Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and Its Alternatives

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CHALLENGES TO INTERNATIONAL LAW ENFORCEMENT COOPERATION FOR THE UNITED STATES IN THE MIDDLE EAST AND NORTH AFRICA: EXTRADITION AND ITS ALTERNATIVES

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I. INTRODUCTION

In the wake of the September 11, 2001 terrorist attacks, locating, apprehending and surrendering (or prosecuting) criminals is playing an obvious and more significant role for the United States and those countries within the Middle East and North Africa with which the United States historically has not maintained active bilateral law enforcement relationships.1 Newspapers and other publications are replete with stories that highlight governments' efforts to ensure that fugitives, particularly those associated with terrorism, terrorist financing and narco-terrorism, are brought to justice or, alternatively, that impunity is confronted where the fugitive is found.2

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1. For purposes of this Article, the Middle East and North Africa includes those countries of the Levant (including Israel, though, as noted below, not a country of focus for this Article), Iran, Iraq, those of the Arabian Peninsula and African countries bordering the Mediterranean Sea. Israel is not a focus of this Article because the law enforcement relationship between the United States and Israel is not typical of those between the United States and other countries within the region. When possible, references to Palestine (West Bank and Gaza) are included. "Bilateral law enforcement relationships" refer to routine police-to-police or prosecutor/investigating judge-to-prosecutor/investigating judge communication concerning ordinary criminal or criminal-related process between the United States and a particular country. Whether and to what extent the United States and a particular country might communicate outside law enforcement channels is beyond the scope of this Article.

In a part of the world where bilateral extradition treaties with the United States are few and lack vigor, efforts to locate, apprehend and surrender fugitives face many challenges. Highlighting those challenges and drawing attention to appropriate alternatives is the focus of this Article. The first section will draw attention to the United States' bilateral law enforcement relationships within the Middle East and North Africa before September 11 and highlight noteworthy changes that have taken place since that time. It will also focus on extradition between the United States and countries within the region. In the second section, the Article will identify alternatives to extradition and the role they can play between the United States and other countries in the region, regardless of the existence of a treaty. The final section will focus on considerations the U.S.


5. For further discussion of the United States' bilateral law enforcement relationships in the Middle East and North Africa before and after September 11, see infra notes 9-18 and accompanying text.

6. For further discussion of extradition treaties between the United States and countries in the Middle East and North Africa, see infra notes 19-64 and accompanying text.

7. For further discussion of alternatives to extradition between the United States and countries in the Middle East and North Africa, see infra notes 65-113 and accompanying text.
government and governments in the region might wish to draw on to promote bilateral law enforcement relationships between and among themselves to facilitate fugitive location, apprehension and return. 8

II. BACKGROUND

Before the terrorist attacks on New York City and Washington, D.C., the bilateral law enforcement relationship between the United States and Middle Eastern and North African countries was limited at best. 9 U.S. law enforcement agencies with overseas offices, such as the Federal Bureau of Investigation (FBI), 10 the Drug Enforcement Administration (DEA) 11 and

8. For further discussion of possibilities to promote bilateral law enforcement relationships in the Middle East and North Africa, see infra notes 114-32 and accompanying text.


10. The Federal Bureau of Investigation (FBI) presence overseas is well-documented. See, e.g., FBI, Your Local FBI Office/Legis (noting that FBI has forty-eight country offices and six sub-offices with law enforcement cooperation responsibility in fifty-two countries, including Egypt, Israel, Jordan, Saudi Arabia and United Arab Emirates), at http://www.fbi.gov/contact/legat/legat.htm (last visited Jan. 26, 2005); FBI, The FBI Workforce/By the Numbers (reporting that more than two hundred agents and support staff serve in attaché offices overseas), at http://www.fbi.gov/page2/aug04/workforce082504.htm (last visited Jan. 26, 2005). State Department diplomatic agents are also posted throughout the region.


11. Although the Drug Enforcement Agency (DEA) office in Cairo is the DEA's exclusive physical representation in the Middle East and North Africa, it
the Bureau of Immigration and Customs Enforcement12 (BICE, the successor agency to the U.S. Customs Service) had practically no physical representation in the Middle East and North Africa; other law enforcement agencies had none. The FBI had offices with defined oversight in Cairo, Egypt and Riyadh, Saudi Arabia, but its offices in Paris, France and Athens, Greece otherwise shared principal oversight over the region.13 Police communications outside represented agencies often took place on case-specific investigations through Interpol, and prosecutorial/investigating judge contacts tended to be specific to particular investigations and prosecutions.14

Needless to say, the United States' approach to law enforcement within the region is receiving greater focus.15 The FBI, for instance, has expanded its representation in the Middle East and North Africa. In addi-


13. The FBI also maintained an office in Tel Aviv, Israel, whose jurisdiction also included Amman, Jordan. That has since changed. The FBI office in Amman, Jordan, now has oversight responsibility for Jordan, Lebanon and Syria. Pre-September 11 issues in the region that fell under no specific regional office were handled by the FBI's office in Rome, Italy.

14. Interpol is an inter-governmental organization dedicated to disseminating police information among its member states. See generally Interpol, at http://www.interpol.int (last visited Jan. 26, 2005). Its constitution in part explains that the mission of Interpol is to "ensure and promote the widest possible mutual assistance between all criminal police authorities with the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights." Interpol, Const. art. 2, available at http://www.interpol.int/Public?ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp#gp (last visited Jan. 26, 2005). This is accomplished through an information exchange network of the National Central Bureaus of each of the member countries. The United States' is called the U.S. National Central Bureau (USNCB), and all countries in the Middle East and North Africa are members of Interpol and have their own National Central Bureau. See 22 U.S.C. § 263a (2004) (providing statutory authority for USNCB); see also U.S. Dep't of Justice, U.S. Nat'l Cent. Bureau of Interpol, Point of Contact for International Law Enforcement (underscoring liaison role of USNCB), at http://www.usdoj.gov/usncb/usncb/org/mission.html (last visited Jan. 26, 2005).

tion to Cairo, Egypt and Riyadh, Saudi Arabia, the FBI reports that it has offices in Amman, Jordan, Sanaa, Yemen and Abu Dhabi, United Arab Emirates. Soon, it will add personnel in these locations and open new offices in Tunis, Tunisia and Kuwait City, Kuwait. BICE is now represented in Abu Dhabi. Although DEA representation has not changed physically in the region, efforts to focus on narco-terrorism within the region have.

III. EXTRADITION

Though police cooperation has changed in the wake of September 11, bilateral extradition relationships have not. Before September 11, the United States had bilateral extradition treaties with Egypt, Iraq and Jordan. These countries remain the United States' only extradition partners in the region.

The extradition treaty with Egypt is one of the oldest bilateral extradition treaties in force for the United States. It is captioned in the name of the Ottoman Empire, but neither country has disavowed its viability.


17. See supra note 12 (identifying BICE offices abroad, including Abu Dhabi); see also BICE, Iraqi Heritage: ICE Operations in Iraq (highlighting BICE activities in Middle East, particularly Iraq), at http://www.ice.gov/graphics/investigations/iraqi_heritage.htm (last visited Jan. 26, 2005).


The treaty is a list treaty, including eight crimes or categories of crimes for extradition. Because it is a list treaty, extradition cannot be sought for many classes of crimes, such as terrorism-related crimes, unless an alternative basis permits extradition. For instance, if Egypt were to seek an individual's return to stand trial for financial crimes generically, the treaty in its current form would unlikely accommodate a request from the petitioning state. If the financial crime were linked to narcotics or narco-terrorism, the requesting state could rely on Article 6(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as a basis to solicit the fugitive's return because both the United States and Egypt are a Party to that Convention, which incorporates crimes identified in the Convention into the bilateral extradition treaty.

States have had extradition treaty in place since 1870s), available at http://www.state.gov/g/inl/rls/nrcrpt/2003/voll/html/29839.htm.


23. Article II of the treaty enumerates the crimes or categories of crimes for which extradition can be sought: (1) murder; (2) attempted murder; (3) other violent crimes, such as rape, arson, piracy, mutiny; (4) burglary; (5) forgery (the utterance of forged paper, counterfeiting of public, sovereign or government acts); (6) fabrication or circulation of counterfeit money; (7) embezzlement of public moneys; and (8) embezzlement of employer. U.S.-Egypt Extradition Treaty, supra note 20, art. II.


Once Egypt (and other treaty partners) becomes a Party to the United Nations Convention for the Suppression of Terrorist Financing, the extradition for offenses covered under that treaty could be sought as well. See United Nations Convention for the Suppression of Terrorist Financing, Jan 10, 2000, art. 11, 39 I.L.M. 268 ("The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States
Under the terms of the treaty, nationality can be a bar to extradition (though the Egyptian Constitution apparently does not preclude the prohibition of Egyptian nationals). Waiver or simplified extradition are not expressly provided for in the treaty. Nor does the treaty contain a provisional arrest provision. Specialty, however, is included in the treaty. Notwithstanding the treaty's longevity, apparently neither country has invoked the treaty to seek a fugitive's extradition.

The treaty with Iraq dates to 1934. It, too, is an old list treaty, identifying twenty-five crimes or categories of crimes for extradition. For obvious reasons, it had not been used before September 11, and neither Party has endeavored to use it since the Coalition's departure in June 2004.

25. See U.S.-Egypt Extradition Treaty, supra note 20, art. VI (obligating neither party to "deliver up its own citizens," though not foreclosing choice to do so).


27. Some extradition treaties include a provision that enables a fugitive to forego extradition proceedings or consent to extradition summarily. See U.S.-Jordan Extradition Treaty, supra note 20, art. 17 (providing basis to waive extradition); U.S.-Mexico Extradition Treaty, supra note 22, art. 18 (establishing basis for simplified extradition).

28. Authority to provisionally arrest enables a requested state to take a fugitive into custody under urgent circumstances and places the requesting state under a treaty-specified deadline to provide supporting documents. See 18 U.S.C. § 3184 (2004) (empowering judicial authority to issue warrant for arrest of individual found in its jurisdiction who is believed to have committed extraditable offense); U.S.-Jordan Extradition Treaty, supra note 20, art. 11(4) (providing for fugitive's provisional arrest); Warner, supra note 4, at 175 n.35 (discussing provisional arrest and highlighting question of probable cause in provisional arrest context); see also Thomas G. Snow, The Investigation and Prosecution of White-Collar Crime: International Challenges and the Legal Tools Available to Address Them, 11 WM. & MARY BILL RTS. J. 209, 221 n.41 (2002) (same).

29. One facet of the Rule of Specialty precludes a requesting state from prosecuting or punishing a fugitive for crimes other than those for which extradition was sought and granted. See U.S.-Egypt Extradition Treaty, supra note 20, art. III (providing that "the person or persons delivered up for the crimes enumerated in the preceding article shall in no case be tried for any ordinary crime committed previously to that for which his or her surrender is asked"); see also infra note 86 (discussing specialty).

30. One explanation might focus on the futility of seeking recourse under a treaty that identifies so few crimes or classes of crimes. Another might reflect the previously limited engagement between the United States and Egypt on international law enforcement cooperation matters. A third might be grounded on the kinds of challenges any extradition would inevitably generate. In any case, neither Party has made much, if any, use of the treaty since its entry into force.

31. See U.S.-Iraq Extradition Treaty, supra note 20, art. II (specifying crimes, such as murder, attempted murder, rape, arson, crimes committed at sea, burglary, robbery, forgery, embezzlement, kidnapping, larceny, perjury or subornation of perjury, fraud and bribery).

32. Coalition refers to the Coalition Provisional Authority, a military authority that administered Iraq after the U.S.-led intervention toppled the regime of Sad-
Extradition of nationals is discretionary under the treaty (and Iraq's current constitution does not prohibit the extradition of Iraqi nationals). Waiver and simplified extradition are not included in the text of the treaty. Provisional arrest is contemplated under the treaty, as is the rule of specialty.

The U.S.-Jordan Extradition Treaty is clearly the most contemporary of the three. It contains a dual criminality clause to permit the extradition for any offense that is a crime and punishable by a prison sentence of more than one year in both countries. Provisional arrest is contem-
plated under the terms of the treaty, as well as temporary and deferred surrender, specialty and waiver of extradition proceedings. Unlike the other two treaties, the Parties cannot invoke nationality as a basis to refuse extradition. Neither U.S. nor Jordanian law bars the extradition of nationals. Though clearly the most legally flexible of the three treaties, the U.S. government reports that the treaty has been used only once since it entered into force.

Notwithstanding the absence of bilateral extradition treaties between the United States and other countries within the region, domestic laws can provide a basis to extradite fugitives—particularly to rather than from

request even if the latter offense is punishable by deprivation of liberty for one year or less, provided that all the other requirements for extradition are met.

For major crimes, such as murder, kidnapping and robbery, the dual criminality standard is generally met without difficulty. Where crimes simply are not yet defined, such as cybercrime and cybersecurity, an alternative basis for the fugitive's return must be pursued.

38. See id. art. 11(1) (providing that provisional arrest request "may be transmitted through the diplomatic channel or directly between the Department of Justice in the United States and the Ministry of Justice in the Hashemite Kingdom of Jordan" and explaining that "facilities of the International Criminal Police Organization (INTERPOL) may be used to transmit such a request"). A fugitive can be provisionally arrested for two months, with the possibility of a month extension. See id. art. 11(4) (providing that "60 days can be extended an additional 30 days").

39. See id. art. 13 ("If the extradition request is granted in the case of a person who is being proceeded against or is serving a sentence in the Requested State, the Requested State may temporarily surrender the person sought to the Requesting State for the purpose of prosecution . . .").

40. See id. art. 16 (identifying conditions relevant to specialty and its waiver).

41. See id. art. 17 ("If the person sought consents to surrender to the Requesting State, the Requested State may surrender the person as expeditiously as possible without further proceeding under this treaty.").

42. See id. art. 3 ("If all conditions in this Treaty relating to extradition are met, extradition shall not be refused based on the nationality of the person sought.").

43. Section 3196 of Title 18 of the U.S. Code states: If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met. 18 U.S.C. § 3196 (2004).


45. See Frank Main, Tunisia Returns Longtime Fugitive in Sex Abuse Case, CHI. SUN-TIMES, Jan. 25, 2004, at 3 (reporting extradition of fugitive to United States "under the North African country's domestic extradition laws").
the United States. The requirements for extradition pursuant to a domestic law often mirror the requirements set forth in a bilateral or multilateral treaty and the domestic process under that law to effect the fugitive's return is practically identical. Tunisia, for instance, requires receipt, through diplomatic channels, of a certified copy of the charging

46. With very limited exception, the United States can only extradite pursuant to a treaty. See 18 U.S.C. § 3181(a) (2004) (providing for surrender of persons to requesting state "only during the existence of any treaty of extradition with such foreign government"); id. § 3184 (conditioning authority to arrest fugitive in United States on "treaty or convention for extradition between the United States and any foreign government"); see also Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (affirming that "the legal right to demand [ ] extradition and the correlative duty to surrender [a fugitive] to the demanding country exist only when created by treaty").

As an exceptional measure, U.S. law contemplates the extradition of certain individuals from the United States on the basis of comity. Section 3181(b) of Title 18 of the U.S. Code states:

The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that—

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and (2) the offenses charged are not of a political nature.


Section 16 of Title 18 of the U.S. Code states:
The term "crime of violence" means—
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.


Extradition pursuant to comity, however, applies to the return of third country nationals. See 18 U.S.C. § 3181(b). It does not apply to citizens, nationals (as defined in Section 1101(a)(22) of Title 8 of the U.S. Code) or permanent residents of the United States. See 8 U.S.C. § 1101(a)(22) (2004) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

A fugitive can also be extradited to an international war crimes tribunal. See Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda, Pub. L. No. 104-106, § 1342, 110 Stat. 486 (1996) (providing that extradition provisions of Title 18 of U.S. Code "shall apply in the same manner and extent to the surrender of persons" to two international tribunals).

document and warrant, the text of the offenses with applicable penalty provisions, the text of the statute of limitations and identification information (in the form of photograph and, if available, fingerprints). Once received by the Foreign Ministry and accepted by the Ministry of Justice, a particular court in Tunis then determines whether the requesting country has provided sufficient material to show that an extraditable offense was committed or that the fugitive was convicted of an otherwise extraditable offense and that the person sought is the likely perpetrator or convict. If the court concludes that the material is sufficient, then the Executive decides, in its discretion, whether to deliver the individual to the requesting state. Otherwise, the court's conclusion is final and the fugitive is released.

Tunisian law does not prescribe a particular period of time to complete this process.

Even assuming a viable extradition relationship, pursuing extradition often generates challenges. The offense for which extradition is sought may not be "covered" under a list treaty or the elements of the offense for which extradition is sought may not mirror the same or similar offense in

48. See Tunisian Code of Criminal Procedure, supra note 47, art. 316 (stating information Tunisia requires from requesting country).
49. See id. arts. 317-18 (indicating how court reviews potential extradition).
50. See id. (stating what court does if material is sufficient for extradition).
51. See id. art. 323 (stating that court's decision is final and fugitive is released if it decides material is insufficient for extradition).
52. See id. arts. 308-35 (providing no prescribed period for process).
53. In the United States, extradition proceedings are akin to probable cause hearings and are considered quasi-criminal. The detainee is regularly appointed counsel, but other rights afforded a criminal defendant, such as bail, are unavailable to fugitives facing extradition. See Wright v. Henkel, 190 U.S. 40, 62 (1903). In Wright, the Court stated:

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

Id.

Since Wright, courts have crafted a special circumstances exception to this rule, but courts have rarely invoked this exception. See, e.g., In re Requested Extradition of Terence Damien Kirby, 106 F.3d 855, 863-64 (9th Cir. 1997); In re Extradition of Yechiel Heilbronn, 773 F. Supp. 1576, 1581-82 (W.D. Mich. 1991).

Moreover, the fugitive has no right to speedy trial, discovery or even cross-examination of witnesses testifying at the hearing. The fugitive may seek to describe the information before the judge, but otherwise, the fugitive's right to present evidence is limited. See Wright, 190 U.S. at 60-62.
the requested country. In these cases, the requested country will give particular scrutiny to the underlying facts and circumstances alleged in the request. Other challenges might be grounded in procedure, such as whether a statute of limitations to prosecute or serve a sentence has run. Criminals often espouse an argument to claim that an offense is political or that the request is politically motivated.

A country's legal system may impose extra-treaty requirements, often based on a constitutional norm. The U.S.-Egypt Extradition Treaty, for instance, provides that the "President of the United States, or the proper executive authority in [Egypt], may then issue a warrant for the apprehen-

54. Nomenclature often differs for financial offenses, and countries tend to approach conspiracy—as an offense—differently from the United States.

55. See U.S.-Jordan Extradition Treaty, supra note 20, art. 2(3). Article 2(3) reads:

For purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology; or (b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

Id.

56. The U.S.-Egypt Extradition Treaty is silent on this point. The U.S-Iraq Extradition Treaty bars extradition "when from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the crime for which the surrender is asked." U.S.-Iraq Extradition Treaty, supra note 20, art. V. The U.S.-Jordan Extradition Treaty takes a completely distinct approach, precluding the requested state from considering its or the requesting state's statutes of limitation. See U.S.-Jordan Extradition Treaty, supra note 20, art. 6 ("The decision whether to grant the request for extradition shall be made without regard to provisions of the law of either Contracting State concerning lapse of time."); Cf. U.S.-Mexico Extradition Treaty, supra note 22, art. 7 (providing that "[e]xtradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party") (emphasis added). Algerian, Moroccan and Tunisian domestic extradition laws follow this principle. See Algerian Code of Criminal Procedure, supra note 47, arts. 612-617; Moroccan Extradition Law, supra note 47, arts. 689-691, at 158-59; Tunisian Code of Criminal Procedure, supra note 47, art. 312.

57. All three bilateral treaties in the region contain a political offense exception. See, e.g., U.S.-Egypt Extradition Treaty, supra note 20, art. III (providing that "treaty shall not apply to any crime or offence of a political character"); U.S-Iraq Extradition Treaty, supra note 20, art. III (including "provisions of this Treaty shall not import claim of extradition for crimes of a political character"); U.S-Jordan Extradition Treaty, supra note 20, art. 4(1) ("Extradition shall not be granted if the offense for which extradition is requested is a political offense.").

Even if the fugitive does not espouse a political offense or make a claim that the request is politically motivated, the requested country may make the case on the fugitive's behalf. Political motivation is also often raised in public corruption cases. See World in Brief, Mexico City, Wash. Post, Sept. 3, 2004, at A13 (reporting extradition of Rogelio Montemayor, "the disgraced former head of Mexico's state oil monopoly, Pemex, to face corruption charges in his homeland").
sion of the fugitive, in order that he may be brought before the proper judicial authority for examination." Nevertheless, under U.S. law, a competent court—not the Executive—determines whether probable cause exists to issue a warrant and, if appropriate, orders that the warrant be issued.

Notwithstanding the inevitable challenges associated with extradition, the Rule of Non-Inquiry offers those governments that can seek extradition from the United States motive to solicit surrender through a treaty. The Rule of Non-Inquiry narrowly limits what a U.S. court can analyze in an extradition proceeding. Under the Rule, "courts refrain from investigating the fairness of a requesting nation’s justice system and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country." Courts have considered creating an exception to the Rule, an exception courts will certainly continue to consider as fugitives face possible return to a region of the world where efforts to promote legal reform face challenges. A viable Rule of Non-Inquiry, however, ensures that the Secretary of State can continue to make the foreign policy decision whether to extradite a fugitive to a particular country, provid-

58. See U.S.-Egypt Extradition Treaty, supra note 20, art. V.
59. Section 3184 of Title 18 of the U.S. Code states: Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, . . . issue [a] warrant for the apprehension of the person so charged [with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention], that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.


What is required to obtain a warrant in the context of a provisional arrest request has received greater scrutiny. See Parretti v. United States, 122 F.3d 758, 773, op. withdrawn en banc, 143 F.3d 508 (9th Cir. 1998) (questioning standard to obtain provisional arrest). But the premise itself—the government’s ability to detain an international fugitive while awaiting supporting documents from the requesting State—has withstood challenge. See United States v. Wiebe, 733 F.2d 549, 553-54 (8th Cir. 1984) (affirming basic legitimacy of provisional arrest).

60. The Rule of Non-Inquiry refers to the judicially-created principle that reserves questions of procedures and treatment of the prospective extraditee to the executive. See United States v. Kin-Hong, 110 F.3d 103, 120 (1st Cir. 1997) (explaining rule); In re Extradition of Manzi, 888 F.2d 204, 206 (1st Cir. 1989) (same).

61. See Kin-Hong, 110 F.3d at 120 (internal quotes and citations omitted); id. at 109-10 (recognizing foreign policy considerations rather than considerations particular to individual facing extradition).


63. See Kin-Hong, 110 F.3d at 111 ("It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in
ing the U.S. government with necessary flexibility as it seeks to advance law enforcement cooperation efforts throughout the region. 64

IV. ALTERNATIVES TO EXTRADITION

Because extradition treaties with the United States in the region are few and lack vigor, alternatives to extradition must be considered to ensure that fugitives are brought to justice and that impunity is combated. 65

A criticism of employing alternatives to surrender fugitives is that other vehicles are irregular or disguise extradition. The duty to surrender, or _dedere_, however, does not foreclose a broader interpretation that includes alternatives to extradition, especially in the absence of an extradition treaty or in light of a treaty or domestic extradition legal impediment to return a fugitive. 66

Accepting the narrower interpretation means that

64. Cf. _Cornejo-Barreto v. Siefert_, 218 F.3d 1004, 1012-13 (9th Cir. 2000) (providing fugitive with opportunity to challenge Secretary's decision to surrender "when asserting prospective likelihood of torture, if extradited"). Ramiro Cornejo-Barreto, a Mexican national and lawful permanent U.S. resident, was the subject of an extradition request from Mexico. _Id._ at 1007. Mexico solicited Cornejo-Barreto's return so he could stand trial for murder and other crimes. _Id._ A magistrate judge certified Cornejo-Barreto for extradition. _Id._ at 1008. Cornejo-Barreto appealed, seeking habeas relief from the district court. _Id._ In his petition, Cornejo-Barreto made multiple arguments, including that extraditing him to Mexico would violate United States' obligations under the Convention Against Torture. This is the sole claim he asserted on appeal before the Ninth Circuit. _Id._ at 1009. He argued that federal implementing legislation for the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or, in the alternative, the CAT itself superseded the Rule of Non-Inquiry and accordingly prohibited the United States from surrendering him to Mexico. _Id._ The Ninth Circuit affirmed the finding of extraditability, but also found that the federal law implementing the CAT provided the court a basis to review the Secretary of State's surrender warrant, if he in fact were ordered surrendered. _Id._ at 1012-17.

The Secretary of State subsequently issued the surrender warrant against Cornejo-Barreto and legal challenges ensued. Appeals were withdrawn and decisions arising from the legal challenges were vacated. See _Cornejo-Barreto_, 379 F.3d 1075 (9th Cir. 2004), _rehearing granted en banc_, 386 F.3d 938 (9th Cir. Oct 19, 2004), _and opinion vacated on rehearing by_, 389 F.3d 1307 (9th Cir. Nov. 19, 2004).

Notwithstanding the above, courts have not denied an extradition based on a humanitarian exception or a finding that procedures or punishments an extradite might face are "so antipathetic to a federal court's sense of decency as to require reexamination" of the Rule of Non-Inquiry. _Cornejo-Barreto_, 218 F.3d at 1010 (citations omitted).

65. See Warner, _supra_ note 4, at 172-74 (favoring alternatives to extradition for apprehending and returning white-collar fugitives).

66. See Colleen Enache-Brown & Ari Fried, _Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law_, 43 McGill L.J. 613, 625-26 (1998) ("Even in the cases in which no extradition treaty has been signed between the host state and the state requesting the return of the alleged offender, an obligation on the part of the host state to take action is present."). Moreover, the argument assumes that _dedere_ embodies a particular notion of pro-
criminals can find safe haven in those countries where a bilateral extradition relationship with the United States does not exist or an impediment under a treaty or domestic extradition law arises. Even assuming a treaty basis to extradite, governments' pursuing these acts in the first instance can ensure a fugitive's more immediate return. An immediate return manifests an asylum state's desire to deny safe haven to international fugitives and concomitantly promotes collective action to combat impunity directly.

Cases demonstrate that fugitives—particularly fugitives with ample resources—exploit multiple means to evade justice. To limit fugitives' mobility, governments need to ensure that legal mechanisms are in place to frustrate or impede fugitives' travel. These mechanisms should include denying or revoking a visa or passport. Denying or revoking a visa may


68. For examples, see infra note 85; see also Laflin, supra note 67, at 329 ("These forms of rendition prove to be faster and less expensive than the full extradition procedure.").

69. See Enache-Brown & Fried, supra note 66, at 629-30. The authors argue: If the principle of aut dedere aut judicare is not considered a norm in international law, what results is the unlikelihood of punishment of a perpetrator of a universally condemnable crime where the host state is not a party to a treaty which contains an obligation to take action. The obligation to take action is a condition precedent for any criminal legal system's validity, particularly in respect of the validity of a given prohibition. Id. at 631-32.

70. See Warner, supra note 4, at 171 (illustrating complexities of bringing white-collar fugitives to justice). Two major white-collar fugitives from Mexico are Oscar Espinosa Villarreal, who fought extradition in Nicaragua, and Carlos Cabal Peniche, who fought extradition in Australia. See id. at 171 n.2 (noting examples).

71. Mechanisms also include border security measures. See, e.g, 9/11 COMMISSION REPORT, supra note 15, at 564 n.36 (drawing attention to biometrics); Many Get Reprieve Over Passports, WASH. POST, Oct. 23, 2004, at A4 (reporting that millions of visitors will receive one-time reprieve should they seek to enter without passports that are now required to be scannable); Sylvia Moreno, Border Security Measures to Tighten Next Month, WASH. POST, Oct. 15, 2004, at A21 (reporting implementation of biometric screening on November 15, 2004); Robert O'Harrow, Jr. & Scott Higham, 2-Fingerprint Border ID System Called Inadequate, WASH. POST, Oct. 19, 2004, at A8 (explaining that current fingerprint system for entry is problematic).

72. See, e.g., 22 C.F.R. § 41.121 (2004) (stating that refusal must be based on "legal grounds"); id. § 41.122 (providing example of U.S. government's effort to restrict travel); see also 8 U.S.C. § 1182 (2004) (setting forth legal grounds for inad-
sound obvious, but practice suggests otherwise. For instance, only after efforts to combat public corruption received attention throughout the hemisphere did governments consider taking actions to deny or revoke visas of corrupt public officials and their immediate families. Fugitives charged with serious violent offenses are not even subject to this restriction. A country’s failure to provide a legal basis to deny or revoke visas


Of course, combating impunity may mean issuing a visa or leaving a visa in force, but that remains a unilateral decision of the issuing government where rights of the asylum state are not implicated. See Fong Yue Ting v. United States, 149 U.S. 698, 710 (1893) (affirming that immigration actions are sovereign and unilateral); McMullen v. INS, 788 F.2d 591, 596 (9th Cir. 1986) (same). It can also be a cooperative decision of governments that appreciate the particular concerns of a specific case. See Laflin, supra note 67, at 326-29 (discussing informal cooperative efforts between states). Cooperation, in this instance, is grounded on the governments’ collaborative desire to ensure that justice is achieved. See id. at 326 (same). Though the practice is questioned, preserving the executive’s prerogative is important to ensure that all appropriate tools to combat impunity can be used. Editorial, A Visa Revoked, WASH. POST, Sept. 7, 2004, at A22 (questioning U.S. actions to revoke visa of prominent scholar).


Those who are sought to stand trial, even for violent offenses, are not inadmissible. See 8 U.S.C. § 1182(a)(2)(A)(i) (requiring criminal conviction, admission of commission or admission of acts constituting essential elements of “crime involving moral turpitude” or drug offense to deny visa); see also id. § 1182(a)(2)(B) (providing visa denial for those convicted of two or more non-political offenses for which aggregate sentences were five or more years).

Convictions are not required and, therefore, visas can be denied for those associated with drug trafficking; those associated with prostitution; serious felons who asserted immunity from prosecution; public officials who violate religious freedoms; persons associated with trafficking in persons; money launderers; those whose presence could adversely impact U.S. foreign policy; members of totalitarian political parties; participants in Nazi persecutions or genocide; public charges; those without labor certifications; unlawful entrants; those with invalid entry docu-
or to deny visas to convicts but not to those facing prosecution for serious, ordinary, non-political crimes, promotes impunity.\textsuperscript{75} Adopting or amending legislation to address this issue would enable states—on an administrative basis—to deny fugitives safe haven and combat impunity more directly.\textsuperscript{76}

As a practical matter, executive authorities of a requesting country may have to work directly with their counterparts in the requested country to deny or revoke a visa.\textsuperscript{77} In the best case scenario, the administrative action can lead to the individual's apprehension (and return). Alternatively, the action limits the fugitive's geographic mobility and demonstrates a cooperative basis to combat impunity frontally.\textsuperscript{78} If necessary, the requesting country may solicit appropriate ancillary measures, such as surveillance, to mitigate further risks of flight.\textsuperscript{79}

\begin{footnotesize}
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\item\textsuperscript{75} For further discussion of the duty of states, see supra note 66 and accompanying text (underscoring states' obligation to take action to combat impunity).
\item\textsuperscript{76} Governments will undoubtedly expose themselves to criticism, but such sovereign acts remain a matter solely between the government and the alien. See \textit{Fong Yue Ting}, 149 U.S. at 711; \textit{McMullen}, 788 F.2d at 596; see also Interpol, \textit{Extradition—Some Benchmarks} (distinguishing extradition from deportation), at http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS11.asp (last updated Mar. 18, 2003).
\item\textsuperscript{77} See \textit{Laflin}, supra note 67, at 326 (noting that cooperative alternatives “invoke[e] no or little international opprobrium or state sponsored retaliation later on since both states were involved in the operation”).
\item\textsuperscript{78} At the same time, governments might coordinate a request for provisional arrest or extradition. For further discussion of provisional arrests, see supra note 28. See also \textit{Enache-Brown & Fried}, supra note 66, at 632-33 (concluding that state actions to cooperate do not impinge on state's sovereignty). For further discussion of Interpol's role in extradition, see supra note 74.
\item\textsuperscript{79} The USMS, for instance, is equipped to assist foreign governments seeking to confirm the location of fugitives in the United States. See USMS, supra note 10 (noting availability to assist foreign law enforcement requests); see also 8 C.F.R. § 287.3(d) (2004) (permitting BICE to detain certain individuals for up to forty-eight hours when deciding whether individual is clearly and beyond doubt entitled to be admitted); 8 U.S.C. § 1225(b)(2)(A) (2004) (setting forth “clearly and beyond a doubt” standard). Expanding the detention period for those seeking admission subject to an Interpol Red Notice could afford requesting and requested states sufficient time to coordinate apprehension and return efforts.
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Denying the issuance of or revoking a fugitive’s passport also limits geographic mobility.\(^{80}\) Passport revocation is not a practice embraced by many countries. Some countries disfavor the practice, claiming that doing so infringes on a fugitive’s fundamental right to identity and nationality because a passport is inseparably linked to identity and nationality.\(^{81}\) Accepting the passport as a travel document and understanding that the concepts of identity/nationality and mobility are severable can provide the appropriate basis to promote legal initiatives to help combat transnational crime.\(^{82}\) Preserving this premise in a statute would then ensure, in practice, that Egyptian national fugitives who enter an Egyptian consulate in Morocco to solicit particular services, for instance, could also find themselves returning to Egypt to face justice.\(^{83}\)

Absent this mechanism, officials must often look to deportation, expulsion or another immigration basis for removing the fugitive, generally, to the fugitive’s home country to face trial, be sentenced or serve a sentence.\(^{84}\) The immigration act, an act of a sovereign state, is often grounded in the requesting country’s disclosure of a charging document and concomitant order for arrest.\(^{85}\) As a general rule, removal under im-

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81. See Warner, supra note 4, at 172 n.12 (noting that if other countries implement similar normative rules outside United States, it could assist in bilateral efforts to locate and apprehend fugitives).

82. Unlike the right to domestic interstate travel, the U.S. Constitution allows the right to international travel to be regulated. See Haig v. Agee, 453 U.S. 280, 307 (1981) (stating that right to international travel can be regulated within bounds of due process); see also Kent v. Dulles, 357 U.S. 116, 125-26 (1958) (discussing right to international travel). Those fleeing justice should not be able to cloak themselves in this qualified right when their aim is to evade justice and seek safe haven.

83. See, e.g., Anthony Faiola, Chess Champ Fischer Maneuvers to Avoid Extradition, WASH. POST, July 30, 2004, at A11 (providing example of U.S. citizen and fugitive who sought consular assistance abroad and found himself subject to U.S. request for his return to face charges in United States).


85. See Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (affirming principle that immigration acts are sovereign and unilateral); McMullen v. INS, 788 F.2d 591, 596 (9th Cir. 1986) (affirming principle that immigration removal is sovereign act); United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981) (“Nothing in [an extradition] treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so.”).

Federal case law provides multiple examples. See, e.g., United States v. Chapa-Garza, 62 F.3d 118, 121 (5th Cir. 1995) (discussing Mexican authorities who de-
matters. The principle has since developed through case law.


87. A criticism of this approach is that it lacks process similar to that afforded in extradition proceedings. Premature disclosure can compromise an on-going investigation or alert other interested persons of the government’s action. Seeking return through immigration process can reduce or eliminate these risks.

88. Countries throughout the Middle East and North Africa have constitutional provisions in this regard. See BAH. CONST. art. 17(b) ("It is prohibited to banish a citizen from Bahrain or prevent him from returning to it."); available at http://www.oefre.unibe.ch/law/icl/ba00000_.html (last visited Jan. 26, 2005); EGYPT CONST., supra note 26, art. 51 ("No citizen may be deported from the country or prevented from returning to it."); IRAQ INTERIM CONST., supra note 34, art. 11(b) ("No Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalized citizen who, in his application for citizenship, as established in a court of law, made material falsifications on the basis of which citizenship was
state initiate this process against an individual who actually or potentially has a claim of the requested state's nationality. Challenges, however, are common, especially among white collar fugitives, and, therefore, hearings are often protracted over periods of years. In the end, the fugitive's return is generally a foregone conclusion—more a question of when—but the time earned challenging the immigration process has shown that some fugitives can return to their home country uncuffed and, as a result of legal maneuverings in the requesting country, with a court order in hand to guarantee release.

In these scenarios, the requesting state is taking action so that the accused can stand trial or convicted can be sentenced or serve a sentence. According to press accounts, U.S. officials negotiated with Yaser Hamdi, a U.S. born citizen who had been held as an enemy combatant, to revoke his U.S. citizenship and return him to Saudi Arabia, his alternative country of nationality. See Jerry Markon, Father Denounces Hamdi’s Imprisonment, WASH. POST, Oct. 13, 2004, at A4 (restating comments made by Hamdi’s father). Moreover, other naturalized citizen defendants in the United States have entered into plea agreements that include renunciation of U.S. citizenship and acceptance of a concomitant order for removal through immigration process at the discretion of the U.S. government. See Jerry Markon, Muslim Activist Sentenced to 23 Years for Libya Contacts, WASH. POST, Oct. 16, 2004, at A17 (reporting that defendant automatically lost U.S. citizenship as part of plea agreement). Those naturalized citizens who are convicted also face immigration removal. See Jerry Markon, Man Guilty in Case of Terror Ties, WASH. POST, Oct. 13, 2004, at A4 (providing example).

89. A review of nationality law of the respective countries is outside the purview of this Article, though as a practical matter most countries in the region include the principle of *ius sanguis* in their nationality law. See, e.g., CODE DE LA NATIONALITE MAROCAINE [MOROCCAN NATIONALITY CODE] art. 6 (providing that Moroccan women cannot give their nationality to their husbands), available at http://www.mincom.gov.ma/french/generalites/ orga_eta/statut.html (last visited Jan. 26, 2005).

90. See Bruce Zagaris, U.S. Extradites PEMEX’s Former Director to Mexico on Electoral Fraud Charges, 20 INT’L ENFORCEMENT LAW RPR. 455, 455-56 (2004) (reporting that process to return much sought after Mexican white-collar fugitive from United States took more than two years).

91. See id. (stating that creative lawyering “ensured that [Rogelio Montemayor] would be subject to home detention rather than jail” after he returned to Mexico).
Viewed through eyes of the victim or harmed community or through the lens of pragmatism, many interests can be accommodated—including preserving public coffers and promoting judicial economy—if these fugitives would voluntarily return to the requesting country. While challenging proceedings conforms with the laws of the requested state and international law and practice—and affords the fugitive all the protections under the laws of the requested country—all too often the conclusion is the same: The fugitive returns to the requesting country to face justice. Legal maneuvers, particularly in high profile cases, do little to serve the public at large and, depending on the degree of publicity, can adversely impact the integrity of the court.

The requesting state may defer to or rely on the requested state’s domestic judicial process to ensure that justice is served. Deferring to another state’s domestic process often arises in the context of extraterritorial

92. It is plausible that a fugitive may want to waive process and return to requesting jurisdiction to stand trial. Prosecutors may afford the fugitive a benefit for making that decision and otherwise cooperating. See United States v. Diacolios, 837 F.2d 79, 81 (2d Cir. 1988) (noting that defendant expressed willingness to voluntarily return). But see Bruce Zagaris, U.S. Efforts to Extradite Persons for Tax Offenses, 25 Loy. L.A. INT’L & COMP. L. REV. 653, 677 (2003) (claiming government neglected to disclose potential capital sentence so defendant could make informed decision). Or the individual may also conclude that voluntarily returning serves other interests. See Miguel Ángel Rodríguez, Carta al presidente del Consejo Permanente de la Organización de los Estados Americanos, Aristides Royo, EL TIEMPO LATINO, Oct. 15, 2004, at A6 (noting costs to family and intergovernmental organization persuaded organization’s leader to resign and face corruption investigation in home country).

In those cases, the United States may “parole” the fugitive into the United States to stand trial when the fugitive lacks alternative legal basis to enter. See 8 U.S.C. § 1182(d) (2004). In the immigration context, parole permits the individual to physically enter the United States, though for other legal purposes is not considered legally present. See id.

93. For further discussion of the U.S. extradition of Rogelio Montemayor, a major Mexican white-collar fugitive, see supra note 91. See also Zagaris, supra note 90, at 456 (suggesting that maneuverings are appropriate because fugitive returned with protections of specialty and without prospects of immediate detention).

94. Fugitives, on occasion, have publicly espoused the integrity of the requesting state’s judicial system—often their home country’s—yet insist on challenging their return, perhaps even preemptively exposing themselves to a requested state’s judicial system. For further discussion of Oscar Espinosa Villareal and Carlos Cabal Peniche as two examples, see supra note 70; see also Zagaris, supra note 90, at 456 (discussing Rogelio Montemayor as another example).

95. Deference may be express or tacit. Directly transferring prosecution to the asylum state would be express. Domestic prosecution pursuant to an asylum’s decision not to extradite on the basis of nationality is another example. See U.S.-Mexico Extradition Treaty, supra note 22, art. 9. Tacit deference may be the asylum state taking action based on a victim seeking recourse in the asylum state with or without the assistance of the officials who otherwise would have authority in the jurisdiction where the crime occurred. State of Texas, Criminal Prosecutions Under Article 4 of the Mexican Federal Penal Code (March 2000), chs. I & II (illustrating example of victim seeking recourse with assistance of state officials), available at http://www.oag.state.tx.us/AG_Publications/txts/article4_manual.htm#chap1.
Unlike the United States, many countries in the Middle East and North Africa permit domestic prosecution for crimes committed abroad by their nationals or against their nationals. In practice, this means that a criminal of Algerian nationality or a criminal who victimized an Algerian national should not be able to seek refuge in Algeria. In the absence of extraterritorial jurisdiction, a country like the United States has to rely on the asylum state's laws to ensure that justice is served. So, if an American were to commit an ordinary crime abroad, the United States would have to rely on the jurisdiction in which the offense occurred to bring that individual to justice.

In the rare instance when the crime involved is particularly egregious and when a requested state is unwilling or unable to cooperate to return or prosecute a fugitive, the requesting state may have to consider unilateral actions, such as lures or other extraordinary measures, to bring a fugitive to justice. The U.S. Department of Justice says that a "lure involves

96. See Snow, supra note 28, at 230 (drawing attention to principle of nationality as basis for countries to prosecute domestically committed crimes abroad by or against their nationals).

97. See Algerian Code of Criminal Procedure, supra note 47, arts. 582-89 (providing extraterritorial jurisdiction in Algeria for criminal acts committed outside Algeria by Algerians or against Algerian nationals); Moroccan Extradition Law, supra note 47, arts. 748-56 (establishing jurisdiction when perpetrator is Moroccan or victim is Moroccan national); Tunisian Code of Criminal Procedure, supra note 47, arts. 305-307 (accepting jurisdiction over crimes committed outside Tunisia by Tunisians or against Tunisian nationals).

98. For further discussion of the issue of nationality in context of extradition and merits for trying individuals in jurisdiction where crime was committed, see infra notes 114-16. See also William Branigin, 2 Sentenced to Die for USS Cole Attack, WASH. POST, Sept. 30, 2004, at A18 (reporting that Yemeni court sentenced Abd Rahim Nashiri and Jamal Badawi to death and four others to incarceration for their roles in suicide bombing of USS Cole in October 2000); Aljazeera.net, Yemenis to Die for USS Cole Blast (Sept. 29, 2004) (reporting sentences for individuals convicted of bombing USS Cole), at http://english.aljazeera.net/NR/exeres/BD47BCAE-6431-4F38-A07B-7B6CFE54DFCB.htm.


100. The recent Omani case of the American woman convicted for having her husband killed illustrates this point. See BBC News World Ed., US Woman Faces Execution in Oman (July 17, 2004) (reporting capital sentence), at http://news.bbc.co.uk/2/hi/middle_east/3903289.stm. An Omani court convicted Rebecca Thompson, along with her son, for hiring Omani nationals to kill her husband. See id. (noting that Thompson's son received three-year sentence and would be deported). Had Oman taken no action against her or acquitted her for the acts, U.S. law probably would have offered no basis to bring her to justice.

101. The U.S. Supreme Court has affirmed that the method by which a defendant appears before the court does not bar the court from exercising jurisdiction over that defendant. See Frisbie v. Collins, 342 U.S. 519, 522 (1951) (declining to overturn holding that jurisdiction is not impaired by forcible abduction); Ker v. Illinois, 119 U.S. 456, 440 (1886) (holding that mere irregularities of how defen-
using a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States, in international waters or airspace, or in a third country for subsequent extradition, expulsion, or deportation to the United States.”

The lure scenario may be as simple as initiating a telephone call, sending an e-mail or transmitting a page. Or it could be as complex as drawing someone into international waters, where the individual is confronted by U.S. officials, U.S. vessels and a one-way ticket to the United States. Luring may include non-disclosure to the country of the individual’s nationality or target country (if not the United States), but the presumption of non-disclosure is grounded in supposition, not practice. While the United States considers a lure to be a legitimate law enforcement tool, other countries may not. Consequently, a destination country may refuse to extradite a lured fugitive. Needless to say, the use of lures should remain selective, limited and controlled.

The case of Humberto Alvarez Machain, the Mexican doctor who U.S. officials claimed prolonged the life of DEA Agent Enrique “Kiki” Camarena Salazar to subject him to additional torture before his assailants executed him, is an example of a government’s decision to resort to extraordinary measures to bring a fugitive to justice at the hands of state agents, agents acting on behalf of the removing state or other private
agents, such as bounty hunters. Critics tend to use the case to illustrate, as if routine, measures the U.S. government employs to apprehend and return fugitives. A review of federal case law shows that the United States' use of such measures is exceptional and that, when employed, asylum states have generally permitted, participated in or not protested the measure. Obvious international repercussion for resorting to such measures means that cases, such as Alvarez Machain, should remain


110. The review focuses on federal cases. For examples of extraordinary measures, see supra note 104; see also United States v. Rezaq, 134 F.3d 1121, 1126 (D.C. Cir. 1998) (providing example of forcible removal); Matta-Ballesteros v. Hehman, 896 F.2d 255, 260 (7th Cir. 1990) (same); Waits v. McGowan, 516 F.2d 205, 208 (3d Cir. 1975) (same); United States ex rel Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir. 1975) (same); United States v. Yunis, 681 F. Supp. 891, 895-96 (D.D.C. 1988) (same), aff'd, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991); United States v. Unverzagt, 299 F. 1015, 1016 (W.D. Wash. 1924) (same)

111. See, e.g., Ker v. Illinois, 119 U.S. 436, 438 (1886) (illustrating how defendant was kidnapped from Peru); United States v. Yousef, 327 F.3d 56, 89 (2d Cir. 2003) (providing example of seizure of defendant in Pakistan); Kasi v. Angelone, 300 F.3d 487, 491 (4th Cir. 2002) (same); United States v. Torres-Gonzalez, 240 F.3d 14, 15 (1st Cir. 2001) (describing how defendant was seized from Venezuela); Rezaq, 134 F.3d at 1126 (explaining facts involving defendant's release from Malta prison into hands of U.S. authorities); United States v. Matta, 937 F.2d 567, 567 (11th Cir. 1991) (stating how U.S. agents seized defendant from Honduras); Matta-Ballesteros, 896 F.2d at 256 (same); United States v. Kaufman, 858 F.2d 994, 1006-09 (5th Cir. 1988) (explaining how United States kidnapped defendant from Mexico); United States v. Toro, 840 F.2d 1221, 1229 (5th Cir. 1988) (describing how Panamanian authorities released defendants to United States); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (stating facts regarding kidnapping in Guatemala); United States v. Cordero, 668 F.2d 32, 32 (1st Cir. 1981) (discussing defendant's transport from Panama to Venezuela and then to Puerto Rico); United States v. Reed, 639 F.2d 896, 899 (2d Cir. 1981) (illustrating defendant's abduction from Bahamas); United States v. Lara, 539 F.2d 495, 495 (5th Cir. 1976) (explaining defendant's abduction from Panama); United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975) (stating facts regarding defendant's kidnapping from Mexico); United States v. Lira, 515 F.2d 68, 69-70 (2d Cir. 1975) (describing how defendant was forced out of Chile into U.S. hands); United States v. Quesada, 512 F.2d 1043, 1044 (5th Cir. 1975) (illustrating how defendant was forced out of Venezuela); Lujan, 510 F.2d at 63 (discussing how defendant was seized from Bolivia); United States v. Herrera, 504 F.2d 859, 860 (5th Cir. 1974) (demonstrating defendant's abduction from Peru); United States v. Vicars, 467 F.2d 452, 455 (5th Cir. 1972) (discussing defendant's alleged illegal arrest from Panama Canal Zone); United States v. Sobell, 244 F.2d 520, 521 (2d Cir. 1957) (same); Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1948) (discussing defendant's apprehension in Germany and return to United States); United States v. Noriega, 746 F. Supp. 1506, 1529-30 (S.D. Fla. 1990) (describing how defendant was kidnapped from Panama); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (explaining how defendant was arrested from Mexico); United States v. Insull, 8 F. Supp 310, 313 (N.D. Ill. 1934) (stating facts of defendant's arrest from Turkey); Ex parte Campbell, 1 F. Supp. 899, 899 (S.D Tex. 1932) (describing defendant's abduction
exceptional. If circumstances justify a requesting state's resorting to extraordinary measures, then their scope should be controlled and proportionate to the crime for which removal is sought.

V. Considerations

Effective bilateral law enforcement relationships between the United States and other countries in the region are an obvious and worthwhile goal. While existing bilateral extradition treaties offer a point of departure for fostering these kinds of relationships, negotiating further treaties can play an important role in promoting engagement and fostering collaborative actions to combat transnational crimes, especially terrorism, terrorist financing and narco-terrorism.

Should the United States and governments in the region choose to engage and begin extradition treaty negotiations, the issue of nationals from Mexico); Unverzagt, 299 F. at 1016 (illustrating how United States obtained defendant from Canada).

112. See Laflin, supra note 67, at 323 (noting that failure to surrender or to prosecute breaches asylum state's duty of "due diligence," violation of customary international law, and therefore becomes complicit in underlying act); see also Kelly, supra note 67, at 521 (explaining that governments' conflicting interests can enable criminals to "play the system" and make "mockery of the law").

113. See Alvarez-Machain, 504 U.S. at 657 n.2 (reporting that negotiations to negotiate Alvarez-Machain's return were unsuccessful); Sosa, 124 S. Ct. at 2746 (stating that "DEA asked the Mexican Government for help in getting Alvarez into the United States" and that "the requests and negotiations proved fruitless").

For a review of federal case law, see supra notes 109, 111. It supports the notion that extraordinary measures—especially those that are truly unilateral—by the United States are infrequent. Of those cases, Mexico protested forcible removals on three occasions. See Alvarez-Machain, 504 U.S. at 670 (concluding "that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico"); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991) (holding that United States did not illegally seize Mexican national from Mexico); Lopes, 6 F. Supp. at 344 (noting that U.S. officials forcibly removed U.S. citizen who was granted asylum in Mexico). Mexico did not protest forcible removals on other occasions. See, e.g., Kaufman, 858 F.2d at 1006-09 (discussing how DEA agents arrested defendants in Mexico and Mexican officials participated in removal via commercial carrier); Sobell, 244 F.2d at 521 (noting that Mexican Security Police seized defendant in Mexico City and transported him to Laredo Port of Entry); Campbell, 1 F. Supp. at 899 (stating that Mexican and U.S. officials participated in forcible removal of defendant).

Surprisingly, some fugitives have gone so far as to argue that due diligence in apprehending transnational fugitives includes abduction. See United States v. Blanco, 861 F.2d 773, 778-79 (2d Cir. 1988) (noting that defendant contended that "government should have tried to either lure her from Colombia or seize her there"); United States v. McGeough, No. CR-82-00327-11 (CPS), 1992 WL 390234, at *4 (E.D.N.Y. Dec. 8, 1992) (discussing defendant's argument that United States "should have sent its agents abroad to kidnap the defendant"). Both courts rejected the defendants' argument. See Blanco, 861 F.2d at 777 (rejecting defendant's argument that government violated her right to speedy trial); McGeough, 1992 WL 390234, at *6 (rejecting defendant's argument of prejudice).
will likely play a determinative role.\textsuperscript{114} Neither the U.S. Constitution nor U.S. law prohibits the extradition of U.S. nationals,\textsuperscript{115} giving support to the U.S. position that the duty of non-asylum, or denying safe haven, includes the notion that fugitives should be prosecuted in the jurisdiction where they committed the crime.\textsuperscript{116} Two countries in the region, however, have constitutional provisions that expressly forbid the extradition of their nationals,\textsuperscript{117} and other countries have domestic legal provisions that prohibit the extradition of nationals.\textsuperscript{118} The U.S.-Jordan Extradition Treaty, however, illustrates one approach for resolving this issue, and negotiators can use this treaty as an example to explore alternatives to address the nationality issue.\textsuperscript{119}

Probable sentences facing prospective extraditees could also impact treaty negotiations.\textsuperscript{120} While a prospective capital sentence is generally

\textsuperscript{114} According to one commentator, "U.S. Department of Justice officials routinely urge foreign officials to change the laws or policies which prevent them from extraditing their nationals." Snow, \textit{supra} note 28, at 216 n.22. Snow refers to a State Department report, which asserts that "[t]he United States makes no distinction between extraditing its own nationals and nationals of other countries. We advocate that all countries adopt the same policy." \textit{Id.} (citation omitted).

\textsuperscript{115} See 18 U.S.C. § 3196 (2004) (providing that United States can extradite national even if provision not included in extradition treaty).

\textsuperscript{116} The concerns of the victims and community are squarely confronted when an individual is prosecuted in the jurisdiction where the crime was committed. See Enache-Brown & Fried, \textit{supra} note 66, at 613, 632-33. (noting that extraditing criminals to requesting states imposes only minimal burden on host country). Moreover, witnesses and other evidence are within that jurisdiction. See Laflin, \textit{supra} note 67, at 333 (explaining that evidence is more often found in jurisdiction where crime took place).

\textsuperscript{117} See U.A.E. CONST. art. 38 ("The extradition of citizens and of political refugees shall be prohibited."); YEMEN CONST. art. 44 ("A Yemeni national may not be extradited to a foreign authority.") (available at \url{http://www.al-bab.com/yemen/gov/con94.htm} (last visited Jan. 26, 2005)); \textit{see also} PALESTINIAN CONST. art. 31 ("No Palestinian may be extradited to a foreign state.").

\textsuperscript{118} See ALGERIAN CODE OF CRIMINAL PROCEDURE, \textit{supra} note 47, arts. 696, 698 (prohibiting extradition of Algeria nationals based on nationality at time crime occurred); MOROCCAN EXTRADITION LAW, \textit{supra} note 47, arts. 3, 5 (barring extradition of Moroccan nationals based on nationality at time individual committed crime); TUNISIAN CODE OF CRIMINAL PROCEDURE, \textit{supra} note 47, art. 312 (prohibiting extradition of Tunisians based on nationality at time decision to extradite is made).

\textsuperscript{119} See U.S.-Jordan Extradition Treaty, \textit{supra} note 20, art. 3 (stating that nationality cannot bar extradition if all other conditions to grant extradition are met). Obvious factors will play key roles in whatever effort the U.S. government takes to promote this principle in any future treaty negotiated within the region. Legal factors include constitutional norms and domestic procedures to promote internal normative changes. Policy factors include geopolitical events within and outside the region, particularly the U.S. relationship with Israel. Cf. Agreement Between the Arab League States Concerning the Extradition of Fugitive Offenders, Nov. 3, 1952, \textit{reprinted in} 159 BRIT. AND FOREIGN STATE PAPERS 606, 606-12 (1961) (obliging parties to surrender nationals of requesting state but not requested state under specific circumstances).

\textsuperscript{120} Other countries, particularly Mexico, have recently expressed concerns about prospective sentences extraditees might face in the United States. The ex-
not a bar to extraditing an individual from the United States, how the
capital sentence might be carried out in the requesting country could
raise concerns for an extraditee from the United States.\textsuperscript{121} Similarly,
countries in the region might impose a capital sentence for a crime that
carries a maximum term of years in the United States. Or the prospective
term of years may be more significant than the prison sentence the indi-
vidual might have faced for committing the same crime in the United
States. With an emphasis on combating terrorism and terrorism-related
crimes, questions concerning prospective sentences are unavoidable and
should be addressed in treaty negotiations.\textsuperscript{122}

Advice and consent before the U.S. Senate will surely draw attention
to the kind of procedures a prospective extraditee to the requested coun-
try might face.\textsuperscript{123} Legislators will question whether the prospective treaty

tradition treaty between the United States and Mexico acknowledges that the re-
quested State can deny a request for extradition absent an assurance that a capital
sentence would not be imposed or, if imposed, not be executed. See U.S.-Mexico
Extradition Treaty, supra note 22, art. 8. Even so, since October 2001, Mexico has
been soliciting similar assurances for prospective life sentences. See U.S. Dep’t of
www.state.gov/g/innl/rls/nrcrpt/2005/vol1/html/42364.htm. The Mexican gov-
ernment has grounded its requests for assurances on a Mexican Supreme Court
decision that was issued the same month that the court interpreted life sentences
to be a form of cruel and unusual punishment under Article 22 of the Mexican
Constitution, a position the Mexican Supreme Court recently affirmed in April
2004. See \textit{id}.\textsuperscript{121}

121. The U.S. government does not report whether an extradition to another
country has been denied based on the prospective sentence a fugitive might face
in the requested country.

122. The U.S.-Jordan Extradition Treaty recognizes this issue, with respect to
a capital sentence, not disparate terms of years. Prospective treaties will likely treat
the issue of sentencing similarly. See U.S.-Jordan Extradition Treaty, supra note 20,
art. 7 (permitting requested country to seek assurances that capital sentence will
not be sought or, if imposed, not be carried out).

In this context, discussion may also focus on the prospective treaty partners’
use of shariah law and human rights practices. Shariah law, or the religious law of
Islam, is a fundamental source of law in the Middle East and North Africa. Offense
and punishment under shariah law may differ from those in the United States. See
\textit{Aljazeera.net, Scholars Condemn US Sharia Threat} (Feb. 21, 2004), at http://en-
english.aljazeera.net/NR/exeres /9CBB1903-FF67-482A-B756-78970EDD1173.htm;
basic notions of shariah), at http://www.bbc.co.uk/religion/religions/islam/be-
liefs/sharia/ practical.shtml#start.

The U.S. Department of State regularly publishes reviews of human rights
practices of various countries. See \textit{2003 U.S. DEP’T OF STATE HUMAN RIGHTS REP.}
g/dril/rls /hrrpt/2003/index.htm. A review of criminal process and the applica-
tion of shariah law is often contained in them. See \textit{id}. (presenting criminal proced-
ures of countries suspected of being human rights violators).

123. See \textit{Campbell v. Wood}, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissent-
ing) (condemning decapitation in conjunction with hanging); see also President
George W. Bush, President Bush Condemns Brutal Execution of Nicholas Berg
(May 12, 2004) (expressing condolences relating to death of innocent civilian in
partner provides for such fundamental protections, such as the presumption of innocence, cross-examination and appellate review.124

The United States will likely expose itself politically through a prospective Party's treaty ratification process. U.S. actions domestically and abroad since September 11 have faced criticism,125 particularly regarding U.S. immigration, ordinary criminal and military processes.126 The United States' position on the Middle East peace process also may complicate treaty negotiations.127 Nonetheless, a continuation and proliferation of events throughout the Middle East and North Africa since the death of Yasser Arafat suggest a more hopeful outlook for engagement in the region.128

124. The viability of the Rule of Non-Inquiry may help assuage concerns of a requesting state, in as much as the Executive retains authority to make particular decisions. But see Nation in Brief/Los Angeles, Wash. Post, July 26, 2004, at A5 (reporting week-long detention of Californian in Egypt and his claim that "he was beaten" while in custody); World News in Brief/Stockholm, Wash. Post, May 23, 2004, at A24 (reporting Swedish protest of reported torture in Egypt of two men Sweden extradited to stand trial for violent acts against Egyptian government).


126. For news articles referring to the issue of treatment of individuals, see supra note 2. For further reference to the Hamdi matter, see supra note 88. For further discussion of identifying other points of reference, see supra note 122.


In the meantime, until negotiations are completed and vitality is infused in the extant extradition treaties, governments should consider taking more action to promote alternatives to extradition. Passing legislation or other normative measures to deny or revoke visas is one example. Ensuring that domestic norms permit the denial or revocations of passports is another. Establishing competent central authorities, apart from police channels, within respective countries and then promoting direct communication between these authorities could also further this end. Regular meetings and conferences can support this communication and serve to promote further engagement between the United States and countries in the region. Regardless of the approach, engagement is essential.

VI. CONCLUSION

Extradition and its alternatives are tools that enable governments to locate, apprehend and return fugitives to face justice. In the context of the Middle East and North Africa, the focus must be on the alternatives given a dearth of bilateral extradition treaties between the United States and countries throughout the region. Until additional extradition treaties in the region are negotiated and ratified, the U.S. government may have to rely on domestic prosecutions to ensure that justice is served for specific cases. As the U.S. government and governments within the region engage


130. Interpol is an effective resource for criminal police communication. For further discussion of Interpol, see supra note 14. Once specific communication is required beyond police channels, such as communication between prosecutors, alternative communication channels should be used. Establishing central points of contacts meets that end.

131. Direct communication can take myriad forms, such as telephone calls, facsimile transmission, electronic communications or face-to-face encounters. Regardless of the form, permitting direct communications between the United States and appropriate host country counterparts is important to advance daily bilateral law enforcement cooperation efforts in the region. Necessary language training to facilitate direct communication should be encouraged.

and increase daily, bilateral law enforcement cooperation efforts, the numbers and kinds of fugitives located, apprehended and returned (or prosecuted) should increase.