CHAPTER 9

EXTRADITION AND RELATED PROCEDURES

I. INTRODUCTION

This chapter summarizes the basic rules and procedure relating to extradition as well as the various alternatives to extradition, including deportation, exclusion and expulsion, transfer of prisoners and criminal proceedings, and other forms of "rendition" such as abduction.

§ 9–1 DEFINITION

In an international context, the term "extradition" refers to the formal procedure by which one State surrenders custody of an accused person or a fugitive to another State for purposes of criminal prosecution. Technically, it is one of several legal mechanisms by which an individual can be transferred (or "rendered") from one national jurisdiction to another. Deportation (sometimes called "removal" in immigration practice) is another method. The main differences are that an extradition request is premised on pending criminal charges (or an existing conviction and sentence) in the requesting State and is generally (although not always) based on a treaty or other reciprocal arrangement.

Within the United States, a distinction is drawn between domestic extraditions and international extraditions. Domestic extraditions (those between individual states of the United States) are based on the "extradition of fugitives" authority in the U.S. Constitution; Art. 4, Sec. 2, cl. 2 requires one state to deliver fugitives who have committed a "treason, felony or other crime" to the requesting state from which that individual has fled. A federal statute, 18 U.S.C. § 3182, sets the process by which such domestic requests are made, but state law governs as well.

By distinction, international extradition (between the United States and a foreign country) is exclusively a federal function. A valid extradition treaty must be in force between the United States and the foreign country, and the governing procedures are set forth at 18 U.S.C. §§ 3181–96.

A useful overview of U.S. law and practice in the Congressional Research Service Report titled "Extradition To and From the United States: Overview of the Law and Contemporary Treaties" (Oct. 2016), which is available at *https://www.everycrsreport.com/files/20161004_98-958_53c6c09c590214876fb5959c6fdb0d78942b5cc6.pdf.*

§ 9–2 PURPOSE

Agreed extradition procedures between different States help to bring to justice those accused or convicted of crimes while promoting respect for the sovereignty and independence of the States concerned. If extradition were not possible, criminals might readily find refuge and safe haven in foreign countries. In addition, domestic law enforcement authorities might be inclined towards "self-help" measures to apprehend fugitives in other jurisdictions.

Frequently, the State in which the accused person or fugitive is found cannot prosecute the offense in question because it lacks jurisdiction over crimes committed in other countries. Even when that is not the case, it is often more practicable and more desirable for the individual to be prosecuted by the State where the offense was committed, since that is where the evidence and witnesses are likely to be located and that State has the greatest interest in the prosecution.

§ 9–3 HISTORICAL DEVELOPMENT

The first known extradition treaty was negotiated between Ramses II of Egypt and Hittite Prince Hattusili III in the Thirteenth Century BC. The terms of that treaty were carved into the walls of the Temple of Karnak at Luxor. One of the first modern extradition treaties (and in fact one of the first post-independence American treaties) was the Jay Treaty of 1794 with the United Kingdom. Bilateral treaties proliferated throughout the 19th century with the advent of global trade and commerce.

Broadly speaking, these earlier international extradition practices have continued without significant change and reflect the nature of an international system based primarily on the interests of sovereign States. Some commentators suggest that the changing nature of the international system makes the extradition system obsolete, especially in light of the emergence of human rights norms and the establishment of international criminal tribunals. It seems likely, however, that the vast majority of criminal offenses will continue to be prosecuted in domestic courts for the foreseeable future, so extradition laws and practices will remain relevant.

II. GENERAL PRINCIPLES

No rule of customary international law requires one State to surrender accused individuals or fugitive offenders to another State. As a result, international extraditions typically proceed on the basis of a treaty or other formal agreement providing reciprocal obligations between the States concerned. In other words, the international extradition regime is founded on consent.

Besides reciprocity, the essential principle is "dual criminality," which means that the offense for which extradition is sought must be a crime in both the requesting and requested jurisdictions. Most States do not extradite people to be prosecuted elsewhere for an offense that is not a crime in their own jurisdiction.

Within each country, the specific procedures that must be followed in responding to a request for extradition are typically a matter of domestic law. Legislation may provide specific rules dictating who can be extradited, what kind of evidence may be required in support of a request, the extent of judicial review over the process, even the grounds for refusing an extradition request. The details and requirements therefore vary between national legal systems. The following discussion focuses primarily on U.S law and practice.

§ 9–4 THE TREATY REQUIREMENT

Extradition is founded on reciprocity. There is no duty under international law to extradite absent a treaty or other agreement between the States concerned. Some States may surrender persons even where no treaty exists. However, most countries, including the United States, require a valid treaty to be in force before requests for extradition can be considered.

1. *Bilateral Treaties*

Most countries extradite on the basis of bilateral treaties or agreements. The United States has traditionally conditioned its extradition laws and practices on an existing bilateral treaty with other countries. In fact, this "treaty requirement" is reflected in the extradition statutes. *See* 18 U.S.C. §§ 3181, 3184 (1996). Moreover, a bilateral treaty is almost always required. Over 100 such treaties are currently in force. They are listed at 18 U.S.C. § 3181 note (1996). Most recently, the Senate gave its advice and consent to bilateral extradition treaties with Serbia (Sen. Exec. Rpt.

115-4) and Kosovo (Sen. Exec. Rpt. 115-5) on July 26, 2018. See *www.foreign.senate.gov/treaties*.

U.S. courts rely on the views of the Department of State as to whether a given treaty remains in force for the United States. On questions of interpretation, the views of the Executive Branch are given substantial deference in the interpretation of treaty provisions.

2. *UN Model Extradition Treaty*

The terms of individual extradition treaties have a broad similarity but tend to differ markedly in their particulars. In 1990, to promote the adoption of modern extradition relationships by countries of differing legal cultures around the world, the UN General Assembly approved a Model Treaty on Extradition. *See* U.N. Doc. A/RES/45/116 (Dec. 14, 1990), text available at *https://www.unodc.org/pdf/model_treaty_extradition.pdf.*

3. *Extradition to Tribunals*

A recent exception to the treaty requirement in U.S. practice involves the surrender of individuals to the ICTY and ICTR. To comply with its obligations to surrender persons charged by those Tribunals, the United States concluded separate executive agreements with them in 1994 and 1995, respectively. The agreements were subsequently implemented by statute providing that the extradition laws "shall apply in the same manner and extent to the surrender of persons, including United States citizens, to [the ICTR and the ICTY]." *See* National Defense Authorization Act of 1996, Pub. L. No. 104–106, § 1342(a)(1), 110 Stat. 186 (1996), 18 U.S.C. 3181 note.

Bishop Elizaphan Ntakirutimana, charged with acts of genocide, challenged his surrender on the ground that no "Article II" treaty existed between the ICTR and the United States. The Fifth Circuit rejected the argument, holding that it is not unconstitutional to extradite a person in the absence of such a treaty so long as Congress has authorized the action pursuant to statute. *See Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), cert. denied, 528 U.S. 1135 (2000).

Even though the United States is not a party to the Rome Statute creating the International Criminal Court, some concerns have been expressed about the possibility of requests for the extradition of people from the United States to the ICC. These concerns are reflected in 22 U.S.C. § 7423, which prohibits various form of support to and cooperation with the ICC, including with respect to extradition. Section 7423(d) states that

> Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government may extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.

In addition, §7423(f) prohibits the use of appropriated funds to assist the "investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court."

4. *Multilateral Treaties*

It has long been U.S. practice (strongly endorsed by the U.S. Senate) to require a separate bilateral treaty for each country. The concern has been to ensure that the United States only

assumes extradition obligations with countries considered to have sufficiently reliable legal systems. By contrast, many States around the world can extradite on basis of a multilateral treaty.

Although no global extradition treaty exists, a number of regional multilateral treaties are in force. Within the Council of Europe, for example, Member States have long based their extradition relationships on the 1957 European Convention on Extradition (for members of the European Union, this treaty has now largely been displaced by the European Arrest Warrant, discussed below). Regional extradition arrangements exist between the Benelux countries, within the Commonwealth, in the Arab League, and among the South African States.

The Organization of American States boasts two multilateral extradition treaties. The first is the 1981 Inter-American (Caracas) Convention on Extradition (entered into force in March 1992), text available at *http://www.oas.org/juridico/english/treaties/b-47.html*. It has six Member States: Antigua and Barbuda, Costa Rica, Ecuador, Panama, St. Lucia and Venezuela. The United States has neither signed nor ratified this treaty.

Since 1935, the United States has been party to the second, the 1933 Inter-American (Montevideo) Convention on Extradition, 49 Stat. 3097, 165 LNTS 19. Other parties include Argentina, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua and Panama are also parties. The United States on several occasions has relied upon its terms to accomplish extraditions in a relatively few instances where the bilateral relationship with the country in question was not sufficient. The text is available at *http://www.oas.org/juridico/mla/en/treaties/en_conve_extra_inter_american_1933_montevideo.pdf*.

In addition, a number of the multilateral criminal law conventions to which the United States is a party also provide a basis for extradition in respect of covered offenses, including the UN Conventions on Transnational Organized Crime, Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, Maritime Terrorism, and Corruption. These are discussed *supra* in Chapter 7. These treaties operate to amend existing bilateral treaties between States Parties to include the specific offenses covered by those conventions and to provide a treaty basis for extradition for such offenses when no bilateral exists.

As indicated in Chapter 7, these conventions generally define the primary jurisdictional bases for States Party to prosecute the crimes in question (e.g., when the offence was committed on their territory or by their nationals) and require other States Party where an accused offender may be found either to extradite the accused to a State Party with such jurisdiction or (if unable to do so) then to prosecute the offender themselves. This "extradite or prosecute" (*aut dedere aut judicare*) principle is an essential element of the global counter-terrorism system.

§ 9–5 DUAL CRIMINALITY

The general requirement of dual (or double) criminality reflects the principle that it would be repugnant to surrender someone to stand trial in another country for an act that is not considered a criminal offense in the requested State. Most extradition treaties contain an explicit dual criminality requirement. The principle is firmly established in U.S. law. "In short, an individual will be extradited under a treaty containing a [dual] criminality provision only when his actions constitute an offense in both the requesting and requested states." *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988).

Dual criminality does not mean exact equivalence. Generally speaking, the requirement is satisfied when the relevant offenses are substantially analogous and when the conduct in question is subject to criminal sanctions in both jurisdictions. As stated in *United States v. Sacoccia*, 58 F.3d 754, 766 (1st Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996):

> The principle of dual criminality does not demand that the laws of the surrendering and requesting States be carbon copies of one another. Thus, dual criminality will not be defeated by differences in the instrumentalities or in the stated purposes of the two nations' laws. By the same token, the counterpart crimes need not have identical elements.

Assertions of extraterritorial jurisdiction can sometimes raise dual criminality issues. Some treaties include a specific territorial requirement, so that extradition is available only for crimes committed in the territory of the requesting State. More commonly, the treaty might provide that an extraterritorial offense will be covered if it would be prosecutable had it taken place entirely within the territory of the requested State. For a recent discussion of the dual criminality requirement, see *Matter of Extradition of Fordham,* 281 F.Supp.3d 789 (D. Alaska 2017).

§ 9–6 WHAT CRIMES ARE EXTRADITABLE?

Broadly speaking, there are two different approaches to identifying the offenses for which extradition is possible. The first is to describe them individually in the treaty itself. This enumerative or "list" approach is the traditional one. It assures dual criminality because the governments agree in advance on precisely which crimes are covered. But it has clear drawbacks. It is likely to be under-inclusive and requires constant revision to keep pace with new offenses and developments in criminal law procedure (think, for instance, of the relatively rapid emergence of cybercrime and terrorism).

The second is the more modern "no list" approach, which provides simply that all offenses are extraditable if they are punishable in both countries by a specific minimum sentence (such as one year). It is more inclusive and self-adapting but may generate difficulties in determining dual criminality in some cases. This may be the situation, for example, where prosecution in the requesting State is premised on conduct that may not be an element of the comparable crime in the requested State.

The United States occasionally confronts this problem with respect to mail and wire fraud, racketeering and continuing criminal enterprise, and cybercrime, since most foreign legal systems do not criminalize conduct in comparable terms. Prosecution for inchoate crimes, such as attempts, conspiracy, and aiding and abetting, can also raise difficulties depending on the law of the requested State.

§ 9–7 NON-EXTRADITABLE OFFENSES

It is traditional for extradition treaties to exclude tax, fiscal and customs crimes as well as religious offenses. In recent years, however, there has been an increased willingness to narrow the fiscal offenses exception, in light of a growing consensus on the need to prosecute such practices as bribery, corruption and money laundering and to confiscate the proceeds of illegal actions (such as drug trafficking) as an effective law enforcement tool. *See, e.g.*, the Second Additional Protocol to the 1957 European Convention on Extradition, Dec. 13, 1957, E.T.S. 24, and article 18(d) of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, C.E.T.S. 141, reprinted at 30 I.L.M. 148 (1991).

Military crimes (i.e., offenses under military law which are not also offenses under the regular criminal law) are also typically excluded. In some cases, the exclusion covers "crimes of a military character."

The exclusion for "political crimes" is discussed in connection with the "political offense" exception, *infra* at § IV.

§ 9–8 EXTRADITION OF NATIONALS

One major issue that divides many countries concerns extradition of one's own citizens or nationals. Civil law countries traditionally refuse to do so but are able to prosecute them for crimes committed in other countries on the basis of nationality jurisdiction. By contrast, common law countries have generally rejected nationality-based jurisdiction (believing that crimes are most effectively prosecuted where they are committed no matter where the offenders come from) but have been willing to extradite their own citizens.

Historically, the United States long favored the extradition of its own nationals but was not always able to negotiate clear-cut reciprocal commitments with other countries. On occasion, ambiguous treaty language caused problems. In *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5 (1936), the U.S. Supreme Court held that a treaty provision providing that neither State was bound to give up its nationals was an insufficient basis for extradition. As a result, for many years, the extradition of U.S. nationals to certain countries was effectively precluded by such discretionary language in the relevant bilateral treaties.

In 1992, Congress amended the extradition statute to eliminate the problem, providing that

> If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

See 18 U.S.C. § 3196 (1990).

Some bilateral treaties deal with this issue by listing specific crimes for which extradition will not be refused solely on the basis of nationality. *See*, for example, article 3(1) the 2006 Extradition Treaty between the United States and Malta, which specifies *inter alia* participation in crimes of terrorism, trafficking in persons, computer crime, sexual exploitation of children and child pornography.

§ 9–9 GROUNDS FOR REFUSAL

In some situations, a government might have what it considers valid reasons for not surrendering the person in question. Extradition treaties and statutes typically provide a number of grounds on which extradition requests can be refused.

1. *Non Bis In Idem*

A commonly accepted basis for refusing extradition is the principle that an individual who has already been prosecuted and acquitted in the requesting State should not be re-tried for the same offense. It is sometimes referred to as *non bis in idem* or *autrefois acquit*.

In the U.S. view, this principle (like its *double jeopardy* counterpart in domestic law) is not violated where the individual has been previously prosecuted and convicted elsewhere for the same or a similar offense. See, e.g., *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir 2017). Thus, extradition from the United States to another country would not necessarily be refused simply

because U.S. authorities had already prosecuted the individual in question for the same conduct for which the requesting State seeks his surrender. *See, e.g., Elcock v. United States*, 80 F. Supp. 2d 70 (E.D.N.Y. 2000).

Nonetheless, some U.S. extradition treaties contain provisions precluding extradition when the person whose extradition has been requested has already been tried and discharged or punished with final and binding effect in the requested State.

A more difficult situation can arise when the requested State has previously decided *not* to prosecute the individual for the conduct on which the extradition request is based. On the one hand, this may reflect a judgment that no crime had in fact been committed, or perhaps simply that the necessary evidence was lacking. On the other hand, allowing such a decision to preclude extradition can mean that the offender is effectively immune from prosecution anywhere. Some U.S. treaties include a provision permitting the refusal of extradition where the authorities have previously decided not to prosecute the person for the offenses on which the extradition is based or have discontinued such prosecutions.

2. *Lapse of Time*

Extradition may generally be refused if prosecution would be time-barred. This is sometimes referred to as "prescription." In practice, difficulties arise from the fact that different legal systems have different rules about when the "statutes of limitation" run for various crimes. Some extradition treaties provide that the relevant law is that of the requesting State, others specify the law of the requested State, and still others invoke the shorter of the two. In the United States, the general rule for federal crimes is 5 years, although more serious offenses (and some like fraud that are harder to prove) have longer periods.

3. *In Absentia Conviction*

Many countries, especially those in the civil law tradition, are able to prosecute and convict persons in their absence. Before agreeing to extradition, many States require a guarantee that the individual will have the right to challenge an *in absentia* conviction one way or another. Typically, this means a new trial. The United States traditionally treats the issue as if the individual had been charged but not convicted, and requires a trial *de novo* after surrender. As recently as 2009, Italy conducted trials *in absentia* against some 24 Americans allegedly involved in the kidnapping of an Egyptian Cleric during an extraordinary rendition.

4. *Persecution/Discrimination*

It is not uncommon for extradition treaties (especially those involving continental European countries) to permit denial of extradition when, in the view of the requested State, substantial grounds exist for believing that the prosecution or punishment in the requesting State has a discriminatory purpose or would be prejudicial to the individual in question. In some of its bilateral treaties, the United States has reserved the right to deny extradition on this ground. See, for example, art. 6 of the U.S.-Hong Kong bilateral agreement, which permits either party to refuse an extradition request which it believes is "politically motivated" or made for the "primary purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinion." It also permits denial when the person is likely to be denied a fair trial or punishment for the same reasons.

5. ***Humanitarian Considerations***

Some U.S. bilateral treaties permit refusal of extradition requests when the surrender of the requested individual is considered "likely to entail exceptionally serious consequences related to age or health." *See, e.g.*, art. 7 of the U.S.-Hong Kong bilateral.

6. ***Capital Punishment and Life Imprisonment***

States which have abolished capital punishment, or where a sentence of life imprisonment without possibility of parole is not permitted, are unlikely to extradite persons when such penalties are possible. Accordingly, many extradition treaties do not oblige requested States to surrender persons to States which enforce the death penalty without adequate assurances from the requesting State that it will not seek or impose capital punishment. *See, e.g.*, art.1 of the 1957 European Convention on Extradition, E.T.S. 24 (1960), and art. 9 of the 1981 Inter-American Extradition Convention.

Increasingly, these provisions have posed difficulties for extraditions to the United States when the accused would be subject to prosecution on capital charges. In its decision in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A.) 1, 11 EHRR 439 (1989), the European Court of Human Rights held that, if it extradited a seventeen year old German citizen to the United States (where he was charged with first-degree murder), the United Kingdom would violate that individual's right to be protected against degrading treatment under the European Convention on Human Rights and Fundamental Freedoms.

A growing number of countries have limited or abolished not only the death penalty but also life imprisonment. For example in 2001 the Mexican Supreme Court ruled that individuals could not be extradited if they would face a potential life sentence in the requesting country.

The European Court of Human Rights has considered a number of such cases, including with respect to extraditions to the United States. See the Court's Fact Sheet (December 2017) available at *https://www.echr.coe.int/Documents/FS_Extradition_life_sentence_ENG.pdf.*

8. ***Torture***

A separate treaty basis for refusing extradition can be found in the 1984 UN Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment, which entered into force for the United States on November 10, 1994, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984). Article 3(1) provides that extradition is not allowed to a country where the fugitive would be in danger of torture. *See also* UN Model Treaty on Extradition, art. 3(1).

Specific provisions are also found in contemporary U.S. bilaterals. For example, article 6 of the Treaty on Extradition Between the Government of Canada and the Government of the United States of America (Dec. 3, 1976) provides:

> When the offence 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 offence, 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.

Within the United States, the question of who decides whether the person whose extradition is sought faces a "substantial likelihood of torture" has occasioned a good deal of litigation. The

obligation under the Torture Convention was implemented by a 1998 statute (§ 2242 of the Foreign Affairs Reform and Restructuring Act, Pub.L. No. 105–277, div. G, 112 Stat. 2681–2682, codified at 8 U.S.C. § 1231 note). The government has consistently contended that it is a determination for the executive branch, and specifically the Secretary of State, rather than the courts, *inter alia* because under the rule of non-inquiry (discussed below) courts cannot inquire into the degree of risk that the extraditee would face when returned. In *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. denied*, 552 U.S. 1135 (Jan. 9, 2008), the court of appeals held that the 1998 statute precludes federal courts from reviewing a decision to extradite a fugitive despite claims that he will likely be tortured in the requesting State. See also *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 845 (Jan. 7, 2013).

§ 9–10 DOCTRINE OF SPECIALTY

The doctrine of "specialty" prohibits the prosecution of a defendant for any crime other than those for which extradition has been granted. In other words, the requesting State may prosecute only for the offense for which the extraditee was surrendered and otherwise must allow that person an opportunity to leave the requesting State. Offenses committed in the requesting State following surrender are not covered by the rule.

Conceptually, the duty is owed to the requested State and thus may be waived by that State. The federal courts have tended to differ on whether an individual defendant has standing to raise a violation of the doctrine of specialty. *Compare United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995), cert. denied, 516 U.S. 933 (Oct. 16, 1995), *with United States v. Burke*, 425 F.3d 400 (5th Cir. 2005), cert. denied, 547 U.S. 1208 (2006). In *United States v. Valencia-Trujillo*, 573 F.3d 1171 (11th Cir. 2009), the court of appeals held that the specialty doctrine applies only to extraditions pursuant to treaty, with the result that a defendant whose transfer was not premised on that basis lacked standing to assert a violation.

While the question is usually framed as a treaty issue, at least one court has held that the doctrine of specialty also applies where extradition is based on customary international law. *United States v. Kaufman*, 858 F.2d 994 (5th Cir. 1988).

As a corollary to the rule of specialty, the requesting State is not able to "re-extradite" the individual to a third country, or to international tribunals, without the consent of the first State from which extradition occurred.

III. EXTRADITION PROCEDURE

The act of international extradition has been defined by the U.S. Supreme Court as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

In U.S. law, extradition is a formal but unique process. The purpose is criminal but the proceedings are civil. It is governed both by statute and by treaty. While the ultimate decision to surrender is a matter of discretion and lies in the hands of the executive branch, the process is governed by legal principles and requires the direct involvement and concurrence of the judiciary. Thus, the executive cannot order extradition without a judicial decision subject to certain safeguards, but the judiciary cannot order the executive to extradite a person.

§ 9–11 EXTRADITION TO THE UNITED STATES

Requests for the extradition of an individual from another country to the United States originate with the relevant federal, state or local prosecutors. These requests are necessarily based either on criminal charges or a conviction. They are coordinated in the first instance by the Office of International Affairs ("OIA") in the Criminal Division of the U.S. Department of Justice.

Working with the prosecutors in question, OIA prepares the formal extradition papers and other necessary documentation, including for example affidavits indicating the relevant facts, the charges (or judgment) on which the request is based, the evidence substantiating the allegations, information establishing the defendant's identity, and responding to other treaty requirements. The request is then reviewed by the Office of the Legal Adviser in the Department of State and, when approved, is forwarded in diplomatic channels to the U.S. Embassy in the country in question. The Embassy in turn submits the request under cover of a diplomatic note to the appropriate host government officials.

In urgent cases, a request for the provisional arrest of the individual in question may be transmitted in advance of the formal extradition request. Depending on the treaty in question, such requests can be sent through diplomatic channels, via INTERPOL, or even directly to the law enforcement authorities in the foreign country in question.

Once the necessary procedures under foreign law have been completed and the extradition request has been approved, the Department of Justice sends U.S. Marshals to take custody of the prisoner and escort him or her to the United States.

§ 9–12 EXTRADITION FROM THE UNITED STATES

By comparison, requests from foreign authorities for the apprehension and extradition of an individual in the United States are more complicated. The process is governed not only by the relevant bilateral treaty but also by the federal extradition statute, 18 U.S.C. §§ 3181–96, around which a great deal of interpretive case law has arisen.

Extradition requests typically arrive in diplomatic channels, for example by way of the foreign government's embassy in Washington, D.C. They are delivered to the Department of State, which conducts a preliminary review to determine that a bilateral treaty is in fact in force with the country in question, that the request falls within the terms of that treaty, and that the necessary documents have been properly authenticated so as to be admissible at trial. The request is then forwarded to the OIA at the Department of Justice, which conducts its own review and assesses the sufficiency of the evidentiary and other supporting materials.

Not infrequently, requests are found to be deficient and must be supplemented by additional materials from the requesting State in light of domestic U.S. legal requirements. Obtaining the necessary information in the proper form often takes considerable time. Once the request is complete and in proper form, it is forwarded by the Department of Justice to the Office of the United States Attorney in the judicial district where the fugitive is believed to be located. In turn, that office files a complaint in federal district court requesting the individual's extradition.

After a preliminary review, the district court may issue a warrant for the arrest of the person whose extradition is sought. Once apprehended, the individual is brought before the court for an initial appearance. Since by definition such individuals are considered flight risks, there is a general presumption against bail absent special circumstances.

Summary Extradition. It is possible at this juncture for individuals to waive their right to extradition in the formal sense and to consent to transfer without further proceedings. Some modern treaties explicitly provide for "expedited" or "summary" extradition based on the extraditee's consent.

§ 9–13 REQUEST FOR EXTRADITION

Generally, the required form and contents of an extradition request are specified in the relevant treaty. While the details vary from treaty to treaty, in all cases the requesting State must provide information concerning the identity and presumed location of the person whose extradition is sought, relevant facts demonstrating that the offense in question was committed, copies of the relevant law under which the person is charged, a copy of the foreign warrant for arrest or verdict, etc. The request must "be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable offenses in the Treaty and that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States." *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir. 1981).

Under 28 U.S.C. § 3181(b)(1), in making the request, the Department of Justice must certify, among other things, that sufficient evidence has been presented by the foreign government to indicate that the dual criminality requirement is satisfied and that "the offenses charged are not of a political nature."

1. *Request for Provisional Arrest*

Many extradition cases begin with requests for "provisional arrest." Most treaties provide an undertaking by the requested State to detain a person for a limited time in cases of urgency, extreme risk of flight, or extreme danger during which the requesting State can prepare the necessary formal documentation to support its extradition request. Normally, the time limit for to submission of the formal request for extradition is 45–60 days. In U.S. law, provisional arrest is authorized by 28 U.S.C. § 3187.

In addition, at the request of a member country, INTERPOL may issue a so-called "Red Notice" informing all other members that an arrest warrant has been issued for a specific fugitive. In many countries, but not in the United States, the Red Notice itself can serve as the basis for provisional arrest.

2. *Bail*

In the United States, there is a presumption against bail in extradition cases, for the reason that almost by definition the individual whose extradition is sought will properly be considered a flight risk. The Bail Reform Act does not apply in extradition proceedings, and the government will ordinarily oppose bail applications vigorously. In exceptional situations, it is possible for the person sought to establish "special circumstances" justifying release on bail. *See*, e.g., *United States v. Kin-Hong*, 83 F.3d 523 (1st Cir. 1996); *In the Matter of the Extradition of Vladimir Blasko to the Slovak Republic*, No. 1:17-mc-00067-DAD-SAB, 2018 WL 3691859 (E.D. Cal. June 1. 2018).

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§ 9–14 THE COURT'S ROLE

The role of the extradition court is based on the provisions of 18 U.S.C. § 3184. That provision states that when an extradition treaty exists between the United States and the requesting county:

any justice or judge of the United States, or any magistrate judge authorized so to

> do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.

The statutes also states:

> Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

§ 9–15 THE EXTRADITION HEARING

The formal extradition hearing takes place before a magistrate or district judge pursuant to 18 U.S.C. § 3184. The scope of the hearing is narrowly circumscribed. Its object is merely to confirm (1) that a valid extradition treaty exists between the United States and the requesting State, (2) that criminal charges are in fact pending in the requesting State, (3) that the offenses for which extradition is sought are covered by the relevant treaty as "extraditable offenses" and do not fall within one of the exceptions or exclusions provided by that particular treaty (such as the political offense exception), and finally (4) that probable cause exists to believe that the offenses charged were committed and that the person before the court committed them. *See Skaftourous v. United States*, 667 F.3d 144 (2d Cir. 2011).

The hearing is not a criminal proceeding and is not for the purpose of proving guilt or innocence. Indeed, the individual in question cannot defend on the merits or even present exculpatory evidence. A limited right does exist to present "explanatory evidence" by way of challenging the government's "probable cause" submission, that is, "reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause." However, a fugitive may only present evidence that explains rather than contradicts the demanding country's proof.

The Federal Rules of Criminal Procedure and the Federal Rules of Evidence are expressly inapplicable to extradition proceedings. *See* Fed. R. Crim. P. 1(a)(5)(A) and Fed. R. Evid. 1101(d)(3). There is no right to discovery or to cross-examination, and hearsay and otherwise excludable evidence is admissible. If properly certified, "[d]epositions, warrants or other papers or copies thereof" offered by the requesting State in support of its extradition request must be accepted and admitted as evidence. *See* 18 U.S.C. § 3190 (1948).

§ 9–16 PROBABLE CAUSE

The main objective of the extradition hearing is to determine whether probable cause exists to believe that the offenses charged were committed and that the person before the court committed them. In this context, "probable cause" is measured by the federal standard used in preliminary proceedings and means that the extradition judge's role is merely to determine whether there is competent evidence to justify holding the accused to await trial. *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006). If these requirements are met, the judge or magistrate certifies the individual's extraditablity. *Prasoprat v. Benov*, 42l F.3d 1009, 1012 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006).

In this narrow context, the person whose extradition is sought is not permitted to raise questions of his or her ultimate guilt or innocence, or to introduce "contradictory evidence" that conflicts with the government's probable cause evidence. By contrast, "explanatory evidence" relating to the underlying charges is admissible.

By contrast, in civil law countries, the relevant test is normally "prima facie case." In some legal systems, this can be an even lower evidentiary standard than "probable cause." Moreover, under 1957 European Convention on Extradition, Member States are not required to provide evidence of a prima facie case unless the requested State has made a reservation to that effect.

For a recent decision reflecting the "probable cause" issue, see *In the Matter of the Extradition of Aguasvivas*, No. 17-mj-4218-DHH, 2018 WL 6416814 (D. Mass. Dec. 6, 2018).

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§ 9–17 RULE OF NON-INQUIRY

Another limiting feature of the extradition hearing is the so-called rule of non-inquiry, which precludes the extradition court from examining the requesting State's criminal justice system or considering claims that the defendant will be mistreated or denied a fair trial in that country. "Under the rule of non-inquiry, courts refrain from investigating the fairness of a requesting system, and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country." *United States v. Kin-Hong*, 110 F. 3d 103, 110 (1st Cir. 1997). The underlying principle is that assessment of such factors is the function of the executive branch, not the courts, and the decision is accordingly left to the discretion of the Secretary of State. The rule of non-inquiry "serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request." *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006). *See also Venckiene v. United States*, 328 F.Supp.3d 845 (N.D. Ill. 2018).

A classic application of the rule occurred in *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990). There, the District Court rejected a political offense argument and confirmed a magistrate's order of extraditability to Israel. However, in considering the individual's claim that upon return he would be mistreated, denied a fair trial, and deprived of his constitutional and human rights, the court permitted extensive testimony from expert and fact witnesses concerning Israel's law enforcement procedures and its treatment of prisoners. The Second Circuit Court of Appeals disapproved.

A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge. In *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980), the court said that "the degree of risk to [appellant's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch." In *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir. 1976), the court said that "[i]t is not the business of our courts to assume

the responsibility for supervising the integrity of the judicial system of another sovereign nation." It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds. *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). This view is fairly consistently held in the various appellate circuits. *Cf. Matter of Extradition of Manea*, Civ. No. 15 MJ 157 (JGM), 2018 WL 1110252 (D. Conn. Mar. 1, 2018).

Specific treaty provisions may affect the application of this rule. One prominent example of treaty-sanctioned inquiry is contained in article 3 of the 1985 U.S.-U.K. Extradition Treaty, which explicitly expanded the scope of judicial inquiry to include issues of potential discriminatory intent of the fugitive in the requesting country.

§ 9–18 DETERMINATION OF EXTRADITABILITY

If the extradition judge concludes that (i) the individual brought before the court is the person sought by the requesting State, (ii) there is, in fact, probable cause to believe that individual has committed the crimes alleged, and (iii) the crimes in question are covered by a valid treaty, that judge will issue a certificate of extraditability to Secretary of State.

Since it is not a final judgment, this determination may not be directly appealed. It is, however, is reviewable collaterally by *habeas corpus* under 28 U.S.C. § 2241. Here again, the scope of the inquiry is narrow. In the *habeas* proceeding, a petitioner may challenge whether the magistrate had jurisdiction, whether the offense charged was within the treaty and whether there was any competent evidence warranting the finding that there was reasonable ground to believe the accused guilty. The *habeas* action does not afford the reviewing court to second-guess the magistrate's findings by re-evaluating the evidence or serving in a fact-finding capacity.

If the court denies the *habeas* petition, the individual may appeal that decision. However, if the individual is found not to be extraditable, the government has no recourse. The proceeding is terminated. Since it is not a criminal proceeding, no jeopardy attaches, and the government is free to file another request for extradition.

§ 9–19 DECISION BY THE SECRETARY OF STATE

Once a court issues an order certifying extraditabilty, the decision whether to surrender the fugitive rests with the Secretary of State, who has two months to review the case. *See* 18 U.S.C. § 3186 (1948). The Secretary has final authority to extradite the fugitive, but is not required to do so. The Secretary may either sign a surrender warrant, condition the surrender on specified conditions, or surrender only after receiving assurances. Ultimately, the decision whether to surrender a person found eligible for extradition remains a discretionary one committed to the executive branch. *See In re Extradition of Hilton*, 2013 WL 1891527 (D. Mass. May 3, 2013).

Once the decision has been made, the Department of State forwards a diplomatic note to the embassy of the requesting State, indicating that the person has been found extraditable, on what charges, and the deadline for delivery. Typically, the requesting State sends its law enforcement officials to the United States to take custody of the individual from the U.S. Marshals, often at the airport.

§ 9–20 CONSTITUTIONALITY OF THE EXTRADITION STATUTE

On occasion, the fact that the ultimate decision to surrender lies within the discretionary authority of the Executive Branch has given rise to arguments that the extradition statute is unconstitutional. Specifically, the contention has been that in deciding whether to issue certificates

of extraditability under 18 U.S.C. § 3184, judicial officers are exercising the "judicial power" of the United States under article III of the Constitution, and that by subjecting their judgments to the discretionary authority of the Executive Branch, the statutory scheme violates separation of powers. If, on the other hand, judicial officers are not exercising article III judicial powers when they decide extradition cases, then Congress has impermissibly required judges to act in a non-judicial capacity.

These arguments have been rejected by the courts. *See Lo Duca v. United States*, 93 F.3d 1100, 1105–10 (2d Cir. 1996); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); *cf. Matter of Requested Extradition of Artt*, 158 F.3d 462 (9th Cir. 1998). *But see LoBue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), *vacated and remanded*, 83 F.3d 1081 (D.C. Cir. 1996). Similarly, in *Ntakirutimana*, the district court rejected the contention that, since extradition is ultimately committed to the Executive, and Congress had no right to conduct foreign policy, a statute implementing an executive agreement violated separation of powers. *See In re Ntakirutimana*, 1998 WL 655708 at *6 (S.D. Tex. 1998).

IV. POLITICAL OFFENSE QUESTION

One of the most important principles in international extradition law and practice is that a State is not obliged to surrender a person wanted in connection with offenses that it considers to be of a political nature. Most extradition treaties (and all U.S. extradition treaties) recognize this exception explicitly, in one form or another, using such terms as "political offense," "offense of a political character," and "offenses connected with a political offense." Exactly what circumstances qualify for this exception can be a contentious issue, and over time a considerable evolution has taken place in the doctrinal basis for the exception.

§ 9–21 ORIGINS

The origins of this exception demonstrate the conflicting interests and sensitivities of States with respect to certain kinds of crime. Historically, extradition served precisely to allow governments to obtain the return of political offenders who had fled abroad, for example those who committed crimes against the State or attempted to kill the King. During the 19th Century era of "liberal revolutions" in Europe, however, some States insisted on a right to provide asylum to those who had risen up to overthrow reactionary and repressive monarchical regimes in neighboring States and then fled across the border.

In consequence, those States began to insert a political offense exception into their treaties. The concern was that when the conduct at issue relates to political activism against the monarchy, extraditing a person who has failed in such efforts would condemn that individual to an automatic conviction and almost certain death. The United States followed suit in 1843, a decade after nations such as Belgium, France, and Switzerland first included the political offense exception in their bilateral extradition treaties.

But after Belgium refused to extradite Emperor Napoleon III's would-be assassin in 1856, States began to accept what is called the "attentat" clause, which excludes from the scope of the political offense exception attempts on the life of a Head of State or Government or members of their families.

§ 9–22 PURE VS. RELATIVE OFFENSES

A distinction is typically made between "pure" and "relative" political offenses. The core

"pure" political offenses are treason, sedition and espionage. Such crimes are (in theory) perpetrated directly against the State itself and are not intended to cause private injury; they have been criminalized by the State for its own protection. "Relative" political offenses, by comparison, involve common crimes committed with a particular political motive, for example robbing a bank to finance the revolution or incidentally killing civilians shopping in the mall.

Like many other countries, the United States has traditionally limited the exception in its treaties to purely political offenses, which have been described as offenses of opinion, political expression, and those which otherwise do not involve the use of violence.

In practice, "pure" political offenses are fairly easy to identify, while "relative" political offenses depend a more nuanced determination of the facts as well as the underlying motives of the perpetrator. Different jurisdictions have adopted different approaches to the issue.

Over time, French law adopted an "objective" test, covering only crimes directly injuring the State or government; by contrast, the Swiss adopted a "preponderance" test, weighing common vs. pure aspects. For its part, the United States settled on the "incidence test," which requires the act in question to have taken place during an armed uprising and be directed toward combatants, not innocent civilians (the point being to deny terrorists the benefit of the exception)

The incidence test thus asks whether (l) there was a violent political disturbance or country at the time of the alleged offense, and if so, (2) whether the alleged offense was incidental to or undertaken as part of that disturbance or uprising. *See Vo v. Benov*, 447 F.3d 1235, 1241 (9th Cir. 2006).

The incidence test was based, in its origins, on the decision in *In re Castioni*, [1891] 1 Q.B. 149, 158 (1890) (Opinion of Denman, J.), in which the court stated that:

> It must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political uprising, or a dispute between two parties in the State as to which is to have the government in its hands.

The decision in *United States v. Pitawanakwat*, 120 F.Supp.2d 921 (D.Or. 2000) is illustrative. Canadian authorities had requested extradition of James Allen Scott Pitawanakwat, a Canadian citizen who had violated terms of his parole by leaving Canada without permission after serving only a portion of his sentence for criminal mischief and gun possession. The prosecution resulted from a confrontation in 1995 between the Royal Canadian Mounted Police and the Canoe Creek Band in the Cariboo Tribal Council at Lake Gustafsen in British Columbia. During that confrontation, Pitawanakwat shot a rifle at a helicopter. He successfully invoked the political offense exception to defeat the Canadian request for his extradition. The court found there had been an "uprising or other violent political disturbance" and that the charged offense was incidental to it. The court acknowledged that applying this test in the U.S.-Canada context seemed strange, especially since the parole violation, which was the basis for the request, was obviously not part of the uprising in question. However, the antecedent crimes clearly were, as an attempt to dislodge Canadian authorities from a sacred burial ground.

In the words of the court of appeals in *Ordinola v. Hackman*, 478 F.3d 588, 600 (4th Cir. 2007),

> [F]or a claimant to come within the protections of the political offense exception, it is necessary, but not sufficient, for the claimant to show that he was politically motivated. In other words, a claimant whose common crime was not subjectively politically motivated cannot come within the exception regardless of whether the

offense itself could be described as an objectively "political" one.

Application of the incidence test can be difficult. For example, in *Ordinola*, the court was confronted by the question whether crimes of aggravated homicide, aggravated kidnapping, forced disappearance of persons, and inflicting major intentional injuries on innocent civilians could qualify as political offenses. The situation involved Peru and in particular the acts of a special Peruvian military unit (Grupo Colina), which had been formed by the Fujimora government to combat the Sendero Luminoso (Shining Path), a Maoist terrorist group, during the 1980s. Ordinola a former military officer active in Grupo Colina, was charged with committing his crimes as part of the campaign against Sendero Luminoso. He sought to defeat his extradition from the United States on the grounds that they qualified as political offenses.

The court of appeals upheld the district court's determination that while Ordinola's actions occurred "in the course of a violent political uprising," they were not "in furtherance of quelling the uprising." It was not sufficient, it said, that the Peruvian government had led Ordinola to believe that the victims of Ordinola's crimes were terrorists. To fall within the political offense exception, his actions had to have been in some way proportional to or in furtherance of quelling the Shining Path's rebellion. As the court noted, the "legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent."

To the same effect is the decision in *Koskotas v. Roche*, 931 F.2d 169, 171–72 (1st Cir. 1991) (quoting *Quinn v. Robinson*, 783 F.2d 776, 809 (9th Cir. 1986)), which notes that crimes "incidental to" war, revolution, or rebellion do not include "common crimes connected but tenuously to a political disturbance, as distinguished from criminal acts 'causally or ideologically related to [an] uprising.' " In *Koskotas*, the fugitive had been charged with funneling embezzled money to Greek government officials in return for political favors, and the scandal resulted in the ouster of the Greek Prime Minister and the controlling political party. The fugitive argued that the political offense exception should apply because Greece was in the midst of a violent "constitutional revolt" and his alleged financial crimes were part of the effort to eliminate political opposition to the controlling party.

For a recent discussion, see *United States v. Alahmedalabdaloklah*, No. CR-12-01263-001-PHX-ROS, 2018 WL 5807091 (D. Ariz. Nov. 6, 2018).

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§ 9–23 EXTRADITION FOR ACTS OF TERRORISM

In recent years, the increase in international terrorism has led to a narrowing of the political offense exception. It is generally no longer applicable to crimes which have been defined in multilateral conventions as offenses under international law—such as genocide, narcotics trafficking, and in particular acts of terrorism such as aircraft hijacking and hostage taking.

Within the Council of Europe, the scope of the political offense exception has been reduced by the European Convention on the Suppression of Terrorism, E.T.S. No. 90 (1977), which precluded offenses associated with terrorism from being regarded political offenses. The 1975 Additional Protocol to the 1957 European Convention on Extradition, E.T.S. No. 86 (1979) also excluded war crimes and crimes against humanity from the definition of political offense.

Article 11 of the Inter-American Convention Against Terrorism, adopted in June 2002, expressly provides that, for the purposes of extradition (as well as mutual legal assistance), "none of the offenses established in the international instruments listed in article 2 shall be regarded as a political offense or an offense connected with a political offense or an offense inspired by political motives." Inter-American Convention Against Terrorism, June 3, 2002, OAS Treaty A-66, 42 I.L.M. 19 (2003). As a result, States Parties to that Convention may not refuse a request for

extradition on that ground.

Another example is article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism, which provides that none of its covered offenses "shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives."

Similar provisions have also been included in various bilateral extradition treaties. See, for example, art. 4(2)(b) of the 2006 bilateral with Estonia, which excludes among other things "an offense for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution."

V. ALTERNATIVES TO EXTRADITION

Extradition is not the only form of international rendition. Because the formal process of extradition can be time-consuming and cumbersome, States have worked to create speedier alternatives. Several means exist as an alterantive to, or outside of, the formal extradition process.

§ 9–24 SIMPLIFIED OR EXPEDITED EXTRADITION

In some countries the law permits the person sought to consent to extradition and waive his or her rights to a judicial determination of extraditability. Typically this is done at the time of the individual's first court appearance following provisional arrest, that is, without waiting for presentation of documents. In other instances, the requesting State may first have to submit the formal extradition request with supporting documents, despite the fugitive's willingness to return immediately to the requesting State. The relevant provisions thus vary from treaty to treaty.

Such arrangements have also been adopted on a regional basis. For example, within the Commonwealth countries, which generally share a similar approach to the issues, the so-called "London Scheme" for extradition governs the extradition of a person from one Commonwealth country to another. It effectively supersedes existing extradition treaties by simplifying and expediting the process. Similarly, within the Council of Europe, the 1957 European Extradition Convention as modified by its Additional Protocols of 1995 and 1996 provided for simplified proceedings and restricted grounds for refusal.

§ 9–25 EUROPEAN ARREST WARRANT

More recently, the European Arrest Warrant has effectively replaced the traditional extradition scheme between the 27 members of the European Union. Under this system, adopted in 2002, an arrest warrant issued in one Member State must be recognized and enforced in all other Member States. In addition to removing the double criminality requirement, the EAW abolishes the political offense exception as well as the traditional exception for surrender of own nationals. The obvious purpose is to facilitate law enforcement in Member States by speeding up the transfer of suspects and removing the political dimension to extradition. The EAW only applies to Member States of the European Union and does not alter existing obligations under treaties with non-EU Member States. More information on the European Arrest Warrant is available at: *http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm*.

§ 9–26 EXCLUSION, REMOVAL, DEPORTATION

International law generally recognizes a right to travel, and in particular a right of every person to leave and return to his or her own country. But States remain free to decide whom to admit, and there is no requirement in international law that States must admit everyone who would like to enter their territories. All States have their own laws, rules and procedures regarding entry and residence. When an individual does not qualify under a given State's immigration laws, he or she may be denied entry at the border. This was previously known as "exclusion" and is now covered by the term "removal."

Once a foreign national has entered the territory, domestic law typically governs the procedures by which he or she can be expelled or "removed." In the United States, the principal method is by deportation. The requirements, procedures, and protections of the deportation process are spelled out in the Immigration and Naturalization Act and its accompanying regulations. In most cases, deportation proceedings are initiated as a result of the individual's violation of immigration or criminal laws.

In some circumstances, removal can be an alternative to extradition. Like extradition, deportation is a legal process, grounded in statute and involving a judicial hearing, in which the individual in question has rights and an opportunity to defend. However, the relevant standards differ: while in extradition the questions turn on the existence and applicability of a treaty and "probable cause" that the individual has committed a crime, the issue in a removal is whether the individual is ineligible to remain in the United States under statutory criteria.

In addition, naturalized U.S. citizens may subject to a process known as denaturalization. For example, where it can be established that the individual wrongly obtained citizenship, he or she can be deprived of their citizenship and then subjected to deportation. This was the process followed in the notorious case of John Demjanjuk, a former Nazi death camp guard during World War II. He had lied about his background when he was admitted to the United States; he was naturalized and lived in the country for many years. When evidence emerged about his deception, the government began proceedings to revoke his citizenship, and eventually he was deported to Germany to stand trial for war crimes.

§ 9–27 ABDUCTION AND LURING

On rare occasions a government may decide that its critical interests can only be served by using unilateral measures to obtain custody of a fugitive in another country. This is sometimes characterized as "self-help" or "irregular" or "extraordinary rendition." These actions can be taken with (or without) the knowledge and express or tacit consent of the foreign State concerned. An often-cited example of such measures is the 1960 apprehension of former Nazi official Adolf Eichmann in Argentina by individuals acting on behalf of Israel and his return to stand trial in Israel on charges of crimes against humanity. Such situations give rise to two questions (among others): (1) do such apprehensions violate international law, and if so, (2) do they deprive the courts of the apprehending state of jurisdiction to prosecute the individual in question?

The answer to the first question is fairly clear. In most situations, a unilateral cross-border apprehension undertaken *without* the consent of the other country will be considered a violation of national sovereignty and territorial integrity, for which the offending country will bear international responsibility. In the *Eichmann* case, the Government of Argentina protested on those grounds, and the Government of Israel made a formal apology. Depending on the circumstances, such an incident might become the basis for a formal complaint to an international body such as the International Court of Justice, a regional human rights court, or an international arbitral body. In almost all cases, an apprehension of an individual by a foreign government will be a violation of the criminal laws of the country in which it occurs, such as a kidnapping, exposing the

responsible individuals to prosecution.

The answer to the second question is not as straightforward. Traditionally, national criminal courts have adhered to the *male captus bene detentus* rule, which means essentially that an unsanctioned cross-border rendition will not deprive the court of jurisdiction even if it took place in violation of international or domestic law. This was the holding in *Attorney General of the Government of Israel v. Eichmann* (1961), 36 ILR 5 and 277. U.S. law has long had the same approach, known as the Ker-Frisbie Rule. In *Ker v. Illinois*, 119 U.S. 436 (1886), the U.S. Supreme Court rejected a jurisdictional challenge by a defendant who had been abducted in Peru by a bounty hunter and returned to the United States to stand trial for larceny in Illinois. In *Frisbie v. Collins*, 342 U.S. 519 (1952), the forcible abduction of a fugitive from Illinois to Michigan to stand trial for murder was held not to defeat jurisdiction.

In 1992, the U.S. Supreme Court adopted a somewhat narrower view of the *male captus bene detentus* rule in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), which involved the forcible abduction of a Mexican citizen from Mexico to stand trial in the United States. The defendant challenged the court's jurisdiction *inter alia* on the basis that his rendition violated the terms of the bilateral extradition treaty between the two countries. The lower courts found that U.S. officials were responsible for the abduction and that the Government of Mexico had protested the operation as a violation of the Treaty, so that the indictment was dismissed.

Relying primarily on *Ker* and *Frisbie*, the Supreme Court reversed, finding that nothing in the Treaty explicitly prohibited abductions outside its terms and declining to imply such a prohibition. Conceding that the abduction may have been "in violation of general international law principles," Chief Justice Rehnquist stated, it did not violate the Extradition Treaty, so that "[t]he fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States." 504 U.S. at 669–70. Whether he should be returned to Mexico, in light of the Mexican Government's protest, is "a matter for the Executive Branch." *Id.*

Justices Stevens, Blackmun and O'Connor dissented, noting that unlike *Ker* and *Frisbie*, the case involved an officially-sanctioned abduction of another country's citizen "which unquestionably constitutes a flagrant violation of international law and a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty." *Id*. at 682. In their view,

> The Government's claim that the Treaty is not exclusive, but permits forcible governmental kidnapping, would transform these, and other, provisions into little more than verbiage. For example, provisions [in the Treaty] requiring "sufficient" evidence to grant extradition (art. 3), withholding extradition for political or military offenses (art. 5), withholding extradition when the person sought has already been tried (art. 6), withholding extradition when the statute of limitations for the crime has lapsed (art. 7), and granting the requested Country discretion to refuse to extradite an individual who would face the death penalty in the requesting country (art. 8), would serve little purpose if the requesting country could simply kidnap the person.

Id. at 673.

In *Alvarez-Machain*, the respondent had also argued that the U.S. court should decline to exercise jurisdiction over him because the circumstances of his abduction—the way in which he had been treated—were "shocking." In so doing, he sought to invoke the exception established (by dicta) in *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974), in which the Court of

Appeals viewed the concept of due process "as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." The court justified that conclusion not on any principle of international law but as "an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." *Id*. In that case the specific allegations included deliberate misconduct by U.S. agents, including corruption and bribery of a foreign official as well as kidnapping "accompanied by violence and brutality to the person."

The so-called *Toscanino* exception has frequently been invoked but no court has found its criteria satisfied. Its continued validity has been questioned. *See, e.g., United States v. Khatallah*, 160 F.Supp.3d 144 (D.D.C. 2016).

§ 9–28 LURES

By distinction, law enforcement authorities sometimes work to entice a suspect or fugitive to leave one jurisdiction (where he may be insulated from apprehension) for another where he can be taken into custody. In cases where defendants have urged the court to dismiss the indictment solely on the grounds that they were fraudulently lured to the United States, courts have uniformly upheld jurisdiction.

A classic example of "luring" is found in *United States v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988), *rev'd on other grounds,* 859 F.2d 953 (D.C. Cir. 1988). Fawaz Yunis, a Lebanese citizen, was accused of blowing up a Royal Jordanian airliner in Beirut. Using the bait of a lucrative narcotics deal, U.S. authorities successfully lured him from Lebanon to a small boat in international waters off the coast of Cyprus, where he was arrested. He challenged his indictment on the basis that (i) the circumstances surrounding the arrest were outrageous and violated his due process rights and (ii) the apprehension contravened U.S. obligations under its extradition treaties with Lebanon and Cyprus. The court rejected the first because the way Yunis was treated did not rise to the level of deliberate torture and abuse required by *Toscanino*. It rejected the second because neither Lebanon nor Cyprus had objected, and "[a]ccepted principles of international law recognize that only sovereign nations have the authority to complain about violations of extradition treaties." *Id*. at 916.

In its decision in *Prosecutor v. Dokmanovic*, ICTY 95–13a–PT, Judgment, (Oct. 22, 1997), the pretrial chamber rejected a challenge to its jurisdiction based by stating that luring is consistent with principles of international law.

§ 9–29 PRISONER TRANSFER TREATIES

Prolonged incarceration in a foreign country can be a particularly difficult experience, since the convicted person is typically far from home and in a different culture, sometimes in difficult, overcrowded conditions, and perhaps facing possible mistreatment. The presence of large numbers of foreigners can also place a strain on the resources—financial, custodial and diplomatic—of the State in question. Over time, States have addressed these issues through consensual agreements for prisoner transfer or repatriation. While these agreements are legally distinct from extradition and work differently than the extradition process, they are nonetheless a means by which persons convicted of crimes can be transferred from one country to another.

For the United States, the first bilateral prisoner transfer treaty was with Mexico, and it came into force in 1977. Since then the program has grown, so that the United States is currently a party to 12 bilateral prisoner transfer treaties (with Bolivia, Canada, France, Hong Kong S.A.R.,

Marshall Islands, Mexico, Micronesia, Palau, Panama, Peru, Thailand and Turkey). In addition, the United States is a party to two multilateral prisoner transfer treaties, the Council of Europe Convention on the Transfer of Sentenced Persons (the "Strasbourg" Convention) and the Inter-American Convention on Serving Criminal Sentences Abroad (or "OAS Convention"), which together establish transfer relationships with more than eighty other countries. For a list of the countries covered by these treaties, see *https://www.justice.gov/criminal-oia/list-participating-countries.*

The International Prisoner Transfer Program began in 1977 when the United States government entered the first in a series of treaties to permit the transfer of prisoners from countries in which they had been convicted of crimes to their home countries. The program is designed to relieve some of the hardships faced by offenders incarcerated far from home and to facilitate the rehabilitation of these offenders. Prisoners may be transferred to and from countries with which the United States has a treaty. While all prisoner transfer treaties are negotiated principally by the United States Department of State, the program itself is administered by the United States Department of Justice.

Legislation implementing the prisoner transfer treaties for the United States is found at 18 U.S.C. §§ 4100–4115. Transfers are discretionary and require the consent the U.S. Government, the foreign government and the prisoner. The individual in question must be a national of the receiving State, must have been convicted of an offense which was also punishable in the receiving State, must have completed any minimum sentence under relevant law, but must have at least six months remaining in the sentence. The sentence must be final and all appeals completed, and all fines and court costs paid. Individuals convicted of purely military offenses, and those sentenced to death, are not eligible for transfer.

Even after the transfer, the sending State retains exclusive jurisdiction over the sentence as well as the authority to pardon or grant amnesty. A transferred prisoner cannot challenge his or her sentence in the receiving country.

The U.S. Central Authority is the International Prisoner Transfer Unit, Criminal Division of the U.S. Department of Justice. See *http://www.justice.gov/criminal/oeo/iptu.* See also *http://travel.state. gov/law/legal/treaty/treaty_1989.html*.

Arrangements for the transfer of sentenced persons have been explicitly encouraged by some multilateral conventions. For example, article 45 of the UN Convention Against Corruption provides that "States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there."

§ 9–30 RECOGNITION OF FOREIGN CRIMINAL JUDGMENTS

While in some cases individual prisoners may be transferred to serve the remainder of their sentences in another State, States do not as a general rule enforce foreign criminal law or give effect to the criminal judgments or sentences of other countries. Certainly, no rule of customary international law requires them to do so. As Chief Justice Marshall noted in *The Antelope*, 23 U.S. 66, 123 (1825), "[t]he Courts of no country execute the penal laws of another." *See also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 489 and Reporters' Note 6 (2018), discussing enforcement of foreign penal judgments pursuant to extradition, mutual legal assistance, and prisoner transfer treaties.

Domestically, this is occasionally called the "Penal Law Rule" and is frequently addressed as a component of the broader "Revenue Rule," under which U.S. courts typically decline to

enforce foreign laws or judgments regarding tax, customs or other revenue laws or liabilities. Both rules reflect a general reluctance to give effect to the "public policy" rules of foreign governments. Recent decisions have given a cautious interpretation to the broader rule. *See, e.g., Pasquantino v. United States*, 544 U.S. 349 (2005) (upholding prosecution under federal wire fraud statute for smuggling liquor into Canada to evade Canada's alcohol import taxes).

Some countries do, however, give effect to criminal sentences and related judgments (for example, awarding damages) rendered by foreign governments. A few treaties exist for that purpose, such as the 1970 European Convention on the International Validity of Criminal Judgments, E.T. S. No. 70, which permits one Contracting State to enforce a "sanction" (meaning a punishment or other measure expressly imposed on a person in connection with a criminal offense) which has been imposed in another Contracting State and is enforceable in the latter State. The Convention only applies in certain cases and subject to certain conditions; the obligation to give effect to a foreign sanction arises only at the request of another Contracting State; and requests may be refused *inter alia* on various grounds such as lack of jurisdiction, conflict with "fundamental principles," *non bis in idem*, political offense, or discrimination on basis of race, religion, nationality or political opinion.

§ 9–31 TRANSFER OF CRIMINAL PROCEEDINGS

In some cases, arrangements exist for the transfer of the actual criminal case (as opposed to the sentenced person) from one State to another.

Under the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, E.T.S. No. 73, for example, one State may ask another to undertake prosecution of an accused person on its behalf. Such a request may be made if the suspected person is a national of, or normally resident in, the requested State, if the transfer of proceedings is warranted in the interests of a fair trial, or if the enforcement of an eventual sentence in the requested State is likely to improve the prospects of his/her social rehabilitation. The requested State may not refuse acceptance of the request except in specific cases and in particular if it considers that the offense is of a political nature or that the request is based on considerations of race, religion or nationality. This convention is currently in force between twenty-four members of the Council of Europe.

Within the European Union, a framework decision on the transfer of criminal proceedings was adopted in 2008, and EU Member States were required to implement its provisions into their national law.

Provisions related to transfer of proceeding can also be found in a number of international criminal law proceedings, including the 1988 UN Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Convention (art. 8), the UN Convention Against Corruption (art. 47) and the UN Convention on Transnational Organized Crime (art. 21).

A model UN treaty on the transfer of proceedings in criminal matters was adopted in 1990. *See* UN Doc. A/RES/45/118 (Dec. 14, 1990).

§ 9–32 FURTHER READING

Stefano Maffei, EXTRADITION LAW AND PRACTICE: CONCEPT AND FAMOUS CASES (Europa 2019); Kriangsak Kittichaisaree, THE OBLIGATION TO EXTRADITE OR PROSECUTE (Oxford 2018); Ronald Hedges, INTERNATIONAL EXTRADITION: A GUIDE FOR JUDGES (Federal Judicial Center 2017); David Sadoff, BRINGING INTERNATIONAL FUGITIVES TO JUSTICE: EXTRADITION AND ITS ALTERNATIVES (Cambridge 2016); Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED

STATES LAW AND PRACTICE (Oceana 6th ed. 2014; Artemio Rivera, "Probable Cause and Due Process in International Extradition, 54 Am. Crim. L. Rev. 131 (2017).