

Kidnapped Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-legal Options

I. Introduction

Through the use of its extradition treaties with other states, the United States has successfully returned a number of terrorists from other countries to stand trial in the United States for acts and planned acts of terrorism against U.S. citizens. Since the mid-1980s, several high-profile international terrorists and narco-terrorists have been returned to the United States from foreign countries through the use of a process known as irregular rendition. Irregular rendition is the forceful abduction of an individual from one country by agents of another country, principally without the knowledge or consent of the former. Irregular rendition occurs outside the parameters of extradition treaties. Irregular rendition may be an effective way of bringing terrorists to justice. However, irregular rendition may affect a state's relationship with the nation who refused to extradite their national, as well as the state's reputation among the international community. Should irregular rendition still be a viable option in the 21st century? Other options are available to a requesting state when a requested state refuses to extradite and does not adequately punish or prosecute the terrorist.

In this Note, the theories behind extradition, the rule of "prosecute or extradite," and the idea of using due diligence when prosecuting and punishing a criminal offender, will be thoroughly explored, relying on both customary international law and treaty-based law. In Part II, this Note will focus specifically on the historical reasons for a policy of non-extradition of nationals, common among many states. Part III will examine why this policy of non-extradition causes other states to use force extraterritorially (i.e., irregular rendition). Many international scholars as well as other nation-states disagree with the idea of using force extraterritorially for reasons other than self-defense during an "armed attack," as defined in article 51 of the U.N. Charter. In Part III, this Note will study irregular rendition further and see whether, in some extreme circumstances, irregular rendition may be justified.

Lastly, in Part IV, this Note will show that irregular rendition should no longer be the only choice when negotiations regarding extradition fail. Luring fugitives into international waters or cooperating with another state outside the formal process of extradition are options that may prove less offensive and intrusive, and more effective than forcibly abducting the criminal from a nation that does not consent to the abduction. Other viable options include increased cooperation among states, revised, stricter extradition treaties, U.N. involvement when a state refuses to either extradite or punish, and an enhanced mutual respect for a nation's sovereignty. These proposals can achieve the same outcome as irregular rendition: protect nationals abroad and bring criminal offenders to justice. Moreover, this movement toward bilateral cooperation establishes friendly ties and shows respect for other nations' sovereignty. Extensive international cooperation concerning extraterritorial investigations will make the world a smaller place, and terrorists and narco-terrorist havens will become more difficult to find. Though irregular

rendition may have short-term advantages, irregular rendition can hamper friendly relations among states and halt their cooperative efforts in the long run. This Note uses examples in Mexico, Colombia, and the Dominican Republic to illustrate this point.

II. Extradition and The Rule of Due Diligence

Extradition is a formal process through which a state diplomatically surrenders criminal suspects to foreign governments requesting transfer of such suspects.¹ Extradition developed as a formal process to recover fugitives as sovereign entities grew to respect the territorial integrity of other nations.² Extradition is based upon fundamental principles of international law.³ Reciprocity and comity have long been established as international principles of friendly cooperation among states.⁴ Comity can be defined as an act of courtesy, goodwill cooperation between states, and a mutual recognition among the states concerning each other's own legislative, executive and judicial acts with regard to each particular extradition request.⁵ Under the principle of reciprocity, a government of a state grants an extradition request only in exchange for the extradition or promise of future extradition of an individual that such government seeks from its counterpart.⁶ If this reciprocity is so consistent that it becomes a custom of that state, it may become binding under international law.⁷ Respect for territorial sovereignty is also an important principle of international law, thus the need for a formal process to extradite so that a state will not feel it is being intruded upon if another state chooses to enter and remove a person from within its own borders.⁸

The Hague (1971), Montreal (1971), and Hostages Conventions (1979) reveal the international theory of imposing on contracting states the duty to prosecute or extradite criminal offenders.⁹ These Conventions require the state to take suspects into custody to enable criminal or extradition proceedings to be instituted against them.¹⁰ The European Convention on Suppression of Terrorism, signed in 1977, also affirmed the obligation of the states of the Council of Europe to prosecute or extradite terrorists.¹¹

Another fundamental principle regarding extradition, other than the concept of prosecute- or-extradite, is the treaty system. The treaty system anchors modern extradition practices.¹² Most current extradition treaties are bilateral since specific criminal needs necessitate the creation of individually-tailored treaties between specified pairs of states.¹³ Usually, states cooperate in establishing specific procedures for extradition

1. See M. Cherif Bassiouni, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 2-3 (3d ed. 1996).

2. See Kai I. Rebane, Note, *Extradition & Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 *FORDHAM INT'L J.* 1636, 1644-46 (1996).

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

4. See Bassiouni, *supra* note 1, at 17.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 1646 art. 7 (1971) [hereinafter *Hague Convention*]; Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565, 571 art. 7 [hereinafter *Montreal Convention*]; International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1456, 1460 art. 8 [hereinafter *Hostages Convention*].

10. See Jimmy Gurulé, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 *HASTINGS INT'L & COMP. L. REV.* 457, 474 (1994).

11. See European Convention on Suppression of Terrorism, *opened for signature* Jan. 27, 1977, 15 I.L.M. 1272-76 (1976) [hereinafter *Terrorism Convention*].

12. See Rebane, *supra* note 2, at 1647.

13. See *id.* at 1648.

under a treaty agreement.¹⁴ "Common extradition treaty features include a dual criminality provision or a list of specific criminal conduct warranting extradition, a clause addressing the extradition of nationals, a list of protected rights, and a political offense exception."¹⁵ The treaty system, comity, and reciprocity all dictate their international extradition procedures.¹⁶ It is also important to remember that each nation's domestic extradition process is governed by its own internal laws and policies.¹⁷

When choosing to prosecute criminal suspects rather than extradite, customary international law has imposed a duty on all states to use due diligence in prosecuting and punishing criminal offenders within the state's territorial boundaries.¹⁸ This idea of using due diligence in prosecuting and punishing the criminal offender has been codified in various multilateral conventions and treaties. The Hague and Montreal Conventions state that the contracting nations have a duty to provide "the greatest measure of assistance in connection with the criminal proceedings."¹⁹ The *Janes*²⁰ case best represents the idea of state responsibility to use due diligence. In *Janes*, a U.S. citizen was murdered in Mexico, and although the Mexican authorities had eyewitnesses to the murder, they did nothing to apprehend the suspect.²¹ The United States alleged that Mexico was derelict in its duty under international law to use due diligence.²² The General Claims Commission found that the Mexican government was liable for "not having measured up to its duty of diligently prosecuting and properly punishing the offender."²³ States must keep this in mind when deciding to prosecute rather than extradite.

III. The Policy of Non-Extradition of Nationals Has Led to Irregular Rendition

Many states opt to prosecute offenders within their own borders, especially if the criminal suspect is a national of that state. This modern practice of non-extradition of nationals dates back to medieval times, and is rooted in the relationship between the feudal ruler and his subjects.²⁴ While the ruler owed protection to his subjects for their allegiance, work, and contribution to his wealth and power, the subjects were entitled to the *ius de non evocando*, the right not to be withdrawn from the jurisdiction of their local courts.²⁵ In 1777, France and the Helvetic League agreed that each party would not deliver up its own citizens except for a *grave et public*.²⁶ Most European countries adopted this rule by the middle of the nineteenth century; the rule has persisted in Europe and Latin America.²⁷ With the exception of the Netherlands and a specific situation among the Nordic countries, no countries mentioned above have abandoned this doctrine.²⁸ In contrast, according to several opinions made by U.S. courts, "United

14. See Bassiouni, *supra* note 1, at 49.

15. Joshua H. Warmund, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 *FORDHAM INT'L L.J.* 2373, 2381 (1999) (footnotes omitted).

16. See *id.*

17. See Rebane, *supra* note 2, 1649.

18. See Gurulé, *supra* note 10, at 473.

19. Hague Convention, *supra* note 9, art. 6, 22 U.S.T. 1645-46; Montreal Convention, *supra* note 9, art. 6, 24 U.S.T. at 570.

20. *Janes Case* (U.S. v. Mex.), 4 *REP. INT'L ARB. AWARDS* 82 (1925).

21. See *id.* at 87.

22. See *id.*

23. *Id.*

24. See Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 *EMORY INT'L L. REV.* 77, 82 (1999).

25. See *id.*

26. See *id.* at 83.

27. See *id.* at 84.

28. See *id.*

States citizenship does not bar extradition by the United States."²⁹ American citizenship of an offender grants "neither an immunity for offenses committed abroad, nor a right to demand all the procedural guarantees existing under the law of the United States."³⁰

A. Non-Extradition and Territorial Sovereignty

Why have so many states maintained this rule of non-extradition of nationals? The rule of non-extradition largely rests on the notion of territorial sovereignty. This notion, according to Harvard Research in International Law, "presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment."³¹ If this was the case and unfair treatment was commonplace when extradition of nationals occurred, then Harvard Research correctly points out that "[i]f justice as administered in other States is not to be trusted, then there should be no extradition at all."³² Moreover, many feel the reason for a state's refusal to surrender its nationals is a special relationship between them and their home country. This theory, developed by German writers, has remained unclear, and has recently been criticized for being "devoid of any practical significance."³³ Along the lines of territorial sovereignty, other arguments in support of the non-extradition of nationals include: the fundamental right to asylum, popular instinct of society, disparity in the domestic legal systems with respect to substantive law and procedure, and the potential for bias and prejudice against the offender, based solely on his foreign origin and nationality.³⁴

B. Non-Extradition Policy and Fear, Bribery, and Governmental Corruption

Fear of retaliation, bribery, and overall government corruption are also reasons why many states choose to prosecute rather extradite. France is an example of refusing to extradite for fear of retaliation. In 1977, France refused Israel and West Germany's request for the extradition of Muhammad Daoud Audeh, the mastermind behind the 1972 Munich Olympics massacre in which eleven Israeli athletes were seized and murdered by Palestinian terrorists.³⁵ The French did not wish to incur the wrath of the PLO. In 1985, Italy refused to hand PLO hijackers over to the United States and actually arranged for their leader, Mohammed Abu Abbas, to escape to Yugoslavia, in order to avoid possible terrorist retaliation.³⁶ Throughout the 1970s and 1980s, Europe, fearful of potential reprisals, seemed more inclined to provide a safe haven for international terrorists than to seek their apprehension.

Caribbean and South American nations' refusal to comply with extradition treaties rests more with the reasons of bribery and general government corruption. These nations that prohibit extradition, particularly of their nationals, hamper the U.S. law enforcement efforts to combat its own domestic drug problem. Narco-terrorism has arisen as a force to be contended with, particularly in South America, and is defined as "drug trafficking by insurgent/terrorist groups, the commission of violent acts by these groups to possibly influence government policy, and any type of linkages between terrorist groups and narcotics organizations."³⁷ For example, in the mid-1980s in Colombia, several

29. *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986).

30. *Plachta*, *supra* note 24, at 87.

31. *Id.* at 88.

32. *Id.* (quoting Harvard Research in International Law, *Draft Convention on Extradition*, 29 AM. J. INT'L L. 15, 296 (Supp. 1935)).

33. *Id.* at 90.

34. *See id.*

35. *See* Bruce Hoffman, *Is Europe Soft on Terrorism?*, FOREIGN POL'Y, July 1, 1999 at 62.

36. *See id.*

37. U.S. DEP'T OF JUSTICE, *TERRORISM IN THE UNITED STATES* 18 (1989).

insurgent/terrorist groups operating within Colombia emerged in an attempt to topple its government. One of these groups included the Revolutionary Armed Forces of Colombia (FARC) and the April 19th Movement (M19), which began to participate in the lucrative drug trade.³⁸ The FARC and the M19 were connected among and between various insurgent/terrorist groups and established drug-trafficking families. The November 6-7, 1985, takeover of Colombia's Palace of Justice, where judicial proceedings and drug-related extraditions were in progress, reveals just one example of apparent early cooperation between Colombian terrorist groups and drug lords.³⁹ During the takeover, Colombia's highest court was seized by M19 gunmen. This siege concluded with numerous killings of magistrates who were involved in drug-related proceedings.⁴⁰ Many have speculated that the key motive for this onslaught was to stop extraditions and intimidate judicial officers from acting against drug traffickers.

Drug traffickers fear extradition because it virtually assures them a U.S. prison sentence. The Colombian Treaty of 1979 provided for the extradition of wanted individuals who are charged with or convicted of offenses listed in a schedule annexed to the treaty, including drug-related offenses.⁴¹ Supporters who voiced their beliefs soon became victims of narco-terrorism.⁴² In 1986, the Colombian Supreme Court nullified the law that enabled the Colombian Treaty.⁴³ Most commentators agree that this decision, and those similar to it, were the result of fear, intimidation, and coercion stemming from the narco-terrorist response to the Colombian treaty.⁴⁴

The Dominican Republic provides another example of a non-extradition policy due to a reign of violence and corruption to ensure that anti-drug efforts to create a favorable pro-extradition policy fail. Article VIII of the Dominican Treaty with the United States, adopted in 1910, provided for the extradition of nationals subject to executive discretion.⁴⁵ In 1969, the Dominican legislature nullified the discretionary authority granted to the executive by passing Law 489 of the Domestic Penal Law.⁴⁶ Law 489 prohibited the extradition of Dominican nationals, thereby providing a safe refuge for Dominican criminals who committed crimes in the United States and fled back to their homeland.⁴⁷ International drug trafficking and anti-drug enforcement policies certainly impact extradition practices between the Caribbean, South America, and the United States.

C. Non-extradition Policy and the Need for Irregular Rendition

This lack of cooperation and unwillingness to even consider extradition as a means toward a just resolution has caused some states, particularly the United States, to consider irregular rendition. Irregular rendition is typically considered to be the "abduction of an individual from one nation by agents of another nation" or by relying on private agents, such as bounty hunter and informants, to accomplish the same task.⁴⁸ Rendition

38. See *id.* at 17.

39. See *id.*

40. See *id.* at 18.

41. See Extradition Treaty with the Republic of Colombia, Sept. 14, 1979, U.S.-Colom., S. Treaty Doc. No.97-8.

42. See Bruce Zagaris, *Protecting the Rule of Law from Assault in the War Against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 703, 707-08 (1991).

43. See Ley 27 de 1980 (Colom.).

44. See Igor I. Kavass, *Colombia: Supreme Court Decision on the Law Concerning the Extradition Treaty Between Colombia and the United States*, 27 I.L.M. 492, 496 (1988).

45. See Convention Between the United States and the Dominican Republic for the Extradition of Criminals, June 19, 1909, U.S.-Dom. Rep., 36 Stat. 2468 [hereinafter Dominican Treaty].

46. See No. 489 Ley de Extradición Del 22 de Octubre de 1969 (Dom. Rep.).

47. See *id.* art. 4.

48. U.S. DEP'T OF JUSTICE, *TERRORISM IN THE UNITED STATES* 15 (1997).

is also carried out through the "informal surrender of an individual by one nation to another without formal or legal process," or through the "use of immigration laws to expel an accused or convicted criminal from a country," or by luring a fugitive to U.S. territory, international waters, or to other countries where their renditions can be more readily obtained.⁴⁹ For the purposes of this paper, the traditional irregular rendition method consists of abductions of suspected terrorists from one nation by agents of another nation without the nation's consent.

"Irregular rendition has deep historical roots."⁵⁰ "In the United States, the history of irregular rendition dates back further than extradition," with many early irregular renditions involving the border countries of Canada and Mexico.⁵¹ In 1866, the United States exercised extraterritorial jurisdiction over John Surratt, a possible co-conspirator in the assassination of President Abraham Lincoln.⁵² Law enforcement officers returned Surratt to the United States after he had fled to Alexandria, Egypt.⁵³ The U.S. Supreme Court has consistently approved of the irregular method of rendition. The *Ker-Frisbie* doctrine "states that forcible abductions as a method of arresting and returning fugitives from a foreign land will not bar U.S. courts from asserting jurisdiction when the accused finally appears before them."⁵⁴ Federal courts have relied on this doctrine in upholding the legality of state-sponsored abductions in later decisions.⁵⁵ "The courts almost unanimously follow *Ker-Frisbie*."⁵⁶

Often, the United States chooses irregular rendition to apprehend a suspect who has committed criminal acts against a U.S. citizen abroad. In *Alvarez-Machain*,⁵⁷ Humberto Alvarez-Machain, a citizen and resident of Mexico, was indicted for the kidnapping and murder of U.S. DEA Special Agent Camarena-Salazar in Mexico.⁵⁸ Alvarez-Machain was abducted by Mexican police officers who were acting at the request of the DEA and was flown to the United States to be turned over to DEA agents.⁵⁹ The Mexican government did not wish to cooperate with the United States to bring Camarena's assailants to justice. Additionally, high-level Mexican government officials were said to be linked to the kidnapping.⁶⁰ This right to intervene and protect nationals abroad when the foreign state was unwilling or unable to do so has been recognized in past customary international law, international arbitral decisions, as well as in writings of jurists and in the practice of states.⁶¹ "Traditional law has recognized the right of a state to [use force] for the protection of the lives and property of its nationals abroad in situations where the state of their residence . . . is unable or unwilling to grant them the protection to which they are entitled."⁶²

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. *See id.*

54. *Id.* *See Ker v. Illinois*, 119 U.S. at 436 (1886); *Frisbie v. Collins*, 342 U.S. at 522 (1951).

55. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); *United States v. Lovato*, 520 F.2d 1290 (9th Cir. 1975); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975); *United States ex rel. Calhoun v. Twomey*, 454 F.2d 326 (7th Cir. 1971).

56. *See* Argiro Kosmetatos, Comment, *U.S.-Mexican Extradition Policy: Were the Predictions Right about Alvarez?*, 22 *FORDHAM INT'L L.J.* 1064, 1074 (1999) (footnote omitted).

57. 504 U.S. 655 (1992).

58. *See id.* at 657.

59. *See id.*

60. *See* Gurulé, *supra* note 10, at 460.

61. *See id.* at 480.

62. *Id.* at 479, 480. (citing PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 169 (1949)).

IV. Irregular Rendition May Be Justifiable in Rare Circumstances

It is important to remember that irregular rendition would not be necessary if the requested state used "due diligence" to prosecute and punish criminal offenders when they choose not to extradite.⁶³ Because of these states who have been corrupted by terrorists, drug traffickers, and narco-terrorists and have put no effort to prosecute, U.S. federal law enforcement agents are faced with the difficult choice of either following the customary extradition treaty and taking the chance that terrorists or drug traffickers will avoid prosecution for their crimes, or bypassing traditional legal channels by obtaining custody of fugitives through irregular rendition.

Also, the United States is not the only state that faces the difficult decision of whether or not to choose irregular rendition. In February of 1999, Turkey abducted from Nairobi, Abdullah Ocalan, the Kurdish fugitive whose rebel forces had waged a 15-year separatist insurrection in Turkey.⁶⁴ Ocalan was tricked into boarding an aircraft in Nairobi, believing he was headed for political asylum in the Netherlands.⁶⁵ The Kurdish leader will stand trial as a terrorist facing the death penalty. Kurds stormed the Greek and Kenyan diplomatic missions and battled police in more than thirty cities.⁶⁶ In March of 1999, North Korea attempted to abduct from Thailand, Hong Sun Gyong, a former commercial counselor at the North Korean Embassy in Bangkok, after accusing him of embezzling millions of dollars his government had allocated to pay Thailand for rice.⁶⁷ Thailand's foreign minister delivered an official protest to the North Korean Embassy over the attempt to abduct Gyong. Thailand has a law, called the International Cooperation on Criminal Cases Act, which an affected country can resort to in the absence of an extradition treaty with Thailand.⁶⁸ Thus, according to Thailand, a country should not need to take action by itself. This is regarded as an act of disrespect to Thailand's sovereignty and integrity.⁶⁹

A. The International Community Reaction to Irregular Rendition

The international community has its own ideas on irregular rendition. It has been noted that international law has recognized a right to protect nationals abroad when the foreign state was unwilling or unable to do so. Additionally, territorial sovereignty has been recognized, and article 2(4) of the U.N. Charter restricts use of force extraterritorially and states: "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."⁷⁰ Article 2(4) may be construed as prohibiting all uses of force extraterritorially. The exception to the restriction of use of force extraterritorially is under article 51 of the U.N. Charter, which says that a state is justified in using force to repel "an armed attack."⁷¹ Many scholars disagree as to whether the right to protect nationals abroad survived the adoption of the U.N. Charter.⁷² If the term "armed attack" is broadly construed, protecting nationals abroad would be considered an act of self-defense against an informal "armed attack" by those causing harm to nation-

63. *Janes Case* (U.S. v. Mex.), 4 REP. INT'L ARB. AWARDS 82 (1925).

64. See Paul Koring, *Kurds Enrages as Rebel Chief Snatched*, GLOBE & MAIL, February 17, 1999, at A1.

65. See *id.*

66. See *id.*

67. See Thongchai Thongpao, *Commentary: Extradition Procedures Must Not Be Ignored*, BANGKOK POST, March 21, 1999, available in 1999 WL 8496140.

68. See *id.*

69. See *id.*

70. U.N. CHARTER, art. 2, para 4.

71. U.N. CHARTER, art. 51.

72. See Gurulé, *supra* note 10, at 481.

als abroad. If the term "armed attack" were to be construed narrowly, armed attack would strictly mean a military attack made by one state on another's land, and would not justify use of force extraterritorially to protect nationals abroad.

According to Professor Gurulé, three theories have emerged to either restrict or approve irregular rendition, according to the interpretation of the language in article 2(4) and 51. The restrictive theory prohibits the use of force regardless of the intervening state's motives and only makes a narrow exception in response to a foreign-armed attack.⁷³ The realist theorists argue that the literal reading of article 2(4) does not limit the right of a state to use force to protect its nationals abroad.⁷⁴ According to realist scholars, "use of force to protect a state's nationals in a foreign territory is not directed at the 'territorial integrity' or 'political independence' of the foreign state."⁷⁵ Lastly, under the self-defense theory, "the use of force. . . is viewed as an extension of the lawful exercise of a state's right of self-defense."⁷⁶ One could argue that the defense of nationals is, in effect, the defense of the state itself.⁷⁷ Whatever the justification for irregular rendition may be, the language in article 2(4) is not so specific that a state could not, in some way, use the realist or self-defense theories to circumvent article 2(4) and carry out irregular rendition in particular circumstances.

Besides what international law, according to the U.N. Charter, may suggest regarding irregular rendition, irregular rendition also has an impact on other nations. Using the *Alvarez-Machain* case as an example, after the Supreme Court ruling in *Alvarez-Machain* in 1992, the Inter-American Judicial Committee of the OAS issued "an opinion that characterized the abduction as a serious violation of public international law and impermissible transgression of Mexico's territorial sovereignty."⁷⁸ In November 1992, Ibero-American Summit Conference participants formally requested the U.N. General Assembly to submit to the International Court of Justice an advisory opinion regarding the legality of international abductions.⁷⁹ Canadian leaders questioned the status of the U.S.-Canada extradition treaty and threatened criminal prosecution of individuals who participated in any transborder abductions from Canadian soil.⁸⁰ "Latin American governments expressed their opposition by refusing to cooperate with U.S. extradition requests."⁸¹ The Mexican government temporarily suspended government cooperation with DEA agents in Mexico, demanded a re-negotiation of the Treaty and vowed to prosecute any individuals participating in law enforcement activities on Mexican soil without prior authorization.⁸² These types of protests over the irregular rendition of *Alvarez-Machain* can not be said to be particularly uncommon whenever irregular rendition is used.

B. When Irregular Rendition May Be Appropriate

Due to the international consequences and protests that occur after irregular rendition takes place, it may be that states stop using irregular rendition as an instrument to bring about justice and protect its nationals abroad. Professor Gurulé provides a com-

73. See *id.* at 482.

74. See *id.*

75. *Id.*

76. *Id.* at 484.

77. See *id.* at 485.

78. Legal Opinion of the Inter-American Judicial Committee on the Decision of the U.S. Supreme Court in the *Alvarez-Machain* Case, reprinted in 13 HUM. RTS. L.J. 395 (1992).

79. See U.N. Doc. A/47/249 (1992).

80. See *Shocking Ruling from U.S. Court*, TORONTO STAR, June 17, 1992, at A20.

81. See Kosmetatos, *supra* note 56, at 1088 (footnote omitted).

82. See Tim Golden, *Mexicans Mollified over Drug Ruling*, N.Y. TIMES, June 18, 1992, at A3.

pling argument as to when irregular rendition may be appropriate. First, an abduction should be used only in extreme cases and should be narrowly restricted and confined to when an asylum state has refused to punish or extradite.⁸³ When the asylum state breaches its duty of "due diligence," it violates customary international law and therefore, becomes an accomplice in crime.⁸⁴ Second, an abduction should only occur in the case of a violation of a serious and heinous crime.⁸⁵ "When an individual is charged with any of these offenses [e.g., terrorist bombings, murder, hijacking, kidnapping, and large-scale narcotics trafficking], the foreign state's failure to act jeopardizes the safety of American nationals by encouraging future terrorist acts or other violent crimes."⁸⁶ Third, the doctrine of proportionality suggests that a state should be sanctioned to only use "the amount of force necessary to apprehend the foreign fugitive."⁸⁷ Lastly, irregular rendition should be approved by the Attorney General after consultation with other administration officials in order to ensure that "proper consideration would be given to foreign policy concerns and would provide for a comprehensive risk-benefit assessment at the highest levels of government."⁸⁸ Under these guidelines, irregular rendition could be justified due to the amount of careful thought and consideration made by all levels of government. The foreign state has already violated international law, and it is up to the state who has examined the advantages and disadvantages in the particular situation to decide whether it is in their best interest to proceed with the irregular rendition. A system of checks and balances is appropriate when deciding to choose use of force extratorritorially over another state's territorial sovereignty.

Having already established guidelines as to when irregular rendition may be necessary in a particular situation, it must be recognized that there is no single, universal solution to the problems that are brought about by serious and violent crimes such as acts of terrorism, murder, hijacking, kidnapping, and large-scale narcotics trafficking, regardless of where they are committed. This fact only reinforces the need for multiple creative solutions, to resolve or at least control the growth of crimes such as terrorism. In light of this, it is important to look at other options to irregular rendition, which may prove more beneficial in the long-run and less controversial among nation states.

V. Other Options to Irregular Rendition

Irregular rendition is an extreme measure which may bring an international terrorist to justice in the short term while creating a myriad of dire and unforeseen consequences in the long run. For this reason, irregular rendition is used infrequently and with great discretion by the U.S. However, there are several other forms of rendition which are less offensive and equally as effective as irregular rendition. U.S. federal law enforcement agencies have successfully lured fugitives abroad into international waters or other countries from where their rendition can be more easily effected. In addition, U.S. law enforcement in conjunction with the State Department have discretely persuaded many countries on a case-by-case basis to bypass the formal extradition or legal process by simply handing over a fugitive to U.S. authorities for transport to the U.S. to face trial. Neither of these rendition options violates territorial sovereignty, and therefore, is less intrusive and more effective than the traditional irregular rendition method.

83. See Gurulé, *supra* note 10, at 490.

84. See *id.* at 491.

85. See *id.*

86. *Id.*

87. *Id.* at 492.

88. *Id.*

The Federal Bureau of Investigation (FBI) is the primary federal law enforcement agency in the United States responsible for investigating acts of terrorism and carrying out renditions in foreign countries. The FBI organizes overseas investigations with the U.S. Department of State and the host foreign government.⁸⁹ "Investigating acts of terrorism overseas includes interviewing victims, collecting forensic evidence, and apprehending terrorist fugitives."⁹⁰ The Omnibus Diplomatic Security and Antiterrorism Act of 1984 expanded the FBI's jurisdiction to include investigating acts of terrorism directed against U.S. citizens or U.S. interests overseas.⁹¹ The 1988 Hostage Taking Act was created to criminalize acts including hijacking and hostage-taking committed outside the United States by non-United States citizens, and essentially, sanctioned the abduction of suspected terrorists.⁹² In 1989, the Office of Legal Counsel at the U.S. Department of Justice concluded that the FBI has legal authority under domestic U.S. law to arrest persons in other countries without the consent of those countries.⁹³ The U.S. government has in fact brought back many suspects without using the formal extradition process by using the authority that this legislation provides.

A. Luring into International Waters

The United States government has used "luring" as an alternative to extradition, and has authorized law enforcement authorities to lure suspects out of their homeland even if an extradition treaty exists with that nation.⁹⁴ For example, the FBI captured suspected terrorist Fawaz Yunis, a citizen of Lebanon, by luring him into international waters off the coast of Cyprus and then forcefully returning him, via U.S. naval ships and aircraft, to the United States on charges of hostage taking and aircraft piracy.⁹⁵ Yunis was lured onto the boat with an enticing drug deal. Despite the coercive rendition, the federal district court for the District of Columbia allowed his prosecution under the 1988 Hostage Taking Act.⁹⁶ Neither Lebanon nor Cyprus appeared to have objected to Yunis' rendition in international waters.

Luring fugitives into international waters has been considered to violate international customary law because the principles of this law state that "a nation's agents may not seize an individual from another nation without obtaining consent from the other nation's government."⁹⁷ However, although different methods of rendition are done outside the formal process of extradition, luring can be considered less offensive than the typical irregular rendition because no territory's sovereignty has been violated. Yunis was tricked onto the boat in international waters under the pretense of a drug deal. U.S. agents did not enter Cyprus and abduct him; Yunis voluntarily chose to get on the boat, albeit through trickery.

89. See U.S. Dep't of Justice, *Terrorism in the United States* 17 (1995).

90. *Id.*

91. See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1202(a), 100 Stat. 896.

92. See *U.S. v. Yunis*, 924 F.2d 1086, 1090 (D.C. Cir. 1991).

93. See *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (statement of William Barr, U.S. Assistant Attorney General) [hereinafter Barr Statement].

94. See JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW* 426 (Carolina Academic Press 1996).

95. *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988).

96. See *id.* at 955.

97. Paust, *supra* note 94, at 435 (footnote omitted).

Some argue that this type of abduction violates the human rights of the abducted person. The abductee is unlawfully arrested and detained by a nation which has chosen to circumvent the formal process of extradition.⁹⁸ This issue, whether an abduction under these circumstances constitutes a violation of human rights, has been addressed under the *Toscanino* exception.⁹⁹ *Toscanino*, an Italian convicted for conspiracy to import narcotics to the United States, alleged that U.S. agents kidnapped him from his home in Uruguay, took him to Brazil, brutally tortured him and brought him to the United States to face trial.¹⁰⁰ *Toscanino* claimed that the illegality of his arrest and rendition, along with his torture and interrogation, negated the court's jurisdiction. The Second Circuit concluded that the Ker-Frisbie doctrine's narrow conception of due process, which requires a fair trial, should also include the manner in which the accused is brought to trial or else this type of rendition would reward "police brutality" and "lawlessness."¹⁰¹

Subsequent court decisions further developed the *Toscanino* exception. For an abduction to prejudice the outcome of a trial, the court ruled in *ex rel Lujan v. Gengler*¹⁰² that a fugitive must establish first, that the governmental conduct in question "shocks the conscience," second, that the abduction was the work of state agents, and third, there was a protest by the injured state.¹⁰³ The *Toscanino* exception in general, therefore, can be said to curb any conduct by U.S. law enforcement agents which would result in human rights violations of the abducted fugitive; otherwise, the abductee would go free. The standard for a human rights violation in an abduction case was identified as any action which would "shock the conscience" of the court. This exception allows for the U.S. government to abduct suspected terrorists from international waters while still safeguarding the human rights of the abductees. By this ruling, the courts affirmed the jurisdiction and responsibility of law enforcement in overseas abduction cases, but sent a clear message that gross human rights violations would not be tolerated.

The principal advantage of luring suspected terrorists into international waters where they can be forcefully abducted and transported to the U.S. directly or via a cooperating third country is that this type of rendition eliminates any issue of violating a state's sovereignty. The decision of the United States Supreme Court in *Cunard S.S. Co. v. Mellon*¹⁰⁴ held that the high seas are located where there is no territorial sovereignty.¹⁰⁵ U.S. maritime policy has always held that the "[a]ssurance that key sea and air lines of communication will remain open as a matter of international legal right."¹⁰⁶

Historically, the territorial jurisdiction of the United States extended for three miles from the shore.¹⁰⁷ President Reagan issued a proclamation extending the territorial sea of the United States to twelve miles from shore.¹⁰⁸ Most countries now follow this twelve-mile distinction. The twelve-mile limit includes the territorial sea, which extends to three miles from the coast, and the contiguous zone, which extends from three to twelve miles from the coast; the high seas lie seaward of the territorial sea.¹⁰⁹ When U.S. law enforcement agents forcefully abducted Fawaz Yunis, he was in international wa-

98. See *id.* at 436.

99. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand*, 398 F. Supp. 916.

100. See *id.*

101. *Id.* at 272.

102. 510 F.2d 62 (2d Cir. 1975).

103. See *id.* at 66-68.

104. 262 U.S. 100 (1923).

105. See *id.* at 123.

106. U.S. Dep't of Defense, National Security and Convention on the Law of the Sea 8 (1994).

107. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 441 (1989).

108. See Presidential Proclamation No. 5928, 3 C.F.R. 547 (1988).

109. See *United States v. Williams*, 617 F.2d 1063, 1073.

ters. As long as the U.S. vessel which was used in Yunis' abduction stayed beyond the twelve-mile limit of the coast of Cyprus, U.S. agents were in a high seas area and could not be said to be violating any local laws when luring Yunis onto their boat.

Futhermore, according to U.S. government officials in the *Yunis* case, extradition treaties are designed to protect the territorial sovereignty of nation states and promote global cooperation.¹¹⁰ The government contends that such sovereignty is threatened only when a foreign power enters another country for the purposes of abducting one of its residents. Since the United States never entered or invaded the sovereign territory of Lebanon or Cyprus when arresting the defendant, there was no reason to make an extradition request.

Whereas irregular rendition consists of unilateral action, no cooperation among states, no consent, and a violation of territorial sovereignty, luring criminal suspects into international waters is a different form of rendition since only one sovereign nation is involved in this type of action. Luring may not be the most efficient method to bring a suspect back to the requested state, but it does eliminate the potential offense of violating territorial sovereignty.

B. Informal Cooperative Efforts between States

States have sought to overcome the limitations placed on international law enforcement activities arising from the principle of territorial sovereignty by engaging in a discrete process of informal cooperation in matters dealing with extraterritorial crime and in apprehending fugitives.¹¹¹ When such cooperation is possible, no question of unilateral action even arises.¹¹² When one state allows the removal of a fugitive in its territory by agents of another state without legal process and outside the parameters of a formalized extradition treaty, then this is essentially a cooperative expulsion or deportation. This cooperative expulsion is an informal process that proves to be less offensive than irregular rendition and promotes cooperation and consensual, bilateral action on the part of all states involved. This method appears to be most effective in accomplishing its objectives while invoking no or little international opprobrium or state sponsored retaliation later on since both states were involved in the operation.

For example, on February 7, 1995, FBI agents and State Department diplomatic security officers apprehended fugitive Ramzi Ahmed Yousef in Islamabad, Pakistan.¹¹³ Pakistani officials turned Yousef over to U.S. agents and he was transported to the United States the following day where he was arraigned on charges relating to his alleged involvement in the February 26, 1993, World Trade Center bombing.¹¹⁴ In April of 1995, Yousef was indicted for conspiring to bomb Philippine Airlines Flight 434 and several other carriers transiting the Far East.¹¹⁵ This is an example of Pakistani and U.S. officials working discretely together to capture a suspected terrorist. Normal extradition procedures would not have been possible because Pakistan did not want to call attention to the fact that they were contributing to Yousef's rendition and transportation to the United States.

Due to unstable political conditions and the spread of Islamic fundamentalism, some countries in the Middle East do not want to be viewed as a U.S. partner in bringing terrorists to justice. These countries can ill afford the publicity and attention that a formal

110. See *Yunis*, 859 F.2d at 953.

111. See Barr Statement, *supra* note 92.

112. See *id.*

113. See U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES 7 (1995).

114. See *id.*

115. See *id.*

extradition process might create. However, many governments are willing to provide informal cooperation which is usually not made public and, therefore, conducted without the knowledge of any citizen group which might protest or oppose such actions. This type of cooperation usually results in either the informal surrender of a fugitive to U.S. authorities, or allowing U.S. agents to forcefully abduct a fugitive within its territory without interference, participation or protest.

The FBI is the lead agency which investigates acts of terrorism directed at Americans overseas. With the passage of new laws expanding the FBI's extraterritorial jurisdiction to combat international terrorism,¹¹⁶ the FBI has become more and more involved in overseas investigations of terrorist acts and threats. And after a presidential directive in May, 1999, the FBI has worked more intimately with intelligence agencies and the military in foreign counterintelligence operations targeting international terrorists.¹¹⁷

On the day of the bombings of U.S. embassies in Kenya and Tanzania on August 7, 1998, suspected terrorist Mohammed Sadiq Odeh passed through a Pakistani airport and was arrested by local authorities for carrying a false passport.¹¹⁸ After nearly a week of interrogation by Pakistani investigators, Odeh admitted that he had helped organize the Kenya bombing, gave key details of the plot, and confirmed that Osama bin Laden had directed and financed the bombings from his base in Afghanistan.¹¹⁹ This information led directly to several other arrests and the seizure of significant evidence in several countries.

The Pakistani government, which had never officially advised the U.S. government of Odeh's capture and interrogation, quietly deported him with U.S. assistance to Kenya.¹²⁰ It was in Nairobi that Kenyan authorities allowed FBI criminal investigators to interview Odeh.¹²¹ Once in the custody of U.S. officials, Odeh was granted his due process and constitutional guarantees since only information gained under procedures acceptable in a U.S. court can make its way into the indictments naming him, bin Laden and 14 others for their alleged roles in the embassy bombings.¹²²

Some have criticized the FBI for allowing Pakistani interrogators to use tactics that might not necessarily be permitted under the laws of the U.S. However, the U.S. has no jurisdiction over Pakistani police interrogators or their interview techniques; regardless of the legality or potential abuses of due process when Odeh provided his confession, any statements made by Odeh to Pakistani investigators would be inadmissible in U.S. courts. Due to the disparity among nations in both due process and the treatment of prisoners, it has been suggested that international human rights laws should regulate state-sponsored interrogations and abductions rather than allow each state to follow its own domestic policy.¹²³ In this instance, due to the cooperative efforts of Pakistani, Kenyan,

116. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, '2002(a), 98 Stat. 2186. See also The Omnibus Diplomatic Security and Antiterrorism Act of 1986, *supra* note 91.

117. See Robert Suro, *FBI's "Clean" Team Follows "Dirty" Work of Intelligence; Units Pool Facts on Sensitive Foreign Cases but Work Apart*, THE WASHINGTON POST, August 16, 1999 at A13.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. The Universal Declaration of Human Rights only states that everyone has "the right to life, liberty, and security of person" and that "no one shall be subjected to arbitrary arrest." G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), Article 3 & 9. The words "security of person" and "arbitrary arrest" have been interpreted to include kidnapping. See Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 12 (1997). "As a general rule, the prohibition of abduction has a legitimate rationale. Individuals should have the right to walk down the street without the fear of a foreign government kidnapping them for unknown reasons. However, under

and U.S. officials, bin Laden and other terrorists have been indicted in U.S. courts and will eventually be brought to justice.

Another example of cooperative rendition occurred in the Philippines. On April 22, 1995, Philippine authorities transferred Abdul Hakim Murad to FBI agents.¹²⁴ Philippine police found and arrested Murad after a fire broke out in a Manila apartment in which Murad, Ramzi Yousef, and another person were living.¹²⁵ Inside the apartment, Philippine officials noticed explosives and bomb making materials. Murad was then returned to the United States, and along with Ramzi Yousef, was charged with conspiring to bomb U.S. civil aircraft transiting the Far East.¹²⁶ Jordanian officials have also cooperated with U.S. authorities in the apprehension of suspected terrorists. On August 2, 1995, Jordanian authorities rendered Eyad Ismoil Najim, a Palestinian, to FBI custody.¹²⁷ Najim was charged with bombing and conspiracy violations in connection with the 1993 World Trade Center bombing.¹²⁸

One of the more famous cooperative expulsion cases was *Matta-Ballesteros v. Henman*.¹²⁹ U.S. Marshals, assisted by Honduran paramilitary troops, abducted a Honduran fugitive involved in drug trafficking from Honduras and brought him to the United States for trial. The Ninth Circuit dismissed the fugitive's appeal that his abduction from Honduras by U.S. agents violated the extradition treaty between Honduras and the United States; in addition, the court ruled against the fugitive who further claimed that the circumstances of his abduction and the treatment to which he had been subjected were sufficiently egregious that the court was divested of jurisdiction over him.¹³⁰ The court noted that the Supreme Court in *Alvarez-Machain* had been careful to state that an extradition treaty would only be violated if forcible abduction was specifically prohibited by the express terms of the treaty.¹³¹ There were no such express terms in the Honduras-U.S. Extradition Treaty, and thus, no violation of the extradition treaty.¹³²

Also, the court held it could exercise its "inherent supervisory powers" to order dismissal for only three reasons: "(1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring a conviction rests on appropriate considerations validly before a jury; (3) and to deter future illegal conduct."¹³³ The circumstances surrounding *Matta-Ballesteros*' abduction, while "disturbing," did not meet these criteria.¹³⁴ In light of *Alvarez-Machain*, the purported actions of the U.S. marshals had "violated no recognized constitutional or statutory rights."¹³⁵ The only circumstances in which the court could exercise its supervisory powers would be where the fugitive could demonstrate governmental misconduct "of the most shocking and outrageous kind," and the fugitive had not done so by saying he had

circumstances where crimes are horrendous enough to shock the international conscience, states must be able to balance the potential for human rights violations by abduction with the numerous human rights violations committed by notorious evildoers [like Osama bin Laden and infamous terrorists and narco-terrorists]. It is at this point, where the individual's violations far outweigh the violation of the abduction, that the abduction should be permissible and should not be considered a violation of human rights." *Id.* at 13 (emphasis added).

124. See TERRORISM IN THE UNITED STATES 7 (Counterterrorism Threat Assessment and Warning Unit, U.S. Department of Justice 1995).

125. See *id.*

126. See *id.*

127. See *id.* at 8.

128. See *id.*

129. 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990).

130. See *United States v. Matta-Ballesteros*, 71 F.3d 754, 762-63 (9th Cir. 1995).

131. See *id.* at 762.

132. See *id.*

133. *Id.* at 763 (citing *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)).

134. See *id.* at 763.

135. *Id.* at 763-64.

been immobilized by the use of stun guns.¹³⁶ Since there was no ground for the exercise of the court's supervisory powers, the court rejected the fugitive's jurisdictional objections and proceeded to affirm the district court's decision on substantive grounds.¹³⁷ The court's use of "shocking and outrageous" in language to describe possible misconduct on the part of U.S. officials, which if true would have benefited the defendant and provided cause to dismiss the case, sounded similar to the *Toscanino* due process exception already in place. A similar standard exists for U.S. domestic cases wherein the abuse of police authority or the flagrant violation of a suspect's rights by law enforcement agents will usually result in the dismissal of criminal charges pending against the defendant. Since domestic, both state and federal, and international due process procedures are essentially identical, it is not surprising that U.S. courts have demonstrated an unwillingness to validate the customary defense tactic utilized by most abducted fugitives when they claim that irregular rendition is both illegal and a violation of their human rights. On the contrary, criminal cases such as *Matta-Ballesteros* have demonstrated that cooperative expulsion is a valuable law enforcement tool which can be successful as long as a fugitive's human rights are not violated.

Most nations will offer to surrender fugitives to the United States out of comity, or choose to expel them for inadequate visas.¹³⁸ These forms of rendition prove to be faster and less expensive than the full extradition procedure.¹³⁹ The only states that have been unwilling to cooperate in apprehending suspected terrorists are recognized state sponsors of international terrorism: Iran, Iraq, Syria, Sudan, Libya, Cuba, and North Korea.¹⁴⁰ Diplomats from some of these countries have been involved in terrorist-related activities.¹⁴¹ They would not cooperate either through extradition or the less formal process of rendition. However, most other states are willing to expel suspected terrorists from their borders; since this cooperation is both voluntary and conducted by mutual consent between the governments of the countries involved in this action, cooperative expulsions are viewed, as both legal and appropriate by U.S. courts. And if the international community continues to harbor concerns that these forceful abductions violate a fugitive's human rights, an international law-making body like the U.N. should legitimize and regulate these abductions under certain conditions.¹⁴²

Hence, the international customary rule against forcible abductions is inapplicable to cooperative expulsions because there is active cooperation in the abduction by the injured or host state, and therefore, no possible protest by the injured state. These cooperative expulsions are effective methods of bringing a suspected terrorist back to a requesting state, especially when no extradition treaty exists between the two states involved.

C. Improving Foreign Relations while Improving the Extradition Process

There is no doubt that a positive effort to improve foreign relations between the U.S. and those countries which do not recognize uniform extradition procedures would help to limit future disagreements on both the need and justification for irregular rendition.

136. *Matta-Ballesteros*, 71 F.3d at 764 (citing *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980)).

137. *See id.* at 772.

138. *See* Richard Downing, *The Domestic and International Implications of the Abduction of Criminals from Foreign Soil*, 26 STAN. J. INT'L L. 573, 577 (1990).

139. *See id.*

140. *See Terrorism in the United States* 12 (Counterterrorism Threat Assessment and Warning Unit, U.S. Department of Justice 1995).

141. *See id.*

142. *See* Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1 (1997).

Diplomacy, cooperation, and mutually acceptable solutions to extradition issues will always be preferable to any unilateral action, such as the forceful abduction of fugitives by one state from the territory of another state.

1. Mexico

For example, after the *Alvarez-Machain* case, the Bush administration promised to refrain from future overseas abductions and promoted a policy of international cooperation.¹⁴³ With the signing of NAFTA in 1993, bilateral negotiations between U.S. and Mexican leaders resulted in the signing of the Transborder Abduction Treaty in 1994.¹⁴⁴ In return for an end to state-sponsored abductions, the U.S. government asked that Mexican officials consider extraditing their citizens to the United States upon request.¹⁴⁵ Previously, Article 9 of the United States-Mexican Extradition Treaty did not require either state to extradite its own citizens.¹⁴⁶ Unfortunately, the Transborder Abduction Treaty failed to specifically address the option to extradite under the Treaty, hence it gave Mexico no incentive to extradite its own nationals.¹⁴⁷ However, the signing of the Transborder Abduction Treaty does signify a renewed effort by both governments towards improvement of extradition policies. Possibly in the future, with greater trust and respect built between the two countries, the United States could renegotiate the Treaty to require extradition where all of the applicable grounds and procedures under the agreement apply in the particular circumstance.

Also, in order to adopt a more aggressive policy against drug trafficking and political corruption in Mexico, the U.S. President, according to Section 490(b) of the Foreign Assistance Act, must certify that Mexico has cooperated with the U.S. government or has taken adequate steps on its own to combat drug trafficking.¹⁴⁸ After President Clinton's decision to grant recertification to Mexico, the U.S. State Department claimed that Mexico's 1996 counter-drug measures yielded encouraging results and lauded the notable progress in bilateral cooperation.¹⁴⁹

Lastly, Mexico's policy on extradition has originated, in large part, from Article IV of the Mexican Constitution, which prevents the Mexican government from extraditing its own nationals.¹⁵⁰ Mexico's extradition policy seems to be slowly changing. The Mexican government expelled a Mexican citizen, Juan Chapa Garcia, to the United States in 1995 on charges of drug trafficking.¹⁵¹ And in April 26, 1996, Mexican President Zedillo broke precedent and authorized the extradition of two Mexican nationals to the United States, invoking the "exceptional circumstances" provision in Mexico's International Extradition Law to justify the extradition of its own nationals.¹⁵² Mexican authorities agreed to extradite six more suspects in 1997, including several for drug-

143. See Statement by Press Secretary Marlin Fitzwater on the Supreme Court Decision on the *Alvarez-Machain* Case, 28 WEEKLY COMP. PRES. DOC. 1063 (June 15, 1992).

144. See 139 CONG. REC. H6964 (daily ed. Sept. 23, 1993)(statement of Rep. Brown); 139 Cong. Rec. H6965 (daily ed. Sept. 23, 1993)(statement of Rep. Fields). Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., 31 U.S.T. 5059 (The Transborder Abduction Treaty has not been submitted to the U.S. Senate for Advice and Consent to Ratification.) [hereinafter Transborder Abduction Treaty].

145. See *id.*

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

147. See Kosmetatos, *supra* note 56, at 1104.

148. See Foreign Assistance Act, 22 U.S.C. § 2291 (1994 & Supp. 1997).

149. See 143 CONG. REC. S2581 (daily ed. March 20, 1997) (statement of Sen. Coverdell).

150. See Kosmetatos, *supra* note 56, at 1101.

151. See *id.* at 1102.

152. See *id.*

related offenses.¹⁵³ These extraditions seem to be small steps in the right direction and are evidence of a trend towards greater cooperation between both governments. The aftermath of *Alvarez-Machain* seems to have caused the United States to become more sensitive to relations between states, and particularly in Mexico, led to the signing of the Transborder Abduction Treaty, the ratification of NAFTA, the Clinton Administration's decision to re-certify Mexico for state aid in the fight against narcotics trafficking, and the Mexican government's willingness to extradite its nationals under an exceptional circumstances clause.

2. Colombia

In the case of Colombia, both improved relations and cooperation with the United States and domestic changes within Colombia led to the creation of a pro-extradition policy in Colombia. In the past, narco-terrorism definitely hindered any attempts to create extradition reform; Colombians generally viewed extradition as a violation of their sovereign authority.¹⁵⁴ But, after a serious crackdown on cartel leaders in the mid-to-late 1990s, the Colombian political and judicial systems gained renewed strength.¹⁵⁵ "New reform-minded politicians and jurists recognized that extradition might help solve Colombia's drug cartel problem."¹⁵⁶ By the late 1990s, many Colombian lawmakers reinterpreted extradition as a tool and not a renunciation of national sovereignty.¹⁵⁷ These reformers also recognized the global trend towards multilateralism in enforcing anti-drug policies.¹⁵⁸ In 1997, Colombia passed its new extradition law, which provides for the extradition of Colombian nationals, although Colombia still retains the principle of discretion.¹⁵⁹ Unfortunately, the new extradition law does not apply retroactively, and many feel this provision reflects months of drug cartel lobbying, bribery, and death threats on Colombian lawmakers.¹⁶⁰ Nevertheless, Colombia's president Samper praised the new law as a crucial step in the fight against drug cartels.¹⁶¹ At least the new law is one step in the right direction towards promoting bilateral cooperation, even if many Colombian drug traffickers already wanted on charges in the United States are exempt from the new law.

3. The Dominican Republic

Similarly, in the Dominican Republic, Dominican lawmakers began to understand that modern anti-drug enforcement required a reconceptualization of sovereignty that would accommodate the extradition of nationals.¹⁶² Meanwhile, the Dominican Republic's new president, President Fernandez, felt he could utilize extradition as a platform for garnering political power and could remove drug dealers who supported his political opponents.¹⁶³ Acknowledging that the threat posed by organized drug trafficking surpassed traditional notions of sovereignty, the Dominican Congress passed a law that would provide for extradition of nationals, specifically targeting drug-trafficking and drug-related offenses.¹⁶⁴ And, although the law also provides a great deal of discretion

153. See *id.*

154. See Warmund, *supra* note 15, at 2404.

155. See *id.* at 2406-07.

156. *Id.* at 2407.

157. See *id.*

158. See *id.*

159. See Acto Legislativo Numero 01 de 1997 (Colombia).

160. See Warmund, *supra* note 15, at 2420.

161. See *id.* at 2421-22.

162. See *id.* at 2416.

163. See *id.* & n. 295.

164. See Ley 278-98 del 29 de Julio de 1998 (Dominican Republic).

to the President over particular extradition decisions, again, as in Colombia and Mexico, it is a step in the right direction towards promoting bilateral cooperation in the fight against narco-terrorism.

4. *European States*

Not to be outdone by the pro-extradition movements in Latin America and the Caribbean, Europe, which, in the past, has been criticized as being soft on international terrorism compared to the United States' "no blackmail, no concessions" policy, is now moving towards multilateral cooperation and implementing joint counterterrorism initiatives.¹⁶⁵ The progress in consolidating the European Union may be a major factor in encouraging governments to take steps to abandon the rule of non-extradition of nationals, open its borders, and provide mutual legal assistance. The 1992 Treaty on European Union, the Maastricht Treaty, promoted legal cooperation by mandating the creation of a European Police Office (Europol) to facilitate cooperation between the national police forces of the European Union member states and also by providing a joint information-sharing system that covers a variety of crimes, such as illicit drug trafficking, money laundering, and terrorism.¹⁶⁶

This idea of cooperation seems to be working. In 1999, the same France that in 1977 refused a request for extradition for a PLO terrorist, arrested six leading members of the Basque separatist group, ETA, as well as, convicted six Libyans for the 1989 in-flight bombing of a French jetliner over Africa.¹⁶⁷ And in 1998, during the World Cup Soccer Games, Belgium, France, Germany, Italy, and Switzerland coordinated simultaneous police raids which led to the arrest of over 100 terrorists.¹⁶⁸ This operation claimed to have smashed three important terrorist logistical support networks.¹⁶⁹

These efforts of bilateral and multilateral cooperation among states reveal signs of significant improved relations in recent years among states. With improved relations can come discussions regarding the possible extradition of criminal suspects with states who previously had a strict non-extradition policy. If states keep working together and gain trust and mutual respect, irregular rendition will no longer have to be used as a tool to bring an offender into a country who wishes to prosecute him. Hence, both ideas of territorial sovereignty and protecting one's nationals abroad from acts of violence and terrorism will receive the same amount of respect. Increased cooperation among states is a better, more just resolution than irregular rendition.

D. *Overturning the Rule of Non-Extradition of Nationals*

Along the lines of improved cooperation among states, states must also emphasize reciprocity with each other, especially to those nations that lean toward non-extradition of their nationals. Back in ancient times, when there was a great amount of hostility between nations and tribes and disparities in the level of civilization, the surrender of a subject to a foreign state was practically exile, if not death.¹⁷⁰

But today, in this age of civilization, this ancient practice of non-extradition is no longer necessary or justified. While the arguments associated with extradition include "world legal order, fundamental justice, and the need to strengthen the international

165. See Hoffman, *supra* note 35, at 62.

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.*

170. See Plachta, *supra* note 24, at 81.

solidarity and spirit of cooperation in the suppression of criminality, the counter-arguments point almost exclusively to the domestic matters of a state."¹⁷¹ Those who oppose the extradition of their nationals should be asked to reevaluate their justification, reexamine its validity, and reconsider their further adherence to this rule.¹⁷²

There are many reasons why non-extradition of nationals does not bring about the most just outcome. Oftentimes, authorities of the requested state face insurmountable difficulties in conducting a criminal prosecution and trial; these difficulties are mainly due to evidentiary considerations.¹⁷³ The evidence is usually found in the territory where the offense occurred, not where the offender is from. Also, the state where the offense was committed usually has the primary interest in seeing the offender brought to justice, since they were the ones who were hardest hit by the offender's actions. Hence, it is more desirable to base the decision of whether to prosecute in the requested country or surrender the offender on mutual consultations between the appropriate authorities of the states involved. A general and rigid rule of refusing to extradite nationals would reduce the effectiveness of extradition to combat transnational crime.

Another option that is one that would allow the sentenced person to serve imprisonment in his home country, rather than be extradited to the country that imposed the sentence.¹⁷⁴ This would require both states to cooperate, and the requesting state would have to be willing to entrust the enforcement of a sentence imposed by its court with the authorities of the requested state. At the same time, the requested state has a duty to respect and enforce a judgment rendered by a foreign court. These basic ideas have been adopted in the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the Inter-American Convention on Extradition of 1981.¹⁷⁵

It will be interesting to see if the creation of the European Union will eliminate the rule of non-extradition among European states. Heading toward a step in the right direction, the participants in the 1989 International Conference on Extradition in Siracusa, Italy challenged and criticized the rule of non-extradition as being incompatible with the fundamental premises of justice and extradition.¹⁷⁶ The most recent proposal was adopted in 1997 by the U.N. Commission on Crime Prevention and Criminal Justice, and it was agreed that in the long term, states should work towards the elimination of the ground for refusal based on the nationality of the requested person.¹⁷⁷

E. United Nations Security Council Resolutions in Support of Extradition

In addition to the existing conventions which already support extradition, in 1992, the United Nations Security Council adopted two resolutions regarding a state which refused to cooperate with other states to apprehend criminal suspects and submit all evidence gathered.¹⁷⁸ Libya refused to extradite two of its nationals who had been accused of planting the bomb which caused the mid-air explosion of Pan Am Flight 103 over Lockerbie, Scotland, and was determined not to submit all the evidence gathered after an extensive three-year investigation. With Resolution 748, the Security Council

171. *Id.* at 86.

172. *See id.* at 79.

173. *See id.* at 123.

174. *See id.* at 138.

175. *See* U.N. E/CONF. Doc. 82/15, reprinted in 28 I.L.M. 493 (1989); *See* OEA/Ser. A/36, reprinted in 20 I.L.M. 723 (1981).

176. *See* Plachta, *supra* note 24, at 92.

177. *See* U.N. Doc. E/CN.15/1997/L/16/Rev.1, at 6.

178. *See* Joint Declaration of the United States and the United Kingdom, U.N. Doc. S/23308 (1991), reprinted in 31 I.L.M. 723 (1992).

urged Libya to respond fully to the lawful requests of the United States, United Kingdom, and France, and also imposed economic sanctions on Libya.¹⁷⁹

When Libya brought the case before the International Court of Justice seeking measures to prevent the United States or United Kingdom from compelling Libya to hand over the two criminal suspects, the Court confirmed the validity and binding force of Resolution 748.¹⁸⁰ A possible interpretation of the Security Council's involvement in Lockerbie could be that the Security Council is not only upholding the existing extradition system, but also supplementing the system with the recourse to intervene in exceptional situations, especially where the traditional treaty model proves unworkable.

The Court's approval of Resolution 748 takes precedence over any other international agreement, and in essence, makes the choice between extradition and prosecution and chooses extradition. This increased cooperation among the member states of the U.N. to come to the just resolution of extradition to bring those criminal offenders to justice demonstrates the world's commitment to see extradition become even more common. The Security Council's resolutions on extradition and similar rulings by the International Court of Justice will allow those countries who before had strict policies against the extradition of nationals, to support the idea of extradition of all persons.

F. Stricter Extradition Treaties

While trying to convince those countries who refuse to extradite to adopt a less strict policy of non-extradition, states must also revise existing extradition treaties to reflect increased cooperation among the states. States should require extradition when all of the applicable grounds and procedures under the agreement apply in the particular circumstance. The treaty must be tight enough to ensure prosecutors that they can recover criminals who flee, or at least that the laws of either state will be followed. And, states must not forget to contemplate good faith and mutual cooperation in the exchange of criminal offenders.

A formula that has been employed to accommodate conflicting laws and policies under extradition is the "optional clause," which the Foreign Office explains that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."¹⁸¹ An optional clause does not express a decision to surrender, but rather provides discretion not to surrender.¹⁸²

Such a formula has been included in several extradition treaties in recent years, such as in Great Britain and Canada.¹⁸³ The Mexican Supreme Court interpreted the optional clause as not prohibiting, but authorizing, the parties to surrender their own citizens according to their discretion.¹⁸⁴ Chief Justice Vallarta pointed out that if it had been the intention of the signatory states to prohibit their authorities from surrendering their own citizens, then they would have employed a clearer meaning, expressly stating that the citizens of either state are exempted from the obligation to extradite.¹⁸⁵ This optional clause allows those states which are not comfortable with extradition of its nationals, but

179. See S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/23574 (1992), reprinted in 31 I.L.M. 731 (1992); S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992), reprinted in 31 I.L.M. 749 (1992).

180. See *Libyan Arab Jamahiriya v. United Kingdom*, 1992 I.C.J. 3 at 90-91.

181. Plachta, *supra* note 24, at 143.

182. See *id.*

183. See *id.*

184. See *id.* at 143-44.

185. See *id.* at 144.

agree in principal on the need for extradition under certain circumstances, to be more flexible by showing a willingness to surrender a subject to a foreign power while still maintaining the discretion to refuse extradition.

VI. Conclusion

The need for irregular rendition is simply not as necessary as it was in the 1980s and early 1990s. The examples of Mexico, Colombia, the Dominican Republic, and Europe show that states are increasingly working together to solve the problems of international crime, especially those as troubling and as prevalent as terrorism and narco-terrorism. Nations must cooperate in international investigations to tackle terrorist acts.

The focus should be on identifying, apprehending, and presenting for the prosecution the criminal offender, and less importantly, where the offender will be prosecuted. Luring suspected terrorists into international waters and apprehending fugitives through cooperative efforts among states are viable and less offensive options than the traditional irregular rendition method of forcibly abducting a criminal offender from one nation by agents of another nation.

Besides other proposals such as greater cooperation, improved overall relations, resolutions passed by the U.N. Security Council, and revising current extradition treaties, it is also important to note that any change must come from within the country which has refused extradition in the past. In Colombia and the Dominican Republic, the changes in their extradition policies started with the general public and the legislative bodies, who were tired of the hold the narco-terrorists have had over the entire country. Countries, such as the United States, need to encourage states with non-extradition policies to reevaluate themselves, while simultaneously providing them with the respect and trust these countries need to take their own judicial, legislative, or executive issues into their own hands. This type of approach will prove to be more effective than irregular rendition, although the need for irregular rendition in rare circumstances will most likely survive. Luring, cooperative expulsion, and other approaches mentioned are all needed to fight international terrorism.

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