the asylum country will extradite if the requesting nation's laws punish such an offense or if the person thus sought is a national of the requesting party which follows *aut dedere aut judicare*.<sup>264</sup> In addition, U.S. federal crimes which do not have Mexican counterparts are not subject to the specialty requirement, but are allowed under a provision permitting extradition for interstate offenses.<sup>265</sup>

#### D. *The International Criminal Court*

Nations and commentators have raised a renewed call for an international, uniform forum and structure where criminals could be guaranteed both a fair, impartial trial and clear, substantive and procedural standards.<sup>266</sup> Among the solutions to the disparity of tests and procedures in extradition law, the establishment of an International Criminal Court<sup>267</sup> ("ICC") is

258. *Id.* art. 2 (1), (3), 31 U.S.T. at 5062, T.I.A.S. No. 9656, at 4.

259. *Id.* art. 5, 31 U.S.T. at 5063-64, T.I.A.S. No. 9656, at 5-6.

260. *Id.* art. 10, 31 U.S.T. at 5066-67, T.I.A.S. No. 9656, at 8.

261. *Id.* art. 13, 31 U.S.T. at 5069, T.I.A.S. No. 9656, at 11.

262. *Id.* art. 5(2)(a), 31 U.S.T. at 5064, T.I.A.S. No. 9656, at 6.

263. *Id.* art. 9, 31 U.S.T. at 5061-62, T.I.A.S. No. 9656, at 7.

264. *Id.* art. 1(2), 31 U.S.T. at 5061-62, T.I.A.S. No. 9656, at 3-4. *Aut dedere aut judicare* stands for the ability of a nation to either extradite and individual or prosecute her domestically. WORLD PUBLIC ORDER, *supra* note 4, at 6-7.

265. U.S.-Mexico Treaty, *supra* note 232, art. 2(4)(b), 31 U.S.T. at 5062-63, T.I.A.S. No. 9656, at 4-5.

266. A.B.A. Report, *supra* note 2, at 42-45 (detailing recent proposals for an international criminal forum); Peterson, *supra* note 126, at 788-90 (discussing International Court of Terrorism and international criminal code).

267. WORLD PUBLIC ORDER, *supra* note 4, at 427. An International Criminal Court ("ICC") would be an international organ with either exclusive or review jurisdiction over crimes, both international and common, which may be problematic for national courts. *Id.*

most highly touted.<sup>268</sup> The idea of an international court with widespread jurisdiction dates back almost one-hundred years, to the First Hague Convention.<sup>269</sup> Over the years, a number of obstacles, specifically the unwillingness of nations to surrender sovereignty rights and a lack of consensus on what constituted governing international law, blocked the establishment of an ICC.<sup>270</sup> Periodically, the idea has been put forward, but timing or sovereignty concerns have always barred its creation.<sup>271</sup>

Previous ICC discussions have stalled over a consensus on laws.<sup>272</sup> A recent proposal<sup>273</sup> suggested that the current twenty-two categories of international and transnational crimes recognized by conventional and customary international criminal law supply a basic criminal code.<sup>274</sup> Proponents of an ICC argue

268. Bassiouni & Blakesley, *supra* note 219, at 154-55. The authors feel that the development of an ICC is necessary to facilitate multilateral cooperation in handling the increasing sophistication in crime and the growing interdependence of the world order. *Id.*; see also *ABA Report, supra* note 1, at 1 (recommending establishment of ICC); *United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court*, U.N. International Law Commission, 45th Sess., Supp. No. 10, at 255-335, U.N. Doc. A/48/10 (1993), 33 I.L.M. 253 (1994) [hereinafter *UNILC 1993 Draft*] (submitting draft statute for permanent international criminal tribunal and draft code of international crimes); *Draft Code Against the Peace and Security of Mankind: Report of the Working Group Established Pursuant to The Request From the General Assembly to the International Legal Commission*, U.N. Doc. A/CN.4/L.454 (1990) [hereinafter *ILC 1990 Draft*] (concluding ICC is necessary to prevent human rights violations).

269. Bassiouni & Blakesley, *supra* note 219, at 152; Convention for the Pacific Settlement of International Disputes, July 29, 1899, 1901 Gr. Brit. T.S. No. 9 (Cmnd. 798), 32 Stat. 1779. A significant step was taken 20 years later in the 1919 Versailles Treaty when a special commission, charged with investigating the responsibility for acts of war, provided for crimes against humanity. Bassiouni & Blakesley, *supra* note 219, at 152; Treaty of Peace with Germany, June 28, 1919, 1919 Gr. Brit. T.S. No. 4 (Cmnd. 153), 2 Bevans 43.

270. Daniel B. Pickard, Comment, *Security Council Resolution 808: A Step Toward A Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 436 (1995). "The short-sightedness and xenophobic tendencies of politicians after World War I had made impossible the advancement of international criminal law and the establishment of an international criminal court." Bassiouni & Blakesley, *supra* note 219, at 152.

271. See Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 97 (1995) (discussing history and setbacks of ICC).

272. Gianaris, *supra* note 112, at 111-12.

273. M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 115-77 (1987) [hereinafter *DRAFT CODE AND STATUTE*].

274. Bassiouni & Blakesley, *supra* note 219, at 163. These crimes are: aggression, war crimes, crimes against humanity, genocide, slavery, apartheid, unlawful human experimentation, torture, unlawful use of weapons, piracy, hijacking and sabotage of air-

that various procedural and substantive problems encountered in the past could be solved through a search of already existing organizations and norms.<sup>275</sup> World bodies, such as the International Court of Justice<sup>276</sup> ("ICJ") and regional human rights tribunals, like the European Court of Human Rights<sup>277</sup> ("ECHR"), could provide guidance for both the structure and substance of an ICC.<sup>278</sup>

## II. THE PROBLEMS WITH CURRENT EXTRADITION LAW AND PRACTICE AND PROPOSED SOLUTIONS

Extradition law remained relatively unchanged until the post-World War II period.<sup>279</sup> Drug trafficking, global terrorism, and the birth of new nations combined with mass communication and transportation to create new problems in international law.<sup>280</sup> The international community attacked these and other worldwide concerns, developing a series of multilateral treaties that addressed global problems and supplemented bilateral arrangements.<sup>281</sup>

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craft, attacks against and seizures of internationally protected persons and diplomats, taking of civilian hostages, international traffic in drugs, destruction or theft of national treasures, theft of nuclear materials, unlawful use of the mail, cutting of international submarine cables, bribery of foreign public officials, international traffic in obscene materials, counterfeiting, and certain types of environmental harm. *Id.*

275. Gianaris, *supra* note 112, at 111 (suggesting that ICC be modeled after 1951 Draft Statute for ICC, or more recent draft); *Revised Draft Statute for an International Criminal Court (Annex to the Report of the 1953 Committee on International Criminal Jurisdiction)*, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 (1954); DRAFT CODE AND STATUTE, *supra* note 273, at 215-52.

276. U.N. CHARTER art. 92; INTERNATIONAL LAW, *supra* note 25, at 296. The International Court of Justice ("ICJ") is composed of 15 elected judges, selected by the U.N. General Assembly and Security Council. INTERNATIONAL LAW, *supra* note 25, at 297. It has jurisdiction over both controversies and advisory opinions. *Id.* at 300.

277. INTERNATIONAL LAW, *supra* note 25, at 43-44. The European Court of Human Rights ("ECHR") enforces an "international bill of rights." *Id.*

278. Homrig, *supra* note 23, at 703; *see also A.B.A. Report, supra* note 2, at 16-20 (looking at ICJ structure and proposing modifications to suit ICC).

279. Green, *supra* note 113, at 468.

280. *Id.* "It is unlikely that the development of the POE anticipated modern day terrorism, or its inclusion therein." *Id.*

281. *See* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 24 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmnd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987) (pledging cooperation in areas of international crime); Charter of Paris for a New Europe, Nov. 21, 1991, U.N. Doc. A/

### A. Criticisms of Current Extradition Laws and Practices

Cooperation in international law enforcement led to an increasing use of irregular means of rendition and a narrowing of the political offense exception.<sup>282</sup> Outdated, restrictive, or non-existent treaties frustrated officials and encouraged irregular rendition, while terrorists hid behind the political offense exception<sup>283</sup> As a result, governments eliminated important individual rights safeguards and narrowed the political offense exception's coverage.<sup>284</sup>

#### 1. Reasons Behind Current Restrictions and Elimination of Extradition Safeguards

Extradition judges examine specific circumstances to defeat terrorists' defense that their acts stem from a political motivation and are therefore non-extraditable.<sup>285</sup> Terrorists whose violent acts are held to be more closely linked with political aims, however, have succeeded under this argument.<sup>286</sup> Recently, governments have begun to focus more on what action furthers foreign policy interests than what satisfies the spirit of the political offense exception.<sup>287</sup> They have restricted the exception's protection through both multilateral<sup>288</sup> and bilateral arrangements.<sup>289</sup>

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45/859, at 20 (1990), 30 I.L.M. 190 (condemning terrorism and illicit trafficking in drugs and seeking new forms of cooperation).

282. Lorenzo L. Lorenzotti, Note, *In re Extradition of Atta: Tension Between the Political Offense Exception and U.S. Counterterrorism Policy*, 1 PACE Y.B. INT'L L. 163, 174 (1989).

283. Peterson, *supra* note 126, at 779 (indicating that updated treaties would have dramatic impact on terrorist immunity).

284. Lorenzotti, *supra* note 282, at 174. "In application, the Supplementary Treaty eliminates the POE as a viable exception to extradition." *Id.* at 174.

285. See *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) (shooting of constable occurred at distance from political uprising); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981) (finding insufficient connection between bombing of market full of civilians and political goals of Palestinian Liberation Organization).

286. See *McMullen*, 788 F.2d 591 (viewing bombing of British barracks in context of political uprising); *Mackin*, 688 F.2d 122 (murdering British soldier furthered political purpose of Irish Republican Army).

287. 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, 846 (1993).

288. See, e.g., Terrorism Treaty, *supra* note 55, Europ. T.S. No. 90, 15 I.L.M. 1272. The Terrorism Treaty signifies the most comprehensive, unified attack launched in recent times, although subsequent bilateral attempts have also proven successful. Peterson, *supra* note 126, at 783. The Terrorism Treaty was based on the already then-prevalent belief that extradition is especially effective measure in combating terrorism. *Id.*

a. The Fight Against Terrorism is Narrowing the Political Offense Exception

Nations are narrowing the political offense exception.<sup>290</sup> As demonstrated by the U.S.-U.K. Supplementary Treaty, the search for a solution to terrorism has resulted in the circumvention of judicial review.<sup>291</sup> The elimination of clearly identifiable violent crimes from within the exception reduces the danger that criminals can escape liability by bootstrapping a political agenda.<sup>292</sup> The tradeoff, however, is that individuals denied access to their domestic political system and forced to struggle for political change through violence are also unable to invoke the provision's protection.<sup>293</sup>

b. Frustration Over Treaty Reform and the Extradition Process Leads to Abduction

The rise in drug trafficking during the late twentieth century<sup>294</sup> contributed to the use of irregular methods of obtaining jurisdiction over wanted criminals.<sup>295</sup> Officials who attempted to extradite individuals were frustrated in their legal extradition efforts by the exclusion of any references to drug-related offenses in extradition treaties, most of which dated back to the early 1900's.<sup>296</sup> Although countries attempted to update these ar-

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The United Kingdom's stance on terrorism shaped both multilateral and bilateral treaties. *Id.*

289. U.K. Supplementary Treaty, *supra* note 207, 24 I.L.M. 1104.

290. *See* Lorenzotti, *supra* note 282, at 168, 174 (discussing additional requirements imposed by courts and elimination of political offense exception by exclusion from U.K. Supplementary Treaty).

291. Christopher H. Pyle, *The Political Offense Exception*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* 181, 182 (M. Cherif Bassiouni ed., 1988).

292. Peterson, *supra* note 126, at 786.

293. *Id.* When a group does not have access to political instruments by which subversive methods may be carried out, however, the elimination of all other actions from the exception may result in grave injustice to the individual sought, and also in injury to the world system that ties its own hands from helping those struggling against oppressive systems. Sapiro, *supra* note 10, at 661-62.

294. Nadelmann, *supra* note 287, at 861; *see* Joseph B. Treaster, *Smuggling and Use of Illicit Drugs Are Growing*, *U.N. Survey Finds*, *N.Y. TIMES*, Jan. 13, 1992, at A11.

295. Nadelmann, *supra* note 287, at 861.

296. *Id.* In some cases, however, the 1972 Protocol to the Single Convention on Narcotic Drugs repaired the omission. *Id.*; Protocol Amending the 1961 Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439, 1979 Gr. Brit. T.S. No. 23 (Cmd. 7466).

rangements, the negotiation of new provisions was long and cumbersome.<sup>297</sup> The choice often was either to let criminals avoid prosecution or allow law enforcement officers to bypass legal channels in obtaining jurisdiction.<sup>298</sup> In addition, extradition treaties did not always exist between the relevant nations,<sup>299</sup> or governments collaborated with the group or individual sought.<sup>300</sup> Nations turned, therefore, to other methods of rendition, including deportation, exclusion, and abduction.<sup>301</sup>

### c. The Exclusion of Nationals from Extradition Encourages Irregular Rendition

Many nations, particularly civil law nations, cannot extradite nationals.<sup>302</sup> Instead, these nations pursue a policy of *aut dedere, aut iudicare*,<sup>303</sup> choosing to prosecute their nationals domestically.<sup>304</sup> The principle is based on civil law's interpretation of criminal jurisdiction, which extends to crimes committed abroad as well as at home.<sup>305</sup> In practice, however, the policy fails through either a lack of interest in prosecution or else the difficulty in obtaining the necessary evidence and witnesses.<sup>306</sup> Other times, the nation either acquits the individual or issues a lenient sentence.<sup>307</sup>

### d. Confusion Over Treaty Language and Criminal Codes in Outdated Treaties Prevents Extradition

Many treaties have not been recently updated and do not address modern crimes, such as drug trafficking.<sup>308</sup> In addition,

297. *A.B.A. Report*, *supra* note 2, at 46.

298. Abraham Abramovsky, *Transfer of Penal Sanction Treaties: An Endangered Species?*, 24 *VAND. J. TRANSNAT'L L.* 449, 472 (1991).

299. *See Weissman*, *supra* note 1, at 467 (noting United States lacks extradition treaties with 56 countries).

300. *Id.* at 485.

301. *A.B.A. Report*, *supra* note 2, at 46; *see supra* notes 193-95 and accompanying text (defining irregular rendition methods).

302. Nadelmann, *supra* note 287, at 815. The reasons for this policy range from the nation's perceived obligation to protect its citizens to the better chance of rehabilitation in a familiar system and setting. *Id.* at 847.

303. *WORLD PUBLIC ORDER*, *supra* note 4, at 6-7. This maxim allows a nation to either extradite or prosecute domestically. *Id.*

304. *Id.* at 435-42.

305. Nadelmann, *supra* note 287, at 847.

306. *Id.*; *A.B.A. Report*, *supra* note 2, at 47.

307. *A.B.A. Report*, *supra* note 2, at 47.

308. Gianaris, *supra* note 112, at 109-10; The United Nations Convention Against

certain non-U.S. nations have refused to extradite in cases of crimes whose construct is a domestic anomaly.<sup>309</sup> The response of requesting nations has been to replace specific lists of extraditable crimes with broader clauses, eliminating the problems of terminology.<sup>310</sup>

## 2. Increasing Use of Irregular Rendition to Circumvent Outdated Treaties and the Slow Extradition Process

Irregular rendition is superseding the extradition process as the norm in the retrieval of fugitives.<sup>311</sup> Despite the prohibitions against abduction in the U.N. Charter,<sup>312</sup> the UDHR,<sup>313</sup> and the ICCPR,<sup>314</sup> nations continue to abduct individuals.<sup>315</sup> Furthermore, irregular rendition methods that do not infringe on na-

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Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Drug Convention Agreement") not only provides for the extradition of accused drug-traffickers, but also allows the apprehending nation to prosecute the criminal in the event that the nation where the offense took place is unable or unwilling to do so. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 6, ¶ 3, 28 I.L.M. 493, 507 (1989). In addition, the Drug Convention Agreement can serve as an extradition treaty where a specific extradition treaty has not been signed by two signatory nations. *Id.* art. 6, 28 I.L.M. at 507. The Drug Convention Agreement provides requesting nations with the advantage of prosecuting alleged narcotics offenders in their own judicial systems, removed from the corruption and intimidation which often permeate the drug traffickers' home courts. Gregory Wilson, Note, *The Changing Game: The United States Evolving Supply-Side Approach to Narcotics Trafficking*, 26 VAND. J. TRANSNAT'L L. 1163, 1179-80 (1994). As of April 1993, the Convention had been ratified by 75 nations and the European Community. Duncan E. Alford, *Anti-Laundering Regulations: A Burden on Financial Institutions*, 19 N.C.J. INT'L L. & COM. REG. 437, 442 (1994). The Drug Convention Agreement is currently supported by two-thirds of the World's nations. Barbara M. Yarnold, *Doctrinal Basis for the International Criminalization Process*, 8 TEMP. INT'L & COMP. L.J. 85, 111 (1994).

309. Nadelmann, *supra* note 287, at 830-31. The United States encounters particular difficulty when the crime charged falls under a federal criminal statute based on the use of the mails, telephone, or other forms of interstate commerce for the commission of a crime. *Id.* at 831-32; see Kester, *supra* note 87, at 1460-64 (discussing U.S. laws with no foreign counterparts).

310. Nadelmann, *supra* note 287, at 832.

311. Homrig, *supra* note 23, at 702. "If the United States creates a new custom of abduction, other countries may soon follow." *Id.*

312. U.N. CHARTER art. 2, ¶ 4; see Homrig, *supra* note 23, at 702 (noting prohibition against abduction in these agreements).

313. UDHR, *supra* note 12, art. IX, at 71; Homrig, *supra* note 23, at 702.

314. ICCPR, *supra* note 13, art. 9, ¶ 1, 999 U.N.T.S. at 175, 6 I.L.M. at 371; Homrig, *supra* note 23, at 701.

315. Abramschmitt, *supra* note 107, at 128. The rise in irregular apprehension over the past 20 years is attributed to such factors as the increase in terrorist acts and drug trafficking, as well as domestic elements which retard or impede extradition. *Id.*

tional rights, such as deportation, are sometimes condoned or pardoned by the international community.<sup>316</sup>

a. Abduction as a Means of Carrying Out National Policy Goals

Incidences of abduction have increased as a result of various factors that frustrate valid extradition practice.<sup>317</sup> Rather than wait for a lengthy extradition request to be processed, nations sometimes resort to abduction,<sup>318</sup> despite the fact that such action violates modern human rights law<sup>319</sup> and defeats the purpose of formal extradition procedures.<sup>320</sup> Still, the reluctance of some nations to extradite nationals<sup>321</sup> as well as the desire for expediency in obtaining jurisdiction over wanted fugitives contributes to these nations' use of abduction.<sup>322</sup>

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316. *WORLD PUBLIC ORDER*, *supra* note 4, at 127-28. This does not, however, mean that the practice is not heavily criticized by human rights groups, who see irregular rendition as a violation of the individual's right to legal process. *Id.* at 128.

317. Abramschmitt, *supra* note 107, at 122.

318. *Id.* at 132. One of the most notorious and recent extralegal strategy was the American capture of General Manuel Noriega in December 1989 and his arraignment in the United States on charges of drug trafficking and conspiracy. Nadelmann, *supra* note 287, at 879-90 (detailing U.S. invasion of Panama in December 1989).

319. Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 *ST. JOHN'S L. REV.* 551, 558 (1993). The express prohibitions against arbitrary arrest or detention of the individual evinces that abductions violate modern human rights law. *Id.* at 561-63 (looking at examples such as 1981 decision of Human Rights Committee of the Covenant on Civil and Political Rights, that abduction of Uruguayan refugee from Argentina by Uruguayan officials violates abductee's individual right to be free from arbitrary arrest and detention).

320. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 *VA. J. INT'L L.* 151, 176 (1991). "Where such treaties exist it is clearly the intention of the parties to the treaty that the surrender and acquisition of the defendants be accomplished in a manner which does not violate the sovereignty of either state." *Id.* From the practice, writings, and decisions of the international community, it is clear that forced extradition has not been traditionally favored. Herrold, *supra* note 80, at 148. The act has been considered violative of fundamental human rights and also of the territorial integrity of the country wherein the abduction occurred. *Id.* Forced extradition is clearly not accepted by the international community and is even seen as proscribed under the U.N. and O.A.S. Charters. *Id.*

321. See Nadelmann, *supra* note 287, at 847 (refusing to extradite nationals is source of frustration); *supra* note 124 and accompanying text (noting that civil law nations do not extradite nationals).

322. Abramschmitt, *supra* note 107, at 132.

b. Use of Immigration Devices to Circumvent Extradition Requirements

The use of deportation and other immigration devices to achieve "disguised extradition"<sup>323</sup> is quasi-legal because it circumvents the extradition process but is undertaken with the cooperation of the asylum nation.<sup>324</sup> Deportation can be used when a political offense defense has proven successful<sup>325</sup> or when domestic laws prevent extradition.<sup>326</sup> Deportation deprives the individual of rights available to an extraditee, such as the political offense defense and the doctrine of specialty.<sup>327</sup> The individual thus falls victim to expediency.<sup>328</sup>

c. International Cooperation Through Informal Surrender

Informal surrender refers to various non-legal devices used to obtain jurisdiction over fugitives.<sup>329</sup> The United States is often a participant in this style of rendition because of the long, common borders it shares with Mexico and Canada.<sup>330</sup> In addition to these border renditions, the United States operated an extensive program of informal surrender throughout the 1970's in an effort to capture drug traffickers.<sup>331</sup> Because the United

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323. SHEARER, *supra* note 9, at 78; Kane, *supra* note 184, at 333. "Disguised extradition" refers to a nation's use of legal procedures other than extradition to deliver a fugitive to another nation. *Id.*

324. Abramschmitt, *supra* note 107, at 132-33.

325. Kane, *supra* note 184, at 334-35. After a U.S. judge ruled that Peter McMullen was not extraditable because his acts furthered the political goals of the Provisional Irish Republican Army, the United States deported him for his participation in a terrorist organization. McMullen v. I.N.S., 788 F.2d 591, 596 (9th Cir. 1986) (viewing bombing of British barracks in context of political uprising).

326. Kane, *supra* note 184, at 334; VAN DEN WIJNGAERT, *supra* note 17, at 53. After members of the Baader-Meinhoff group blew up the West German Embassy in Stockholm, domestic law prevented Sweden from extraditing the surviving terrorists to West Germany. *Id.* Instead, Sweden formally expelled the members, subsequent to which West Germany arrested them. *Id.*

327. SHEARER, *supra* note 9, at 88.

328. *Id.* at 89.

329. Nadelmann, *supra* note 287, at 858. There are many other names for this method, including "extradition Mexican-style," referring to an arrangement whereby Mexican police push fugitives over the border into the United States, where they are then arrested. *Id.* Until 1965, a similar practice was followed by officials of the Republic of Ireland in returning fugitives to Northern Ireland. SHEARER, *supra* note 9, at 75.

330. Nadelmann, *supra* note 287, at 860.

331. *Id.* at 860-61. Known as "Operation Springboard," the Bureau of Narcotics and Dangerous Drugs coordinated with various Latin and South American police units to capture dozens of drug traffickers. *Id.*

States, like many other nations, follows the principle of *male captus, bene detentus*,<sup>332</sup> courts do not inquire as to the method by which jurisdiction was obtained and indictments are not prevented by procedural irregularities.<sup>333</sup>

### B. *Arguments for an ICC*

The idea of an ICC has won the support of numerous nations,<sup>334</sup> the United Nations,<sup>335</sup> and the media.<sup>336</sup> Proponents of an international standard believe an ICC would fill gaps in the international legal system.<sup>337</sup> Proponents argue that an ICC would resolve a number of factors contributing to unwillingness to extradite.<sup>338</sup> It would provide a neutral forum,<sup>339</sup> eliminate the appearance of favoritism or pressure in outcome,<sup>340</sup> and surmount legal barriers, such as lack of a treaty or a provision.<sup>341</sup> An ICC could also guarantee individual rights, because international law would form the basis of its accompanying code.<sup>342</sup>

#### 1. An ICC Would Foster Neutrality in Extradition

Delivering an individual to a neutral body would avoid any

332. Homrig, *supra* note 23, at 680. "An illegal apprehension does not preclude jurisdiction." *Id.*

333. *Alvarez-Machain*, 504 U.S. 655; Homrig, *supra* note 23, at 680. The Israeli court in *Eichmann v. Israel* used this rationale. Judgment of May 29, 1962, 36 I.L.R. 277 (S. Ct.) (Isr.). In *Eichmann*, the court based its jurisdiction on the universal jurisdiction provided for war crimes, and claimed that the proper forum for protesting Eichmann's abduction from Argentina was at an "international level." Homrig, *supra* note 23, at 699-700. The court cited the universal nature of the crimes charged. *Id.*

334. Marquardt, *supra* note 271, at 90-91. Trinidad and Tobago, together with a coalition of Latin American and Caribbean nations with limited resources, are interested in using an ICC to combat drug traffickers. *Id.* Other nations, such as Russia, Germany, Canada, Spain, Poland, Hungary, Nicaragua, Mexico, and Australia have also indicated their support of an ICC. 140 CONG. REC. S104 (daily ed. Jan. 26, 1994) (testimony of Senator Dodd).

335. *UNILC 1993 Draft*, *supra* note 268, U.N. Doc. A/49/10, in 33 I.L.M. 253; *ILC 1990 Draft*, *supra* note 268, U.N. Doc. A/CN.4/L.454.

336. 140 CONG. REC. S104 (daily ed. Jan. 26, 1994) (testimony of Senator Dodd); *A Court for International Outlaws*, N.Y. TIMES, July 6, 1993, A1 (editorial comment).

337. Marquardt, *supra* note 271, at 97.

338. *Id.*

339. *Id.* Using an ICC, countries could void influence that drug traffickers and other, powerful criminals might have in a domestic system. *Id.* at 99.

340. *Id.* at 97-98.

341. *Id.* An ICC would test Libya's professed willingness to turn over suspected Lockerbie terrorists to a neutral judicial body. *Id.* at 98.

342. *Id.* at 111.

appearance of choosing sides on an issue.<sup>343</sup> Part of the original purpose of the political offense exception was to allow the requested state to remain neutral regarding another state's political conflict.<sup>344</sup> The negotiation of bilateral and multilateral treaties results in a multi-tiered extradition process; nations whose politics coincide form supplemental treaties, while nations whose politics are dissonant do not conclude revision.<sup>345</sup> The prosecution of a particular case or individual might also be a source of conflict or embarrassment, either because of foreign policy or internal politics.<sup>346</sup> For example, governments unwilling to extradite terrorists or drug traffickers to the United States because of political tension or public opinion could avail themselves of the ICC and thereby maintain a neutral stance toward the United States.<sup>347</sup>

## 2. An ICC Would Reduce Political Pressure In Extradition

An ICC would facilitate the prosecution of individuals or groups whose control of domestic courts is insidious.<sup>348</sup> The very nature of a crime or the individual involved may intimidate a court.<sup>349</sup> Current multilateral conventions, even those recently updated, may be subject to existing bilateral treaties as well as participating nations' reservations.<sup>350</sup> An ICC would dilute the control of powerful nations over extradition partners, the latter

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343. Gianaris, *supra* note 112, at 109-10.

344. VAN DEN WIJNGAERT, *supra* note 17, at 3; Sapiro, *supra* note 10, at 663.

345. James L. Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 EMORY INT'L L. REV. 43, 72 (1990); Sapiro, *supra* note 10, at 685. This would result in citizens from "friendly" nations being denied a political offense defense, while those from "unfriendly" nations have enhanced protection. *See id.* (using example of treatment of British national as opposed to Irish national).

346. Bassiouni & Blakesley, *supra* note 219, at 172 (discussing German-United States relations after German's refusal to extradite TWA hijackers, and hypothetical scenarios involving deposed leaders).

347. Scharf, *supra* note 199, at 153.

348. A.B.A. Report, *supra* note 2, at 47; Bassiouni & Blakesley, *supra* note 219, at 164; *see generally* Igor I. Kavass, *Colombia: Supreme Court Decision on Law Concerning the Extradition Treaty Between Colombia and the United States*, in 27 I.L.M. 492 (1988) (discussing intimidation and corruption in Colombian judicial system by drug traffickers).

349. Bassiouni & Blakesley, *supra* note 219, at 172. The nation might be subject to retaliation, harassment, or hardship, especially in the case of terrorism. *Id.* A number of Caribbean and Latin American countries have expressed an interest in alternatives to domestic prosecution or extradition. A.B.A. Report, *supra* note 2, at 47.

350. *See Colombian Drug Trafficking and Control: Hearings Before the Select Committee on Narcotics Abuse and Control*, 100th Cong., 1st Sess. (1987) (exploring weaknesses in Inter-American Convention on Extradition of 1933).

of which would no longer be subject to economic, political, or military pressure to extradite.<sup>351</sup>

### 3. An ICC Would Provide a Neutral Forum

An ICC would provide a neutral forum with uniform laws applicable to all who came before the Court.<sup>352</sup> Nations who fear that the accused would not receive a fair trial in the requesting nation would be able to turn to a neutral ICC.<sup>353</sup> Furthermore, nations that are reluctant to extradite to a particular country because of popular sentiment will have a viable alternative forum.<sup>354</sup> The ICC would provide a neutral jurisdiction and clear rights framework to which nations could surrender both nationals and other fugitives.<sup>355</sup>

### 4. An ICC Would Create Uniformity in Extradition Law and Procedure

An ICC would ensure that all nations are treated equally by preventing the formation of a multi-tiered extradition process.<sup>356</sup> It would eliminate the uncertainties facing an individual in a different criminal justice system by providing uniform procedure and protections.<sup>357</sup> Existing multilateral treaties and conventions, as well as the writings of scholars, could form the basis for international rules.<sup>358</sup> An ICC could define the political offense exception and then apply it without policy or political con-

351. Bifani, *supra* note 15, at 698. An example of this type of coercion is the 1971 visit of a senior narcotics official of the State Department to Paraguay, who threatened to cut off US\$11 million of annual U.S. aid and U.S. support for loans if Auguste Ricord, a Corsican drug trafficker, was not rendered to the United States. Nadelmann, *supra* note 287, at 863.

352. Gianaris, *supra* note 112, at 109-10. Nations would circumvent the problem of delivering a criminal to a different criminal justice system. *Id.* It would also solve the problem of disputed or concurrent jurisdiction. *Id.* at 110.

353. Marquardt, *supra* note 271, at 97. The ICC could provide a forum where the suspected Lockerbie terrorists could face trial. Bassiouni & Blakesley, *supra* note 219, at 166. Currently, Libyan law prohibits the extradition of nationals and the United States and United Kingdom do not trust the reliability of a Libyan trial. *Id.*

354. *A.B.A. Report*, *supra* note 2, at 47

355. Marquardt, *supra* note 271, at 97-98; Bifani, *supra* note 15, at 696.

356. Taulbee, *supra* note 345, at 685; *see supra* note 345 and accompanying text (demonstrating how bilateral reform would favor certain nations over others).

357. 139 CONG. REC. S930 (daily ed. Jan. 28, 1993) (arguing advantages of ICC); Gianaris, *supra* note 112, at 110-11.

358. 139 CONG. REC. S930 (daily ed. Jan. 28, 1993) (statement of Senator Dodd).

cerns.<sup>359</sup>

### 5. An ICC Would Expedite Extradition Process and Reform

An ICC with clear jurisdiction and procedures would eliminate the need for irregular rendition.<sup>360</sup> The negotiation of updated bilateral treaties, as well as multilateral agreements, necessary to eliminate drug trafficking and clarify the political offense exception, takes time and frustrates officials seeking extradition.<sup>361</sup> In addition, domestic laws prohibit many nations from extraditing nationals to foreign countries, shielding fugitives from punishment.<sup>362</sup> Proponents of an ICC believe that an international court would supplement existing extradition treaties and give those governments unable to extradite to another nation a viable alternative.<sup>363</sup> Furthermore, agreement on an ICC structure would facilitate, rather than hamper, bilateral cooperation by providing a clear procedural framework for extradition, free of domestic legal pitfalls.<sup>364</sup>

### 6. An ICC Would Function as an Enforcement Mechanism

An ICC would provide a means of enforcing extradition de-

359. Sapiro, *supra* note 10, at 687. An ICC would remove the element of discretion from the decision to extradite. *Id.*

360. Marquardt, *supra* note 271, at 141-42. Critics argue that an ICC would undermine the existing system, however:

[T]he existing system is hardly perfect. Some crimes are never prosecuted because the state in which the suspect is found refuses to extradite, whether for reasons of political expediency, national pride, or genuine concern over the fairness of a trial. An international criminal court can serve a valuable function as an adjunct to the existing extradition network by catching those cases that fall through the cracks . . . . An international criminal court could go far to ease tensions and inefficiencies caused by the aggressive unilateral pursuit of foreign suspects by providing an established, internationally legitimate forum for cooperation and action.

*Id.*

361. Nadelmann, *supra* note 287, at 831. Negotiation takes time and resources are often limited. *Id.* Furthermore, ratification of multilateral agreements takes time and is often delayed by uncertainty over meaning and application. *Id.*

362. SHEARER, *supra* note 9, at 94. "The effect of the absolute prohibition in the case of States whose law does not provide generally for the punishment of crimes committed extraterritorially is to render a criminal immune from prosecution for no reason other than accident of birth." *Id.*

363. 140 CONG. REC. S121 (daily ed. Jan. 26, 1994).

364. 132 CONG. REC. 16,593 (1986) ("A general multilateral agreement on terrorism would ease the way for bilateral extradition treaties.")

cisions<sup>365</sup> and eliminate the need for nations to resort to abduction, since the court would function as a mechanism for resolving conflicts over extradition decisions.<sup>366</sup> The presence of an international body capable of resolving extradition disputes would also have a deterrent effect on nations who would otherwise resort to abduction to obtain jurisdiction over a fugitive.<sup>367</sup> Whereas current extradition treaties have no enforcement mechanisms, an ICC could pursue jurisdiction by imposing sanctions and placing international obligations upon resistant nations.<sup>368</sup>

### C. *Arguments for Repair Through Existing Systems and Procedure*

The current system of bilateral and multilateral extradition treaties and conventions covers a broad range of topics.<sup>369</sup> Opponents of an ICC argue that the current system is increasingly effective in bringing criminals to justice.<sup>370</sup> Preservation of national sovereignty requires that nations, not international bodies, determine their own laws.<sup>371</sup> Furthermore, the expectations and perspectives of nations change over time, and an ICC may not change to suit them.<sup>372</sup>

#### 1. An ICC Would Infringe on National Sovereignty Rights

Sovereignty is a fundamental right of nations, and includes the right to domestically prosecute crimes committed on their territory.<sup>373</sup> Opponents of an ICC believe that domestic laws and

365. Gianaris, *supra* note 112, at 111. "Economic sanctions proposed and supported by an international criminal court or armed intervention by an international agency would provide a fair and neutral approach to the problem of a nation's lack of cooperation and would not rely solely on one nation's superior economic or military prowess." *Id.*

366. Bassiouni & Blakesley, *supra* note 219, at 168; Bonnie Santosus, *An International Criminal Court: "Where Global Harmony Begins,"* 5 *TOURO L. REV.* 25, 33 (1994).

367. Santosus, *supra* note 366, at 33.

368. Gianaris, *supra* note 112, at 111.

369. Scharf, *supra* note 199, at 147-48. The system relies on numerous conventions which cover crimes against peace, aggression, war crimes, crimes against humanity, genocide, torture, apartheid, drug offenses, counterfeiting, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes against officials and diplomats, and hostage taking. *Id.*

370. *Id.* at 149 (quoting Chinese representative to U.N. Sixth Committee).

371. Bassiouni & Blakesley, *supra* note 219, at 161.

372. *Id.* Nations' expectations relate to both the nature of the offense and the operation of the ICC. *Id.*

373. Marquardt, *supra* note 271, at 85; Sandra L. Jamison, *A Permanent International*

decisions should be free from the interference of outside international bodies.<sup>374</sup> Each nation must be able to control and protect its citizens, allowing other nations to determine their own internal responsibilities.<sup>375</sup> Critics state that an ICC would undermine a nation's legislature and judiciary, and place its citizens at the mercy of a non-domestic body.<sup>376</sup>

## 2. International Standards Do Not Suit Regional Problems

Any proposed ICC would depend on good faith participation.<sup>377</sup> Opponents argue that nations who refuse to extradite under the current system are unlikely to do so under an ICC.<sup>378</sup> Furthermore, an ICC assumes that judges would be impartial and able to apply the law fairly.<sup>379</sup> Any politicization, however, will produce unjust decisions by which nations and individuals will be bound.<sup>380</sup> An ICC would exclude nations from the decision process, and any decision could preclude a nation from its own prosecution of future similar offenses or criminals.<sup>381</sup> An ICC would have to balance both common law and civil law traditions, accommodating, for example, the differences in evidentiary and prosecution procedures.<sup>382</sup> ICC opponents argue that

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*Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 431 (1995).

374. *Id.*

375. Herrold, *supra* note 80, at 144. The essence of sovereignty is:

This control may take the form of certain public duties and obligations placed upon the citizen, but such duties and obligations do not cross national boundaries. The individual is likewise afforded certain privileges and immunities which also do not cross boundaries and are not afforded to citizens of other States.

*Id.*

376. 140 CONG. REC. S101 (daily ed. Jan. 26, 1994) (statement of Senator Helms); Santosus, *supra* note 366, at 35-36.

377. Perry, *supra* note 152, at 734. Some nations tend not to cooperate in reciprocal systems and this failure creates confusion and conflicting results in extradition practice. *Id.*

378. A.B.A. Report, *supra* note 2, at 46.

379. Perry, *supra* note 152, at 734.

380. 140 CONG. REC. S113 (daily ed. Jan. 26, 1994) (statement of Senator Helms); Santosus, *supra* note 366, at 36 (discussing threat of ICC as means of embarrassing countries or political administrations).

381. Scharf, *supra* note 199, at 165. "An acquittal or light sentence handed down by the international criminal court could immunize the accused from further prosecution under the existing prosecute or extradite system." *Id.*

382. *Id.* at 166-67. The public prosecutor investigates and prosecutes in a common law system, while that is the judiciary's function in a civil law system. *Id.* at 167.

a better solution is to continue establishing ad hoc courts as the need arises, which will eliminate a politicized bureaucracy and still punish criminals.<sup>383</sup>

### 3. There Is No Clear Body of International Law

There is no clear international criminal law upon which an ICC could rely.<sup>384</sup> Any law that an ICC adopts would bind nations as well as individuals.<sup>385</sup> An ICC, dependent upon the support of its signatory nations, will choose the safe middle ground of policy and not risk challenging the position of more powerful members.<sup>386</sup> Worse still, it might develop unacceptable definitions of international crimes that could not be challenged by domestic courts.<sup>387</sup>

### 4. Bilateral and Multilateral Arrangements Better Meet National Needs

Bilateral arrangements are more responsive to changed environments than multilateral agreements.<sup>388</sup> The modification of existing treaties tailors changes to the immediate needs of participating nations.<sup>389</sup> Any ambiguity that exists in law is necessary to maintain flexibility in the courts and to adapt to changes in the international system.<sup>390</sup> The creation of an ICC

383. Jamison, *supra* note 373, at 437. A permanent ICC would also raise the issue of who will burden the cost of a permanent, sitting international body. *Id.* at 438.

384. Marquardt, *supra* note 271, at 137. The movement to create an ICC has made and will continue to make little progress because:

A permanent international court would have no better method to fill the gaps in international criminal law than to sense the Zeitgeist of international values from a variety of imprecise sources. While general principles of international morality were sufficient at Nuremberg, not all cases in an international court would be so clearcut.

*Id.*

385. *Id.* at 143 (claiming that, although ICC would derogate state sovereignty, there would be little change in existing status quo of state obligations).

386. *Id.* at 144.

387. 140 CONG. REC. S101 (daily ed. Jan. 26, 1994) (statement of Senator Helms); *A.B.A. Report, supra* note 2, at 48 (quoting letter from State Department).

388. Nadelmann, *supra* note 287, at 827-28. In the case of the United States, bilateral treaties afford an opportunity to obtain agreements of the greatest interest and advantage to the United States. *Id.* This stands in contrast to multilateral treaties which tend to settle on the lowest common denominators of cooperation. *Id.*

389. Kane, *supra* note 184, at 332-33. "Through their specificity, bilateral agreements can minimize the inconsistency resulting from varying judicial constructions of the present law." *Id.*

390. Littenberg, *supra* note 161, at 1200.

would thereby undermine the growth and improvement of domestic justice systems.<sup>391</sup> Any existing problems in extradition law result from conflicting national systems, which the current ICJ is capable of handling.<sup>392</sup>

### 5. An ICC Would Not Protect Individual Rights

An ICC would not guarantee basic liberties, currently enjoyed domestically, nor would it maintain an effective political offense defense.<sup>393</sup> Instead, an ICC would constitute an aggregate of systems, not all of which recognize extensive individual rights and freedoms.<sup>394</sup> Some ICC opponents claim that the recent changes to the political offense exception maintain significant rights safeguards.<sup>395</sup> They believe that, while the expanding list of non-political crimes has reduced the acts that can be considered political, other modifications maintain the spirit of the exception.<sup>396</sup> An ICC, however, might sacrifice basic human rights in an attempt to create a universally accepted criminal law.<sup>397</sup>

## III. EXTRADITION LAW MUST BE REFORMED THROUGH AN ICC

An ICC, based on established international law, is necessary to safeguard individual rights. Nations, responsive to public pressure and societal needs, subvert individual rights in pursuit of extradition.<sup>398</sup> They abduct individuals to avoid lengthy negotiations<sup>399</sup> and reform treaties to reflect short-term policy

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391. *A.B.A. Report*, *supra* note 2, at 48.

392. *See Santosus*, *supra* note 366, at 39 (stating ICJ can adequately handle claims); *Jamison*, *supra* note 373, at 489 (presenting argument that ICJ can house international criminal proceedings).

393. 140 CONG. REC. S249-40 (daily ed. Jan. 26, 1994) (arguing that ICC would eliminate First and Fourth Amendment protections).

394. *Id.*

395. *See* 132 CONG. REC. 16,588 (1986) (statement of Senator Thurmond) (claiming reformed political offense exception is still viable defense).

396. 132 CONG. REC. 16,588 (1986) (statements of Senators Thurmond and Pell); *see* U.K. Supplementary Treaty, *supra* note 207, art. 3, 24 I.L.M. at 1107 (excluding certain acts from within political offense category).

397. *Santosus*, *supra* note 366, at 36.

398. *See supra* notes 189-92 and accompanying text (identifying events and conditions which demonstrate subversion of individual rights).

399. *See supra* notes 296-98, 317-18 and accompanying text (discussing abduction out of frustration over outdated treaties and desire for expediency).

needs.<sup>400</sup> Neither of these approaches accounts for the long-term policy goals or considers the original purpose of the extradition exceptions.<sup>401</sup> An ICC would eliminate the uncertainty of the current political offense exception and the need for abduction, benefiting both individuals and nations. Individuals would be guaranteed a fair hearing in a neutral forum before actual extradition takes place and nations would have an international body capable of mediating extradition disputes and trying fugitives.

### A. *Current International Trends Violate International Law*

International agreements, such as the UDHR and ICCPR, have expanded human rights.<sup>402</sup> Both customary and conventional international law recognize basic rights.<sup>403</sup> International law guarantees the right to asylum and self-determination,<sup>404</sup> as well as freedom from arbitrary arrest and detention.<sup>405</sup> Current international extradition trends, such as abduction and restrictive political offense exceptions, threaten the growth of these basic rights.

#### 1. Abduction

Extralegal rendition violates the rights of both nations and individuals.<sup>406</sup> The extradition process has built-in safeguards,<sup>407</sup> which abduction and other forms of extralegal rendition bypass.<sup>408</sup> Furthermore, these methods are all expressly prohibited

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400. *See supra* notes 287-89 and accompanying text (noting recent focus on restricting political offense exception).

401. *See supra* notes 146-82 and accompanying text (explaining evolution of and reasons for extradition exceptions).

402. *See supra* notes 57-78 and accompanying text (discussing terms of ICCPR and UDHR).

403. *See supra* notes 24-56 and accompanying text (detailing history of international individual rights).

404. *See supra* notes 68-70, 75-77 and accompanying text (specifying Articles of UDHR and ICCPR which assure these rights).

405. *See supra* notes 67, 78 and accompanying text (discussing Articles of UDHR and ICCPR guaranteeing freedom from arbitrary arrest and detention).

406. Herrold, *supra* note 80, at 148. These methods are convenient, but not acceptable. *Id.*; *see supra* notes 80-84, 146-83 and accompanying text (noting sovereign's historical limitations and growth of extraditee's rights).

407. *See supra* notes 146-83 and accompanying text (discussing safeguards).

408. *See supra* notes 317-33 and accompanying text (finding irregular rendition used as alternative to lengthy extradition process).

by the UDHR and the ICCPR,<sup>409</sup> as well as the U.N. Charter and conventions that reflect both conventional and customary law.<sup>410</sup> Arbitrary arrest and detention are illegal under these and other international agreements.<sup>411</sup> An abduction from one nation, carried out by the officials of another nation, disrupts the world public order, infringes on the sovereignty and territorial integrity of another nation, and violates the rights of the abductee.<sup>412</sup> Maintaining the status quo endangers individuals by allowing their liberty interests to become secondary to a nation's policy interests.<sup>413</sup>

## 2. The Political Offense Exception

The modified political offense exception has limited the individual right to self-determination to struggles against non-democratic nations.<sup>414</sup> This contradicts international law, as embodied in convention and custom, which guarantees individual political rights.<sup>415</sup> The original intent of the political offense exception was to legitimize political dissent, guarantee the rights of the accused, and protect the rights of nations.<sup>416</sup> Recent modifications, however, have turned the political offense exception into a policy decision.<sup>417</sup> Whereas the original exception fo-

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409. Homrig, *supra* note 23, at 702 (noting that both UDHR and ICCPR prohibit abduction); *see supra* notes 67, 75-77 and accompanying text (finding international law prohibits abduction).

410. *See* Homrig, *supra* note 23, at 702 (noting that these agreements, which derive from customary international law, all prohibit abductions); *supra* notes 52-56 and accompanying text (listing sources of international individual rights law).

411. *See supra* notes 50-56, 67, 77-78 and accompanying text (containing examples of international agreements).

412. *A.B.A. Report, supra* note 2, at 46; INTERNATIONAL EXTRADITION, *supra* note 96, at 191; *see* SHEARER, *supra* note 9, at 88 (rendering individual through non-extradition methods deprives her of rights available to extraditee); *see also supra* notes 193-98 and accompanying text (discussing different forms of irregular rendition).

413. *See supra* notes 189-92 and accompanying text (listing incidences where individual rights were ignored to obtain jurisdiction).

414. *See supra* note 345 and accompanying text (indicating that modified political offense exception results in multi-tiered extradition process).

415. *See supra* notes 50-56, 70, 78 and accompanying text (discussing guaranteed right to self-determination).

416. *See supra* notes 161-64 and accompanying text (explaining original purpose of political offense exception).

417. *See supra* notes 202-14 and accompanying text (discussing current status of political offense tests).

cused on the political character of the crime,<sup>418</sup> supplementary treaties and modifications focus on the intention behind the extradition request.<sup>419</sup>

### B. *The Current System Is Inadequate to Repair Extradition Law*

Although the current extradition treaty system is extensive,<sup>420</sup> it is not effective.<sup>421</sup> Bi- and multi-lateral treaties can only address specific problems between specific parties. In addition, current extradition law is made up of not only bi- and multi-lateral agreements, but also domestic law and custom.<sup>422</sup> The modification of one treaty has only limited impact, because current extradition law is an aggregate of various systems and customs.

Individual rights are also a blend of customs and treaties.<sup>423</sup> As demonstrated by the UDHR, an international consensus can lead to binding law.<sup>424</sup> Despite these rights and the existence of valid procedures for obtaining custody of fugitives, however, nations continually circumvent these procedures.<sup>425</sup> Because sovereignty essentially involves the control and protection of boundaries and citizens,<sup>426</sup> and because respect for another nation's territorial integrity is a basic tenet of international law,<sup>427</sup> a system which permits abductions and reduces individual and national rights offends sovereignty, as well as individual rights.

418. See *supra* note 201 and accompanying text (finding no distinction between revolutionary and terrorist).

419. See *supra* notes 212-14 and accompanying text (summarizing political offense exception as in U.K. Supplementary Treaty).

420. See *supra* note 369 and accompanying text (listing range of international agreements).

421. See *supra* notes 282-333 and accompanying text (detailing problems with current extradition law).

422. See *supra* notes 24-29 and accompanying text (deriving international law from both custom and convention).

423. See *supra* note 57 and accompanying text (deriving individual rights from various sources).

424. See *supra* notes 66, 71-72 and accompanying text (indicating that combining UDHR with ICCPR makes consensus provisions binding).

425. See *supra* notes 293-332 and accompanying text (discussing abduction of individuals by nations).

426. See *supra* note 80 and accompanying text (defining sovereignty).

427. See *supra* notes 98-101 and accompanying text (indicating that respect for sovereignty is basic tenet of international law).

C. *An ICC Would Update Extradition Law and Practice to Reflect Current International Individual Rights Law*

Current international law guarantees individual rights.<sup>428</sup> Existing treaties, declarations, and conventions form a basis for international rights in general.<sup>429</sup> The principles of the UDHR and ICCPR are part of both customary<sup>430</sup> and conventional international law.<sup>431</sup> Abduction and the narrowing of the political offense exception represent a retreat from these human rights advances.

1. Individuals Need Their Own Forum

Currently, an individual challenging extradition must rely on a nation to champion her cause, because existing forums only address the needs of nations. Opponents of an ICC advocate a return to positivism and argue that existing world bodies are sufficient to satisfy individual rights claims.<sup>432</sup> Current law, however, follows the naturalist theory, under which individuals have standing to assert violations of individual rights.<sup>433</sup> An ICC would give individuals a forum in keeping with their current standing in individual law.

2. An ICC Would Guarantee Individual Rights by Eliminating Incentive to Abduct and by Establishing Uniform Laws

An ICC would protect, not harm, individual liberties by assuring that proper procedure is followed. An ICC would provide a neutral forum with uniform laws<sup>434</sup> and an established uniform procedure which would minimize any risk of politization.<sup>435</sup> An

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428. See *supra* notes 50-78 and accompanying text (discussing fundamental human rights guaranteed by international law).

429. See *supra* note 358 and accompanying text (suggesting basis for international law of ICC).

430. See *supra* notes 65-66 and accompanying text (demonstrating consensus of U.N. Members).

431. See *supra* notes 72-74 and accompanying text (making UDHR binding).

432. See *supra* notes 49-56 and accompanying text (discussing reemergence of naturalism).

433. See *supra* notes 11-15 and accompanying text (defining naturalist law and explaining emergence of individual standing in international law).

434. See *supra* notes 352-54 and accompanying text (arguing neutral forum).

435. See *supra* notes 356-57 and accompanying text (eliminating uncertainties of procedure and assuring equality of treatment).

ICC would guarantee a fair, neutral trial while avoiding negative public or political pressure.<sup>436</sup>

### 3. An ICC Would Eliminate the Need to Abduct

The presence of an international body capable of adjudicating extradition disputes would also provide nations with an alternative to abduction. An ICC would resolve conflicts and facilitate extradition, eliminating the reasons behind irregular rendition.<sup>437</sup> An ICC would replace frustration caused by lengthy treaty negotiations and extradition processes with confidence in a mechanism capable of reaching a swift decision independent of domestic and political pressures.

### 4. An ICC Would Maintain the Purpose of the Political Offense Exception

An ICC would preserve the spirit of the political offense exception by maintaining neutrality.<sup>438</sup> Opponents of an ICC claim that the reformed political offense exception captures the original intent.<sup>439</sup> In fact, the reform eliminates the original goals of the exception<sup>440</sup> by making the decision to extradite a discretionary political decision. An ICC would prevent the formation of a multi-tiered extradition process which favors friendly nations and uphold the right to self-determination by removing the extradition question to a neutral body.

## CONCLUSION

Individual rights have been established under international law. Various court decisions and international agreements have recognized these rights and enacted safeguards for them. Unfortunately, the result has not been uniform. The growing concerns of governments in pursuing international terrorists, drug

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436. *See supra* notes 352-54 and accompanying text (removing to neutral ICC overcomes reluctance to extradite).

437. *See supra* notes 315-32 and accompanying text (finding increase in irregular rendition represents perceived necessity and cooperation).

438. *See supra* note 344 and accompanying text (finding that remaining neutral protects interests of requested state).

439. *See supra* notes 395-96 and accompanying text (arguing that reforms do not change spirit of political offense exception).

440. *See supra* notes 161-64 and accompanying text (listing three original purposes behind political offense exception).

traffickers and other criminals are affecting the protection once given the individual by the political offense exception and the extradition process itself. As policy goals take precedence over defendants' rights, a solution which permits prosecution while preserving essential rights needs to be found. Extradition is in a state of flux, and in order to insure that important individual rights are maintained, it is necessary to remove the extradition process to a neutral forum. An International Criminal Court serves both the purpose of ensuring that individuals have a fair, impartial hearing before defending themselves in a domestic trial and enables governments to avail themselves of a neutral forum, with clearly defined goals and policies. Without a neutral, extranational body to oversee extradition, the individual rights asserted in international law will be a sham. The expansion of individual rights in international law can only be secure if all aspects of the law grow with it.