The Development of the Conceptual Framework Supporting International Extradition

Valerie Epps

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol25/iss3/1
I. INTRODUCTION

All laws and all legal practices rest upon sets of ideas. In general, those ideas, which are thought to aid the betterment of social order, are referred to as contributing to "justice." It is not the purpose of this Article to swell the vast literature that attempts to unravel the concept of justice; but rather, to ask on what legal concepts the idea of international extradition rests. In other words, what legal constructs are necessary before the idea of extradition can exist? The Article’s second purpose is to examine how the changing nature of certain underlying concepts resulted in changes in the nature of extradition law. An understanding of the framework of ideas that support the notion of international extradition may shed some light on the changing legal context in which it exists and how extradition itself has altered to reflect and adapt to those changes.

II. TWIN RADICAL CONCEPTS UNDERLYING EXTRADITION TREATIES: NO USE OF FORCE AND EQUALITY OF STATES

The history of interstate relationships is dominated by the tale of interstate warfare. For centuries, states have spent much of their resources on the acquisition and consolidation of armies and
munitions. The ability to subdue and rule neighboring or far flung nations has depended largely on superior arms and better organized military forces.\(^1\) Sometimes luck or surprise wins the day but such accidents of history are the exception, not the rule.

[Although] most major religions have produced doctrines which define the occasions when fighting a war is justified...\(^2\) It was not until the end of the nineteenth century and the beginning of the twentieth century that there was any movement to urge the adoption of universal rules governing interstate warfare... War was an instrument of state policy and was used when seen as promoting the state’s interests. Despite early efforts of some international scholars to promote rules governing warfare, it is fair to say that, prior to the twentieth century, war was beyond the scope of anything recognizable as law.

After the devastation of World War I, the failure of the League of Nations, and the ensuing atrocities and ruin of World War II, the United Nations was born. One of the main purposes of the U.N. Charter was “to save succeeding generations from the scourge of war”\(^3\) and “to maintain international peace and security.”\(^4\) An essential element of those overriding purposes was to assure the sovereign equality of states. As long as powerful states were free to overwhelm their weaker neighbors, the threat of perpetual war would remain. The Charter, therefore, needed other vital principles. It required states to renounce the use of force in international relations except for force used in self-defense,\(^5\) but it also established the fundamental concept of the equality of sovereign states. The Charter reaffirmed “faith in... the equal rights... of nations large and small.”\(^6\) It further asserted “the principle of equal rights and self-determination of peoples”\(^7\)

---

4. Id.
5. Id. art. 2, para. 4, art. 51. The Security Council is also permitted to authorize member states to use force. See id. art. 42.
6. Id. pmbl.
7. Id. art. 1, para. 2.
and declared that "the Organization is based on the principle of the sovereign equality of all its Members."8 Without the twin radical notions of equality of states and freedom from aggressive force by powerful states, the whole regime of international treaties entered into by states on an equal basis, which forms the fundamental basis for international extradition,9 could not exist.

Equality of states is one of the linchpins of treaty law. Without the norm of equality, weaker states are hesitant to enter into treaties with stronger states, knowing that the stronger state will only keep its treaty obligations as long as it is deemed expedient. Thus, trust is the fundamental component of treaty negotiation and conclusion. Equality of sovereignty is the necessary norm for trust between states.

Prior to the Charter's prohibition of the use of force and declaration of the equality of states, nations could, and did, enter into treaties, including extradition treaties, but these treaties were often unequal. The more powerful state could always enforce its will upon the weaker state regardless of treaty provisions.10 Just as domestic law prohibiting murder can never ensure that murders will not occur or that all murderers will be prosecuted, international law cannot ensure that all of its precepts will be adhered to or enforced. Nonetheless, the underlying norms of equality of states and no use of force provide the framework for the stage on which modern extradition and rendition of criminal suspects is enacted.

III. SEPARATE SOVEREIGNTIES NECESSITATE EXTRADITION

The idea of international law springs fundamentally from the concept of the sovereign state. The idea of extradition is dependent upon the notion of separate sovereign states exercising jurisdiction only within their territorial borders. Even after the

8. Id. art. 2, para. 1.
9. Although some states have always engaged in extradition without formal treaties, modern practice is almost wholly dependent on bilateral, or, less frequently, multilateral treaties. Even where extradition takes place without a written treaty, the success of the arrangements depends on reciprocal trust for which a written treaty is a more formal manner of expression.
Enlightenment of eighteenth-century Europe,\textsuperscript{11} when the concept of the individual as a subject of international law arose, and later when the individual was gradually seen as having international legal rights and obligations, the notion of state sovereignty has persisted as the bedrock of the international legal system.

It is the concept of separation of territory into sovereign states, with separate spheres of governmental power that makes the idea of extradition necessary. Extradition is the process of rendition of fugitive criminals from the state of flight to the state having jurisdiction over the alleged crime.\textsuperscript{12} Extradition is only necessary because the two concepts of sovereignty and equality mandate that one sovereign may exercise no power in the territory of another sovereign, unless permitted to do so by the territorial sovereign.\textsuperscript{13} An agreement to extradite criminal fugitives is a formal process to assist another state in the enforcement of its criminal law. In a sense, it is an agreement to operate as the police force and the initial judicial hearing officer for the requesting state.

The criminal who is wise enough, or lucky enough, to cross an international border after committing a crime knows that the executive of the state having jurisdiction over the crime will not be able to chase him\textsuperscript{14} once the boundary is crossed, unless the state to which the fugitive has fled has some process to catch him and


\textsuperscript{13} Restatement (Third) of the Foreign Relations Law of the U.S. § 432 cmt. b (1987). “It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter’s consent.” Id.

\textsuperscript{14} I refer to the fugitive with the masculine pronoun throughout this Article, in part for economy of words but also because the overwhelming majority of fugitives subject to extradition are, in fact, men.
send him back—"ay, there's the rub." The process of catching and sending the criminal back after his successful flight across a border is the process of extradition and this process has a long history—a history that largely reflects the changing nature of the state and its own perceived interests.

Throughout recorded history, most fugitives would have been quite safe once they left the state within whose jurisdiction the crime was committed, because most countries did not have extradition agreements and only a few countries engaged in rendition through informal processes or based on reciprocity. Of course, getting across a border might well prove hazardous and immigration barriers have increasingly prevented such flight, particularly since the later half of the twentieth century.

IV. EXTRADITION CRIMES TEND TO REFLECT THE STATE'S CENTRAL CONCEPT OF ITSELF

The types of crimes for which extradition has been primarily sought have reflected the state's concept of itself. If the state is a theocracy, religious dissidents have been the prime target of extradition. In contrast, if the state sees itself as a war machine, the bulk of those extradited are military deserters. Presently, when a number of highly developed states find themselves under attack by those they term "terrorists," then criminals, who fall broadly under one of the numerous definitions of terrorism, are

15. William Shakespeare, Hamlet, act 3, sc.1 (1603). This is not to say that states have always observed the law restricting their operations in other states. The capture of Adolf Eichmann by Israeli agents from Argentina to stand trial in Israel, and the capture of Humberto Alvarez-Machain in Mexico, by U.S. agents, to stand trial in the United States, are two notorious examples of states exercising their powers in another state without that state's permission. Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (S. Ct. 1962) (Israel); U.S. v. Alvarez-Machain, 504 U.S. 655 (1992).


17. See, e.g., Victoria Lehrfeld, Comment, Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again, 8 La Raza L.J. 209, 215 (1995).


19. Id.

the offenders most aggressively subject to extradition or other forms of rendition.21

Petty criminals are not often subject to extradition, in part because extradition is an expensive process and application of a cost-benefit analysis reveals that petty criminals are simply not worth pursuing. The definition of what constitutes a “petty” crime almost ensures the result of no extradition. Even if the act is a violation of the existing criminal code, a society may define the act as only a “petty” crime, such as fornication, for example. Thus, by definition, that society does not perceive such an act as undermining the state in a major way and is not likely to spend its resources tracking down the offender. On the other hand, if a state, such as a strictly religious state, defines fornication as a capital offense, presumably it would see the act as antithetical to the existence of an ordered society and thus might be expected to regard such crimes as grave and in need of pursuing across borders through extradition. It is not, then, the act itself that increases or decreases the likelihood of extradition. Rather, it is the degree of seriousness that the state attaches to the act, which correlates to the perceived necessity for extradition. Acts that are seen as undermining the core values of the state are the acts that increase the likelihood of pursuit of the perpetrator beyond the state’s borders.

V. THE HISTORICAL PRACTICE OF EXTRADITION REFLECTS THE CHANGES IN THE CONCEPT OF THE STATE

There are four main phases in the history of extradition: antiquity until the end of the seventeenth century; eighteenth century to the first half of the nineteenth century; the latter half of the nineteenth century to the mid-twentieth century; and the mid-twentieth century to the present.22 Each of these periods reflects a particular concern central to the state’s concept of itself.

---


22. BASSIOUNI, supra note 18, at 33-35; I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5-19 (1971); Valerie Epps, The Validity of the Political Offender
The earliest period most frequently subjected political and religious offenders to extradition. This was hardly surprising in light of states' overwhelming concern for the preservation of their newly emerging power structures, which were primarily based on religious values and the need to suppress rival political factions. For example, a run-of-the-mill murderer was not perceived as a threat to the political order, but, a rival faction, either political or religious, might harbor the seeds of total annihilation and thus must be captured and contained.

From the eighteenth century to the first half of the nineteenth century, extradition treaties focused on military deserters. The European treaties are instructive. Europe, before Waterloo, had been characterized by continuous wars of acquisition between groups of states forming alliances and attacking one another. War was one of the main activities of the state and military deserters were seen as undermining the core purpose of the state.

The French and American Revolutions gave rise to an entirely new concept of the state. Government "by the people" was a radical concept even though the persons included in the notion of "people" was hardly comprehensive. Perhaps the most fundamental change, advocated in documents such as the French Declaration of the Rights of Man and the Citizen, the American Declaration of Independence, the U.S. Constitution, and the U.S. Bill of Rights is the notion that the power to govern emanates from the people and not from the divine right of rulers. In a legal

---


24. The term "people" as used in such documents as the U.S. Constitution or the French Declaration of the Rights of Man and the Citizen only included white, educated, and propertied males. Jefferson noted in his discussion of the wording of the Declaration of Independence that "The clause . . . reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it." THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in JEFFERSON WRITINGS 18 (Merrill D. Peterson ed. 1984). American Indians are specifically referred to as "merciless . . . savages." THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).
landscape that was founded on natural law concepts, the bedrock belief in the divine ordering of authority was being turned on its head. The divine originator remained, but was now seen as vesting power in the individual. Law was only legitimate in so far as it expressed the will of the people. As a result, extradition treaties during this period began to provide some protections for the individual, most notably through the political offense exception to extradition.

When an individual escaped from a state with a non-representative system of government (i.e. all governments until well into the twentieth century) and when his crime was directed against the state, the "enlightened" state of refuge would not send the perpetrator back to the benighted state. The perpetrator who had tried to overthrow an existing government and put another government in its place (or who had committed a common crime in the course of such efforts) was considered a criminal in the country from which he had fled, but was welcomed as a hero in the country of refuge. He had struck a blow for freedom from tyranny. He had supported the new idea of the representative state. The Belgians and the French were the first to introduce the idea of protecting the political offender and specifically excepted the délit politique from extradition in their joint treaty of 1834. The United States' policy of protecting political offenders from extradition did not appear until it signed a treaty with France in 1843. By the late nineteenth century, the political offense exception had become a standard U.S. treaty clause and remained so until the end of the twentieth century.

The final phase of extradition law, running from the middle of the twentieth century to the present, has shown an increasing concern with the rights of the fugitive. The U.N. Charter and the Universal Declaration of Human Rights heralded the era of human rights. This era ushered in the idea that individuals had rights springing from their personhood and that governments must not interfere with those rights (negative rights, e.g. freedom from torture or arbitrary arrest) and later, that governments had

25. This is the classic definition of the relative political offense.
27. Treaty of Extradition, Nov. 9, 1843, U.S.-Fr., art. 4, 8 Stat. 580.
29. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999
obligations to ensure certain rights (positive rights, e.g., the right to education, work, or health). More recently, the human rights movement has championed certain group rights (e.g., the right to culture and language). Finally, the notion of individual obligations enforceable under international law has taken root. Although the Nuremburg and Tokyo trials represented early assertions of the principle of individual obligations, the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have established and expanded that principle. With an emphasis on human rights, it is not surprising that extradition treaties have begun to reflect concern for the way the fugitive is treated in the extradition process.

VI. EXTRADITION PRACTICE IN THE ERA OF THE STATE AS THE PROTECTOR OF HUMAN RIGHTS

A. The Restriction of the Political Offense Exception

Towards the end the 1970s, a movement began that favored abolishing the political offense exception largely because it was perceived as no longer protecting fighters for freedom, but rather,

30. See ICCPR, supra note 29, art. 9.
32. See id. art. 6.
33. See id. art. 12.
34. See ICCPR, supra note 29, art. 27; ICESCR, supra note 31, art. 15.
35. See ICCPR, supra note 29, art. 27.
41. Epps, supra note 22, at 82.
as providing safe haven to those who bombed buildings, murdered civilians, and hijacked aircraft to achieve political ends. The world gradually recognized that an exception to extradition, which had originally protected the human rights of the fugitive, was being used to trample human rights of the victims. The dilemma was resolved through a series of multilateral conventions and numerous bilateral treaties that describe specific acts which, regardless of their motivation, will be subject to extradition and will not count as political offenses. By abolishing or limiting the political offense exception, states are eager to prevent the extradition system from protecting the fugitive to the detriment of other individual’s right to life.

B. Refusal to Extradite on the Grounds of Nationality

In the era of human rights states have, however, emphasized protections for the fugitive. Many states, particularly civil law countries, simply refuse to extradite their own nationals fearing harsh treatment by a foreign government. In such instances, the home state prosecutes the fugitive if there is a basis for jurisdiction. Fortunately, most civil law countries assert jurisdiction over crimes based on nationality. Thus, the fact that the offense did not take place in the fugitive’s home state is not a barrier to prosecution. The fugitive, however, gains the comfort of being prosecuted in his own country, usually in his native language, or a language he understands, and through a process with which he is, presumably, more familiar. He will also be able to serve the prison sentence in his own country and possibly

42. "The easiest solution to the dilemma is simply to drop the political offender exception in extradition treaties." Id. at 87.


receive the support of family members and friends throughout his prosecution and prison term.

C. Refusal to Extradite Based on the Rule of Speciality

The defense of speciality, under which the requesting state may only try the fugitive for the specific offenses for which he was extradited, also provides the fugitive with a particular form of protection. While it is true that the requesting state can try the fugitive for crimes other than the crimes for which he was extradited, the fugitive must be afforded a reasonable period of time to leave the country before such prosecution can commence. The rule of specialty, therefore, protects the fugitive by limiting his prosecutorial exposure after extradition.

D. Refusal to Extradite Because of Incarceration Conditions or Type of Sentence

More recent cases have focused on the conditions under which a fugitive is held pending and after trial and the range of penalties the fugitive may suffer. In the Soering litigation, the European Court of Human Rights ultimately held that Britain would violate her obligations under the European Convention on Human Rights if she extradited Soering (a German citizen) to the United States. Soering was charged with the capital offense of murder, and if convicted, would be kept on death row for years due to lengthy appeals. Additionally, death row conditions in U.S. jails were deemed inhumane.

As more states have become parties to an increasing array of human rights treaties, states have found themselves with the possibility of conflicting treaty obligations. For example, a state may be obligated to extradite under an extradition treaty but may violate various human rights obligations if it does in fact extradite

---

45. Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989). The court held that extraditing Soering from the United Kingdom to the United States on a capital charge would violate art. 3 of the European Convention on Human Rights, because of the conditions in which he would be held on death row); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (stating “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”). After the court’s decision, the authorities in Virginia amended the charges to remove the capital offense and the United Kingdom extradited Soering to the United States for trial.
the fugitive to a country not meeting the required norms.\textsuperscript{46} The trend is to honor the fugitive’s human rights obligations rather than the extradition obligation.

\textbf{E. The Re-Negotiation of Treaties to Protect Fugitives}

In the wake of more protective human rights standards, states have also sought to renegotiate treaties. This has been particularly true with regard to the death penalty. Starting at the beginning of the 1960s, a large human rights movement, often spearheaded by non-governmental organizations such as Amnesty International, sought to abolish the death penalty. At the present time, roughly two-thirds of all states no longer administer the death penalty as punishment for crimes. These states are understandably reluctant to extradite fugitives to countries that may impose a death sentence. Initially attempting diplomatic negotiation, abolitionist states have essentially told death penalty states that they will not extradite fugitives unless the death penalty states reduce the charges to non-capital offenses or guarantee that fugitives will not be subject to the death penalty. This strategy has been successful on occasion, as in the \textit{Soering Case}.\textsuperscript{47} More recently, abolitionist states have begun renegotiating treaties and have reserved the right to refuse extradition if the fugitive would be subject to the death penalty.\textsuperscript{48}

\textbf{F. Attacking the Rule of Non-Inquiry}

The rise in protections for the fugitive has also battered the rule of non-inquiry, which asserts that the magistrate or judge hearing the extradition case in the requested state will not inquire into the procedures to be followed in the requesting state. This rule grew out of the sense that if a state was willing to enter into an


extradition treaty with another state, its political departments would have already made the policy decision that surrender of fugitives to that state was compatible with overall notions of fairness. In the United States, that initial policy decision would also have been subject to a two-thirds Senate vote and subsequent presidential ratification in the treaty making process.\(^49\) It was then considered improper for the judiciary to second-guess the decisions of the political branches once they had laid down the language in a treaty obligating the United States to extradite fugitives. The rule of non-inquiry is a facet of the political question doctrine, although no court, to my knowledge, has ever stated that the determination whether or not to extradite a fugitive is solely for the political branches to decide.\(^50\) When an extradition treaty exists, courts have traditionally deemed themselves obligated by the treaty promise, regardless of the nature of the regime (both political and judicial) to which the fugitive is being returned. This "hands-off" approach is coming under attack.\(^51\)

The new role of the state as a protector and promoter of individual rights facilitated the rise of the state as the protector of the fugitive in the extradition process. States were still ready to return criminals for prosecution, but only after assuring that the fugitives' core rights would be protected. As the state's role changed, so did the extradition process.

**VII. THE DEMISE OF SOVEREIGNTY**

The rise of the nation-state and its gradually changing sense of itself have now entered a new phase, one that might well be described as the era of the demise of sovereignty. The confidence with which states have been able to insist on the guarantee of certain human rights norms for fugitives was made possible because the individual state is part of a much larger group of states sharing the same values. This has been true even when extradition treaties have not provided for such human rights guarantees, and

\(^{49}\) U.S. CONST. art. II, § 2, cl. 2. Although extradition treaties are almost invariably sent to the Senate for a two-thirds vote, such treaties could be the subject of an executive agreement, which does not require such "advice and consent."

\(^{50}\) The Secretary of State retains the final determination whether or not to extradite once a court has decided that the fugitive can be extradited. 18 U.S.C. § 3184 (1993); see also In Re Stupp, 23 F. Cas. 296 (C.C.S.D.N.Y. 1875) (No. 13,563).

even when the requesting state has been considerably more powerful than the requested state. The human rights system emerged through the broad agreement by many states on the necessity for a common set of norms and the gradual evolution of enforcement mechanisms.

Groups of states have entered into regional alliances and delegated powers to supranational bodies. The most highly developed regional organization is the European Union, which now regulates everything from tariffs to the definition of chocolate for its members. Other supranational organizations exist on a worldwide basis to govern particular areas of human activity such as the World Trade Organization, which sets the governing norms for international trade.

This movement towards subsuming the state into larger governing structures is reflected in extradition law by the emergence of multilateral extradition treaties and by the requirement that states surrender individuals within their jurisdiction to supranational entities such as the ICTY, the ICTR and the ICC.

VIII. THE STATE AS A PART OF A MULTISTATE LEGAL SYSTEM

A. The Emergence of the Multilateral Extradition Treaty

Traditionally, extradition treaties have been bilateral agreements that came about as the result of bilateral negotiations. Crime was perceived as largely a concern of individual nations. When a criminal fled, the individual nation where the fugitive was

---


53. The range of enforcement mechanisms runs from mere reporting, see, e.g., Convention on the Rights of the Child, supra note 52, art. 44, to the right of the individual to sue his or her state, see, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 29, art. 22.


found would return the fugitive for prosecution. As long as crime was largely local, the system worked quite well. With the massive increase in the movement of goods and people, and the rise of the multinational corporation, particularly since the middle of the twentieth century, crime was bound to become international in scope.

Although large numbers of bilateral treaties can cover what a single multilateral treaty on the same subject covers, states find it increasingly beneficial to negotiate multilateral treaties addressing a variety of criminal matters, while making provisions for extradition within those multilateral treaties. The treaties usually: define particular offenses; broaden the scope of traditional bases of jurisdiction; obligate states to prosecute or extradite offenders; and agree that the treaty itself shall serve as an extradition treaty if the parties in question lack an extradition treaty between them. These multilateral treaties cover a large number of offenses, from hostage taking to the smuggling of nuclear materials, and employ extradition as a cornerstone of their enforcement mechanism. The need to tackle crime at the international level has necessitated these treaties, while extradition has provided the key to enforcement.

There are also some regional multilateral extradition conventions. The European states, which had carried out extradition through a large number of bilateral treaties, all with slight variations in their obligations, decided that a uniform set of extradition requirements would be more effective. To that end, the European Convention on Extradition was adopted and ratified by almost all of the members of the Council of Europe, as well as by two non-members. Similarly, the Inter-American Convention on Extradition provides a multilateral extradition

---

56. See, e.g., Hijacking Convention, supra note 43, art. 8; Sabotage Convention, supra note 43, art. 8; Hostages Convention, supra note 43, art. 10.
57. Hostages Convention, supra note 43.
system for members of the Organization of American States. As more states collaborate in regional organizations, the number of multilateral extradition treaties can be expected to increase.

**B. The Surrender of Sovereignty Eliminates the Need for Extradition**

If regional groups of states ultimately surrender some, or all, of their sovereignty, the need for the process of international extradition, as we now know it, will disappear. If Europe, for example, ever moves towards a uniform criminal law system with unified enforcement mechanisms, extradition would no longer be necessary. The current European Convention on Extradition has a few tentative moves towards uniform enforcement. A number of its articles create a common standard: Article 12 (the request for extradition and supporting documents); Article 13 (supplementary information); Article 16 (provisional arrest); and Article 20 (handing over property).\(^6\)

The disappearance of extradition in a hypothesized Europe demonstrates, once again, how extradition requires separate sovereignties to exist. As states form unions, extradition is modified. Once separate sovereignties no longer exist (or at least no longer exist in criminal law or criminal law enforcement) extradition dies.

**IX. The State as Part of a Universal System of International Criminal Law Enforcement**

Although multilateral and bilateral extradition treaties will remain the predominate enforcement mechanism for the surrender of criminals who have violated domestic law and fled out of state, the 1990s saw major developments in the prosecution of individuals for the violation of international criminal law. The Security Council decided to establish the ICTY\(^63\) and the ICTR,\(^64\) and states created the ICC by becoming parties to the Rome Convention.\(^65\)

---

63. ICTY, supra note 38.
64. ICTR, supra note 39.
65. Rome Statute, supra note 40.
Although the concept of universal jurisdiction had embraced such crimes as genocide, war crimes, and crimes against humanity, so that any state could try the perpetrator regardless of any connection with the events, very few states in fact chose to exercise such jurisdiction. Too often those who carried out serious violations of international criminal law would either remain in power, ensure for themselves a grant of amnesty, or escape to a place where they could not be prosecuted. Weak regimes with the moral courage to try such perpetrators might well fear the consequences.

The solution was the creation of international courts with jurisdiction over the most serious offenses. Despite the doubts about the Security Council's ability to create such courts, the Yugoslav and Rwanda Tribunals have handed down a growing body of judgments against individuals for the violation of international crimes as defined in their statutes. The ICC, which may well hear its first case within a year, will no doubt follow suit. All three of these international courts have required the creation of a new regime for the surrender of individuals charged with crimes by a prosecutor.

Traditional extradition is a state-to-state process. Surrender of indictees to an international tribunal is a state-to-international entity process. There are a number of articles that address the topic of surrender to the ICTY and the ICTR and more recently the surrender mechanism envisioned for the ICC. Rendition or surrender of criminals has entered a new phase reflective of sovereign states' relationships to newly created international entities. Some states have resisted cooperation with these new international courts. Yugoslavia, recently renamed Serbia-Montenegro, initially resisted all cooperation with the ICTY but gradually a number of the country's leaders during the Balkan war, including Slobodan Milošević have either surrendered to the


Tribunal voluntarily or been subject to forcible arrest and rendition. Political will on the part of individual states, and on the part of the larger community of states, is essential for these tribunals to gain jurisdiction over reluctant indictees who live in resistant states.

Other states, notably the United States, have embraced and endorsed the two tribunals established by the Security Council but have refused to become a party to the ICC.69 The expressed fear of the United States is that, as a nation with military forces throughout the world, its troops face the greatest exposure to prosecution. Since the United States cannot control who is prosecuted under the ICC's Statute,70 it is not prepared to become a party to the treaty. The ICC's jurisdiction over indictees is not, however, dependant on any particular state being party to the treaty. In light of the ICC's prevailing jurisdiction, the United States has recently entered into some treaties with foreign states under which the foreign state agrees not to surrender any U.S. citizen or member of the U.S. armed forces to the ICC without the specific permission of the United States.71

If we ask what the reluctance of the United States to become a party to the ICC statute represents in terms of underlying concepts, the answer lies in the idea of preserving old notions of separate sovereignty together with the notion that a powerful state can set its own rules for interstate relationships, in particular, when it comes to surrendering criminals not only to other nation states but also to supranational legal entities. It is still too early to tell

69. President William Clinton signed the Rome Treaty on December 31, 1999. However, President George W. Bush withdrew the U.S. signature on May 6, 2002 in a letter from John Bolton, U.S. Under Secretary of State for Arms Control and International Security to U.N. Secretary General Kofi Annan. This letter formally declared the U.S. intention not to ratify the Rome Treaty and renounced any legal obligations arising from the U.S. signature of the Treaty. The constitutionality of presidential withdrawal of the U.S. signature to a treaty had never been addressed by U.S. courts.

70. Rome Statute, supra note 40 (during the plenipotentiaries conference in Rome 1998, the United States tried very hard, but failed, to have prosecution made subject to Security Council veto).

71. By April 16, 2003, the American Non-Governmental Organizations Coalition for the ICC (AMICC) listed twenty-four states as having concluded such agreements with the United States, although a number of these agreements are subject to subsequent parliamentary approval. See AMICC, Bilateral Immunity Agreements, at http://www.amicc.org/usinfo/administration_policy.html#agreements (last visited Sept. 21, 2003).
whether powerful states will be able to remain outside the new system of rendition to international entities. However, if we examine the truly remarkable expansion of international law and international entities since the end of World War II, the reasonable person might well conclude that extradition and rendition have entered a new phase and that cooperation, not recalcitrance, is likely to win the day. A new spirit of sovereign participation with international entities—not independent domination of them—may create the path for the “extradition” of the future.