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## The Domestic Politics of International Extradition

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# The Domestic Politics of International Extradition

WILLIAM MAGNUSON\*

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*Extradition poses a set of unique challenges for current theories of international law. State decisions regarding extradition involve the intersection of domestic criminal law, complex international treaties, and often overtly political considerations, thus defying neat explanation by legal theorists. This Article argues that current theory fails to adequately explain the international law of extradition because it relies on state-centric models of international relations. By focusing our attention on unitary state interests, commentators overlook the important ways in which domestic politics shapes and influences state behavior. More particularly, this Article argues that domestic groups and institutions both constrain and empower government decision-makers in structuring international extradition arrangements. Government officials often have conflicting incentives regarding extradition decisions, and these tensions help explain the tradeoffs states have made between commitment and flexibility in extradition treaties. A closer examination of the incentives of domestic actors in extradition decisions also reveals a deeper issue that current theory overlooks: the possibility of “compliance uncertainty,” or situations where states are unsure what actions count as compliance. Compliance uncertainty has fundamental consequences for the structure, substance, and practice of extradition treaties, as well as for international law in general.*

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## INTRODUCTION

In 2010, the antisecrecy website WikiLeaks released a trove of nearly 400,000 confidential documents related to the Iraq war, exposing, among other things, that the United States had systematically ignored reports of torture by Iraqi authorities.<sup>1</sup> WikiLeaks promised to release another batch of documents in a matter of months.<sup>2</sup> The publication of the documents was an embarrassment for the U.S. government but proved a boon to Julian Assange, the director of WikiLeaks, who found himself hailed as a prophet of the new age of government accountability.<sup>3</sup> Soon after the release of the first batch of documents, however, Assange learned that authorities in Sweden sought him for questioning regarding charges of sexual assault by two WikiLeaks volunteers.<sup>4</sup> He fled to London, where he was arrested by British police pursuant to a Swedish warrant.<sup>5</sup> Sweden submitted a request for his extradition to the United Kingdom, and a British court granted the request.<sup>6</sup> Assange protested that the extradition request was politically motivated and could potentially lead to his imprisonment in Guantanamo, the notorious U.S. prison for terrorism suspects. The case is currently on appeal.<sup>7</sup>

In 1977, Roman Polanski, one of the world's most well-respected filmmakers, was arrested in Los Angeles on charges of sexually assaulting a thirteen-year-old girl.<sup>8</sup> Before he could be sentenced, however, Polanski fled the country and returned to his home in France, where he remained

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1. See David Leigh & Maggie O'Kane, *US Turned Over Captives to Iraq Torture Squads*, *GUARDIAN*, Oct. 25, 2010, at 1.

2. See Dylan Welch, *Fugitive to Leak Secret Airstrike Video*, *SYDNEY MORNING HERALD*, June 18, 2010, at 3.

3. See Tim Blair, *Plugging Leak in Pool of Hypocrites*, *DAILY TELEGRAPH*, May 16, 2011, at 1.

4. See Jeanne Whalen, *Sweden Questions Assange's Departure*, *WALL ST. J.*, Feb. 8, 2011, at A8.

5. *Id.* There is some debate about whether Assange fled Sweden or merely left for London for other reasons. The court concluded that it was "a reasonable assumption from the facts (albeit not necessarily an accurate one) that Mr Assange was deliberately avoiding interrogation in the period before he left Sweden." *Id.* at 10.

6. See Ravi Somaiya, *British Court Grants Sweden's Request for Extradition of the Founder of WikiLeaks*, *N.Y. TIMES*, Feb. 25, 2011, at A4.

7. *Id.*

8. For a discussion of the case, and a more thorough analysis of its background, see Jeffrey Toobin, *The Celebrity Defense: Sex, Fame, and the Case of Roman Polanski*, *THE NEW YORKER*, Dec. 14, 2009, at 50.

free for several decades.<sup>9</sup> When U.S. authorities learned that Polanski would be traveling to Switzerland in 2009 to receive a film award, they presented the Swiss with an arrest warrant.<sup>10</sup> Swiss police took Polanski into custody, and U.S. authorities promptly filed an extradition request with the Swiss government.<sup>11</sup> Polanski and others protested that the request was politically motivated and illegal.<sup>12</sup> After deliberating for several months, a Swiss court denied the U.S. extradition request, allowing Polanski to go free.<sup>13</sup>

Two cases, similar facts, and yet different results. What distinguishes the two cases? In both, an individual committed a crime in one country, fled to another, and was subsequently arrested for extradition to the original country.<sup>14</sup> On the surface, the facts are similar, but the results diverge: In Assange's case, it appears likely that Sweden's extradition request will be granted; in Polanski's case, the United States' extradition request was denied.

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9. *Id.*

10. *Id.*

11. See Henry Chu, *The World: Polanski is Facing Months in Swiss Prison*, L.A. TIMES, Sept. 30, 2009, at A19.

12. See Roman Polanski, *I Can Remain Silent No Longer*, LA REGALE DU JEU (May 2, 2010, 8:04 PM), <http://tinyurl.com/2vrrhss>; Jeremy Kay, *Roman Polanski Arrest: Hollywood Unites in His Defence*, GUARDIAN FILM BLOG (Sept. 28, 2009, 11:57 PM), <http://tinyurl.com/y99ap55>. Much of Hollywood united in Polanski's defense, from comments that he did not commit "rape-rape" to descriptions of his behavior as a "so-called crime." See Michael Kimmelman, *A Gallic Shrug, Preserve of Artists*, N.Y. TIMES, Oct. 4, 2009, at WK1. Indeed, Polanski received an outpouring of support in the days after his arrest. The French writers' guild, SACD, published a petition demanding Polanski's release and stating that "[f]ilm-makers in France, in Europe, in the United States and around the world are dismayed by this decision." David Charter & Chris Ayres, *Hollywood Divided in Support for Jailed Director Polanski*, TIMES (LONDON), Sept. 30, 2009, at 5. Celebrities as prominent as Martin Scorsese, David Lynch, and Woody Allen signed the petition. John Horn & Tina Daunt, *A Cultural Divide Over Polanski*, L.A. TIMES, Oct. 1, 2009, at D1. Another petition, sponsored by French philosopher Bernard Henri-Lévy, said, "We ask the Swiss courts to free him immediately and not to turn this ingenious filmmaker into a martyr of a politico-legal imbroglio that is unworthy of two democracies like Switzerland and the United States." Jennifer Harper, *Roman Polanski Case Ignites Culture Debate: Celebrities Weigh In On His Arrest*, WASH. TIMES, Oct. 1, 2009, at A1. This petition received support from Steven Soderbergh, Salman Rushdie, and Milan Kundera, among others. Toobin, *supra* note 8. The indignation was not limited to cultural figures. French President Nicolas Sarkozy said that Polanski's arrest was "not a good administration of justice." Guillaume Tabard & Philippe Goulliaud, *Nicolas Sarkozy: 'I Am Determined to Fight Against All Reactionary and Intransigent Forces'*, LE FIGARO, Oct. 15, 2009, at 2.

13. See Deborah Ball & Tamara Audi, *Polanski Free as Extradition Rejected*, WALL ST. J., July 13, 2010, at A3.

14. For the purposes of this discussion, I assume that Assange and Polanski actually committed the crimes of which they are accused. Polanski plead guilty to unlawful sexual intercourse but was never sentenced. See Eugene Robinson, *Injustice: The Director's Cut*, WASH. POST, July 13, 2010, at A15. Because Assange is still awaiting extradition, his guilt has not yet been adjudicated by a court of justice. See Ravi Somaiya, *Founder of WikiLeaks Is Ordered Freed on Bail*, N.Y. TIMES, Dec. 15, 2010, at A12.

One response is that, on closer inspection, the legally relevant facts are not as similar as they appear. Polanski argued that he had actually served his period of imprisonment,<sup>15</sup> while there is no question that Assange has not been sentenced or confined.<sup>16</sup> Polanski committed his crimes over thirty years before the extradition request, whereas Assange's actions occurred just a matter of weeks before Sweden's extradition request. Polanski's victim openly called for dismissal of the case,<sup>17</sup> while there are no signs that Assange's accusers are backing off their charges.

Another response recognizes that the legal aspects of the two cases are similar but stresses the different political dimensions of the Polanski and Assange extraditions. Polanski was a world-acclaimed director with wide support in the public, while Assange had earned the enmity of governments around the world for his attack on government secrecy and confidential communications. The United States requested Polanski's extradition from Switzerland, a country long lauded for its neutrality in world affairs and, at the time, facing tough scrutiny from the United States for its bank secrecy laws.<sup>18</sup> Sweden and the United Kingdom enjoy close relations, with the Swedish and British prime ministers going so far as to coauthor a recent opinion article in the *Financial Times*.<sup>19</sup> Polanski's imprisonment arguably contributed little to serious national security interests, while Assange's WikiLeaks presented a major diplomatic and security problem for the Obama Administration.<sup>20</sup> According to this response, the different results in the Polanski and Assange extraditions are best explained by politics.

But to dismiss these cases as merely nonanalogous, either legally or politically, is to ignore the very real connection between domestic politics and international law. In both cases, domestic institutions purported to ground their decisions in interpretations of international extradition treaties.<sup>21</sup> These treaties were in turn negotiated by government actors with

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15. See David Itzkoff, *A Free Man, Polanski Is Seen at Montreux Festival*, N.Y. TIMES, July 20, 2010, at C3.

16. See Jane Croft and Tim Bradshaw, *Assange to Fight Extradition Ruling*, FINANCIAL TIMES, Feb. 25, 2011, at 4.

17. See Harriet Ryan, *Polanski's Victim to Request End to Extradition Efforts*, L.A. TIMES, Jan. 22, 2010, at A8.

18. The United States had launched an investigation into a number of major Swiss banks in order to determine whether they were enabling American citizens to engage in tax evasion. See Evan Perez, *Feds Press Swiss Bank to Name U.S. Clients*, WALL ST. J., July 1, 2008, at A1.

19. David Cameron and Fredrick Reinfeldt, *Reining in Europe's Deficit Is First Step*, FINANCIAL TIMES, June 16, 2010, at 11.

20. See Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 18, 2011, at A1.

21. The United States requested Polanski's extradition under an extradition treaty with Switzerland. Extradition Treaty Between the Government of the United States of America and the Government of Switzerland, Nov. 14, 1990, S. Treaty Doc. No. 104-9, Art. 2. Sweden requested Assange's extradition under a European Arrest Warrant, a multilateral extradition system covering all the member states of the European Union. Council Framework Decision 2002/584/JHA of 13 June

particular interests and incentives. Without a fuller understanding of the way that domestic politics shapes and influences the preferences of domestic actors in international law, any explanation of the Polanski and Assange cases must be incomplete.

Where scholars have addressed extradition as a phenomenon of international law, they have tended to explain extradition treaties as products of rational interchanges between states: Two states have an interest in preventing and punishing criminal acts, and extradition is one tool in pursuing that interest. Under this analysis, states conclude extradition treaties in order to promote cooperation in penal matters and to ensure the enforcement of domestic criminal law. They comply with their extradition obligations out of a respect for comity and the equality of sovereigns.<sup>22</sup> This approach, however, fails to explain many of the key contours of extradition law today. If states have an interest in cooperative extradition proceedings, why do they need treaties at all? Why do they include a number of exceptions to extradition obligations that arguably threaten to overwhelm the fundamental purposes of extradition treaties? Finally, why do states at times breach their extradition agreements with other states?

These questions remain largely unanswered because most theorists have understood extradition as a state-level phenomenon, best explained as a process of cooperation between countries.<sup>23</sup> Thus, most extradition scholars overlook the key variable in extradition law, domestic institutions and interest groups. Domestic politics creates the demand for extradition treaties, but also distorts the formation and interpretation of these treaties in predictable ways. Perhaps most importantly, the structure of interest-group politics at a local level may heavily influence a state's decision whether to comply with its obligations under extradition treaties. For example, a state may have a general interest in promoting cooperative relations on criminal matters with a neighboring country. However, a

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2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, [2002] O.J. (L 190) 1. For discussions of the European Arrest Warrant's operation and implementation, see Susie Alegre & Marisa Leaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—The European Arrest Warrant*, 10 EUR. L.J. 200 (2004); Jan Komarek, *European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles,"* 44 COMMON MARKET L. REV. 9 (2007); Robin Loof, *Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings Throughout the EU*, 12 EUR. L.J. 421 (2006); Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems*, 9 GERMAN L.J. 1313 (2008); Daniel Sarmiento, *European Union: The European Arrest Warrant and the Quest for Constitutional Coherence*, 6 INT'L J. CONST. L. 171 (2008); J.R. Spencer, *Implementing the European Arrest Warrant: A Tale of How Not to Do It*, 30 STATUTE L. REV. 184 (2009).

22. See Chimene I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 93 (2011).

23. See *id.* at 58; Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 132–34 (2007).

government decision-maker pondering the decision whether to enter into an extradition treaty with a neighboring country may be affected by more parochial incentives, such as expanding agency competences, earning campaign contributions, or gaining re-election, incentives that may not align perfectly with the general interest of the state. Once a decision has been made to negotiate a treaty, the question arises of what sort of substance to include in the treaty. A broadly inclusive and rigorous treaty may be desirable for a country interested in deterring crime, but if powerful interest groups lobby in favor of certain exceptions to the treaty, or if decision-makers predict that certain kinds of extraditions may be politically harmful, incentives arise for negotiators to reduce the scope of the treaty or include escape hatches from otherwise obligatory treaty provisions. Once the treaty has entered into force, states that expect to interact with each other regularly through the agreement will likely have an interest in complying with their obligations, if only to ensure that the other side has a stake in continuing to comply with their own obligations. A breach of treaty obligations could lead to wider and potentially longer-term harm to the state's reputation for law-abidingness. Domestic decision-makers, however, who sometimes do not internalize long-term consequences but often face short-term exigencies, may have incentives to breach the agreement when domestic interest groups are sufficiently mobilized against compliance. These effects are only exacerbated when domestic processes operate to obscure or justify the breach.

A domestic politics approach to extradition law brings to light several important mechanisms and failures in international legal regimes, factors that current theories of extradition fail to identify. First, the structure of domestic politics affects the demand for extradition treaties. Second, it creates incentives, in certain cases, for negotiators to build in greater flexibility for politically sensitive extradition decisions. Third, it may affect decisions regarding whether to comply with extradition obligations, particularly in situations of "compliance uncertainty," or when states are unsure what actions should count as compliance. These hidden features of state behavior can help explain why states act in the way they do, not just in extradition decisions, but also more broadly in all treaty-based frameworks.

The Article proceeds as follows. Part I briefly discusses the history of extradition as a concept in international law. This Part traces the evolution of extradition from an exclusively political phenomenon to a largely criminal one and discusses how some prominent features of extradition have developed. Part II examines the structure of extradition law. This Part analyzes why states use treaties at all in order to gain control over wanted individuals, why they overwhelmingly opt to use bilateral (as opposed to multilateral) extradition treaties, and how they decide the level

of discretion and flexibility to incorporate into their treaties. Part III addresses the substance of international extradition treaties. This Part looks at three key features of extradition treaties: the citizenship exception, the rule of noninquiry, and the political offense exception. It attempts to explain how these rules originated and what interests are furthered by their inclusion in extradition treaties. Part IV focuses on why states comply with their extradition obligations. This Part describes the effect of “compliance uncertainty,” or the difficulty of determining what counts as compliance, on compliance decisions.

## I. HISTORY OF INTERNATIONAL EXTRADITION

The international practice of extradition, whereby a country formally surrenders an alleged criminal to another country having jurisdiction over the crime charged,<sup>24</sup> has today become an institution. Every year, thousands of individuals, from petty thieves<sup>25</sup> to financial fraudsters<sup>26</sup> to former dictators,<sup>27</sup> are handed over from one country to another pursuant to extradition treaties. The vast majority of extradition requests are complied with; it is only the rare case when a country denies a properly presented extradition request from a country with which it has concluded an extradition treaty.<sup>28</sup> In some ways, this is an unprecedented example of international cooperation through international law. In a world in which many suggest that international law is not really law at all,<sup>29</sup> the fact that states are, in at least one area, engaging in constant and daily interactions in compliance with the terms of international treaties is striking. On its face, this situation would appear to support the proposition that international law matters and has an effect on state behavior. But why does it matter? And how does it affect state behavior? In order to answer these questions,

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24. See BLACK'S LAW DICTIONARY 655 (9th ed. 2009).

25. See *Polikarpovas v. Stolic*, 256 Fed. App'x 127 (9th Cir. 2007).

26. For example, in 2006, three British businessmen accused of fraud in connection with the collapse of Enron were extradited from the United Kingdom to the United States. See John R. Cook, *Contemporary Practice of the United States*, 101 AJIL 100 (2007). The extradition caused an uproar in the United Kingdom, and an emergency debate on the matter was held in the House of Commons. See Dominic Rushe & Richard Fletcher, *Poor Relations*, SUNDAY TIMES (London), July 16, 2006, Business at 5.

27. Manuel Noriega, the former general-turned-dictator of Panama, was extradited from the United States to France in April 2010. After spending twenty years in jail in the United States on drug-trafficking charges, Noriega was released from U.S. custody in order to stand trial for laundering drug money in Paris. See Pierre-Antoine Souchard, *In France, Noriega Back Behind Bars*, BOSTON GLOBE, Apr. 28, 2010, at 4.

28. See John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 153 n.314 (2002) (noting that the U.S. “Secretary of State has refused extradition in as few as three cases since 1940”).

29. See generally Anthony D'Amato, *Is International Law Really “Law”?*, 79 NW. U. L. REV. 1293 (1985).



we have to become familiar with the history of extradition and its development through time.

Extradition treaties are some of the oldest known examples of international law.<sup>30</sup> Indeed, the oldest document of diplomatic history, the peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III in 1258 B.C., contains provisions regarding the extradition of criminals.<sup>31</sup> In ancient Greece and Rome, state extradition requests stood in conflict with the sacred right of asylum, but eventually the fear of divine retribution gave way to political considerations.<sup>32</sup> This development was rooted largely in ancient concepts of respondeat superior and vicarious liability.<sup>33</sup> Under

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30. The term "international," in this context, is used to denote relations between separate political systems. One might argue that the term "international law" cannot properly be used to describe treaties between groups other than modern nation-states. See THOMAS ALFRED WALKER, A HISTORY OF THE LAW OF NATIONS 38 (Cambridge Univ. Press 1899) (cited in COLEMAN PHILLIPSON, 1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 62 (1911)). Such a definition, however, would exclude a wide variety of international and interstate actions that predate the rise of the nation-state after the Treaty of Westphalia in 1648. Such a limited understanding of the term "international" is confusing and unnecessary for our purposes.

31. The treaty purported to resolve a long-enduring conflict between Egypt and the Hittite kingdom. During the thirteenth century B.C., the Hittite and Egyptian empires fought numerous, savage wars over the control of disputed territory. For example, the famous Battle of Kadesh, the largest chariot battle ever fought, was waged during this time. Weary of the many years of conflict, Rameses and Hattusili finally agreed to a peace treaty, under which the leaders promised to maintain peace between the empires and to lend mutual assistance in case of an attack from another country. The treaty, a copy of which was found on an inscription on the wall of the Temple of Amun in Egypt, also addressed the issue of criminals who had fled from one empire to the other. The treaty stated that any such criminals would not be sheltered by the receiving king, but rather, would be delivered up to the proper authorities in the country from which they fled. Interestingly, the treaty provided extradited criminals some rights as against their native countries: The treaty stated, with reference to extradited subjects, that "their tongue and their eyes are not to be pulled out; their ears and their feet are not to be cut off; their houses with their wives and their children are not to be destroyed." The treaty also threatened serious sanctions for any party that breached the terms of the agreement. One provision in the treaty stated that "[i]f Rameses and the children of the country of Egypt do not observe this treaty, then the gods and the goddesses of the country of Egypt and the gods and the goddesses of the country of Hatti shall exterminate the descendants of Rameses, the Great King, the king of the country of Egypt." See JAMES H. BREASTED, A HISTORY OF EGYPT FROM THE EARLIEST TIMES TO THE PERSIAN CONQUEST 438 (2d ed. 1916); O.R. GURNEY, THE HITTITES 63 (1952); GEORGE LISKA, IMPERIAL AMERICA: THE INTERNATIONAL POLITICS OF PRIMACY 13-14 (1967); JAMES PRITCHARD, ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 199-203 (1992); IVAN ANTHONY SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971) (citing FRANZ VON HOLTZENDORF, 1 HANDBUCH DES VÖLKERRECHTS 169 (1885); W. Mettgenberg, *Vor mehr als 3000 Jahren: Ein Beitrag zur Geschichte des Auslieferungsrechts*, 23 ZEITSCHRIFT FÜR VÖLKERRECHT 23 (1939)); see generally MARK HEALY, QADESH 1300 BC: CLASH OF THE WARRIOR KINGS (1993).

32. Greek and Roman values concerning hospitality and the protection of guests coincided with a strongly-held belief that the gods favored the granting of asylum. Violations of the right of asylum, it was believed, would be met with the fierce retribution of the gods. Often, asylum was based on an individual's proximity to certain powerful symbols. For example, the Temple of Artemis and the Delian Temple of Apollo offered inviolable refuge to Greek suppliants, and in Rome, standing near statues of the emperors conferred protection on criminals. See PHILLIPSON, *supra* note 30, at 349-58.

33. See *id.* at 363-64. For a discussion of the modern importance of communal responsibility, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 346 (2003).

the Roman law of *noxae deditio*, the father or master of a criminal could be held liable for the actions of the criminal unless he delivered the fugitive up to justice.<sup>34</sup> Thus, even if the father or master had committed no crime himself, he was deemed guilty of the crime if he did not find and hold responsible his child or servant. This theory of guilt “by reason of authority” was eventually extended into the realm of international relations. A state that harbored a foreign criminal was considered to be poisoned or tainted by the presence of that individual, and could be held liable for that criminal’s actions.<sup>35</sup> If the state did not return the fugitive, what was originally a private dispute could escalate into a public one, requiring diplomatic negotiations or even war. The system created a strong incentive for states to extradite fugitive criminals to the requesting countries.

Extradition practice in ancient times was overwhelmingly characterized by a focus on political, as opposed to private, crimes.<sup>36</sup> Such offenses included fomenting rebellion, violating the safety of ambassadors, and initiating war.<sup>37</sup> States continued to use extradition primarily as a means for acquiring jurisdiction over political offenders, as opposed to common criminals, well into the eighteenth century.<sup>38</sup> Extradition treaties during this period were rare and often involved the narrow interests of political elites. One of the few examples was the 1661 treaty between Charles II of England and Denmark.<sup>39</sup> Charles II’s father, Charles I, had been executed during the English Civil War of the 1640s, leading to the abolition of the

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34. See PHILLIPSON, *supra* note 30, at 362; see also David Johnston, *Limiting Liability: Roman Law and the Civil Law Tradition*, 70 CHI.-KENT L. REV. 1515, 1527–33 (1995).

35. See PHILLIPSON, *supra* note 30, at 363; Jan Arno Hessbrügge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT’L L. & POL. 265, 278–80 (2004).

36. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 5 (2007); SIR EDWARD CLARKE, *A TREATISE UPON THE LAW OF EXTRADITION* 17–18 (London, Stevens & Haynes, 3d ed. 1888); ANDRÉ DE MELLO, *MANUAL OF THE LAW OF EXTRADITION AND FUGITIVE OFFENDERS APPLICABLE TO THE EASTERN DEPENDENCIES OF THE BRITISH EMPIRE* (1933); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 214 (1954); 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 696, 704 (8th ed. 1955); SHEARER, *supra* note 31, at 5.

37. In 314 B.C., for example, the city of Sora (located in modern-day Lazio) rose up and slaughtered a group of Roman colonists. At this time, the Roman republic was still fighting the resilient Samnite tribes for control of the Italian peninsula and was thus particularly sensitive to rebellions. In response to the massacre, Roman soldiers attacked the city and requested extradition of the ringleaders of the massacre. The citizens of Sora identified and handed over 225 of the participants in the massacre. These ringleaders were then sent to Rome, where they were flogged and beheaded in the Forum, “to the vast delight of the common people.” The town of Sora was otherwise left unharmed. See LIVY, *ROME AND ITALY* 248 (Betty Radice trans., 1982).

38. See BASSIOUNI, *supra* note 36, at 5.

39. JOHN BASSETT MOORE, *A TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 10 (1891); CLARKE, *supra* note 36, at 20.

monarchy in England for over a decade.<sup>40</sup> When Charles II ascended to the throne in the restoration of the monarchy in 1660, one of his first acts as monarch was to punish those responsible for his father's execution. To this end, he negotiated a number of treaties with foreign states, including the treaty with Denmark, requiring the government of Denmark to give up regicides.<sup>41</sup> These types of treaties, regarding the surrender of enemies to the sovereign, might properly be understood as gestures of friendship between allies, methods for establishing or maintaining peaceful relationships between countries. They also demonstrated a preeminent concern with maintaining the status quo among reigning heads of state.<sup>42</sup>

With time, however, the scope of extradition law and its perceived functions widened. Extradition treaties proliferated, and the substance of those treaties came to include a greater variety of crimes and criminals. Beginning in the eighteenth century, it became common practice for extradition treaties to specify deserting troops as extraditable criminals.<sup>43</sup> In a Europe riven by dynastic rivalries and interminable conflicts, military desertion was a major problem for armies, and some commentators have suggested that during the eighteenth and nineteenth centuries, extradition treaties were *chiefly* concerned with military offenders.<sup>44</sup>

By the nineteenth century, what we might consider the modern conception of extradition began to take shape. Whereas previously extradition had focused on narrow categories of offenders — political enemies, leaders of rebellions, military deserters — nineteenth-century extradition treaties covered a wide variety of common crimes.<sup>45</sup> The Treaty of Amiens, for example, concluded between Great Britain and France in 1802, provided for the extradition of individuals accused of “murder, forgery or fraudulent

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40. See REBECCA FRASER, *THE STORY OF BRITAIN: FROM THE ROMANS TO THE PRESENT: A NARRATIVE HISTORY* 327–77 (2005).

41. See CLARKE, *supra* note 36, at 20.

42. In 1834, Russia, Prussia, and Austria entered a treaty whereby they agreed to extradite any individuals charged with high treason, *lese majeste*, or rebellion. Most commentators explain the treaty as a reaction to the fear of constitutionalism and revolt in Poland. See GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 510 (2003).

43. A 1788 treaty between the United States and France, for example, dealt specifically with the extradition of deserting sailors, a major issue at a time when conditions in the navy were compared unfavorably with jail. As Samuel Johnson once observed, “Why, sir, no man will be a sailor, who has contrivance enough to get himself into a jail; for, being in a ship is being in a jail, with the chance of being drowned.” James Boswell, *Journal of a Tour to the Outer Hebrides with Samuel Johnson, LL.D.*, in *JOHNSON’S JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND AND BOSWELL’S JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON, LL.D.* 247 (R.W. Chapman ed., 1924).

44. See BASSIOUNI, *supra* note 36, at 5.

45. Of course, some extradition treaties before the nineteenth century did deal with common criminals. See PRITCHARD, *supra* note 31, at 199–203; Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT’L & COMP. L. REV. 39, 48 (1981).

bankruptcy.”<sup>46</sup> This was a very different kind of treaty from previous ones, for it dealt with the problem of regular crimes and torts rather than political offenses.<sup>47</sup>

Gradually, this new conception of the role of extradition took hold in international treaties. Formal procedures were established for extradition requests. Reciprocity of obligations was imposed on the parties. Requesting states were required to state the grounds for extradition and to justify them under the relevant treaty. Treaties set out extraditable crimes and often included a list of nonextraditable crimes.<sup>48</sup> Extradition finally emerged as a decidedly “legal” phenomenon. Concomitant with the rise of “legal” extradition came a new emphasis on courts. National courts were regularly called upon to decide the legality of extraditions, and they quickly developed a considerable jurisprudence in the area.<sup>49</sup>

The case of Nathan Robbins illustrates the role that the judiciary played in extradition proceedings.<sup>50</sup> After the French Revolution of 1789 and the

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46. See JOHN D. GRAINGER, *THE AMIENS TRUCE: BRITAIN AND BONAPARTE 1801–03*, at 78–79 (2004).

47. The work of Cesare Beccaria, the renowned Italian philosopher and penologist, certainly played an important role in this development. Beccaria was interested in reforming the criminal law system in order to make it both more effective and more just. His treatise, *Crimes and Punishments*, published in 1764, argued that the death penalty should be abolished, torture prohibited, and dueling strictly punished. In his pursuit of a criminal justice system inspired by reason, Beccaria took a keen interest in the spread of extradition treaties, for he believed they might serve an important role in disincentivizing crime. As he stated, “the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence.” CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENT* 46 (4th ed. 1775); *CRIMES AND PUNISHMENTS INCLUDING A NEW TRANSLATION OF BECCARIA’S DEI DELITTI E DELLE PENNE* 193–94 (J.A. Farrer trans., London, Chatto & Windus 1880) [hereinafter *CRIMES AND PUNISHMENTS*]. At the same time, he worried that extradition, if not implemented justly, might lead to oppression. Thus, he wrote,

I shall not pretend to determine this question [whether nations should extradite criminals], until laws more conformable to the necessities and rights of humanity, and until milder punishments, and the abolition of the arbitrary power of opinion, shall afford security to virtue and innocence when oppressed; and until tyranny shall be confined to the plains of Asia, and Europe acknowledges the universal empire of reason, by which the interests of sovereigns, and subjects, are best united.

This worry about the injustices of extradition gained increasing acceptance in the nineteenth century and eventually led to an exception in extradition treaties excluding political offenders from extradition in order to prevent the very kind of political vengeance that defined ancient extradition practice. *CRIMES AND PUNISHMENTS*, *supra*, at 149–50.

48. See Blakesley, *supra* note 45, at 51–52.

49. American courts, faced with the pervasive problem of fugitive criminals in the colonies, quickly developed an expertise in the area. See CLARKE, *supra* note 36, at 28–29 (2d ed. 1874). The Articles of Confederation, along with the U.S. Constitution, contained provisions requiring states to deliver up fugitives charged with treason, felony or other crimes in another state. ARTICLES OF CONFEDERATION OF 1781, art. IV; U.S. CONST. art. 4, § 2.

50. For an analysis of the case of Jonathan Robbins, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

beheading of Louis XVI, Great Britain declared war on France, a war that would last for the next twenty-three years.<sup>51</sup> Much of the war was fought on the seas, and some major operations occurred off the American coast in the British West Indies.<sup>52</sup> The H.M.S. *Hermione* was a British frigate assigned to the West Indies, and it was led in 1797 by the talented but cruel Captain Pigot. One day at sea, Pigot threatened to flog the last sailor down from the topsails, and in the ensuing shuffle two sailors fell to their deaths on the quarter-deck. Pigot's blunt response was to "throw the lubbers overboard."<sup>53</sup> The next day, the crew mutinied, killing Pigot along with nine other officers.<sup>54</sup> The mutinied crew then dispersed to various destinations in order to escape punishment. One member of that crew was Thomas Nash. In 1799, a man using the name Jonathan Robbins was arrested in Charleston, South Carolina, and was accused of being Nash.<sup>55</sup> Britain requested that Robbins be extradited to face punishment under British law. American opinion was fiercely opposed to the extradition, particularly when it was discovered that Robbins was an American citizen who had been forcibly impressed into service on the *Hermione*. A federal judge in South Carolina examined the extradition request, the applicable treaty (the Jay Treaty of 1794), and the factual allegations, and concluded that Robbins was subject to extradition.<sup>56</sup> After the decision of the court, Robbins was handed over to the British navy, which took him to Jamaica, tried him by court-martial, and hanged him.<sup>57</sup> The Robbins affair became an important issue in the presidential election of 1800, which John Adams lost, especially when it became public that Adams had instructed the judge to deliver Robbins to the British.<sup>58</sup>

By the late 1800s, bilateral extradition treaties began to proliferate, and since World War II, they have become so prevalent that the United States alone has over one hundred treaties in force.<sup>59</sup> The broad outlines of the

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51. See FRASER, *supra* note 40, at 479–506.

52. See ALFRED THAYER MAHAN, 2 THE INFLUENCE OF SEA POWER ON THE FRENCH REVOLUTION AND EMPIRE 210–11 (1902).

53. See 2 EDWARD BRENTON, NAVAL HISTORY OF GREAT BRITAIN 435–37 (London, C. Rice 1823).

54. 3 ISAAC SCHOMBERG, THE NAVAL CHRONOLOGY; OR, AN HISTORICAL SUMMARY OF NAVAL AND MARITIME EVENTS 76 (London, T. Egerton 1815).

55. See Wedgwood, *supra* note 50, at 286–87.

56. See *United States v. Robins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175).

57. See CLARKE, *supra* note 36, at 40.

58. This case also led to the first U.S. extradition statute, a legislative enactment intended to constrain executive power and re-enforce the judicial nature of extradition decisions. See *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); see also John Parry, *supra* note 28, at 108–14; Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1207 (1991).

59. See BASSIOUNI, *supra* note 36, at 24.

law of extradition are now clear.<sup>60</sup> Extradition occurs pursuant to a treaty, rather than an informal exchange. A request is made to the executive of another country for the extradition of an alleged criminal. This request provides the grounds for the extradition, along with factual support for the allegations. If the executive deems the request to be within the applicable treaty, the judiciary then determines whether the individual is extraditable. The judiciary will look at the allegations and the applicable treaty to ensure that the evidence is sufficient to sustain the charge under the treaty.<sup>61</sup> Most crimes are included within modern extradition treaties, although political crimes are generally excluded.<sup>62</sup> If the judge finds that the evidence is sufficient that the individual has committed a crime enumerated in the applicable treaty, he will certify the proceedings to the executive, who is ultimately authorized to effect the extradition.<sup>63</sup>

One of the most striking occurrences in the history of extradition is that whereas extradition began as a political phenomenon that largely excluded common crimes, by the nineteenth century, the situation flip-flopped: Extradition became a criminal phenomenon that largely excluded political crimes. Most commentators explain the change as a product of two revolutions, one ideological and the other material.

The French Revolution marked the beginning of a period of revolt against the entrenched regimes in Western Europe. These despotic regimes were seen by democrats as contrary to reason and natural law, and political philosophers of the time, including Rousseau and Suarez, theorized that the people were justified in overthrowing regimes that did not represent the general will. The French Constitution of 1793 enshrined these values by promising asylum to all those exiled from their home countries "for the cause of liberty."<sup>64</sup> The political offense exception gained rapid acceptance in Western Europe.<sup>65</sup> This was a dangerous doctrine. Conservative states across Europe trembled at the thought that

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60. Extradition proceedings operate differently in different countries. What follows is a description of widely applicable extradition procedures.

61. See 18 U.S.C. § 3184.

62. See L.F.E. Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N.U. L. REV. 53 (1986).

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

64. See OPPENHEIM, *supra* note 36, at 512.

65. By 1815, Sir James Mackintosh, the Scottish jurist and politician, went so far as to state in Parliament:

I believe that I may venture to lay it down, if not as a part of the consuetudinary law of nations, at least as agreeable to the usage of good times, that though nations may often agree mutually to give up persons charged with the common offences against all human society, civilized States afford an inviolable asylum to political emigrants.

SIR GEORGE CORNEWALL LEWIS, ON FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 46 (London, John W. Parker & Son 1859).

citizens who rebelled against the established order could flee across the border and receive protection, and states such as Austria and Prussia fought hard to prevent the expansion of the doctrine of political asylum.<sup>66</sup> Despite their best efforts, however, the rise of democracy coincided with a widespread acceptance of the political offense exception.

Common crimes, on the other hand, went from being largely exempt from extradition to being the main focus of extradition treaties.<sup>67</sup> This development was connected inextricably with the Industrial Revolution.<sup>68</sup> The introduction of railways and long-distance steamships made international travel a less daunting prospect for criminals.<sup>69</sup> Suddenly, national borders were hours, rather than days, distant.<sup>70</sup> As a consequence of the new technologies, “the conviction was forced upon the States of [civilized] humanity that it was in their common interest to surrender ordinary criminals regularly to each other.”<sup>71</sup> Extradition treaties began to specify common crimes as harms subject to extradition. The Industrial Revolution thus brought extensive changes to the way that states perceived crimes, just as the French Revolution brought changes to the way they viewed the purposes of government.

Before concluding this historical section, a few trends in extradition practice since World War II should be noted. First, states have increasingly opted to enter into multilateral, rather than bilateral, extradition treaties.<sup>72</sup> While bilateral treaties are still by far the most common of extradition arrangements, a number of states that share geographic and political similarities have entered into additional, supplemental, or superseding multilateral agreements. The European Arrest Warrant is perhaps the most well-known of these agreements, but other regional groups have also adopted multilateral extradition treaties.<sup>73</sup>

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66. For example, when Switzerland refused to extradite a number of Piedmontese revolutionaries to Austria, Prussia, and Russia, in 1828, Count Metternich persuaded Louis XVII to place troops on the Swiss border. CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 80 (2001).

67. See BASSIOUNI, *supra* note 36, at 5.

68. See OPPENHEIM, *supra* note 36, at 504.

69. See SHEARER, *supra* note 31, at 7–11.

70. As Benjamin Constant observed in 1802, “[e]xpatiation, which for the ancients was a punishment, is easy for the moderns; and far from being painful to them, it is often quite agreeable.” BENJAMIN CONSTANT, POLITICAL WRITINGS 141 (Biancamaria Fontana ed., 1988).

71. See OPPENHEIM, *supra* note 36, at 504.

72. See BASSIOUNI, *supra* note 36, at 13–24.

73. See Agreement on Extradition between the European Union and the United States of America, June 25, 2003, T.I.A.S. No. 10-201, 2003 O.J. (L 181) 27; Agreement on Mutual Legal Assistance between the European Union and the United States of America, T.I.A.S. No. 10-201.1, June 25, 2003, 2003 O.J. (L 181) 34; Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, June 13, 2002, 2002 O.J. (L 190) 1; Inter-American Convention on Extradition, Feb. 25, 1981, 1752 U.N.T.S. 191; O.A.S.T.S. No. 60; Benelux Extradition Convention, June 27, 1962, 616 U.N.T.S. 8893; Arab League

Another important recent development is the rise of human rights considerations in extradition law. Until recently, the rule of noninquiry prevented the judiciary from inquiring into the fairness of the requesting nation's justice system.<sup>74</sup> As the Supreme Court articulated it, courts are "bound by the existence of an extradition treaty to assume that the trial [in the requesting state] will be fair."<sup>75</sup> The rule of noninquiry, however, has slowly been chipped away at by governments and courts in the post-World War II period. The roots of this decay have been attributed by some to the rise of human rights law during the same period.<sup>76</sup> Just as states came to recognize that individuals possessed rights separate and distinct from the countries in which they found themselves, courts also came to recognize that extradition involved interests beyond those of countries alone. Thus, traditional ideas about comity and sovereignty gave way to a renewed interest in fairness. In a landmark 1960 opinion, the Second Circuit Court of Appeals held that there might be situations where a defendant "upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the [rule of noninquiry]."<sup>77</sup> A number of other federal courts have spoken approvingly of this exception to the rule.<sup>78</sup> The war on terrorism has put further strain on the rule of noninquiry, as the United States has sought the extradition of terrorist suspects for trial by military commission. Some countries object to the possibility that such suspects might be subject to the death penalty in the United States, and a number of European countries have demanded that the United States waive the death penalty as a condition for extradition.<sup>79</sup> The rule of noninquiry, born out of concern

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Extradition Agreement, Sept. 14, 1952, 1952 B.F.S.P. 159, at 606, League of Arab States Treaty Series 27-32, *reprinted in* 8 REV. EGYPTIENNE DE DROIT INT'L 328-32 (1952).

74. See Matthew Murchison, *Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*, 43 STAN. J. INT'L L. 295 (2007); see generally Semmelman, *supra* note 58.

75. Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

76. See Semmelman, *supra* note 58, at 1214; see also William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT'L L. 255 (2010).

77. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960).

78. See *In re Extradition of Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984) (stating that an exception to the rule of noninquiry might apply to "particularly atrocious [sic] procedures or punishments employed by the foreign jurisdiction"); Prushinowski v. Samples, 734 F.2d 1016, 1019 (4th Cir. 1984) (stating that the court might not extradite a defendant if "the prisons of a foreign country regularly opened each day's proceedings with a hundred lashes applied to the back of each prisoner who did not deny his or her God or conducted routine breakings on the wheel for every prisoner"); see also Mainero v. Gregg, 164 F.3d 1199, 1210 (9th Cir. 1999); United States v. Kin-Hong, 110 F.3d 103, 110-11 (1st Cir. 1997).

79. Indeed, the very foundation of U.S. efforts to prosecute terrorism suspects, the military commission system, has drawn criticism as incompatible with modern standards of decency, and some commentators have suggested that any suspect subject to trial by a military commission should be exempt from extradition. See Alan Clarke, *Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783, 784-808 (2003); James Finsten, *Extradition or Execution, Policy Constraints in the*



for courtesy and friendship between *governments*, has given way to a new concern for the rights of *individuals*.

It is impossible to give a full history of extradition in the limited space available here, and this brief summary provides just a glance at the many facets of extradition law over the centuries. It does, however, highlight the ever-changing nature of extradition. The practice of extradition has evolved from a relatively informal process that largely concerned sovereigns, to a heavily legalized process that deals with thousands of criminals a year. Certain concerns have been constant, such as the punishment of wrongdoers wherever they may be found, the importance of maintaining friendly relations between countries, and the relative importance of individual rights. Regardless, international extradition law is a deeply complicated phenomenon that defies easy explanation. In order to better understand this phenomenon, the next Part discusses the structure of extradition treaties, that is, the forms and framework under which extradition takes place.<sup>80</sup>

## II. THE STRUCTURE OF EXTRADITION TREATIES

How do we explain the curious structure of international extradition treaties? There are many aspects of extradition law today that, on closer inspection, are strikingly counter-intuitive, depending on one's conception of international law. In particular, this Article is interested in three aspects of the structure of extradition law: First, why do states enter into formal extradition treaties at all, rather than using informal "soft" law commitments; second, why do states overwhelmingly enter into bilateral rather than multilateral extradition agreements; and third, why do states generally leave the ultimate decision whether to extradite to the executive branches, rather than the judiciary? All of these are difficult questions, and ones that are not easily soluble. A close look at domestic politics may, however, begin to untangle the difficulties.

### A. *Hard Versus Soft Law*

Why do states use international treaties, rather than informal understandings, as the primary means of securing the extradition of

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*United States' War on Terror*, S. CAL. L. REV. 835 (2004); Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 882–84 (1993); Gareth Peirce, *America's Non-Compliance: Gareth Peirce Presents the Case Against Extradition*, LONDON REV. BOOKS, May 13, 2010, at 18, 19–22.

80. Here, treaty structure is distinguished from treaty substance, which refers to the considerations that enter into a determination of extraditability. The distinction between structure and substance, although commonly used, may not be so clear as it appears. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 130–32 (2008).

individuals from foreign states?<sup>81</sup> It is not entirely obvious that states could not satisfy many or all of their interests in extradition through evolved patterns of informal cooperation, as opposed to treaty negotiations. Informal understandings and customary usages often form the basis of international relations.<sup>82</sup> Some commentators have even suggested that, in this era of complicated and intractable international disputes, nonbinding “soft” law might be more effective than formal treaties.<sup>83</sup> Why, then, have states opted to entrust extradition almost entirely to treaty-based relations?<sup>84</sup>

International law scholars have spent considerable effort attempting to answer the question of why states choose to enter into binding international treaties rather than nonbinding understandings. One particularly influential methodology is the rational choice institutionalist approach.<sup>85</sup> The basic assumptions underlying institutionalist theories of

81. Extradition in the absence of a treaty is a rare, although not unheard of, occurrence. See SHEARER, *supra* note 31, at 27–34.

82. See Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L & COMP. L.Q. 787, 788–89 (1986); Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901, 903–04 (1999); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495 (1991).

83. Richard N. Haass, the president of the Council on Foreign Relations, recently stated that “[i]n this era of international relations, we may need to start thinking less about formal international treaties and agreements and much more about what you might describe as coordinated national policies.” Bernard Gwertzman, *The New “Informal” Multilateral Era*, COUNCIL ON FOREIGN RELATIONS (Sept. 24, 2009), <http://www.cfr.org/publication/20275>.

84. But see Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 823 (2005) (noting that “in its dealings with states with weaker governments and law enforcement systems, the United States has maintained its policy of crossborder kidnappings as well as assassinations in some instances, despite their questionable international legality”).

85. See, e.g., GUZMAN, *supra* note 80; Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 10 (2008); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008); Christian Kirchner, *The Power of Rational Choice Methodology in Guiding the Analysis and the Design of Public International Law Institutions*, 2008 U. ILL. L. REV. 419 (2008); Duncan Snidal, *Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 923 (1985); Duncan Snidal, *Rational Choice and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 73, 74–76 (Walter Carlsnaes et al. eds., 2002); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT’L ORG. 299, 311–16 (1982). Institutionalism is often contrasted with liberalism. For examples of the liberal approach, see Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113 (2003); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115 (2002); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 514 (1997); Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797 (2005); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005); John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order*, 36 INT’L ORG. 379 (1982). Constructivist theories, on the other hand, provide a non-rational choice approach to international law. See Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, Address at the Third Annual Houston

international law is that states are the unit of interest in international law, and that they are unitary, self-interested, and rational.<sup>86</sup> Unitary, in this instance, means that the model need not take into account domestic politics or fractious interest groups within the state. The state, in other words, is a “black box” and can be understood without reference to groups inside domestic borders.<sup>87</sup> States are rational in that they adopt policies that are aptly suited to achieving the state’s goals.<sup>88</sup> States are self-interested in that they strategically pursue some combination of security, national wealth, and citizen well-being.<sup>89</sup> Although institutionalist theories do not require the assumption that state interests are always self-regarding,<sup>90</sup> most institutionalist theorists of international law do not take seriously the proposition that states act altruistically.<sup>91</sup>

Institutionalist theories of international law have much to say on why states enter into treaties. Andrew Guzman, for example, argues that treaties are a form of contract.<sup>92</sup> Applying well-established theories of contract formation, Guzman demonstrates that parties will enter into an agreement when doing so is advantageous for both parties. More specifically, the Coase theorem holds that, in the absence of transaction costs, parties will enter into contracts that maximize joint gains.<sup>93</sup> Contract theory generally assumes that when an agreement is reached, the parties will memorialize that agreement in the form of a legally binding contract. By providing that an agreement will be enforceable in court, parties can ensure that the agreement’s obligations will be performed unless the joint cost of performance is greater than the joint benefit. The legally binding contract can be brought to court in the event of breach by one party, and the court will enforce the contract’s terms, either by awarding damages to the injured party or by forcing the party to perform its obligations. Much

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Law Review Lecture Series Frankel Lecture in International Law (Apr. 8, 1998), in 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391, 2405–09 (1994); Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999 (1994); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398–2402 (1991); Andrew T.F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT’L ECON. L. 81 (2006).

86. Abbott, *supra* note 85, at 10–11.

87. *Id.*

88. Some models of rational choice theory acknowledge that states exhibit “bounded rationality,” a concept understood as rationality within a set of methodological constraints. See Snidal, *Rational Choice and International Relations*, *supra* note 85, at 74–76.

89. See Posner, *supra* note 85, at 798.

90. See Snidal, *Rational Choice and International Relations*, *supra* note 85, at 74–76.

91. *Id.* at 82–85.

92. See GUZMAN, *supra* note 80, at 130–32; Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 585 (2005).

93. NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW* 110 (2d ed. 2006).

of the value of a contract, then, lies in its enforceability, which allows parties to rely on past commitments and encourages the formation of mutually beneficial agreements.<sup>94</sup>

Unlike contract law, however, international law cannot rely on a court of general jurisdiction that can interpret agreements, determine whether a breach has occurred, and enforce damage awards.<sup>95</sup> There is no international police force that can confiscate state property if a state refuses to pay damages. The essential feature of international law, thus, is its weak level of enforceability.<sup>96</sup> This is a major problem for states, if, as mentioned above, the value of a contract lies to a great extent in its binding nature. The question naturally arises why states enter into treaties at all if the treaties have little or no way of being enforced. Guzman believes that the answer lies in the concept of credibility.

According to Guzman, states have much to gain from being able to make credible commitments to other states. Through cooperation, states can overcome certain enduring problems of international politics, such as the prisoner's dilemma and the tragedy of the commons. Thus, states have an interest in being able to make enforceable agreements in order to facilitate cooperation. Until there is a supranational authority on par with domestic authorities, however, states will never be able to make their agreements enforceable in the way that domestic contracts are. Instead, states attempt, in some but not all cases, to increase the *credibility* of their commitments. Instead of relying on a court to enforce damage awards, states punish breaches of agreements through two kinds of sanctions: direct and reputational. Direct sanctions are explicit punishments for the violation of an agreement. Reputational sanctions are those costs that a state incurs by signaling that it does not take its commitments seriously.<sup>97</sup> So, if the United States breaks an international arms reduction treaty, it may need to worry that the other parties to the agreement will impose direct sanctions in the form of frozen assets, import and export restrictions, or even military force. But such direct sanctions are rare in international law.<sup>98</sup> More important are reputational sanctions.<sup>99</sup> Other countries, seeing that the United States has breached its agreement, might

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94. See Guzman, *supra* note 92, at 585–87.

95. In the realm of international trade, the dispute settlement body fulfills many of these functions. See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); *THE WTO DISPUTE SETTLEMENT SYSTEM 1995–2003* (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004); William Magnuson, *WTO Jurisprudence and Its Critiques: The Appellate Body's Anticonstitutional Resistance*, 51 HARV. INT'L L. J. ONLINE 121 (2010).

96. See Guzman, *supra* note 92, at 588–89.

97. *Id.* at 595–96; see also Guzman, *A Compliance-Based Theory of International Law*, *supra* note 85.

98. See Guzman, *supra* note 92, at 595–96.

99. For a discussion of the complicated role that reputation plays in international law, see Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L. J. 231 (2009).

become more wary of entering into an agreement with the United States if they believe that the United States is a country that rarely honors its commitments. The United States would then lose out on the many benefits of international cooperation. Even if it succeeds in entering into future agreements, the added risk that other states perceive in dealing with it may force it into less favorable agreements.<sup>100</sup>

Guzman's conclusion is that there may be situations in which a state is better off opting for a nonbinding agreement rather than a treaty. This conclusion stems from his observation that entering into a treaty increases the potential harm from breach. Countries, thus, might opt for nonbinding agreements in cases when the parties would abide by their commitments even in the absence of a treaty, or if the parties would violate their commitments even in the presence of a treaty. A country will decide to enter into a treaty, on the other hand, when the added compliance pull of reputational sanctions will make the difference between compliance and breach.<sup>101</sup> In other words, countries will enter into treaties only when they expect that the presence of a treaty will affect future behavior in a significant way.

Guzman identifies several other implications of his model. First, states will be especially likely to use credibility-enhancing mechanisms (such as signing a treaty) where the issues involved are low-stakes. This is so because "where the compliance decision of states is likely to be influenced by reputational issues, the use of credibility-enhancing devices is more likely."<sup>102</sup> For example, if a state is threatened with extinction, it is unlikely that it will be worried about the reputational sanctions of breaching an agreement. If, on the other hand, the issue is not central to a state's interest, the state will be more likely to comply with an adverse obligation in order to preserve a reputation for law-abidingness, a reputation that may later lead to future gains.<sup>103</sup> A second implication of this model is that treaties, rather than understandings, will be entered into when the likelihood of violation is low. As Guzman explains, sanctions are costly and cause a net loss to parties. The more likely it is that a violation will occur, the higher the expected cost of breach will be.<sup>104</sup>

The advantage of a treaty, then, is that it increases the credibility of a country's commitment. If the advantages of increased credibility outweigh the potentially higher costs associated with breach, states will choose to enter into a formal treaty, rather than leave cooperation to informal understandings or ad hoc agreements.

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100. See Guzman, *supra* note 92, at 596.

101. *Id.* at 597.

102. *Id.* at 605.

103. See *id.* at 605–06.

104. *Id.*

Guzman's rational choice institutionalist theory of why states enter into international treaties suggests that the design of extradition agreements should be analyzed by looking at the relevant costs and benefits to states of treaty, as opposed to soft law, arrangements. More specifically, he identifies these costs and benefits as being the increased likelihood of compliance weighed against the increased reputational harm in the case of breach. If a country is likely to comply with an extradition request, or refuse to comply, regardless of the presence of a treaty, then states will likely choose not to enter into a treaty at all. To do so would increase reputational harm to the breaching state, a clear loss, without any concomitant gain in cooperation rates. If a state does decide to enter into an extradition treaty with another state, Guzman would likely conclude that the two states believe that the treaty will help facilitate the arrest and rendition of criminals. It might also signal that the state parties believe that extradition is an issue of sufficiently low importance that reputational risks could deter any potential violations of the treaty. In other words, the possibility of harm to a country's reputation for law-abidingness would outweigh any advantages that the state could receive by refusing to honor an extradition request. So, for example, a country might desire to protect a wealthy or influential individual who is sought by another country, but that country might also realize that doing so would do serious harm to its reputation on the international stage. If the country's desire to protect, or at least not affirmatively track down and arrest, alleged criminals is not sufficiently central to the country's interests, then the country might be more willing to enter into extradition treaties.

The other possibility that Guzman foresees is that the decision to negotiate a treaty will be affected by expected compliance rates. If a country believes that violations will be infrequent, then it may be more willing to enter into a binding commitment to extradite. After all, as expected reputational costs of a treaty decrease (due to low possibilities of violation), the overall value of a treaty increases. The inverse relationship between expected violation rates and treaty value suggests that extradition treaties will be entered into when a country expects to be able to fulfill its obligations under the treaty. In other words, we can conclude that a state will enter into an extradition treaty when it is committed to complying with the requesting state's extradition demands.

Despite the appealing simplicity of Guzman's design model, the model leads to some problematic conclusions about when we would expect states to enter into extradition treaties. First, do states truly enter into treaties only when the issues are "low-stakes"? While it may be true that there is a certain category of topics that are so central to a state's interests as to be anathema to treaty negotiations, the list of such topics must be short. A state's interest in its own survival, the maintenance of its government, and

the protection of its citizens might enter into that list, but few others would. In fact, even the ability of a state to protect its citizens as it sees fit has been restricted by international treaties.<sup>105</sup> More importantly, treaty negotiations are costly to domestic actors and the state as a whole, both in time and in resources. If an issue is not sufficiently important to a state's interests, a state will not decide to incur these costs. Given transaction costs, we might conclude that a state will only enter into a treaty when the issues at play are high-stakes, not low-stakes. This conclusion is supported by evidence of the way in which the United States has used extradition treaties since the terrorist attacks of September 11, 2001. The Bush and Obama Administrations have made the identification and arrest of terrorism suspects, whether domestically or abroad, one of their primary national security goals.<sup>106</sup> Extradition is one tool through which the United States effectuates this policy. The rise in the importance of extradition has led, not to reduced efforts to conclude extradition treaties, but rather to increased efforts.<sup>107</sup> It might be that the United States concluded these treaties in spite of, rather than because of, the renewed importance of extradition in the post-9/11 world, but it seems plausible that the importance of extradition instead contributed to their completion. If we believe that government decision-makers respond to public opinion, then this conclusion makes sense. As the public became increasingly concerned with international terrorism, the incentives of elected officials to appear "tough on terror" increased.

Guzman's reliance on reputation as an important factor in the decision whether to enter into treaties is also misplaced when we examine the role of domestic politics in determining state behavior. As Rachel Brewster has argued, there are serious questions about whether states consider reputation as a significant constraint on behavior.<sup>108</sup> When we look at the incentives of individual actors within the state, a state's reputation for law-abidingness would appear to be relatively unimportant in many instances. In democratic (and, to a lesser degree, nondemocratic) countries, leaders and governments come and go. If violating a treaty provides immediate benefits to a leader, he may weigh that interest more heavily than the long-

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105. For example, the WTO treaty has established strict limits on a state's right to protect its citizens from the introduction of pathogens. *See* Appellate Body Report, *Australia — Measures Affecting Importation of Salmon (Australia — Salmon)*, ¶ 125, WT/DS18/AB/R (Oct. 20, 1998); Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

106. *See* Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 911 (2005); Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT'L & COMP. L. REV. 493 (2003).

107. *See Increased Extraditions to United States, With Record Number From Mexico; Some Extraditions From United Kingdom Face Difficulty*, 104 AM. J. INT'L L. 124, 124 (2010).

108. *See* Brewster, *supra* note 99.

term cost of breaking the treaty. After all, he may only be in power for a short time, and he will be able to extract the value now. And even if he does violate the terms of a treaty, it is not clear that the country as a whole will develop a “bad” reputation. Future leaders will likely disclaim the acts of the past government and argue that they, unlike past leaders, are law-abiding. The immediate and visible change in international attitudes towards the United States after President Obama’s inauguration is evidence of the fact that a country’s reputation depends to a great extent on its current president.<sup>109</sup>

A second complication that Brewster highlights concerns the informational content of a reputation.<sup>110</sup> Presumably, states develop reputations for law-abidingness because other states believe that past behavior correlates with future behavior. But what reliable conclusions can other states draw from a country’s breach of a treaty? The violation of an environmental treaty may not be a helpful predictor of a state’s commitment to its treaties in the areas of security or trade. Reputations may, therefore, be specific to issue area. Furthermore, treaty violations may be more intimately connected to changes in domestic and international interests than to past compliance. As Brewster explains:

[T]he likelihood that the United States will comply with future arms control agreements depends far more on the strategic situation of the moment (for example, the present threat from international terrorist groups) than whether it complied with the ABM Treaty in very different political contexts in the past (for example, during the Cold War).<sup>111</sup>

We might also add that the likelihood of compliance will heavily depend on the sometimes conflicting interests and fluctuating power of domestic institutions, including the Pentagon and the State Department. Therefore, for a number of reasons, past behavior may not be predictive of future behavior, belying the claim that reputation strongly influences state behavior.

Additionally, and perhaps most fundamentally, institutionalist scholars, when pushed, have to look within the state to examine the interests and incentives of domestic actors in order to defend their assertions about state behavior. Reputation may be important in international law, but to fully understand its role in influencing state action, we have to understand who the relevant actors are. If governments do not have the same interests as the state as a whole, then we may observe behavior that does not fully

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109. See, e.g., *Confidence in Obama Lifts U.S. Image Around the World*, PEW RESEARCH CENTER (Jul. 23, 2009), <http://tinyurl.com/laa9d6>.

110. Brewster, *supra* note 99, at 233.

111. *Id.*



align with institutionalist theories that assume the state is a “black box.” Traditional rational choice institutionalist theory, then, must either succumb to these failings or relinquish its claim that states should be treated as unitary actors.

A better explanation of why states enter into extradition treaties, then, must examine the incentives of domestic institutions and decision-makers. Jack Goldsmith and Eric Posner have addressed this question with regard to international law in general, and their analysis may be useful here.<sup>112</sup> Like Guzman, they argue that international law exerts no moral or normative pull on states.<sup>113</sup> At the same time, they recognize that treaties are abundant in the modern world, and they attempt to explain this phenomenon through game theory. Goldsmith and Posner show that states can achieve joint gains through cooperation or coordination in many situations.<sup>114</sup> By agreeing not to attack fishing vessels, or by promising to reduce nuclear arsenals, states can improve their country’s welfare and security. Law, they argue, plays no necessary role in this process. What is necessary, however, is for states to know which actions count as cooperation and coordination.<sup>115</sup> By communicating about how to cooperate (i.e., how much to reduce nuclear weapon stockpiles, or how to verify compliance), states can more effectively and reliably reach their optimal payoffs. Treaties can be a useful way for states to communicate with each other in international affairs.<sup>116</sup> A treaty clarifies expectations about other states’ moves.

If treaties are just another form of communication, why would states not choose a less expensive version of communicating a message, either through diplomats or through informal meetings? International treaties have a number of inherent advantages over informal agreements. First, because legislative consent is a condition for national ratification of treaties in most nations, the very process of ratification will inevitably reveal important information about the country’s attitude toward the agreement, as well as the likelihood of compliance.<sup>117</sup> When a treaty goes through hearings, expert testimony, public discussions, and amendments, the world learns a tremendous amount about the state’s interests — or payoffs, in game theory terms. Just as importantly, the fact that the president has sent a treaty to Congress sends a message about the seriousness of the president’s commitment to the treaty. By submitting the treaty to ratification, the president incurs certain costs (in foregoing other priorities,

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112. See Goldsmith & Posner, *International Agreements: A Rational Choice Approach*, *supra* note 85.

113. See Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 85.

114. *Id.* at 116–18.

115. *Id.* at 117.

116. *Id.* at 118.

117. *Id.* at 122–28.

in resources spent on defending the agreement, etc.).<sup>118</sup> Thus, the decision to choose a formal international treaty, rather than an informal agreement, is a credible signal from a country about the seriousness of its commitment to the agreement.

In this sense, the choice between formal and informal agreements tracks the seriousness of a state's commitment to an agreement. If a state decides to go through the effort of negotiating and ratifying a formal treaty, it is communicating to other states that it is likely to comply with the treaty. If a state decides to use an informal agreement, the state communicates to other states that it views the agreement less seriously. In Goldsmith and Posner's view, legalization of an international agreement serves as a means of conveying the seriousness of a state's intent to be bound, similar to the way that signing a contract in domestic law conveys a greater level of commitment.

Domestic institutions are not just tools for government decision-makers, however. The preferences of government decision-makers are themselves influenced critically by the domestic and transnational environment in which they operate.<sup>119</sup> Nonstate actors, such as corporations and nongovernmental organizations (NGOs), shape the social purposes that underlie state preferences, and those state preferences in turn determine state behavior.<sup>120</sup>

Domestic politics and institutions, thus, can play an important role in creating a demand for treaty-based arrangements. Kal Raustiala, for example, argues that individuals and private groups use the state as a means of pursuing their interests, both domestically and internationally.<sup>121</sup> The interplay of these interests, aggregated at the level of the state, ultimately determines state behavior. Domestic preferences and domestic institutions interact to affect the structure of international agreements. According to Raustiala, domestic pressure for international cooperation, where it exists, will inevitably be skewed in favor of binding treaties, rather than nonbinding "pledges."<sup>122</sup> This systematic preference for treaties is based on the widespread belief that pledges are "weak, ineffective, and inferior" to treaties.<sup>123</sup> It is unimportant whether treaties actually do lead to higher rates of compliance; what matters is that domestic groups think they do.

This perception, however, does not mean that states will always prefer treaties over pledges. First, there is no guarantee that the aggregated

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118. *Id.* at 124–25.

119. See Moravcsik, *supra* note 85, at 516.

120. *Id.*

121. Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L. L. 581, 595 (2005)

122. *Id.* at 596.

123. *Id.*

preferences of a society will be in favor of cooperation. It might be that the interplay of domestic factions leads to a preference for a somewhat weaker commitment in the form of a pledge. Second, domestic institutions may tip the balance as well.<sup>124</sup> In most states, treaties require a more stringent ratification process than informal understandings. For example, in the United States, treaties must be affirmed by two-thirds of the Senate, whereas informal understandings need undergo no legislative consent process.<sup>125</sup> Thus, officials in the executive branch will often prefer pledges to treaties if they are worried about high transaction costs. Pledges also serve to insulate governments from domestic political pressures because pledges are less “prominent” and visible to the public.<sup>126</sup> At the same time, treaties may serve a useful purpose to government officials who want to signal credibility. A state that enters into a treaty, with all the institutional requirements necessary for ratification, demonstrates that it has strong domestic support for compliance with that treaty. Ex ante, this credibility may be useful to government officials because it can reassure other states that the commitments will be honored. Ex post, of course, it may lead to lower flexibility in a state’s decision whether or how to comply with its international obligations, because treaties generally will set out with more specificity the precise undertakings that a state is making.<sup>127</sup> It should be remembered, though, that government officials often have short time horizons and thus may be less concerned about long-term consequences.<sup>128</sup>

Raustiala’s liberal model of state decision-making suggests very different places to look when attempting to answer why states opt to structure their extradition proceedings through treaties. Instead of focusing on the benefits to states of high compliance and the costs of potentially greater reputational harm, as institutionalist scholars would have us do, Raustiala’s theory asserts that we must examine the perspectives and opinions of domestic actors, including both civil society groups and government officials. If states enter into formal extradition treaties, rather than informal pledges, this is owing to the complex interplay of perceived (and not necessarily objective or rational) perspectives of individuals and groups

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124. *Id.* at 597–98.

125. For discussions of the legal requirements regarding international agreements in the United States, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 134 (1998); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 790 (2001).

126. Raustiala, *supra* note 121, at 597.

127. This may not be the case in all treaties. Some treaties, such as many human rights treaties, contain only vague commitments from states. This is a kind of soft law, somewhere between a treaty and an understanding.

128. See Brewster, *supra* note 99, at 254.

within the state. An even casual perusal of extradition arrangements today demonstrates that treaties are the dominant form of cooperation, an observation that would appear to show that domestic groups are strongly in favor of cooperating to find, arrest, and deliver criminals internationally. This may be explained by the powerful pull of law and order as a political tactic. It may also be explained by the perceived interests of government officials within foreign ministries and ministries of justice. Regardless of whether extradition treaties actually do lead to more cooperation in extradition affairs, many groups appear to believe that they do.

An important point here is that domestic preferences for or against extradition treaties may not be entirely coherent, either within a state or through time. Some groups within a state may favor cooperation with foreign states in criminal affairs, while other groups within the same state may declaim any such cooperation as foreign meddling. Often, the public's reaction to extradition requests depends on who the requesting state is. Domestic groups generally favor the return of individuals who have escaped their country and fled to another. But domestic preferences for foreign cooperation drop off significantly when the request is made on one's own state. For example, when it was discovered that Pakistani nuclear scientist Abdul Qadeer Khan had passed sensitive nuclear technology to Iran and North Korea, domestic groups in the United States were strongly in favor of requesting that Pakistan deliver him to U.S. authorities.<sup>129</sup> Pakistani newspapers, on the other hand, ran editorials with titles such as "Do Not Extradite Him, They Are Murderers," demanding that the Pakistani government refuse any extradition request from the United States.<sup>130</sup> Of course, extradition treaties generally contain mutual obligations, requiring both state parties to render up criminals of certain types. Thus, there is no option to sign a treaty that only allows for extradition requests by one country. The obligations will always bind both parties.

A state's aggregated preferences for extradition treaties may depend, then, on whether it foresees being primarily a requesting state or a requested state. If domestic groups expect to make a large number of requests on another state (either because a large number of criminals escape there or because a criminal group resides there permanently),<sup>131</sup> it might be more willing to enter into an extradition treaty. For example, the

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129. See Syed Mohsin Naqvi, *Thousands Rally Against Musharraf*, CNN.COM, (Mar. 20, 2005), <http://tinyurl.com/c73gyxj>.

130. See *Nuclear Prisoner*, NEWSIDENTIST, Sept. 3, 2005, at 5; BBC Monitoring International Reports, *Saudi Press Selection List*, BBC (June 17, 2006), <http://www.monitor.bbc.co.uk>.

131. This may be the case for countries that are known to have terrorist cells residing within their borders.

United States makes many more extradition requests than it receives.<sup>132</sup> The United States, then, relies more heavily on extradition treaties than its treaty partners do. Assuming that the intensity of extradition requests are related to a state's interest in extradition, the United States probably has a strong preference for extradition treaties.

The use of treaties, as opposed to soft law, may also reflect a decision to harness the institutional competences of courts. Treaties must be interpreted by courts, while soft law generally is not judicially enforceable. Judicial decision-making in extradition may be advantageous for a number of reasons. First, courts may be seen as increasing the probability of compliance, an advantage for countries worried about cheating. Second, delegating decision-making to courts reduces pressure on the political branches and insulates them from public criticism. Third, courts may be more skilled at interpreting treaties than the political branches, and thus may produce more consistent results.

Domestic actors may also use international treaties as an alternative forum for pursuing domestic policy aims that are frustrated by local structures.<sup>133</sup> When domestic interest groups cannot achieve their goals through domestic legislation, they may at times use international agreements as a substitute. Thus, there is some evidence that a number of countries with weak, overburdened, or affirmatively corrupt criminal justice systems use extradition arrangements with other countries as a criminal law enforcement tactic.<sup>134</sup> Israel, for example, has in recent years reached out to the United States to help prosecute Israeli crime bosses. Colombia and Mexico have similar arrangements and often allow their own citizens to be extradited to the United States for prosecution, highlighting the struggles that domestic law enforcement and judicial institutions face in effectively prosecuting criminal organizations.<sup>135</sup> These difficulties may stem from structural problems, such as the lack of expertise by domestic institutions, but they may also stem from sociological issues, such as the reluctance of witnesses to testify against powerful local figures without strong witness protection programs. Where local circumstances make domestic prosecution of certain groups difficult,

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132. In 2002, the United States successfully received the extradition of 269 individuals from foreign countries, while it itself extradited only 102 fugitives to foreign countries. See Ashley Wright Baker, *Forcible Transborder Abduction: Defensive Versus Offensive Remedies for Alvarez-Machain*, 49 ST. LOUIS U. L.J. 1373, 1411 n.228 (2004).

133. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501 (2004) (discussing the ways in which international agreements can influence domestic policy).

134. See Marc Perelman, *Israel Seeks U.S. Help to Fight Mob Crime Wave*, JEWISH DAILY FORWARD, (Oct. 16, 2008), <http://tinyurl.com/cxd4f3b> ("The extradition would allow the boss to be prosecuted in American courts rather than Israeli ones — a shift that Israeli authorities have encouraged. It is the second such request in two years."); see also Edward M. Morgan, *Traffic Circles: The Legal Logic of Drug Extraditions*, 31 U. PA. J. INT'L L. 373, 374–75 (2009).

135. Morgan, *supra* note 134.

extradition treaties serve as a useful means for satisfying the interests of domestic actors in prosecution.

One factor that we must keep in mind when analyzing why a state enters into an extradition treaty is what other alternatives the state has that might serve to satisfy its interests. If the ultimate interest is the return of criminals for prosecution, a country has a number of alternatives to executing a treaty. It can attempt to negotiate an ad hoc agreement with the foreign state related specifically to the criminals at issue. For example, in 1864, the United States extradited a former governor of Cuba at the request of Spain in the absence of an extradition treaty, after it was alleged that the governor had unlawfully sold over one hundred Africans into slavery.<sup>136</sup> Or a state can try to locate the individual on its own, bypassing cooperation with the other state, and bring him to justice.<sup>137</sup> This occurred in the well-known case of Alvarez-Machain, a Mexican national who was suspected by the United States of being involved in the torture and murder of a Drug Enforcement Agent.<sup>138</sup> Although the United States had an extradition treaty with Mexico, it decided, perhaps because of doubts about Mexican cooperation, to operate outside of the treaty in order to put Alvarez on trial. In 1992, Alvarez was kidnapped by masked gunmen in Guadalajara and flown to Texas for arrest.<sup>139</sup> The U.S. Supreme Court would later hold that Alvarez's abduction did not violate the extradition treaty because the treaty did not address forcible abductions.<sup>140</sup> The U.S. raid into Pakistan that killed Osama bin Laden, which aimed to capture him in the absence of resistance, would also fall within this category, as Pakistani authorities were unaware of the operation before it occurred.<sup>141</sup>

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136. This case has been described as provoking more discussion than any other in the history of extradition in the United States, due to its occurrence in the absence of an extradition treaty. See 2 ROLAND FOULKE, A TREATISE ON INTERNATIONAL LAW 45 n.9 (1920); MOORE, *supra* note 39, at 33–35.

137. See Michael H. Cardozo, Note and Comment, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961); D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 29–30 (1988); G. Gregory Schuetz, Comment, *Apprehending Terrorists Overseas Under United States and International Law: A Case Study of the Fawaz Younis Arrest*, 29 HARV. INT'L L.J. 499 (1988).

138. See William C. Aceves, *The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain*, 3 SW. J.L. & TRADE 101 (1996); Posner, *supra* note 84, at 822–23 (analysis of this case using a choice domestic politics approach).

139. Aceves, *supra* note 138, at 107–08.

140. *United States v. Alvarez-Machain*, 504 U.S. 655, 664–65 (1992). The decision sparked outrage in both Mexico and the United States. See Editorial Desk, *Kidnap? Sure, Says The Court*, N.Y. TIMES, June 18, 1992, at A26 (“The Supreme Court’s astonishing Mexican extradition decision upholds national power at the expense of national honor.”); David C. Scott, *U.S. Court Ruling Provokes Heated Mexican Retort*, CHRISTIAN SCI. MONITOR, June 17, 1992, at 1 (“Mexico responded angrily . . . by issuing a blanket ban on activities of U.S. Drug Enforcement Administration (DEA) agents in Mexico.”).

141. See Mark Landler & Helene Cooper, *New U.S. Account in Bin Laden Raid: He Was Unarmed*, N.Y. TIMES, May 4, 2011, at A1 (Some commentators have, however, asserted that the operation had

A third option, located somewhere between ad hoc agreements and forcible abduction without the consent of the other state, is what is known as “extraordinary rendition.”<sup>142</sup> Extraordinary rendition generally refers to the practice of the United States after 9/11 of forcibly abducting terrorism suspects in foreign countries, through murky cooperation with elements of the foreign government, and delivering the suspects to locations outside of the reach of U.S. judicial review.<sup>143</sup> Extraordinary renditions take place under veils of immense secrecy, but evidence of their occurrence has nonetheless seeped out. In 2003, for example, the radical Islamic cleric Abu Omar was abducted on his way to a mosque in Milan, Italy, by CIA agents and flown to Egypt, where he was interrogated and tortured for information related to terrorist activities.<sup>144</sup> Although Italian authorities have denied knowing about or acquiescing in Omar’s abduction, other sources have acknowledged such ties.<sup>145</sup> It is widely suspected that Italy’s intelligence service, SISMI, cooperated with their American counterparts in the raid.<sup>146</sup>

These three alternatives to extradition treaties (ad hoc agreement, secret abduction, and extraordinary rendition) provide states with a variety of options when deciding how they might satisfy their interest in securing the return of criminals from foreign states. They have the advantage of not requiring the lengthy and potentially costly process of treaty negotiation, and they may give government decision-makers more flexibility in future transactions. After all, there is no requirement of mutuality or judicial consent when conducting an extraordinary rendition. But these alternatives also come at a cost. The cost of negotiating for the return of potentially hundreds of individuals every year would weigh heavily on all involved actors, a daunting task even for a country such as the United States that has vast governmental capacities. And the invasion of a country’s sovereign territory is always a risky venture. Just as importantly, the abduction or extraordinary rendition of suspected criminals from foreign states can create large political costs for both countries, especially if such transactions are not subject to traditional constraints of probable cause or judicial review. The Abu Omar case, for example, was damaging both for

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no intention to capture bin Laden alive.); Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER, Aug. 8, 2011, at 34–45.

142. See generally David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 124–25 (2006); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295 (2007).

143. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1416 (2008).

144. Craig Whitlock, *CLA Ruse Is Said To Have Damaged Probe in Milan; Italy Allegedly Misled on Cleric’s Abduction*, WASH. POST, Dec. 6, 2005, at A1.

145. Colleen Barry, *Judge: Italy Probably Knew of CIA Kidnapping*, STAR LEDGER, Feb. 2, 2010, at 26.

146. See *Secrecy on CIA Cleric Snatch Criticized*, ANSA MEDIA SERVICE (Feb. 1, 2010), <http://tinyurl.com/6s4d9ff>.

Silvio Berlusconi, Italy's prime minister, and George Bush, let alone the careers of the agents involved in planning the abduction. Government officials, thus, may prefer to have the political cover that an extradition treaty provides to prevent the kind of media backlash that the more ad hoc and secret renditions have caused. This preference may be rooted in a deeper preference within the public at large for open and lawful government actions.

### B. *Bilateral Versus Multilateral Treaties*

Once a state has decided that it has an interest in negotiating an extradition treaty, it must then decide the next question: With whom? Should it negotiate a single treaty with all states of the world? Should it negotiate bilateral treaties with individual states? Or should it instead attempt to reach agreements with some subset of all states, based either on geographical closeness, ideological similarities, or some other factor?

As an empirical matter, states have demonstrated by their actions a strong preference for bilateral extradition treaties. The United States alone has more than one hundred treaties in force with other states.<sup>147</sup> At first glance, it appears quite illogical for states to negotiate individual bilateral extradition treaties with other states. The costs of negotiating the countless treaties are high. The complexity of understanding the different provisions of different treaties is overwhelming. And the mere fact that an individual is located in one country, rather than another, may affect a state's ability to arrest the individual. This is a perverse result for states that desire a predictable and consistent method for securing the return of criminals to justice.

Adding to the mystery is the general consensus that extradition is a problem that requires collective action. As Beccaria observed as early as 1764, "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."<sup>148</sup> In other words, if a state has an extradition treaty with most, but not all states, then a fugitive can always decide to travel to the excluded states in order to escape the reach of justice. Thus, the value of extradition treaties lies to a great extent in their ability to ensure that the state's jurisdiction is inescapable. Criminality is a problem that requires collective action, just as environmental pollution and world trade do.<sup>149</sup>

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147. BASSIOUNI, *supra* note 36, at 24.

148. CRIMES AND PUNISHMENTS, *supra* note 47, at 194.

149. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227 (1997); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).



Despite this situation, however, the vast majority of extradition treaties are bilateral. Is there some feature of extradition that makes it particularly incompatible with multilateral treaties? Is it mere chance or an accident of history? Or is some other factor at work here?

The choice between multilateral and bilateral treaties may be seen as a negotiation problem. Negotiation theorists note that multilateral agreements, although necessary in some situations, present additional strategic barriers for parties.<sup>150</sup> First, the process of creating value is much more complicated in multilateral contexts. If we define a value-enhancing deal as one that is Pareto-efficient — that is, one in which one party can be made better off only by making the other party worse off — then negotiations will only create value if each party has veto power. But if each party has veto power, a real risk of holdout problems arises. For example, assume that there are five parties to a negotiation. Four parties reach a deal that is satisfactory to them. The fifth party can exercise considerable power over the process by threatening to veto the entire deal. As long as each party has veto power, the holdout problem can lead to a never-ending cycle of threats and compromises.<sup>151</sup> The resulting transaction costs can be prohibitive. Furthermore, the increased number of parties increases the likelihood that there is no zone of possible agreement (or ZOPA, in the terminology of negotiation theorists) at all.<sup>152</sup> In other words, if every party has a veto, then many arrangements that might benefit the vast majority of parties could be stymied by a few dissenters.

Multilateral negotiations also raise issues of coalition-building.<sup>153</sup> If a negotiated agreement is being prevented by a minority of the parties, the other parties can decide to split off and negotiate an agreement amongst themselves. Although this option reduces the holdout problems associated with multilateral negotiations, it simultaneously creates a new set of issues. Coalition-building may at times make the parties that have been left out of the deal worse off than they were before negotiations began. For example, regional trade agreements often divert beneficial trade away from the states that are not privy to the trade agreement.<sup>154</sup> The harm created by the agreement may at times outweigh the benefits of the agreement. States may decide to forego multilateral negotiations to prevent this kind of

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150. Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1 (2003).

151. *Id.* at 15.

152. *Id.* at 16.

153. *Id.* at 17.

154. Jagdish Bhagwati & Arvind Panagariya, *Preferential Trading Areas*, in THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS 6–7 (Jadish Bhagwati & Arvind Panagariya eds., 1996); Richard Baldwin, *Regulatory Protectionism, Developing Nations and a Two-Tier World Trading System* 1–2, presented at Brookings Trade Forum, Oct. 2000, in BROOKINGS TRADE FORUM: 2000 (Dani Rodrik & Susan M. Collins eds., 2001).

harm. For all these reasons, from an institutionalist perspective, states may have an interest in concluding bilateral extradition treaties in place of wider multilateral ones.

The choice between bilateral and multilateral agreements may also depend to a great extent on the subject matter of the agreement. Gabriella Blum, for example, identifies several categories of activities, including coordination activities, cooperation activities, universal goods, and activities with externalities.<sup>155</sup> Coordination activities are ones in which states have an interest in adopting uniform policies but the actual policy itself is undetermined prior to communication. After agreement has been reached in this situation, then, there is no incentive to defect. One example of a coordination activity is the international code for aerial communication, where all countries can benefit from a uniform method of communication between airplanes, regardless of what that method is.<sup>156</sup> Cooperation activities, on the other hand, are activities in which parties can achieve gains by reaching agreement but in which states have incentives to cheat after agreement has been reached.<sup>157</sup> A typical example of this regime is nuclear disarmament: If both parties can agree to limit their nuclear arsenals, both countries are better off, but a party can gain an advantage if it builds up its arsenal without the other party's knowledge. Universal goods are goods that are nonrivalrous and nonexcludable, meaning that consumption of the good does not reduce its availability for others and that no individual can be effectively excluded from using the good. Environmental issues, such as global warming, are generally understood as universal good-type regimes.<sup>158</sup> Finally, externality-projecting activities are activities that affect states not involved in the activity. Most often, we think about externalities as negative factors, such as when pollution from one state seeps into another state. Agreements may, however, produce positive externalities. Many commentators argue that the U.S.-Soviet arms reduction agreements benefited countries around the world, not just the United States and the Soviet Union.<sup>159</sup>

Blum argues that this typology of regimes is helpful in understanding how states structure their agreements. Coordination activities, according to Blum, are generally most efficiently regulated through multilateral treaties, because these activities typically involve many states and require active monitoring, assistance, and dissemination of information.<sup>160</sup> Cooperation activities are a bit more complicated. Multilateral regimes increase

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155. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 354 (2008).

156. *Id.* at 354–55.

157. *Id.* at 356.

158. *Id.* at 357.

159. *Id.* at 361.

160. *Id.* at 355.

incentives for compliance, reduce fears of defection by others, and overcome collective action problems, but they also make retaliation against cheaters more difficult. Reciprocity becomes diffused among a number of parties, as does retaliation. The diffusion of reciprocity may reduce the effectiveness of the agreement.<sup>161</sup> Thus, in the context of cooperation activities, Blum argues that bilateral agreements are “easier to negotiate, monitor, and enforce through direct retaliation.”<sup>162</sup>

Blum argues that multilateral agreements are clearly preferable with regard to universal goods.<sup>163</sup> Because universal goods affect the entire international community, their regulation requires wide participation to be effective. Where the goods at issue are relevant to a more limited subset of parties, or where differences between countries are pronounced, bilateralism may be more effective. Finally, the presence of externalities often renders bilateral agreements inefficient. When the effects of an agreement are felt by states not party to the agreement, these effects are often not taken into consideration when determining the obligations of the member-states. Thus, an agreement that is a net loss for all the relevant parties may still be concluded if some of those parties are not involved in the negotiations. Blum argues that multilateral treaties are useful in “mitigating negative externalities and in redistributing the benefits of positive externalities.”<sup>164</sup> At the same time, parties may not *want* to include all the negatively affected parties if doing so will require more concessions from them.

Blum specifically addresses the issue of extradition at several points. First, she argues that extradition arrangements are not a universal good and thus are best regulated through bilateral treaties. Extradition treaties, she suggests, are highly contingent on differences between countries and require reciprocal exchanges of commitments. Blum concludes that these factors make extradition a subject matter most effectively regulated by bilateral agreements, rather than multilateral agreements. Many countries would object to a multilateral treaty on extradition, she argues, “partly due to domestic constitutional constraints prohibiting the extradition of one country’s citizens to another country, and . . . partly due to a reluctance to extradite people to countries that have disreputable legal or punitive systems.”<sup>165</sup> In addition, Blum asserts that extradition arrangements impose “almost no externalities” on third parties.<sup>166</sup> In other words, the extradition of an individual from one state to another does not affect the

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161. *Id.* at 356–57. See also Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORG. 1, 23–24 (1986).

162. Blum, *supra* note 155, at 357.

163. *Id.* at 357.

164. *Id.* at 361.

165. *Id.* at 360.

166. *Id.* at 361.

interests of other states. For these reasons, extradition is an area in which “multilateralism is bound to fail.”<sup>167</sup>

The international relations and negotiation literature provides substantial insight into why states would choose to enter into bilateral, rather than multilateral, extradition treaties. While the transaction costs of negotiating hundreds of bilateral agreements may be high, the difficulty of finding common ground with multiple states is high as well. In fact, there may be no agreement that would adequately meet the demands of all states, if we take seriously Blum’s assertion that domestic preferences vary widely with regard to extradition. The legal regimes within states governing extradition, such as the extraditability of citizens and the legal process of foreign states, may differ so much that negotiating a truly multilateral treaty would be prohibitively expensive. In negotiation terms, there may be no ZOPA at all. Furthermore, taken individually, bilateral extradition treaties are easy to monitor and enforce, as reciprocity and retaliation is direct. All these considerations suggest that extradition is a subject best left to bilateral treaties.

While current theory provides useful insights into extradition arrangements, it fails to take into account the effect of domestic politics on state decision-making in important ways. Blum’s assertion that multilateralism is bound to fail with regard to extradition treaties is not entirely convincing. First, multilateralism appears to be growing. The recent advent of the European Arrest Warrant shows that the advantages of multilateral extradition treaties are not negligible. The speed and uniformity of the European Arrest Warrant may convince other countries that multilateral treaties are more effective.<sup>168</sup> Second, the theoretical advantages of multilateral extradition treaties are strong. Extradition is based partly on an understanding that individuals will be less likely to commit crimes if they know that they will be unable to escape punishment. A truly universal extradition system, in which all countries participate, could be more effective at disincentivizing crime, and crime-fighting is politically popular and thus attractive to elected officials. Similarly, a single extradition code would help governments and officials better understand

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167. *Id.* at 360.

168. It might be argued that the European Arrest Warrant is not truly a multilateral agreement because it is an act of a single body, the European Union. While this may be true, the European Union is not a state as that term is traditionally understood. The acts of the European Union apply to a number of states, and in this sense, they are multilateral agreements. For discussion of the debate, see Trevor C. Hardley, *International Law and the Law of the European Union — A Reassessment*, 72 BRIT. Y.B. INT’L L. 1, 1–2 (2001); Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. INT’L L. 315, 345 (2006); Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT’L L.J. 389, 389 (1996).

the requirements for extradition and reduce the likelihood that extradition would be denied because of procedural mistakes.<sup>169</sup>

It is also unclear that extradition treaties have “almost no externalities” for third parties, as Blum asserts.<sup>170</sup> Domestic groups in third-party countries may well have an interest in the extradition proceedings of two states, particularly if those other states are extraditing citizens from the third-party country. If we believe the claim that the prosecution of a state’s citizens in a foreign country is a matter of interest to groups in that state, then the extradition arrangements of other states become a matter of real concern to government officials. The case of Viktor Bout, the Russian businessman suspected of running an arms trafficking organization, is a paradigmatic example of this interest. The United States suspected that Bout was providing weapons to governments, rebels, and insurgents around the world. His activities inspired the 2005 film *Lord of War* and a book, *Merchant of Death*. In 2008, Thai authorities arrested Bout after he agreed to sell weapons to undercover U.S. agents posing as rebels from the Revolutionary Armed Forces of Columbia (FARC). The United States requested his extradition. Russia protested vigorously against Bout’s extradition, arguing that the United States was putting pressure on the Thai government to extradite an innocent Russian citizen. Eventually, Thai courts authorized Bout’s extradition, and Russia angrily denounced the ruling as an “illegal political decision.”<sup>171</sup> Russia’s response to Bout’s extradition demonstrates that it perceived an interest in the extradition treaty between Thailand and the United States: It wanted to ensure that the treaty gave adequate protection to Russian citizens. This interest may have stemmed from pressure from local interest groups, or it may have come from the personal interests of government officials. Regardless, the angry protestations of Russian officials after Bout’s arrest show just how important the issue was to them. Thus, it appears that in many cases extradition arrangements between two states project externalities onto other states. These externalities are only evident when we look at extradition from the perspective of domestic politics, and they may help explain why states are increasingly opting for multilateral treaties today. The significance of the externalities depends on the likelihood of citizens’

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169. The Polanski case here comes to mind, although instances of procedural mistakes in extradition abound. See David Makovsky & Alon Pinkas, *Peres: PA Not Obligated to Give Up Hamas Men*, JERUSALEM POST 1 (Aug. 28, 1995) (noting that Israel was forced to reissue extradition requests for fourteen terrorist suspects to the Palestinian Authority because of technical mistakes in the first requests); Avi Meir, *Mondrowitz Extradition Denied by Israel’s Supreme Court*, 5TJT.COM (Jan. 14, 2010), <http://tinyurl.com/2uzn9jf> (noting that Israel denied a U.S. extradition request for an accused pedophile due to the statute of limitations).

170. Blum, *supra* note 155, at 360.

171. Thomas Fuller, *Arms Suspect Vows to Win Case in U.S. after Extradition Order*, N.Y. TIMES (Aug. 20, 2010), <http://tinyurl.com/3785rnt>.

extradition, along with the country's particular preferences with regard to the prosecution of both domestic and foreign individuals. These preferences, in turn, are formed by the structure of domestic politics.

### C. *Treaty Discretion*

Treaty discretion is the final element of extradition structure that we must address. To a certain extent, all treaties are binding. Indeed, that is the very definition of a treaty, as the Vienna Convention states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>172</sup> At the same time, treaties in fact vary in the strictness of their obligations. Some treaties contain specific and clear obligations for parties, while others have more ambiguous requirements and grant some flexibility to states in deciding how to implement them.<sup>173</sup> In the context of extradition, an important consideration is the amount of discretion that states reserve for themselves in the decision whether to extradite an individual.

Traditional international relations theories argue that states want to maximize their flexibility in deciding how to comply with treaty obligations.<sup>174</sup> This flexibility allows states to reevaluate their interests continuously and decide what course of action to take. By maintaining a full range of options in future actions, states can ensure that they are not constrained in confronting emerging problems. Flexibility becomes particularly important when future payoffs are uncertain.<sup>175</sup>

Flexibility, however, can be a two-edged sword: It may at times give states greater freedom to pursue their self-interests, but it may also limit their freedom to enter into beneficial agreements with other states. As mentioned above, states also have an interest in having the capacity to make credible commitments to other states. If states cannot make binding commitments, then their promises have little value to other states. Other states will not want to enter into agreements with them, and cooperation will become difficult. For these reasons, states at times desire to in effect "bind themselves to the mast," committing themselves to a course of action and stripping themselves of all power to cheat.

Institutionalist theories of international law, however, struggle to explain how states can in fact credibly commit themselves. They may rely on concepts of reputation or patterns of cooperation, but these

172. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

173. See Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?* 5 J. INT'L ECON. L. 647, 649–50 (2002); Raustiala, *supra* note 121.

174. See ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION 23 (1975); Robert Gilpin, *No One Loves a Political Realist*, 3 SECURITY STUDIES 5, 6 (1996).

175. See Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 519–20 (1991); Beth A. Simmons, *International Efforts Against Money Laundering*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 245, 262 (Dinah Shelton ed., 2000).

explanations prove weak in a number of contexts.<sup>176</sup> When a state is seen as monolithic and entirely self-interested in a narrowly conceived way, it is difficult to imagine a state committing itself to actions that are not, in the future, viewed as utility-enhancing. A closer look at domestic institutions solves many of these problems. Decision-makers within states may be able to credibly commit themselves to future actions if they delegate decision-making to other domestic institutions. For example, if the president of the United States believes that extradition agreements are sufficiently important, he might delegate individual decisions about extraditability to courts. This delegation might reassure other states that the president will not violate treaty provisions in politically sensitive cases. Of course, the ability for a country to commit itself by leveraging diverse domestic institutions depends on the assumption that different institutions have different interests and viewpoints. In other words, if we believe that U.S. courts are not truly independent of presidential pressure, then the delegation of decision-making to courts will not provide much assurance to other countries. These issues are more prevalent in countries that do not have strong separation of powers or that have weak institutions. Where the rule of law is absent, states may not be able to delegate decision-making to alternate institutions in order to increase the power of their commitments.

The advantages of delegation were amply demonstrated in the passage of the Foreign Sovereign Immunities Act (FSIA). The doctrine of sovereign immunity holds that a state is generally immune from civil or criminal suits. The rule was grounded on concepts of international comity and the "perfect equality and absolute independence of sovereigns."<sup>177</sup> Before 1976, states that were sued in the United States could only assert sovereign immunity if the State Department, within its discretion, recognized the defense.<sup>178</sup> The blatantly political nature of sovereign immunity decisions, and the unfettered discretion granted to the executive, led to tension with foreign countries, as other countries knew that the executive could grant or reject sovereign immunity in any case.<sup>179</sup> In order to remedy these tensions, Congress passed the FSIA, a principal purpose

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176. See Olivier Compte, *On Failing to Cooperate When Monitoring Is Private*, 102 J. ECON. THEORY 151 (2001); George J. Mailath & Stephen Morris, *Repeated Games with Almost-Public Monitoring*, 102 J. ECON. THEORY 189 (2001); Matthew Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 68–69 (2003).

177. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

178. See David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440 (1983); Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 491 (1992); Jack Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 463 (1993).

179. See *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578 (1943).

of which was to “transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”<sup>180</sup> The FSIA thus restricted executive discretion on the question of sovereign immunity. Interestingly, the FSIA was not a power-grab by Congress at the protest of the executive branch. Instead, the FSIA was actually drafted by the Departments of State and Justice.<sup>181</sup> The executive desired to limit its own discretion in order to promote good relations with other states. The story of the FSIA demonstrates just how valuable credible commitments can be for a state and for domestic officials.

Extradition similarly exhibits the complicated interplay between discretion and obligation in international law. As described earlier, extradition has become a legalized phenomenon in which discretion is highly cabined.<sup>182</sup> When an extradition request is made on a state, the judiciary has a very limited number of duties in determining whether an individual is extraditable. These generally revolve around whether the allegations and evidence are sufficient to make the case fall under the applicable extradition treaty.<sup>183</sup> The obligation to extradite is often absolute if these requirements are met.<sup>184</sup> The obligatory nature of many extradition agreements suggests that states are interested in making binding commitments in this area. The value of cooperation thus outweighs the reduction in flexibility. This assessment also suggests that uncertainty about the future is a lesser concern in extradition cases. Countries appear to be willing to make irrevocable commitments to extradite suspected criminals to other countries. The inflammatory nature of extraditions might partially explain this willingness. The extradition of popular figures, or the nonextradition of unpopular ones, can often be harmful to government officials. By ceding its discretion in these affairs, the executive branch can reduce the harmful effect of extradition decisions. In other words, government officials are widely immune from public scrutiny about extradition decisions as long as those decisions are viewed as legal, not

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180. H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

181. *See* Note, *The Impact of S.566 on the Law of Sovereign Immunity*, 6 LAW & POL’Y INT’L BUS. 179 (1974); Note, *Sovereign Immunity: Proposed Statutory Elimination of State Department Role*, 15 HARV. INT’L L.J. 157 (1974).

182. *See supra* Part I.

183. *See* 18 U.S.C. § 3184 (2006).

184. *See* Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1315 (1962); 106 INTERNATIONAL LAW REPORTS 267 (Elihu Lauterpacht et. al. eds., 1997) (stating that “[t]he power to grant or refuse extradition is no longer a discretionary power, at least between the States parties to the European Convention of 1957”).



political, decisions.<sup>185</sup> Of course, some skeptical domestic observers may doubt that the decisions are truly nonpolitical, as Americans have doubted the legality of the Swiss decision to deny extradition of Polanski, but the legally binding nature of these treaties lessens the pressure for intervention. Thus, the binding nature of extradition treaties and the tightly restricted judicial discretion in extradition decisions serve at least two purposes: First, they signal the seriousness of the state's commitment to abide by its obligations to other nations; and second, they insulate government officials from domestic pressure with regard to extradition decisions.<sup>186</sup>

To say that extradition law is an entirely judicial process absent of discretion, however, would be to overlook some essential features of extradition. In the United States, for example, the action of the executive with respect to extradition cases was originally considered purely ministerial: If the judiciary found that the requirements of the extradition treaty were satisfied, the executive was duty-bound to surrender the individual.<sup>187</sup> No executive discretion was admitted. With time, however, the Secretary of State began to assert a power to independently interpret the relevant treaties and law.<sup>188</sup>

Other countries have blunted the inflexible nature of extradition treaties by reading domestic law to grant some discretion to the executive branch. Both France and Switzerland have asserted that their governments retain discretion to make the ultimate judgment about whether to extradite a fugitive, even in the presence of a treaty that purports to create an absolute duty to extradite. For example, a French lawmaker has explained that "[i]n any case where a judicial decision authorizes extradition, the Government reserves the right to refuse extradition on grounds of which it shall remain the sole judge."<sup>189</sup> Swiss legal commentators have also explained that "the duty to extradite imposed by the European Convention on Extradition must be overridden if international public policy stands in its way."<sup>190</sup> These assertions of discretion may reduce the power of French and Swiss officials to make binding commitments with other countries in the area of extradition, and they also open the door to domestic pressure in particularly sensitive extradition proceedings. On the other hand, such

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185. *Cf.* Raustiala, *supra* note 121, at 595–97 (explaining that non-state actors prefer for international agreements to take the form of binding legal contracts as opposed to mere pledges).

186. *Cf. id.* (explaining that legal agreements increase governmental obligations and that these increased obligations lead non-state actors to prefer binding contracts in international agreements).

187. MOORE, *supra* note 39, at § 361.

188. *See* *In re Stupp*, 23 F. Cas. 281, 295 (C.C.S.D.N.Y. 1873) (No. 13,562) (in which the Secretary of State refused to extradite a Prussian citizen because the alleged offense occurred in Belgium, not Prussia).

189. 106 INTERNATIONAL LAW REPORTS, *supra* note 184, at 268.

190. *Id.* at 269.

discretion suggests that government officials are concerned with future uncertainty about extradition decisions.

Such explicit recognition of the nonbinding nature of extradition obligations is curious, though. If domestic officials have an interest in denying an extradition request, there are many less harmful ways of preventing extradition. As one commentator has explained, “[i]t is sufficient merely not to employ any zeal in attempting to arrest the individual whose surrender is sought, even if it means helping that person to avoid arrest and makes his capture impossible, in order to paralyze the implementation of extradition proceedings.”<sup>191</sup> In other words, there are ways in which a state can pursue its interest in nonextradition while maintaining a reputation for law-abidingness. Of course, while this may be a good option for some states, for other states, in which the judiciary and police operate relatively independently of executive decisions, it may not be an option at all.

The binding nature of extradition treaties, and the ways that executives have disempowered themselves, demonstrates the strong tension that government officials perceive between maintaining flexibility in the future and making credible commitments in the present. This balance has been constantly evolving and has never been fully resolved by states.

### III. THE SUBSTANCE OF EXTRADITION TREATIES

Generalizing about the substance of extradition treaties is difficult because of the amazing variety we find in current agreements. However, a few strands may be picked out and identified. Three aspects of extradition obligations are of particular interest: first, why states have crafted a citizenship exception to extradition treaties; second, why and when states scrutinize the legal regimes in foreign states; and third, why states often exclude political crimes from extradition treaties. In the history of extradition, these have been some of the most controversial and prominent features of debate. This section will examine these questions in order to cast light on the depth of international legal commitments in the field of extradition.<sup>192</sup>

#### A. *The Citizenship Exception to Extradition*

Most extradition treaties today contain provisions exempting citizens of the requested state from extradition. This exception provides a very obvious loophole through which alleged criminals may run. In fact, one

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191. *Id.* at 270 (quoting *Repertoire Dalloz, Droit penale, sub Extradition*, No. 297).

192. See Raustiala, *supra* note 121, at 581 (stating that substance refers to “the deviation from the status quo that an agreement demands”).

might suspect that the first place an individual sought by a foreign country would seek solace would be his home country. Beyond knowledge of the language, society, culture, and land, the awareness of immunity from extradition makes home countries a tempting location for fugitives. The citizenship exception from extradition is therefore potentially a glaring exception to general extradition obligations.<sup>193</sup>

As discussed previously, government decision-makers often perceive an interest in promoting the rule of law and disincentivizing crime, and one way they pursue this interest is by concluding extradition treaties. Extradition treaties assist states in ensuring that the purposes of criminal law are not frustrated by territorial boundaries. At the same time, government officials may have other interests, such as protecting their citizens from harm. If a state were obliged to extradite any citizen suspected of committing a crime by a foreign state, then its citizens could risk foreign persecution. The United States has demonstrated its own reluctance to submit its citizens to judgment abroad by concluding bilateral agreements with a number of countries to ensure that U.S. citizens are not subjected to the jurisdiction of the International Criminal Court.<sup>194</sup>

One potential explanation for the citizenship exception, then, is that states have accurately weighed the benefits and costs of extradition, and they find that the relevant costs of extradition exceed the benefits when citizens are involved. The protection of one's own citizens outweighs the benefits of promoting the rule of law in a foreign country. This calculus changes, however, when noncitizens are involved. When Britain extradites a Moroccan citizen to the United States, for example, the relevant costs of extradition are reduced because no British citizens are involved. The cost is borne by Morocco, whose citizen is threatened with prosecution by a foreign government. This is an externality, a cost that is not felt by the negotiators, so we might expect that bilateral extradition treaties will only marginally consider the interests of third parties.<sup>195</sup> The citizenship exception ensures that the main costs of extradition will be borne by third parties and not the negotiating partners.

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193. Of course, the requested state may prosecute its citizens for crimes committed outside its territory if prosecution is provided for by domestic law. For a discussion of the proper extent of extraterritorial application of domestic law, see I. Glenn Cohen, *Medical Outlaws or Medical Refugees?: Circumvention Medical Tourism and the Extraterritorial Application of Domestic Criminal Law* (August 5, 2011) (unpublished manuscript) (on file with the Virginia Journal of International Law Association).

194. The United States threatened to cut off foreign aid to any country that did not conclude a bilateral agreement preventing U.S. citizens from prosecution in the International Criminal Court. Alisha D. Telchi, *The International Criminal Court: Is the United States Overlooking an Easier Way to Hold Saddam Hussein and Osama Bin Laden Accountable for their Actions?*, 38 NEW ENG. L. REV. 451, 451–54 (2004).

195. See Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 309 (1997).

Not all treaties include exceptions for citizens. The extradition treaty between the United States and Israel, for example, states that a "requested Party shall not decline to extradite a person sought because such person is a national of the requesting Party."<sup>196</sup> Similar provisions occur in U.S. extradition treaties with the United Kingdom,<sup>197</sup> Italy,<sup>198</sup> and Uruguay.<sup>199</sup> The close political and diplomatic ties between these countries may explain why the states are more willing to extradite their own citizens. Concerns about persecution may be mitigated when allies deal with one another, so pressure from domestic interest groups may accordingly be lower. These concerns are not fully eliminated, though. In 1978, the Israeli Knesset enacted a statute prohibiting the extradition of Israeli citizens, despite the explicit provision to the contrary in their extradition treaty.<sup>200</sup> The fact that Israel would risk violating its international obligations in order to prevent the extradition of its citizens shows just how powerful its perceived interest in a citizenship exception was. It also suggests that the exception is not unilaterally imposed by the United States, but rather is at times imposed or demanded by the weaker party.<sup>201</sup>

Public choice theory may provide greater insight into the incentives of domestic actors in the context of citizenship exceptions.<sup>202</sup> Public choice theorists generally assume that state preferences are formed by the domestic political activities of groups and individuals.<sup>203</sup> The interests of a government are not predetermined, but are rather a function of the pressures brought to bear on government officials. These pressures, however, are not always entirely rational or equitable. Governments will not necessarily give equal importance to the views of different individuals. An important insight of public choice theory is that certain groups possess disproportionate levels of influence on government preferences. These influences can sometimes bias national decisions in favor of one group or

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196. Convention on Extradition, U.S.-Isr., Dec. 10, 1962, 14 U.S.T. 1707 (amended by 18 U.S.T. 382 on Apr. 11, 1967).

197. Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, art. III, March 31, 2003, 28 U.S.T. 227 (entered into force April 26, 2007).

198. Extradition Treaty, U.S.-It., art. IV, Oct. 13, 1983, T.I.A.S. 10837.

199. Extradition Treaty, U.S.-Uru., art. IV, April 6, 1973, 35 U.S.T. 3206.

200. See Yaffa Zilbershats, *Extraditing Israeli Citizens to the United States—Extradition and Citizenship Dilemmas*, 21 MICH. J. INT'L L. 297, 311 (2000). It should be noted that in 1999, Israel decided that it would allow the extradition of its citizens on the condition that they serve their prison sentences in Israel. See Perelman, *supra* note 134, ¶ 7.

201. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 18 (2000).

202. See Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 20–21 (2008).

203. See 3 DENNIS C. MUELLER, PUBLIC CHOICE §§ 1–2 (2003).

another.<sup>204</sup> Equally important, government officials are themselves autonomous actors with interests and desires.<sup>205</sup> Thus, representatives may be motivated by a desire for re-election. Bureaucrats may be motivated by career advancement. Furthermore, just as government officials may be influenced by the pressures placed on them by domestic civic groups, government officials may also be influenced by other groups within the government.

One important dynamic of domestic politics is the relationship of the executive to the legislature.<sup>206</sup> This “two-level game,” in which the executive branch must negotiate with other states but must ultimately bring any agreement back to the legislature for approval, creates a number of implications for negotiation strategy.<sup>207</sup> A recalcitrant legislature may hinder an executive in negotiating a treaty by removing certain options from the table, but it may also give the executive leverage, as the other state will know that any treaty must ultimately be ratified by the legislature.<sup>208</sup> Negotiation theorists have identified this as a “commitment” strategy.<sup>209</sup> The commitment strategy is often analogized to a game of “chicken.” In that game, two cars line up on opposite sides of a street and then drive directly at one another. The loser, or chicken, is the driver who turns away first. One potential strategy to winning the game is to convince the other driver that you will not turn away. In such a situation, unless the other driver is suicidal, he will turn away before collision. The trick, of course, is finding out a way to convince the other driver of your intentions. The commitment strategy calls for an irrevocable act that signals your commitment to a course of action, in this case, throwing your steering wheel out of the window. As long as the other driver sees this action and has not done the same, you are highly likely to win.<sup>210</sup> In the extradition context, an executive may be able to follow a similar approach, using a legislature’s demands as a kind of commitment strategy that indicates to other nations that some conditions are non-negotiable. Similarly, the executive may also use the constraints of international negotiations to help win over domestic constituencies.

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204. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

205. See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 137 (1957); Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special Interest Politics*, 63 REV. ECON. STUD. 265, 266 (1996).

206. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 433–35 (1988).

207. *Id.*

208. See I.M. DESTLER, *AMERICAN TRADE POLITICS* 111–14 (4th ed. 2005).

209. See HERMAN KAHN, *ON ESCALATION* 11 (1965). See generally THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22–28 (1960).

210. See KAHN, *supra* note 209, at 11.

In order to understand the citizenship exception in context, then, we must identify the most relevant actors and examine their various interests, incentives, and constraints. A brief analysis of the U.S.-U.K. extradition treaty, and events following its entry into force, is enlightening.

After the terrorist attacks of September 11, 2001, the Bush Administration sought to implement a number of measures aimed at improving their ability to arrest, interrogate, and prosecute individuals suspected of terrorism. One of the prongs of this effort was the conclusion of new, robust extradition arrangements with countries in which terrorist suspects might be located.<sup>211</sup> The United States worried that citizenship exceptions hindered their efforts to apprehend and investigate terrorist suspects. Thus, the U.S. administration sought to include provisions in the extradition agreements mandating the extradition of nationals. The U.S.-U.K. extradition treaty, concluded in 2003, therefore did not include a citizenship exception to its general obligations.<sup>212</sup> As a consequence, citizens are fully extraditable under the treaty.

It did not take long before these provisions were called into question. In 2004, the United States requested the extradition of three former employees of the British bank, National Westminster (now the Royal Bank of Scotland), on charges of financial fraud related to the Enron fiasco.<sup>213</sup> Although the “NatWest 3” were British citizens, they were charged with defrauding American investors and violating American wire fraud laws.<sup>214</sup> Their eventual extradition provoked an outcry among civil rights groups and the business community in the United Kingdom, leading to street protests and an emergency meeting of Parliament.<sup>215</sup> The Confederation of British Industry, the most influential business lobby in Britain, led the attack on the extradition treaty.<sup>216</sup> British civil rights groups also played an important part in criticizing the extradition.<sup>217</sup> Public relations advisers lobbied politicians and the media.<sup>218</sup> The British government complained

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211. See Letter from James J. Foster, Deputy Chief of Mission, United States Mission to the European Union, to Romano Prodi, President, Commission of the European Communities (Oct. 16, 2001), available at <http://tinyurl.com/ccyvzuz>.

212. Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, *supra* note 197, at art. III.

213. See Kate Murphy, *Fraud Case Tied to Enron Ends in Prison for 3 Men*, N.Y. TIMES, Feb. 23, 2008, <http://tinyurl.com/cnmpcee>.

214. See Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, in GLOBAL CAPITAL MARKETS & THE U.S. SECURITIES LAWS 2009: STRATEGIES FOR THE CHANGING REGULATORY ENVIRONMENT 789, 813–14 (Nicolas Grabar & Ethiopis Tafara eds., 2009).

215. See Alan Cowell, *A U.K. Court Approves Extradition of 3 Bankers*, N.Y. TIMES, Oct. 16, 2004, Finance at 13; Murphy, *supra* note 213; *UK Extradites Three Bankers*, WALL ST. J., July 11, 2006, at C3.

216. See Steven Foley, *NatWest Three Given Three-Year Jail Sentences for Enron Fraud*, INDEPENDENT, Feb. 23, 2008, News at 12.

217. See Katie Allen, *NatWest Three: Media Campaign: It Was About the US Extradition Treaty, Not Them*, GUARDIAN, Feb. 22, 2008, Financial Pages at 28.

218. *Id.*

about the treaty's failings, stating that "[t]he situation is grossly unfair and it is exasperating that the Americans seem to hold all the cards."<sup>219</sup> The *Daily Telegraph*, a conservative London newspaper, launched a campaign against the treaty, arguing that "[t]he UK had allowed a very unsatisfactory extradition arrangement to develop which put the UK citizen at an unfair disadvantage when it comes to dealing with US authorities."<sup>220</sup> Prime Minister Tony Blair faced severe criticism over his handling of the case and the negotiation of the extradition treaty.<sup>221</sup>

The pressure from powerful domestic constituencies led Gordon Brown's government to enact a statute allowing the home secretary to veto the extradition of British citizens.<sup>222</sup> Some commentators have suggested that the statute was motivated most immediately by concern that senior executives of British Airways might face extradition over charges of price-fixing.<sup>223</sup> Without a doubt, the new law was at least partially a response to the widespread outcry, particularly prevalent in the London business community, against the extradition of the NatWest 3.

The NatWest example demonstrates how domestic groups and individuals can mobilize public opinion, and therefore pressure politicians, to promote certain agendas on the international stage. In this case, influential business groups in London faced the threat of prosecution in the United States for actions that took place almost entirely in the United Kingdom. They feared that being subject to the vagaries of the U.S. justice system would put businessmen in an unacceptably risky position. As the chairman of the Confederation of British Industry argued, the NatWest bankers "represent no threat to society, yet they will be banged up in a US prison with rapists and drug addicts, deprived of their liberty for up to two years even while a case is compiled."<sup>224</sup> Business groups formed a coalition with civil rights groups, who feared that American protections of civil liberties were insufficient. These groups lobbied the media and politicians to suspend or modify the extradition treaty. Eventually, facing enough pressure, the majority Labour government enacted legislation to protect British citizens from prosecution in the United States. The international law of extradition, and especially the citizenship exception, depends to a great extent on this kind of interaction between domestic groups and

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219. David Cracknell & Sarah Baxter, *Hain Backs NatWest 3 Fight*, SUNDAY TIMES (London), July 9, 2006, News at 2.

220. Allen, *supra* note 217 (quoting Damian Reece, head of business at the Daily Telegraph).

221. See Frank Millar, *Suicide of Witness as 'NatWest Three' Set for US Trial*, IRISH TIMES, July 13, 2006, (World), at 10.

222. See David Leppard, *Minister Gets Power to Veto US Extraditions*, SUNDAY TIMES (London), Oct. 14, 2007, News at 4.

223. See, e.g., *id.*

224. *NatWest Three: Protest March Today Against Extradition to USA*, INDYMEDIA UK (June 29, 2006, 3:05 AM), <http://tinyurl.com/8ymgdhd>.

government officials. Domestic pressure forces governments to construct a new vision of state interests in international law, and these constructed interests are formulated and codified in treaties with other states. In this case, the citizenship exception, although originally excluded because of security concerns, eventually found its way in through the back door by domestic legislation.

### B. *The Rule of Noninquiry*

One of the most debated issues in extradition is whether states may refuse to extradite individuals to countries in which the individual may face unfair or inhumane treatment. There are few instances that provide a starker example of the conflict between individual rights and state rights in international law. On the one hand, extradition treaties often oblige states to render individuals suspected of crimes to other states. On the other hand, many times the receiving state has a faulty or affirmatively corrupt justice system. Indeed, some requests seem to be explicitly motivated by revenge, as was Charles II's request for the return of regicides.<sup>225</sup> The likelihood of an extraditee receiving a fair trial under these circumstances can be small. For this reason, human rights groups have often protested the extradition of individuals to countries with poor human rights records.<sup>226</sup> These concerns extend even to U.S. extradition requests, where some countries worry that individuals will face the death penalty or other harsh punishments.<sup>227</sup>

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225. See CLARKE, *supra* note 36, at 20.

226. See, e.g., Barbara Demick, *China Says Terrorist Cell Broken: Officials Say They Arrested 10 Separatists Who Represented Major Threats*, L.A. TIMES, June 25, 2010, at A4.

227. The most well-known case involving the denial of a U.S. extradition request based on the conditions of the U.S. justice system is *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) at 439 (1989). After the U.K. Foreign Minister ordered Soering's extradition, Soering applied for relief to the European Commission on Human Rights, arguing that the "death row phenomenon" constituted "inhuman or degrading treatment or punishment" in violation of the European Convention on Human Rights. *Id.* at 464. The European Court of Human Rights eventually held that Soering's extradition would violate the European Convention. According to the court, an extradition violates the European Convention "where substantial grounds have been shown for believing that the [individual], if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment in the requesting country." *Id.* at 468. The Court concluded that the death row phenomenon (including the "extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row," along with "the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty") amounted to inhuman or degrading treatment. *Id.* at 460, 478. See also Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85 (1992) (examining *Soering* and concluding that much of the rationale justifying the traditionally limited judicial role in extradition law has evaporated as foreign legal systems have become increasingly accessible and human rights norms have solidified). For a more recent case of an extradition denial based on human rights, see Robert Wielaard, *Rights Court Halts Extradition of Four Terror Suspects to US*, BOSTON GLOBE, July 9, 2010, at 5.



Despite such concerns, many countries have adopted a rule of noninquiry, under which courts may not examine the requesting country's justice system or human rights record in determining whether to extradite an individual.<sup>228</sup> If the extradition request meets the procedural requirements of the treaty, extradition must be granted.<sup>229</sup> Although the rule has come under increased scrutiny in the post-World War II human rights era, the general contours of the doctrine still hold sway.

Why do some states still apply the rule of noninquiry in extradition proceedings, and why do some states refuse to apply the rule? What state interests are at play when determining whether to examine the nature and fairness of foreign justice? How do these interests cohere in international extradition treaties?

At the most basic level, extraditions often implicate broader relations with other countries. The denial of an extradition request can lead to international tensions and can have serious foreign policy implications. After all, extradition has long been viewed as a matter of international comity and a way of promoting friendly relations between countries.<sup>230</sup> Including a rule of noninquiry may increase the credibility of a government's commitments to its obligations. When an extradition request is denied, it can be harmful for domestic actors who have staked their reputation on successfully arresting the suspect. In addition, one country's decision that another country's justice system is unfair or biased can be understood as a repudiation of all the commitments that the countries mutually entered into in their extradition treaty. Finally, judicial inquiry into another state's domestic practices entangles courts in conflict with traditional understandings of state sovereignty and independence.<sup>231</sup> To be more precise, as a prudential matter, there are concerns about the wisdom of allowing one state's courts to sit in judgment on another's courts. In a state-centric international system, many factors militate in favor of a rule that state commitments are absolutely binding and not subject to further judicial questioning, as such questioning might throw the binding nature of other commitments into doubt.

Domestic institutions may have other reasons to favor a rule of noninquiry in extradition decisions. The individuals, officials, and groups involved in extradition proceedings have interests and incentives of their own.<sup>232</sup> U.S. State Department officials may be biased in favor of

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228. See Semmelman, *supra* note 58, at 1198–99.

229. In the United States, the Secretary of State has discretion to refuse extradition, but this discretion is rarely exercised. See Note, *supra* note 184, at 1328.

230. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).

231. See Michael Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257, 264 n. 34 (1989).

232. See Murchison, *supra* note 74; Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 277, *passim* (2002).

promoting cordial relations with other nations because of their institutional constraints and competencies. Courts are interested in the efficient resolution of controversies and may lack the tools and time necessary to investigate foreign justice systems. It is unclear that judges have the ability to fairly assess the mechanisms and procedures of foreign countries. The adversarial briefing system utilized in common law countries may not provide a good way to educate a court about foreign justice. Stability and consistency are not necessarily the most prevalent attributes of courts, and thus negotiators may be wary to include such a potentially powerful and unpredictable exception in extradition treaties. The Justice Department may also hesitate to second-guess the fairness or motivations of extradition requests, as it has an interest in receiving reciprocal cooperation from foreign ministries of justice. The constellation of these interests combines to form a powerful interest in favor of a rule of noninquiry in extradition proceedings.<sup>233</sup>

Even if courts were equipped to analyze the fairness of foreign justice systems, and other institutions approved, such an approach could effectively exclude some countries from extradition at all. The mere fact that a country's judicial system is perceived as unfair (an accusation that is often leveled at the U.S. justice system, it should be noted<sup>234</sup>) does not mean that other countries do not have an interest in mutual extradition arrangements with that country. But the prospect of having extradition requests denied may lead some decision-makers to forego the process entirely. Alternatives to extradition, including forcible abduction or extraordinary rendition, may be adopted instead. These alternatives may be more politically harmful to government officials than formal extradition. Thus, in deciding whether to adopt a rule of noninquiry, decision-makers must consider whether this rule is a useful mechanism for harnessing institutional competences and preventing potentially more harmful alternatives to extradition.

In some circumstances, however, states may decide that the rule of noninquiry is not appropriate. The United States takes a relatively absolutist position with respect to the rule: Courts must not examine the future treatment of the individual to be extradited.<sup>235</sup> Still, some U.S. extradition treaties give the parties more discretion, permitting a requested state to refuse to extradite an individual when that individual faces a likelihood of abuse or mistreatment in the requesting state.<sup>236</sup> Other

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233. See Powers, *supra* note 232, at 314.

234. See Steven Erlanger, *French See Case Against Strauss-Kahn as American Folly*, N.Y. TIMES, July 4, 2011, at A1.

235. See John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973, 1975 (2010).

236. See, e.g., Extradition Treaty, U.S.-Neth., art. 7, no. 2, June 24, 1980, 31 U.S.T. 944; Extradition Treaty, U.S.-Fin., art. 7, no. 1(c), May 11, 1980, 31 U.S.T. 944.

treaties require states to refuse extradition in such cases.<sup>237</sup> In Scandinavian countries, for example, domestic laws impose an absolute requirement that all extradition treaties include an exception for humanitarian grounds.<sup>238</sup> These exceptions often occur in treaties with countries in which public opinion strongly opposes the death penalty. Government officials in such countries may fear the repercussions of extraditing individuals to countries with subpar human rights records, as such actions might be unpopular or might undermine citizens' trust in their own judicial system.

Similarly, the assumption that the rule of noninquiry encourages cooperative relations between countries because it prevents either state from looking at the fairness of criminal procedures in the other country is not entirely persuasive. It may be true that, if an extradition treaty has been completed and one state expects to reap the benefits of the treaty by having criminal suspects rendered up to them, the denial of a request due to inadequate criminal procedures in the requesting state will naturally cause the requesting state to reassess the reliability of the other state as a partner. A state that shirks its commitments is not a desirable negotiating party. At the same time, this argument assumes that states do not expect their partners to examine their judicial system. If the U.S. Justice Department knows that Scandinavian countries will not extradite criminals subject to the death penalty in the United States, and the treaty explicitly provides for such a denial, then the denial itself can hardly be a cause for tensions between the countries. No commitment has been breached, and the countries have maintained a reputation for compliance.

The issue, then, would appear to be more closely related to expectations. The rule of noninquiry promotes cooperation between states to the extent that it clarifies expectations. In countries with clear domestic rules governing extradition requests and the grounds for their denial, the rule of noninquiry may not be a helpful tool in increasing the credibility of commitments: Predicted behavior is already established through domestic law. This may partially explain why European countries, whose positions on the death penalty and other harsh forms of punishment are well-known, generally do not include noninquiry provisions in extradition treaties.<sup>239</sup>

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237. See, e.g., Convention on Extradition, U.S.-Swed., art. 5, no. 6, Oct. 24, 1961, 14 U.S.T. 1845; Treaty on Extradition, U.S.-Ir., art. IV, § c, July 13, 1983, T.I.A.S. 10813.

238. See *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981), cited in Semmelman, *supra* note 58, at 1223 n.182.

239. See Jon Dugart & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 91 AM. J. INT'L L. 187, 202 (1998).

### C. *Political Offenses*

Now that we have discussed the citizenship exception and the rule of noninquiry, we can proceed to a final aspect regarding the substance of extradition treaties, the question of which crimes are included as extraditable offenses. This question is essential to the analysis of extradition treaties because it goes to the very root of what states are interested in when they negotiate their extradition commitments. Without an understanding of which criminals are in fact extradited between states, we cannot have sophisticated knowledge of the mechanisms and purposes of extradition law today. As mentioned previously, extradition changed dramatically in the late-eighteenth and early-nineteenth centuries, evolving from a largely political phenomenon that ignored common crimes to a largely criminal phenomenon that exempted political crimes.

The political offense exception to extradition presents a number of tricky questions for states. What constitutes a political offense, versus a common crime? Must the political offense exception be included in a treaty for it to be operable? How explicit and specific must a treaty be in defining exceptions to its obligations in order for a state to deny extradition? Controversy often erupts when what one state views as a political offense is viewed by a requesting state as purely a common crime. The political offense exception, thus, is a two-edged sword: It can provide governments with some wiggle room regarding their otherwise absolute obligation to extradite individuals, but it also potentially creates conflict with treaty partners.

Take, for example, a 1973 extradition request made by the United States on France. In that year, a group of five U.S. citizens hijacked a domestic flight. Two of the hijackers had escaped from prison, where they were serving sentences for armed robbery and murder. The hijackers requested \$1 million as ransom for freeing the passengers on board the plane, a sum they received. The hijackers then forced the plane to fly them to Algeria. The individuals were eventually identified and apprehended in Paris. The United States sought extradition of the group on charges of aircraft piracy, an offense that was included in the extradition treaty between the United States and France. The French court, however, denied the extradition request. According to the court, the extradition request fell under the political offense exception because the true motive of the hijackers was to escape racial segregation in the United States, and the charges against them amounted to political persecution.<sup>240</sup>

This case demonstrates just how broadly some states have read the political offense exception. Far from protecting political revolutionaries, it

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240. *The Individual in International Law: Extradition*, 1976 INTERNATIONAL LAW REPORTS DIGEST § 5, at 124–25.

appears at times to cover regular criminals who have committed terrible crimes absent any real political motivations. The approach of the French court in the above case is probably best understood as an inquiry into the fairness of the American justice system, not an inquiry into the political nature of the crime. Many states have essentially eviscerated the original meaning of the political offense and have instead granted to themselves wide latitude to determine which crimes are extraditable, even in the face of explicit provisions in extradition treaties.

The political offense exception, thus, often serves as a kind of escape hatch. It allows a state to refuse an extradition and yet remain within the treaty framework. It provides a simple and defensible legal explanation for noncompliance. This possibility is of tremendous value to states, particularly when the stakes are high and when treaty substance is deep. The ability to deny an otherwise lawful extradition request is especially useful when domestic pressure against extradition is strong. This generally occurs when a criminal suspect has active domestic support, is a member of powerful or popular groups, or represents a particularly sympathetic symbol. The hijacking case in France is a perfect example. There, government officials faced serious pressure from their constituents to deny extradition, and they had strong incentives to acquiesce to this pressure. In such a case, the ability to provide a compelling reason, and one that was foreseen in the extradition treaty, is useful to the state.

If it is domestic pressure that government officials are worried about, then the political offense exception may be a very useful tool to further this goal. There is reason to believe that domestic pressure on government officials is highest when perceived political actions are implicated. In other words, civic groups will exercise their political influence most when the requested individual represents a political cause or is involved in political activity. It is precisely political offenses, then, that concern the conflicting incentives of government officials.

The political offense exception is also particularly valuable to states when the extradition treaty has a deep level of substance, that is, when the treaty creates a strong legal obligation for a state to act in a certain way. If an extradition treaty contains wide grounds for flexibility in extradition decisions, it may not be as important for states to have this escape valve because they have other ways to avoid the reputational harm of noncompliance with a treaty. But when the extradition treaty does not provide significant powers of discretion to states to decide whether to extradite, states face the risk of either complying with the demands of citizens or complying with international legal obligations. If they decide to grant extradition, the government decision-makers may lose office, raise fewer campaign contributions, or face domestic criticism. Thus, their most immediate incentives are to deny extradition. Yet if they decide to refuse

extradition, states can face harmful reputational consequences, consequences that are not offset by any significant benefit.<sup>241</sup> A state that is seen to regularly disregard its international obligations will steadily lose its credibility as a partner in international affairs, and other states will become less willing to cooperate with it. No parties are made better off by this loss of reputation. Thus, a political offense exception that gives states some room to maneuver in extradition decisions can be beneficial in certain circumstances.

It is important to note here that the discretion that the political offense exception grants to states is of value both to the requested state and the requesting state. Most obviously, it allows the requested state to deny extradition with fewer negative domestic and international consequences. But just as significantly, it provides benefits to the requesting state.

First, the political offense exception gives government officials in the requesting state political cover for failing to acquire the suspect. Just as government officials in the requested state may feel pressure from domestic constituents, so too may government officials in the requesting state be motivated by domestic pressure. The original extradition request may have been animated by a desire to please powerful domestic groups.<sup>242</sup> The mere act of submitting a formal request for extradition may grant government officials some political capital. It may deflect some of the pressure from interest groups, and it will demonstrate that the government is attempting to satisfy local demands. From an incentives perspective, government officials may not be particularly concerned with the final result of the extradition request, as the determination of extraditability often comes after some period of time has passed and is entirely the responsibility of the requested state. The political offense exception, thus, provides government officials in the requesting state with the benefits of extradition arrangements without imposing an undue cost on the requested state.

Second, the political offense exception may be beneficial to the requesting state from a reputational perspective as well. States are not benefited when another state's reputation is harmed. Future cooperation becomes problematic when the other state is viewed as an unreliable partner. The requesting state would prefer to be able to cooperate with the requested state in the future, and the political offense exception gives them some leeway to do so. By keeping the requested state within the international system of obligations, and within the society of law-abiding nations, the exception can benefit all parties.

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241. See generally Guzman, *A Compliance-Based Theory of International Law*, *supra* note 85.

242. See ELTON V. SMITH, PERSPECTIVES ON INTERNATIONAL TRADE 59 (2002) (discussing whether WTO complaints are motivated by special interests).

Though treaties often include political offense exceptions, the exception is not necessarily demanded or preferred by all domestic actors. In fact, just as with the citizenship exception, we see a good amount of conflict between treaty negotiators (often the executive) and treaty ratifiers (often the legislature). These conflicts were exemplified by the process of ratification of the Supplementary Treaty on Extradition between the United States and the United Kingdom in 1985.<sup>243</sup> In the 1970s and 1980s, U.S. courts denied a number of extradition requests from the United Kingdom based on findings that acts of terrorism by Irish Republican Army members constituted political offenses and therefore were not extraditable crimes.<sup>244</sup> In order to prevent further such occurrences, the Reagan and Thatcher Administrations concluded a supplementary extradition agreement, removing the political offense exception from the treaty.<sup>245</sup> The U.S. Senate, however, motivated by concern about potential prejudicial prosecutions, ratified the treaty only after adding a provision that authorized a court to deny extradition where the accused individual faced prejudice because of his race, religion, nationality, or political opinions.<sup>246</sup> The Senate, thus, in direct contradiction to Reagan Administration efforts, reinserted political considerations into the newly negotiated extradition treaty.

To summarize, there are good reasons why the political offense exception may be beneficial to states, both from an institutionalist perspective and from a domestic politics perspective. From an institutionalist perspective, the exception reduces the harmful reputational effects of noncompliance while still ensuring compliance in the vast majority of cases. From a domestic perspective, the exception allows government officials to reap the benefits of extradition arrangements without undue harm to officials in the other state. The specific value of the political offense exception, however, depends heavily on the intensity of domestic preferences and the structure and substance of the extradition treaty. Different institutions within a state may have conflicting

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243. Supplementary Extradition Treaty With The United Kingdom, U.S.-U.K., June 25, 1985, S. Treaty Doc. No. 99-8.

244. See James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM L. REV.* 317, 342 n.96 (1992).

245. Some have concluded that Thatcher was further motivated by the attempt on her life at Brighton. In addition, Senate action on the treaty looked unlikely until the terrorist bombing in West Berlin that killed and injured a number of American military officers. See M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K. — A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 *DENV. J. INT'L L. & POL'Y* 255, 280 (1987).

246. Extradition Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., art. 3, § a, Dec. 23, 1986, T.I.A.S. No. 12,050. See Supplementary Extradition Treaty with the United Kingdom, U.S.-U.K., at 4-5, June 26, 1986, S. EXEC. REP. No. 99-17 (1986).

preferences with regard to the substantive exceptions to international agreements. To a certain extent, the flexibility granted to states under the exception may be traded off against the rigidity of other treaty obligations. The depth of treaty obligations may be offset by a relatively permissive political offense exception. Similarly, when extraditions are expected to be highly contentious and politically explosive affairs, a political offense exception may be necessary to deflect criticism from decision-makers.

#### IV. COMPLIANCE WITH INTERNATIONAL EXTRADITION OBLIGATIONS

The final, and perhaps most essential, question this paper will address is why states comply with their extradition obligations. After all, if the international law of extradition exerts no influence on how states act, then the structure and substance of extradition treaties has little value. Until we understand how extradition treaties in reality affect the behavior of states, we cannot arrive at any useful understanding of state behavior in the context of extradition.

Institutionalist theories of international law focus our attention on aggregated state interests in order to understand when states will comply with treaty obligations. Goldsmith and Posner argue that there are many reasons why states might comply with international law even if that law exerts absolutely no normative pull on their decision-making. Behavioral regularities between states arise from four behavioral logics. The first behavioral logic is “coincidence of interest,” when states perceive a private advantage from the same action, whether or not other parties engage in that action.<sup>247</sup> The second logic is coercion, where a powerful state forces other states to act in ways they otherwise would not in the absence of such force.<sup>248</sup> Third, behavioral regularities arise out of cooperation, understood as states acting in a certain way to achieve long-term mutual gains, even at the expense of short-term gains that could be achieved by cheating.<sup>249</sup> As Goldsmith and Posner explain it, this prisoner’s dilemma can be solved as long as states expect to interact for a sufficiently long period of time.<sup>250</sup> Finally, behavioral regularities may arise when states face coordination problems, that is, if states coordinate on similar moves, they will both receive higher payoffs than if they do not coordinate.<sup>251</sup>

Goldsmith and Posner’s theory of compliance is supported by Guzman, who has argued that formal international agreements are merely tools that

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247. Goldsmith & Posner, *A Theory of Customary International Law*, *supra* note 85, at 1114.

248. *Id.* at 1114–15.

249. *Id.* at 1115.

250. *Id.*

251. *Id.*



states use to enhance the credibility of their commitments.<sup>252</sup> Guzman argues that there are many areas in which states have an interest in being able to make credible commitments to other states. They cannot, however, conclude enforceable contracts of the sort that individuals and corporations conclude in the domestic context, because there is no supranational court to enforce these agreements. Instead, they use another form of sanctions, either direct or reputational.<sup>253</sup> A state that often breaks its commitments is an unappealing partner and will find it more difficult to enter into mutually beneficial arrangements with other states in the future. A state with a reputation for breaking its agreements will find it increasingly difficult to convince other states that its agreements hold any weight. Guzman's argument is not new: In *The Republic*, Plato wrote that the just and law-abiding are "wiser, and better, and more able to act than the unjust, who are indeed, incapable of any combined action."<sup>254</sup> Even if a state with a bad reputation manages to enter into agreements in the future, other states will take into account the risk of breach, leading to a less favorable agreement.<sup>255</sup>

From this point of view, we can reach a number of conclusions about why states comply with extradition obligations. First, they may extradite individuals because they see a specific benefit arising from their removal. The removal of criminals, murderers, thieves, and other undesirables from a state brings a clear benefit to any state interested in the rule of law. Second, states may extradite individuals when a more powerful state forces them to do so. The United States, for example, may be able to force other states to extradite individuals by threatening other forms of sanctions if they do not comply with their extradition obligations. Third, states may extradite individuals when they understand that, in the long run, cooperation with other states in this area is beneficial. Even if a state perceives a short-term interest in not extraditing a popular figure, it may still extradite him if it fears the long-term consequences of refusing to cooperate. These consequences may be limited to extradition issues, for example other states' refusal to extradite individuals sought by the state. But consequences may also be felt in other areas of cooperation, such as aid or trade. Any and all of these factors may be at play in any given extradition decision.

Where institutionalist theories of international law fall short, however, is in understanding how norms of compliance can be internalized and either strengthened or weakened through domestic agencies. Harold Koh has

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252. See Guzman, *supra* note 92.

253. See Guzman, *A Compliance-Based Theory of International Law*, *supra* note 85, at 1861, 1865.

254. PLATO, *THE REPUBLIC* 32 (Wordsworth 1999).

255. Guzman, *A Compliance-Based Theory of International Law*, *supra* note 85, at 1864–65.

described this phenomenon as a kind of “transnational legal process.”<sup>256</sup> He uses transnational legal process to attempt to answer the question of why states obey international law.<sup>257</sup> Koh defines obedience in contradistinction to mere compliance, which he defines as following a rule in order to gain specific rewards or avoid specific punishments. Obedience, he explains, occurs when a state has “*internalized* the norm and incorporated it into its own internal value system.”<sup>258</sup>

Koh argues that a nation’s repeated participation in the transnational legal process is an important factor in determining whether states will obey international law. The first step in this process is interaction, in which transnational actors (states, NGOs, or individuals) come together in a law-declaring forum.<sup>259</sup> The interaction then forces an interpretation or articulation of the international law at issue in the law-declaring forum. This interpretation aims to force the parties to internalize the law into their normative system. Once the international law is internalized into a state’s internal value set, the state will tend to obey the law.<sup>260</sup>

Transnational legal process sees individuals and groups as important actors in the internalization of international legal norms. NGOs and prominent individuals play the role of “transnational norm entrepreneurs” who mobilize popular opinion and political support for the norm.<sup>261</sup> Domestic departments and bureaucrats increase the pressure on governments to comply with international law. Bureaucracies may develop institutional habits that lead them into patterns of compliance with the law.<sup>262</sup> All of these function as mechanisms by which nonstate actors affect state behavior towards international law.

Transnational legal process suggests that in order to explain why states obey extradition treaties, we need to look at the extent to which a state has internalized treaty norms. How has a state’s legislature ratified or adopted the treaty? How has the judiciary interpreted and enforced the treaty? Has the executive given attention and priority to extradition proceedings? Just as importantly, what kind of pressure have domestic individuals and groups exerted? Have influential actors come out in favor of complying

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256. For a more thorough explanation of Koh’s vision of transnational legal process, see Koh, The 1998 Frankel Lecture: Bringing International Law Home, *supra* note 85; Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, *supra* note 85; Koh, *Refugees, the Courts and the New World Order*, *supra* note 85; Koh, *Transnational Legal Process*, *supra* note 85; Koh, *Transnational Public Law Litigation*, *supra* note 85.

257. See Koh, The 1998 Frankel Lecture: Bringing International Law Home, *supra* note 85, at 626–27.

258. *Id.* at 628 (*italics in original*).

259. *Id.* at 644. The law-declaring forum may be a court within an international organization or a tribunal within domestic law.

260. *Id.*

261. *Id.* at 647.

262. *Id.* at 648.

with extradition obligations, or have they voiced concern or anger at extradition proceedings? These domestic actors can have just as much influence on a state's decision to comply with international law as a state's general interest in extradition treaties as a whole.

Take the NatWest case from 2004, cited above, in which several high-profile British bankers were extradited to the United States to face trial on charges of financial fraud.<sup>263</sup> There, the British government faced pressure from the London financial community to refuse extradition of the requested bankers. A powerful lobby of banks, the media, and civil rights groups came together to resist extradition. Despite their efforts, the government acquiesced to the United States' requests. This result may partially be explained by the extent to which the U.S.-U.K. extradition treaty's norms had already been internalized by government actors in the United Kingdom. At the same time, the lobby of disparate groups, what Koh might describe as transnational norm entrepreneurs, managed to influence the future direction of those norms. A few years after the NatWest extradition, the British Parliament enacted a statute giving the home secretary authority to veto the extradition of British citizens.<sup>264</sup> In the future, the British government would never be obliged to extradite British citizens in the face of fierce domestic criticism. This change was heavily affected by the coalition of actors that went into action to support the NatWest bankers and eventually gathered considerable public support.<sup>265</sup>

Nonstate actors and interest groups thus have the power to promote obedience to international law, but also to ratify breaches of international law. They do so by harnessing public opinion in order to change the incentives of government decision-makers. Politicians who face re-election have an interest in pleasing their constituents. Government officials in nondemocratic countries may feel this pressure less, but even they must please powerful forces within their countries. Elected judges also have incentives to rule in ways that are politically popular, while nonelected judges may be somewhat sheltered from shifting public perceptions. Law enforcement officials may have incentives to spend resources on particular activities, and thus the incentive to actually find and arrest suspects may vary. Each of these actors may also have conflicting incentives to cooperate with foreign actors, particularly if they interact on a regular basis

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263. See Cowell, *supra* note 215; Murphy, *supra* note 213; UK *Extradites Three Bankers*, *supra* note 215.

264. See David Leppard, *Minister Gets Power to Veto US Extraditions*, SUNDAY TIMES (London), Oct. 14, 2007, at 4.

265. It is unclear how this unilateral change of policy by the United Kingdom was viewed in the United States. The U.S.-U.K. extradition treaty did not provide for a citizenship exception, and the statute, or at least its use, could very well be considered a breach of the treaty's terms.

and need to cultivate mutually advantageous relationships.<sup>266</sup> These incentives sometimes militate in favor of compliance with extradition obligations, while at other times they militate against compliance. Ultimately, the decision-maker must weigh the net benefits of compliance against the net costs of compliance in order to proceed.

Up to this point, we have addressed the question of compliance in a relatively straightforward manner. Actors either have incentives to comply or they have incentives to breach. Other states view their actions as compliant or noncompliant and respond accordingly. Current international law theory relies on this binary understanding of compliance.<sup>267</sup>

What current theory fails to identify, however, is perhaps the key factor in explaining extradition decisions, what I describe as “compliance uncertainty.” Compliance uncertainty occurs when states are uncertain what actions count as compliance with treaty obligations.<sup>268</sup> Compliance uncertainty thus deconstructs the orthodox conception of compliance as a binary phenomenon. As this article has attempted to show, the history of extradition demonstrates that clear judgments regarding compliance are not always possible. In many instances, what counts as compliance is unclear. Did France violate its extradition treaty with the United States when it refused to extradite hijackers who claimed their hijacking was politically motivated? Was Thailand’s extradition of Viktor Bout, the *Lord of War* businessman, to the United States a violation of international law, as Russia claims? Was Nathan Robbins justly extradited to Great Britain for his mutiny aboard a British ship, when he was himself a U.S. citizen?

These questions are not easy to answer. But more significantly, the very difficulty of answering them is an important variable in state decision making. For whether one believes that states are worried about a reputation for law-abidingness, or whether one believes that nonstate actors exert pressure on government officials to comply with international law, the depth and strength of that influence depends on an ability to determine what counts as compliance. After all, if there is no independent

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266. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 122–29 (2009).

267. But see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 31 (2005) (arguing that cooperative strategies between states are possible only if “the parties . . . know what counts as cooperation and what counts as cheating”).

268. Compliance uncertainty should be distinguished from vagueness. If an agreement contains vague provisions, then it may be difficult for the parties to know what the agreement requires in terms of state actions. In this sense, treaty vagueness may contribute to situations of compliance uncertainty. Other factors may also contribute to compliance uncertainty, including lack of factual knowledge and conceptual disagreements between the parties. While a certain degree of compliance uncertainty is present in nearly all legal agreements, its significance is especially pronounced in international agreements, where there is no tribunal that can definitively settle disputes about treaty interpretation. See generally WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960).

judge or objective criterion by which a state's extradition decision can be measured, then the power of reputation and norms is diminished. A state's reputation for law-abidingness is decreased when it is seen as violating its obligations, but if there is a legitimate dispute about whether it met those obligations, the reputational harm will be lower. Likewise, domestic pressure to comply with treaty norms is diminished when it is unclear how those treaty norms apply in concrete cases.

Compliance uncertainty may therefore be a beneficial phenomenon for government actors when deciding whether to pursue a course of action. For example, if a foreign government has requested the extradition of a politically popular figure, politicians may face domestic pressure to deny the extradition request. If the denial could be clearly identified as a breach of treaty obligations, then they might face either direct or reputational sanctions from the requesting state, as well as from other states who view the denial as a sign that the country does not take its extradition obligations seriously. If, however, the denial is not clearly a breach and could plausibly be viewed as compliant with the treaty, then politicians may be able to reap the rewards of appeasing domestic interest groups without suffering the accompanying reputational harms. Compliance uncertainty, then, may be an effective tool for domestic decision-makers in certain circumstances.

At the same time, uncertainty regarding what counts as compliance creates costs for states in a number of ways.<sup>269</sup> First, in negotiating treaties, states will recognize that compliance uncertainty may reduce cooperation rates. Negotiators can attempt to prevent this problem by drafting agreements with more specific requirements and thereby reduce to some extent the possibility of compliance uncertainty, although a certain amount of uncertainty appears to be inherent in treaties.<sup>270</sup> Where compliance

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269. Contract theorists have explored extensively the costs and benefits of including vague provisions in contracts. Traditional theory holds that vague provisions occur when the benefits of reducing ex ante negotiation expenses outweigh the costs of increasing ex post litigation expenses. Recent theory has explained vague provisions as the consequence of agency conflicts, adverse signaling effects, and information screens. See B. Douglas Bernheim & Michael D. Whinston, *Incomplete Contracts and Strategic Ambiguity*, 88 AM. ECON. REV. 902 (1998); Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503 (2008); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006); Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289 (2006); Kathryn Spier, *Incomplete Contracts and Signalling*, 23 RAND J. ECON. 432 (1992); George G. Triantis, *The Efficiency of Vague Contract Terms: A Response To the Schwartz-Scott Theory of U.C.C. Article 2*, 62 LA. L. REV. 1065 (2002).

270. For a discussion of vagueness in contracts and treaties, see Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 479–81 (2004); Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the*

uncertainty is a worry, the time and expense of negotiating treaties may be higher.<sup>271</sup> Second, states may not be able to develop enduring cooperative strategies if they cannot easily and clearly identify the actions that count as cooperative moves.<sup>272</sup> In other words, if a state cannot determine whether the other state complied with the treaty in a given instance, then the state will not know whether to retaliate against the other state. This circumstance might lead to a wholesale breakdown in cooperative systems, and may in fact reduce the number of treaties if states believe that extradition treaties have no effect on behavior.

It may be asked, then, how cooperation can persist in the face of compliance uncertainty. The cooperative dynamic is premised on the assumption that states can identify and punish, either through direct or reputational sanctions, instances of breach. Reputational sanctions may be particularly important in encouraging cooperation in extradition, where communication occurs through international networks of government sub-units that interact regularly.<sup>273</sup> This tit-for-tat strategy breaks down as the severity of compliance uncertainty increases.<sup>274</sup> In other words, if a state has *no* information about another state's action, then it cannot reliably punish the other state for breaching a treaty: It does not know what the other state has done, let alone whether it breached. However, a number of studies have shown that, even where it is difficult to identify an action as cooperative or uncooperative, cooperation dynamics may develop if the parties can make reasonable inferences about the behavior of other parties.<sup>275</sup> As long as the communication from one party to the other is not overly "noisy," or uncorrelated with the actual state of affairs, then cooperation may persist, particularly if decisions are delegated to sufficiently reliable decision-makers that other parties view as *super partes*.

Let us take a close look at the Roman Polanski case from the perspective of uncertainty. Assuming that the U.S.-Switzerland extradition treaty required Switzerland to extradite Polanski to the United States, there are a number of reasons why Switzerland would want to comply with those obligations. It might want to preserve a reputation for abiding by the terms of its agreements. As described above, this reputation is of value to

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*Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 272–73 (2007); Samuel W. Buell, *The Upside of Overbreadth*, 83 NYU L. REV. 1491, 1493–96 (2008); Timothy Endicott, *The Value of Vagueness*, in VAGUENESS IN NORMATIVE TEXTS 27, 27–48 (Bhatia et al. eds., 2005); see also Compte, *supra* note 176; Mailath & Morris, *supra* note 176.

271. On the other hand, if states believe that more specific treaties will not be able to reduce compliance uncertainty significantly, they may spend less time, not more, negotiating treaties. States will likely be less willing to invest in treaties that do not promise important benefits.

272. See GOLDSMITH & POSNER, *supra* note 267, at 31.

273. See Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (Or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 334–35 (2006).

274. See *supra* note 176.

275. *Id.*

Switzerland, for it allows the country to continue to enter into beneficial agreements with other states. It also helps ensure that other countries continue to abide by their agreements with Switzerland. There might be a strong pro-international law lobby within the country that exerts influence over key decision-makers. Switzerland might have domestic institutions that have internalized the treaty's norms and attempt to enforce those norms. Transnational nongovernmental organizations might criticize the country for failing to live up to its commitments.

All this changes, however, if one recognizes the difficulty of pinpointing what *counts* as compliance: How can one reliably and consistently determine whether extradition decisions comply with treaty terms? How can other states determine whether Switzerland's denial of the extradition request actually constitutes a violation of its international obligations? If other countries do not perceive Switzerland's denial of extradition as a breach, then they will not discount the value of Switzerland's present and future promises. Of course, the United States itself would protest and might actually sanction Switzerland in some way. Indeed, when a State Department spokesman was asked whether he believed Switzerland's rationale for denying extradition, he responded, "Please."<sup>276</sup> But the reputational harm from the rejection will likely be limited because it is not easy to determine whether Switzerland's actions constituted a breach. The reputational harm may be limited to relations with the United States, and not with other countries. As mentioned earlier, reputational harm is in general considered the strongest mechanism for compliance in institutionalist theories of international law, and therefore the uncertainty of determining what counts as compliance could dramatically affect state decision-making.

Similarly, domestic pressure, and the state preferences that domestic pressure conditions and structures, will be affected by the uncertainty of determining compliance. If individuals and groups view Switzerland's denial of extradition as compliant with international legal norms, or at least not an affirmative breach, they may not exert the influence they otherwise would. In other words, if groups interested in complying with international law cannot adequately determine whether Switzerland has complied or breached, their influence is lessened. Domestic actors will not feel the same kinds of strong incentives to extradite that would exist if the failure to extradite could clearly be identified as a breach of Switzerland's international obligations.

This Part has argued that compliance uncertainty is an essential variable in any formulation of how and when states comply with their international

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276. See Daily Press Briefing, Philip J. Crowley, U.S. Dep't of State (July 12, 2010), *available at* <http://tinyurl.com/76b5x6n>.

extradition obligations. When an action cannot clearly be identified as a breach, states may be more willing to engage in the action, because the reputational and normative consequences of the action will be lower. At the same time, this uncertainty creates costs for states because they cannot know the actions that will count as cooperation, and thus cooperative logics may break down. Domestic actors recognize, and take advantage of, this uncertainty.

### CONCLUSION

Extradition is an oft-misunderstood element of international law. This misunderstanding can partially be explained by the tendency of commentators to analyze extradition through the lens of rational state interests. This Article has attempted to correct this failing by demonstrating how domestic structures can influence the demand for and compliance with extradition treaties. Domestic groups and institutions affect the form and manner of state interaction through extradition, both by shaping the preferences of government officials and by constraining the powers of domestic decision-makers. Extradition, then, may usefully be understood as an expression of the interests and incentives of nonstate actors in international criminal cooperation. It is hoped that this Article will spark further debate about what these interests and incentives may be.



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