CATCHING UP WITH INTERNATIONAL CRIMINALS IN THE TWENTY-FIRST CENTURY:

MODIFYING AND ACCELERATING U.S. EXTRADITION

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INTRODUCTION

Globalization and the growing interconnectedness between individuals and enterprises across states has resulted in an increased threat to peace and security, as evidenced by continued terrorism and the commission of transnational crimes such as human trafficking, drug trafficking, and money laundering, often funded and orchestrated through transnational organized crime networks. The international legal community has addressed violations of *jus cogens* norms and violations of the laws of war by creating ad hoc tribunals, permanent international courts, and regional agreements. However, terrorism, human trafficking, and international drug trafficking are equally egregious crimes that can also result in violations of *jus cogens* norms. Yet, the individuals who are responsible for these crimes often go unpunished, or it takes several years to bring the criminals before an adjudicatory body.[1] For example, it took ten years for the individuals accused of the bombing of Pan Am Flight 103 over Lockerbie, Scotland to be brought before a court of justice in The Netherlands.[2] In the United States, a request for extradition in the Second Circuit took four years to be resolved and a request sought in the Seventh Circuit took five years before resolution.[3] Additionally, when competent tribunals are established by request of states that recognize their inabilities, extradition still takes years.[4]

To fairly and competently prosecute an individual for an offense, the individual, if possible, should be present before the relevant court. Obtaining the individual's presence requires that the court have a legal basis for requesting the individuals' appearance and procedures for securing such. With respect to a suspect who has fled a territory where a crime has been committed, a state would most likely accomplish securing this individual by means of a bilateral or multilateral extradition treaty or agreement with the hosting state. The legal bases for securing the fugitive's appearance in court would then be the court's extraterritorial jurisdiction stipulated by the relative treaty or agreement, and supported by an arrest warrant and accompanying documentation outlining the conviction or offense details.[5]

Consequently, one of the most important aspects emerging from the international legal community's efforts in addressing international crime is the ability to bring the accused before a

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[1] M. Cherif Bassiouni, *Reforming International Extradition: Lessons of the Past for a Radical New Approach*, 25 Loy. L.A. Int'l & Comp. L. Rev. 389, 399, 407 (2002-2003) [hereinafter Bassiouni: Reforming International Extradition].

[2] *Id*.

[3] *Id*. at 399

[4] *See infra* note 106 (discussing long extradition periods for international ad hoc tribunals and the International Criminal Court).

[5] Jurisdiction is "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially." Restatement (third) of the Foreign Relations Law of the U.S., Part IV, introductory note (1987). The most common and important form of jurisdiction is territorial jurisdiction, where a state asserts authority over individuals within its own territorial boundaries. With respect to extradition, there are four types of jurisdiction that can be asserted outside the territorial boundaries of a state. These principles of jurisdiction fall under the primary category of extraterritorial jurisdiction: (1) The protective principle of jurisdiction addresses potential threats to a state's interests or functions; (2) the nationality principle is the second most important principle of jurisdiction as it refers to a state's ability to assert legal authority over its citizens' actions when its citizens are outside the state's territorial boundaries; (3) the passive personality principle addresses injuries that take place outside of the territorial boundaries of the state that are perpetrated on the state's citizen by another state's citizen; and (4) the principle of universality allows any state to assert authority over any individual when certain egregious violations of international law have been committed, including, piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, hijacking of civil aircraft, and terrorism.

competent legal body, which often requires extradition. However, extradition is a slow process. Therefore, the purpose of this Article is to propose an accelerated extradition mechanism that will facilitate bringing international criminals before competent national courts in a more efficient and timely manner. Parts I through IV review and analyze the procedural and substantive aspects of extradition and surrender current international ad hoc tribunals, and international, regional, and national courts: the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the International Criminal Court ("ICC"), the European Union ("EU"), and the extradition process of the United States. Part V is synthesis of the analysis, considering constraints and benefits of the substantive and procedural aspects and suggesting how selected aspects may be integrated into an accelerated extradition mechanism to use against the growing international crime with respect to serious international offenses.

Procedural requirements of the international criminal justice system, such as jurisdiction, arrest warrant, and extradition treaties or surrender agreements should have equivalent substantive requirements to ensure that minimal standards of judicial competence are provided to protect the rights of the accused. Substantive requirements found in most extradition and surrender agreements include double criminality, enumerated extraditable offenses, *ne bis in idem* – or double jeopardy, reciprocity, and speciality. Combined, these requirements provide a due process foundation for extradition and surrender proceedings in national courts as well as international tribunals.

SURRENDER AND EXTRADITION WITHIN THE ICTY AND ICTR

The International Criminal Tribunal for the former Yugoslavia - ICTY

After the Nuremberg Tribunal, which focused on bringing to justice individuals who committed war crimes during the Second World War, subsequent tribunals were established to prosecute and punish criminals who violated international law or customary international law. The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") were established to punish and prosecute those responsible or who directly participated in the atrocities committed during the Bosnian War and those individuals responsible for or who directly participated in the Rwandan genocide, respectively.[6] Both tribunals, which are ongoing but scheduled for completing in 2010, are ad hoc tribunals, facing similar but also disparate challenges. The efforts of the ICTY have been relatively successful, and of those 161 individuals indicted, only two remain at large.[7] Conversely, of the approximately 125,000 individuals accused in the Rwandan genocide, the ICTR has only publicized eighty-five indictments, and of those individuals indicted, there are still more than a dozen fugitives at large.[8]

The ICTY was established in May 1993 by a statute encompassed in UN General Assembly Resolution 827.[9] The Tribunal's specific purpose is to "prosecut[e] persons

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[6] Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 Yale J. Int'l L. 383, 385 (1998).

[7] International Criminal Tribunal for the Former Yugoslavia, available at http://www.icty.org/action/cases/4 [hereinafter ICTY Website].

[8] International Criminal Tribunal for Rwandan, available at http://69.94.11.53/default.htm [hereinafter ICTR Website].

[9] S.C. Res 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter, ICTY Statute].

responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council."[10] As the first international war crimes tribunal to be established, albeit on an ad hoc and temporary basis, after the Nuremberg Tribunal, the ICTY initially required a causality element linking the offense to war or conflict in order to find an individual culpable of war crimes.[11] That nexus was eliminated by an ICTY case, thus opening the door for individuals to be held accountable for war crimes, crimes against humanity, and other egregious violations of international criminal law outside the parameters of war.[12] The ICTY also became a model for the subsequent ICTR. Furthermore the procedures, conditions, and challenges implemented and confronted by establishing the ICTY illustrate how, within the framework of international cooperation using modalities such as extradition and the transfer of criminal proceedings, prosecuting and punishing international criminals may be achieved with relative efficiency and success.[13]

At the end of WWII, war crimes, which had long been designated a violation of the laws of nations, were codified by the Geneva Conventions in order to provide a legal basis for prosecuting and punishing war criminals.[14] During the Bosnian War, which began in March 1992 and lasted until November 1995, approximately one-hundred thousand individuals were killed, not only victims of war crimes, but victims of genocide, crimes against humanity, and breaches of the Geneva Conventions.[15] Once news about the horrific events occurring in the territories of the former Yugoslavia pervaded the United Nations, a Commission of Experts was established, which eventually led to the decision that the conflict in Bosnia-Herzegovina was a threat to international peace and security. As such, the issue fell under the purview of the UN Security Council and, consequently, using the Genocide Convention to the surprise of many in the international legal community, the Council passed a resolution to establish an international tribunal, the ICTY, in order to end the conflict and eliminate the threat.[16]

The ICTY has three primary divisions: the Chambers, the Prosecutor, and a Registry.[17] The Chambers includes three trial chambers and an Appeals Chamber.[18] In the Trial Chambers, indictments are reviewed and approved, orders and arrest warrants are issued, and cases are brought before independent judges for adjudication.[19] The Prosecutor is a separate and independent entity responsible for investigating, preparing any necessary indictment, and eventually prosecuting the case.[20] The Registry is the administration arm of the Tribunal.[21]

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[10] *Id.* at ¶ 2.

[11] Enumerated crimes: Breaches of Geneva Conventions, violating laws or customs of war, genocide, and crimes against humanity.

[12] *Prosecutor v. Tadić*, Case No: IT-94-1-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

[13] The transfer of criminal proceedings falls outside the scope of this Article. However, two proceedings of the ICTR were transferred to other jurisdictions. ICTR Website.

[14] Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 Law & Contemp. Probs. 153, 155 (1996).

[15] ICTY Website, *supra* note 7.

[16] Samantha Power, *A Problem from Hell: American and the Age of Genocide*, 326 (2002).

[17] ICTY Statute, S.C. Res. 827, *supra* note 9, at art.11.

[18] *Id.*

[19] *Id*. at art. 19.

[20] *Id.*

[21] *Id.*

Because the ICTY was a response to the Bosnian War atrocities and was established by a UN Security Council resolution, the procedures and substantive requirements of the Tribunal with respect to extradition, while similar to the procedures between individual states, were also distinguishable from the extradition practices of individual states. The legal basis of the ICTY is similar to a treaty in that the Tribunal was established by Statute through a UN resolution, binding on all members of the UN. However, there is a difference involving the ICTY's jurisdiction and jurisdiction provided by other bilateral and multilateral extradition treaties between states: the ICTY had "primacy" over national courts with respect to jurisdiction.[22] Therefore, while national courts could investigate and prosecute individuals who allegedly committed offenses enumerated in the statute, the Tribunal could institute a "deferral process" and intervene and assert its authority, or primacy, over the national courts at any point.[23]

ICTY Procedure: Jurisdiction and Surrender

The issue of primacy concerned key members of the UN Security Council, as the ICTY's jurisdiction perceivably encroached upon states' sovereignty and, thus, was critically distinguishable from the extradition practice between states.[24] Consequently, upon the Statute's enactment, a number of States Parties articulated the fact that the primacy provided by Article 9(2) was only applicable to the issue provided by Article 10.[25] It could be reasoned that these statements considerably narrowed the scope of the deferral procedure and the ICTY's jurisdiction over national courts. However, the rationale behind the Tribunal's primacy is that the jurisdictional mechanism provides a baseline of standards for adjudicating claims fairly, and given the rampant corruption and lack of independent judiciaries that occur because of internal and international conflicts, the rationale is legitimate.[26]

The Tribunal's method of taking criminals into custody is predicated on Article VII of the UN Charter, which calls for a "surrender or transfer" of a person charged by the Tribunal by States Parties.[27] The surrender or transfer, because it is founded on a UN Resolution, is conditioned on the States Parties implementing national legislation to comport with the surrender provision.[28] The ICTY's ability to arrest and detain relators largely depended upon cooperation of international organizations was also necessary to ensure the ICTY's ability to arrest and have surrendered persons accused of the offenses set forth by its statute. However, despite the need for international cooperation, the initial investigation of the ICTY is performed by the Prosecutor, independently, but with the cooperation of States Parties and local officials. Once sufficient evidence has been gathered and the Prosecutor determines a *prima facie* case can be made, the Prosecutor prepares an indictment to be submitted to the Trial Chamber.[29] If the Trial Chamber deems the evidence sufficient for a *prima facie* case, the indictment is confirmed and additional orders pertaining to bringing the indicted person to court are issued.[30] The

[22] *Id*. at 1.
[23] Brown, *supra* note 6 at 395.
[24] Brown, *supra* note 6 at 399; ICTY Statute, S.C. Res. 827, *supra* note 9, at art. 9(2).
[25] ICTY Statute, S.C. Res. 827, *supra* note 9, at art. 9(2).
[26] Brown, *supra* note 6 at 398.
[27] ICTY Statute, S.C. Res. 827, *supra* note 7, at art.29; *see also* S.C. Res. 1503 ¶¶ 2, 3, U.N. Doc. S/RES/1503 (Aug. 28, 2003)..
[28] ICTY Website.
[29] ICTY Statute, S.C. Res. 827, *supra* note 7, at art. 18.
[30] *Id*. at art. 19.

requirement of implementing legislation can pose a number of challenges.[31] For example, the United States' implementing legislation requires surrender to take place in the manner required by U.S. extradition law, which requires the provision of enumerated grounds for the charge, a probable cause hearing, double criminality, speciality, and the rule of non-inquiry.[32] Provided these conditions are met, the U.S. will most likely comply with the Tribunal's request for surrender. France, however, will not surrender individuals requested by the Tribunal until its courts have had an opportunity to adjudicate the matter.[33]

Upon ratification of ICTY, several States Parties did, in fact, pass implementing legislation in order to reconcile their national laws with the surrender procedures of the ICTY.[34] Furthermore, the case history providing information about the surrender of individuals to the ICTY illustrates that one of the most significant hurdles the ICTY faced did not involve implementing legislation, but public indictments.[35] Initially, the indictments were not sealed, which made procuring the requested individuals very difficult.[36] However, once a change was implemented in the indictment process, the number of surrenders significantly increased and the time between the issuance of the arrest warrant and the surrender was often less than one year.[37]

ICTY Substantive Provisions

The substantive aspects that accompany criminal proceedings involving extradition or surrender, such as double criminality, extraditable offenses, *ne bis in idem*, reciprocity, and speciality were not of significant concern for the ICTY, given the founding of the Tribunal and the enumerated offenses. However, scholars have argued that the *ne bis in idem* provision was undermined by the deferral process and Rule 9 that governs that process.[38] Additionally, Article 10(2)(a)-(b) provides an exception to the principle of *ne bis in idem*:

> A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.[39]

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[31] United States legislation is more cooperative in comparison to France's legislation; double criminality; and safe havens.

[32] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 385 (3d ed. 1996) [hereinafter Bassiouni: International Extradition].

[33] ICTY Website, *supra* note 7, Greece, 15 Dec. 1998; Romania, 28 July 1998; January, 1996; Croatia, 1996; United Kingdom, 1996; Austria, 1 June 1996; Belgium, 22 Mar. 1996; Switzerland, 21 De. 1995; Australia, 28 Aug. 1995; New Zealand, 9 June 1995; Germany, 10 Apr. 1995; Bosnia-Herzegovina, 6 Apr. 1995; France, 2 Jan. 1995; Denmark, 21 Dec. 1994; Sweden, 1 June 1994; Spain 1 June 1994; The Netherlands, 21 Apr. 1994; Finland, 15 Jan. 1994; United States 1994; Italy, 28 Dec. 1993.

[34] *Id.*

[35] Allison Morrison Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1, 25 (2006).

[36] *Id*.

[37] *Id*. Sealed indictments were found to be more effective.

[38] Brown, *supra* note 6.

[39] ICTY Statute, S.C. Res. 827, *supra* note 9, at art. 10(2)(a)-(b).

Nevertheless, the language of Article 10(2) speaks directly to one of the purposes of the tribunal, which is to ensure competent and fair adjudication through the principle of *ne bis in idem*.[40] One of the most discussed cases of the ICTY involved the issues of general primacy and *ne bis in idem,* also referred to as *non-bis-in-idem*.[41] In *Prosecutor v. Tadić*, the defendant, who was charged with multiple offenses relating to the ethnic cleansing during the Bosnian War, argued that the Tribunal had violated double jeopardy, or *ne bis in idem*.[42] The claim was predicated on the fact that the accused was in the midst of being tried in Germany for many of the same crimes when he was extradited to stand before the Tribunal and that the ICTY"s jurisdiction was "contrary to statute."[43] The court found that because the proceedings in Germany had not yet concluded, according to the language set forth in the statute, there was no violation of *ne bis in idem*.[44] Equally important, the jurisdiction of the Tribunal would, in fact, be eroded were the court to construe the interpretation of the provisions in the manner of the defendant.[45] Yet, the primacy of the Tribunal over Tadić was determined by a previous case involving Tadić and, further, was conceded by Tadić.[46] Scholars have criticized the Tribunal for going beyond its jurisdictional scope in *Tadić* with respect to enumerated crimes.[47] The defense argued that statements made by members of the UN Security Council supported the defense's arguments about the relationship between two provisions of the statute, which provide for deferral. The Tribunal disagreed and, refusing to analyze the legal underpinnings of the Security Council members' statements, reemphasized the fact that deferral to the ICTY did not violate *ne bis in idem*.[48]

The International Criminal Tribunal for Rwanda – ICTR

The ICTR, like the ICTY, was established by a UN General Assembly Resolution on 8 November 1994. As the instability from Rwanda began creeping into neighboring states, the UN Security Council determined that the Rwanda genocide, like the genocide in Bosnia-Herzegovina, was a threat to international peace and security.[49] Per the Rwandan government's request, the UN Security Council established the ICTR specifically to "prosecut[e] persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31

[40] *Id*.

[41] *Prosecutor v. Tadić,* Case No: IT-94-1-T, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem (Nov. 14, 1995).

[42] *Id*. at 2.

[43] *Id*. at 3.

[44] *Id.* at 7.

[45] *Id.* at 12.

[46] *Prosecutor v. Tadić, supra* note 12.

[47] Danner, *supra* note 35, at 29. The larger criticism encompassing this argument is that international judges, especially with respect to the laws of war, should not make international law is beyond the scope of this paper. However, the fact is that the line between international criminal law and the laws of war is often blurred. Therefore, international tribunals and magistrates involved in implementing procedures for the adjudication of international trials or individuals who have committed international crimes, whether war criminals or criminals outside of the parameters of war, are compelled by the evolution and need of international justice to occasionally expand the scope of review and enlarge or clarify the provisions of international law.

[48] *Tadić*, *supra* note 41, at 12.

[49] Power, *supra* note 16, at 484.

December 1994."[50] The request was in response to the need for justice after the slaughter of almost one million people in order to eliminate the Tutsi population of Rwanda during July and August 1984.[51] In addition to genocide, the ICTR, similar to the ICTY, was also established to prosecute crimes against humanity and violations of Common Article 3 of the Geneva Conventions.[52] It should be noted that the scope of the ICTR, however, is expressly broader than the scope of the ICTY in two ways: territorial jurisdiction and enumerated crimes. Additionally, the ICTR explicitly provides that individuals who are non-state actors may be indicted and duly prosecuted for the enumerated crimes if deemed necessary.[53]

The ICTR, because it was modeled after the ICTY applied the same procedures and rules used by the ICTY, allowing for modifications as needed:

> The judges of the International Tribunal for Rwanda shall adopt for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.[54]

Presumably UN Member states would use the same or similar procedures, as practiced with the ICTY, with respect to surrender and transfer of accused persons, as well as implement the necessary national legislation that would facilitate international cooperation in the relevant matters.

Also, like the ICTY, the ICTR consists of three main organs which function in the same manner as the respective organs of the ICTY: The Chambers, the Prosecutor, and a Registry.[55]

Primacy over national courts, like the ICTY's primacy, is also a mechanism used by the ICTR. However, the jurisdiction of the ICTR, unlike the jurisdictional scope of the ICTY, which is confined to the territory of a single former State, extends to neighboring states. A debate about the ICTR's primacy emerged not with neighboring states, however, but with the United States in a case involving a Hutu priest who was residing in Texas.[56] Elizaphan Ntakirutiman was a Seventh Day Adventist Hutu priest in the Mugonero compound in Rwanda during the time of the genocide.[57] Tutsis of the area surrounding the compound were encouraged to seek shelter from the genocidaires in the Ntakirutiman's church.[58] Once a large number of Tutsis were inside the church, it was alleged that Ntakirutiman directed a large Hutu band to the sanctuary where the Tutsis who were gathered for protection were murdered.[59] Ntakirutiman continued with the

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[50] ICTR Statute, S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

[51] Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to* Civis *in Rwanda*, 75 N.Y.U. L. Rev. 1221, 1222 (citing Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, 261, 264-265 (rev. ed. 1997)).

[52] ICTR Statute, S.C. Res 955, *supra* note 50, at art. 3 - 5.

[53] *Id*. at art. 6(1): "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be *individually* responsible for the crime." (emphasis added).

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

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

[56] Elizaphan Ntakirutimana, Case No. ICTR-96-10-T, http://69.94.11.53/default.htm; *see also* Brown, *supra* note 6 at 411-12.

[57] *In re Ntkairutimana*, No. L-98-43, U.S. Dist. LEXIS 22173, at *2 (S.D. Tex. 1998).

[58] *Id* .

[59] *Id.* at *4.

campaign of genocide in another area of Rwanda, and in 1994 he travelled to Laredo, Texas in the United States, where his brother resided to live.[60] In 1996, the ICTR indicted Ntakirutiman on charges of genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[61] In 1996, the U.S. filed a request to extradite Ntakirutiman but in 1997, the magistrate of the Texas district court denied the government's request on the grounds that the request was not based on a treaty and, therefore, unconstitutional and that there was a lack of probable cause.[62] The government filed a second request for extradition, which was subsequently granted in August 1998.[63]

ICTR Substantive Requirements

As compared to the ICTY, the ICTR enlarged the scope of enumerated crimes. The ICTY, per articles 2 through 5, prosecuted persons on grounds of having committed or violated grave breaches of the Geneva Conventions of 12 August 1949, the laws or customs of war, genocide, or crimes against humanity.[64] The crimes or violations for which persons prosecuted by the ICTR include not only those enumerated by the ICTY, but also include violations listed under the Additional Protocol II dated 8 June 1977 of the Geneva Conventions.[65] These crimes include and, per the ICTR, are not limited to:

> (A) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishment; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) pillage; (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by a civilized peoples; (h) threats to commit any of the foregoing acts.[66]

With the exception of hostage-taking, the crimes and violations listed in the Additional Protocol II are not included in the ICTY and only "pillage" and "torture" are implicitly addressed by the ICTY.[67] Thus, by enlarging the substantive grounds by which persons could be surrendered to an international court, the ICTR took a significant step in furthering the reach of international criminal law.

Another critical distinction between the ICTR and the ICTY is that, despite the fact that the ICTR was modeled after the ICTY, the surrender or transfer modality of the ICTR has not been as effective as the same mechanism in the ICTY. Established only one year after the ICTY, the ICTR has only prosecuted thirty-five persons, of which twenty-nine persons have been

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[60] *Id.* at *3-4.
[61] *Id.* at * 4.
[62] *Id.*
[63] *Id.* at *4-5.
[64] ICTR Statute, S.C. Res. 955, *supra* note 5, at art. 2 – 5; ICTY Statute, S.C. Res. 927, *supra* note 9.
[65] ICTR Statute, S.C. Res. 955, *supra* note 5, at art. 2 – 5
[66] *Id.* ICTY Statute, S.C. Res. 927, *supra* note 9
[67] *Id.*

sentenced.[68] Moreover, more than one dozen individuals are still considered fugitives of the ICTR.[69] One could hazard to guess that the reason behind the lack of success of the ICTR is Western or racial bias: white eastern Europeans were slaughtered in the Bosnian War while black Africans were slaughtered in the Rwandan genocide. Albeit a hazardous guess, if it is incorrect, there must be a reason for the lack of success by the ICTR. In accordance with the purpose of the ICTY, twenty-one States have passed national implementing legislation to provide cooperation to the ICTY.[70] On the other hand, only eight States have entered into bilateral agreements on sentencing in accordance with the purpose of the ICTR.[71] Moreover, only three of the States that entered into these agreements were European, while nineteen of the States that passed implementing legislation for the ICTR were European.[72] The ICTR was provided half the amount of funding that was provided to the ICTY.[73] Finally, there seems to be reluctance to pass national implementing legislation. However, one must also consider the fact that an inordinate number of individuals, approximately 125,000 persons, stand accused of participating in the Rwanda genocide. Combing through documentation and evidence with respect to this many individuals and to determine who, among the 125,000 persons should be prosecuted before the international tribunal and who should be prosecuted before national criminal courts, would be a daunting task for any tribunal.

This author proffers an additional hypothesis: Not only was the task set before the ICTR exceptionally challenging in scope, but that perhaps the success of the ICTY resulted in a premature decision to provide the same structure of justice for Rwanda, despite the fact that Rwanda is starkly different from the territories of the former Yugoslavia, judicial structure, and culture. According to renowned international criminal law and human rights leader M. Cherif Bassiouni, Rwanda had less than a handful of attorneys in the Kigali and barely a semblance of a Western-structured judicial system at the time the ICTR was established. This was unfortunate as compared to Eastern Europe, where there was, at least, a judicial structure somewhat competent enough to adjudicate crimes associated with the Bosnian War. Perhaps traditional tribal justice should have been used in Rwanda, whereby the likelihood of bringing actual justice and full closure to the issue would have been greater.[74] However, a Western system of justice was imposed on a country that obviously was not prepared for it, as evidenced by the 125,000 individuals still imprisoned and the International Criminal Tribunal for Rwanda's performance frustrated.[75]

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[68] *Id.*

[69] *Id.*

[70] ICTY Website, *supra* note 7.

[71] ICTR Website, *supra* note 8. Republic of Rwanda, 4 Mar. 2008; Italy, 17 Mar. 2004; Sweden, 21 Apr. 2004; France, 14 March 2000; Swaziland, 30 Aug. 2000; Mail, 12 Feb. 1999; Benin, 26 Aug. 1999; Tanzania, 24 Sept. 1996.

[72] ICTY Website, *supra* note 7; ICTR Website, *supra* note 8.

[73] *Id.*; Drumbl, *supra* note 51, at 1288 (discussing the lack of resources and rampant corruption plaguing the Rwanda justice system).

[74] Scott Straus, *The Order of Genocide: Race, Power and War in Rwanda* 245 (2006) ("Given its slowness, Rwanda's justice system has generated considerable resentment among survivors and their families as well as among detainees and their families.").

[75] While the government of Rwanda requested assistance in prosecuting and punishing the genocidaires, a mirror of the ICTY was not requested. A complete treatment of this issue is outside the parameters of this article's object. However, the discussion was to acknowledge that even in a globalized world, traditional mechanisms as opposed to progressive mechanisms are sometimes required to accomplish the true ends of justice.

Following WWII and the Nuremberg trials, the ad hoc tribunals, notwithstanding the difficulties confronted by the ICTR, were a logical progression in the direction of establishing an international jurisdictional resolution that would prosecute and punish international criminals. Moreover, given the fact that the atrocities of Armenia, the atrocities of Nazi German, and the atrocities of Kampuchea, each, were no supposed to happen again, the ICTY, especially was established with both relative efficiency and was effective in achieving its goal.

Though in international law, the primary point of contention, with respect to multi-state arrangements and instruments, has been sovereignty, the ICTY and the ICTR overcame that contention because they were supported by the UN Security Council. Thus, while states may have been somewhat reluctant to cooperate, as signatories to the UN Charter, states were legally bound to comply, either by enacting national legislation or through diplomatic channels.

Modeling the tribunals after the extradition laws and procedures of most states made it easier to facilitate cooperation between the ICTY and the requested states. Acknowledging that the individual rights of the accused would be protected by the substantive requirements set forth in the ICTY addressed the interests of those states whose nationals might appear before the Tribunal. Yet, the same cannot be said for the ICTR. Geographical, structural, financial, and cultural differences resulted in the ICTR being a tribunal half as effective as its predecessor. Arguably, the root cause of the ICTR's ineffectiveness may be traced to a lack of understanding of the need to approach genocide in an African country perpetrated by malicious ethnic rivalry very differently from genocide in a European country perpetrated by government and military leaders. The situations were diametrically different save for one common denominator—the mass murder. Thus, logic would normally dictate that it would be unlikely that the same procedures would succeed when trying to resolve both situations.

Nevertheless, aspects of both tribunals furthered the realization that an international criminal adjudicatory body and mechanisms other than traditional extradition were needed in a world that was rapidly growing more interconnected, more complex, and more lethal.

THE COURT OF LAST RESORT FOR EXTRADITION: THE INTERNATIONAL CRIMINAL COURT ("ICC")

Even before the slaughter of six million Jews during World War II, the international community envisaged the need for a legal body that would prosecute and punish individuals who committed heinous acts "violating the laws of humanity."[76] However, that need was obscured by nationalist policies until the end of World War II, when the Nuremberg Charter was adopted and, subsequently, the Nuremberg Trials took place.[77] Inertia, nonetheless, permeated the international community with respect to developing a permanent international criminal court even though, on request of the UN General Assembly motivated by the horrors of Pol Pot's regime in Cambodia, the International Law Commission ("ILC") in 1989 began working toward drafting the statute that was to establish the International Criminal Court ("ICC").[78] However, the tragedies of the Bosnian War and the effectiveness of the ICTY's efforts galvanized the ILC

[76] M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 Vand. J. Transnt'l L. 151, 152-53 (1993) [hereinafter Bassiouni & Blakesley].

[77] Diane Marie Amann and M.N.S.Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. Supp. 381, 382 (2002).

[78] Brown, *supra* note 6 at 416-17.

and the international legal community began earnestly drafting the Rome Statute in the early 1990's.[79]

The largest issue of contention within the international legal community in creating the International Criminal Court was sovereignty of the prospective States Parties.[80] Initial drafts of the Rome Statute, the treaty that established the ICC, contemplated the ICC having jurisdiction over national courts when national courts were deemed ineffective, which gave the ICC primacy over national courts. Related to this issue were sub issues of jurisdiction, the types of crimes the court would adjudicate, and additional procedural and substantive matters.[81] Thus, it was apparent that for the ICC to be realized, cooperation of the States Parties would be essential. Several committees, organizations, and individual members of the international community convened regularly over several years to devise the Rome Statute.[82]

The United States was an early proponent of the ICC because the United States considered that the Court was a body that would assist in fighting crime the United States could not unilaterally address – international drug trafficking.[83] Ironically, once the Rome Statute was finalized, the United States, under President Clinton refused to ratify the agreement.[84] The President, rebuffing the Statute because of its arguable jurisdictional encroachment on member states, qualified the U.S.'s position explaining that he was, in fact, reluctant to sign the agreement and only did so to influence the evolution of the Court, and would not recommend the Statute's ratification to the next President.[85] After George W. Bush followed Mr. Clinton as U.S. President, in a rather exceptional move, President Bush called for the withdrawal of the United States' signature from the Rome Statute, underscoring the U.S.'s opposition to the ICC.[86] Additional action taken by the United States to pronounce its opposition to the ICC was the prohibition of funding the Court provided by the American Servicemembers' Protection Act of 2001 ("ASPA").[87] The Act was passed in August of 2002 and authorizes the President to take whatever measures required ensuring that U.S. military personnel are not arrested by the ICC, or if they are arrested, they are freed.[88] Commentators have proffered various arguments to explain the U.S.'s action, but the Court's extraterritorial jurisdiction that can be perceived to encroach on states' sovereign rights is the most agreed upon point of contention.[89] The second paragraph of Article 4 provides that "[t]he Court may exercise its functions and power, as provided in this Statute, on the territory of any State Party, and, by special agreement, on the territory of any other state."[90] An equally compelling argument is that the U.S. government feared that its leadership and military might be held legally accountable for human rights violations perpetrated

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[79] *Id.* at 417.
[80] *Id.* at 418.
[81] *Id.*
[82] Amann and Sellers, *supra* note 77, at 381, 383-84.
[83] Amman and Sellers *supra* note 77, at 382.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 38.
[88] American Servicemembers' Protection Act of 2001, 22 U.S.C. § 7401 (2008) [hereinafter ASPA 2001]. *See also* Remiguis Chibueze, *U.S. Objection to the ICC: A Paradox of "Operation Enduring Freedom*, 9 Ann. Surv. Int'l & Comp. L. 19, 22 (2003) (explaining that the ASPA is commonly referred to as the "Hague Invasion Act" and that its provision authorizing the withholding of military aid to countries who are members of the ICC may damage U.S. international relationships).
[89] ASPA 2001 § 7410, *supra* note 81.
[90] *Id.* at art. 4(2).

by U.S. members of the military while serving outside of the United States.[91] Nevertheless, 108 countries are States Parties to the Rome Statute. Unlike what some scholars presumed would happen to the ICC without the United States' support, the ICC was not rendered impotent. The substantial ratification of the ICC may be attributed to the fact that States Parties have one vote each and any State party can request an investigation.[92] Moreover, *propio motu* may be estopped by a two-judge vote. Therefore, many of the States Parties do not appear to be concerned by the same issues that the United States was concerned by.

The ICC resides in The Hague, Netherlands, and was modeled after the ICTY and the ICTR.[93] Three primary organs comprise the ICC body: the Judicial Divisions, the Office of the Prosecutor, and the Registry.[94] Also, in comparison to the ad hoc tribunals, the ICC has a president who oversees the judicial administration of the Court, with the exception of the Office of the Prosecutor. Furthermore, with slight exceptions, the organs of the ICC function much in the manner of the organs of the ICTY and the ICTR. The ICC has three primary Chambers instead of 2: Pre-trial, Trial, and Appellate; the Office of the Prosecutor has three divisions: Prosecutions, Jurisdictions and Complementarity, and Cooperation. Registry manages only non-judicial matters.[95]

ICC Procedural Mechanisms

Cases are either referred to the ICC by a State Party or by the UN Security Council. The Office of the Prosecutor ("OTP") also has the authority to investigate cases on its own, being conferred *proprio motu*: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute."[96] If the facts and evidence support a reasonable determination of culpability, the prosecutor may request an arrest warrant for surrender of the accused.[97]

The legal basis for the International Criminal Court is the Rome Statute, through which it asserts extraterritorial jurisdiction over individuals who are nationals of States Parties and, theoretically, individuals who are nationals of non-States Parties by means of surrender.[98] Commentators have noted that because the UN Security Council can refer an action to the ICC, the ICC may assert jurisdiction over non-States Parties at the behest of the Security Council and with the support of the Security Council's enforcement power, thus, impinging on the sovereign rights of non-States Parties.[99] To address this jurisdictional point of contention, the preamble of the Rome Statute expressly states that the ICC "shall be complementary to national criminal jurisdictions."[100] Moreover, Article 1 of the Statute expressly reiterates this point by restating complementary status with respect to States' jurisdictions.[101]

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[91] Gérard Prunier, *Darfur: the Ambiguous Genocide*, 143 (2007).

[92] Amman and Sellers *supra* note 77, at 388.

[93] The Rome Statute of the International Criminal Court, art. 1, A/CONF. 183/9 (July 17, 1998) [hereinafter Rome Statute].

[94] *Id.* at art. 34.

[95] *Id.* at art. 39, 42.

[96] *Id.* at art. 53(1).

[97] *Id.* at art. 58.

[98] *See supra* p 19 citing Art. 4, 2. *See also, infra* p. 21 discussing Art. 12.

[99] Chibueze, *supra* note 88, at 30.

[100] Rome Statute, *supra* note 93, at preamble, art. 1.

[101] *Id.* at art. 1.

Article 1 of the ICC includes an assertion of the Court's jurisdiction over individuals who commit international crimes enumerated by the Statute: genocide, crimes against humanity, war crimes, and crimes of aggression.[102] Crimes of aggression have yet to be determined and defined. Therefore, for practical purposes, the ICC asserts jurisdiction over 3 crimes: genocide, crimes against humanity, and war crimes. Additionally, per Article 12, the Court, theoretically, has jurisdiction over non States Parties as well: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State, may by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception."[103]

Because of the doctrine of complementarity, if States Parties have not instituted proceedings against an accused individual, who has been requested for surrender by the Court, the States Parties are obligated to surrender the requested individual to the Court, provided that the supporting documentation required by the Statute with respect to the arrest warrant and request for surrender accompany the warrant.[104] However, the surrender must also comport with the national laws of the States Parties.[105] Because the ICC is the court of last resort, an issue may arise where an individual of one State ("country of origin") may have committed an enumerated crime in another State and been referred to the Court by yet another State and the country of origin has begun proceedings against the individual. Moreover, national laws may preclude a State from surrendering an individual as expeditiously as desired. Also, because the documentation requested in support of the arrest warrant may not comport with a States' documentation requirements for extradition, or the state's national laws *per se*, the length of time for surrender may be prolonged.[106] Four of the five accused in Uganda have been at large for approximately four years; those accused in Darfur, Sudan have been at large for nine months to two years; and one of the four accused in the Democratic Republic of the Congo has been at large for almost three years.[107] The ICC also provides for "provisional arrests" when the situation is "urgent." However, it would seem that bringing to justice an individual who may have committed genocide, war crimes, or crimes against humanity would most likely be "urgent" if for no other reason than to facilitate closure for victims of such atrocities.

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[102] *Id.* at art. 1, 5.

[103] *Id.* at art. 12.

[104] *Id.* at art. 89, 91.

[105] *Id.* at art. 89.

[106] International Criminal Court, available at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ [hereinafter ICC Website]. With respect to the Uganda situation, Joseph Kony's arrest warrant was issued 8 July 2005 and, as of this writing, Kony remains at large; Vincent Otti's arrest warrant was issued 6 May 2005 and, as of this writing, Otti remains at large; Okot Odhiambo's arrest warrant was issued 6 May 2005, and, as of this writing, Odhiambo remains at large; Dominic Ongwen's arrest warrant was issued 6 May 2005, and as of this writing, Ongwen remains at large; Raska Lukwiya's arrest warrant was issued 6 May 2005 and he died before arrest. With respect to the Democratic Republic of the Congo, Thomas Lubanga Dyilo's arrest warrant was issued 10 Feb. 2006 and Dyilo was surrendered to the Court 17 Mar. 2006; Germain Katanga's arrest warrant was issued 2 July 2007 and Katanga was surrendered to the Court 17 Oct. 2007; Mathieu Ngudjdo Chui's arrest warrant was issued 6 July 2007 and Chui was arrested 6 Feb. 2008; Bosco Ntaganda's arrest warrant was issued 22 Aug. 2006 and, as of this writing, Ntaganda remains at large. With respect to Darfur, Sudan, Ahmad Muhammad Harun's arrest warrant was issued 2 May 2007 and, as of this writing, Harun remains at large; Ali Muhammad Ali Abd-Al Rahman's arrest warrant was issued 2 May 2007 and, as of this writing, Abd-Al Rahman remains at large; Omar Hassan Ahmad Al Bashir's arrest warrant was issued 14 July 2008 and, as of this writing, Al Bashir remains at large. With respect to the Central African Republic, Jean-Pierre Bemba Gombo's arrest warrant was issued 23 May 2008 and Gombo was surrendered to the Court 3 July 2008.

[107] *Id.*

The ICC expressly differentiates between the custodial modalities of "surrender" and "extradition."[108] Article 102 defines surrender as "the delivering up of a person by a State to the Court, pursuant to this Statute," and defines extradition as "the delivering up of a person by one State to another as provided by treaty, convention or national legislation." Therefore, where some states have challenged the ICC's jurisdiction with respect to extradition treaties as extraterritorial jurisdiction relates to and their national legislation, the ICC has theoretically circumvented that issue by explicitly distinguishing the legal bases of surrender and extradition. Hypothetically, a state could lack national implementing legislation but if the extraditable offenses of the ICC comport with the offenses of the national laws of that state, surrender as opposed to extradition may be a legally viable option.

Of the situations and cases currently on the ICC's docket, the fact that eight of the thirteen persons for whom arrest warrants have been issued remain at large, a ninth having died while at large, illustrates the significant challenge the ICC has in taking the accused into custody. Also, that these individuals are accused of the most serious of international crimes, including attacks against a civilian population, recruiting and using children as soldiers, rape and sexual slavery, but are, nonetheless, free calls into question the effectiveness of the international cooperation upon which the ICC depends.[109] An alternative question may involve the effectiveness of the other modalities, surrender, and arrest. The atrocities in Darfur have been ongoing for several years and, though the situation was referred to the Court, each of the three persons indicted remain free.[110] The Court, nonetheless, provides support when the systems of national courts, such as Uganda, the Democratic Republic of the Congo, Sudan, and the Central African Republic, cannot effectuate a sufficient and effective investigation into grievous international crimes perpetrated by individuals within their own territory or upon their nationals in the territories of others.

Substantive Provisions of the ICC

The Rome Statute expressly provides for a number of substantive rights to individuals who have been accused and subsequently surrendered to the Court. As mentioned, *supra*, the extraditable offenses currently defined are genocide, war crimes, and crimes against humanity. Article 20 sets forth the principle of *ne bis in idem*, which is similar to double jeopardy in the United States. Article 22 sets forth the principle of *nullum crimen sine lege*, or the "rule of speciality," in which the accused may only be prosecuted for those crimes enumerated in the indictment. Cautiously heeding the rights of the accused, the second paragraph of Article 22 stipulates that if the definition of a crime is deemed ambiguous, the definition used will be one that is favorable to the accused.[111] Not required by some extradition statutes, such as the United States, however important to the spirit of prosecuting government officials who egregiously abuse their power, Article 28 of the Rome Statute nullifies immunity for heads of state.[112]

Because most signatories of the Rome Statute are also signatories to the Geneva Conventions and the Genocide Convention, the issue of double criminality with respect to the crimes listed under those conventions would likely not be problematic. However, there is no

[108] Rome Statute, *supra* note 93, at art. 102(a0-(b).
[109] ICC Website, *supra* note 106.
[110] *Id.*; Prunier, *supra* note 91, at 159.
[111] Rome Statute, *supra* note 93, at art. 22(2).
[112] *Id.* at art. 28.

convention regarding crimes against humanity and, while it is unlikely that this offense would be an issue of dispute, it is plausible that because of the number of crimes that comprise the offense, a dispute may arise.[113] As with double criminality, the substantive aspect of reciprocity is one that is unlikely to emerge because of the substantial number of States Parties that have ratified the Rome Statute and, thus, implicitly entered into an agreement of reciprocity with each other on the issue of the offenses governed by the ICC. The exception is non-States Parties that may, nevertheless, agree to cooperate on the legal basis of surrender and the fact that the offenses are violations of *jus cogens* norms.

The International Criminal Court was initially contemplated to address a larger body of offenses within the international legal system.[114] However, because the Court was established by treaty and not by a UN Security Council resolution, the interests of potential states parties resulted in establishing a body that only adjudicated heinous international crimes because agreement could not be reached on further offenses.[115] Therefore, the scope of the ICC was, in the end, dramatically limited. Furthermore, the issue of primacy that the Court could theoretically assert over nationals of States Parties and non-States Parties resulted in the United States taking a position inapposite to the stance it first held.

Although the ICC has a limited scope, the Statute's language makes clear the difference between surrender and extradition. Thus, States Parties with extradition laws can use the laws or an amended version to cooperate with the ICC and non-States Parties whose extradition laws may require a treaty, may cooperate by either amending those laws to comport with the crimes enumerated in the Rome Statute or to comport with the legal basis of surrender. Also, mindful of the rights of the accused, the Court, through Article 22, carefully attends to the issue of speciality, providing a rule that is sympathetic to those indicted. Therefore, the International Criminal Court, though not large with respect to the number of offenses it covers, has provided the international legal system with a thumbprint of a legal basis for procuring international criminals absent an extradition treaty and in addition to the principles of comity and reciprocity.

EVOLVING EXTRADITION MECHANISMS OF THE EUROPEAN UNION ("EU")

Within a regional system, European extradition was first codified by the European Convention on Extradition in 1957 ("ECE").[116] Scholars suggest that modern extradition was codified by the Treaty of the European Union.[117] However, the ECE was enacted in recognition of the necessity for cooperation among members of the European Community.[118] Furthermore, because other extradition conventions of Europe, including the Convention on Simplified Extradition Procedure Between the Member States of the European Union ("EU Simplified Extradition Convention") derived many of their provisions from the ECE, one could argue that the ECE was the beginning of codifying modern extradition and surrender law in Europe. Nevertheless, the European Arrest Warrant ("EAW"), established by a Framework Decision in

[113] Amman and Sellers *supra* note 77, at 400.

[114] Bassiouni & Blakesley, *supra* note 76, at 154-56.

[115] Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 Vand. J. Transnat'l L. 2 (2008) (comparing the difficulties of establishing consensus on crimes with establishing jurisdiction).

[116] Council of Europe, European Convention on Extradition (Dec. 13, 1957) ETS 24 [hereinafter ECE].

[117] G. Vermeulen and T. Vander Beken, *New Conventions on Extradition in the European Union: Analysis and Evaluation*, 15 Dick. J. Int'l L. 265, 273 (1997).

[118] ECE, *supra* note 116, at preamble: "Considering that the aim of the Council of Europe is to achieve a greater unity between its members."

2004, purportedly mitigates the need for treaty-based extraditions for Member States of the EU, and is the most current instrument in the evolution of extradition and surrender among regional international systems.[119]

The European Convention on Extradition ("ECE")

The ECE asserted jurisdiction over the "metropolitan territories of the Contracting Parties," members of the Council of Europe.[120] Per Article 28, the Convention holds primacy over all agreements between members of the Council of Europe, including "bilateral treaties, conventions, or agreements governing extradition."[121] Moreover, the ECE requires that any agreements entered into between members were to be subordinate to the ECE with respect to extradition.[122]

Procedural Scope of the ECE

The documentation required to assert the jurisdiction was an arrest warrant or a copy of the convention and sentence, a statement of the offense or offenses, a statement providing the legal basis for the arrest and a description of the relator.[123] In addition to an arrest warrant obtained through channels of competent authorities of the requesting Party, the Convention also allowed for a provisional arrest warrant if the matter was "urgent."[124] Article 1 provides the scope of the ECE:

> The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.[125]

Additionally, surrender proceedings are set forth in Article 18:

> 1. The requested Party shall inform the requesting Party by means [stated in a previous article] of its decision with regard to extradition.
> 2. Reasons shall be given for any complete or partial rejection.
> 3. If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.
> 4. Subject to [certain provisions], if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.

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[119] Zsuzsanna Deen-Racsmany, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, 14 Eur. J. Crim. L. & Crim. Just. 271, 272 (2006).

[120] ECE, *supra* note 116, at art. 27. Paragraph 2 of article 27 also extends the ECE's reach to Algeria and overseas Departments of France, as well as other related territories of the United Kingdom and Northern Ireland.

[121] *Id.* at art. 28.

[122] *Id.* at 28(2).

[123] *Id.*

[124] *Id.* at art. 16.

[125] *Id.* at art. 1.

> 5. If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree [on] a new date for surrender and the provisions of paragraph 4 of this article shall apply.[126]

From the language of Articles 1 and 18, it is relevant to note that the ECE considered "surrender" and "extradition" the same or, at least, similar actions. Specifically, Article 1 speaks of an obligation the Parties have to "surrender to each other," paragraph 3 discusses "a view to surrender," while the subsequent paragraph 4 discusses "refus[al] to extradite." Using surrender throughout the ECE to describe provisions that were not similar to many extradition provisions may have been a way to emphasize the cooperative aspects of the extradition process as it pertained to members of the same international regional system, while minimizing the stronger, more discordant tone of "extradition."[127]

Substantive Rights Under the ECE

The substantive provisions of the ECE, like most instruments governing extradition, covered extraditable offenses, double criminality, *ne bis in idem*, and speciality.[128] Under the ECE's provision for extraditable offenses, per Article 2, double criminality is addressed by requiring the requested party to either have the same law or a comparable offense that requires "deprivation of liberty" or a maximum detention order of one year or a stronger penalty.[129] Extraditable offenses are not expressly listed, but described as those "offences punishable under the laws of the requesting Party."[130] Moreover, the ECE, in Article 3 also allows for the political offense exception.[131] Article 8 of the ECE prohibits what the United States refers to as double jeopardy and Article 14 provides for the rule of speciality.[132] By drafting and adopting the European Convention on Extradition, a multilateral treaty with primacy over bilateral treaties between Member States, the Council of Europe presumed extradition would become a more simplified process; yet that presumption was incorrect.

Simplified Extradition for the EU

The EU, through drafting the Convention on Simplified Extradition Procedure Between the Member States of the European Union ("Convention on Simplified Extradition"), sought to improve upon the ECE by simplifying particular extradition processes: "admissibility of extradition," government involvement in outcomes, and the process involving relators who consent.[133] The Convention, predicated on the consent of the relator, also provides for *de facto*

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[126] *Id.* at art. 18.

[127] Luisa Vierucci, *The European Arrest Warrant: An Additional Tool for Prosecuting ICC Crimes*, 2 J. Int'l Crim. Just. 275, 279 (2004) (explaining the use of the term "surrender" may be a linguistic acknowledgment of cooperation between EU Member States").

[128] *Id.* at art. 2, 9, 14, 18.

[129] *Id.* at art. 2.

[130] *Id.* at art.2(1).

[131] *Id.* at art. 3(1): "Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connoted with a political offence."

[132] *Id.* at art. 8, 14.

[133] Vermuelen and Vander Beken, *supra* note 117, at 278-79.

elimination of the rule of speciality as consent of the relator is deemed to imply an elimination of speciality.[134] However there was no consensus on the rules involving the political offense exception and extraditing nationals.[135] Nevertheless, the Convention was signed by Member States in March of 1995.[136]

Because Member States of the EU are signatories to the Convention on Simplified Extradition, which is a supplemental albeit comprehensive agreement to the ECE, the Convention on Simplified Extradition's jurisdiction is analogous to the jurisdiction asserted by the ECE. Furthermore, as the Convention on Simplified Extradition is invoked when a requested country is given consent by a relator, jurisdiction becomes a non-issue. Moreover, states that are not members of the EU or the Council of Europe, such as Belgium, can still participate in the process through other regional arrangements or bilateral extradition treaties.[137]

By obtaining consent of the relator, the Convention created an accelerated extradition mechanism, reducing a process from one that would often take many months to one that only takes thirty to fifty days, depending on the time it takes for consent to be given, notification to reach the requesting state, and surrender to take place.[138] Relators who consented to extradition, per the Convention, would be moved through summary proceedings and because of the consent provided, delays that previously occurred based on due process concerns would be alleviated.

Other substantive issues such as double criminality, extraditable offenses, and speciality have also been addressed by the EU Convention on Simplified Extradition as well as later agreements. Subsequent to the EU Convention on Simplified Extradition, in September 1996, the EU further allowed for a "relaxation" of the double criminality rule and the political offense exception when Member States entered into the Convention relating to Extradition between Member States of the European Union.[139] For Member States, double criminality is determined not by the names of offenses, but by the acts.[140] Extraditable offenses are only listed on bilateral treaties as implemented by non-Member states and even if states are in disagreement regarding the offense, refusal is not likely, except with certain offenses, such as those involving conspiracy. Non-member states may take advantage of reservations or treating offenses as violations of law as long as intent can be proven.[141] The circumstances by which the political offense exception could be claimed were reduced.[142] Also, though debate has surrounded the issue of speciality and its implied renunciation once a relator has consented to extradition, concern for the rights of the relator are given a great deal of weight and, thus, if a relator has explicitly renounced speciality, the consent of the requested state would also be considered relinquished.[143]

Establishing Extradition Uniformity with the European Arrest Warrant ("EAW")

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[134] *Id.* at 280.
[135] *Id.*
[136] *Id.* at 276.
[137] *Id.* at 269.
[138] *Id.* at 279-80.
[139] *Id.*
[140] *Id.* at 290.
[141] *Id.* at 291.
[142] *Id.* at 291-92.
[143] *Id.* at 296-97.

The European Arrest Warrant ("EAW") was established in 2002 by a Framework Decision of the Council of the European Union.[144] The EAW was into force on January 2004 and theoretically supersedes all previous EU Conventions, therefore, establishing jurisdiction over all members of the European Union.[145] The purpose of the EAW is to unify and accelerate the extradition processes set forth in the various conventions and agreements of the EU and between Member States on extradition and surrender, as well as establish uniform processes for the particular procedures.[146] Per Article 1, the EAW is a "judicial decision," which any Member State can issue and which is grounded on the "mutual recognition" among the Member States.[147] Accordingly, the EAW not only provides all EU Member States with the legal bases for extradition and surrender of alleged and prosecuted criminals within the EU, but the EAW also acknowledges the continued need for EU Member States to cooperate in order to facilitate a more secure and unified regional justice system.

As discussed, *supra*, the European Union, formerly the European Community, established several conventions and agreements on extradition: the European Convention on Extradition of 1957, the Convention on Simplified Extradition Procedure Between the Member States of the European Union, the Convention relating to Extradition between the Member States of the EU, the European Convention on the Suppression of Terrorism, and the Schengen Agreement.[148] Moreover, EU Member States have bilateral and multilateral treaties on extradition, as well.[149] In supplanting the legal bases of the aforementioned instruments, the Council Framework Decision provides legal bases for the EAW through judicial authority. Article 1, paragraph 1 of the Framework Decision states, "The European Arrest warrant is a judicial decision issued by a member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."[150] Therefore, the EAW is a mechanism EU Member States employ solely between the judicial authorities of those states, thereby removing extradition from the traditional diplomatic channels.

EAW Judicial Authority and Related Procedures

Placing sole authority of extradition decisions with the judiciary, the Framework Decision not only decreases the politicization of the extradition or surrender procedures, but also,

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[144] Council Framework Decision, 190/58 2002 O.J. 190 [hereinafter Framework Decision].

[145] *Id.* at preamble paras. 1-7. Dionysios Spinellis, *Extradition – Recent Developments in European Criminal Law*, 8 Eur. J.L. Reform 223, 227-28 (2006). This commentator considers previous conventions and treaties on extradition are theoretically superseded because there are still Member States of the EU that do not consider themselves bound by the Framework Decision establishing the EAW. *See* Mark Mackerel, *'Surrendering' the Fugitive—The European Arrest Warrant and the United Kingdom*, 71 J. Crim L. 362, 363 (2006-2007) (discussing the proposition of the EAW was also considered an additional mechanism by which to improve cooperation within the EU's criminal justice system).

[146] Framework Decision, *supra* note 144, at preamble para. 15.

[147] *Id.* at art. 1.

[148] Vermeulen and Vander Beken, *supra* note 117, at 268-73.

[149] Vermeulen and Vander Beken, *supra* note 117, at 268-69. The Benelux Extradition Treaty, the agreements between Nordic countries, Additional Protocol to the European Convention on Extradition (Denmark, the Netherlands, Portugal, Spain, Sweden), Second Additional Protocol to the European Convention on Extradition (Austria, Denmark, Finland, Germany, Italy, the Netherlands, Portugal, Spain Sweden, United Kingdom); German bilateral treaties.

[150] Framework Decision, *supra* note 144, at art. 1(1).

in accordance with Article 5, increases the likelihood that the rights of the accused or prosecuted will be protected.[151] Article 5 provides that the issuance of the EAW may be conditioned on a number of circumstances. First, in the case that a relator was prosecuted in absentia, the relator receives a chance to request a new hearing.[152] Second, if a relator is sentenced to life imprisonment or detention, the requested Member State may be required to have laws providing for a review of sentencing guidelines.[153] Also, the requested state, after complying with the requesting state, may receive the relator back after the relator has had an opportunity to speak.[154] Additional rights of the relator are provided in Articles 11-13.

Despite the protection of individual rights provided for in Article 5, the Framework Decision nevertheless recognizes the rights of Member States as well per Articles 6 and 7, which allow members to designate their own judicial construct for purposes of issuing the EAW and making decisions pursuant to an EAW request.[155] The processes by which the EAW result in the surrender of an accused or prosecuted person are relatively straightforward. The judicial authority that receives the request will, upon granting the request, issue the EAW to the designated juridical authority of the requested Member State.[156] Once the requested Member State's authority has received the request, if the relator has consented to the surrender, the authority has ten days to review and decide whether to grant the request.[157] If there has been no consent provided, the person will be arrested and the authority will have sixty days in which to decide on whether to surrender the person to the requesting authority.[158] The time limits may be extended by thirty days if an explanation for the delay has been quickly provided to the requesting authority.[159] The surrender must then take place within ten days of the decision, unless there are humanitarian reasons that require a delay.[160] If the surrender is to be delayed, a new date should be agreed upon and surrender must occur within ten days of the new date.[161] Thus, with the exception of humanitarian delays and depending on consent of the relator, the surrender proceedings should only take twenty to seventy days. This timeframe is a stark contrast to the years taken for extradition of some of the persons requested by the ICTY, the ICTR, and the ICC.[162]

The European Convention on Extradition, one of the conventions that the Framework Decision was to ideally replace, unlike the ad hoc tribunals, used the terms, "surrender" and

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[151] Framework Decision, *supra* note 144, at art. 5, (1)-(3); *see* Michael Plachta, *European Arrest Warrant: Revolution in Extradition?*, 11 Eur. J. Crime Crim. L. & Crim. Just 179, 187-88 (discussing the depoliticization of extradition that occurred as a result of removing the process from the executive and how it also attributed to expeditious and efficient extradition); *see also* Mackerel, *supra* note 145, at 366 (explaining the increased efficiency of the extradition process after the process was placed under the purview of the judicial authorities of the EU).

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] Framework Decision, *supra* note 144, at art. 6,7.

[156] Framework Decision, *supra* note 144, at art. 9.

[157] Framework Decision *supra* note 144, at art 17(2).

[158] *Id.* at art. 17(3). It should also be noted that though an appeal for surrender is not available per se, Article 14 does provide for a non-consent hearing to persons who have not consented to surrender.

[159] *Id.* at art. 17(1).

[160] *Id.* at art 23(3).

[161] *Id.* at art. 23(4).

[162] See *supra* note 106 (providing the extradition timeframes for relators of the different tribunals); *see also* Plachta, *supra* note 151 (commenting on the elimination of long delays in extradition proceedings that resulted from timing provisions); *see also* Mackerel, *supra* note145 at 367.

"extradition" interchangeably and the Framework Decision does not provide a definition of terms.[163] Scholars assert that the contextual language surrounding the terms imply a different procedure, one based on cooperation as opposed to strict legal treaty-bound mandates.[164] Yet, the titles of additional conventions that the Framework Decision was to replace incorporated the term, "extradition" instead of "surrender."[165] However, in paragraph fourteen, of the preamble, the Framework Decision explains the conditions under which a person's "extradition" is prohibited.[166] Therefore, it is reasonable to presume that the terms "surrender" and "extradition" in the context of the Framework Decision are synonymous or, at the very least, interchangeable to allow for consistency with the national laws of Member States.[167]

Accountability, Enumerated Offenses and Additional Substantive EAW Provisions

In addition to recognizing the constraints of Member States, the Framework Decision also establishes a number of substantive provisions to ensure the rights of the accused are not abused. However, the Framework Decision also removes blanket shields that normally provided certain individuals from accountability. Procedures that have been streamlined or eliminated include the transmission of documentation between judicial authorities, as opposed to communication through channels or Ministries; shortening the deadline for the final decision; eliminating the political offense exception; eliminating the exception for nationals; and eliminating dual criminality.[168]

The thirty-two offenses for which a person can be accused and subsequently charged and surrendered, while not inclusive of all crimes that could be committed, represent such a wide range of offenses that the provision for dual criminality, or double criminality, is relatively a nonissue.[169] The crimes for which an individual may be surrendered are:

> [P]articipation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud . . ., laundering the proceeds of crime, counterfeiting currency, computer-related crime, environmental crime, facilitation of unauthorized entry and residence, murder and grievous bodily injury, racism and xenophobia, organized or armed robbery, illicit trafficking in cultural goods, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of

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[163] Framework Decision, *supra* note 144, at preamble par. 5, art. 13 – 15. *See* Tjaarda D. O. van der Vijer and Rufat R. Babayev, *The Framework Decision on Procedural Rights in Criminal matters: One Small Step for Human Rights; A giant Leap for Mutual Trust*?, 4 Cambridge Student L. Rev. 74, 86-87 (2008-2009) (discussing the use of the terms in various instruments but that extradition is also used in connection with cooperation in the EU Treaty); Vierucci, *supra* note 127.

[164] Deen-Racsmany, *supra* note 119, at 273-74.

[165] European Convention on Extradition, Benelux Extradition Treaty, Additional Protocol to European Convention on Extradition.

[166] Framework Decision, *supra* note 144, at preamble, para. 4.

[167] *Id.* at preamble para. 14. *See also* Deen-Racsmany, *supra* note 119, at 281 (discussing how the Polish Constitutional Tribunal construed the terms to be interchangeable because there was no "substantive" change in the procedure).

[168] Framework Decision, *supra* note 144, at art. 2(2)-2(4), 3, 4, 5.

[169] Deen-Racsmany *supra* note 119, at 274.

> payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.[170]

By providing an enumerated list of offenses and conditioning other offenses not listed to be considered on the premise of dual criminality, the Framework Decision addresses the issue of dual criminality that may arise among EU Member States.[171] Furthermore, dual criminality is also addressed by paragraph 4 of Article 2, which provides, "For offences other than those covered by paragraph 2, surrender may be subject to the condition that the *acts* for which the European arrest warrant has been issued constitute an offence under the law of the executing Member Sate, whatever the constituent elements or however it is described."[172] Thus, the elemental foundation for dual criminality with respect to the EAW is the *actus reus* of the crime and not the name.

Provisions that preclude *ne bis in idem* are established in Articles 3-2, 4-2, and 4-5.[173] Thus, the Framework Decision provides that the relevant judicial authority shall refuse a EAW request when the relator has been finally judged on a crime for which the relator is being requested; when the relator has been prosecuted in the requested Member State for the same act that the EAW is being requested; and if the designated judicial authority has determined that the relator was "finally judged by a third State in respect of the same acts provided that the sentence has been served or is no longer enforceable."[174] The Framework Decision also protects individuals who have been prosecuted *in absentia*; the Decision provides the person a right to retrial where the relator and Member State can both be present.[175]

Contained in the Framework Decision are certain traditional exemptions of extradition, but the exemptions are also constrained. Article 20 implies that immunities held by heads of state, government officials, and diplomats will be respected.[176] Nevertheless, Article 20 also provides that if a judicial body of a requesting state has the authority to waive the relevant privileges or immunities, it should exercise that authority and that if the judicial authority of the requested state has the authority to waive relevant privileges or immunities, the authority should exercise that power.[177] Furthermore, the rule of speciality is provided by Article 27 but may be expressly or implicitly unavailable in cases where the relator has provided consent.[178] Article 13 provides, "If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the 'speciality rule', referred to in Article 27(2), shall be given before the executing judicial authority."[179] Thus, persons who would be found culpable but for their positions, may not necessarily have the blanket immunity they once enjoyed. Additionally, the Framework Decision may have provided the international criminal justice system with a way to reach persons who may have been culpable of other offenses but

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[170] Framework Decision, *supra* note 144, at art. 3.
[171] Spinellis, *supra* note 145, at 235-36.
[172] Framework Decision, *supra* note 144, at art. 2(5).
[173] *Id*. at art. 3-2., 4-2.
[174] Framework Decision, *supra* note 144, at art. 3(2), 4(2), (5).
[175] *Id*. at ar. 5(1); Plachta, *supra* note 151 at 189.
[176] Framework Decision, *supra* note 144, at art. 20(1).
[177] *Id*. at art. 20(2).
[178] *Id*. at art. 27.
[179] *Id*. at art. 13(1).

only extraditable for one offense, by predicating their consent on renunciation of speciality. Therefore, the substantive aspects of the EAW provided for through the Framework Decision illustrate methods by which international criminal law procedures can protect the rights of the accused while simultaneously creating a more efficient and effective extradition procedure.

Nevertheless, while the Framework Decision on the EAW has been considered a positive step in the realm of international criminal law, it has also been criticized. The provision requiring the extradition or surrender of nationals has come under serious criticism by Member States of the EU.[180] Commentators have also criticized the difference, or lack thereof, between "extradition" and "surrender."[181] Additional scholars have expressed concern over a potential lack of due process rights for the requested persons, such as a right to a fair trial.[182] Thus, the Framework Decision's objective to unify and accelerate extradition among the EU Member States may not be as easily applicable as it was theoretically set forth.

Criticisms of the EAW Framework Decision

In drafting the proposal for the Framework Decision, the preamble language allowed for extradition of Member States' nationals.[183] The initial paragraph from the proposed Framework decision stated, "Since the European arrest warrant is based on the idea of citizenship of the Union [. . .], the exception provided for a country's nationals, which existed under traditional extradition arrangements, should not apply."[184] Prohibiting the surrender of nationals not only existed in the extradition treaties and conventions but, demonstrative of the notion of sovereignty, the prohibition was also was firmly entrenched in a number of Member States' constitutions.[185] Moreover, not many legal regimes rejected a state's refusal to surrender its own nationals when predicated on a constitutional provision.[186]

The adopted Framework Decision revised the preamble language of paragraph 12 to focus on a respect for human rights, removing the earlier language but the revised language, nevertheless, did not expressly prohibit extradition of nationals.[187] Furthermore, the EAW's implicit jurisdiction over Member States' nationals is clarified even more by the language involving Member States' constitutions set forth in the second part of revised paragraph 12. The provision states, "This Framework Decision does not prevent a Member Sate from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."[188] Nevertheless, Article 4 of the Framework Decision does provide an option for Member States in the extradition of nationals if "the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law."[189] Given the implicit

[180] Deen-Racsmany, *supra* note 119, at 278.
[181] *Id.* at 280.
[182] Van der Vijver and Babayev, *supra* note 163, at 84.
[183] Deen-Racsmany, *supra* note 119, at 278; *see* Mackerel, *supra* note 145, at 363 (discussing sovereignty as a challenge for the Framework Decision's implementation).
[184] *Id.*
[185] *Id.* at 276.
[186] *Id*.
[187] Framework Decision, *supra* note 144, at preamble para. 12.
[188] *Id*.
[189] *Id*. at art. 4(6).

jurisdictional scope of the Framework Decision, various challenges by the governments of four Member States have proceeded: Poland, Germany, Greece, and Cyprus.[190]

Poland has determined that the EAW cannot be reconciled with its constitutional prohibition against extraditing or surrendering Polish nationals.[191] Germany does not consider the EAW a valid instrument.[192] Conversely, the high court of Greece, the *Areios Pagos*, has concluded that the EAW and the Greek constitution were reconcilable.[193] Similarly, the Supreme Court of Cypress, while expressing concerns about the primacy of the Framework Decision, fostered an expeditious amendment to the Cyprus Constitution with respect to extraditing Cypriot nationals in the event such was requested through the issuance of a EAW.[194] Thus, it appears that a minority of Member States are steadfast in holding to the constitutional provisions of their states banning the extradition of their nationals, and the remaining states are seeking ways to either reconcile their constitutional provisions with the Framework Decision or enact national implementing legislation that will comport with the requirements of the EAW. This may be a result of the answer to the criticism of the initial language of paragraph 12, that response being a simple removal of the declaratory language on extradition of nationals replaced with a declaratory stance on the position of human rights and silence with respect to extradition of Member States nationals.

The lack of a provision for a right to a fair trial is another criticism of the Framework Decision.[195] However, the right to a fair trial is not guaranteed by international law. The Rome Statute, however, does imply that fairness should be a component of a trial: "The Court may rule on the relevance or admissibility of any evidence and any prejudice, that such evidence may cause to a *fair* trial."[196] Furthermore, the ICTY provides mechanisms for a fair trial in a number of provisions.[197] Therefore, although international tribunals and courts may provide and seek to ensure that a trial is fair, the right to such is not always guaranteed.[198]

Equally important, the meaning of a fair trial is debatable given the manner in which a number of trials, especially in the United States, have been managed over the last century.[199] The Supreme Court clearly had its work cut out for the decades following the infamous *Dred Scott* decision, as lower courts proceeded to uphold inequitable trials.[200] Particularly interesting,

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[190] Deen-Racsmany, *supra* note 119, at 276.

[191] *Id*. at 283.

[192] *Id*. at 287.

[193] *Id*. at 290.

[194] *Id*. at 292.

[195] Van der Vijver and Babayev, *supra* note 163, at 84.

[196] Rome Statute, *supra* note 93, at art. 69(4) (emphasis added).

[197] ICTY Statute, S.C. Res. 827, *supra* note 9, at art. 20("The Trial Chambers shall ensure that a trial is fair and expeditious."), art. 21 ("[T]he accused shall be entitled to a fair and public hearing.").

[198] For example, the International Covenant on Civil and Political Rights, one of the three international instruments comprising the International Bill of Rights, only provides: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or released." International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, GA. Res. 54/16 ¶ 21, U.N. Doc. A/RS/52/16 (Mar. 23, 1976) art. 9.

[199] *Scott v. Sandford*, 60 U.S. 393, 1856 (holding that a black man who had lived freely in states where slavery was illegal, once moving into a legal sate was, in fact, a slave and, therefore, not a citizen of the United States and, thus, ineligible to bring a cause of action before a court).

[200] *See Powell v. State of Ala.*, 287 U.S. 45 (1932) reversing *Powell v. State*, 224 Ala. 540 (1932) (where the court refused defendants right to counsel). The case involved a group of young black men, the "Scottsboro Boys," wrongly accused of molesting a young white woman; *see also, Cassel v. Texas*, 339 U.S. 282, 290 (1950)

in the light of the rights of defendants being prosecuted in a foreign territory, is the Court's language in a case overruling an egregiously unjust lower court's decision involving the Scottsboro Boys.[201] In *Powell v. State of Alabama*, the Court stated:

> In the light of the facts outlined…-the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and *families were all in other states* and communications with them necessarily difficult, and above all that they stood in deadly peril of their lives-we think *the failure of the trial court* to give them reasonable time and opportunity to secure counsel was a clear denial of due process.[202]

It was only in 1986 when the Supreme Court addressed one of the last mechanisms used to subvert due process in the courts—the use of preemptory challenges for establishing all-white juries.[203] Thus, while concerns for the lack of due process rights, specifically the provision of a right to a fair trial by the EAW are valid, the expectations of such concerns should be tempered with an understanding of the policies and long-standing legal practices of the court system of the requesting states.

The purpose of the European Arrest Warrant was to increase cooperation among the Member States of the EU by establishing an extradition mechanism that would bring uniformity and cohesion to the various conventions and agreements on extradition existing within the union. Crafted so as not to directly challenge the sovereignty of Member States, the EAW nevertheless has primacy through the judicial authorities of Member States in matters of extradition. However, by enumerating offenses and allowing for double criminality predicated on the acts of the accused or prosecuted instead of the name of the offense, the Framework Decision of the EAW clarified provisions that were left vague in conventions such as the ECE.

Despite the clarity of its provisions, the Framework Decision was criticized for not expressly banning the extradition of nationals, for the ambiguity involved when using the terms "surrender" and "extradite" interchangeably, and for lack of due process guarantees. Only a relatively small number of states have maintained that the EAW is inapplicable and irreconcilable with their constitutional provisions, thereby, rendering that criticism almost a non-issue. The fact that surrender and extradite are used interchangeably may speak to the purpose of continuing to foster cooperation among Member States and an institutional evolution toward that cooperation. Furthermore, while neither the international system as a whole, nor relative superpowers such as the United States are able to guarantee or provide fair trials, the Framework Decision, through several provisions, establishes procedures by which the rights of the accused and prosecuted are protected before, during, and after extradition.

(reversing a case where juries were selected on the basis of who the prosecutor knew); additionally, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (reversing a Florida Supreme Court ruling which stated that an indigent defendant was not eligible for court appointed counsel).

[201] *Powell v. State of Ala.*, 287 U.S. 45 (1932).

[202] *Powell v. State of Ala*., 287 U.S. at 71 (emphasis added).

[203] Jack Greenberg, *Crusaders in the Courts, Legal Battles of the Civil Rights Movement*, 496 (2004) (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

Extradition between the U.S. and the EU

To extend the scope of extradition and cooperation in international legal matters, in 2003, the United States also entered into an extradition and mutual legal assistance ("MLAT") agreement the European Union.[204] The agreement is primarily a counter-terrorism tool.[205] However, because of the constitutional provisions that address extradition in the EU's Member States, several States have determined that provisions of their constitutions must be met before adhering to this agreement.[206] Moreover, the actual legal basis of this agreement is questionable because the EU is not a state but an organization of states that still maintain sovereignty rights.

Extradition in the system of European states has developed through a number of mechanisms: bilateral treaties between individual states, the multilateral European Convention on Extradition in 1957, the Convention on Simplified Extradition Procedure Between the Member States of the European Union, and the Council of Europe Framework Decision on the European Arrest Warrant. Each of these instruments instituted provisions that increased the efficiency and effectiveness of extradition processes between Member States of the Council of Europe and the European Union. The issue of sovereignty with respect to constitutionality of the EAW has concerned some Member States, causing a number of those concerned to reject the EAW. Nevertheless, the procedures and substantive provisions afforded by the Framework Decision on the EAW are the most progressive, not only in the European legal system but in the international legal system as well. Furthermore, given the progressive nature of the EAW, the latest action in international cooperation in legal affairs taken by the EU, an MLAT between the EU and the United States, might indicated regard for the EU's vision in international legal matters, such as extradition and mutual legal assistance.

EXTRADITION IN THE UNITED STATES

Partially in respect for sovereignty, extradition in the United States has historically been predicated on treaties, beginning with the U.S.-France Extradition Treaty in 1788.[207] Because treaties are arrangements between governments, the U.S. relationship with other states plays a significant role in the extradition process.[208] However, treaties are not the sole legal bases for extradition in the U.S.[209] The United States also extradites individuals as a matter of comity or reciprocity, but these instances are, however, usually based on the absence of a treaty, especially when the crime is not listed as an extraditable offense.[210] The U.S. will also use informal arrangements and other disciplines such as immigration law.[211] Nevertheless, treaties are the primary legal bases for extradition.

U.S. extradition proceedings are codified by 18 U.S.C. §§ 3181-3196.[212] Section 3181(a) provides that the United States will surrender an individual who has committed a crime in

[204] Spinellis, *supra* note 145, at 231-32.
[205] *Id.*
[206] *Id.*
[207] Bassiouni: Reforming International Extradition, *supra* note 1, at 389, 391.
[208] Bassiouni: International Extradition, *supra* note 32, at 35.
[209] *Id.* at 53-54.
[210] *Id.*
[211] Bassiouni: International Extradition, *supra* note 32, at 61-63.
[212] 18 U.S.C. §§ 3181-3196 (2009). Bassiouni: International Extradition, *supra* note 32, at 655.

another country if an extradition treaty is in force with the relevant country.[213] However, the subsequent subsection (b) provides that, in the absence of a treaty, surrender of an individual on the basis of comity, provided the person is not a citizen, national or permanent resident of the U.S. is conditioned on a provision of evidence, double criminality and the political offense exception.[214]

There are two reasons for basing extradition on treaties. The first reason is a matter of legal efficacy: an individual who has committed a crime should be prosecuted and punished and if the individual has fled from the jurisdiction where the crime is committed, it is most appropriate that the individual be returned to that jurisdiction, provided that justice is served in a fair and effective manner.[215] The second reason, which is somewhat related to the first, is that international law requires adherence to rules of jurisdiction.[216] While these reasons are credible, the U.S. has not substantively modified its extradition procedures for more than a century.[217] However, the demands of globalization in the realm of international criminal law with respect to extradition have illustrated on a number of occasions why the procedures of extradition should be changed.[218]

U.S. Extradition Procedures

Currently, an extradition request is received by the Department of State that communicates the requests to the Department of Justice ("DOJ").[219] The supporting documentation of the request must meet all material provisions of the relevant treaty. Additionally, extradition in the U.S. has no temporal bounds except those which may be expressly stated in the treaty. The DOJ delivers the request to the United States District Attorney in the district where it is reasonably presumed that the relator can be located. A federal district judge or magistrate issues the arrest warrant, which must include supporting documentation for the legal action. The Federal Bureau of Investigation ("FBI") investigates, locates—if possible—and arrests the relator. Individuals may request bail after arrest. In the U.S. provisional arrests may only be procured according to a treaty provision. An extradition cannot be appealed; the only avenue for relief from the proceeding is filing a habeas corpus petition.[220]

Supporting documentation of an extradition request must include a copy of the arrest warrant, indictment or other "charging instrument" and other documentation of support, "sworn or verified statement of correct foreign authority providing description of facts and documentation, "affidavits, documents and evidence on the applicable foreign law with respect to the facts. Additionally, the request must be evidenced by probable cause.[221] While it is not a hearing to determine innocence or guilt, there must be a reasonable presumption shown that the

[213] § 3181(a).
[214] § 3181(b).
[215] *Id.* at 383.
[216] *Id.*
[217] Bassiouni: Reforming International Extradition, *supra* note 1 at 389, 394; *see also* John T. Parry, *The Lost History of International Extradition Litigation*, 43 Va. J. Int'l L. 93, 169-70 (2002-2003).
[218] See *supra* p1 (discussing the Lockerbie Case, the individuals for whom arrest warrants are still outstanding with respect to the genocide of the Bosnian War and Rwanda, and currently Darfur).
[219] Because this article's object is to propose an accelerated mechanism for extradition within the U.S., it will consider the U.S. extradition procedures from the perspective of the United States as a requested state.
[220] Bassiouni: International Extradition, *supra* note 32, at 656.
[221] 18 U.S.C. § 3184.

person could have committed the crime. Therefore, procedures for extradition in the U.S. are implemented by each of the three branches of the U.S. government.

Substantive Characteristics of U.S. Extradition

In addition to the procedures discussed *supra*, the U.S. also has five substantive requirements that must be met for extradition: reciprocity, double criminality—or dual criminality, extraditable offenses, speciality, and the rule of non-inquiry.[222] While reciprocity is not a steadfast requirement, double criminality must be met. Therefore, the crime for which the relator is requested must be a crime that is either enumerated in the treaty or a crime by which extradition of an individual can be sought.

Extraditable offenses must be enumerated by the Treaty or mutually agreed upon by the executive branch and corresponding ministers.[223] Courts in the U.S. first consider the relevant treaty provisions to ensure that the offenses for which the extradition is sought are listed. If a treaty does not list offenses but instead provides a method for determining extraditable offenses, the judge or magistrate will look to the facts provided in the supporting documentation. The facts of the documentation should comport with facts that would result in an extraditable offense in the United States.[224]

To be held and prosecuted only for the crime for which one is being surrendered or extradited is a critical right for the accused. Therefore the rule of speciality must be enforced. While minor technical differences in an indictment may exist, speciality requires that the offense for which the relator is sought constitute the offense for which he or she will be prosecuted once extradited or surrendered.[225] As discussed *supra*, speciality is an additional substantive requirement of the U.S. Moreover, speciality has gained consensus in the international legal community through widespread practice among several states and, thus, has become, like double criminality, a rule of customary international law to which all states in the international legal system, including the U.S., are bound.

The rule of non-inquiry has more political capital, in U.S. extradition proceedings, than human capital with respect to the rights of the accused. However, under certain circumstances it could be construed as necessary. As another rule of customary international law, the principle of non-inquiry precludes courts from examining a number of factors with respect to an extradition request, including: how a state procures evidence to show probable cause, if the ensuing prosecution and related procedures will be fair, and the penalty and conditions a returned individual may face.[226] Nevertheless, as illustrated in discussions *supra*, various international extradition Conventions and instruments contain provisions upholding what is referred to in the United States as "due process" rights, thereby obviating the need for the rule of non-inquiry in many extradition cases.

U.S. extradition is treaty-based and seldom veers from that long-standing tradition. The reasons for maintaining a modality of extradition based on treaties are compelling and logical: formal agreements help to ensure that the intent of the parties—the U.S. and the respective state—will be fulfilled, and international agreements, such as extradition treaties protect the

[222] *Id.* at 385.
[223] Bassiouni: International Extradition, *supra* note 32, at 393.
[224] *U.S. v. Alvarez-Machain*, 504 .S. 655, 670-74 (1992).
[225] Bassiouni: International Extradition, *supra* note 32, at 429.
[226] *Id.* at 486.

sovereign rights of the parties, specifically in terms relating to jurisdiction. Nevertheless, the procedures of extradition, implemented across the executive, judicial, and legislative branches require procedural steps, while necessary at times, are also unwarranted under certain circumstances. The requisite substantive requirements can also be improved upon. Furthermore, because the extradition code and case law in the U.S. illustrates the lack of cohesive extradition doctrine and rules, the code should be substantively modified to provide the government and international system with a comprehensive, organized and consistent rule of law involving U.S. extradition.

CONCLUSIONS AND RECOMMENDATIONS

Globalization and the increased movement of individuals and enterprises have increased the need for international law in a number of areas. One of those areas is international criminal law. Serious crimes such as terrorism, transnational organized crime, and human trafficking all take place not in one state or region but internationally and the perpetrators of these crimes quickly move between jurisdictions and states to escape prosecution and punishment, resulting in a need to modernize the modality of national and international justice systems.[227] In addition to crimes that violate *jus cogens*, these crimes also threaten the peace and security of the international community. The international legal community has attempted through the decades and with various mechanisms to address the growing need for bringing individuals who commit serious international crimes to justice. While relatively successful, these efforts—the ad hoc tribunals, the International Criminal Court, and the European Arrest Warrant—are insufficient. States in the international system want to stop these serious crimes, but at this time, are reluctant to relinquish what they consider sovereignty in order to bring the accused before international courts. Therefore, until the international community can reach a consensus and expand the crimes that fall under the jurisdiction of the ICC or establish another Chamber within the ICC to adjudicate these crimes, national courts should be able to extradite individuals who are presumed to commit such crimes without the constraints of the traditional extradition encumbrances.

National courts, such as the federal courts of the United States, should have a mechanism by which extradition for serious crimes is accelerated and the needs of current international criminal law are met. The Framework Decision on the European Arrest Warrant, incorporating procedures and substantive requirements from the extradition evolution within the international legal system, provides a reasonable model for developing such a mechanism in the U.S.

Extradition Acceleration through Procedure

Modifying the Legal Basis: Executive or Legislative

To establish an accelerated mechanism for extradition in the United States, the first encumbrance that should be removed is the requirement that the mechanism be based upon a treaty. A mechanism that is not treaty-based must be founded upon a legal basis that addresses the two critical reasons upon which most extradition treaties are based.[228] The legal basis could be executive agreements or national legislation, as suggested by one commentator, which would

[227] Donald M. Snow, *National Security for a New Era, Globalization and Geopolitics*, 355 (2004).
[228] *See* discussion *supra* pp. 43-44.

absolve the issue Congress might have with losing its "advice and consent" powers relative to treaties.[229] The legal basis could also be an executive order.

Removing the treaty requirement, the President could establish the mechanism through the executive branch, the President could use an Executive Order providing changes in procedure that shift the decision-making on the original request for extradition or surrender from the Department of Justice to the judiciary, explicitly providing for both surrender and extradition, and revising the procedures as discussed *supra*. The order could also set forth jurisdictional requirements of requesting states or international courts and tribunals, including the International Criminal Court, thereby rebuilding a relationship with an important international legal institution. The procedural changes, discussed *supra*, would undoubtedly perturb those currently involved in extradition within the Department of Justice, but the accelerated extradition mechanism would not be designed to supplant these individuals or their responsibilities to the nation *per se*. Rather, the mechanism would be an additional tool that would unfetter resources that could be used to investigate and pursuit criminals in the federal legal system while, simultaneously, fostering efficiency in the international criminal legal system.

The major drawback of establishing the mechanism through the executive branch is that with a few strokes of the next President's ink pen, the executive order establishing the mechanism could be overturned, thus rendering the mechanism worthless unless, Congress had decided to support the Executive Order by amending the extradition statute accordingly. Thus, while establishing an accelerated extradition mechanism through the legislature may be a cumbersome and lengthy process, possibly mired in congressional fisticuffs or siestas across and between the aisles, it would nevertheless be more prudent than to allow the U.S. extradition statute to remain the completely vague, overly broad, sloth of a statute that it is today.

Congress might also want a voice in the appointment of the independent counsel and would be perturbed by the rejection of that idea because it would muddy the waters of an already murky procedure, undermining the very purpose of an accelerated mechanism. Additionally, the Supreme Court might not find that the legislative voice legally permissible.[230]

Investigating and Making the Ultimate Decision: An Independent Counsel and the Judiciary

Arguably, when implemented through the executive or legislative branch, the mechanism is not a "judicial decision" but an executive one.[231] While technically, this may be accurate, if the Department of State were to bypass the FBI and deliver requests for surrender and extradition directly to federal district judges, who would subsequently work with independent counsel to review the requests, time would be saved at the beginning of the process and the decision would be judicial. The FBI is traditionally the agency that investigates federal crimes and currently is the second step in the process. However, there is no compelling basis for presuming that extradition requests cannot be competently investigated by an independent counsel. This person would investigate the request, including supporting documentation and relevant facts, and present a memorandum of support or opposition for the request, leaving the ultimate decision with the judge. The judge would next review the memorandum and supporting documentation—if warranted, and base his or her judgment on the memorandum and documentation provided. If

[229] Bassiouni & Blakesley, *supra* note 76, at 402.
[230] *Morrison v. Olsen*, 487 U.S. 654, 682 (1988) (limiting Congress's power over independent counsel).
[231] Framework Decision, *supra* note 144, at art. 1.

the judge found that the request was legally, an arrest warrant would be issued and the warrant would provide the modality being used, surrender or extradition.

The Available Modalities: Extradition and Surrender

Both extradition and surrender should be sufficient with respect to the legal basis underlying this mechanism, be it executive or legislative. Scholars have suggested that surrender is an inappropriate term for the process of taking foreign nationals into custody to return them or send them to another state to be prosecuted because that process is extradition; to call it surrender causes ambiguous construction and erodes the legal basis by which the modality it implemented.[232] This author disagrees. Two reasons suggest that the terms surrender and extradition may coexist, may define the same type of process, and still not be interchangeable. First, as defined by the Rome Statute, surrender is the term that describes delivering up an individual from one state to another; the Statute defines extradition as the same act but based on a treaty, an international agreement between states.[233] Thus, according to the ICC, the results of surrender and extradition are the same, but the legal bases are different.

Because of the dynamics of states with respect to succession, failure, and development, surrender may be the most prudent modality by which certain states or organizations, in the absence of a treaty and without encroaching on sovereign rights, may be able to apprehend an international criminal. Accordingly, it would be unreasonable to ask that a state begin a treaty-making process if there is a modality available that would deliver a genuine international criminal to justice in a much shorter time than it would to begin, go through, and successfully conclude treaty deliberations.[234] The modality would serve not only the interest of the requesting state but the interest of the international legal community and, more importantly, the world community.

In the best interest of the global community, the United States mechanism would allow for both surrender and extradition. Yet the mechanism would be referred to as an accelerated extradition mechanism because extradition is the term used by the laws of most countries with respect to the desired result. Upon issuance of an arrest warrant, once a relator was located and placed in custody, the relator would not only be allowed to request bail, but also, similar to the EAW, if refusing consent to the request, the relator should be allowed a hearing on the issue of extradition or surrender.[235] The hearing would allow the relator to present a defense against the request. Allowing the relator to present a defense may slow the process as opposed to accelerate it, resulting in a complete trial on the merits of the original offense and thus offend notions of sovereignty with respect to the requesting state as well as possibly violate international and national law. However, over the entire length of the process, allowing for a defense against a request for extradition or surrender may not necessarily be slower.

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[232] Plachta, *supra* note at 151, at 190-94.

[233] Rome Statute, *supra* note 93, at art. 102

[234] Mackerel, *supra* note 145, at 368 (The UK enacted the Extradition Act of 2003 to reconcile their national laws with the EAW, providing 2 tracks for requesting states: one for EU Members and one for non-EU Members. The U.S. using surrender as one modality and extradition as a second modality could accomplish would be accomplishing something similar.).

[235] Framework Decision, *supra* note 144, at art. 5(1). The issue of bail is not definitive in U.S. courts, however. Though the right to bail is inherent within the Sixth Amendment of the United States Constitution, it is not provided for in the extradition code. Therefore, judges and magistrates have determined requests for bail using, in addition to the facts presented, their discretion.

Allowing for Consent or Defense with Non-Consent May Further Accelerate the Process

Currently, extradition in the U.S. can only be appealed by filing a writ of habeas corpus which relators often do if sought from the United States. Therefore, it may be more efficient to grant a hearing to be concluded within a specified time, after which the relator can decide to retain his or her position of non-consent or change their position to consent. Whereas this hearing would be more procedurally and substantively equitable than the current probable cause hearing, it may also be more efficient.[236] If consent is provided, summary proceedings would ensue and the relator would be expeditiously turned over to the requesting state. If a position of non-consent is maintained, the judge would have a certain amount of time by which to deliberate on the defense's case and decide to either grant or deny the request. If the judge determines to grant the request after this hearing, and barring any humanitarian reasons that would provide one final hearing to the relator, the individual would be extradited or surrendered.

Extradition Acceleration through Substantive Aspects

Irrespective of the route by which the mechanism is established, substantive provisions would nevertheless be a critical aspect of the modality. The requirement of reciprocity could be maintained, as well as the traditional interpretation of extradition treaties for states whose constitutions would require the traditional mechanism. The mechanism would be predicated on an enumeration of an inexhaustible list of offenses for which individuals could be extradited or surrendered. Additionally, offenses enumerated in international conventions and treaties, such as the Geneva Conventions and the Protocol to Prevent, Suppress and Punish Trafficking would be implicitly included within this list. Thus, the enumerated list would combine those offenses provided in the ICTR and the Framework Decision, as well as others.[237]

Additionally, the provisions establishing the mechanism would maintain the five requirements already incorporated within the U.S. procedures for extradition, but further expand substantive rights. For example, the rule of speciality is a cornerstone that should remain in place but by tailoring speciality in the fashion of *nullem crimen sine lege* per Article 22 of the Rome Statute, a more efficient rule is created. [238] Substantive requirements should also be predicated on the provision of *ne bis en idem* as provided for in the ICTY, which is not yet a requirement of U.S. extradition.[239] The double criminality aspect should be modified so that it is

[236] The current probable cause hearing provided by § 3184 is heavily weighted against the relator. The author proposes amending these procedures to eliminate the bias in a manner that will nevertheless maintain the efficient nature of the hearing. The bias is exemplified by the fact that the relator cannot confront witnesses and the Federal Rules of Evidence are not required and, thus, hearsay and a number of other elements that would not be allowed in regular criminal proceedings are allowed. The extradition code is broad in what is admissible into evidence with respect to the requesting state. Therefore it should be amended and narrowly tailored so as to render it at the very least neutral in terms of rights provided to those in custody. If the relator cannot confront witnesses, witnesses should not be used for the purposes of extradition or surrender. Precluding evidence of witnesses may be considered a radical proposition. However, circumstantial evidence may be just as compelling, if not more so, than eyewitness testimony or depositions. It is a questionable argument that most fugitives can only be found extraditable on the grounds of eyewitness testimony and that the code should not be amended to provide those who are in custody for extradition or surrender the same rights as those in custody for federal criminal charges.

[237] See discussions *supra*, pp. 11, 35

[238] See *supra* p. 23.

[239] See *supra* pp. 8-10.

not based on *per se* name of the offense, but on the acts from which the offense is determined. Framework Decision of the EAW provides right to counsel, as does the U.S., but also provides a right to a translator. Therefore, incorporating provisions from the Framework Decision and other international instruments, the proposed accelerated mechanism would also further protect the rights of the accused in extradition proceedings.

Notwithstanding the fact that it is critical to justice to protect the rights of the individual accused, the Framework Decision, balancing the rights of the international community against the rights of the individual, also limits immunities and privileges expanding the reach of the EAW and shrinking the loopholes by which international criminals can escape. Additionally, limits imposed on the number of hearings an individual may request also forecloses, to a certain extent, the possibility of a challenging, lengthy appeal process that is sometimes used strategically by those who are eventually found culpable.

Determining whether to establish an accelerated extradition through the executive branch or through the legislative branch may be the lesser of challenges the U.S. would have to face. The fact that terms are explicitly defined in statutes, even when amended to provide clarity and unambiguousness, does not mean that there will not be a misapplication, misinterpretation, or even non-interpretation of the language of the statute, including the re-defined terminology.[240] Other problems that could be experienced at the court level as opposed to the legislative level are breaches with respect to timing provisions and the consideration of other international obligations. Nonetheless, the U.S. would not have the issue of trying to reconcile different legal systems in order to facilitate the mechanism's implementation, as distinguished from the EU's issue regarding its Member States.[241] However, if the UK can implement the Framework Decision on the EAW effectively, and it seemingly has thus far, the U.S. should be able to master the implementation of its own mechanism. With little question, the U.S. federal courts have less of a challenge to confront when construing statutes that are clear and unambiguous than states attempting to pass national legislation to comport with multilateral treaties or conventions. Challenges may need confronting, but the breadth of those challenges, when considered from a single, national perspective as opposed to a regional perspective, appears less daunting and the purpose even more visible and seemingly attainable.

The modern challenge of international criminal law in bringing individuals responsible for committing egregious international crimes began with the plight of six million Jews. Since then, more than two-hundred innocents perished in a matter of minutes in Scotland; approximately two-hundred thousand were slaughtered during the Bosnian War; nearly eight-hundred thousand were massacred in Rwanda; almost three thousand were murdered in New York in a matter of a few hours; an unknown million of those who could be considered the living dead contribute to a seven billion dollar international sex-trafficking industry; and another unknown, yet huge, number of the living dead contribute to the thirty-three billion dollar drug-trafficking industry. Nevertheless, years, and sometimes decades, pass without the perpetrators of these crimes being brought before a court to answer for their actions. During the time the perpetrators are at large, millions of individuals and families grieve, legitimate enterprises suffer, and the global community suffers, as the perpetrators enjoy the million-dollar profits reaped from the carnage, in which they planned, participated or facilitated. The foregoing analysis of extradition procedures and substantive requirements implemented by the tribunals and courts that were to prevent these atrocities was to illustrate methods that the U.S., and other national courts,

[240] Mackerel, *supra* note 145, at 369.
[241] *Id.* at 375.

should implement as it substantively modifies its extradition code to help end the suffering of the global community. It has been more than a century United States extradition procedures have substantively changed. It is time that the U.S. extradition procedures and policies join their European counterparts and work toward the problems existing not in the nineteenth century, but existing in the twenty-first century.