EXTRADITION: EVALUATING THE DEVELOPMENT, USES AND OVERALL EFFECTIVENESS OF THE SYSTEM

I. INTRODUCTION

Imagine yourself as the leader of a nation. Three weeks ago in a foreign country, Mrs. X, a national of that country, took part in the murder of her own father. Sometime later Mrs. X escapes from jail and flees to your country, where she begins taking part in various illegal activities. After being captured for violating the laws of your country, Mrs. X's country immediately requests her return. Soon thereafter, agents of your government enter a plea agreement with Mrs. X and tell her that if she cooperates by testifying in other proceedings, she will not be surrendered to her country. To make matters worse, your country is in the process of sensitive negotiations with another country, negotiations in which Mrs. X's country represents your country. What do you do? Do you grant extradition, or do you pursue some other means of surrender?

This scenario is based on the case of Josette Bauer, who was extradited by the United States to Switzerland in 1981.[1] It illustrates the various questions nations must face when deciding whether to grant final surrender of a fugitive criminal. As the scenario indicates, there are no easy answers — a myriad of political, social and judicial factors play a crucial role in shaping the final outcome.

This note will examine the development of extradition throughout the centuries, both with and without the use of mutual extradition treaties. Further, it will examine various "disguised" or alternative methods to extradition and determine what, if any, advantages they have over traditional extradition. Finally, it will discuss several proposals that have been recommended for correcting the current traps and pitfalls of extradition, and whether these proposals are realistically capable of providing the neces-

1. *In re* GEISSER, 627 F.2d 745, 746 (5th Cir. 1980).

sary changes for salvaging the system. The underlying theme throughout this note considers whether the present system of extradition has failed to meet the expectations reasonably demanded of it; namely, that of effectuating final surrender of criminal fugitives with the intention of administering justice.

II. EXTRADITION

A. Definition

Extradition — from the Latin word *extradere*, meaning forceful return of a person to his sovereign — is the process whereby one nation, upon request by another nation, surrenders an individual found within its territory who has been charged with a criminal offense in the requesting state.[2] In essence, the underlying goal or purpose of extradition is the final surrender of a criminal fugitive for the purpose of administering "justice." Final surrender further serves the basic concepts of fair play and the protection of national, as well as international interests. Therefore, while extradition may serve such ends as political necessity, its primary purpose is to ensure the swift and effective administration of justice.[3]

Extradition is distinguishable from other means of surrender in that it involves a conscious effort to return an individual to the jurisdiction in which his crime was committed.[4] Another distinguishing feature of extradition is the principle of reciprocity, which means that if one state extradites a fugitive criminal to another state, that state will return the favor by extraditing a fugitive criminal at some point in the future.[5] Reciprocity may

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2. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION & WORLD PUBLIC ORDER 3 (1974).

> Extradition has always been considered contrary, or an "extra-tradition" to the practice of granting asylum and hospitality; thus giving indication to the formulation of its name. *Id.* at 3. The usage of the word extradition, however, did not appear until the first part of the 19th century. I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 12 (1971). For example, in the United States, extradition as a term of art did not become officially recognized until 1848. And in England, it would have to wait until 1870 before finally becoming a common fixture in Parliamentary circles. *Id.*

3. *See* Edward M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 709 (1969).

4. *See* M. BASSIOUNI, *supra* note 2, at 3.

5. *See* Wade A. Buser, Note, *The Jaffe Case & the Use of International Kidnapping as an Alternative to Extradition*, 14 GA. J. INT'L. & COMP. L. 362 (1984).

be secured in one of two ways: first, by the formation of a treaty, or second, through guarantees based on comity, courtesy and good will.[6] Extradition by treaty establishes a legal duty and obligation to reciprocate at some point in the future.[7] In the absence of a treaty, reciprocity is based on principles of good will and comity.[8] Thus, although the principle of reciprocity is not expressly stated, it nevertheless remains an integral part of the overall process, both with and without the use of a treaty.

International extradition is an "institutional practice" whereby the requesting and requested governments are viewed as the subjects of its regulation, and the individuals are viewed as the subjects of its outcome.[9] Any restrictions or limitations included in the process are primarily implemented for the benefit of the states, not the individuals. Thus, extradition is mainly an inter-governmental practice where the fate of the individual is placed at the mercy and good will of the respective nations.[10]

The working definition of extradition includes several "interlocking factors" which contribute to its conceptual framework for analysis.[11] First, national interests of the requesting and requested state must be weighed and balanced to provide the most favorable benefits for each state. Second, an international duty to preserve and maintain public order must also be considered. Third, application of certain minimum standards of fairness must be applied to the individual so as to insure the existence of certain fundamental rights. Finally, there is a collective duty among all nations to combat or suppress criminal conduct.[12] These factors and competing interests add meaning to this practice and shed light on the difficult questions that each nation must attempt to resolve when faced with a request for extradition.

B. History

Extradition can be traced as far back as the Egyptian, Chinese, Chaldean and Assyro Babylonian civilizations.[13] While one author suggests that treaties or agreements for extradition

6. *See* M. BASSIOUNI, *supra* note 2, at 1.
7. Buser, *supra* note 5, at 362.
8. *See id.*
9. M. BASSIOUNI, *supra* note 2, at 49.
10. *Id.* at 51.
11. *Id.* at 47.
12. *Id.* at 47-48.
13. *Id.* at 1.

date back as early as 1496 B.C., the earliest known recorded extradition treaty was signed around 1280 B.C. between Ramses II of Egypt and Hattusili III, the Hittite Prince.[14] This treaty provided for the return of criminals found within the territory of one nation that had violated the laws of the other. Although it is unknown whether any criminals were surrendered under this treaty, it nevertheless remains the oldest monument to the institution of extradition.[15]

After these early beginnings little attention was paid to extradition until its resurgence with the Roman Empire around 400 - 100 B.C.[16] Most infamous during this period was Rome's request for extradition of Hannibal from Syria in accordance with the treaty ending the war between the two nations.[17] An interesting feature of Roman law during this time permitted extradition of Roman nationals for offenses against ambassadors who were present in Roman territory at the time of the offense.[18]

The next significant historical period was the 17th century.[19] Extradition during this time consisted mainly of the delivery of political or religious dissidents, with the national interests of the state taking precedence over any concern for world order.[20] Extradition was viewed mainly as an act of friendship or comity between the nations. In fact, surrender of fugitives often occurred without solicitation.[21] Leaders were more likely to voluntarily surrender fugitives for offenses involving political or religious crimes than any other offenses. As a result, the common criminal received little attention during this time and was often considered a "second class citizen" under the system.[22]

In the 18th and 19th centuries the focus shifted to the suppression of common criminality.[23] Prior to this time, the suppression of criminality was of little concern for neighboring states. Escape from a home city was exceptional. It often meant a hard and uncertain life away from family, friends and country.[24]

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14. Buser, *supra* note 5, at 358.
15. *Id.* at 358.
16. *Id.*
17. *Id.*
18. *Id.*
19. M. BASSIOUNI, *supra* note 2, at 3-4.
20. *Id.* at 4.
21. *Id.*
22. *Id.*
23. *See* Buser, *supra* note 5, at 359; *see also* SHEARER, *supra* note 2, at 11-16; M. BASSIOUNI, *supra* note 2, at 4.
24. *See* SHEARER, *supra* note 2, at 7.

Transport was slow and marked with many dangers. It was much safer for the criminal to take his chances at home than to seek refuge abroad.[25] Additionally, there was a sense that crimes committed in a certain country were the problem and concern of that country alone. In other words, criminality was best punished at home without the aid of outside interference.[26] An additional limiting factor was the harshness of criminal law. Countries were less willing to restore a fugitive to a requesting country where laws were brutal or extremely unjust.[27]

With the advancement of travel and technology, however, the isolationism that once marked foreign relations would no longer remain practical.[28] Many of the factors that had placed the suppression of criminality in the background — such as the inability to travel great distances in a short period of time, and the lack of an efficient means of global communication — would no longer present an obstacle to mobility.[29] A new sense of international cooperation was needed to combat the expanding nature of criminality. This growing sense of cooperation would be evidenced by an onslaught of mutual extradition treaties in the 18th and 19th centuries. One such treaty, often viewed as the first extradition treaty of the modern era, was Jay's Treaty in 1794.[30] Although limited to the crimes of murder and forgery, this treaty between the United States and Great Britain would serve as a framework for future treaties, leading to many of the features and characteristics that are presently found in treaties of extradition.[31]

Since 1948 there has been a growing concern for the preservation of world order and the protection of individual human rights.[32] The rise of humanitarian international law would place certain limitations on a state's right to extradite.[33] Still of major concern, however, was the suppression of common criminality, evidenced by the continual increase in the formation of mutual extradition treaties.[34]

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25. *Id.*

26. *Id.*

27. *Id.* at 10-11.

28. *See id.* at 7-8.

29. *See* M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN L. REV. 2 (1968).

30. *See id.* at 2-3.

31. SHEARER, *supra* note 2, at 11-16; *see also* BUSER, *supra* note 5, at 360. *See infra* text accompanying notes 86-126 for the typical features found in extradition treaties.

32. M. BASSIOUNI, *supra* note 2, at 4-5.

33. *See* SHEARER, *supra* note 2, at 16-19.

34. *Id.* at 34-43.

III. METHODS OF ACCOMPLISHING EXTRADITION

The two most common means of extradition are: extradition in the absence of a treaty, and second, extradition through the use of a treaty. Other means exist which effectuate final surrender yet are considered alternatives or substitutes to the traditional practice of extradition.[35]

A. Extradition in Absence of Treaty

Only a few countries in the world possess no extradition treaties whatsoever. However, several countries possess only a handful of such treaties, choosing not to practice extradition by treaty with certain countries for any one of several reasons to be discussed below.[36]

Evidence for extradition in the absence of a treaty is found as early as 1880, in a resolution by the Institute of International Law.[37] Furthermore, certain legal scholars recognize an obligation to extradite fugitive criminals regardless of the presence of a treaty.[38] Today, most civil law states add support to this position and recognize final surrender absent a treaty as a valid form of extradition.[39]

In comparison, common law countries such as the United States and Great Britain show greater reluctance in granting extradition in the absence of a treaty. According to their view, no absolute duty to extradite exists absent a specific treaty obligation.[40]

Those states which do extradite in the absence of a treaty will often require a guarantee of reciprocity before surrendering a subject. For example, on July 30, 1872, the Circulaire of a French Minister of Justice stated that, "on the basis of reciprocity extradition might take place in the absence of a treaty ...."[41] The German extradition law of 1929 also states that extradition absent a treaty will not occur unless recripocity is guaranteed.[42]

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35. *Id.* at 67.
36. M. BASSIOUNI, *supra* note 2, at 10. *See infra* part III.A.2.
37. *Id.* at 10-11.
38. *See* SHEARER, *supra* note 2, at 20, 23, 68; *see also* Extradition Without Treaty, 4 MOORE INT'L. L. DIGEST § 580, at 245 [hereinafter MOORE].
39. M. BASSIOUNI, *supra* note 2, at 9-15.
40. *Id.* at 11.
41. SHEARER, *supra* note 2, at 25-26.
42. M. BASSIOUNI, *supra* note 2, at 11.

Until such a guarantee is forthcoming, final surrender will not take place.[43] Such provisions as those found in the French and German systems provide a wall of protection against the future bad faith activity of a requesting nation.

1. Questions of Obligation and Comity

Writers such as Grotius and Vattel support the proposition that extradition is a matter of "international obligation."[44] Therefore, even in the absence of a treaty a nation is obligated to extradite; or in the alternative, to prosecute the fugitive in accordance with the laws of the state of refuge. Either procedure is considered sufficient for the administration of justice.[45]

Grotius believed that this obligation to extradite created a legal duty, not merely a moral duty that a state could choose to obey at a whim.[46] Thus, the bottom line for writers such as Grotius and Vattel appears to be justice. Their justice is driven by a higher sense of duty and obligation and does not require the presence of a treaty before it exists. Nations should never hesitate to extradite even in the absence of a treaty or formal request. This brand of extradition envisions nations acting out of inherent duties and legal obligations, as opposed to political necessity, tradition or custom.

The opposing, as well as currently prevailing view takes the position that "[n]o state has an absolute and perfect right to demand of another the delivery of a fugitive criminal."[47] In other words, no international obligation exists which requires the requested state to surrender the fugitive criminal, or prosecute in accordance with its laws. The duty to extradite in these circumstances is viewed as moral, not legal. For example, in *Factor v. Laubenheimer*, the court held,

> [w]hile a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a *moral duty* to do so, . . . the legal right to demand his extradition and the correl-

43. *See* MOORE, *supra* note 38, at 245.
44. *Id.*
45. *Id.*
46. *See id.* at 245-46.
47. *Commonwealth v. Deacon*, 10 S. & R. 125 (1823).

> ative duty to surrender him to the demanding country exists only when created by treaty.[48]

Accordingly, the only obligation existing in the absence of a treaty is "imperfect," creating a moral, but not legal duty to extradite.[49] The only method to create an absolute duty to extradite is through the signing of a treaty.[50] The dominance of this latter view has provided the necessary impetus for the increase in the formation of modern-day mutual extradition treaties.[51]

Extradition in the absence of a treaty always hinges on the principles of "courtesy, good will, and mutual convenience."[52] Since the prevailing view fails to recognize an absolute duty or obligation in the absence of formal treaty relations, comity and common courtesy must serve as the sole basis for surrender where no treaty exists.[53]

On several occasions states which require a treaty before extraditing have been forced to request extradition based on courtesy with countries where no treaty of extradition exists. For example, in 1828 the United States requested the return of a fugitive who had escaped to Mexico after committing several murders in the state of Tennessee.[54] Such a request is exceptional since the United States, as with most common law states, possess no authority to reciprocate in the absence of a treaty.[55] Consequently, the request requires an appeal to Mexico's discretion and sense of justice, since the United States can not promise or guarantee similar reciprocity in the future.[56]

2. Why Extradite in the Absence of a Treaty?

Several reasons exist for choosing to extradite in absence of a treaty. First, some states simply prefer as a matter of principle or convenience to enter into treaties only with those countries that require such agreements before extradition can take place. If the requested state does not require a treaty before it will extradite, the requesting state may choose to avoid any

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48. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) (emphasis added).
49. MOORE, *supra* note 38, at 245.
50. *Id.* at 245-46.
51. *See* M. BASSIOUNI, *supra* note 2, at 13-21.
52. MOORE, *supra* note 38, at 254.
53. *Id.* at 254-55.
54. *Id.* at 254.
55. *See id.* at 254-56.
56. *Id.* at 254.

such formal obligations.[57] Second, it seems unnecessary to enter into treaties with countries where extradition is a rarity.[58] Third, states do not want to become a resting place for criminals and will often enact legislation permitting extradition in the absence of a treaty as a combatant to unsuspected entry. This will enable the country of refuge to expel any unwelcome fugitives upon request regardless of the existence of a treaty with the receiving state, and without the concern of guaranteeing reciprocity to that state in the future.[59] Fourth, with certain rare exceptions, such as the Netherlands, Zaire, Ethiopia, Israel, and Turkey, extradition in civil law countries in the absence of formal treaty obligations is widely recognized.[60] Therefore, when two civil law states are involved there is little need to rely on a treaty of extradition. Finally, states with few economic ties or dependencies may prefer to avoid the binding force of a treaty. In such cases there is little need to maintain good relations for reasons of future economic self-gain.[61]

Clearly, the overriding reasons for extradition in the absence of a treaty are self-interest, convenience and practicality. Extradition without a treaty adds a measure of flexibility not typically found within the confines of formalistic treaty relations.[62]

Because nations not recognizing an absolute duty or obligation to extradite will not be bound to extradite in the absence of specific treaty relations, the major disadvantage to extradition in the absence of a treaty is the lack of certainty and consistency in which extradition will occur.[63] While guarantees of reciprocity generally accompany a request for extradition in the absence of a treaty, these guarantees are not absolute. As a result, there is less reason to abide by a promise or guarantee that is outside the general framework of the duties and obligations created by a treaty.[64]

B. Extradition by Treaty

From its earliest inception the use of the treaty as a means of extradition has remained an effective means of final surrender.

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57. *See* M. BASSIOUNI, *supra* note 2, at 9-13; *see also* SHEARER, *supra* note 2, at 27-34.
58. *Id.*
59. *Id.*
60. M. BASSIOUNI, *supra* note 2, at 10-11.
61. SHEARER, *supra* note 2, at 1-4.
62. *See generally* M. BASSIOUNI, *supra* note 2, at 9-13.
63. *Id.*
64. *Id.*

In fact, extradition by treaty is by far the most common form of this practice in existence.[65] For example, as of 1992 the United States had entered into more than ninety-eight bilateral treaties with other nations.[66] In addition, many states rely on treaties as the sole means of surrender, since such treaties embody more formal and binding reciprocal relationships.[67]

Furthermore, a treaty is needed in cases of extradition not only to formally bind each nation, but also to provide due process and protect certain fundamental rights of the criminal detainee.[68] M. Cherif Bassiouni offers the following definition of treaty,

> [a] written agreement by which two or more states create or intend to create a relation between themselves operating within the sphere of international law. Though international law prescribes no special form or procedure for the making of an international agreement, yet a treaty which is an international agreement creates certain legal rights and obligations between the parties and binds them to observe the rules of conduct laid down therein as law.[69]

Thus, for the United States and other common law countries, the existence of a treaty signifies the existence of formal obligations and legal rights which require one nation to extradite upon request. Treaties, in essence, create the underlying goals of extradition.[70] This is quite contrary to the view of Grotius mentioned earlier, which states that such obligations and duties exist regardless of the presence of a treaty.

The following discussion regarding the procedures involved in bringing a request, and the various provisions and elements typically found within most treaties further illustrates the many problems currently plaguing the practice of extradition.

1. Procedure

Any request for extradition by means of a treaty must follow certain specific procedures. Sources of procedure can be found

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65. Buser, *supra* note 5, at 362.

66. *Id.*

67. *See* SHEARER, *supra* note 2, at 24-25; *see also* M. BASSIOUNI, *supra* note 2, at 13-18.

68. *See* M. BASSIOUNI, *supra* note 2, at 30-34.

69. *Id.* at 28 (emphasis added).

70. Another question is whether the treaty is self-executing, or whether it requires some form of legislation for its implementation. *Id.* at 30-31. For those countries that view extradition treaties as self-executing, international legal doctrine requires no additional convention or form of legislation before the treaty can take effect. In other countries, extradition treaties require some form of legislation before they will take effect. *See id.* at 31-34.

in the following: (1) the treaty itself, (2) specific extradition legislation, or (3) other generally applicable municipal laws.[71] The treaty is by far the most important and logical source of procedure since it contains the truest expression of the parties' intent.[72]

The requesting nation must first submit a complaint in writing to a court of general jurisdiction in the requested nation stating that the individual and crime are subject to the provisions of the existing extradition treaty.[73] This request must pass through the appropriate diplomatic channels as specified by the treaty. In addition, it must be accompanied by supporting documents, affidavits and other evidence which allow the requesting nation to meet its burden of proof.[74] Depending on the severity of the crime and potential flight risk, this formal request may be preceded by a request for provisional detention or detainment, which provides the requesting nation with additional time to process the request.[75] It is important for a requesting nation to strictly adhere to established procedures since some states make a second request inadmissible where the first request has failed.[76]

Once the proper procedures for submission have been followed, an extradition magistrate will then hear the evidence and determine if the request has satisfied the necessary elements of the treaty.[77] If the magistrate determines that the evidence has indeed satisfied the necessary elements, the subject is then labeled extraditable and the order is certified for approval by the Secretary, who alone has authority for final surrender. Absent such certification the Secretary has no power to surrender.[78]

Assuming that the request has satisfied the necessary requirements of the treaty, the subject is then returned to the requesting country. However, if the Secretary through the use of executive discretion decides that the treaty did not require extradition in the particular case, final surrender will be denied.[79]

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71. SHEARER, *supra* note 2, at 195.

72. Id.

73. *Id.* at 200; *see* J. Richard Barnett, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L. & COMP. L. 285, 300-01 (1985).

74. *Id.*

75. *Id.* at 200-01.

76. *Id.* at 207.

77. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1314 (1962).

78. *Id.* at 1313-15.

79. *See id.* at 1314-15. *See infra* part IV.

The costs and expenses involved in bringing a request for extradition are considerable. Not only must a requesting nation hire an attorney to represent its interests, but if extradition is granted, the requesting state is typically required to provide for transportation expenses for the criminal. Such expense often create a barrier to the use of extradition.[80]

Recent changes in documentation and presentation of evidence have somewhat reduced the financial burdens of the procedure.[81] However, many changes are still required before the burden of cost will no longer make extradition an inaccessible tool for many countries.[82]

2. Provisions and Principles: the General Framework

As stated above, the prevailing practice of extradition is implemented through the use of bilateral treaties. Such modern treaties tend to have certain provisions and elements in common. Each is characteristic of the tradition and history of this practice.

Most extradition treaties contain six basic provisions, each expressly agreed upon by the parties. The requesting nation must present enough evidence during the preliminary hearing to convince the magistrate that each has been fully satisfied. If the requesting nation fails to meet this burden, the magistrate may deny certification and the subject will be labeled 'not extraditable.'[83]

The mutual extradition treaty between Switzerland and the United States will be used to illustrate the six common treaty provisions [hereinafter referred to as the U.S. - Swiss Treaty].[84]

a. Territoriality

The first provision typically found is territoriality. Simply stated, territoriality requires that the offense for which extra-

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80. SHEARER, *supra* note 2, at 210-11.

81. Barnett, *supra* note 73, at 310-11.

82. Wise, *supra* note 3, at 712.

83. *See generally* Note, *supra* note 77, at 1313-26.

84. Treaty on the Extradition of Criminals, May 14, 1900, U.S. — Switz., 31 Stat. 1928 [hereinafter U.S. — Swiss Treaty].

dition is sought be committed within the territorial boundaries of the requesting state.[85] This provision is found in Article I of the U.S. - Swiss Treaty: "[t]he Government[s] . . . bind themselves mutually to surrender such persons as, being charged with or convicted of any of the crimes or offenses enumerated hereinafter . . . committed in the territory of one of the contracting States, shall be found in the territory of the other State."[86]

Problems often arise over the question: What is territory? Interpretation of matters such as territory of airspace and territory of waterways only adds to the confusion.[87] Furthermore, some nations, such as France, attach criminal jurisdiction to the fugitive wherever he may be located; while others view territoriality more restrictively, recognizing jurisdiction only within their borders.[88] Additional problems arise for offenses committed outside the territory that have an effect within the territory. For example, some nations, such as the United States, recognize a protective principle of territoriality. This principle provides the requisite jurisdiction for crimes such as tax evasion and conspiracy to commit an offense, which are committed outside the territory but somehow have an effect within the territory. [89]

Despite the prevailing practice of most treaties to refer to the locus in quo of the initial offense, questions of territoriality may nevertheless provide additional obstacles to surrender.[90]

b. Dual Criminality

The second provision typically found in extradition treaties is dual, or double criminality.[91] This provision states that the act for which extradition is sought, in addition to being a crime in the requesting nation, must be considered a crime in the requested nation as well.[92] The offense must also be included in the list of offenses found within the treaty. In the U.S. - Swiss Treaty, Article II specifically lists several extraditable offenses, including murder, arson, robbery and counterfeiting.[93] If the

85. Buser, *supra* note 5, at 362.

86. U.S. - Swiss Treaty, *supra* note 84, at 1928-29 (emphasis added).

87. Buser, *supra* note 5, at 363.

88. *Id.* at 364.

89. *See generally United States v. Pizzarusso*, 388 F.2d 8, 8 (2d Cir. 1968), *petition for cert. denied*, 392 U.S. 936 (1968).

90. *See id.* at 363; *see also* Wise, *supra* note 3, at 712.

91. *See* Buser, *supra* note 5, at 364.

92. *Id.*

93. U.S. — Swiss Treaty, *supra* note 84, at 1929-30.

offense for which extradition is sought is considered criminal under the laws of both states, as well as being listed in the treaty, the element of dual criminality has been met. Although some treaties have remained silent on this issue, most nations require this provision to be included within the treaty.[94]

A problem with the doctrine of dual criminality is that extradition may not be allowed for offenses not specifically included within the treaty. Thus, if the offense is a crime under the laws of both nations, but is not specifically characterized by both nations as one of the offenses listed in the treaty, then extradition may not occur.[95] The potential for such injustice is evidenced by the *Dunster* case, where Great Britain refused to extradite a couple that had assisted in the kidnapping of their daughter's children from the United States to Great Britain.[96] Since the crime of kidnapping as characterized by the United States, was not similarly characterized as such in Great Britain, extradition was denied.[97]

However, not all states adhere to such a strict interpretation of dual criminality.[98] Significant changes in recent times have occurred by switching from the enumerative approach, which specifically lists those offenses which are extraditable, to a broader listing according to the nature or type of offense.[99] For example, recent treaties provide for extradition of all crimes or offenses that are punishable under the laws of both nations by imprisonment of greater than one year.[100] In addition, recent treaties add conspiracies and attempts to the list of offenses, which broadens the scope and ultimate deterrent effect which extradition treaties may impose.[101]

c. Doctrine of Specialty

The U.S. — Swiss Treaty uses the following language to describe specialty: "[n]o person surrendered by either of the

94. M. Cherif Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 742 (1969).

95. *See* Barnett, *supra* note 73, at 300-01.

96. Act Charged, a Crime in Both Countries, 6 WHITEMAN DIGEST § 13, at 775-776 (1968).

97. *Id.*

98. Barnett, *supra* note 73, at 301 n.120.

99. SHEARER, *supra* note 2, at 133-34.

100. Barnett, *supra* note 73, at 305.

101. *Id.* at 306-07.

Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition other than that for which the extradition is granted."[102] In other words, the requesting state may prosecute only for offenses for which the subject was extradited. If the requesting nation later decides to prosecute the subject on an offense for which he was not extradited, it must give the subject sufficient time to leave the state before initiating the proceedings.[103] An exception to this doctrine allows the requesting state to prosecute for actions committed after extradition has occurred.[104] In addition, the criminal fugitive may be extradited and tried for a crime other than that for which he was extradited if the requested country consents, or waives the doctrine of specialty.[105] Article IX of the U.S. — Swiss Treaty contains a similar statement: "[n]o person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted, *unless he expressly consents to it in open Court*...."[106] Although the party providing the consent in this case is the individual subject to extradition and not the requested country, the underlying proposition remains that the doctrine of specialty may be waived.

The main purpose of the specialty doctrine is to enable the requested state to regulate the extradition proceeding of the requesting state.[107] The doctrine of specialty prevents "faked extraditions" for crimes which might not otherwise be extraditable, such as political offenses.[108] In this light the doctrine of specialty provides an extra layer of protection for individual rights and liberties.

d. Statute of Limitations

The fourth provision typically found is a statute of limitations covering the offense for which extradition is sought.[109]

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102. U.S. — Swiss Treaty, *supra* note 84, at 1932.

103. Buser, *supra* note 5, at 364-65.

104. *See* M. Bassiouni, *supra* note 94, at 749.

105. *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (quoting *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979)).

106. U.S. — Swiss Treaty, *supra* note 84, at 1932 (emphasis added).

107. Buser, *supra* note 5, at 365 n.56.

108. *See* M. Bassiouni, *supra* note 94, at 749.

109. *See* Barnett, *supra* note 73, at 307-08.

Article VIII of the U.S. — Swiss Treaty states that extradition shall not be granted when, "[u]nder the laws of the State upon which the requisition is made, or under those of the State making the requisition, the criminal prosecution or penalty imposed is barred by limitation."[110] Thus, the courts of the requested country must determine if the applicable statute of limitations has expired in either the requested or requesting nation. If the applicable statute has run, the magistrate may deny certification.

Problems typically occur when the action is expunged, forgiven, or otherwise erased from the records of the state where the offense occurred. The statute of limitations may expire in one country, and not in the other.[111] For example, India applies a case by case approah for non-capital offenses, applying no statute of limitations. This would potentially create a problem with a nation such as the United States that did apply a statute of limitations for non-capital offenses.[112]

Recent developments appear to solve this problem by making the issue of the statute of limitations of the requested nation irrelevant, focusing instead on the statute of the requesting nation. These changes enable requesting nations to effectively combat specific crimes and offenses which may not receive similar attention in other states.[113]

e. Political Offense Exception

The fifth provision is the political offense exception.[114] This well-known provision, found in Article VII of the U.S. — Swiss Treaty, simply provides that extradition will not be granted for certain "[p]olitical or religious crimes or offenses."[115] Such crimes and offenses against a harsh government or regime are often viewed as more just than the typical crimes against humanity. Underlying this provision is the assumption that the subject will not receive due process or fair and equal treatment if returned to the requesting state.[116]

The noble and ideal objectives set forth by this exception have not been fully realized, mainly because the decision whether

110. U.S. - Swiss Treaty, *supra* note 84, at 1932.
111. M. Bassiouni, *supra* note 94, at 744.
112. *See* Barnett, *supra* note 73, at 308.
113. *Id.* at 308.
114. Buser, *supra* note 5, at 364.
115. U.S. — Swiss Treaty, *supra* note 84, art. VII, at 1932.
116. *See* M. Bassiouni, *supra* note 94, at 746-48.

to apply this exception ultimately rests with the asylum state, a state which carries its own political affinities and biases.[117] As a result, a requested state may be more willing to overlook the applicability of this exception when the requesting state holds similar political ideologies.[118] However, even where the exception might be applicable, the requested state must first determine what crimes and offenses are contained in the terms "political or religious," since most treaties, including the U.S. – Swiss Treaty, fail to give any indication of what these crimes entail.[119] Further, the requested state must determine which of the three most common tests to apply: the French Objective Test, the Swiss Proportionality Test, or the American Incidence Test.[120] Thus, even if the requested state determines that this provision is applicable to the case at hand, it still must deal with the inherent intricacies of this exception.

f. Surrender of Nationals

The sixth and final provision that is typically found in modern extradition treaties involves the decision by the requested state of whether or not to extradite its own nationals.[121] As a general rule states are not obligated to surrender their nationals.[122] The U.S. – Swiss Treaty provides that, "[n]either of the two Governments ... shall be required to surrender its own citizens."[123]

The reason for refusing to surrender nationals stems from a special duty of each nation to protect its citizenry. Each citizen is said to possess the right to remain undisturbed and free from outside interference while in his homeland.[124] The lack of similar forms of justice and comparable criminal laws provide additional resistance to this practice. Punishment from state to state often varies greatly such that individual rights and liberties cannot be guaranteed upon extradition.[125]

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117. *See id.* at 746.

118. *See id.* at 748; *see generally* SHEARER, *supra* note 2; *See* M. BASSIOUNI, *supra* note 2.

119. *See, e.g.*, U.S. – Swiss Treaty, *supra* note 84, art. VII, at 1932.

120. *Quinn v. Robinson*, 783 F.2d 776, 794-95 (9th Cir. 1986) (for a more thorough discussion of each test).

121. *See* Barnett, *supra* note 73, at 308-10; *see also* M. Bassiouni, *supra* note 94, at 749-50.

122. *See* Barnett, *supra* note 73, at 308.

123. U.S. – Swiss Treaty, *supra* note 84, art. I, at 1929.

124. *See* SHEARER, *supra* note 2, at 95, 98, 105, 107, 117-21.

125. *Id.*

On the other hand, those in favor of granting extradition of nationals argue that an offense committed is an offense against the nation in which it was committed, not the state of nationality. Therefore, regardless of nationality, the country where the offense was committed is the most appropriate forum for justice.[126]

Clearly, the question regarding the extradition of nationals is filled with debate. Recent treaties attempt to calm the waters by providing that the requested state has the discretion to extradite its nationals if it so chooses.[127] If extradition of a national is then denied, the treaty typically requires that the prosecuting authorities of the requested nation initiate proceedings against the fugitive.[128] As a result of these recent developments it has become more difficult for the fugitive-national to escape the long-arm effects of extradition.

3. Why Extradite by Treaty?

Several reasons have been suggested for a state's decision to extradite by treaty. Many are directly parallel to those factors considered when deciding whether to extradite without the use of a treaty.[129]

First, economic interdependence plays a significant role in determining whether to enter into an extradition treaty with another nation. When one state wishes to maintain good relations with another state it often acquiesces to that nation's request to enter into a treaty. Second, a nation may choose to enter into a treaty as a symbol to the world of its continued support of individual rights, as well as the suppression of common criminality. This serves a nation's interests by gaining favor and reputation within the world community. Along these lines, extradition through the use of a treaty decreases recidivism of criminals who flee to nations that will not extradite to another state in the absence of a treaty.[130]

Nations choose to extradite by treaty for the same basic reasons nations choose to extradite without a treaty: self-interest, convenience and overall practicality. The willingness to enter into an extradition treaty may also depend on the various political

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126. *See id.* at 98, 121-25.

127. *See* Barnett, *supra* note 73, at 309; *see also* Buser, *supra* note 5, at 365-66; M. Bassiouni, *supra* note 94, at 750.

128. Barnett, *supra* note 73, at 309-10.

129. *See supra* part III.A.2.

130. *See* SHEARER, *supra* note 2, at 3, 9-10.

affiliations and affinities of the nations involved. For example, due to their underlying theories of duty and obligation, common law countries are more likely to enter into treaties than civil law countries.[131]

C. *Other Methods of Final Surrender*

Other methods or alternatives outside the traditional practice of extradition may be equally effective in accomplishing final surrender. These methods are, in essence, a form of "disguised extradition."[132]

First, international kidnapping or abduction is one possible alternative to the practice of extradition. Although clearly discouraged by the United Nations, this modern day form of bounty hunting occurs when individuals from the apprehending state remove a fugitive criminal from the state of refuge through force, threat of force or fraud.[133] This practice is generally implemented by governmental agents or employees; however, as the term bounty suggests, private individuals may also offer their services to the highest bidder. In essence, abduction is a way of securing jurisdiction over fugitive criminals who were at one time within the jurisdiction of the apprehending state.[134]

The treatment of this practice has been diverse. For example, in the United States, courts have generally followed the Roman maxim *male captus bene detenum*, which translates, "an illegal apprehension does not preclude jurisdiction."[135] Certain limitations, however, are placed on this maxim. For example, in *United States v. Toscanino*, the Second Circuit held that the courts of the United States have no jurisdiction over an individual who is returned through abduction, viewing such abduction as a violation of international law.[136]

Soon after *Toscanino*, the Second Circuit would soften its Draconian view in *United States ex rel. Lujan v. Gengler*.[137] The court upheld jurisdiction, taking the position that abduction is a violation of international law only in cases where the offended state objects to the abduction.[138] Consequently, if the offended

131. *See* M. BASSIOUNI, *supra* note 2, at 10-13.

132. SHEARER, *supra* note 2, at 78; M. BASSIOUNI, *supra* note 2, at 124-28.

133. SHEARER, *supra* note 2, at 72; *see also* Buser, supra note 5, at 367.

134. Buser, *supra* note 5, at 368.

135. *Id.* at 369.

136. 500 F.2d 267, 275, *petition for reh'g en banc denied*, 504 F.2d 1380 (2nd Cir. 1984).

137. 510 F.2d 62 (2d Cir. 1975), *petition for cert. denied*, 421 U.S. 1001 (1975).

138. *Id.*

nation consents to the act, jurisdiction may be exercised over the individual.

In 1992, the Supreme Court spoke on this matter in *United States v. Alvarez-Machain*, where the Court affirmed that forcible abduction of an individual from another jurisdiction does not prohibit the courts of the United States from exercising jurisdiction.[139] Therefore, when a treaty is not invoked by the state of refuge, a court may properly exercise jurisdiction even in cases where the individual is returned through abduction.

With recent holdings such as *Alvarez-Machain*, the practice of international kidnapping as a means of effectuating the surrender of a fugitive criminal may become more prevalent. Countries may view this practice as a less expensive and more efficient means of rendition. Conflicts are likely to arise regarding legality of the act, as well as questions regarding respect for the sovereignty of the state of refuge.

A second alternative to the practice of extradition is deportation, which is the "compulsory ejection of an alien from the territory of the deporting state."[140] This practice differs from extradition in that the deporting state is simply expelling the alien from its territory, and not attempting to return him to the jurisdiction of the state in which the offense was committed.[141] It is possible in certain cases to control the final destination of the alien and deport him to the jurisdiction in which the crime occurred. When this happens, de facto extradition is said to occur.[142] However, very few cases exist where deportation was overruled on the ground that the order was a disguised form of extradition in violation of international law.[143]

Many objections are raised to the use of this alternative. First, since the deportee leaves the deporting state a free man, he is able to seek entry into any port en route to the intended port of final destination. As a result, the state wishing to prosecute the fugitive criminal is not guaranteed the opportunity to do so.[144] Second, since deportation sometimes acts as de facto extradition, the deportee should be entitled to the same protec-

139. 112 S. Ct. 2188 (1992).
140. SHEARER, *supra* note 2, at 76.
141. *Id.* at 76-77.
142. *Id.* at 84.
143. *Id.* at 88.
144. *Id.* at 87-88.

tions involved in the practice of extradition, including the political offense exception.[145] The case of *Greville Wynne* illustrates the potential for injustice. Here, a British subject captured in Hungary was deported to the Soviet Union for various political crimes and offenses.[146] This transfer would likely have been avoided through the application of the political offense exception had extradition proceedings been initiated.[147] In this light deportation acts as a means of circumventing basic political and religious freedoms.

In final analysis, deportation serves as a tool in cases where no extradition treaty exists with the receiving nation. Similarly, deportation helps overcome the problem of dealing with countries that require a treaty before extradition may occur.[148]

A third alternative to extradition is the use of immigration controls. By tightening security at the borders and refusing to admit those suspected of having criminal records, countries create a viable alternative to the use of extradition as a means of final surrender.[149] However, this alternative is only effective if the fugitive attempts to enter the country through proper channels.[150] Therefore, if the fugitive enters through secret or undercover means, strict immigration laws and administrative policing activities have little overall effect.

Recent developments within the European Community have created an open-door policy between member states.[151] With such a policy, the use of immigration controls as a form of disguised extradition will soon disappear. In rejecting these developments, various members are tightening their immigration procedures to protect against an endless wave of refugees. At the time of this writing, Britain remains the main obstacle to full implementation of this European Community policy, which coincided with the opening of the Single Market on January 1, 1993. Britain has stated, however, that a potential middle-ground may be reached through the development of a system which would permit members to quickly and efficiently expel those seeking asylum who do not appear to have legitimate claims.[152]

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145. *Id.* at 88-89.
146. *Id.* at 27.
147. *See generally* SHEARER, *supra* note 2, at 93.
148. *See id.* at 76-78.
149. *See id.* at 91-93.
150. *See id.*; *see also* M. BASSIOUNI, *supra* note 2, at 133-34.
151. *EC Falls Short on Open-Border Goal*, The Virginian-Pilot and The Ledger-Star, Nov. 29, 1992, at A22.
152. *Id.*

A fourth alternative to extradition is the implementation of specific legislation recognizing or enforcing the laws of the jurisdiction from which the fugitive has escaped.[153] For example, in 1891 the United States responded to a request from Belgium regarding the enforcement of a certain Belgian law upon vessels found within U.S. ports. The Secretary of State, Mr. Foster, stated,

> [a] fugitive from justice from Belgium who arrives at any of the ports of the United States comes within their territorial jurisdiction and has a right to claim the protection of their laws, and this Government, in the absence of legislation or treaty authorizing the recognition or enforcement of a foreign law within its territorial jurisdiction, cannot acknowledge its binding effect.[154]

As stated earlier, the practice of surrendering a fugitive to a requesting nation cannot be accomplished in most common law states without the presence of a treaty, convention or legislative provision. Likewise, the excerpt above states that a similar grant of authority is required before the laws of the requesting nation will be applied within the territorial jurisdiction of the requested state.

A question immediately arises as to the comparable nature of the laws of the requesting state to those of the forum state. What happens if they conflict? Do the provisions of the requested state supersede the laws of the requesting nation? Also, no guarantee is provided that the fugitive will not be subject to double jeopardy upon return to his homeland.[155] Underlying these quagmires is the principle that one nation does not enforce the penal laws and judgments of another nation.[156] Questions such as these must be answered before this method can effectively be used as an alternative to extradition.

A possible twist to this last alternative is sanctioned by writers such as Grotius, and occurs where the state of refuge punishes the subject not in accordance to the laws of the requesting state, but in accordance with the laws of the requested state.[157] Once again, however, the comparable nature of the ju-

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153. *See* MOORE, *supra* note 38, at 252; *see also* SHEARER, *supra* note 2, at 20-21, 68.

154. *See id.* at 252 (*quoting* Mr. Foster, Sec. of State, to Mr. Le Ghait, Nov. 12, 1892, MS. Notes to Belg. Leg. VII. 571) (emphasis added).

155. *See* SHEARER, *supra* note 2, at 194-97, 207-10.

156. *See id.* at 207-09.

157. *See* MOORE, *supra* note 38, at 245-46.

dicial systems of each government must be carefully scrutinized. Moreover, the requesting nation may not be pleased with the severity of the punishment handed down by the courts of the requested nation.[158]

The last alternative to extradition practiced in modern times is the use of special conventions or legislation specifically providing for the surrender or punishment of fugitive criminals.[159] The most obvious example is the Nuremberg trials of Nazi war criminals. However, such an alternative is not free from attack. Questions of jurisdiction and the existence of statehood must be dealt with when justifying its use.[160] Regardless of the stated controversy, this method has proven effective in accomplishing the underlying purposes and goals of extradition.

IV. CHOOSING A METHOD: TO USE EXTRADITION, OR NOT TO USE EXTRADITION . . . IS THAT THE QUESTION?

As the discussion to this point clearly indicates, the underlying goals and purposes of extradition may be carried out through means other than the traditional practice of extradition. The question thus becomes, "why continue to use extradition as a means of surrender when other means are readily available for accomplishing the same goals and purposes?" If the true goal of extradition is final surrender for the purpose of administering justice, then alternative means capable of meeting this goal should not be readily overlooked. Several additional factors must be carefully considered before settling on extradition as the most appropriate means of surrender in any given situation.

A. Additional Considerations

First, the ability of the detainee to effectively challenge the current system of extradition is very limited. Overall, individual rights receive little protection. Various municipal laws and conventions, such as the European Convention, provide what little protection exists.[161] In the United States, the fugitive criminal is permitted to either petition the federal courts for a writ of

158. SHEARER, *supra* note 2, at 21; *see also* M. BASSIOUNI, *supra* note 2, at 224, 252, 450.

159. Wise, *supra* note 3, at 730.

160. *Id.* at 730; *see* SHEARER, *supra* note 2, at 185-87.

161. M. Bassiouni, *supra* note 94, at 750-51.

habeas corpus, or to seek a writ of certiorari. However, the courts have typically been unconcerned with the plight of the fugitive.[162] More importantly, the rule of non-inquiry has added to the unfairness of the proceedings. This rule embodies a hands-off approach toward any complaint filed by the detainee regarding harsh or oppressive treatment by the requesting state.[163] An example of the potential injustice of the rule of non-inquiry is illustrated by the case of John Demjanjuk, a Ukranian national convicted of being Ivan the Terrible. In 1988, the United States extradited Demjanjuk to Israel in accordance with the treaty between the two countries. Questions soon followed regarding the reliability of the witnesses used to convict Demjanjuk, thus casting doubt on the true identity of Demjanjuk as Ivan the Terrible. Throughout the proceedings the Justice Department was well aware of the evidentiary inconsistencies, but nonetheless continued to prosecute.[164]

The actions by the Justice Department in the case of Demjanjuk were undoubtedly fueled in part by the political and moral uproar over the heinous nature of the accusations. Indeed, "[p]rosecutions for such dubious reasons should never occur in a nation that prides itself on retaining an unbreachable wall between the dispensation of justice and political considerations."[165] Clearly this case reflects the great extent to which a nation will go to maintain friendly relations with the requesting state, often sacrificing truth and justice to preserve non-inquiry.

A second feature of extradition that must be considered is the investment of time and money required to secure final surrender of the fugitive criminal.[166] An ironic twist in the case of Demjanjuk illustrates this potential obstacle. If Israel had accepted the United State's initial efforts to deport Demjanjuk for prior falsifications on his original application for citizenship, four years of enormous legal fees and other related costs might have been avoided.[167] Although potentially risking his escape during the return trip home, the United States could nonetheless have

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162. *Id.* at 751.

163. *Id.* at 752.

164. Stephen Green, *Justice Department Mishandled Extradition*, Human Events, THE NAT'L. CONSERVATIVE WEEKLY, Dec. 12, 1992, at 18; *see generally* Francine R. Strauss, *Demjanjuk v. Petrovsky: An Analysis of Extradition*, 12 MD. J. INT'L. L. & TRADE 65 (1987).

165. Green, *supra* note 164, at 18.

166. *See* SHEARER, *supra* note 2, at 210-11.

167. *See* Green, *supra* note 164, at 18.

ensured a "de facto extradition" by accompanying Demjanjuk to the final location of deportation.[168]

A third consideration, executive discretion, also discourages a nation's use of extradition as a means of surrender. Discussed mostly in relation to the extradition framework of the United States, this practice involves the Secretary of State's use of discretionary power to deny final surrender.[169] Despite the apparent contradiction to the rights and duties created by treaty obligations, executive discretion plays a crucial role in the United States extradition policy.[170]

Traditionally, the Secretary's role was considered purely "ministerial."[171] In other words, the Secretary would act as a rubber stamp for the magistrate's findings below. This tradition began to change in 1871, when the Secretary refused to surrender three out of seven detainees to Great Britain. No reason was offered by the Secretary for this refusal.[172] Later, in *In re Stupp*, 1873, the Secretary refused to surrender the accused, a Prussian national, for charges of "arson, murder, and robbery."[173] This decision was the first judicial recognition of the executive's use of discretionary power.[174]

In essence, the use of executive discretion means that full compliance with the letter of the treaty is no longer a guarantee to final surrender. The use of discretion appears even more suspicious in the face of language stating that extradition "shall" be required in cases where the requesting nation has fully complied with the treaty.[175] Anything less than full compliance in such cases would thus be considered a blatant violation of specific treaty obligations.

Fourth, the effect of state succession on extradition treaties is another area for consideration.[176] The central question deals with the effect that such changes will have on current treaty relations with the succeeding state. For example, what happens when the parent state refuses to recognize the official status of

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168. *See* SHEARER, *supra* note 2, at 77-78.

169. *See* Note, *supra* note 77, at 1313-14.

170. *See generally* Note, *supra* note 77; M. Bassiouni, *supra* note 94, at 755-60.

171. Note, *supra* note 77, at 1315.

172. *Id.*

173. 23 Fed. Cas. 281, 282 (No. 13562) (C.C.S.D.N.Y. 1873).

174. Note, *supra* note 77, at 1315. In addition, legislative activity was also changing the traditional role of the Secretary, adding to the already mounting support of case law. *See, e.g.*, 18 U.S.C. § 3184 (1982).

175. *See generally, e.g.*, U.S. — Swiss Treaty, *supra* note 84, at 1928-34.

176. *See* SHEARER, *supra* note 2, at 45-51.

the succeeding state? Further, what if that state becomes part of another state which the parent state has refused to recognize? Often, an entirely new treaty will be required before extradition will resume between the two states. The added time, expense and hassle involved in reformulation may decrease the parent state's desire to continue extradition with that state.[177]

A similar effect on treaty relations is caused by acts of war. According to traditional theories, war terminates all existing obligations between the two countries.[178] However, states in modern times tend to "depend on the objective compatibility of the treaty with a belligerent situation" when determining whether the treaty should be terminated completely, or whether it should be kept in place despite the occurrence of hostilities.[179] In other words, an ad hoc balancing approach is adopted for each conflict. Although the modern era no longer views the outbreak of war as immediate grounds for abrogation of extradition treaties, nothing resembling a consensus has appeared on the international scene to provide a measure of continuity.[180]

The considerations of succession and war are even more critical in light of recent world developments, specifically in the Soviet Union and Yugoslavia, where revolt and succession are a part of everyday life. In an era of emerging independence, a method of extradition is required which will keep pace with rapid governmental changes. Not only must this method stay current with newly developing crimes and offenses, but it must also be flexible enough to deal with sudden, and often violent changes of power.

Moreover, a look into the not too distant past provides evidence of extradition's inability to meet current challenges. Until 1984, crimes such as drug trafficking and computer fraud were absent from the list of offenses of many extradition treaties.[181] In order to effectively continue in the administration of justice, such treaties need to be regularly updated. Meanwhile, innovative criminals will find ways to slip through the cracks in the system. The only way to avoid such mishaps is to make the first question for analysis not, "what method will best serve national interests or political necessity,?" but instead, "which

177. *See id.* at 46-48.
178. *Id.* at 43.
179. *Id.* at 44.
180. *See id.* at 43-45.
181. *See* Barnett, *supra* note 73, at 286.

methods or means will best serve the swift and effective administration of justice?"

A final consideration is the constant political pressure and tension that accompanies any decision to extradite.[182] An illustration of the effects that politics has on a requesting nation's decision to extradite is found in the case of Josette Bauer, a Swiss national who was extradited by the United States to Switzerland in 1981.[183] Throughout Ms. Bauer's proceedings, the United States was involved in sensitive negotiations with Iran for the release of several American hostages. The United States was represented by Switzerland throughout these negotiations.[184] The apparent need to retain friendly relations with the Swiss government was directly impacting the court's decision. Not only did the court have to carefully weigh the evidence before it, but it now had to assume the role of politician and consider the potential effect that denying extradition might have on the lives of the American hostages.

B. Proposals

Despite the many problems that accompany extradition, not everyone has gone so far as to suggest its total abolition. The pages of every newspaper have at one time or another reflected the positive results that extradition provides. Nevertheless, the current system is far from perfect. Several proposals have been suggested for improving this system.

To begin, multilateral treaties are recommended as a way to solve many of the problems facing bilateral treaties. Proponents suggest that the bilateral treaty be replaced with treaties that are based on wide geographical or political affinities, consisting of several nations or states.[185] Modern day examples of such agreements include the Arab League Extradition Agreement, The Benelux Extradition Convention, and the European Convention.[186]

The advantages of multi-lateral treaties are several. First, these treaties are said to "reduce ... the divergence in national legislation that so perplexes national authorities when dealing

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182. *See* Green, *supra* note 164, at 18.

183. *In re Geisser*, 627 F.2d 745, 745 (5th Cir. 1980).

184. *Id.* at 755.

185. *See* SHEARER, *supra* note 2, at 51-52; *see also* M. BASSIOUNI, *supra* note 2, at 19-24.

186. M. BASSIOUNI, *supra* note 2, at 20-22.

with extradition matters on a bilateral . . . basis."[187] For example, countries pledge to settle disagreements by reference to the existing multi-lateral agreement, agreeing not to involve any previous agreements between nations now party to the new treaty.[188] Second, such treaties seem "less susceptible to a process of attrition likely to cause a breakdown . . .," since the withdrawal or removal of a single party will not necessarily dissolve the entire agreement.[189] Finally, one author has suggested that multilateral treaties may contribute to the creation of a common law of extradition.[190]

An additional proposal typically offered elevates the institution of extradition to a "universal plane" through the creation of a single world convention on extradition.[191] Not only would such a convention or model code of extradition afford greater protection to the individual rights of the detainee, but it would also promote world public order, and prevent open and continuous abuse of the system.[192] In essence, a convention on a global scale would act as a watch-dog against the integrity of the system. The following excerpt from the Freiburg Conference on International Extradition puts this proposal into perspective,

> [c]onsequently and in conformity to the contemporary trend to attribute to the individual the quality of subject of International Law, it is suitable to recognize that the individual who is the object of an extradition procedure may uphold before national and international jurisdictions the prerogatives recognized to him by the Universal Declaration of Human Rights and by international treaties.
>
> To this effect and with a measure to foresee a general international convention it might be useful that there be recognized regional or international jurisdictions susceptible of hearing individual recourses directed against the decisions of national authorities rendered in violation of the aforementioned individual rights.
>
> These jurisdictions could also be ceased with a procedure inspired by Habeas Corpus which would permit and give a more effective and practical remedy for the establishment of the Rule on a world-wide basis.[193]

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187. *Id.* at 19.
188. *Id.*
189. *Id.*; SHEARER, *supra* note 2, at 51-52.
190. *Id.* at 51-52.
191. M. Bassiouni, *supra* note 29, at 27-30.
192. *See* M. Bassiouni, *supra* note 94, at 750-55.
193. M. Bassiouni, *supra* note 29, at 29.

This excerpt proposes changes which could potentially bolster the current system of extradition. The injustices facing the traditional rule of non-inquiry would ostensibly be eliminated through a centralized system which carefully monitors international extradition and pays greater attention to individual rights and liberties.

On the other hand, the potential advantages of such a system are far from becoming a reality. A world convention would only shift the current political pressures facing individual nations onto a much larger centralized organization. Further, very few scholars, politicians or statesman have addressed questions relating to the management and control of a single world convention. In addition, how would enforceability of obligations be handled, or what remedies for breach would be available? Questions such as these must be answered before this proposal can receive serious attention.[194]

V. CONCLUSION

The practice of extradition has been a useful, yet far from perfect instrument for effectuating the final surrender of fugitive criminals for the purpose of administering justice. The many problems which plague the system often prevent the administration of justice, and have at times subverted its underlying purposes. Further, attempts to improve the system have provided little more than token changes. Finally, the various proposals and recommendations for improvement have received little attention in international circles. Before any such plans will be taken seriously, many of the questions discussed above must be thoroughly analyzed and answered.

The many available alternatives to extradition are far from trouble-free as well. Each carries its own unique burden. Further, the effect that such decisions as *Alvarez-Machain* will have on the use of abduction as a means of surrender remain to be seen. Similarly, recent developments of open and free travel between states in the European Community will all but eliminate the need for treaties of extradition. Instead, a state requesting the return of a fugitive may simply enter the place of refuge and forcibly remove the subject.

As modern states continue to seek independence and revolutions continue to reflect current unrest, the practice of extra-

194. *See* M. Bassiouni, *supra* note 29, at 27-30.

dition may fail to maintain its place as the most common means of effectuating surrender. Circumstances may demand a departure from formalized traditions to a more practical means of surrender. Flexibility must replace rigidity if the underlying goals and purposes of extradition are to be carried out, mainly, the effectuation and administration of justice.

Nations can no longer rigidly cling to time-honored methods if the challenges and goals initially set forth by the institution of extradition are ever to be fully realized.

ROBERT HERBERT WOODS, JR.*

* This author, like many before him who have tackled this subject, would like to emphasize that this article in no way intends to supplant the volumes upon volumes of treatises and other sources already written. Any compilation or collection on my part is merely intended to direct the reader to additional materials and provide a broad overview of the complex elements and issues involved in extradition.