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INTERPRETING EXTRADITION TREATIES

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It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.
-Justice Oliver Wendell Holmes

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I. INTRODUCTION

In *Factor v. Laubenheimer* the Court held that when an extradition treaty allows for two interpretations, one enlarging the rights of the parties under it, and the other reducing them, the construction that allows the greater rights should be preferred over the other.[1] This doctrine is commonly known as the default rule of international extradition, and requires courts to prefer interpretations that facilitate extradition over those that do not.[2] *Factor*, however, was decided at a time when those subject to extradition were not recognized to have due process rights, and at a time when extradition treaties had not evolved into the current-modern agreements that focus on protecting human rights as well as facilitating the extradition process. Because the main conditions that gave rise to the default rule have ceased to exist, it should be discarded.

Extradition rules come from two main sources, bilateral-extradition treaties and multilateral treaties. The United States makes most, if not all, of its extradition requests through its bilateral extradition treaties with foreign countries, which contain a plethora of human rights and due process protections for the individuals involved in it, commonly known as relators.[3] The number and pervasiveness of these protections prove that the sole purpose of extradition treaties is not simply to facilitate extraditions, as assumed by the Court in *Factor*.[4]

When interpreting extradition treaties, courts should apply the well-entrenched doctrines of treaty construction by considering first the treaty's

[1] 290 U.S. 276, 293–94 (1933).
[2] *See infra* Part IV.
[3] *See generally* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 91 (6th ed. 2014).
[4] *See generally id.*; *see also infra* Part II(B).

text,[5] and when there is ambiguity, assessing other sources such as the history of the treaty's negotiation and the subsequent practice of the parties.[6] Applying these doctrines of treaty construction to extradition treaties would often suggest that relators should not be extradited, which in turn would conflict with the default rule and its requirement that treaties be construed to favor extradition. Courts should choose, however, the settled doctrines of treaty construction over the obsolete default rule.

Unlike regular treaties, extradition treaties are self-executing. After ratification, they are readily enforceable without the need for additional legislation.[7] This means that the rights afforded to relators in extradition treaties, such as the requirement of probable cause, are as enforceable in United States courts as if they were included in a federal statute.

Despite the substantial citation of the default rule by the lower courts, courts often rely on the general doctrines of treaty construction to reach their conclusions. Recently, two federal courts of appeal in *Patterson v. Wagner*,[8] and in *Martinez v. United States*,[9] supported their decisions on general doctrines of treaty interpretation and a thorough consideration of the facts, rather than the default rule. These cases are particular in their substantial analysis of treaty text, the history of negotiations, and other factors such as the subsequent practice of the parties. The contrast between cases such as *Patterson* and *Martinez*, in which the courts engage in in-depth treaty construction, and those that categorically apply the default rule, show that the default rule is no longer applicable to modern extradition treaties, and that its simple application runs counter to current doctrines of treaty construction.

Part II(A) of this Article discusses the self-executing nature of extradition treaties and its significance to their interpretation. Part II(B) lists and discusses twelve different human rights and due process provisions regularly contained in extradition treaties, proving that the sole purpose of extradition treaties is not simply to extradite people. In Part II(C) this Article describes various multilateral treaties containing human rights and extradition provisions that further support this Article's arguments, whereas Part III discusses the basics of treaty interpretation. Finally, Part IV goes into the default rule of international extradition. The discussion of the default rule includes a description of its origins and development in Part IV(A), and the argument in Part IV(B) that the default rule should be considered in light of its historical circumstances —a time when courts did not recognize due process rights to relators. Part IV(C) further argues that the default rule is rooted in the incorrect assumption that the sole purpose of extradition treaties

[5] *See infra* notes 208-209.
[6] *See infra* notes 210-11 and accompanying text.
[7] *See infra* notes 22–23.
[8] 785 F.3d 1277 (9th Cir. 2014).
[9] 828 F.3d 451, 454 (6th Cir. 2016) (en banc).

is to facilitate extradition, and Part IV(D) argues that as in criminal law, extradition treaties should not be construed expansively.

II. EXTRADITION TREATIES AS LEGAL BASIS FOR INTERNATIONAL EXTRADITION

The Restatement of the Foreign Relations Law of the United States defines a treaty as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law[.]"[10] All treaties "have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise."[11] The Constitution refers to "treaties" and to other "agreements" or "compacts" with foreign powers, but it does not define such terms or give any guidance as to their proper scope or purpose.[12] Article II of the Constitution, for example, provides that the President "shall have Power, by and with the Advise and Consent of the Senate, to make Treaties, provided two[-]thirds of the Senators present concur[,]"[13] whereas Article VI, establishes that treaties, as well as the Constitution and the laws of the United States, are "the supreme Law of the Land[.]"[14] This language is considered to grant treaties the same standing as federal statutes, and to subject them both to compliance with the Constitution.[15]

The President's power to make treaties has been construed to limit the role of the judiciary in international extradition.[16] Courts cannot prohibit the executive from negotiating or entering into an extradition treaty, nor can they mandate the executive to negotiate or enter into one.[17] Courts, however, do have a role in international extradition. Mainly, they can refuse to extradite if it would violate the Constitution, a federal law, or a treaty.[18] The main duty of the extradition court is thus to ensure that the request for extradition fulfils the requirements of the applicable treaty and statutes, and that no valid

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[10] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301. Treaties are also commonly known as conventions, agreements, protocols, covenants, charters, statutes, acts, and declarations. *Id.* at n. Comment (a).

[11] *Id.* at Comment (a).

[12] U.S. CONST. art. I, § 10; *id.* art. II, § 2; *id.* art. VI.

[13] U.S. CONST. art. II, § 2.

[14] U.S. CONST. art VI.

[15] Boos v. Barry, 485 U.S. 312, 324 (1988); Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); Valentine v. United States, 299 U.S. 5, 10–11 (1936) (treaties are "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597–99 (1884); United States v. Rausher, 119 U.S. 407, 418 (1886); Restatement (Third) of the Foreign Relations Law of the United States § 302(2) cmt. b (1986) ("Treaties and other international agreements are subject to the prohibitions of the Bill of Rights and other restraints on federal power . . . ."); HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137–40 (1972).

[16] *See* U.S. CONST. art. II, § 2, cl. 1.2; United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318–21 (1936). *See also* BASSIOUNI, *supra* note 3, at 70.

[17] *See* BASSIOUNI, *supra* note 3, at 71.

[18] *See* Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936). *See also* BASSIOUNI *supra* note 3, at 71.

defense or exception to extradition is in order.

Even though extradition treaties and the extradition statute[19] are both legal bases for international extradition,[20] treaties contribute more to the process21 as most conditions are negotiated by the party-states. These extradition treaties are also self-executing,[22] which means that after Senate ratification they do not need separate legislation by Congress to have legal effects in the United States.[23] Should conflict arise between an extradition treaty and the extradition statute, the later of the two must prevail as per the "last in time" doctrine.[24] Since many of the provisions of the extradition statute are more than 150 years old,[25] the applicable treaty will usually prevail in case of conflict. In any case, the power to extradite requires that there be a treaty or statute authorizing it.[26]

Extradition treaties may be "bilateral" —between the United States and a foreign country or entity— or among various states, in which case it is called "multilateral." The extradition statute does not specify what type of treaty is proper for extradition, so it is believed that in addition to bilateral

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[19] *See* 18 U.S.C. § 3181.

[20] *See* BASSIOUNI, *supra* note 3, at 71 ("Federal legislation is developed to regulate the procedures of extradition subject to the provisions of the relevant treaties, which are deemed self-executing.").

[21] *Id.* at 73 ("Regrettably, the orientation of the Act is that it is a supplement to treaties or that it otherwise applies in the absence of contrary treaty provisions, but only when a treaty does exist between the requesting state and the United States.").

[22] United States v. Rauscher, 119 U.S. 407, 418–19 (1886); Cheung v. United States, 213 F.3d 82, 94–95 (2nd Cir. 2000); *see also* BASSIOUNI, *supra* note 3, at 119 ("Extradition treaties are deemed self-executing and therefore do not need legislation."). *See also* United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if as respondent asserts, it is self-executing, it would appear that the court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.").

[23] *See* Medellin v. Texas, 552 U.S. 491, 521 (2008) ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.. . . [the treaty need not say, however, that it is] self-execut[ing] in so many talismanic words."); *see also* Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888) (to the extent that treaties are self-executing, they "have the force and effect of a legislative enactment.").

[24] Reid v. Covert, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); Fong Yue Ting v. United States, 149 U.S. 698, 720–21 (1893) ("The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.... [I]f the two are inconsistent, the one last in date will control the other..."); The Cherokee Tobacco, 78 U.S. 616 (1870) (plurality opinion); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597–99 (1884); Ntakirutimana v. Reno, 184 F.3d 419, 424–27 (5th Cir. 1999) ("The Supreme Court, however, has held that statutes can usurp a treaty. This is confirmed by the 'last in time' rule that, if a statute and treaty are inconsistent, then the last in time will prevail." (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888))).

[25] *See* BASSIOUNI, *supra* note 3, at 73–74.

[26] Valentine v. United States, 299 U.S. 5, 8 (1936); Terliden v. Ames, 184 U.S. 270, 289 (1902) ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.").

treaties, multilateral treaties may constitute a valid basis.[27] Despite such flexibility, the United States conducts its extradition requests mostly through bilateral extradition treaties,[28] as it considers the bilateral treaty to be a better tool for the process.[29]

A. Bilateral-Extradition Treaties are Self-Executing and Create Individual Rights

Because extradition treaties do not require separate legislation for judicial enforcement in the United States, they have been traditionally understood as self-executing. Extradition treaties' constitutional ranking is the same as federal statutes and thus the rights extradition treaties afford relators should be enforced by the courts with the same zealousness they enforce the rights afforded by federal statutes. Unlike regular-non-self-executing treaties, extradition treaties do not constitute mere political documents subject to the whims of the Executive. Whereas the courts afford the executive branch substantial discretion in its interpretation and enforcement of international treaties, the individual rights created by extradition treaties should be strictly applied by the courts in consonance with due process and the Constitution.

According to the Supremacy Clause, the United States' Constitution, federal statutes, and treaties are "the supreme law of the land[.]"[30] Treaties and federal statutes enjoy the same ranking as law, but a lower one than the Constitution.[31] Despite having the same constitutional standing as federal statutes, treaties normally do not create rights that are readily enforceable. Legislation by Congress is required to enforce them, unless the treaty's language indicates the parties' intention for the treaty to have immediate domestic effect.[32] When the treaty's language reflects such intention, the treaty is considered "self-executing" and thus requires no further legislation to be enforced in courts.[33] The parties' intention that the treaty be self-

[27] BASSIOUNI, *supra*, note 3, at 74 ("In the instance where the basis for the extradition request is a multilateral international criminal law convention, the provisions of the Act would be applicable.").

[28] *Id.* at 80.

[29] *Id.* at 75.

[30] U.S. CONST. art. VI, cl. 2.

[31] *See* Artemio Rivera, *Probable Cause and Due Process in International Extradition*, 54 AM. CRIM. L. REV. 131, 167–68 (2017).

[32] *See* Medellin v. Texas, 552 U.S. 491, 505 (2008) (treaties "are not domestic laws unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." (citing Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005)). *But see* Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602–05 (2008) (arguing that because the Supremacy Clause declares treaties the supreme law of the land, a treaty must be presumed self-executing, unless the treaty specifies that it requires additional legislation to be implemented as domestic law).

[33] *See Medellin*, 552 U.S. at 521; Clark v. Allen, 331 U.S. 503, 508 (1947) (recognizing inheritance rights of individuals under treaty between Germany and the United States, despite the treaty's conflict with California inheritance law); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (to the extent that treaties are self-executing, they "have the force and effect of a legislative enactment."). *See also* Sanjaa v. Sessions, 863 F.3d 1161, 1166–67 (9th Cir. 2017); Vazquez, *supra* note 32, at 605 ("This Article argues that, when

executing, however, does not need to be stated literally.[34] As explained by the Court in *Medellin*:

> [N]either our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court's opinion. Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.[35]

Treaties that are not self-executing, on the other hand, are regularly construed as contracts between nations and thus mostly subject to interpretation and consideration by the political branches, not the courts.[36] Unless the provisions of a non-self-executing treaty are further adopted in national legislation, in compliance with the treaty's accords, its provisions will not create individual rights.[37]

Because extradition treaties are considered self-executing,[38] their provisions must be automatically enforced as domestic federal law after Senate ratification, without need for separate Congressional action.[39]

Some courts have insisted that international treaties do not create private rights: "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts[.]"[40] The Supreme Court has noted that various Courts of Appeals "have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary."[41]

But extradition treaties, as self-executing law, are not subject to the

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a treaty binds the United States to behave in a given way towards a particular individual, the treaty is 'judicially enforceable' by the individual just as any statute or constitutional provision would be, unless the treaty is non-self-executing in the Foster sense.").

[34] *Medellin*, 552 U.S. at 521.

[35] *Id.*

[36] Foster v. Neilson, 27 U.S. 253, 314 (1829). *See* Alex Glashausser, *What We Must Never Forget When it is a Treaty We are Expounding*, 73 U. CIN. L. REV. 1243, 1255–56 (2005).

[37] *See supra* note 32, and accompanying text.

[38] *See* United States v. Rauscher, 119 U.S. 407, 418–19 (1886); Cheung v. United States, 213 F.3d 82, 94–95 (2nd Cir. 2000); *see also* BASSIOUNI, *supra* note 3, at 119 ("Extradition treaties are deemed self-executing and therefore do not need legislation.").

[39] *See Rauscher*, 119 U.S. at 419. (A treaty . . . is a law of the land, as an [A]ct of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And[,] when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.).

[40] 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. *a* at 395 (1986).

[41] Medellin v. Texas, 552 U.S. 491, 505-06, n.3 (2008) (citing United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001)). *See also* United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001); United States v. Li, 206 F.3d 56, 60–61 (1st Cir. 2000) (en banc); Goldstar (Panama) S. A. v. United States, 967 F.2d 965, 968 (4th Cir.1992); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3rd Cir. 1979).

regular rules of treaty construction because they are not merely political documents.[42] Courts have regularly recognized the private rights of relators to raise individual defenses or exceptions available in extradition treaties,[43] and their right to be protected by due process provisions such as the requirement of probable cause.[44] Courts, thus, have afforded relators standing to raise treaty-based defenses or requirements, such as statutes of limitations,[45] double jeopardy,[46] double criminality,[47] and political offense,[48] against their extradition requests.

On the other hand, when an issue of extradition arises in a criminal trial, courts are divided on whether the defendant has standing to raise a treaty-based defense. For example, courts are divided on whether defendants have standing to raise the rule of "specialty" as a defense to their criminal prosecution.[49] The rule of specialty requires that extradited persons be prosecuted only for the offenses with which they were charged in their extradition proceedings and for which they were delivered to the requesting state.[50] The most popular position by U.S. courts is that a criminal defendant must be afforded standing to allege a violation of the specialty principle, "limited, however, to those objections that the rendering country might have brought."[51] Circuit courts that afford criminal defendants standing to raise a violation of specialty find support in *Rauscher* and its interpretation that under the Constitution "a treaty is the law of the land and the equivalent of an act of the legislature."[52] Pursuant to that interpretation, the rights afforded by an

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[42] *See supra* note 36.

[43] *See generally infra* Part II (B).

[44] *See infra* Part II(B)(9).

[45] *See* Patterson v. Wagner, 785 F.3d 1277, 1280–83 (9th Cir. 2015); Jhirad v. Ferrandina, 536 F.2d 478, 480 (2nd Cir. 1976); Nezirovic v. Holt, 990 F. Supp. 2d 606, 613–19 (W.D. Va. 2014); *In re* Patterson, 2012 U.S. Dist. LEXIS 157843, *7–8 (C.D. Cal. October 30, 2012). *See also infra* Part II(B)(3).

[46] *See* Sindona v. Grant, 619 F.2d 167, 177–78 (2nd Cir. 1980); Galanis v. Pallanck, 568 F.2d 234, 238–39 (2nd Cir. 1977). *See also infra* Part II(B)(4).

[47] *See* United States v. Pena-Bencosme, 2007 U.S. Dist. LEXIS 80316, *27 (E.D.N.Y. October 30, 2007); *In re* Sauvage, 819 F. Supp. 896, 900–01 (S.D. Cal. 1993). *See also infra* Part II(B)(1).

[48] *See* Meza v. United States, 693 F.3d 1350, 1358–60 (11th Cir. 2012); Barapind v. Enomoto, 400 F.3d 744, 750–53 (9th Cir. 2005); Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); *Nezirovic*, 990 F. Supp. 2d at 619–21; Ahmed v. Wigen, 910 F.2d 1063, 1066 (2nd Cir. 1990) ("Whether an extraditee is accused of an offense of a political nature is an issue for judicial determination."). *See also infra* Part II(B)(2).

[49] *See* BASSIOUNI, *supra* note 3, at 579; United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995).

[50] United States v. Rauscher, 119 U.S. 407, 424 (1886); United States v. Valencia Trujillo, 573 F.3d 1171, 1173–74 (11th Cir. 2009); United States v. Iribe, 564 F.3d 1155, 1158 (9th Cir. 2009); United States v. Garrido-Santana, 360 F.3d 565, 577 (6th Cir. 2004); United States v. Baez, 349 F.3d 90, 92 (2nd Cir. 2003) ("Based on international comity, the principle of specialty generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country.").

[51] United States v. Lomeli, 596 F.3d 496, 500 (8th Cir. 2010) ("This circuit has held that extradited individuals such as Lomeli have standing to raise any objection that the surrendering country might have raised to their prosecution."); *Puentes*, 50 F.3d at 1572, 1575 ("We, therefore, hold that an individual extradited pursuant to an extradition treaty has standing under the doctrine of specialty to raise any objections which the requested nation might have asserted. The extradition individual, however, enjoys this right at the sufferance of the requested nation.").

[52] *Puentes*, 50 F.3d at 1573 (citing United States v. Rauscher, 119 U.S. 407, 418 (1886)).

extradition treaty are conferred on the state parties and the relator.[53]

Unlike regular international treaties, which are non-self-executing, extradition treaties require no further legislation after ratification to be enforceable as law in the United States. Extradition treaties provide a variety of individual rights that should be enforced by the courts with zeal because extradition treaties have the same constitutional ranking as federal statutes, and thus should not be treated as mere contractual terms subject to political consideration by the Executive and Congress.[54] The default rule requiremes that extradition treaties be construed expansively in favor of extradition conflicts with the self-executing nature of extradition treaties because the human rights afforded by them come from federal law and thus are not subject to the discretionary interpretation of the political branches.

B. The Typical Extradition Treaty Contains Multiple Clauses Protecting Human Rights and Due Process

The United States maintains bilateral extradition treaties with over one hundred foreign countries.[55] Even though the extradition process in the United States is heavily weighted in favor of the requesting country,[56] extradition treaties generally contain several clauses meant to shield relators from an unfair or arbitrary process, and to protect their human rights. The following are some of the most common clauses found in bilateral extradition treaties for the protection of relators.

1. Dual Criminality

Dual criminality clauses require that an offense be extraditable only "if the acts . . . [for which extradition is requested are] criminal[ized] by the laws of both countries."[57] Dual criminality does not require countries to name their offenses the same, or that they have exactly the same elements,[58] but rather that the charged conduct constitutes a crime in both countries.[59] Even though there must be an analogous crime in the requested country to the crime

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[53] *Puentes*, 50 F.3d at 1574 ("We believe that Rauscher demonstrates that even in the absence of a protest from the requested state, an individual extradited pursuant to a treaty has standing to challenge the court's personal jurisdiction under the rule of specialty.").

[54] *See supra* note 33 and accompanying text.

[55] 18 U.S.C. 3181 (2012). *See also* BASSIOUNI, *supra* note 3, at 1025–35.

[56] *See* Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969) ("[T]he procedural framework of international extradition gives to the demanding country advantages most uncommon to ordinary civil and criminal litigation.") (internal quotations omitted). *See generally*, Rivera, *supra* note 31.

[57] Collins v. Loisel, 259 U.S. 309, 311 (1922).

[58] *Id.* at 312.

[59] *See* Choe v. Torres, 525 F.3d 733, 738 (9th Cir. 2008) ("The fact that the Korean law is broader than ours, and thus punishes conduct that would not be unlawful here, is of no consequence, so long as the particular conduct Choe is charged with is prohibited in both countries." (citing Emami v. U.S. Dist. Court, 834 F.2d 1444, 1450 (9th Cir. 1987)); Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir. 1986) ("An accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations."); Republic of France v. Moghadam, 617 F.Supp. 777, 784 (N.D. Cal. 1985) ("The principle of dual criminality does not require that the charges be identical, but only that the acts be punishable in each country.").

charged in the requesting country,[60] "the elements of the analogous offenses need not be identical."[61]

The rule of dual criminality protects relators by requiring that people not be extradited for acts that are not criminal in their own country. It also promotes reciprocity between states by not forcing requested countries to surrender their nationals to face charges that the requested country does not consider illegal.[62] By 2011, clauses requiring dual criminality appeared in approximately sixty-nine of the United States extradition treaties.[63]

2. Political, Military, and Fiscal Offenses

Many U.S. treaties disallow extradition when the charged offense is related to a political, military, or fiscal issue. Some sort of political offense exception is contained in almost all extradition treaties.[64]

Offenses that are otherwise extraditable, should not form the base for an extradition if they are of a political nature.[65] To consider whether an offense qualifies as political for the purpose of the exception, the court must first determine whether the offense constitutes a "pure" or a "relative" political offense.[66] "Pure" political offenses are those that are naturally related to political intercourse, such as treason, sedition, and espionage, whereas "relative" political offenses are those "common crimes that are so intertwined with a political act that the offense itself becomes a political one."[67] Ordinary crimes such as murder or fraud may constitute political offenses if their commission is sufficiently related to political acts such as rebellions, uprisings, and civil wars.

The political offense exception is linked to "eighteenth-century political theories on freedom, democracy, and the right to rebel against oppression."[68] The exception is premised on three main justifications: (1) the belief that people have a right to resort to political activism to cause political change; (2) the concern that fugitives of political crimes would be subjected

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[60] United States v. Khan, 993 F.2d 1368, 1372–73 (9th Cir. 1993) ("Many cases have held that dual criminality is satisfied even though the names of the crimes and the required elements were different in the two countries. But in each of these cases the laws of the two countries were sufficiently analogous to satisfy dual criminality....We are not aware of any of any Pakistani law that is analogous to 21 U.S.C. § 843. Consequently, we are not convinced that Khan could be charged and punished in Pakistan for the conduct underlying Count VIII, separate and apart from the crime of conspiracy. Therefore, the doctrine of dual criminality has not been satisfied with respect to Count VIII.").

[61] Clarey v. Gregg, 138 F.3d 764, 766 (9th Cir. 1998) ("When the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are substantially analogous[.]") (citations omitted).

[62] *See* John T. Soma et al.,, *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 324 (1997).

[63] BASSIOUNI, *supra* note 3, at 1075.

[64] *Id.* at 670.

[65] United Nations Model Law on Extradition § 4.

[66] Ordinola v. Hackman, 478 F.3d 588, 596 (4th Cir. 2007).

[67] *Id.*

[68] BASSIOUNI, *supra* note 3, at 673.

to unfair trials because of their political ideas, should they be returned to their countries; and (3) the understanding that governments should not intervene with the "internal political struggles of other nations."[69] International human rights conventions, for example, proclaim the rights of all people to self-determination, "and implicitly recognize the need for revolution when those in power fail to respond." [70]

Military offenses, on the other hand, are exempt from extradition in fifty-seven U.S. bilateral treaties.[71] "Military offenses include those such as sedition, mutiny, and desertion, which are outside the realm of ordinary criminal law."[72] To be exempted, the acts giving rise to the charges must constitute a military crime under the laws of the requesting state, and must not be typified as an ordinary crime[73] or form a violation of the laws of war.[74] The United States extradition treaty with Sweden, for example, exempts extradition "[w]hen the offense is purely military."[75]

Some United States extradition treaties exempt offenses of a fiscal nature. The extradition treaties with Germany[76] and Switzerland[77] are two examples. The extradition treaty with Switzerland grants the requested country discretion to refuse extradition for violations of "currency policy, trade policy, or economic policy," or acts "intended exclusively to reduce taxes or duties."[78]

3. Statutes of Limitation

A statute of limitations defense may be raised against a request for extradition only if the applicable treaty provides for it,[79] but most current

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[69] Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986).

[70] David M. Lieberman, Note, *Sorting the Revolutionary from the Terrorist: The Delicate Application of the "Political Offense" Exception in U.S. Extradition Cases*, 59 STAN. L. REV. 181, 184 (2006) (citing C. Vanden Wijngaert, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION ix (1980)).

[71] *Id.*

[72] *In re* Extradition of Suarez-Mason, 694 F. Supp. 676, 703 (N.D. Cal. 1988).

[73] *See* Extradition Treaty, Latv.-U.S., art. 4(4), Dec. 7, 2005, S. TREATY DOC. 109-15.

[74] BASSIOUNI, *supra* note 3, at 739. The United Nations Model Treaty on Extradition suggests that nations may agree to require that extradition not be granted "[i]f the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law[.]" Model Treaty on Extradition, G.A. Res. 45/16, annex, U.N. GAOR, 45th Sess., Supp. No. 49A, at 211, U.N. Doc. A/45/49 (Dec. 14, 1990), 30 I.L.M. 1407 (1991).

[75] Extradition Treaty, Swed.-U.S., art. V(4), Oct. 24, 1961, S. TREATY DOC. 104-9. *See also* Extradition Treaty, Neth.-U.S., art. 4, June 24, 1980, 22 U.S.T. 1; Extradition Treaty, H.K.-U.S., art. 2(5), Dec. 20, 1996, S. TREATY DOC. 105-3; Extradition Treaty, Thai.-U.S., art .3(c), Dec. 14, 1983, 28 U.S.T. 5290; Extradition Treaty, India-U.S., art. 5, June 25, 1997, S. TREATY DOC. 105-30.

[76] Extradition Treaty, Ger.-U.S., art. 6, June 20, 1978, 32 U.S.T. 1485.

[77] Extradition Treaty, Switz.-U.S., art. 3(3), Nov. 14, 1990, 47 Stat. 2122.

[78] *Id.*

[79] *See* Merino v. United States Marshall, 326 F.2d 5 (9th Cir. 1963). *See also In re* Patterson, 2012 U.S. Dist. LEXIS 157843 at 8–9 (C.D. Cal. October 30, 2012) (relator is certified extraditable even though the prosecution was begun by South Korea well after the statutes of limitation for both countries had run because the wording used by the extradition treaty implied that application of the defense was optional by the requested country.).

extradition treaties contain such provisions.[80] Their language usually allows the barring of extradition when the requesting country has not brought prosecution against the relator within the terms provided by the laws of the requesting or requested state. In such cases, the extradition magistrate is permitted to inquire into the laws of the requesting state to determine whether the statute of limitations has run or not.[81]

Statutes of limitations are meant to "ensure due process and fundamental fairness."[82] They protect the innocent from being charged at a time when they no longer have access to exculpatory evidence, and shield the public from untimely and ineffective prosecutions.[83] The inclusion of provisions for statutes of limitations in extradition treaties is clearly meant to protect relators from untimely and potentially unfair extraditions and criminal prosecutions.

4. Double Jeopardy

Double jeopardy provisions are contained in most U.S. extradition treaties.[84] In criminal cases, the constitutional prohibition against double jeopardy is meant "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[85] The doctrine of double jeopardy may apply in international extradition when the relator already has been prosecuted for the same facts or charges by the requesting or requested country.

Double jeopardy has been held not to apply to extradition proceedings, in terms of protecting relators from subsequent extradition requests.[86] This means that the denial of an extradition request does not necessarily prevent a future request for the same person by the same country. Courts reason that extradition hearings are preliminary proceedings, and thus the denial of a request for a certificate of extradition does not constitute an acquittal or a decision on the merits.[87] But double jeopardy, or the similar civilian-doctrine of *Ne Bis in Idem*, may be used as a defense against extradition when the relator already has been prosecuted in the requesting or requested country for the same offense or facts.[88]

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[80] Roberto Iraola, *Statutes of Limitations and International Extradition*, 2010 MICH. ST. L. REV. 103, 103 (2010).

[81] Skaftouros v. United States, 667 F.3d 144, 161 (2nd Cir. 2011).

[82] BASSIOUNI, *supra* note 3, at 779.

[83] United States v. Marion, 404 U.S. 307, 322 (1971). *See also*, Artemio Rivera, *A Case for the Due Process Right to a Speedy Extradition*, 50 CREIGHTON L. REV. 249, 255 (2017).

[84] Sindona v. Grant, 619 F.2d 167, 177 (2nd Cir. 1980); Galanis v. Pallanck, 568 F.2d 234, 238 (2nd Cir. 1977).

[85] Green v. United States, 355 U.S. 184, 187 (1957).

[86] Collins v. Loisel, 262 U.S. 426, 429 (1923) (double jeopardy not applicable to extradition orders).

[87] *Id.*

[88] *See* BASSIOUNI, *supra* note 3, at 756.

5. Remedies and Recourses Clauses

Many U.S. treaties contain clauses that allow relators to benefit from remedies provided under the laws of the requested state.[89] A recurrent issue with *remedies and recourses clauses* is whether relators can validly assert rights afforded to criminal defendants under the United States Constitution and statutes,[90] such as raising the Sixth Amendment Speedy Trial Clause as a defense.[91] So far, American courts have concluded that constitutional rights afforded to criminal defendants do not accrue to relators because international extradition is not a criminal proceeding,[92] and because the U.S. Constitution cannot be extended extraterritorially.[93] By doing so, U.S. courts have left the purpose of these clauses undefined.

Even though American courts are yet to clarify the exact purpose and meaning of remedies and recourses clauses, these clauses at least seem to recognize that relators are protected by the laws of the requested state, in addition to the protections specifically allowed by treaty. This is particularly relevant in cases where the requested country has local legislation protecting relators from unfair or inhumane treatment by requesting countries,[94] as right and recourse clauses may be understood to integrate such rights. The inclusion of these clauses in extradition treaties also supports the theory of this Article that extradition treaties are meant to protect the rights of relators, as well as to facilitate the extradition process.

6. Death Penalty Exception

Sixty-four of the United States' bilateral extradition treaties contain at least one provision allowing the requested state to refuse extradition to a death state.[95] These provisions are generally exercised by treaty partners whose municipal laws prohibit the death penalty, and who consider the

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[89] *See* Extradition Treaty, Austl.-U.S., art. X, May 14, 1974, 27 U.S.T. 957 ("[T]he person whose extradition is sought shall have the right to use such remedies and recourses as are provided by the law [of the requested state]."); Treaty of Extradition, Arg.-U.S., art. 10, June 10, 1997, T.I.A.S. No. 12,866, 2159 U.N.T.S. 129. In the extradition treaty between the United States and Canada, Article 8 provides that any "person whose extradition is sought shall have the right to use all remedies and recourses provided by [the law of the requested state."] Treaty on Extradition, Can.-U.S., Dec. 3, 1971, Art. 8, T.I.A.S. No. 8237, at 8; *see also* Protocol Amending the Treaty on Extradition, Can.-U.S., Jan. 11, 1988, S. TREATY DOC. 101-17 (1990).

[90] *See generally* Murphy v. United States, 199 F.3d 599 (2nd Cir. 1999); Martin v. Warden, 993 F.2d 824 (11th Cir. 1993); Kamrin v. United States, 725 F.2d 1225, 1227–28 (9th Cir. 1984); Nezirovic v. Holt, 990 F. Supp. 2d 606, 617–19 (W.D. Va. 2014).

[91] *Martin*, 993 F.2d at 829 ("Even if a treaty states that 'the person whose extradition is sought shall have the right to use all remedies and recourses provided by [the law of the Requested State],' as does the treaty between the United States and Canada, the defendant does not have a right to a speedy extradition.") (citation omitted); *Kamrin*, 725 F.2d 1225, 1227–28 (9th Cir. 1984).

[92] *Id.*

[93] *Kamrin*, 725 F.2d at 1227–28.

[94] *See* John Quigley, *The Rule of Non-Inquiry and Human Rights*, 45 CATH. U. L. REV. 1213, 1226 (1996) (listing several foreign courts that have considered the potential fate of the relator at the requesting country as part of their extradition inquiry).

[95] BASSIOUNI, *supra* note 3, at 1078.

treatment afforded in the United States to capital offenders as inhumane and torturous.

For "several decades," European states have refused to extradite individuals to the United States without commitments by the United States that the death penalty will not be imposed.[96] An example of a typical death penalty clause is in the extradition treaty between the United States and the United Kingdom, which provides in Article 7:

> When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.[97]

The application of the death penalty in the United States was at issue before the European Court of Human Rights (ECHR) in 1989 when it decided that an intended extradition from the United Kingdom to the United States would have violated international law because the United States planned to apply the death penalty.[98] The United States requested Great Britain to extradite Jens Soering, a German national, to face murder charges in the state of Virginia.[99] Great Britain approved the extradition request, but Soering appealed to the ECHR.[100] In making its decision, the ECHR considered Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[101] assessed the average length of wait on death row in the state of Virginia, and the conditions of confinement, to rule that the death penalty process in that state was "inhuman[e]" and "degrading" ("death row phenomenon").[102] It further concluded that the intended extradition would violate Article 3 which provides: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[103]

Another decision of an international court that highlights the

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[96] *See* Michael J. Kelley, *Aut Dedere Aut Judicare and the Death Penalty Extradition Prohibition*, 10 INT'L LEGAL THEORY 53, 59–60 (2004).

[97] Extradition Treaty, U.K.-U.S., art. 7, Mar. 31, 2003, 35 U.S.T. 3197, T.I.A.S. No. 10850. *See also* Extradition Treaty, Brazil-U.S., art. VI, Jan. 13, 1961, 15 U.S.T. 2093; United Nations General Assembly's Model Treaty on Extradition, art. 4(d), G.A. Res. 45/116, 45th Sess., 68th plen. Mtg. (Dec. 14, 1990) ("Extradition may be refused . . . (d) [i]f the offense for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.").

[98] Soering v. United Kingdom, European Court of Human Rights, Application No. 14038/88, 44 (1989), *available at* https://www.law.kuleuven.be/iir/nl/activiteiten/documentatie/OldActivities/DeathPenalty/Soering.pdf).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See id.*

[103] *Id. at* 80.

importance of human rights in the extradition process is *Ng v. Canada.*[104] At the time of his extradition request, Charles Chitat Ng was serving a criminal sentence in Canada for attempting a store theft and shooting a security guard.[105] The United States requested Ng's extradition on behalf of the state of California, to try him on nineteen criminal counts, including charges of kidnapping and murder.[106] According to California law, Ng was eligible for the death penalty.[107]

After the corresponding judicial process, Canada's courts and its Minister of Justice ordered Ng's extradition to the United States without any conditions as to the imposition of the death penalty.[108] Not satisfied, Ng filed a complaint before The Human Rights Committee of the United Nations, established under Article 28 of the International Covenant on Civil and Political Rights ("ICCPR").[109]

The Committee considered evidence that death by gas asphyxiation, as then used in California, causes "prolonged suffering and agony" on the prisoner and does not result in death "as swiftly as possible[.]"[110] The Committee concluded that the execution of Ng through such procedure would contravene international standards of humane treatment and thereby violate article 7 of the Covenant.[111] Article 7 of the ICCPR provides in its relevant part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[112] As explained by the Committee:

> [E]xecution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received

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[104] *See generally* Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469 (January 7, 1994), *available at* http://hrlibrary.umn.edu/undocs/html/dec469.htm *United Nations Convention Against Terrorism*

[105] *Id.*

[106] *Id.* at ¶2.1.

[107] *Id.*

[108] *See id.* at ¶¶ 2.2–2.5.

[109] *See* G.A. Res. 2200A (XXI) at IV art. 28, cl. 1.(Dec. 16, 1966); U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966).

[110] Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469, ¶16.3 (January 7, 1994) (*available at* http://hrlibrary.umn.edu/undocs/html/dec469.htm).

[111] *Id. at* ¶16.1.

[112] G.A. Res. 2200A (XXI), *surpa* note 106, art. 7; U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966).

assurances that he would not be executed.[113]

As part of its opinion, the Committee requested Canada to take any possible steps to avoid the imposition of the death penalty on Mr. Ng in the United States,[114] and to ensure that a similar situation would not arise in the future.[115]

Court decisions such as *Soering*'s and *Ng*'s have created a strong precedent that states must apply human rights conventions in extradition proceedings even when the relator is requested by a state that is not a party to these conventions.[116] *Soering* and *Ng* also suggest that extraditing countries may be responsible for any inhumanities, degradations, or unnecessary punishment suffered by relators in the requesting country after extradition.[117]

Further expanding on these principles, the Italian Constitutional Court in *Venezia v. Ministerio di Grazia e Giustizia*[118] ruled that the Italian constitution forbids the extradition of a citizen to the United States for the prosecution of a death penalty offense, unless "absolute assurances" are provided that the death penalty will not be imposed.[119] Because of these and other similar cases, at least one author considers that a regional European norm has been established prohibiting the use of the death penalty and its accompanying extradition.[120]

The development of the "death row phenomenon" doctrine by the European Court of Human Rights in *Soering*, and the decision by the Human Rights Committee of the United Nations in Ng, are supported by various national courts' decisions that have refused to extradite to states that apply the death penalty.[121] Countries such as France, Germany, and Spain, on the other hand, have conditioned the extradition of terrorist suspects to the United States on promises by the U.S. Department of Justice not to seek the death

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[113] Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469, ¶16.4 (January 7, 1994) (*available at* http://hrlibrary.umn.edu/undocs/html/dec469.htm).

[114] *Id. at* ¶18.

[115] *Id.*

[116] *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 196–97 (1998) ("[E]ven where a bilateral treaty fails to include such a provision, the requesting state should be sensitive to the convictions and values of the requested state and be prepared to give firm assurances that the death penalty will not be imposed on the extraditee. This is a subject on which the requesting state cannot, in most circumstances, impose its values on the requested state.").

[117] *See id.; See also* Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469 (January 7, 1994).

[118] Corte cost., sentenza 223/96, June 27, 1996, 79 Rivista di Diritto Internazionale 825 (1996).

[119] *Id.*; *see also* Mark E. Dewitt, Comment: *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATH. U. L. REV. 535, 570–573(1998).

[120] *See* Kelley, *supra* note 96, at 54–55.

[121] *See* Dugard & Van den Wyngaert, *supra* note 118, at 196; Triveniben v. State of Gujurat, (1989) 1 S.C.R. 509 (India); Madhu Mehtu v. Union of India, (1989) 3 S.C.R. 774 (India); Vatheeswaran v. State of Tamil Nadu, (1983) 2 S.C.R. 348; Sher Singh v. State of Punjab, (1983) 2 S.C.R. 582, 593; Catholic Commission for Justice & Peace, Zimbabwe v. Attorney General Zimbabwe, (1993) 1 ZLR 242 (Zimbabwe); Pratt v. Attorney General for Jamaica, (1994) 2 A.C. 1 (Jamaica).

penalty.[122]

7. Extraterritorial Jurisdiction Exception

Various extradition treaties limit the extraterritorial jurisdiction of the requesting country. Because of these treaties, requesting states are usually constrained to demand extradition only for offenses committed within their territorial boundaries unless the laws of both, the requesting and requested country, allow for the exercise of jurisdiction outside their territories under similar circumstances.

The extradition treaty between Brazil and the United States is an example. It provides that "[w]hen [the] offense has been committed outside the territorial jurisdiction of the requesting state, the request for extradition need not be honored unless the laws of the requesting and requested state authorize punishment under such circumstances."[123] Other treaties include language requiring the requested country to deny extradition when the alleged offense occurs outside the territory of the requesting country and the laws of the requested country would not confer jurisdiction under similar conditions.[124] For instance, the extradition treaty between Denmark and the United States requires:

> When the offense for which extradition has been requested has been committed outside the territory of the requesting State, the executive authority of the United States or the competent authority of Denmark, as appropriate, shall have the power to grant extradition if the laws of the requested State provide for the punishment of such an offense committed in similar circumstances.[125]

These limitations protect relators, as well as the international community, from overreaching by states in the exercise of their criminal jurisdiction.

8. Humanitarian Grounds Exception

Some extradition treaties allow the party-states discretion to refuse extradition when the age or health condition of the relator is an issue,[126] or when there are reasonable grounds to believe the request is being made on account of the relator's race, religion, political ideas, or ethnicity.[127] Likewise, some U.S. treaties allow the requested state to deny extradition for unspecified humanitarian reasons,[128] and to protect the relator from unfair

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[122] *See* Kelley, *supra* note 96, at 62–63.
[123] Extradition Treaty, Braz.-U.S., art. IV, Jan. 13, 1961, 15 U.S.T. 2093.
[124] *See* Extradition Treaty, Fin.-U.S., art. 3(3), June 11, 1976, 31 U.S.T. 944.
[125] Extradition Treaty, Den.-U.S., art. 4, June 22, 1972, 25 U.S.T. 1293.
[126] *See* Extradition Treaty, Braz.-U.S., art. XV, Jan. 13, 1961-June 18, 1962, 15 U.S.T. 2093.
[127] *See* Extradition Treaty, Fr.-U.S., art. 4(4), Apr. 23, 1996, S. TREATY DOC. 105-13.
[128] *See* Extradition Treaty, Belg.-U.S., art. 6, Apr. 27, 1987, S. TREATY DOC. 104-7.

proceedings in the requesting country.[129] General humanitarian grounds have been effectively raised against an extradition request in a recent British case.

The extradition treaty with Brazil requires deferral of extradition when transferring the relator to the requesting state may pose a serious danger to health due to a grave medical condition,[130] while the treaty with Denmark requires the denial of extradition "[i]f in special circumstances, having particular regard to the age, health or other personal conditions of the person concerned, the requested State has reason to believe that extradition will be incompatible with humanitarian considerations."[131] The extradition treaties with the Netherlands,[132] Hong Kong,[133] Finland,[134] France,[135] and Canada[136] have similar provisions for the denial of extradition on humanitarian grounds relevant to the relator's age or health.

Human rights provisions also have been included in the United Nations Model Treaty on Extradition. This model was created to promote norms in extradition that are in tune with international standards. In its Article 3(b) it recommends the denial of extradition when:

> [T]he requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons[.][137]

Similar clauses against discrimination are found in the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[138] to which the United States is a party, Article 3(2) of the 1957 European Convention on Extradition,[139] the Inter-American Convention on

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[129] *See* Extradition Treaty, H.K.-U.S., art. 6(3)(c), Dec. 20, 1996, S. TREATY DOC. 105-3.

[130] Extradition Treaty, Braz.-U.S., art. XV, Jan. 13, 1961-June 16, 1962, 15 U.S.T. 2093 (extradition shall be deferred when "in the opinion of competent medical authority" the relator cannot be transported to the requesting state "without serious danger to his life due to his grave illness[.]").

[131] Extradition Treaty, Den.-U.S., art. 7(5), June 22, 1972, 25 U.S.T. 1293. *See also* Extradition Treaty, Nor.-U.S., art. 7(2)(b), June 9, 1977, 47 Stat. 2122 (extradition may be refused "If, in special circumstances, having particular regard to the age, health or other personal conditions of the person concerned, the requested State has reason to believe that extradition will be incompatible with humanitarian considerations."); Extradition Treaty, Swed.-U.S., art. V, Oct. 24, 1961, 14 U.S.T. 1845.

[132] *See* Extradition Treaty, Neth.-U.S., art. 7, June 24, 1980, S. TREATY DOC. 97-7.

[133] *See* Extradition Treaty, H.K.-U.S., Dec. 20, 1996, S. TREATY DOC. 105-3.

[134] *See* Extradition Treaty, Fin.-U.S., art. 7(1)(c), June 11, 1976, 31 U.S.T. 944.

[135] Extradition Treaty, Fr.-U.S., art. 6, Apr. 23, 1996, S. TREATY DOC. 105-13.

[136] Extradition Treaty, Can.-U.S., art. 5, Dec. 3, 1971, 27 U.S.T. 983.

[137] GA Res. 45/116, at 211 (Dec. 14, 1991).

[138] Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6(6), Dec. 20, 1998, 28 I.L.M. 493 (1989) (a state may refuse to extradite "where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.").

[139] European Convention on Extradiction, Europ. TS No. 24, Dec. 13, 1957, 359 U.N.T.S. 273.

Extradition,[140] and Article 4(4) of the extradition treaty between the United States and France.[141]

The Model Treaty on Extradition further promotes human rights by integrating Article 14 of the International Covenant on Civil and Political Rights to provide a right to a fair trial in international extradition. Specifically, Article 3(f) requires the refusal of extradition when:

> [T]he person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14[.][142]

Consistent with the Model Treaty, the extradition treaty between the United States and Hong Kong requires the denial of extradition when "the person sought is likely to be denied a fair trial or punished on account of his race, religion, nationality, or political opinions[,]"[143] and similar language is used by the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States. Section 476(h) of the Restatement provides:

> Extradition is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution, or because the person sought belongs to a particular political movement or organization, or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state.[144]

Recent extradition requests from the United States to the United Kingdom exemplify the importance of human rights in extradition treaties. In October 2012, then-Home Secretary of the United Kingdom Theresa May denied a request from the United States for the extradition of Gary McKinnon, an alleged computer hacker.[145] McKinnon admitted to the British government that he intruded, without permission, into U.S. government computers, but alleged that he had been looking for U.F.O.s.[146] He also alleged suffering

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[140] Inter-American Convention on Extradition, Art. 4(5), Feb. 25, 1981, 20 I.L.M. 733 (1981).

[141] Extradition Treaty, Fr.-U.S., art. 6, Apr. 23, 1996, 53 U.S.T. 1996.

[142] Model Treaty on Extradition, art. 3(f), Dec. 14, 1990, 30 I.L.M. 1407.

[143] Extradition Treaty, H.K.-U.S., art. 6(3)(c), Dec. 20, 1996, S. TREATY DOC. 105-3. *See also Soering*, 161 Eur. Ct. H.R. (ser. A) at 113 (1989) (extradition might be refused "in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.").

[144] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. h (1987).

[145] Gary McKinnon. *Extradition to US blocked by Theresa May,* BBC News (Oct. 16, 2012), http://www.bbc.com/news/uk-19957138.

[146] *Id.*

from Asperger's syndrome and mental depression.[147] The British government concluded that extraditing McKinnon to the United States, given his medical conditions, would have violated his human rights.[148] As explained by Secretary May to Parliament: "After careful consideration of all of the relevant material, I have concluded that Mr. McKinnon's extradition would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr. McKinnon's human rights."[149]

A more recent extradition request from the United States to the United Kingdom, however, had different results. In the case of relator Lauri Love, the United States alleged that Love unlawfully breached into computers of the Federal Bureau of Investigation, the American Missile Defense Agency, and the National Aeronautics Space Association.[150] Similar to Mr. McKinnon, Mr. Love suffers from Asperger's disease and mental depression, and raised such conditions before the British government as supporting a human rights bar to his extradition.[151] On September 16, 2016, a judge of the Westminster Magistrates' Court ruled that Mr. Love was extraditable to the United States, and two months later the United Kingdom's Secretary of State signed an order to extradite him. [152] Mr. Love, however, still has recourse to appeal these decisions to the United Kingdom's High Courts.[153]

9. Probable Cause Requirement

Treaties generally condition extradition on a showing of probable cause that the relator committed the alleged offense.[154] Probable cause for extradition[155] has been defined as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[156] "In making this determination, courts apply a

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[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Samuel Osborne, *Lauri Love extradition: British hacker who breached US government computers to be handed to US by Amber Rudd*, INDEPENDENT (Nov. 14, 2016), http://www.independent.co.uk/news/uk/crime/lauri-love-extradition-hacker-us-government-amber-rudd-a7417541.html.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See* Charlton v. Kelley, 229 U.S. 447, 461 (1891); Glucksman v. Henkel, 221 U.S. 508, 512 (1911); Santos v. Thomas, 830 F.3d 987, 989–90 (9th Cir. 2016) (en banc); Haxhiaj v. Hackman, 528 F.3d 282, 287 (4th Cir. 2008). *See also* BASSIOUNI, *supra* note 3, at 892; Rivera, *supra* note 31, at 137.

[155] *See* Benson v. McMahon, 127 U.S. 457, 463 (1888) (extradition is a proceeding akin to "preliminary examinations . . . for the purpose of determining whether a case is made out which will justify the holding of the accused."); Santos v. Thomas, No. 12-56506, 2016 U.S. App. LEXIS 13756, at *7 (9thCir. July 28, 2016) (en banc); Haxhiaj v. Hackman, 528 F.3d 282, 287 (4th Cir. 2008); Hoxha v. Levi, 465 F.3d 561, 560-61 (3rd Cir. 2006) ("The probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings."); BASSIOUNI, *supra* note 3, at 909 ("The standard of probable cause in international extradition is the same as the one used in preliminary hearings in federal criminal proceedings.").

[156] United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984). *But see Greci*, 527 F.2d at 960 ("Under thecircumstances the treaty, being both more recent and more specific than the statute, provides the controllingrequirements.").

'totality of the circumstances analysis' and 'make a practical, common sense decision whether, given all the circumstances . . . there is a fair probability that the defendant committed the crime."[157]

The probable cause requirement in the extradition treaty between the United States and Canada is typical. It provides that:

> Extradition shall be granted only if the evidence be found sufficient according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.[158]

Treaties, however, may demand more proof for an extradition to proceed. The extradition treaty with Denmark is an example:

> In the case of a request made to the Government of Denmark, the Danish authorities, in accordance with Danish extradition law, shall have the right to request evidence to establish a presumption of guilt of a person previously convicted. Extradition may be refused if such additional evidence is found to be insufficient.[159]

By establishing a requirement of probable cause for international extradition, state-parties provide some measure of due process to individuals which is inconsistent with the doctrine that the sole purpose of extradition treaties is to facilitate extraditions.

10. Prosecutions by Extraordinary Courts and Trials in Absentia

Various treaties allow for the denial of extradition when the relator is to be prosecuted, or has been prosecuted, at the requesting country by an ad-hoc or extraordinary court.[160] The extradition treaty between the United States and Germany provides in its Article 13 that "[a]n extradited person shall not be tried by an extraordinary court in the territory of the Requesting State[,]" and that "[e]xtradition shall not be granted for the enforcement of a

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[157] *In re* Paberalius, 2011 U.S. Dist LEXIS 57907, at *38 (N.D. IL May 31, 2011) (weighing evidence brought by the government against evidence presented by the relator to deny extradition request); *see also* United States v. Froman, 355 F.3d 882, 889 (5th Cir. 2004) (explaining a similar standard as in *Paberalius*); *In re* Extradition of Bonilla, 2014 U.S. Dist. LEXIS, at *4–5 (E.D. Tex. Mar. 4, 2014) (explaining magistrate must reach a common-sense conclusion); *In re* Extradition of Garcia, 825 F. Supp. 2d 810, 832–33 (S.D. Tex. 2011) (explaining that the evidence need only be sufficiently reliable and competent).

[158] Treaty on Extradition, Can.-U.S., art. 10(1), Dec. 3, 1971, 27 U.S.T. 983.

[159] Extradition Treaty, Den.-U.S., art. 6, June 22, 1972, 25 U.S.T. 1293.

[160] *See* Extradition Treaty, Ger.-U.S., art. 13, June 20, 1978, 32 U.S.T. 1485; Extradition Treaty, Braz.-U.S., Jan. 13, 1961, art. V(4), 15 U.S.T. 2093; Extradition Treaty, Swed.-U.S., Oct. 24, 1961, 15 U.S.T. LEXIS 2093.

penalty imposed, or detention ordered, by an extraordinary court."[161]

States additionally may refuse to extradite when relators are convicted in absentia. The exception is suggested by Article 3(g) of the United Nations Model Treaty on Extradition. Article 3(g) provides:

> If the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.[162]

Despite the Model Treaty, United States courts have so far refused to exempt extradition on the basis of convictions in absentia. The Sixth Amendment's confrontation clause, which requires that criminal defendants be confronted with the witnesses against them,[163] has been held inapplicable to extradition proceedings, and thus does not require that relators be convicted at the requesting country after having had the opportunity to confront the evidence against them.[164] But, when the conviction is obtained through a trial in absentia in the requesting country, United States courts do require that probable cause be established at the extradition hearing.[165] Even though probable cause is a relatively low standard of proof, the requirement is clearly meant to protect the due process and human rights of relators.

11. Exemption of Nationals

Approximately forty-three of the extradition treaties of the United States contain provisions allowing countries to refuse extradition of their nationals.[166] Unlike the exceptions for political, military, and fiscal offenses, which are based on the nature of the offense, the exemption of nationals focuses on the person involved. Generally, this exemption allows a requested country to refuse to extradite an otherwise-extraditable person when that person is one of its nationals.[167]

Countries that exercise their prerogative not to extradite their

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[161] *See id.*

[162] Model Treaty on Extradition, art. 3(g), Dec. 14, 1990, 30 I.L.M. 1407.

[163] U.S. CONST. amend. VI.

[164] *See Ex Parte La Mantia*, 206 F. 330 (S.D.N.Y. 1913) (the rights afforded by the Sixth Amendment do not protect "persons extradited for trial under treaties with foreign countries whose laws may be entirely different.").

[165] *See* Haxhiaj v. Hackman, 528 F.3d 282, 289 (4th Cir. 2008) ("for an extradition request based upon a conviction *in absentia*, the Treaty [with Italy] requires more detail than mere proof of the *fact* of conviction to establish probable cause, i.e., 'a reasonable basis to believe that the person sought committed the offense,' id., art. X, P 3(b), but it clearly does not require the kind of actual evidence suggested by Haxhiaj, such as trial testimony or transcripts of the wiretap evidence."); *see also* Gallina v. Fraser, 278 F.2d 77 (2nd Cir. 1960).

[166] BASSIOUNI, *supra* note 3, at 1077.

[167] *See* Extradition Treaty, Belg.-U.S., art. 3, Apr. 27, 1987, 1987 U.S.T. LEXIS 203; Extradition Treaty, Den.-U.S., art. 5, June 22, 1972, 25 U.S.T. 1293; Extradition Treaty, Japan-U.S., art. V, March 3, 1978, 31 U.S.T. 892; Extradition Treaty, Thai.-U.S., art . 8, Dec. 14, 1983, 28 U.S.T. 5290.

nationals, however, are often required to submit the requested person to its national court for criminal prosecution,[168] but there are exceptions. The treaties with Sweden and Japan do not require national prosecution by the requested state when the requested state refuses to extradite on the basis of nationality.[169]

12. Specialty

The rule of specialty limits the power of a requesting country to prosecute a relator to those facts for which the relator is certified extraditable and delivered to the requesting state.[170] Some courts have held that the rule of specialty is a privilege of the requested country, meant to protect the interests of that country, and not a right that accrues to the relator.[171] Despite that, the rule regularly protects relators from being prosecuted for charges not contemplated in their extradition requests, and thus, adds to the due process that extradition treaties require for the extradition process. Specialty is considered a principle of customary international law,[172] and has been included in all United States treaties since 1886.[173] As a principle alone, it should be binding upon the United States.[174]

C. U.S.-Multilateral Treaties Protect Relators' Interests

Multilateral treaties may be formed for a variety of purposes, including the creation of institutions such as the United Nations, or the promulgation of rules, as in the case of the Hague Conventions on the Law of

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[168] *See* Extradition Treaty, Belg.-U.S., art. 3, Apr. 27, 1987, S. TREATY DOC. 104-7; Extradition Treaty, Den.-U.S., art. 5, June 22, 1972, 25 U.S.T. 1293.

[169] Extradition Treaty, Swed.-U.S., art. VII, Oct. 24, 1961, S. TREATY DOC. 104-9; Extradition Treaty, Japan-U.S., art. V, March 3, 1978, 31 U.S.T. 892.

[170] *See* United States v. Rauscher, 119 U.S. 407, 424 (1886); United States v. Valencia Trujillo, 573 F.3d 1171, 1173–74 (11th Cir. 2009); United States v. Iribe, 564 F.3d 1155, 1158 (9th Cir. 2009); United States v. Garrido-Santana, 360 F.3d 565, 577 (6th Cir. 2004); United States v. Baez, 349 F.3d 90, 92 (2nd Cir. 2003)("Based on international comity, the principle of specialty generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country."); United States v. Sensi, 879 F.2d 888, 895–96 (D.C. Cir. 1989); RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES §477 (comment: "Courts in some states construe the doctrine of specialty strictly, so that any variance between the charge on which the extradition was based and the charge on which the prosecution is founded must lead to dismissal of the prosecution. In other states, including the United States, reporter's Note 1, if the prosecution is based on the same facts as those set forth in the request for extradition, the prosecution may go forward.").

[171] Donnelly v. Mulligan, 76 F.2d 511, 512 (2nd Cir. 1935); Sandhu v. Burke, 2000 U.S. Dist. LEXIS 3584, *48 (S.D.N.Y. February 10, 2000).

[172] *See Rauscher*, 119 U.S. at 420; BASSIOUNI, *supra* note 3, at 538 ("Specialty is frequently referred to as a principle because it is so broadly recognized in international law and practice that it has become a rule of [customary international law].").

[173] United States v. Lomeli, 596 F.3d 496, 500 (8th Cir. 2010), *citing* Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VA. J. INTL. L. 71, 75, 80–85 (1993); RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES, § 477 (1987) (the doctrine is included "[u]nder most international agreements, state laws, and state practice").

[174] *See* BASSIOUNI, *supra* note 3, at 538; *see also* Fiocconi v. Attorney General of the United States, 462 F.2d 475, 481 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972) (a person surrendered by comity, outside an extradition process, should be afforded the benefits of the principle of specialty at the requesting country as long as the requested state protests.).

War. States also join in multilateral treaties to promote political and human rights,[175] and to cooperate in the enforcement of their criminal laws. Through these treaties, these states agree on procedures to track and prosecute criminals involved in offenses such as drug trafficking,[176] counterfeiting,[177] and terrorism.[178] Some of these treaties include extradition clauses and language protective of human rights.

One multilateral treaty formed to promote human rights is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[179] which has been implemented in the United States through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[180] The Convention includes language relevant to international extradition in its articles three, five, and eight.[181] Article 3 of the Convention prohibits extradition "to another State where there are substantial grounds for believing that [the relator] would be in danger of being subjected to torture."[182] FARRA contains a similar provision,[183] and additionally requires the adoption of regulations by the executive to implement Article 3 of CAT.[184]

In response to FARRA, the Department of State has adopted regulations requiring the Secretary of State to make determinations as to the likelihood of torture prior to authorizing extradition.[185] According to FARRA and its implementing regulations, it is the Department of State, and not the courts, that should decide whether there is such a likelihood of torture awaiting the relator at the requesting state. If the Secretary of State determines that there is such a likelihood, the relator cannot be extradited.

Another multilateral treaty focused on the protection of human rights

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[175] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 14668.

[176] *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964) (entered into force for U.S. Jun. 24, 1967).

[177] International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 371.

[178] A-66: Inter-American Convention Against Terrorism, June 3, 2002, O.A.S., Ratified by the United States on Nov. 15, 2005. http://www.oas.org/juridico/english/treaties/a-66.html.

[179] G.A. Res. 39/46, U.N. GAOR 3d omm., 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72 at 197-98 (Mar. 6, 1984).

[180] Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. (1998). *See* Trinidad y Garcia v. Thomas, 683 F.3d 952, 955–56 (9th Cir. 2012).

[181] G.A. Res. 39/46, U.N. GAOR 3d omm., 39th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72 at 197-98 (Mar. 6, 1984).

[182] *Id.* (The Convention defines "torture" in Article 1 as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed or is suspected of having committed ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

[183] Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. (1998).

[184] *Id.*

[185] 22 C.F.R § 95.2-.3 (2017).

is the International Covenant on Civil and Political Rights ("ICCPR").[186] The ICCPR requires party-states to guarantee certain widely-acknowledged civil and political rights, such as providing criminal defendants with "a fair and public hearing by a competent, independent and impartial tribunal established by law."[187] The Covenant also requires courts to promptly inform arrestees of the reasons for their arrests and the nature of the charges against them.[188] The ICCPR entered into force in the United States on September 8, 1992.[189] Although it contains no express provision on extradition, it has been construed to require party-states to deny extradition whenever it is foreseeable that the rights protected by the Covenant will be violated by the requesting state after extradition.[190]

Various multilateral treaties ratified by the United States include clauses that refer to extradition proceedings.[191] The Inter-American Convention Against Terrorism,[192] for example, includes a clause through which the contracting states commit not to deny extradition on terrorist crimes on the basis that those crimes constitute political offenses, are related to political crimes, or have been committed for political reasons.[193] Together with its provisions for the extradition of suspected terrorists, it requires party-states not to discriminate on account of a person's "race, religion, nationality, ethnic origin, or political opinion[.]"[194] Its Article 15 requires that agreements under the Convention should be undertaken "with full respect for the rule of law, human rights, and fundamental freedoms."[195]

The United Nations Convention Against Illicit Traffic in Narcotic

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[186] G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

[187] *Id.* at art. 14.

[188] *Id.* at art. 9(2).

[189] *See* 138 Cong. Rec. S4783–84 (daily ed. Apr. 2, 11992). *See also, e.g.*, White House Statement on Signing the International Covenant on Civil and Political Rights, 28 Weekly Comp. Pres. Doc. 1008 (June 5, 1992); United States v. Duarte-Acero, 208 F.3d 1282, 1283 n.1 (11th Cir. 2000).

[190] *See* Kindler v. Canada, U.N. Hum. Rts. Comm., Communications No. 470/1991, dec. of July 30, 1993, reprinted in 14 Hum. Rts. L. J. 307, 308 (1993) ("If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."); Chitat Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994) (finding that Canada violated the ICCPR by extraditing relator to the United States because Canada knew that the method of execution to be used on the relator, a gas chamber, inflicted unnecessary suffering and thus constituted cruel and inhuman treatment). *See also* John Quigley, *supra* note 94, at 1219–22.

[191] *See* BASSIOUNI *supra* note 3, at 101–17 (listing various multilateral treaties that contain provisions on extradition).

[192] AG/Res. 1840 (XXXII-O/02), O.A.S. No. A-66, Inter-American Convention Against Terrorism (June 3, 2002), *avaliable at* http://www.oas.org/juridico/english/sigs. The document ratified by the United States on November 15, 2005. *See id.*

[193] *Id.* at art. 11.

[194] *Id.* at art. 14.

[195] *Id.* at art. 15.

Drugs and Psychotropic Substances,[196] ratified by the United States,[197] also includes a provision on extradition. Article 6 provides that states may refuse to comply with extradition requests when they "believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request."[198]

In addition to these multilateral treaties, the United Nations Model Treaty on Extradition ("Model Treaty") is expansive in its integration of international human rights into the extradition process.[199] It suggests that extradition be refused whenever there are substantial grounds to believe that the relator will be subjected to torture at the requesting country, or that the request is made on account of the relator's race, nationality, political ideas, ethnic origin, religion, sex or status.[200] Additionally, the Model Treaty demands the refusal of extradition when the relator "has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14[.]"[201] By integrating the ICCPR, the Model Treaty extends to international extradition the right to a fair trial at the requesting country.[202]

Multilateral treaties that contain extradition clauses, as well as bilateral extradition treaties, evidence the importance that states have recognized to afford relators a fair process by including provisions to protect human rights, protecting relators from the inhumanities of capital punishment, and adopting the due process principles of criminal proceedings. To understand the full legal implications of these human rights clauses, however, one must consider them within the doctrinal framework of international treaty construction.

III. BASICS OF TREATY INTERPRETATION

Courts normally interpret extradition treaties by applying the general doctrines of treaty construction. Through these doctrines, treaties are either

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[196] *See generally* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, *reprinted in* 28 I.L.M. 493 (1988), *available at* https://www.unodc.org/pdf/convention_1988_en.pdf.

[197] Ratified by the United States on February 20, 1990. *See Narcotic Drugs and Psychotropic Substances: United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en

[198] https://www. unodc.org/pdf/convention_1988_en.pdf (last visited Jan. 29, 2018).

[199] United Nations General Assembly's Model Treaty on Extradition, art. 4(d), G.A. Res. 45/116, 45th Sess., 68th plen. Mtg. (1990), *avaliable at* https://www.unodc.org/pdf/model_treaty_extradition.pdf.

[200] *Id.* at art. 3(b).

[201] *Id.* at art. 3(e).

[202] *See* John Dugard & Christine Van den Wyngaert, *supra* note 118, at 193 (1998).

viewed as statutes[203] or contracts.[204] This statute-contract dichotomy affects the courts' views on the nature of treaties and how they should be interpreted.[205] Despite some inconsistencies, some notable doctrines have emerged.

As with statutory construction, it is generally accepted that when interpreting a treaty courts should "begin with the text of the treaty and the context in which the written words are used."[206] If the treaty language is clear and unambiguous, the court's analysis ends there and the words of the treaty are applied as written.[207] If there is substantial ambiguity, however, the treaty should be construed consistently with "the shared expectations of the contracting parties."[208] This means that in cases of ambiguity, a court may look into the history of negotiations, adoption and drafting of the treaty, and the subsequent practice of the parties applying it.[209]

When interpreting treaties, courts should avoid constructions that "'render statutory language surplusage' or 'redundant.'"[210] They should also construe treaties in ways that are consistent with their general purpose and objective, and should prefer constructions that render all parts of a treaty valid and effective over those that give effect to only some parts and not others. [211] Thus, "the meaning of one term may be determined by reference to the terms it is associated with, and [] where specific words follow a general word, the specific words restrict application of the general term to things that are similar

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[203] United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."); United States v. Rausher, 119 U.S. 407, 419 (1886);
Sacirbey v. Guccione, 589 F.3d 52, 66 (2nd Cir. 2009); Kahn Lucas Lancaster v. Lark Int'l, 186 F.3d 210, 215 (2nd Cir. 1999).

[204] *See* Edye v. Robertson, (Head Money Cases), 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); Fourteen Diamond Rings v. United States, 183 U.S. 176, 182 (1901) (Brown J., concurring); Martinez v. United States, 793 F.3d 533, 544 (6th Cir. 2015) ("The Supreme Court has analogized to contract law and statutory interpretation in articulating methods of treaty interpretation[.]"); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 450 (2004); Glashausser, *supra* note 36, at 1244–45 (2005).

[205] *See generally* Glasshauser, *supra* note 36.

[206] Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991) (quoting Volkswagenwerk Aktiengessellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (citations omitted). *See also* United States v. Alvarez-Machain, 504 U.S. 665, 663 (1992) (the interpretation of treaties "must account for [its] . . . full text, language as well as punctuation, structure and subject matter.") (internal citations and quotation marks omitted); Shoji America, Inc. V. Avagliano, 457 U.S. 176, 180 (1982).

[207] United States v. Duarte-Acero, 208 F.3d 1282, 1285 (11th Cir. 2000) (citing Chan v. Korean Airlines, Ltd., 490 U.S. 122, 135 (1989) ("To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.")).

[208] Air France v. Saks, 470 U.S. 392, 399 (1985).

[209] *See* Elcock v. United States, 80 F. Supp. 2d 70, 78–79 (E.D.N.Y. 2000).

[210] Sacirbey v. Guccione, 589 F.3d 52, 66 (2nd Cir. 2009) (quoting Filler v. Hanvit Bank, 378 F.3d 213, 220 (2nd Cir. 2004).

[211] *Id.* (quoting Restatement (Second) of Contracts § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

to those enumerated."[212]

Courts have consistently held that treaties should be liberally construed,[213] but that does not mean that they should be construed broadly.[214] A "liberal" approach to treaty interpretation means only "the willingness of courts, when interpreting difficult or ambiguous treaty provisions, to 'look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[215] Ultimately, a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose."[216]

The most substantial doctrine of treaty construction in international extradition is the "default rule," which provides that in cases of ambiguity, extradition treaties should be construed to facilitate extradition. This Article argues that the default rule should be discarded for two main reasons. First because it is premised on the false assumption that the sole purpose of extradition treaties is to promote extraditions, and second because it is based on old cases decided at a time when courts did not recognize relators' due process rights.

IV. THE DEFAULT RULE OF TREATY INTERPRETATION

In *Factor v. Laubenheimer*, the Court reasoned that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."[217] Some lower courts have construed this language to mean that the sole purpose of extradition treaties is to promote extraditions and thus, when the meaning of the text is ambiguous, it must be interpreted liberally to allow for the relator's extradition.[218]

The default rule, however, incorrectly assumes that the sole purpose of extradition treaties is to facilitate extraditions. When the Court decided *Factor* in 1933, it construed not a modern extradition treaty, but the 1848

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[212] *Id.* (quoting City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 401 (2nd Cir. 2008)).

[213] Air France v. Saks, 470 U.S. 392, 396 (1985).

[214] United States v. Duarte-Acero, 208 F.3d 1282, 1285 (11th Cir. 2000).

[215] Kreimerman v. Casa Verkamp, S.A. de C.V., 22 F.3d 634, 638–39 (5th Cir. 1994) (quoting Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991). *See also* Yapp v. Reno, 26 F.3d 1562, 1569 (11th Cir. 1994) (Carnes, J. dissenting).

[216] *Yapp*, 26 F.3d at 1569 (Carnes, J. dissenting) (quoting Restatement (Third) of Foreign Relations Law § 325(1) (1986)).

[217] 290 U.S. 276, 293–94 (1933).

[218] Martinez v. United States, No. 14-5860, 2016 U.S. App. LEXIS 12501, *27–28 (6th Cir. 2016) (en banc) ("The point of an extradition treaty after all is to facilitate extradition, as any country surely would agree at the time of signing."); United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); Zhenli Ye Gon v. Holder, 992 F. Supp. 2d 637, 651 (W.D. Va. 2014) ("The fundamental purpose of an extradition treaty is to return persons to the requesting country to face trial on certain criminal charges. Extradition treaties are read broadly to achieve this goal."); Elcock v. United States, 80 F. Supp. 2d 70, 78–79 (E.D.N.Y. 2000) ("[C]onstruction of an extradition treaty is also guided by the 'familiar rule that the obligations of treaty should be liberally construed' to effect their purpose, namely, the surrender of fugitives to be tried for their alleged offenses.") (citations omitted).

Webster-Ashburton treaty between the United States and Great Britain,[219] as amended in 1889 by the Blaines-Pauncefote Convention.[220] These old treaties lack the emphasis of modern extradition treaties on protecting the citizens and residents of the contracting nations from being unfairly or maliciously extradited, and do not recognize the modern doctrine of due process as applicable in international extradition.[221]

A. Origins and Development of the Default Rule: Factor and its Progeny

Courts often cite *Factor* to support their decisions to extradite.[222] The *Factor* doctrine that extraditions treaties should be liberally construed to facilitate extraditions has been widely adopted by the lower courts,[223] but rarely discussed. *Factor*'s decision should be scrutinized to understand its current relevance.

In *Factor*, the British government requested the United States to extradite the relator on charges that he had received "certain sums of money, knowing the same to have been fraudulently obtained."[224] One of the two treaties upon which extradition was requested, the Blaines-Pauncefote treaty, included as an extraditable offense the act of receiving fraudulently obtained money. Blaines-Pauncefote and Webster-Ashburton, however, both have language requiring that the charges against the relator constitute a crime in both countries. Because the relator was found in Illinois at the time of the extradition request,[225] and the acts upon which the British charges were based did not constitute a crime in Illinois,[226] relator Factor argued that there was no basis for his extradition.[227]

In the face of this conflict, the treaties could have been construed either to allow Factor's extradition because the offense for which he had been charged was included in Article I of Blaines-Pauncefote as an extraditable

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[219] Treaty to Settle and Define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the American Slave Trade, and for the Giving Up of Criminals Fugitive from Justice, in Certain Cases, Eng.-U.S., Aug. 9, 1842, 8 Stat. 576 (hereinafter Webster-Ashburton Treaty).

[220] Extradition Convention between the United States of America and Her Britannic Majesty, supplementary to the Tenth Article of the Treaty concluded between the same High Contracting Parties on the ninth day of August 1842, Eng.-U.S., July 12, 1889, 26 Stat. 1508 (hereinafter Blaines-Pauncefote Convention).

[221] *See supra* Part II(B); and note 304.

[222] *See* Nezirovic v. Holt, 779 F.3d 233, 239 (4th Cir. 2015) ("We construe extradition treaties liberally in favor of surrendering a fugitive to the requesting country, 'in the interest of justice and friendly international relationships.'"); United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); *In re* Handanovic, 829 F. Supp. 2d 979, 989 (D. Or. 2011); Elcock v. United States, 80 F. Supp. 2d 70, 79 (E.D.N.Y. 2000).

[223] *See* Martinez v. United States, 828 F.3d 451, 463–64 (6th Cir. 2016) (en banc); Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); Santos v. Thomas, 830 F.3d 987, 1041 (9th Cir. 2016) (Callahan, J., dissenting).

[224] Factor v. Laubenheimer, 290 U.S. 276, 286 (1933).

[225] *Id.* at 286.

[226] *Id.* at 299.

[227] *Id.* at 286.

crime, or not to allow it because the charged offense did not constitute a crime in Illinois, the place where Factor was arrested.

The Court ruled for Factor's extradition, but before doing so, it made the following statements which have been widely cited in support of the default rule:

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. Unless these principles, consistently recognized and applied by this Court, are now to be discarded, their application here leads inescapably to the conclusion that the treaties, presently involved, on their face require the extradition of the petitioner, even though the act with which he is charged would not be a crime if committed in Illinois.[228]

In assessing Factor's rights under these two treaties, it must be recognized that Webster-Ashburton was not an extradition treaty, and Blaines-Pauncefote was not as protective of relators' rights as modern extradition treaties. Webster-Ashburton was a multi-purpose treaty in which the United States and Great Britain defined the boundaries of their northern territories in North America, agreed to suppress the African slave trade, and agreed to extradite fugitives.[229] The treaty contained only a single clause on extradition, Article X.[230] Article X established the specific crimes for which extradition was allowed[231] and conditioned extradition upon evidence sufficient to commit a person to a criminal trial at the "place where the fugitive or person so charged shall be found[.]"[232]

Blaines-Pauncefote, on the other hand, was an extradition treaty. It

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[228] *Id.* at 293–94 (citations omitted).

[229] Webster-Ashburton Treaty, *supra* note 221.

[230] Webster-Ashburton Treaty, *supra* note 221.

[231] Webster-Ashburton Treaty, *supra* note 221, at Art. X ("murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper . . .").

[232] Webster-Ashburton Treaty, *supra* note 221, art. X ("[P]rovided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed[.]").

supplemented Article X of Webster-Ashburton with nine separate articles, one of which was Article I, which defined ten additional crimes for which extradition was possible, including the crime with which relator Factor was charged, receiving money knowing it had been fraudulently obtained. Article I, however, also required that the offense for which extradition is sought be "punishable by the laws of both countries."[233]

Facing the conflict of applying an article that would allow extradition for the specific offense with which the relator was charged, and another article through which the extradition should be refused because the charged crime did not constitute a crime in Illinois, the Court concluded that the treaties should be construed liberally to allow for extradition. The Court reasoned that the sole purpose of those treaties was to promote extraditions, and noted that if Article X was meant to limit the types of crimes for which extradition was available, such intent would have been "expressed in connection with the enumeration of the treaty offenses," rather than in the proviso dealing with procedure.[234]

Extradition courts frequently cite *Factor* in support of the default rule, but rarely delve into any discussions of it. Only a few cases do cite the rule and explain their reasons for applying it. The following three cases, *Patterson v. Wagner*,[235] *Martinez v. United States*,[236] and *Elcock v. United States*,[237] are exceptional in their effort at explaining the nature of extradition treaties and the default rule, and thus deserve attention.

1. Patterson v. Wagner

In 1997, a South Korean court convicted Arthur Patterson of destroying evidence in connection with a murder case.[238] At the time of the murder, Patterson was the teenage son of an American serviceman stationed in South Korea. He moved to the United States as soon as he completed a sentence of imprisonment of a little more than a year for destruction of evidence.[239] Twenty years later, South Korea requested Patterson's extradition to prosecute him for the same murder in which he destroyed evidence.[240] In opposing the extradition request, Patterson argued that a statute of limitations provision in the extradition treaty prevented his extradition.[241]

Article 6 of the extradition treaty between the United States and South

[233] Blaines-Pauncefote Convention, *supra* note 222, at art. I.
[234] Factor v. Laubenheimer, 290 U.S. 276, 292 (1933).
[235] 785 F.3d 1277 (9th Cir. 2014).
[236] 828 F.3d 451 (6th Cir. 2016).
[237] Elcock v. United States, 80 F. Supp. 2d. 70 (E.D.N.Y. 2000) (finding a substantial issue as to the construction of a double jeopardy provision in the U.S.-Ger. Extradition treaty).
[238] *Patterson*, 785 F.3d at 1278.
[239] *Id.* at 1279.
[240] *Id.*
[241] *Id.* at 1280.

Korea provided as follows: "Extradition *may be denied* under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State."[242] Because Patterson's extradition request was for second degree murder,[243] the parties did not dispute that his prosecution was time-barred in the United States.[244] The issue was whether Article 6 required the United States to deny extradition for that charge, or whether the use of the terms "may be denied" in Article 6 simply granted the United States discretion to deny it.

To construe Article 6, the court considered *Medellin v. Texas*,[245] and concluded that treaty interpretation begins with the treaty's text.[246] The normal reading of the word "may" in Article 6 is "permissive, not mandatory." [247] "[U]ntimeliness is a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition."[248] In other words, according to the court, the extradition magistrate was obliged by Article 6 to certify Patterson's extradition, and then it was up to the discretion of the Secretary of State to decide whether or not to grant the request. Patterson countered that evidence from the treaty's drafting and negotiating history showed that despite the treaty's use of the words "may be denied," in reference to the application of the requested country's statute of limitations, the parties' meant Article 6 to constitute a mandatory bar to untimely extradition requests.[249]

The court accepted Patterson's legal argument that it should look further than the text of the treaty for its interpretation, but nonetheless found that the extra-textual evidence, "considered as a whole," also supported the government's argument that Article 6 only granted the party-states discretion to deny extradition based on the applicable statutes of limitations.[250] The court explained:

> Because the purpose of treaty interpretation is to 'give specific words of the treaty a meaning consistent with the shared expectations of the contracting parties, courts – including the Supreme Court – look to the executive branch's interpretation of the issue, the views of other contracting

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[242] Extradition Treaty, S. Kor.-U.S., art. VI, June 9, 1998, T.I.A.S. No. 12,962 (emphasis added).

[243] *Patterson*, 785 F.3d at 1280–81.

[244] *Id.*

[245] 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

[246] *Patterson*, 785 F.3d at 1281.

[247] *Id.* (citing Trinidad y García v. Thomas, 683 F.3d 952, 960 (9th Cir. 2012) (en banc) (Thomas, J., concurring).

[248] *Patterson*, 785 F.3d at 1281.

[249] *Id.*

[250] *Id.* at 1282.

> states, and the treaty's negotiation and drafting history in order to ensure that their interpretation of the text is not contradicted by other evidence of intent.[251]

In construing the extradition treaty the court considered the report by the Senate accompanying the treaty, transcripts of Senate hearings discussing it, other extradition treaties with similar provisions, and the letter by the State Department accompanying the treaty when it was submitted to the Senate.[252] Patterson argued that the summary of the Senate Report accompanying the treaty showed that the Senate understood Article 6 to be mandatory.[253] The court, however, rejected this argument by pointing to text from the body of the Senate Report which contained language that showed otherwise.[254] Finally, the court concluded its analysis by holding that the extra-textual evidence –the Senate Report, the discussions in the Senate's hearings, and the letter by the State Department– "reinforce[d] the natural reading of Article 6" that the exception on statutes of limitations is permissive and not mandatory.[255]

2. Martinez v. United States

In *Martinez*, the court construed a lapse-of-time clause in the extradition treaty between the United States and Mexico. The facts of *Martinez* date back to 2005 when one Avelino Martinez allegedly committed murder in the Mexican state of Oaxaca.[256] The government of Mexico requested Martinez's extradition almost eight years later in May 2013.[257] During the extradition proceedings, Martinez argued that his extradition was barred by a lapse-of-time provision in the extradition treaty.[258] More specifically, Martinez argued that Article 7 of the treaty adopted by reference the five-year statute of limitations of 18 U.S.C. §§ 1111(a)-(b), 3282(a), and the Speedy Trial Clause of the Sixth Amendment.[259] Article 7 of the United States-Mexico Extradition Treaty provided 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."[260]

Because Mexico took more than five years to request Martinez's

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[251] *Id.* at 1281–82 (citations omitted).

[252] *Id.* at 1282–83.

[253] *See id.* at 1282 (*citing* S. Exec. Rep. No. 106-13, at 5 (1999)) ("The Treaty with the Republic of Korea precludes extradition of offenses barred by an applicable statute of limitations.").

[254] *Id.* (concluding that the Senate Report refers to Article 6 stating that extradition "may be denied" if the conditions of such article were met, and that the Senate Report cites three other extradition treaties, two of which use the word may, rather than shall, in similar provisions).

[255] *Id.* at 1283.

[256] Martinez v. United States, 828 F.3d 451, 454 (6th Cir. 2016) (en banc).

[257] *Id.* at 455.

[258] *Id.* at 455–56.

[259] *Id.* at 456–57.

[260] *See generally id.*

extradition, he argued that his extradition request was barred by both the applicable American statute of limitations and the Speedy Trial Clause.[261] The circuit court rejected both arguments. In discussing why Article 7 did not integrate the Speedy Trial Clause, the court engaged in an in-depth interpretation of the treaty, which included an analysis of its text, context, history, applicable precedents, commentary, and the default rule.[262]

a. Text

Article 7 is not affected by the Speedy Trial Clause because Article 7 is a classical time bar.[263] In reaching this conclusion, the court first considered the treaty's Spanish version.[264] In the Spanish version the treaty uses the term "prescripción," both in the article's title and in its body, to refer to what the English version describes as "lapse of time."[265] And "prescripción"—the court concluded after considering a dictionary, Mexican Law, previous extradition treaties, and a communication of the U.S. State Department to the U.S. Department of Justice—is the equivalent of "statute of limitations" in Spanish.[266]

b. Context

Article 10(2) of the treaty provided that requests for extradition by the contracting parties must include "[t]he text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense."[267] The court read such requirement to constitute an "enforcement mechanism for Article 7," and concluded that through Article 10(2) the parties interpreted "lapse of time" to mean "time limit," or in other words, "statutes of limitations."[268]

c. History

There is a vast history of extradition treaties between the United States and Mexico:[269] The United States entered into its first extradition treaty with Mexico in 1861,[270] a second in 1899,[271] and the current in 1978.[272] In their 1899 extradition treaty, the parties agreed in Article III(3) that

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[261] *Id.*

[262] *Id.* at 457–70.

[263] *Id.* at 457–58 ("Because the Sixth Amendment does not establish a time limit, fixed or otherwise, before a trial must start, it does not create a rule that 'bar[s]' criminal prosecutions due to 'lapse of time.'").

[264] *Id.* at 459, quoting United States v. Percheman, 32 U.S. (7 Pet.) 51, 88 (1833) ("'[i]f the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.'"

[265] *Id.*

[266] *Id.*

[267] *Id.* at 459–60, (quoting Extradition Treaty, Mex.-U.S., art. 10(2)(d), May 4, 1978, 31 U.S.T. 5059, 5066.).

[268] *Id.*

[269] *Id.* at 460.

[270] *Id.* (citing Treaty for Extradition of Criminals, U.S.-Mex., Dec. 11, 1861, 12 Stat. 1199.).

[271] Treaty of Extradition, U.S.-Mex., art. III(3), Feb. 22, 1899, 31 Stat. 1818, 1821.

[272] Martinez v. United States, 828 F.3d 451, 460 (6th Cir. 2016) (en banc).

extradition must be refused "[w]hen the legal proceedings or the enforcement of the penalty for the acts committed by the person demanded has become barred by limitation according to the laws of the country to which requisition is addressed."[273] The 1978 treaty revised the provisions of Article III(3) of the 1899 treaty into Article 7. Instead of using the word "limitation" to refer to the proper basis for refusing an extradition request, Article 7 of the 1978 treaty used the term "lapse of time." The court understood this change in the 1978 treaty to imply that the term "lapse of time" in Article 7 is used as a synonym for "prescription" or "statute of limitations."

d. Other Extradition Treaties

To reinforce its holding that "lapse of time" in the treaty meant "statute of limitations," the court considered commentary that supports this view,[274] and contrasted Article 7 with the equivalent article in fourteen U.S. extradition treaties.[275] The contrasted articles in these fourteen treaties use the term "lapse of time" in conjunction with the term "statute of limitations" or "prescription" as if they were synonymous.[276] The extradition treaty with South Korea, for example, contains an article entitled "Lapse of Time" which allows for extradition "when the prosecution or the execution of punishment" "would have been barred because of the statute of limitations of the Requested State."[277]

e. Precedent

The court cited the decision by the United States Court of Appeals for the Eleventh Circuit in *Yapp v. Reno*[278] to support its conclusion that the term "'lapse of time has been commonly associated with a statute of limitations violation.'"[279] It further cited four other opinions by federal courts for the same proposition,[280] and noted that in many cases where the applicable extradition treaty contains a lapse of time provision, relators have opted not to raise a speedy-trial defense despite of long delays.[281]

f. Commentary

Commentary in the United Nation's Model Treaty on Extradition[282] and the Third Restatement of Foreign Relations Law were also cited.[283] Both

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[273] *Id.*

[274] *Id.* (*citing* 1 John Bassett Moore, A Treatise on Extradition and Interstate Rendition § 373, at 569-70 (1891); Black's Law Dictionary 1321, 1373 (10th ed. 2014)).

[275] *Id.* at 460-61.

[276] *Id.*

[277] *Id. citing* Extradition Treaty, U.S.-. Kor., art. 6, June 9, 1998, T.I.A.S. No. 12,962, at 4.

[278] 26 F.3d 1562, 1567-68 (11th Cir. 1994).

[279] *Martinez*, 828 F.3d at 462 (*quoting Yapp*, 26 F.3d at 1567-68).

[280] *Id.*

[281] *Id.*

[282] G.A. Res. 52/88, Annex, art. 3(2), U.N. Doc. A/RES/52/88 (Dec. 12, 1997).

[283] *Martinez*, 828 F.3d at 463 (citing Restatement (Third) of the Foreign Relations Law of the United States § 476 (1987)).

commentaries contain language that treat the terms "lapse of time" and "statutes of limitations" indistinctively.

g. The Default Rule

In its final analysis the court reasoned that all of the interpretative tools it had applied to consider Article 7 –text, context, history, precedent, and commentary– point to the conclusion that the phrase "lapse of time" in the extradition treaty does not include speedy-trial protections.[284] It then considered the default rule, but only to make the hypothetical argument that even if there was ambiguity on the issue, its conclusion would remain the same.[285] Quoting *Factor* for the premise that "ambiguity in an extradition treaty must be construed in favor of the 'rights' the 'parties' may claim under it[,]"[286] it concluded that it was required to disallow speedy-trial protections because *Factor* mandates a construction that promotes extradition. According to the court, the purpose of an extradition treaty is to promote extradition. [287]

3. Elcock v. United States

Relator Elcock stole $419,720.00 in different currencies from a bank in Berlin and sent it by mail to his sister's address in the United States.[288] He then flew from Germany to the United States and visited her sister. While attempting to receive the money from the U.S. Mail, he was arrested, charged and convicted of transporting stolen currency in foreign commerce and smuggling the currency into the United States. At the same time Elcock was being prosecuted in the United States, the German government charged him with grand larceny and requested his extradition.[289]

Elcock objected to his extradition, however, arguing double jeopardy. The treaty between the two countries required the denial of extradition when the requesting country intended to prosecute the relator for an offense for which the relator already had been tried at the requested country.[290] At issue before the court was whether it should consider Elcock's defense by applying American principles of double jeopardy or the more lenient European doctrine of *non bis in dem*.[291]

The provision at the heart of the issue, Article 8, required the denial of extradition when the relator "has been tried and discharged or punished with final and biding effect by the competent authorities of the requested State for the *offense* for which extradition is requested."[292] Article 8, and the whole

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[284] *Id.*
[285] *Id.*
[286] *Id.* (quoting Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933)).
[287] *Id.*
[288] *Elcock v. United States*, 80 F. Supp. 2d 70, 73 (E.D.N.Y. 2000).
[289] *Id.* at 75-76.
[290] *Id.* at 75.
[291] *Id.* at 76.
[292] Extradition Treaty U.S.-F.R.G., Art. 8, June 20, 1978, 32 U.S.T. 1485 (emphasis added).

extradition treaty with Germany, notably failed to define the term "offense," and did not establish whether the term should be construed according to international law, or the law of the requested or requesting state.[293] The government argued that Article 8 and the term "offense" should be interpreted by applying the American doctrine of double jeopardy, as adopted by the Court in *Blockburger v. United States*,[294] while the relator claimed that Article 8 should be construed through the civil law doctrine of non bis in idem as understood in Germany.[295]

In assessing this issue, the court first considered whether there was an international consensus on the meaning of the term "offense," but found none.[296] This absence of consensus[297] led the court to conclude that the proper construction of the treaty did not lie in simply applying American principles of double jeopardy, but in applying the American doctrines of treaty interpretation,[298] which include the default rule.[299] The default rule, as applied by the court, led it in turn to employ the double jeopardy doctrine of Blockburguer rather than its German counterpart, *non bis in idem*. Because the double jeopardy provision of *Blockburger* would be more permissive of extradition than *non bis in idem*,[300] the court reasoned, it was the proper doctrine to apply according to the default rule.

Elcock is a good example of a case where the default rule is decisive. The same result reached in *Elcock*—of construing Article 8 to require the application of *Blockburger*—may have been reached, however, by following precedent that apply principles of federal law in cases of international extradition. Lower courts have held that the Fifth Amendment's Due Process

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[293] *Elcock*, 80 F. Supp. 2d at 80 ("Given the absence of any generally recognized meaning for the term 'offense' in international law, it is necessary determine by reference to *travaux preparatoires* and other sources what subjective meaning the United States and Germany mutually attached to the term, if any.")

[294] 284 U.S. 299 (1932).

[295] *Elcock*, 80 F. Supp. 2d at 81 n. 15.

[296] *Id.* at 79-80.

[297] *Id.* at 80.

[298] *Id.* at 78 ("In the absence of such a provision, a court may not simply rely on the meanings the terms of the treaty have in the context of domestic law. Lest the true import of a treaty provision be lost in the translation, a court must first turn to established principles of treaty interpretation to discern the meanings of those terms as they are used in the treaty.")

[299] *Id.* at 78-79.

[300] *Id.* at 81-82 ("The remaining principles of treaty construction applicable in the extradition context –deference to executive branch interpretations and the preference for constructions that promote extradition– both support adoption of the *Blockburguer* test.").

Clause[301] and the Fourth Amendment[302] apply to international extradition proceedings. Extradition courts have also ruled that principles of federal law should be applied in deciding issues of double jeopardy.[303] Even though the Fifth Amendment's Double Jeopardy provision was not directly applicable to relator Elcock, Article 8's reference to protection from double exposure should have been construed consistently with American-double jeopardy law, as it was argued by the government.[304]

Unless specified by treaty or international law, American courts should apply principles of American law. Extradition treaties, as law of the land, must be read in conjunction with the Constitution, the extradition statute, and the accepted principles of treaty construction.[305] Applying American principles of due process to the issue in *Elcock*, suggests in turn, using the American doctrine of double jeopardy.[306] Due process demands that the process afforded to an individual in an extradition proceeding be followed according to American principles of Constitutional law whenever possible.[307]

B. Factor's Default Rule Should be Considered in Light of its Historical Circumstances —a Time When Courts did not Recognize Due Process Rights to Relators

Factor supported its default rule partly on the now-obsolete belief that

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[301] Martinez v. United States, 793 F.3d 533, 556 (6th Cir. 2015) ("Courts have unanimously held that the government is bound by principles of due process in its conduct of extradition proceedings."), *rev'd on other grounds*, 828 F.3d 451 (6th Cir. 2016) (en banc); Valenzuela v. United States, 286 F.3d 1223, 1229 (11th Cir. 2002) ("[T]he judiciary must ensure that the constitutional rights of individuals subject to extradition are observed."); United States v. Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997) ("[E]xtradition proceedings before United States courts [must] comport with the Due Process Clause of the Constitution."); Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969); *In re* Extradition of Gonzalez, 52 F. Supp. 2d 725, 740 (W.D. La. 1999); Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1342 (S.D. Fla. 1998) *rev'd on other grounds*, 172 F.3d 883 (11th Cir. 1999); *In re* Extradition of Koskotas, 127 F.R.D. 13, 27 (D. Mass. 1989) ("Koskotas is certainly entitled to a hearing prior to extradition under the Due Process Clause"); *In re* Extradition of Singh, 123 F.R.D. 108, 125 (D.N.J. 1987) ("[A] defendant in an extradition proceeding has a due process right to a hearing before being extradited."); *see also* Artemio Rivera, *supra* note 31, at 146-63; Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295, 1300 (2000) ("The extradition magistrate is charged with protecting the accused's due process rights, and the extradition hearing is the primary vehicle through which the accused is accorded due process."). *But see* Grin v. Shine, 187 U.S. 181, 184–85 (1902); McMaster v. United States, 9 F.3d 47, 48–49 (8th Cir. 1993) (disclaiming due process rights in extradition unless government requests extradition on the basis of race, sex, creed, or other exceptional constitutional limitation); Kamrin v. United States, 725 F.2d 1225, 1227–28 (9th Cir. 1984).

[302] Caltagirone v. Grant, 629 F.2d 739, 744-45 (2d Cir. 1980) (applying United States standards for arrest and detention, including the Fourth Amendment, to the arrest of a relator for extradition).

[303] *See* Sindona v. Grant, 619 F.2d 167, 178-79 (2d Cir. 1980) (applying principles of American domestic law to address issue of double jeopardy in the then-current extradition treaty with Italy); United States v. Jurado-Rodriguez, 907 F. Supp. 568, 577-78 (E.D.N.Y. 1995).

[304] *Elcock*, 80 F. Supp. 2d at 76. *See* Caltagirone v. Grant, 629 F.2d 739, 741 (2d Cir. 1980) ("When faced with language that may be construed in either of two ways, one conforming to the Framers' command and the other not, courts will choose that construction which comports with the Constitution, and reject the other.").

[305] *See supra* notes 22-23; 33; Caltagirone v. Grant, 629 F.2d 739, 741 (2d Cir. 1980).

[306] *Id.*

[307] *Id.*

there are no private or public interests involved in international extradition.[308] To support this point the Court argued that some countries engage in extradition "voluntarily," and without treaties.[309] Modern courts, however, have consistently held that relators have private interests and enjoy due process rights in international extradition.[310] Modern extradition treaties contain multiple clauses that are meant to provide due process.[311] The inclusion of due process provisions in extradition treaties is consistent with relators' strong liberty interest in not being surrendered to a foreign country for criminal prosecution and imprisonment. Relators' due process rights, thus, should prevent the application of a doctrine that requires courts to construe extradition treaties against their liberty interests.

By 1933, the year *Factor* was decided, the modern doctrine of procedural due process was yet to emerge. Procedural due process, as it is known today, began its development in 1970[312] with *Goldberg v. Kelly*.[313] Goldberg commenced a revolution in procedural guarantees for individuals that first started in administrative proceedings, and later moved to other areas of government intrusion such as the involuntary confinement of mental patients,[314] prison discipline,[315] and criminal trials.[316] *Goldberg* dealt with the procedure owed by the government to recipients of public assistance benefits, when the government intended to eliminate or reduce such benefits. The Court held that the government owed the recipient adequate notice of the reasons for the proposed termination, and that the recipient should be afforded "an effective opportunity to defend by confronting any adverse witnesses, and by presenting his own arguments and evidence orally."[317] According to the

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[308] Factor v. Laubenheimer, 290 U.S. 276, 298 (1933) ("The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest.")

[309] *Id.*

[310] *See supra* note 304.

[311] *See supra* Part II(B).

[312] *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1277 (1975) (citing Londoner v. Denver, 210 U.S. 373, 386 (1975)). This moment in legal history has been referred to as the time of the due process revolution. Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 887 (2015); *See also* Richard J. Pierce, Jr., Essay, *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1973 (1996). Prior to *Goldberg*, courts classified governmental procedures into two main types—those that deal with legislative facts and those that work with adjudicative facts. *Id.* at 1267-68 (1975) ("Despite the efforts by some Justices to find roots for so broad a constitutional principle deep in the past, these had produced only a few Supreme Court constitutional decisions with respect to executive or administrative action until *Goldberg v. Kelly* in 1970.") (citations omitted.) If the procedure was deemed adjudicative, then the process allowed would be similar to that of a judicial case, but if the procedure was considered legislative, then a substantially simpler process would be provided. *Id.* at 1268. Such a simplistic take at procedure did not last.

[313] 397 U.S. 254 (1970). *See* Rivera *supra*, note 31, at 151-52.

[314] Addington v. Texas, 441 U.S. 418 (1979); Zinermon v. Burch, 494 U.S. 113 (1990).

[315] Wilkinson v. Austin, 545 U.S. 209 (2005).

[316] Ake v. Oklahoma, 470 U.S. 68 (1985) (whether due process requires the government to provides access to a psychiatric examination and assistance to an indigent defendant seeking to use the insanity defense at trial).

[317] *Goldberg*, 397 U.S. at 268.

Court, "[t]he fundamental requisite of due process of law is the opportunity to be heard."[318]

After *Goldberg*, the Court developed and polished the contours of procedural due process, most notably in the case of *Mathews v. Eldridge*.[319] In *Mathews*, the Court considered "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing."[320] As part of its analysis, the Court devised a utilitarian test that balances the interests of individuals in conserving their benefits with the government's interest to deprive them.

These developments contrast sharply with the principles of due process recognized by the Court when it decided *Factor* in 1933. By that time, and before the Supreme Court decided *Goldberg* in 1970, the Court reserved due process protections for property rights such as those over a house or money, and for liberty forms recognized in the Bill of Rights.[321] After *Goldberg*, the courts began expanding due process rights to protect liberty and property interests in a variety of different circumstances.[322] Thus, the Court has recognized liberty interests in many instances of governmental conduct, as when the government intends to confine a person involuntarily to a mental hospital,[323] or when prisons attempt to impose certain types of discipline on inmates.[324] To have standing to raise a procedural due process violation it is no longer necessary to hold a property right. It suffices if the government has created in the individual the expectation of a liberty or property interest that is at risk of being taken away by the government.[325]

Relators have liberty interests in international extradition that arise directly from the Fifth Amendment's Due Process Clause, and from extradition treaties, which enjoy the same rank as federal statutes.[326] Liberty interests worthy of legal protection may arise directly from a statute, regulation, or the Due Process Clause.[327] For a protected interest to come

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[318] *Id.* at 267 (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

[319] Mathews v. Eldridge, 424 U.S. 319 (1976). *See* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. Rev. 871, 888 (2000) ("The key case defining what types of procedures are required is *Mathews v. Eldridge*.")

[320] *Id.* at 323.

[321] Landau *supra* note 315, at 887; Pierce *supra* note 315, at 1974.

[322] *See* Henry J. Friendly, *supra* note 315, at 1267-68 ("Since [*Goldberg v. Kelly*] we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another . . .").

[323] Addington v. Texas, 441 U.S. 418 (1979); Zinermon v. Burch, 494 U.S. 113 (1990).

[324] Wilkinson v. Austin, 545 U.S. 209 (2005).

[325] *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972).

[326] *See supra* notes 33; 304 and accompanying text.

[327] Wilkinson v. Austin, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty' . . ."); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989) ("Protected liberty interests 'may arise from two sources the Due Process Clause itself and the laws of the States.'" (quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). *See* Chemerinski, *supra* note 322, at 882 ("You have to look to the Constitution, federal statutes, state

directly from the Due Process Clause it must be a fundamental or "core" liberty interest.[328] The Court has described these fundamental liberty interests as "freedom from bodily restraint,"

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[329]

The word "liberty" in the Due Process Clause must be construed broadly.[330] The relevant inquiry is to assess how severe is the potential injury caused to some individual interest by the proposed government action.[331] In international extradition the severity of the injury to relators is obvious and substantial as they face imprisonment and a criminal process at the requesting country and thus should be considered protected directly by the Due Process Clause.

Relators are also protected by the due process rights created by extradition treaties as these treaties create substantial liberty interests. Statutes and government policies may create liberty interests that go further than the basic liberty interests created by the Due Process Clause.[332] There is no need that the statute, for instance, go as far as creating a liberty right, but individuals claiming lack of due process must at least prove that they have been enjoying a certain liberty interest and that they have a reasonable expectation of continuing such enjoyment.[333] For example, the Court has held that even though there is no constitutional right to parole, once a state grants a prisoner the privilege to return to the community, the government cannot revoke it without affording the prisoner due process.[334] Another example of liberty interests created by regulation appears in *Wolff v. McDonnell*, in which the Court held that "good-time credits" created by the state, and afforded to prisoners for good behavior, created liberty interests in the prisoners that required the state to afford them due process before taking away

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constitutions, and state laws to determine whether there is a reasonable expectation.") For further discussion of due process rights in international extradition *see* Rivera, *supra* note 31, at 146-63.

[328] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 679 (2d. ed. 1988); John K. Edwards, Note, *A Prisoner's Threshold for Procedural Due Process After Sandin v. Conner: Conservative Activism or Legitimate Compromise?*, 33 Hous. L. Rev. 1521, 1533 (1997).

[329] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[330] Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.").

[331] *See* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 126 (1978).

[332] *See* Wilkinson v. Austin, 545 U.S. 209, 221 (2005); Edwards, *supra* note 328, at 1533.

[333] *Id.* at 490-91.

[334] *See* Morrisey v. Brewer, 408 U.S. 471 (1972).

any such credits.[335]

Extradition treaties do for relators what parole laws and prison regulations do for inmates. They create liberty interests. The requirement that probable cause be established as a condition to an extradition, for instance, creates a liberty interest in relators that they not be extradited unless the proper procedure for establishing probable cause is followed.[336] The human rights and due process provisions in extradition treaties thus create a reasonable expectation that people will not be forced onto the jurisdiction of a foreign country unless probable cause and other requirements are established.[337]

Being free from incarceration and expulsion to a foreign country is clearly among the most basic and legitimate of expectations for a free people. Relators have protectable-liberty interests because of the extraordinary consequences of international extradition and the people's reasonable expectation not to be surrendered to a foreign country. For these reasons, the default rule of international extradition must be discarded.

Factor should be valued for its historical importance, but must be discarded on the issue of interpreting extradition treaties. By the time of *Factor* relators were not considered to have, as they do now, due process rights, and that changes the whole equation. By requiring courts to interpret extradition treaties in favor of extradition, the default rule violates relators' due process rights as recognized by modern courts, and infringes on the rule that treaty language must be construed consistently with the Constitution.[338]

C. The Default Rule is Incorrectly Rooted in the Assumption that the Sole Purpose of Extradition Treaties is to Facilitate Extraditions

In *Factor* the Supreme Court built the default rule based on its construction of the Webster-Ashburton Treaty of 1842[339] and the Blaine-Pauncefote Convention of 1889.[340] Webster-Ashburton was a general-purpose treaty between the United States and England. It contained only one paragraph on extradition, Article X.[341] Since the time of signing of Webster-

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[335] 418 U.S. 539 (1974).

[336] *See supra* Part II(B)(9).

[337] *See supra* Part II(B).

[338] *See* Caltagirone v. Grant, 629 F.2d 739, 741 (2d Cir. 1980) ("When faced with language that may be construed in either of two ways, one conforming to the Framers' command and the other not, courts will choose that construction which comports with the Constitution, and reject the other.") "Under our historic mandate to construe ambiguous enactments in a manner that comports with the *Constitution*, we would be loath to permit any construction of the Treaty that could be read to support the purported practice to which we have just alluded." *Id.* at 748 (citation omitted). *See also* Kent v. Dulles, 357 U.S. 116, 128-30 (1958) (statutory interpretation).

[339] Webster-Ashburton Treaty, *supra* note 221.

[340] Blaines-Pauncefote Convention, *supra* note 222.

[341] Webster-Ashburton Treaty, *supra* note 221, at Art. X. ("It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, Officers, or authorities,

Ashburton and Blaines-Pauncefote, extradition treaties have transformed into relatively complex instruments whose purpose is not simply to facilitate extraditions, but also to guarantee relators a fair process and other human rights.

Webster-Ashburton required extradition for the commission of seven different crimes,[342] and provided only one safeguard to relators —that evidence presented to a judge or magistrate of the requested country "be deemed sufficient to sustain the charge" levelled against the relator at the requesting country.[343] The Blaines-Pauncefote Convention, on the other hand, is an *extradition* treaty per sé with nine separate articles.[344] It supplemented Article X of Webster-Ashburton by adding ten crimes for which extradition was proper between the parties,[345] but it also provided certain conditions to extradition not specified in Article X, such as: a requirement that the offense for which extradition is sought "be punishable by the laws of both countries[]" (double criminality),[346] that the offense in question not be one "of a political character,"[347] a requirement that relators be surrendered only for crimes committed prior to their extradition,[348] and that extradition be undertaken pursuant to the law of the requested state.[349]

In contrast with these two treaties, modern extradition treaties contain a variety of clauses meant to protect relators from basic human rights deprivations and to provide due process.[350] Their sole purpose is not simply to facilitate the surrender of people from one state to another, but to establish a consistent process that complies with the municipal law of the requested country, and that is organized and fair to the individual.[351] Most types of

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respectively made, deliver up to justice, all persons who, being charged with the crime of murder, or assault with intent to commit murder, or Piracy, or arson, or robbery, or Forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed: And the respective Judges and other Magistrates of the two Governments, shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining Judge or Magistrate, to certify the same to the proper Executive Authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the Party who makes the requisition, and receives the fugitive.")

[342] *Id.*

[343] *Id.*

[344] *See supra* note 222 and accompanying text.

[345] *Id.* at Article I.

[346] *Id.*

[347] *Id.* at Article II.

[348] *Id.* at Article III.

[349] *Id.* at Article VI.

[350] *See supra* Part II(B).

[351] *See* Martinez v. United States, 793 F.3d 533, 546 (6th Cir. 2015) ("[t]he treaty's purpose is best understood as an effort to establish a practice of equitable, reciprocal extradition consistent with the laws of the two nations involved."), *rev'd on other grounds*, 828 F.3d 451 (6th Cir. 2016) (en banc).

international treaties, indeed, may be thought of as having a multitude of purposes.[352]

The extradition treaty between the United States and the European Union clarifies the parties' motivations behind its signing through the following statement:

> Desiring to combat crime in a more effective way as a means of protecting their respective democratic societies and common values,
>
> Having Due Regard for rights of individuals and the rule of law,
>
> Mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law[.][353]

The multiplicity of purposes of modern extradition treaties is thus inconsistent with the doctrine that extradition treaties should be liberally construed to facilitate extradition because the facilitation of extradition is its sole purpose.[354] As explained by the Ninth Circuit in *United States v. Verdugo-Urquidez*, "[t]he requirements extradition treaties impose constitute a means of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals."[355]

D. Just as with Criminal Statutes, Extradition Treaties Should not be Interpreted Expansively

One final point in assessing the propriety of the default rule is that it runs opposite to the rule of lenity of criminal law. While extradition is not a criminal procedure,[356] it has been considered a quasi-criminal process,[357] and its consequences have been deemed as damaging as those of a criminal

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[352] *See US-Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998), para 17 (". . . most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes.")

[353] Agreements on Extradition and on Mutual Legal Assistance between the European Union and the United States of America, signed June 25, 2003, Council of Europe doc. 9153/03, CATS 28, USA 4.

[354] *See* United States v. Alvarez-Machain, 504 U.S. 655, 664 (1992) ("Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."); Zhenli Ye Gon v. Holder, 992 F. Supp. 2d 637, 651 (W.D. Va. 2014) ("The fundamental purpose of an extradition treaty is to return persons to the requesting country to face trial on certain criminal charges. Extradition treaties are read broadly to achieve this goal."); Elcock v. United States, 80 F. Supp. 2d 70, 78-79 (E.D.N.Y. 2000) ("[C]onstruction of an extradition treaty is also guided by the '"familiar rule that the obligations of treaty should be liberally construed"' to effect their purpose, namely, the surrender of fugitives to be tried for their alleged offenses.") (citations omitted).

[355] 939 F.2d 1341, 1350 (9th Cir. 1991).

[356] *See* Martin v. Warden, 993 F.2d 824, 829 (11th Cir. 1993); Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978); Jhirad v. Ferrandina, 536 F.2d 478, 485 n. 9 (2d Cir. 1976).

[357] *See* BASSIOUNI, *supra* note 3, at 780.

conviction.[358] The rule of lenity directs courts to construe ambiguity in criminal statutes in favor of criminal defendants.[359] Construing extradition treaties in just the opposite manner makes no sense if one accepts that the liberty interests at stake in international extradition are of a similar magnitude as those in criminal law.

Two main policies, long part of our judicial tradition, support the application of lenity in criminal cases.[360] First, there is the shared belief that a fair warning of what constitutes a criminal violation should be legislated in language that the common individual would understand.[361] And second, because of the seriousness of criminal penalties and the social stigma of criminal convictions, it is understood that legislatures, and not courts, should criminalize conduct.[362]

Just as in criminal processes, in international extradition relators are exposed to tremendous loses. Relators face being surrendered to a foreign country for prosecution and imprisonment, and separation from family members and friends. While the criminal law's answer to similar circumstances is lenity, extradition law provides just the opposite without any justification.

It may be argued that because the standard of proof to certify an extradition is probable cause, as opposed to proof-beyond-reasonable-doubt to convict a criminal defendant, the application of opposite rules of construction for criminal statutes and extradition treaties is legitimate. But, the lesser protection in the standard of proof afforded to relators should be cause for larger protection through treaty interpretation rather than the opposite.

Because relators face liberty loses of a magnitude similar or bigger than those of criminal defendants, and yet are protected by a much lesser standard of proof, due process mandates strict scrutiny in the interpretation of extradition treaties, or at least not the liberal and expansive construction often given to extradition treaties.

V. CONCLUSIONS

Extradition treaties are meant to facilitate the surrender of persons between nations for criminal prosecution and imprisonment while protecting those persons' human rights and right to due process. Even though extradition treaties provide a variety of individual rights, courts routinely cite the default

[358] *See* Demjanjuk v. Petrovski, 10 F.3d 338, 354 (6th Cir. 1993) (explaining that the consequences of extradition may exceed those of a criminal process).

[359] *See* United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

[360] *Bass*, 404 U.S. at 348.

[361] *McBoyle v. United States, 283 U.S. 25, 27 (1931).*

[362] *Bass*, 404 U.S. at 348.

rule for the proposition that the only purpose of extradition treaties is to facilitate extraditions, and thus treaty clauses should be read expansively in favor of extradition. The default rule should be discarded because it is grounded on false assumptions and outdated case law, and because the strong liberty interests of relators dictate that extradition treaties not be construed expansively against them.

Because extradition treaties contain a variety of provisions recognizing the human and due process rights of relators, their only purpose cannot be just facilitating extradition. These provisions, which include requirements for the establishment of probable cause, that the alleged offense constitute a crime in the requested and requesting country, and that the offense be subject to applicable statutes of limitations, must be enforced by the courts with the same rigor of congressional statutes as extradition treaties are self-executing, requiring no separate legislation for their enforceability in the United States.

The default rule should be discarded because it is based on false assumptions about its purpose and on a case that predates the development of the modern due process doctrine. The rule was adopted by the Court in 1933, at a time when the modern doctrine of due process was yet to emerge, before relators were recognized to have due process rights, and before modern extradition treaties adopted many of their current provisions meant to protect human rights and due process.

Relators' strong liberty interests require that extradition treaties be either strictly construed against extradition, or at least not liberally construed in favor of extradition. Relators in international extradition face similar or greater limitations to their liberty than defendants in criminal cases. While criminal defendants face potential imprisonment and social stigma if convicted, relators face being surrendered to a foreign country for further imprisonment and criminal prosecution and losing contact with friends and family in the United States. Criminal law's rule of lenity requires that criminal statutes be construed restrictively in favor of defendants. Because of the similarity of liberty interests and potential consequences in extradition and criminal cases, treaty and statutory construction in both fields should be restrictive in favor of the individual, as the rule of lenity provides for criminal cases.