

**ALL’S WELL THAT ENDS WELL:<sup>1</sup> A  
PRAGMATIC LOOK AT INTERNATIONAL  
CRIMINAL EXTRADITION**

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1. WILLIAM SHAKESPEARE, ALL’S WELL THAT ENDS WELL.

## I. INTRODUCTION

The impetus for this Comment was the recent capture and extradition<sup>2</sup> to the United States by Mexican authorities<sup>3</sup> of Mexican “drug kingpin”<sup>4</sup> Juan Garcia Abrego. While a momentous and sensational case like this naturally grabs headlines around the world,<sup>5</sup> extradition has long been a regular occurrence in international relations.<sup>6</sup> The United States is a party to extradition treaties with more than 100 other States.<sup>7</sup> In addition, it is a party to the multilateral 1933 Pan American Convention on Extradition signed at Montevideo, Uruguay.<sup>8</sup>

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2. There is considerable controversy over whether Garcia Abrego was deported or extradited, as well as the motivations for, and circumstances surrounding, his return to the United States. See Tom Masland & Tim Padgett, *Handing off a Hot Case*, NEWSWEEK, Jan. 29, 1996, at 41 (noting that Garcia Abrego has birth certificates from both the United States and Mexico and questioning whether the transfer from Mexico was an extradition or a deportation); Deborah Tedford, *Garcia Abrego Is U.S. Citizen, Officials Insist*, HOUS. CHRON., Feb. 7, 1996, at 1A (reporting the controversy over Garcia Abrego’s citizenship); see also Tracey Eaton, *Reputed Drug Lord’s Extradition Causes Friction in Mexico*, DALLAS MORNING NEWS, Jan. 21, 1996, at 15A (discussing the effects of Garcia Abrego’s arrest and extradition on domestic Mexican politics).

3. See Howard LaFranchi, *Mexico Polishes Image with U.S.*, CHRISTIAN SCI. MONITOR, Jan. 17, 1996, at 7 (discussing the background and search leading to Garcia Abrego’s capture). Authorities in Mexico and the United States had widely sought Garcia Abrego. See *id.* As the reputed head of the Gulf [of Mexico] Cartel, Garcia Abrego was thought to have been responsible for the delivery of at least 100 tons of cocaine annually to U.S. markets. See *id.* In March 1995 the FBI placed him on its 10 most wanted list. See *id.* The Mexican government had offered a \$1 million reward for his arrest. See Andrew Downie, *Mexicans Arrest Top Drug Lord*, HOUS. CHRON., Jan. 16, 1996, at 1A. On January 14, 1996, Mexican federal police arrested Garcia Abrego in the northern Mexican city of Monterrey. See *id.* The following day he was flown to Houston, Texas, and turned over to U.S. drug enforcement authorities. See *id.*

4. See William Branigin, *Probe of Customs Targets Corruption Along the Border*, WASH. POST, Feb. 20, 1996, at A1.

5. See, e.g., *Mexican Drug Lord Convicted in U.S.*, DEUTSCHE PRESSE-AGENTUR, Oct. 16, 1996, available in LEXIS, News Library, DPA File; James Pierpoint, *Alleged Mexican Drug Lord Challenges Extradition*, REUTERS WORLD SERVICE, Apr. 30, 1996, available in LEXIS, News Library, Reuwlid File; Matthew Schwartz, *Mexican Drug Lord Held Without Bail in Texas*, AGENCE FRANCE PRESSE, Jan. 17, 1996, available in LEXIS, News Library, AFP File.

6. See BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE, 1, 11–12 (1991).

7. See 18 U.S.C. § 3181 (1994 & Supp. 1996) (listing bilateral extradition treaties to which the United States is a party, as well as the effective dates). “State,” “Nation,” and “Country” are used interchangeably throughout this Comment as synonyms for a sovereign entity.

8. 49 Stat. 3111, 165 L.N.T.S. 45 (1933).

International extradition attempts to balance the rights of the individual against the rights of the sovereign state to enforce its laws.<sup>9</sup> For a State to enforce its criminal law, extradition provides a means of gaining custody of fugitives that violate the law and flee across an international border.<sup>10</sup>

Because a reason for a fugitive to flee across a border is to avoid the jurisdiction of the nation from which he fled,<sup>11</sup> the fugitive understandably resists extradition. This in turn slows down an already slow process.<sup>12</sup> The decision whether to extradite often raises conflicts for the possessor State<sup>13</sup> among its foreign policy objectives, moral values, and domestic social policy.<sup>14</sup> In addition, the decision can be complicated by national pride,<sup>15</sup> saving face in the world arena, and the growing conflict between individual rights and national sovereignty.<sup>16</sup>

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9. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 830–33 (3d ed. 1996) (discussing the policy considerations of the development and application of extradition between States).

10. See *id.* at 1. *But see id.* at 3 (attributing some historical extraditions to political motivations rather than to common crimes).

11. See YARNOLD, *supra* note 6, at 1.

12. See, e.g., *The Queen v. McMaster*, 1996 Ont. C.J. LEXIS 576 (Ont. Ct. G.D. Jan. 26, 1996) (concerning an extradition from the United States to Canada, which took 17 years; the decision includes a detailed account of the complex extradition process).

13. The terms “possessor State” and “requested State” are used interchangeably throughout this Comment in referring to the State to which the accused or convicted fugitive has fled. “Requesting State” indicates the State’s law that has been violated and that wishes to gain custody of the fugitive.

14. See YARNOLD, *supra* note 6, at 16–20; see also BASSIOUNI, *supra* note 9, at 1–5, 161–62 (discussing the factors that a possessor State considers when determining whether to grant asylum, and particularly noting the impact of foreign relations between possessor and requesting States on extradition); Stanley S. Arkin, *Some Ways of Fighting Extradition*, N.Y. L.J., Aug. 10, 1995, at 3 (discussing the State Department’s role in extradition in the United States).

15. One commentator states:

There is no doubt that states are vitally interested in the repression of crime and the punishment of the criminals who violate their national laws and thus disturb the general peace and happiness of society which is essential for the maintenance of law, order and tranquillity within the state’s own boundaries. Yet, sometimes the states are very nationalistic in their approach and prejudiced, passionate and jealous in dealing with the problems arising within their territorial jurisdiction.

No state is ready to be bound by the dictates of a foreign state because it hurts its pride and is regarded as contrary to the very concept of sovereignty.

SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 29 (1968).

16. See *Blaskic Ready to Surrender UN War Crimes Tribunal: Lawyer*, AGENCE FRANCE PRESSE, Mar. 1, 1996, available in LEXIS, News Library, AFP File (reporting that the Croatian Parliament considered legal reforms allowing

Because of the lengthy and complex process of creating and amending bilateral treaties, as well as certain application problems,<sup>17</sup> some States resort to extrajudicial means<sup>18</sup> to gain custody of accused felons.<sup>19</sup> In light of a growing commitment to the protection of individual human rights,<sup>20</sup> and in reaction to extrajudicial extradition, some commentators call for the elimination of traditional extradition treaties.<sup>21</sup> Others propose various ways of vesting

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extradition because of international pressure); *see also* BASSIOUNI, *supra* note 9, at 823–29 (discussing the relationships among the individual, international law, and the sovereignty of nations); LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 4–6 (1980) (explaining that this conflict of rights is at the heart of international law); Kai I. Rebane, Note, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 *FORDHAM INT'L L.J.* 1636, 1637–38 (1996) (noting the expansion of human rights in international law in general and extradition law in particular).

International law philosophy can be divided into naturalism and positivism. *See* HENKIN ET AL., *supra*. Naturalists believe that there is a supreme law, and that all law is derived from either universal reason or Divine Order. *See id.* The most influential Naturalists are Hugo Grotius (1583–1645), the great Dutch jurist, historian, theologian, and diplomat who relied on reason, and Francisco de Vitoria (1480–1546), the Spanish theologian, who relied on the Divine Order. *See id.* at 4. Positivism, on the other hand, developed parallel to the rise of nationalism in Europe in the latter part of the 18th century. Positivists maintain that international law is State law. *See id.* Under this theory, a State has no obligations to another, except those to which it voluntarily consents through treaties and customs. *See id.* This is the modern view of national States. *See id.*

17. *See* YARNOLD, *supra* note 6, at 13–18 (noting problems of extradition treaties); Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 *DUKE L.J.* 612, 613 (1994).

18. In this Comment, the terms “extrajudicial means,” “extralegal acts,” and “irregular rendition” are used interchangeably to mean actions taken to regain custody when such actions are taken in the absence of a treaty or applicable provisions in an existing treaty.

19. *See* YARNOLD, *supra* note 6, at 2 (noting Israel’s extralegal international extradition of Adolf Eichmann and the U.S. “gunboat extradition” of Manuel Noriega); Gluck, *supra* note 17, at 613; Rebane, *supra* note 16, at 1667–68 (citing the increase in drug trafficking and the difficulty of changing international extradition treaties as significant causes in the increase of extrajudicial acts to gain custody of fugitives). *But cf.* Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box?*, 39 *INT’L & COMP. L.Q.* 757, 778 (1990) (“Consequently, the temptation for States to use ‘alternatives’ to extradition, such as abduction or deportation, will probably not increase due to the application of human rights to extradition.”).

20. *See* Rebane, *supra* note 16, at 1637–38 (“The modern trend is to expand human rights and to eliminate traditional barriers to individual standing.”) (citations omitted).

21. *See* YARNOLD, *supra* note 6, at 69–72, 103–05 (discussing the “dangers” of the use of extrajudicial means and presenting a model in which the International Court of Justice (ICJ) assumes jurisdiction over all extradition

the authority and power to try to punish international and extraterritorial crimes in some form of international court.<sup>22</sup> The North American Free Trade Agreement (NAFTA) focused attention on the idea of a regional solution involving the United States, Canada, and Mexico.<sup>23</sup>

Given the complexity of international politics, individual national priorities, and divergent interests,<sup>24</sup> the extradition of international fugitives is understandably not a quick and seamless process. There is much controversy over if, how, and why alternatives to current extradition methods should be adopted.<sup>25</sup> Because criminal extradition is one purpose of any proposed international court,<sup>26</sup> and because extradition is one of the most well established areas of law between

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matters); *see also* Rebane, *supra* note 16, at 1672 (supporting the proposition of creating an international criminal court (ICC) to “fill the gaps” in international law).

22. *See* YARNOLD, *supra* note 6, at 103–05 (arguing for an expanded ICJ); Rebane, *supra* note 16, at 1672 (arguing for the creation of an ICC).

23. *See* Rita Patel, *One More Effect of NAFTA—A Multilateral Extradition Treaty?*, 14 DICK. J. INT’L L. 153, 180–84 (1995) (proposing a North American extradition agreement); *cf.* Laurie L. Levenson, *NAFTA: A Criminal Justice Impact Report*, 27 U.C. DAVIS L. REV. 843, 863 (1994) (urging the U.S. Department of Criminal Justice to evaluate the impact of the NAFTA on North American criminal justice systems). *But cf.* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL’Y INT’L BUS. 391, 456–58 (1993) (warning U.S. leaders about the consequences of the americanization of Mexican law, given the cultural differences between the two countries).

24. *See* Research in International Law of the Harvard Law School, *Draft Convention on Extradition, with Comment*, 29 AM. J. INT’L L. 32, 47–48 (Supp. 1935); *see also* YARNOLD, *supra* note 6, at 18–20 (arguing that extradition decisions of the possessor State are sometimes arbitrary due to (1) domestic politics; (2) politics between the possessor State and the requesting State; and (3) concern that the requesting State will treat the refugee unfairly according to the possessor State’s sense of justice and morality).

25. *Compare* Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1 DUKE J. COMP. & INT’L L. 135, 147–49, 153–54, 156–59, 164–68 (1991) (discussing the advantages of, and limitations to, an ICC as an alternative to the existing system for prosecuting international crimes), *with* YARNOLD, *supra* note 6, at 104–05 (proposing to expand the jurisdiction of the ICJ over international and State transnational crimes).

26. *See* Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73, 96–99 (1995) (outlining three models: (1) the Nuremberg Model, in which the ICC deters and punishes those who commit heinous international crimes such as genocide, aggressive war, and crimes against humanity; (2) the Adjunct Model, in which the ICC supplements and supports traditional national jurisdiction, which basically fills the gaps of the existing system; and (3) the Sovereign of Last Resort Model, in which the ICC is the “enforcer of international norms” and acts as “a safety net in case of the collapse of national criminal jurisdiction”).

nations,<sup>27</sup> extradition is instructive of how States *actually* interact.<sup>28</sup> This in turn can be helpful in choosing a path through the tangle of alternatives.

In Part II, this Comment addresses the hotly debated question of *what* the United States should “do” concerning criminal extradition, given the forces of international law and domestic concerns. It examines U.S. support of international bodies, as evidenced by actual behavior. Further, Part II proposes a practical alternative to those advocated by other commentators: do nothing. This alternative is based on three pragmatic acknowledgments: (1) the present system of extradition treaties serves its purpose;<sup>29</sup> (2) the present system of extradition treaties allows States to resolve conflicting demands;<sup>30</sup> and (3) there is scant evidence that the United States would submit to an international criminal court of any formulation.<sup>31</sup> Part III reviews the history and development of international extradition in general and in particular the relationships between the United States and Mexico and between the United States and Canada. Part IV examines cases that center on the extradition of criminal fugitives to determine how the United States, Canada, and Mexico behave as they apply and interpret the respective extradition treaties.

## II. A PRAGMATIC PROPOSAL

Sometimes the right thing to do is nothing. And that is precisely what the United States should do amidst the growing clamor for an international criminal court. The U.N.

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27. See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 2, 48, 255 (rev. ed. 1954) (noting extradition agreements from antiquity through the Middle Ages and into the 20th century).

28. See Darin A. Bifani, Comment, *The Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence*, 41 BUFF. L. REV. 627, 629–31, 685–86, 695–99 (1993) (discussing the development of the recognition of individual rights and the effect on traditional extradition processes); see also Rebane, *supra* note 16, at 1646 (“While unilateral action to obtain jurisdiction over a fugitive in the form of kidnaping or collusion is occasionally accepted and even approved, historically, self-help has been condemned by the international community.”).

29. See YARNOLD, *supra* note 6, at 1 (noting the frequency of extraditions today); see also Jacqueline A. Weisman, Comment, *Extraordinary Rendition: A One-Way Ticket to the U.S. . . . Or Is It?*, 41 CATH. U. L. REV. 149, 149–52, 174–75 (1991) (discussing means of gaining custody of fugitives when extradition treaties do not offer a solution).

30. See Weisman, *supra* note 29, at 160–66. *But see* YARNOLD, *supra* note 6, at 47–59 (discussing the controversy over Israel’s abduction of Adolf Eichmann).

31. See discussion *infra* Part II.

General Assembly is in the process of establishing an International Criminal Court.<sup>32</sup> In February 1997 the United Nations Preparatory Committee on the Establishment of an International Criminal Court began drafting a statute for the establishment of an international criminal court.<sup>33</sup> The Committee's aim is to complete a draft statute, which would finalize and adopt the convention, for submission to a diplomatic conference to be held in 1998.<sup>34</sup> U.S. involvement in the formation of the International Criminal Court was high on the list of topics discussed during the Senate confirmation hearings for U.N. Ambassador Bill Richardson.<sup>35</sup> The Assistant Secretary of State for Democracy, Human Rights and Labor also discussed the planned international criminal court at an "on-the-record" briefing held in conjunction with the release of the State Department's Annual Human Rights Report.<sup>36</sup> At least one commentator has proposed modifying the existing International Court of Justice so that it will be an adjudicator of international crimes as well as state transnational crimes.<sup>37</sup> Yet another proposal is for a North American extradition treaty.<sup>38</sup>

Extradition will become an increasingly important issue since the United States, Mexico, and Canada, now linked economically through [the] North American Free Trade Agreement . . . , share common borders. . . . [T]he absence of a unified extradition treaty for the NAFTA actors will prove to be troublesome. As a result of the multilateral NAFTA agreement, now may be the right time for a multilateral extradition treaty between the United States, Mexico, and Canada.<sup>39</sup>

While many suggest the creation of new bodies, or at least the modification of existing ones, to punish

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32. See, e.g., *U.N.: Int'l Criminal Court Should Be Independent and Not Subsidiary of Security Council*, M2 PRESSWIRE, Oct. 22, 1997, available in LEXIS, News Library, M2PW File.

33. See *id.*

34. See *id.*

35. See *Hearing of the Senate Foreign Relations Committee*, FED. NEWS SERVICE, Jan. 29, 1997, available in LEXIS, News Library, Fednew File.

36. See *USIA Foreign Press Center Briefing*, FED. NEWS SERVICE, Jan. 31, 1997, available in LEXIS, News Library, Fednew File.

37. See YARNOLD, *supra* note 6, at 103-05.

38. See Patel, *supra* note 23, at 153.

39. *Id.* (citation omitted).

international and extraterritorial criminals,<sup>40</sup> the discussion often focuses on which of the proposed forms would be best for the United States.<sup>41</sup> The United States should choose openly and honestly “none of the above.” The most reasonable course of action for the United States is to retain the current system of extradition treaties. This “do nothing” proposal is based neither on the belief that the current system is perfect, nor that it is the ideal way to handle the extradition of fugitives. Rather, it is based on the recognition that the current treaty system accomplishes what it was designed to do.<sup>42</sup> It functions because States have found ways to work around the treaties when abiding by the terms of the treaties is not feasible.<sup>43</sup> A second reason for the “do nothing” approach is the dismal lack of evidence supporting a realistic belief that the United States would actually submit to the authority and abide by the rulings of any international criminal tribunal.<sup>44</sup>

As seen by the cases discussed in Part IV,<sup>45</sup> the United States and its neighbors have learned how to apply and

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40. See, e.g., YARNOLD, *supra* note 6, at 103–04 (proposing to expand the role of the ICJ); Rebane, *supra* note 16, at 1638 (arguing for the creation of an ICC).

41. See Scharf, *supra* note 25, at 167–68 (urging the United States to participate in the study and development of an international criminal court); see also Marquardt, *supra* note 26, at 78–79 (discussing whether the United States can constitutionally participate in an international criminal court).

42. See Scharf, *supra* note 25, at 164–65 (discussing the limitations of the existing system of international law enforcement but acknowledging that progress has been made towards its principal objectives).

43. See Weisman, *supra* note 29, at 174–75.

44. See *infra* notes 50–70 and accompanying text.

45. See *United States v. Alvarez-Machain*, 504 U.S. 655, 668–69 (1992) (finding abduction of international fugitives not a violation of extradition treaty between the concerned States if such acts are not prohibited by the treaty); *Ker v. Illinois*, 119 U.S. 436, 441–42 (1886) (justifying kidnaping of fugitive in Peru by rejecting argument that fugitive is entitled to asylum in country to which he has fled and, therefore, can only be removed by proceedings sanctioned by the extradition treaty); *Lobue v. Christopher*, 893 F. Supp. 65, 78 (D.C. Cir. 1995) (declaring unconstitutional law that confers upon executive branch power to review federal judges’ decisions of extraditability); *Martin v. Warden*, 993 F.2d 824, 828–30 (11th Cir. 1993) (holding that Secretary of State can exercise broad discretion and may consider many extraneous factors in decision to extradite); *Montiel Garcia v. United States*, 987 F.2d 153, 154 (2d Cir. 1993) (refusing to allow appeal of extradition by sex offender based on procedural rules); *United States v. Jamieson*, [1992] 73 C.C.C.3d 460 (Can.) (requiring only limited similarity between laws of Canada and United States to meet treaty requirement of mutual laws); *Kindler v. Canada (Minister of Justice)* [1991] 84 D.L.R. (4th) 438, 449–50 (Can.) (allowing extradition to United States despite fact that fugitive might receive capital punishment because court did not want to encourage dangerous criminals to cross Canadian border); *Re Ng*

interpret the current treaty system to everyone's advantage.<sup>46</sup> Each State interprets the treaty as required in a given circumstance, taking into consideration foreign and domestic issues.<sup>47</sup> In cases where a State's decision is unpopular in another State, the current system allows for appropriate outrage and remedial action in one area without endangering other significant areas.<sup>48</sup> Each State can save face, be right, and get what it wants.<sup>49</sup>

The United States has an unspectacular track record in supporting international organizations attempting to resolve international problems. This separatist "city on the hill" mentality has been the subject of much discussion and study.<sup>50</sup> It is in the best interests of the United States to recognize and consider this worldview when deciding whether or not to become part of *any* proposed international criminal court.

As with any foreign policy decision,<sup>51</sup> there is more than one reason for the United States' less than effusive support of international organizations.<sup>52</sup> A thorough examination of the numerous reasons for U.S. resistance to submitting to international organizations is beyond the scope of this Comment.<sup>53</sup> Nevertheless, a brief look at some key events will

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Extradition, [1991] 84 D.L.R. (4th) 498, 503 (Can.) (following reasoning of *Kindler*).

46. See Weisman, *supra* note 29, at 161–62; see also *Jamieson*, 73 C.C.C.3d at 460 (requiring only similarity in laws to conform to regulations of the treaty).

47. See Weisman, *supra* note 29, at 164–65 (discussing the court's validation of Manuel Noriega's abduction).

48. See *Alvarez-Machain*, 504 U.S. at 668–70 (noting that precedent does not support notion that extradition treaty between United States and Mexico prohibits alternative means of retrieving an individual).

49. See *id.* at 669 n.16 (noting advantages of the "diplomatic approach" to resolving difficulties).

50. See, e.g., JOHN G. STOEISSINGER, *CRUSADERS AND PRAGMATISTS: MOVERS OF MODERN AMERICAN FOREIGN POLICY* 3 (2d ed. 1985) ("America would quarantine itself. It would be isolationist or, in more contemporary language, nonaligned. Let the corrupt Europeans continue to devour each other. America would be a morally superior 'city on a hill.'").

51. See K.J. HOLSTI, *INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS* 271–72 (6th ed. 1992). The author notes major external/systemic and domestic factors that influence foreign policy decisions. See *id.* These factors include, but are not limited to, the state of the world economy, actions of others, world opinion, national attributes, public opinion, socioeconomic/security needs, and ethical considerations. See *id.*

52. See *Takes Part in a Town Meeting at the Foreign Policy Council*, FDCH POL. TRANSCRIPTS, Nov. 1, 1995, available in LEXIS, News Library, Arcnws File.

53. For a list of reasons for the United States isolationist impulses, see, for example, Arthur Schlesinger, Jr., *New Isolationists Weaken America*, N.Y. TIMES, June 11, 1995, at 15.

demonstrate the dubious likelihood of the United States' active participation in any international criminal tribunal.

Following World War I, President Woodrow Wilson was almost single-handedly responsible for the creation of the League of Nations.<sup>54</sup> Despite Wilson's key role in creating the League, the United States was one of only two recognized nations that never became a member.<sup>55</sup>

In 1948 the U.N. General Assembly unanimously proposed a treaty against genocide.<sup>56</sup> The United States did not ratify that treaty until 1988.<sup>57</sup> Even though it took over forty years to ratify the treaty, the ratification is heavily burdened with reservations.<sup>58</sup> One commentator has noted that the problem is not a lack of support for the *idea* of human rights. "Most Americans applauded [human rights]. It was the gap between preaching and principle. Words can be cheap, but deeds are not. The perennial question that plagued any attempted marriage between morality and diplomacy [was], . . . [w]hat is the price of principle?"<sup>59</sup> The International Covenant on Civil and Political Rights<sup>60</sup> has a similar history.<sup>61</sup> Approved by the U.N. General Assembly in 1966,<sup>62</sup> the United States did not sign it until 1977,<sup>63</sup> and did not ratify it until 1992.<sup>64</sup> As was the case with the Genocide Treaty, the ratification of the Covenant resulted in numerous reservations and conditions.<sup>65</sup> A recent article in *The San*

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54. See STOESSINGER, *supra* note 50, at 21–23 (discussing Wilson's crusade to establish the League of Nations).

55. See EVAN LUARD, *CONFLICT AND PEACE IN THE MODERN INTERNATIONAL SYSTEM* 230 (1968) (noting that every recognized State except the United States and the Hejaz became members of the League of Nations).

56. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

57. See Genocide Convention Implementation Act of 1987, 102 Stat. 3045 (1988) (codified as amended at 18 U.S.C. §§ 1091–1093 (1994)).

58. See U.S. Declarations and Reservations, Convention on the Prevention and Punishment of the Crime of Genocide, 28 I.L.M. 782 (1989).

59. STOESSINGER, *supra* note 50, at 264.

60. Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

61. See *Remarks on Signing International Covenants on Human Rights*, 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 10, 1977) [hereinafter *Carter's Remarks*] (reporting President Carter's comments at the treaty signing); 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan).

62. See ICCPR, *supra* note 60, 999 U.N.T.S. at 171, 6 I.L.M. at 360.

63. See *Carter's Remarks*, *supra* note 61, at 1488–89.

64. See 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

65. See *id.*; see also John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 60–61, 71–73 (1993) (discussing the reservations in the context of prison sentences and conditions).

Francisco Chronicle sums up nicely the clash between domestic politics and international agreements:

Secretary of State Madeleine Albright noted last week that the [United States] will lose credibility in pressing for future international arms reductions if the Senate fails to deliver on what successive White House leaders have sought.

[Senator Jesse] Helms objects to the treaty, like many overseas agreements, as an invasion of U.S. sovereignty. Corrupt inspectors may try to steal industrial secrets on plant visits, and rival countries may build secret labs, he and other conservatives fear. Renegade nations will perfect the weapons while the trusting [United States] gives up a distasteful but devastating advantage, the argument goes.<sup>66</sup>

The clash of domestic concerns and international obligations was also a key factor in the U.S. refusal to submit to the International Court of Justice's jurisdiction when Nicaragua sued it in 1984.<sup>67</sup>

Finally, because Congress controls the purse and because it is the elected representative of the people, the level of funding for international organizations may be used as a device for measuring U.S. support for those organizations.<sup>68</sup> In 1996 the United States was "voted off a key U.N. financial committee."<sup>69</sup> This move was directly linked to the massive debt of the United States to the United Nations.<sup>70</sup>

### III. BACKGROUND AND DEVELOPMENT OF INTERNATIONAL EXTRADITION

Extradition is defined as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."<sup>71</sup> Scholars debate the

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66. Editorial, *Ban Chemical Weapons Now*, S.F. CHRON., Feb. 10, 1997, at A22.

67. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 395 (Nov. 26).

68. See Richard W. Nelson, *International Law and U.S. Withholding of Payments to International Organizations*, 80 AM. J. INT'L L. 973, 974 (1986).

69. Evelyn Leopold, *U.S. Dumped from U.N. Panel, Financial Committee Vote Shows Disgust on Washington Debt*, PITT. POST-GAZETTE, Nov. 9, 1996, at A3.

70. See *id.* (noting that the outstanding U.S. debt to the United Nations is US\$1.4 billion, while the U.N. annual budget is US\$1.3 billion).

71. *Terlinden v. Ames*, 184 U.S. 270, 289 (1901).

exact origin of international extradition.<sup>72</sup> It is generally accepted, however, that extradition can be traced to ancient civilizations.<sup>73</sup> At one time, extradition was geared mostly toward “the preservation of the political and religious interests of states,” until it gradually centered more on suppressing crime.<sup>74</sup> For the last half of this century, extradition has been primarily directed towards people accused of common crimes against States’ laws.<sup>75</sup> Bilateral treaties are the general vehicles used to extradite common criminals.<sup>76</sup> Furthermore, extradition treaties may also cover persons accused of international crimes.<sup>77</sup>

States recognize the power to enter into treaties as a badge of sovereignty.<sup>78</sup> Similarly, a nation’s enforcement of its criminal law is also an indicator of statehood.<sup>79</sup> International law recognizes that a nation has the power to enforce its laws within its territory.<sup>80</sup> It also recognizes, however, that a nation may not enforce its laws within the territory of another nation.<sup>81</sup> Because a nation cannot control what occurs outside of its borders, international law steps in to deal with a nation’s external affairs.<sup>82</sup> In general, nations do not recognize an obligation to extradite in the absence of a recognized treaty.<sup>83</sup> For example, it is well settled that Canada and the United States do not extradite absent a treaty, and Mexico is reluctant to extradite even with a treaty.<sup>84</sup>

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72. See YARNOLD, *supra* note 6, at 11 (noting an extradition treaty between the Egyptians and Hittites in 1280 B.C.).

73. See *id.*

74. BASSIOUNI, *supra* note 9, at 4.

75. See YARNOLD, *supra* note 6, at 12.

76. See *id.*

77. See *id.* (listing torture, genocide, and apartheid as examples of international crimes).

78. See *id.* at 13.

79. See J.G. MERRILLS, *ANATOMY OF INTERNATIONAL LAW* 34–35 (1976).

80. See *id.* at 35.

81. See *id.* (noting this “fundamental principle”).

82. See *id.* at 42.

83. See *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) (“[T]he principles of international law recognize no right to extradition apart from treaty. . . . [T]he legal right to demand . . . extradition and the correlative duty to surrender [a fugitive] to the demanding country exist only when created by treaty.”); MERRILLS, *supra* note 79, at 12; YARNOLD, *supra* note 6, at 15 (discussing how since World War II, civil law nations that historically relied on comity and reciprocity as bases for international extradition have shifted to an increased use of bilateral treaties).

84. See 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, 132, 136 (1995).

A. *Extradition Between the United States and Mexico*

The historical relationship between the United States and Mexico has been fraught with suspicion and can be characterized as discordant and fractious.<sup>85</sup> There are judicial, cultural, and political reasons for this turbulent relationship.<sup>86</sup> The United States and Mexico share a continent and a border stretching more than 1,500 miles.<sup>87</sup> However, differences in language, culture,<sup>88</sup> and political history<sup>89</sup> separate them. The U.S. judicial system derives from English Common Law, while Mexico:

Traces its [private legal system's] origin to the Roman civil law, which dates from the Twelve Tablets of Rome in 450 B.C. . . . It is the oldest, most widely used, and most influential legal system in the world. Spanish law, which evolved from the Roman civil law, governed the viceroyalty of Mexico as well as the rest of what is now Latin America for three centuries.<sup>90</sup>

In addition to having completely different legal systems, the two nations have a violent and bloody history of territorial and sovereignty disputes,<sup>91</sup> which to this day fuels suspicion and mistrust.<sup>92</sup>

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85. See Zamora, *supra* note 23, at 393 (discussing how the U.S.-Mexico relationship is one of convenience).

86. See James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 86-87, 105 (1993).

87. See Mark A. Sinclair, Note, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 89 (1986) (noting how the border region includes four U.S. states and six Mexican states).

88. See Lawrence Harrison, 'Yanquis' Not to Blame: *Latin America Must Look at Its Own Culture*, HOUS. CHRON., Nov. 24, 1996, at 1C (discussing the failure of economists and academics to review Latin America's economic backwardness and underdevelopment in the historical context of its culture); see also Smith, *supra* note 86, at 92.

89. "The English colonies have enjoyed their local independence from the time they were first colonized; but the provinces of New Spain were governed to the contrary by a system entirely centralized during three centuries of colonial domination. Facts were established in the history and history is not altered with vain declarations." Smith, *supra* note 86, at 92 n.38 (quoting Mexican jurist Jose Maria Iglesias writing in 1856 on "the error of federalism of the 1824 [Mexican] Constitution").

90. *Id.* at 87-88 (citations omitted).

91. See, e.g., BARBARA W. TUCHMAN, *THE ZIMMERMANN TELEGRAM* 42, 92, 94 (1958) (tracing U.S.-Mexican relations prior to World War I); see also STOESSINGER, *supra* note 50, at 12 (providing information on some of the more obvious incidents including: the Mexican War; President Wilson's intransigence

Both Mexico and the United States are democracies with executive, legislative, and judicial branches of government.<sup>93</sup> Both have popularly elected representatives in bicameral legislatures,<sup>94</sup> popularly elected presidents, and a multilevel federal judiciary.<sup>95</sup> Even so, there is a vast difference in the way the two countries operate both politically and judicially.<sup>96</sup>

The United States and Mexico have had extradition treaties in force since 1899.<sup>97</sup> The current treaty was signed in Mexico City on May 4, 1978,<sup>98</sup> and it rescinded all prior treaties.<sup>99</sup> The extradition treaty between the United States and Mexico requires dual criminality.<sup>100</sup> The treaty also includes a list of offenses for which extradition is allowed<sup>101</sup> and an extradition provision for other offenses that are punishable by “a deprivation of liberty the maximum of

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in refusing to recognize the government of General Victoriano Huerta in 1913; the U.S.S. Dolphin incident, which led to the storming of Veracruz by U.S. Marines in 1914; the “massacre of San Ysabel” and the raid on Columbus, New Mexico by Pancho Villa in 1916; and the subsequent foray into Mexico by U.S. troops under General Pershing).

92. See Zamora, *supra* note 23, at 393 (describing the U.S.-Mexico relationship as being “uncomfortable” for both nations).

93. See LaRue Corbin et al., Comment, *The Environment, Free Trade, and Hazardous Waste: A Study of the U.S.-Mexico Border Environmental Problems in the Light of Free Trade*, 1 TEX. WESLEYAN L. REV. 183, 189 (1994).

94. See Smith, *supra* note 86, at 91.

95. See 24 THE NEW ENCYCLOPAEDIA BRITANNICA 37 (15th ed. 1993) (discussing the federal structure of the Mexican judiciary system); 29 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra*, at 195–96 (discussing the structure of the American executive and federal judiciary systems).

96. See Smith, *supra* note 86, at 96–98, 100–03 (explaining some of the differences between Mexico and the United States from a legal practice viewpoint).

A preference for adversarial litigation does not fit easily with the characteristics of cooperation and authoritarianism that mark Mexican society. While the Mexican government appears to be interested in more vigorous enforcement of laws, one cannot conclude that the end result will be (or even should be) a law enforcement system that resembles the U.S. model.

Zamora, *supra* note 23, at 446.

97. See, e.g., Treaty of Extradition Between the United States of America and the United States of Mexico, Feb. 22, 1899, U.S.-Mex., 31 Stat. 1818.

98. See Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty].

99. See *id.* art. 23(3), 31 U.S.T. at 5074.

100. See *id.* art. 2(1), 31 U.S.T. at 5062. Dual criminality means that the act for which extradition is sought is recognized as a crime in both the possessor and requestor States. See BASSIOUNI, *supra* note 9, at 388.

101. See Extradition Treaty, *supra* note 98, Appendix, 31 U.S.T. at 5076–78.

which shall not be less than one year.”<sup>102</sup> Mexico’s constitution specifically prohibits the death penalty for all but a few crimes.<sup>103</sup> Article 8 of the treaty permits Mexican authorities to request assurances from U.S. officials that the death penalty will not be imposed, or if imposed, will not be executed.<sup>104</sup>

Finally, the extradition treaty provides that “[n]either Contracting Party shall be bound to deliver up its own nationals,”<sup>105</sup> but the executive authority of the requested State *may* do so.<sup>106</sup> In the event that a national who is otherwise extraditable is not delivered to the requesting State, the requested State must prosecute him, provided the State has jurisdiction.<sup>107</sup>

### B. Extradition Between the United States and Canada

In sharp contrast to the relationship between the United States and Mexico, Canada and the United States have a long history of cooperation, which includes the mutual extradition of fugitives.<sup>108</sup> When Canada gained its independence in 1867,<sup>109</sup> it succeeded to the Webster-Ashburton Treaty,<sup>110</sup>

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102. *Id.* art. 2(3), 31 U.S.T. at 5062.

103. “The penalty of death for political crimes is likewise prohibited; and for other types of offences, it may be imposed only upon traitors to the Fatherland in a foreign war . . . and offenders who have committed grave offenses of a military character.” MEX. CONST. art. 22, *translated in* WILLIAM SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 250 n.4 (1993).

104. *See* Extradition Treaty, *supra* note 97, art. 8, 31 U.S.T. at 5065.

105. *Id.* art. 9(1), 31 U.S.T. at 5065.

106. *See id.*; *see also* Bedi, *supra* note 15, at 94 (noting that it is those nations with legal systems derived from Roman civil law that “most uncompromisingly refuse to extradite their nationals”).

107. *See* Extradition Treaty, *supra* note 97, art. 9(2), 31 U.S.T. at 5065.

108. *See* Bradley Thrush, *United States’ Sanctioned Kidnapping Abroad: Can the United States Restore International Confidence in Its Extradition Treaties?*, 11 ARIZ. J. INT’L & COMP. L. 181, 193 (1994); James D. McCann, Note, *United States v. Jamieson: The Role of the Canadian Charter in Canadian Extradition Law*, 30 CORNELL INT’L L.J. 139, 143–44 (1997) (discussing Canadian extradition history).

109. *See* CAN. CONST. (Constitution Act, 1867); Amy E. Lehmann, Note, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT’L L. & COM. 187, 193 n.50 (1997).

110. *See* Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; for the Final Suppression of the African Slave Trade; and for the Giving Up of Criminals, Fugitive from Justice, in Certain Cases, Aug. 9, 1842, U.S.-Gr.Brit., art. 10, 8 Stat. 572, 576 [hereinafter Webster-Ashburton Treaty]. The Webster-Ashburton Treaty replaced the Jay Treaty, which had been in force between the United States and Great Britain since 1794. *See* McCann, *supra* note 108, at 143.

then in force between the United States and Great Britain. Throughout the years, the substance of that treaty has remained.<sup>111</sup>

Some things have changed, however. In 1976,<sup>112</sup> and again in 1988,<sup>113</sup> the U.S.-Canadian Treaty<sup>114</sup> was amended. The treaty retains the requirement of “dual” or “double criminality,”<sup>115</sup> and it contains an enumerated list of extraditable offenses.<sup>116</sup> The treaty requires extradition if the offense is punishable by incarceration for more than one year in both nations.<sup>117</sup> The other major change was Article 6 of the treaty, which grants Canada the right to request assurances from the United States that it will not administer the death penalty.<sup>118</sup>

In 1976 the Canadian Parliament abolished the death penalty<sup>119</sup> for all but a few military offenses,<sup>120</sup> and thus joined the ranks of nations that have abjured capital punishment.<sup>121</sup> Abolishment of the death penalty was seen as

111. See Benjamin N. Bedrick, Comment, *United States Extradition Process: Changes in Law to Address Constitutional Infirmary*, 15 DICK. J. INT'L L. 385, 389-90 (1997).

112. See Amending Agreement, June 28, July 9, 1974, U.S.-Can., 27 U.S.T. 1017, 1021.

113. See Protocol Amending the Treaty on Extradition, Jan. 11, 1988, 27 I.L.M. 422 [hereinafter Protocol].

114. See Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983 [hereinafter U.S.-Canada Treaty].

115. Double criminality is “deemed part of customary international law.” BASSIOUNI, *supra* note 9, at 391.

116. See U.S.-Canada Treaty, *supra* note 114, Schedule, 27 U.S.T. at 997-99.

117. See *id.* art. 2(1), 27 U.S.T. at 986.

118. See *id.* art. 6, 27 U.S.T. at 989. Article 6 provides:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

*Id.*

119. See Criminal Law Amendment Act (No. 2), 1976, ch. 105, 1974-75-76 S.C. 2127, 2130, 2139-40 (Can.).

120. See National Defence Act, R.S.C., ch. N-4, §§ 73-76 (1985) (Can.).

121. See John Pak, Note, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239, 239 nn.2-3 (1993) Countries that have abolished the death penalty for a certain group of offenses include: “Argentina (1984), Brazil (1979), Canada (1976), Cyprus (1983), El Salvador (1983), Fiji (1979), Israel (1954), Italy (1947), Malta (1971), Mexico, Nepal (1990), Papua New Guinea (1974), Peru (1979), Seychelles (no executions since independence), Spain (1978), Switzerland (1942), and the

bringing Canadian criminal law into line with the nation's historical views and "recent international commitments by the Canadian government."<sup>122</sup> For example, section 2(b) of the Canadian Bill of Rights forbids "cruel and unusual treatment or punishment."<sup>123</sup> Furthermore, in 1982 the Canadian Charter of Rights and Freedoms,<sup>124</sup> which applies to the legislative and executive acts of Canadian governments,<sup>125</sup> came into force. Section 12 of the Charter prohibits the imposition of "cruel and unusual treatment or punishment."<sup>126</sup> Section 7 of the Charter guarantees that no person shall be deprived of "life, liberty and security of the person . . . except in accordance with the principles of fundamental justice."<sup>127</sup> Section 7 has been referred to as the

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United Kingdom (1973)." *Id.* at n.2. Countries that have abolished the death penalty altogether include:

Andorra (1990), Australia (1985), Austria (1968), Cambodia (1989), Cape Verde (1981), Colombia (1910), Costa Rica (1877), Czech and Slovak Federative Republic (1990), Denmark (1978), Dominican Republic (1966), Ecuador (1906), Finland (1972), France (1981), Federal Republic of Germany (1949/1987), Haiti (1987), Honduras (1956), Hungary (1990), Iceland (1928), Ireland (1990), Kiribati (no executions since independence), Liechtenstein (1987), Luxembourg (1979), Marshall Islands (no executions since independence), Micronesia (Federated States) (no executions since independence), Monaco (1962), Mozambique (1990), Namibia (1990), Netherlands (1982), New Zealand (1989), Nicaragua (1979), Norway (1979), Panama (1903) (date of last known execution), Philippines (1987), Portugal (1976), Romania (1989), San Marino (1865), Sao Tome and Principe (1990), Solomon Islands, Sweden (1972), Tuvalu (no executions since independence), Uruguay (1907), Vanuatu (no executions since independence), Vatican City State (1969), Venezuela (1863).

*Id.* at n.3.

122. *Id.* at 266.

123. Canadian Bill of Rights, R.S.C., app. III, § 2(b) (1970); see also Walter S. Tarnopolsky, *Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?*, 10 OTTAWA L. REV. 1, 2-7 (1978) (examining the history and evolution of "cruel and unusual" treatment or punishment in Canadian jurisprudence).

124. See CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms).

125. See *Kindler v. Canada* (Minister of Justice) [1991] 84 D.L.R. (4th) 438, 439 (Can.).

126. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms) § 12; see also Keith Highet & George Kahale III, *International Decisions*, 87 AM. J. INT'L L. 112, 129 (1993) (statements of William A. Schabas discussing *Kindler*).

127. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms) § 7; see also Highet & Kahale, *supra* note 126, at 129.

“due process” clause and is construed as providing both procedural and substantive due process.<sup>128</sup>

#### IV. ACTUAL APPLICATION AND INTERPRETATION OF EXTRADITION TREATIES

On paper, extradition between the United States and Mexico and between the United States and Canada is fairly simple and straightforward.<sup>129</sup> Both extradition treaties require the involvement of the judicial and executive branches in a decision to extradite.<sup>130</sup> Both treaties provide a means to return a fugitive to the State where a criminal law has been violated while protecting the sovereignty of the

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128. See Hight & Kahale, *supra* note 126, at 129.

129. The United States and Mexico have agreed to extradite those persons who have been charged with, or found guilty of, committing an extraditable offense, or who are wanted “to complete a judicially pronounced penalty of deprivation of liberty” for an extraditable offense. Extradition Treaty, *supra* note 98, art. 1(1), 31 U.S.T. at 5061. Similarly, the United States and Canada have agreed to extradite those persons who have been charged with or convicted of an extraditable offense. See U.S.-Canada Treaty, *supra* note 114, art. 1, 27 U.S.T. at 986.

The extradition treaty between the United States and Mexico lists simple procedures and required documents that must accompany a request for extradition. See Extradition Treaty, *supra* note 98, art. 10, 31 U.S.T. at 5066–68. For example, to request extradition for a person who has been charged with an extraditable offense, the requesting party must provide (1) a statement of facts; (2) the legal provisions describing the “essential elements of the offense;” (3) the legal provisions describing the applicable punishment; (4) the legal provisions describing the time limit on prosecution or punishment of the offense; and (5) personal information and a description of the person sought which will permit the person’s identification and potential location. See *id.* art. 10(2), 31 U.S.T. at 5066. The extradition treaty between the United States and Canada has similar straightforward procedural requirements. See U.S.-Canada Treaty, *supra* note 114, art. 9, 27 U.S.T. at 990.

130. For example, in cases between the United States and Mexico that involve extraditing a party’s own national, the executive branch makes the final decision. See Extradition Treaty, *supra* note 98, art. 9(1), 31 U.S.T. at 5065. If the executive branch does not grant extradition and the party has jurisdiction over the offense, the case will be submitted to the judicial branch for prosecution. See *id.* art. 9(2), 31 U.S.T. at 5065.

Similarly, in cases between the United States and Canada, if both parties have jurisdiction to prosecute the person for the offense, the executive authority decides whether to extradite the person or submit the case to its judicial branch for prosecution. See Protocol, *supra* note 113, art. 17 bis, 27 I.L.M. at 425–26. In making its decision, the executive branch considers (1) the location where the act was committed; (2) the respective interests of each state; (3) the nationality of the victim; and (4) the location and availability of the evidence. See *id.* at 426.

State to which the fugitive has fled.<sup>131</sup> Because States voluntarily enter into treaties,<sup>132</sup> it is reasonable to conclude that most of the time, nations want and try to abide by the terms of the treaty. Thus, the reality of extradition is usually simple and straightforward.<sup>133</sup> Even when the fugitive fights extradition through the courts, there is usually a fairly straightforward analysis and decision.<sup>134</sup>

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131. Both treaties determine whether extradition should be granted based on the laws of the requested state. See Extradition Treaty, *supra* note 98, art. 13, 31 U.S.T. at 5069; U.S.-Canada Treaty, *supra* note 114, art. 8, 27 U.S.T. at 990 (providing that “the person whose extradition is sought shall have the right to use all remedies and recourses provided by such law”). Both treaties allow for refusal to extradite when the offense is punishable by death under the requesting party’s laws and not punishable by death under the requested party’s laws. See Extradition Treaty, *supra* note 98, art. 8, 31 U.S.T. at 5065; U.S.-Canada Treaty, *supra* note 114, art. 6, 27 U.S.T. at 989. The requesting party may be required to provide sufficient assurances that the death penalty will not be imposed, or, if imposed, will not be executed. See Extradition Treaty, *supra* note 98, art. 8, 31 U.S.T. at 5065; U.S.-Canada Treaty, *supra* note 114, art. 6, 27 U.S.T. at 989.

132. The Vienna Convention on the Law of Treaties is the authoritative source of treaty law. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]; LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 416 (3rd ed. 1993). The Vienna Convention is a declaration of customary international law; tribunals and States therefore apply it to nonparties as well as to parties. See HENKIN ET AL., *supra*, at 416–17. Under the Vienna Convention, “[t]reaty means an international agreement concluded between States in written form and governed by international law.” Vienna Convention, *supra*, art. 2(1)(a), 1155 U.N.T.S. at 333, 8 I.L.M. at 680–81. The voluntary nature of this agreement is apparent under the Vienna Convention, which requires a nation’s consent to be bound and describes the means by which that consent may be expressed. See *id.* arts. 11–15, 1155 U.N.T.S. at 335–36, 8 I.L.M. at 684–85. A treaty can be invalidated if the State’s consent was procured by the use of such tactics as fraud, corruption, coercion of a state’s representative, or threats or use of force. See *id.* arts. 49–52, 1155 U.N.T.S. at 344, 8 I.L.M. at 698.

133. Since 1994 the United States has processed 81 incoming extradition requests from Canada, granting 26 and waiving 55. See OFFICE OF INT’L AFFAIRS, U.S. DEP’T OF JUSTICE, CRIMINAL DIV., INCOMING EXTRADITION REQUESTS IN WHICH THE FUGITIVE HAS BEEN EITHER GRANTED/WAIVED SINCE 1994 2–5 (Jun. 3, 1997) (on file with the *Houston Journal of International Law*). In the same timeframe, the United States has processed 43 incoming extradition requests from Mexico, granting 25 and waiving 18. See *id.* at 8–10.

134. During the extradition process, the executive plays a primary role while the extradition magistrate has a limited review function as defined by statute. See 18 U.S.C. §§ 3181–3196 (1994) (setting forth the procedure for handling requests to the United States for extradition). The extradition magistrate conducts a hearing to determine if the evidence is sufficient to sustain the charge against the fugitive under the provisions of the extradition treaty. See *id.* § 3184. If the evidence is sufficient, the extradition magistrate issues an order of extradition. See *id.* The fugitive may challenge the order of extradition by petitioning for a writ of habeas corpus, but the Supreme Court has limited the

*Garcia v. United States* concerned a request by Mexico for extradition from the United States of a fugitive on a multiple count indictment for sexual crimes.<sup>135</sup> The fugitive resisted extradition and filed a writ of habeas corpus after being certified as extraditable.<sup>136</sup> The district court denied Montiel Garcia's petition,<sup>137</sup> and he appealed asserting that extradition was barred by Article 6 of the extradition treaty, the *non bis in idem* clause.<sup>138</sup> The Second Circuit Court affirmed the district court and the fugitive was returned to Mexico.<sup>139</sup>

In *Martin v. Warden, Atlanta Pen* Canada requested the extradition of a fugitive wanted for "criminal negligence causing death and leaving the scene of an accident" in that country.<sup>140</sup> The fugitive resisted extradition, arguing that the length of time between the commission of the crime in Canada and the date of extradition was so long that it violated his constitutional due process right to a "speedy extradition."<sup>141</sup> The court, noting the novelty of the defense, and expressly disapproving the only case recognizing a constitutional right to a "speedy extradition," held that no such right existed.<sup>142</sup> Mr. Martin's case was then turned over to the Secretary of State to determine whether Martin should be surrendered pursuant to the extradition treaty between the United States and Canada.<sup>143</sup>

But as noted, due to the relationship between treaty parties and the differences in legal systems, there are circumstances under which States do not abide by the express terms of the treaties when the return of a fugitive is desired. The means by which States accomplish their goal of retaining or gaining custody of fugitives, while not following

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habeas corpus review of the extradition order to determining only (1) whether the magistrate had jurisdiction; (2) whether the offense at issue is within the treaty; and (3) whether there was any evidence to support the conclusion that there were reasonable grounds to believe that the accused was guilty. See *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

135. *Garcia v. United States*, 987 F.2d 153, 154 (2d Cir. 1993).

136. *See id.*

137. *See id.*

138. *See id.* at 153.

139. *See id.* at 154.

140. *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 825-26 (11th Cir. 1993).

141. *See id.* at 827 (discussing "Canada's alleged delay of over seventeen years in seeking" extradition).

142. *See id.* at 829 & n.8 (holding that no Sixth Amendment right applied).

143. *See id.* at 830.

the expressed terms of the treaty, are irregular rendition and creative interpretation.<sup>144</sup>

While some commentators argue that incentives for irregular rendition have increased recently,<sup>145</sup> irregular rendition is not a modern phenomenon.<sup>146</sup> Any number of reasons exist for why nations resort to irregular rendition, including: (1) the lack of a treaty between the States, or even lack of diplomatic recognition;<sup>147</sup> (2) domestic strife within the requested State;<sup>148</sup> (3) the requested State's refusal to deliver the fugitive;<sup>149</sup> (4) lack of dual criminality; and (5) a difference in societal values in the respective countries.<sup>150</sup> Because this paper focuses on the United States and its neighbors, only examples and cases involving the United States are discussed herein.

Treaties work best when important values are not at stake.<sup>151</sup> When such values are at stake, a nation may be

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144. The term "creative interpretation" as used in this Comment means, in a judicial context, the analysis, balancing of competing interests, interpretation of the words of the statute or treaty, and the review of the case facts in which courts engage to reach a decision. In a political context, the term means the balancing of foreign policy interests, domestic political interests, security, and standing in the international arena in which the executive engages when making decisions.

145. See Weisman, *supra* note 29, at 150 (commenting on the connection between expanding narcotic trafficking and terrorist activities and the increase in the use of irregular rendition).

146. See Gluck, *supra* note 17, at 613 (stating that international abduction has occurred fairly consistently worldwide over the last 160 years).

147. Although Israel and Argentina had established diplomatic relations with each other, they had no extradition treaty until May 9, 1960, signed two days before the abduction. See YARNOLD, *supra* note 6, at 52.

148. See *Ker v. Illinois*, 119 U.S. 436 (1886). This landmark case involves a request for extradition to the United States from Peru. See *id.* at 438. An agent kidnapped Ker and returned him to authorities in Illinois. See *id.* Ker was convicted and the Supreme Court upheld the conviction, stating in response to Ker's due process argument that U.S. laws, treaties, and the Constitution do not guarantee protection. See *id.* at 439, 444-45. Ker thus stands for the proposition that the manner in which a criminal defendant has been brought before a court, including kidnaping by government agents, does not necessarily affect jurisdiction over that defendant. See *id.* at 444.

149. See *Aerial Incidents and the Libyan Arab Jamahiriya*, 1992 U.N.Y.B. 52-53, S.C. Res. 731, U.N. Doc. S/23422 (requiring Libya to extradite those charged with the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland). After the Libyan government ignored the requirements of Security Council Resolution 731 by refusing to comply with the request to extradite, the U.N. Security Council imposed sanctions on Libya. See 1992 U.N.Y.B. 55-56, S.C. Res. 748, U.N. Doc. S/23762.

150. See Bifani, *supra* note 28, at 686.

151. See Frederic L. Kirgis, Jr., *Enforcing International Law*, ASIL NEWSLETTER, ASIL Insight (Amer. Soc'y Int'l L.), Jan.-Feb. 1996, at 2. Kirgis

faced with a choice of supporting its values or furthering its foreign policy.<sup>152</sup> At other times, there may be a conflict between competing societal values.<sup>153</sup> When this happens in the context of an extradition request, governments have proven to be quite capable of interpreting the pertinent treaty or law in a manner that satisfies or avoids the conflict.

There are several accepted means of gaining custody without official extradition, as illustrated by the return of Garcia Abrego to the United States. Courts and commentators are deeply divided, however, when kidnaping is the irregular rendition method used. The effectiveness of kidnaping to gain custody of a fugitive is illustrated by the recent case of *United States v. Alvarez-Machain*.<sup>154</sup> Although clearly controversial,<sup>155</sup> kidnaping can be a viable alternative to formal extradition.<sup>156</sup>

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notes that legal institutions, domestic and international, “function best when vital interests are not at stake.” *Id.*

152. When international rules relate to ordinary foreign policy relationships between governments, they tend to be self-enforcing because all parties realize it is in their self-interest to comply if they want other actors to comply. *See id.* When a government is thought to have breached its legal obligations under international law, it may suffer reprisals such as economic countermeasures to encourage that government to change its ways. *See id.* Other tactics can be used to apply pressure to governments that do not comply with recognized standards of conduct, such as being required to appear before treaty-monitoring bodies to explain compliance with human rights standards. *See id.* International organizations often have a “club-like atmosphere,” and national representatives may be suspended or expelled from membership, but much more common are “subtle and not-so-subtle expressions of disapproval” regarding the member states’ conduct. *Id.* at 3.

153. For example, in the 1970s the Soviet Union was a party to a multilateral treaty directed by the International Labor Organization (ILO). *See id.* The treaty required each party to prohibit the use of forced or compulsory labor with some exceptions, including service that forms part of the “normal civic obligation of citizens.” *Id.* The Soviets issued a decree to require employment of any person “evading socially useful work and leading an anti-social, parasitic way of life.” *Id.* The ILO argued that this decree violated the treaty, while the Soviets took the position that it was merely “enforcing a normal civic obligation of its citizens.” *Id.* Over the following years, the Russians were pressured on this subject and the Soviet Union slowly relaxed its rules. *See id.*

154. 504 U.S. 655 (1992).

155. *See, e.g.,* Michael J. Glennon, *State-Sponsored Abduction: A Comment on Alvarez-Machain*, 86 AM. J. INT’L L. 746, 746, 753 (1992) (“Numerous authorities have viewed it as flatly impermissible under longstanding customary norms for one state to send its agents to seize an individual located in the territory of another state without the consent of the government of that state.”).

156. *See* Weisman, *supra* note 29, at 162–63 (stating that foreign governments do not object to a fugitive’s abduction in all cases; they can also consent or acquiesce to an abduction); *see also* Glennon, *supra* note 155, at 746 (implying that abductions only violate international law if the individual is seized from a territory despite the foreign government’s protest).

Political and public concern over the drug flow into the United States through and from Mexico provide the backdrop for this case. The much publicized torture and death of Drug Enforcement Administration (DEA) agent Enrique Camarena at the hands of Mexican drug dealers outraged politicians and the American public.<sup>157</sup> There was tremendous pressure for justice.<sup>158</sup> The United States, apparently believing that Mexico would not extradite Dr. Alvarez-Machain,<sup>159</sup> chose irregular rendition to gain custody.<sup>160</sup> DEA agents paid to have the doctor kidnapped from his home in Guadalajara, flown to the United States, and turned over to U.S. authorities.<sup>161</sup>

Naturally, Dr. Alvarez-Machain resisted this “extradition” and filed for dismissal under the theory that his return to the United States violated the U.S.-Mexico extradition treaty, and

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157. See *Drug Agent’s Murder Called “Terrorist Act”*, L.A. TIMES, Mar. 29, 1985, at 2 (quoting the head of the Drug Enforcement Administration); *Reagan Urges Capital Punishment for Killers of Police in Drug Cases*, L.A. TIMES, Apr. 20, 1988, at 4 (urging Congress to “send our own message to people who kill cops” by approving a bill providing for capital punishment for those who kill DEA agents or police officers in drug related shootings); see also Olga Brisenio, *Town Honors Hero—Slain Drug-Fighter*, SAN DIEGO UNION-TRIB., Jan. 4, 1986, at A1 (reporting that the U.S. Ambassador to Mexico assured that the perpetrators would be brought to justice); H.G. Reza, *2,000 Mourn Victim of War Against Drug Traffickers; Murdered U.S. Agent Eulogized as “Martyr and Hero,”* L.A. TIMES, Mar. 10, 1985, at 3 (quoting San Diego Bishop Gilberto Chavez as calling Camarena “a martyr for the sake of goodness and a hero to our country because he tried to free us from the slavery and atrocity of illegal drugs”).

158. For example, one U.S. newspaper stated:

[T]o Americans whose moral and political imaginations are not polluted by the banalities of international rhetoric, the abduction was in the service of justice. Alvarez Machain is accused of assisting the torturers of a kidnaped DEA agent, Enrique Camarena Salazar, by keeping him alive and awake, ensuring that his pain would be particularly acute and his death particularly agonizing. When the Mexican government dragged its feet on the case, some persistent and ingenious DEA agents arranged for the doctor’s deliverance to the U.S. justice system.

William S. Smith, *Camarena Case a Place U.S. Can Draw the Line*, HOUS. CHRON., Oct. 27, 1992, at 13A.

159. See *Mexico Unlikely to Extradite Drug Slaying Suspects*, UPI, Jan. 8, 1988, available in LEXIS, News Library, UPI File; see also *supra* note 90 and accompanying text (noting that the U.S. judicial system is based on English common law and Mexico’s judicial system is based on Roman civil law; under the latter, States do not extradite their own nationals).

160. See *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

161. See *id.* & n.2. For further discussion of Dr. Alvarez-Machain’s capture and the DEA’s “difficult decision,” see Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 HOUS. J. INT’L L. 829, 836–37 (1997).

therefore, the United States lacked jurisdiction.<sup>162</sup> The district court and Ninth Circuit agreed and found for Alvarez-Machain.<sup>163</sup> The United States appealed, and the Supreme Court indulged in a little creative interpretation.<sup>164</sup> Because the extradition treaty did not *explicitly forbid* kidnaping, the Court held that Alvarez-Machain's abduction did not violate the treaty.<sup>165</sup> Applying *Ker*, the Court held that U.S. jurisdiction was proper,<sup>166</sup> and the case was remanded for trial.<sup>167</sup> At this point Judge Rafeedie, who originally had dismissed the case for lack of jurisdiction,<sup>168</sup> did some creative interpretation of his own. He dismissed the case for lack of evidence.<sup>169</sup>

Of course, kidnaping is an extreme measure and there are other less drastic and effective means of irregular rendition. The case of *State v. Salcido*<sup>170</sup> is another example of how the existing system of extradition treaties allows nations to satisfy successfully conflicting demands of foreign

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162. See *Alvarez-Machain*, 504 U.S. at 658.

163. See *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd* 504 U.S. 566 (1992).

164. "[T]he majority then inferred that the Treaty merely established the procedures to be followed when the Treaty is invoked. The circuitous logic underlying this phase of the opinion is so flawed that intelligent response is nearly impossible." Halle Fine Terrion, *United States v. Alvarez-Machain: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction*, 43 CASE W. RES. L. REV. 625, 631 (1993); see Ian J. Platt, *All Nations Beware: United States Extradition Treaty with Mexico Does Not Prohibit Forcible Abductions*, 27 SUFFOLK U. L. REV. 271, 279 (1993) ("The Court's interpretation of the extradition treaty was excessively narrow, illogical, and counterintuitive.").

165. See *Alvarez-Machain*, 504 U.S. at 669-70. *But see* Justice Blackmun Addresses ASIL Annual Dinner, ASIL NEWSLETTER, Mar. 1994, available in LEXIS, Intlaw Library, Asilnw File (remarking on the case and the fact that Mexico and the United States amended the existing treaty to specifically prohibit kidnaping).

166. See *Alvarez-Machain*, 504 U.S. at 670.

167. See *id.*

168. See *id.* at 657.

169. See *Balancing the Scales*, SACRAMENTO BEE, Dec. 17, 1992, at B6; see also Frank J. Murray, *Clinton Hits the Court's Kidnapping Decision*, WASH. TIMES, Dec. 16, 1992, at A4 (noting that Dr. Alvarez-Machain is now suing the United States).

170. The facts glean from heavy press coverage of the events. See *A Strange Tale in the Arrest of Accused Wine Country Killer*, U.P.I., Apr. 23, 1989, available in LEXIS, News Library, Arcnws File [hereinafter *A Strange Tale*]; see also Lee Nance, *Murder Suspect Is Returned to U.S.*, CARRIER J., Apr. 21, 1989, at 4A; *Suspect Admits 7 Killings; Mexico Studies Jurisdiction*, CHI. TRIB., Apr. 21, 1989, at 4 [hereinafter *Suspect Admits*]; *Wine Country Killer Guilty; Jury Convicts Him in 7 Slayings*, RECORD, Oct. 31, 1990, at A9 [hereinafter *Jury Convicts*].

relations and domestic policy.<sup>171</sup> In April 1988 Ramon Salcido was sought for the murder of seven people in Sonoma County, California.<sup>172</sup> He had brutally murdered his wife, children, sisters-in-law, and coworkers and seriously wounded others.<sup>173</sup> Salcido was a legal resident alien in the United States and had been working there for years.<sup>174</sup> He was also a Mexican citizen, and following the murders, Salcido fled to his native Mexico.<sup>175</sup>

The United States requested that Salcido be extradited pursuant to the existing treaty.<sup>176</sup> If returned to California and convicted, he would face the death penalty.<sup>177</sup> The exact sequence of events that followed is in dispute,<sup>178</sup> but it is undisputed that Salcido was not extradited.<sup>179</sup> He was, however, turned over to U.S. law enforcement officials in Mexico City and flown back to California in handcuffs.<sup>180</sup>

There is considerable controversy over whether Mexican law enforcement officials knew that Salcido was a Mexican national, whether Salcido had requested that he be returned to the United States, and whether Salcido was deported by Mexico.<sup>181</sup> The answers to these questions are significant because, as noted, Mexico has no death penalty for murder and, under a civil law system, will not extradite its nationals.<sup>182</sup> The U.S.-Mexico extradition treaty specifically provides for this protection.<sup>183</sup> But, also as noted above, if a

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171. In this case, the conflicting demands were Mexico's domestic policy of no capital punishment in murder cases, *see supra* at note 103, and pressure from the United States to obtain custody of the fugitive for trial.

172. *See A Strange Tale, supra* note 170; Nance, *supra* note 170; *Suspect Admits, supra* note 170; *Jury Convicts, supra* note 170.

173. *See Jury Convicts, supra* note 170.

174. *See Suspect Admits, supra* note 170.

175. Newspaper articles provide the pieces to formulate the time line of events. The murder occurred on Friday, April 14, 1989. *See A Strange Tale, supra* note 170. Salcido was then arrested in Mexico on Wednesday, April 19. *See Nance, supra* note 170. Authorities tried to decide his nationality on Thursday, April 20, 1989. *See Suspect Admits, supra* note 170. He was turned over to U.S. authorities in Mexico City on Friday, April 21, 1989. *See A Strange Tale, supra* note 170. *But see Nance, supra* note 170 (reporting that Salcido was deported on April 20, 1989).

176. *See Suspect Admits, supra* note 170.

177. *See Nance, supra* note 170.

178. *See A Strange Tale, supra* note 170; Nance, *supra* note 172; *Suspect Admits, supra* note 170.

179. *See A Strange Tale, supra* note 170.

180. *See id.*

181. *See A Strange Tale, supra* note 170; Nance, *supra* note 172; *Suspect Admits, supra* note 170.

182. *See Extradition Treaty, supra* note 98, art. 8, 31 U.S.T. at 5065.

183. *See id.* arts. 8, 9(1), 31 U.S.T. at 5065.

State chooses not to extradite a felon, it is obliged to prosecute.<sup>184</sup> In cases such as these, when a State faces a conflict between domestic policy and foreign relations, it is often able to reconcile the conflict using irregular extradition methods.<sup>185</sup>

At times, the conflicting demands may be domestic. A comparison of two cases in which the United States requested extradition of fugitives from Canada illustrates how, under the present system, States can resolve such conflicts.<sup>186</sup> As noted above, Canada does not allow capital punishment;<sup>187</sup> there is a strong abhorrence to its implementation and attempts to reinstate it have failed.<sup>188</sup> Clearly capital punishment violates the values of the Canadian people and society.<sup>189</sup> Despite this strong opposition to capital punishment, in 1993 the Canadian Supreme Court refused to block the extradition of two fugitives to the United States,<sup>190</sup> even though each faced the death penalty. Furthermore, the Minister of Justice declined to seek Article 6 assurances from the United States.<sup>191</sup>

In *Kindler* the fugitive had been tried and convicted for a brutal murder in Pennsylvania and had been sentenced to die.<sup>192</sup> He escaped and fled to Canada.<sup>193</sup> In *Ng*,<sup>194</sup> California

184. See *id.* art. 9(2), 31 U.S.T. at 5065.

185. See Jami Leeson, *Refusal to Extradite: An Examination of Canada's Indictment of the American Legal System*, 25 GA. J. INT'L & COMP. L. 641, 648-52 (1996) (discussing the trend to resort to kidnappings).

186. See *infra* notes 192-210 and accompanying text (analyzing *Kindler* and *Jamieson*).

187. See *supra* notes 119-28 and accompanying text.

188. See Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 8 & n.3 (1993).

189. See *Kindler v. Canada (Minister of Justice)* [1991] 84 D.L.R. (4th) 438, 481 (Can.).

190. See *infra* notes 194-99.

191. Such assurances have been included in extradition treaties to reconcile the preservation of human rights and international treaty obligations to states that retain capital punishment. For excellent analyses of such treaty provisions, see generally Craig R. Roecks, *Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime*, 25 CAL. W. INT'L L.J. 189 (1995); Wyngaert, *supra* note 19. This case was significant precisely because Canada neither sought nor received Article 6 assurances from U.S. authorities that the death penalty would not be carried out. See *Pak*, *supra* note 121, at 273 (arguing that Canada violated Articles 7 and 12 of the Canadian Charter); see also *supra* notes 112-18 (discussing Article 6 and its implications).

192. See *Kindler*, 84 D.L.R. (4th) at 445; Highet & Kahale, *supra* note 126, at 129.

193. See *Kindler*, 84 D.L.R. (4th) at 445.

194. 84 D.L.R. (4th) 498 (Can.) (the companion case to *Kindler*). On September 26, 1991, Ng was flown to Folsom State Prison outside Sacramento,

authorities wanted the fugitive for a series of particularly gruesome "sex-torture slayings."<sup>195</sup> He had fled to Canada prior to arrest.<sup>196</sup> Both fugitives were fighting extradition to the United States based on the notion that the death penalty violated Articles 7 and 12 of Canadian Charter of Rights and Freedoms.<sup>197</sup>

Considering Canada's anti-death penalty stance, one might anticipate that Canada would have required Article 6 assurances from the United States. At the time, however, there was a conflicting domestic concern: many Canadians feared that to refuse extradition would result in Canada becoming a haven for killers.<sup>198</sup> In deciding not to block the return absent Article 6 assurances, Chief Justice Lamer noted this public concern as a basis.<sup>199</sup> Even so, the controversial decision disturbed some Canadian groups.<sup>200</sup>

Reassuring the public that *Kindler* and *Ng* did not indicate a wholesale abandonment of Canada's opposition to the death penalty, Canada subsequently refused to extradite absent Article 6 assurances from the United States.<sup>201</sup> In

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California. See Ken Ellingwood, *O.C. Gets 6 Tons of Paperwork on Transferred Murder Case; Trial: Local Attorneys Defending Accused Northern California Serial Killer Charles Ng Face Arduous Task of Sifting Through Mountain of Documents*, L.A. TIMES, Aug. 6, 1995, at B1. On November 12, 1992, he was ordered to stand trial for 12 murders. See *id.* After almost four years of delays, squabbles over trial location, and numerous changes of attorneys, a tentative trial date of September 6, 1996, was set. See *id.* The trial, however, did not begin in September 1996 as planned. See Ken Ellingwood, *Delayed Ng Serial-Murder Case Hits Another Legal Snag*, L.A. TIMES, Sept. 28, 1996, at B12 [hereinafter *Legal Snag*]. In August 1996 Judge Robert R. Fitzgerald removed Ng's public defender at Ng's request. See *id.* Ng changed his mind the next week and requested the public defender's return. See *id.* Judge Fitzgerald refused the request and Ng appealed. See *id.* The California Supreme Court ordered the Court of Appeals in Santa Ana to hear the appeal. See *id.* A tentative hearing date was set for Nov. 18, 1996. See *id.*

195. Kevin Leary, *Sex-Slave Killings: Extradition of Ng One Step Closer*, SAN FRAN. CHRON., Oct. 27, 1989, at A2.

196. See *Ng*, 84 D.L.R. (4th) at 500.

197. See *Kindler*, 84 D.L.R. (4th) at 446; *Ng*, 84 D.L.R. (4th) at 503.

198. See Gary Regenstreif, *Canada OK's Extradition to U.S. of Those Who May Be Executed*, REUTER LIBR. REP., Sept. 26, 1991, available in LEXIS, News Library, Reuwlid File; Philip Hager, *Canada Asked to Extradite Fugitive to U.S.*, L.A. TIMES, Feb. 22, 1991, at A3.

199. See *Kindler*, 84 D.L.R. (4th) at 440.

200. See, e.g., Russell Blinch, *Court Ruling on Deportation of Man Accused in Multiple Murders*, REUTERS N. AMER. WIRE, AM CYCLE, Feb. 17, 1991, available in LEXIS, News Library, Reuna File (quoting an Ottawa representative from Amnesty International).

201. See *Canada Seeks U.S. Promise of No Execution for Wanted Man*, REUTERS N. AMER. WIRE, Dec. 10, 1991, available in LEXIS, News Library, Reuna File [hereinafter *Canada Seeks Promise*]; see also John F. Burns,

*O'Bomsawin* the fugitive was a Canadian wanted in Florida for murder.<sup>202</sup> Even though Florida had the highest execution rate of any state, the Canadian Supreme Court did not block *O'Bomsawin's* extradition.<sup>203</sup> In accordance with Article 6, however, the Minister of Justice received assurances from the United States that if convicted, *O'Bomsawin* would not be executed.<sup>204</sup>

Canada used creative interpretation in the case of *United States v. Jamieson*.<sup>205</sup> In *Jamieson* the United States requested the extradition of a fugitive convicted of drug trafficking in Michigan.<sup>206</sup> Even though *Jamieson* did not face capital punishment, it was argued that Michigan's mandatory minimum sentencing requirement was outrageous.<sup>207</sup> Canada refused to return *Jamieson*.<sup>208</sup> Some U.S. commentators vigorously attacked the decision not to return *Jamieson*,<sup>209</sup> but since the extradition would have to survive Canadian legal standards, the extradition decision was based solely on domestic considerations.<sup>210</sup>

Domestic considerations also played a significant role in *Lobue v. Christopher*.<sup>211</sup> This case involved a Canadian request for the United States to extradite two individuals for kidnaping.<sup>212</sup> In a novel approach, the extradition was contested on the basis that the extradition statute violates the constitutional separation of powers requirement.<sup>213</sup> Although this statute has been on the books and applied hundreds of times in 147 years, Judge Lamberth wrote the opinion holding that the extradition statute did, in fact, violate the U.S. Constitution.<sup>214</sup> While commentators greeted this ruling by the District Court for the District of Columbia as an opportunity to explore the separation of powers

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*Canada Wins U.S. Extradition Deal*, N.Y. TIMES, Feb. 14, 1992, at A3 (reporting Canada's demand that Florida not seek the death penalty).

202. See *Canada Seeks Promise*, *supra* note 201; William Claiborne, *Murder Suspect Tests U.S.-Canada Extradition Pact*, WASH. POST, Nov. 29, 1991, at A38.

203. See Claiborne, *supra* note 202; see also Burns, *supra* note 201.

204. See *Accused Killer to Be Extradited to Florida*, U.P.I., Feb. 6, 1992, available in LEXIS, News Library, Upstat File.

205. [1992] 73 C.C.C.3d 460 (Can.).

206. See *id.*

207. See Leeson, *supra* note 185, at 643 & n.14 (discussing the "shocks the conscience" standard in the decision to extradite).

208. See *id.*

209. See *id.* at 641 (denouncing the *Jamieson* decision).

210. See *id.*

211. 893 F. Supp. 65 (D.D.C. 1995).

212. See *id.* at 67.

213. See *id.* at 67 & n.1 (citing 18 U.S.C. § 3184 (1994)).

214. See *id.* at 78.

issue,<sup>215</sup> other district courts failed to give it credence.<sup>216</sup> Still other district courts have avoided the constitutional issue by denying extradition on other grounds, for example, by finding a lack of dual criminality.<sup>217</sup>

There are reasons why nations choose irregular rendition and creative interpretation rather than go through formal extradition within the terms of the treaty. There are some obvious advantages at times to such irregular methods. For example, the *Alvarez-Machain* case illustrates the effectiveness of these methods in satisfying a conflict between domestic and foreign policy goals. For domestic political reasons, the United States felt pressure to prosecute Alvarez-Machain.<sup>218</sup> On the other hand, had the United States followed the procedures in Article 9 of the extradition treaty,<sup>219</sup> it is doubtful that he would have been prosecuted.<sup>220</sup> Finally, had Alvarez-Machain been tried and convicted in a U.S. court, irreparable damage to U.S.-Mexican relations may have resulted.<sup>221</sup>

Similarly, in the *Salcido* case, Mexico was able to cooperate with the United States after it “dispensed with extradition proceedings and immediately deported” Salcido.<sup>222</sup> The two States could therefore continue their joint

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215. See, e.g., Joseph Silver, *Lobue v. Christopher: Age-Old Separation of Powers Debate Rages on as Court Rules Extradition Statute Unconstitutional*, 26 GA. J. INT'L & COMP. L. 247 (1996).

216. See, e.g., *Matter of Extradition of Lang*, 905 F. Supp. 1385, 1390 (C.D. Cal. 1995) (“[T]he Court believes that *Lobue* was decided incorrectly because it failed to address the threshold issue of whether the plaintiffs in that case actually had standing to challenge the statute.”). The judgment was vacated on appeal on jurisdictional grounds. See *Lobue v. Christopher*, 82 F.3d 1081, 1082 (D.C. Cir. 1996).

217. See, e.g., *Kulekowskis v. DiLeonardo*, 941 F. Supp. 741, 750 (N.D. Ill. 1996).

218. See Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 593 (1996); Andrew Cawthorne, *U.S.-Mexico Relations Grow Strained; Trial of 2 Mexicans Accused in DEA Agent's Murder Reopens Old Wounds*, HOUS. CHRON., Dec. 13, 1992, at 35A.

219. See *supra* note 183 and accompanying text.

220. See Jorge G. Castaneda, *Not the Finest Hour for U.S., Mexico or Justice*, HOUS. CHRON., Dec. 30, 1992, at 11A (reporting that after the charges against Alvarez-Machain were dropped and he returned to Mexico, the Ministry of Foreign Affairs and the Attorney General stated they would not try him again).

221. See Cawthorne, *supra* note 218 (noting Mexican officials' disgust with the Alvarez-Machain trial).

222. Senator Arlen Specter, *The Time Has Come for a Terrorist Death Penalty Law*, 95 DICK. L. REV. 739, 756 (1991); see *supra* notes 170-81 and accompanying text (discussing the *Salcido* case); see also *Mexico to Continue*

anti-drug effort<sup>223</sup> and Mexico did not violate its domestic policy against extraditing nationals. Similarly, Canadian courts use the current treaty system to resolve conflicts between domestic and foreign policy as in *Kindler*<sup>224</sup> and *O'Bomsawin*.<sup>225</sup>

The current system is flexible enough that States may, through their courts, interpret the treaty as needed to satisfy disparities between values and cultures. This is what happened in *Lobue*<sup>226</sup> and *Jamieson*.<sup>227</sup> In both cases, the crime was clearly illegal in both States and appears to be within the scope of the extradition treaty;<sup>228</sup> however, in each case, the values and sense of morality of the requested State was in conflict with the laws of the requestor State and the courts interpreted the treaty and laws to avoid extraditing the fugitive.<sup>229</sup>

## V. CONCLUSION

“[W]hat’s past is prologue.”<sup>230</sup> Given the U.S. history of less than fervent support of international organizations, it is doubtful that it would benefit by the creation of an international criminal court. Recognizing that the current, albeit imperfect, system of extradition treaties does work, and acknowledging the United States’ apprehension of international organizations, it is clear that the best course of action for the United States, at least concerning criminal extradition, is to do nothing.

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*Cooperating on Drug War; Operations to Proceed During Talks on Extradition Treaty*, STAR TRIB., June 17, 1992, at 2A [hereinafter *Cooperating on Drug War*].

223. See *Cooperating on Drug War*, *supra* note 222, at 2A.

224. See *supra* note 187.

225. See *Canada Seeks Promise*, *supra* note 201.

226. See *supra* notes 211–17 and accompanying text.

227. See *supra* notes 205–12 and accompanying text.

228. See *supra* notes 97–107 and accompanying text (describing the U.S.-Mexico extradition treaty’s terms); *supra* notes 112–18 (noting the terms of the U.S.-Canada treaty).

229. See *supra* note 228.

230. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1.

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