Will Amanda Knox Go Back to Italy? An Examination of Extradition Law and the Necessity of Repurposing Agreements in the Fight Against Transnational Crime

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I. INTRODUCTION: YESTERDAY'S STORY IS TODAY'S NEWS

Consider the following sequence of events: law enforcement officers enter a residence and discover a murder victim. The scene is horrifying. The victim's body is covered in multiple stab and slash wounds, many on the neck and throat. The police officers find no traces of a suspect at the scene. The subsequent investigation leads law enforcement to people with close ties to the victim. Within a short time, the police interview two people who make incriminating statements that lead investigators to believe they have found their prime suspects. These two people are not citizens of the country where the brutal murder occurred. As details unfold about the investigation and the upcoming trial, complicated questions arise about the suspects' extradition. Can

* © 2014 Melinda Lim. J.D. candidate 2015, Tulane University Law School; B.A. 2010, University of Virginia. I dedicate this Article to my parents, Ric and Linda Lim. Only with their love and support have my goals become achievements. I want to thank all of my mentors for their invaluable guidance and steadfast faith in me. Lastly, I want to thank my friends who have become my family, my chosen family. You each make moments like these more joyful, and I am so lucky to share this with all of you.

they be extradited to the country where the crime was committed in order to face a foreign justice system? What rights, if any, could protect them from extradition? What treaty protocols are the countries bound by and will those commitments be honored?

At first glance, these facts appear to describe the now infamous Amanda Knox trial, involving the murder of Meredith Kercher in Perugia, Italy.[1] In 2007, Amanda Knox was studying abroad in Perugia, living with three roommates including Meredith Kercher, a British student also studying abroad.[2] On November 2, Kercher's body was found in their apartment. Police reported that her throat was slashed and that she was possibly raped.[3] The police arrested three suspects, including Knox and the man she was dating, Raffaele Sollecito.[4] The trial captured the world's attention; international media released reports every hour, some with live feeds updating readers on any detail about the trial and Kercher's murder.[5]

However, the above set of facts does not describe the trial for Kercher's murder, Knox's fate in the Italian courts, or any incident that occurred in Perugia. Instead, those facts detail the real scenario the European Court of Human Rights (ECtHR) reviewed in *Soering v. United Kingdom*,[6] eighteen years before Amanda Knox flew to Italy to study abroad.[7] In 1966, Jens Soering, a citizen of Germany, attended the University of Virginia as a student.[8] At the time, he was romantically involved with Haysom, a Canadian citizen.[9] Haysom's parents did not condone the relationship. After Haysom and Soering confronted Haysom's parents, William Reginald Haysom and Nancy Astor Haysom, the couple stabbed and killed them.[10] Haysom and Soering eventually

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1. *See* Ian Fisher, *Grisly Murder Case Intrigues Italian University City*, N.Y. TIMES (Nov. 13, 2007), http://www.nytimes.com/2007/11/13/world/europe/13perugia.html?ref=amandaknox&_r=2&.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Andy McFarlane, '*Foxy Knoxy', a Weather Prayer and Commons Chaos Make Headlines*, BBC NEWS (Jan. 31, 2014, 1:35 PM EST), http://www.bbc.com/news/blogs-the-papers-25973946; Crimesider Staff, *A Timeline of the Amanda Knox Case*, CBS NEWS (Jan. 31, 2014, 2:45 PM), http://www.cbsnews.com/news/a-timeline-of-the-amanda-knox-case/; *Amanda Knox News*, N.Y. TIMES (Mar. 24, 2014, 2:16 PM CT), http://topics.nytimes.com/top/reference/timestopics/people/k/amanda_knox/.

6. Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 4 (1989).

7. Kristi Oloffson, *Amanda Knox, Convicted of Murder in Italy*, TIME (Dec. 4, 2009), http://content.time.com/time/world/article/0,8599,1945430,00.html.

8. *Soering*, 11 Eur. Ct. H.R. (ser. A) at 4.

9. *Id.*

10. *Id.*

disappeared from Virginia, and in April 1986, the two were arrested in England for check fraud.[11]

While the Knox and Soering cases occurred decades apart, the two situations echo each other in more ways than one. Most notably, both cases involve questions of extradition for crimes that do not involve political or military offenses. The United States sought Soering's extradition, asking the United Kingdom to honor the request under the Extradition Treaty of 1972 between the United States and the United Kingdom.[12] The question presented to the United Kingdom, as well as the ECtHR, was whether or not Soering's possible death penalty punishment in the state of Virginia would breach article 3 of the European Convention on Human Rights (ECHR), an agreement that bound the United Kingdom to not extradite citizens who may face the death penalty in the requesting country and conflicted with the United States' extradition request of Soering for the Haysoms' murder.[13]

On the other hand, the possibility of Knox's extradition is a new question arising after her lengthy trial and investigation. An Italian court of appeals in Florence found Knox and Sollecito guilty of Meredith Kercher's murder in January 2014.[14] In Italy, Amanda Knox can be tried again for the same crime before a higher level of the Italian courts.[15] While Knox's legal team can still appeal to the Supreme of Court of Italy,[16] there are still questions regarding whether she will be extradited back to Italy to face another sentence.[17] The United States recognizes a right against double jeopardy, while Italy does not.[18] After her trial, Knox returned to the United States; however, there is a possibility that Italy will seek her extradition for a subsequent trial.[19] Her extradition would violate her right against double jeopardy as a U.S. citizen, a right in direct conflict with Italy's laws. The Soering and Knox cases boil down to the essential question: How effective are current extradition treaties in serving their purpose? Furthermore, what exactly is that purpose in a world that must find solutions for preventing crimes spanning from

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11. *Id.*
12. *Id.*
13. *Id.* at 1-2.
14. Hada Messia & Steve Almasy, *Amanda Knox Found Guilty of Murder Again by Italian Court*, CNN (Jan. 30, 2014, 9:28 PM EST), http://www.cnn.com/2014/01/30/world/europe/italy-amanda-knox-retrial/.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Amanda Knox and Raffaele Sollecito Guilty of Kercher Italy Murder*, BBC NEWS (Jan. 30, 2014, 10:05 EST), http://www.bbc.com/news/world-europe-25941999.
19. Messia & Almasy, *supra* note 14.

political offenses to drug smuggling, terrorism, and murder? How should the law of extradition evolve, if it should at all, to remain an effective solution for countries to protect their citizens and adjudicate crimes committed within their borders?

Part II of this Comment first examines the history of extradition, specifically tracing back the origin of the term *extradition* and the structure of early extradition treaties. Part III explores the modern-day extradition procedures in the United States. Part IV breaks down the differences between bilateral treaties and multilateral treaties to show an evolution in the drafting of extradition treaties. Part V then discusses the key issues faced in executing extradition treaties, focusing on the rule of noninquiry, double criminality, and differing rights. These issues result from nations' desires to protect their own sovereignty. The difficulties in executing these treaties are evidence of the need to repurpose and restructure them to honor both the extraditing country's sovereignty and the requesting country's interest in adjudicating crimes committed on its soil against its citizens. Part VI examines how this can be accomplished and then concludes with a discussion of the dangerous measures that countries resort to when governments decide against invoking extradition treaties, namely legally sanctioned kidnapping and covert operations. The complicated and risky situations that can arise without extradition treaties will be illustrated by a discussion on U.S. case law and the Columbia-U.S. mission to execute the infamous drug lord Pablo Escobar. Overall, this Comment seeks to emphasize how important extradition laws are in today's world, where transnational crime is a concern for every country, and how that importance must be addressed by rethinking the way these treaties are drafted and executed.

II. A BRIEF HISTORY OF EXTRADITION

Authorities have different opinions on when extradition became a common practice between countries. One scholar avers that it may have begun when the Philistines requested the extradition of Samson from Israel, while another scholar focuses on the Treaty of Peace between the Egyptians and Hittites, as signed by Ramses II, Pharaoh of Egypt, and King Hattusili of the Hittites.[20] However, extradition did not become a subject of treaties until the Middle Ages.[21] For example, France and England entered into a treaty in 1303, disallowing asylum to their

20. *Compare* Max Schaumburger, *International Extradition*, 6 LOY. L.J. 32, 33 (1924), *with* Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39, 41-42 (1981).

21. Schaumburger, *supra* note 20, at 33.

enemies.[22] Under the reign of Charles II of England, Denmark agreed to extradite those who were charged with the murder of Charles I.[23] From its early history, extradition was used as a political tool only in cases of high priority for the state seeking to prosecute the alleged criminal.[24] Thus, extradition only involved the political interests of crimes against the state, not between individual citizens.[25] Prior to the modern view of extradition, incidents of countries delivering enemies to the requesting countries was limited:

> [R]endition of fugitives occurred on a haphazard basis . . . . [T]hese renditions were totally political occurrences in which the political enemies of the various sovereigns, rather than common criminals, were the objects; coercion, not the binding force of a legal agreement or some abstract international right or duty, was the true motivator of compliance with such requests.[26]

Therefore, extradition was not a normal practice by countries, and it was certainly not commonly the subject of treaties; instead, it was politically motivated and expected without the need for a treaty between countries that had an existing relationship.

Extradition eventually became applicable to ordinary crimes as countries sought to use it as a means to control crime.[27] However, decisions on whether to honor extradition requests still turned mostly on existing relationships between heads of state.[28] By the early eighteenth century, extradition of suspects for ordinary crimes committed against private citizens became a subject worthy of its own treaty, as evidenced by the 1736 treaty between France and Holland for the extradition of citizens charged with ordinary crimes.[29] France continued to enter into similar agreements with other countries, laying the foundation for modern extradition treaties.[30] French extradition treaties became a model for the structure and substance of modern extradition agreements, as well as the procedures behind extradition.[31]

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22. *Id.*
23. *Id.*
24. *Id.*
25. *See id.*
26. Blakesley, *supra* note 20, at 42.
27. Schaumburger, *supra* note 20, at 34.
28. *Id.*
29. Blakesley, *supra* note 20, at 50.
30. *Id.* at 50-51.
31. *Id.* at 51.

III. MODERN-DAY EXTRADITION PROCEDURES IN THE UNITED STATES

Modern-day extradition is defined as "the formal surrender of a person by a state to another state prosecution or punishment."[32] In the United States, extradition is largely based in treaties;[33] currently the United States has 122 bilateral extradition treaties in force.[34] In the United States, there is a set procedure when a country requests extradition of a person within the United States, and this procedure is similar across all bilateral treaties where the United States is a contracting party.[35] Extradition is a matter handled by the State Department and the Secretary of State, whose power is largely unreviewable.[36] The country petitioning extradition must submit a formal request to the State Department along with any documents specified in the governing treaty.[37] The country submitting the request must establish probable cause that the defendant committed the crime and include these specified documents in the request sent to the State Department.[38] The United States Department of Justice also plays a part in evaluating extradition requests, with the United States Office of International Affairs (OIA) and United States Attorneys each charged with certain duties.[39] These offices obtain a warrant to arrest the fugitive, who is then brought before the magistrate judge or district judge.[40] Under 18 U.S.C. § 3184 a hearing is held to determine if the fugitive is extraditable.[41] A judge makes this determination by addressing the following: (1) does the requesting country have a valid extradition treaty with the United States, (2) is the relator the person sought, (3) is the charged offense extraditable, (4) does it satisfy the requirement of double criminality, (5) has probable cause been established, (6) have all relevant documents subscribed by the treaty been filed and authenticated, and (7) has the requesting country followed all treaty requirements and statutory procedures.[42] That decision

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32. MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98-958A, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES summary (2010).

33. *Id.* at 1.

34. *Id.* app. A.

35. *Id.* at 19.

36. *Id.* at 25 n.116.

37. *Id.*; Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1201 (1991).

38. Semmelman, *supra* note 37, at 1202.

39. GARCIA & DOYLE, *supra* note 32, at 20.

40. *Id.*

41. *Id.*

42. *Id.* at 21.

is then reviewed by the Secretary of State, who conducts a separate investigation that is broader than the process conducted at the judicial level. The Secretary of State can consider the court's record alongside any information that the State Department uncovers through its own means.[43] The Secretary of State's decision either to surrender the fugitive or to refuse the request made by the foreign country is not reviewable by the U.S. courts, and the decision is fully within the Secretary of State's discretion.[44] The OIA then arranges the transfer of the fugitive.[45]

The appeals process is fairly strict if extradition is denied; the government soliciting extradition has very limited options.[46] If the magistrate presiding over the extradition hearing finds extradition is not possible because of some identified obstacle, and thus will not certify the case, the requesting government must file a new complaint before a different judge or magistrate.[47] This can go on indefinitely for the requesting country if on each appeal the different judges or magistrates deny extradition.[48] If, on the other hand, the magistrate judge decides there are no obstacles to extradition and certifies the case to the Secretary of State, who then through his or her independent investigation finds it is within his or her discretion to deny surrender, that decision is not reviewable by the courts.[49] If the fugitive wants to challenge the finding of his legitimate extradition, he does not have a broad right to appeal.[50] He does have a right to a habeas corpus petition, but even that is fairly limited.[51] While each extradition request is different because each set of facts and governing treaty is different, these procedures define the general framework for extradition requests in the United States.

IV. BILATERAL AND MULTILATERAL TREATIES

U.S extradition treaties are structured in one of two ways.[52] The most common form is the bilateral treaty.[53] Like many U.S. statutes, treaties can be amended over time and are redrafted in order to address

43. *Id.* at 29.
44. *Id.* at 25.
45. *Id.* at 20.
46. *Id.* at 25.
47. *Id.*
48. *Id.*
49. Semmelman, *supra* note 37, at 1203.
50. GARCIA & DOYLE, *supra* note 32, at 25.
51. *Id.* (explaining that a habeas petition can only be used to resolve questions over jurisdiction, whether the crime properly falls within the treaty the requesting party invoked and whether evidentiary requirements have been met).
52. *Id.* at 2.
53. *Id.*

the evolving relationships between the contracting parties.[54] One example of an amendment to a particular bilateral treaty is the U.S.-Italy Extradition Treaty.[55] The U.S. government and the Italian Republic signed the original treaty on October 13, 1983.[56] With the creation of the European Union under its official title in 1992, the United States and the European Union drafted a new extradition treaty.[57] That treaty came into force in June 2003.[58] The U.S.-Italy Treaty of 1983 was amended in 2006 in order to address any conflicts with the new U.S.-E.U. extradition treaty.[59] The adjusted terms included determining the documents required for extradition requests, the channels of government that would have responsibility over extradition procedures, the terms of extradition with respect to conduct punishable by death in the country requesting extradition, and the protocols countries must adhere to when asked to submit sensitive information in support of an extradition request.[60]

The amended U.S.-Italy treaty incorporated some common language of extradition agreements, particularly regarding the types of offenses that were covered by the treaty.[61] Article 2 of the treaty provides, "An offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty."[62] Several treaties include this type of qualification—using the sentencing of the particular crime—as the most important component in deciding whether or not the treaty covers an offense.[63] Furthermore, the treaty employs boilerplate language regarding conspiracy to commit a crime, an offense that is reciprocally

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54. *See Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, U.S. DEP'T ST. (Jan. 1, 2013), http://www.state.gov/documents/organization/218912.pdf.

55. *See* Extradition Treaty, U.S.-It., Oct. 13, 1983, 35 U.S.T. 3023 [hereinafter U.S.-It. Extradition Treaty].

56. *Id.*

57. Treaty on the European Union, July 29, 1992, 1992 O.J. C191/1.

58. Extradition Agreement Between the United States of America and the European Union, U.S.-E.U., June 25, 2003, T.I.A.S. No. 10,201 [hereinafter U.S.-E.U. Extradition Treaty].

59. U.S.-It. Extradition Treaty, *supra* note 55.

60. *Id.*

61. GARCIA & DOYLE, *supra* note 32, at 6.

62. U.S.-It. Extradition Treaty, *supra* note 55, art. II.

63. GARCIA & DOYLE, *supra* note 32, at 6 (listing specific treaties and showing that the same language is used in the E.U. agreement).

extraditable.[64] Like many other treaties,[65] the U.S.-Italy Extradition Treaty prohibits extradition for political or military offenses.[66]

Multilateral extradition treaties are structured differently than bilateral extradition treaties and can take on two different forms.[67] One form exclusively addresses jurisdiction. An example is the 1933 Montevideo Convention on Extradition, which the United States is a party to, but which has historically never been invoked for the purpose of extradition.[68] Another example is the Extradition Agreement Between the United States and the European Union that became effective in February 2010.[69] As seen in the discussion of the U.S.-Italy Extradition Treaty, the United States' treaty with the European Union is made effective through the separate treaties that the United States has entered into with the individual members of the European Union.[70] The second form of multilateral treaty purports to deter and punish transnational crimes and human rights violations by obligating the contracting parties to either prosecute or extradite the persons who allegedly commit those crimes.[71] These types of multilateral extradition treaties are more specific than the first type of multilateral extradition treaties as they enumerate specific crimes where extradition may be properly requested.[72] Today, bilateral treaties and multilateral treaties have become the traditional structures for extradition agreements.

V. KEY ISSUES

Extradition treaties serve two important purposes: (1) to protect the sovereignty of the contracting nations and (2) to ensure that crimes committed against either country will not go without proper judicial proceedings. These treaties establish clear guidelines outlining which crimes are extraditable offenses and the procedures the contracting countries must follow in the event of an extradition request. The desire for cooperation is often stated in the beginning of the treaty.[73] For example, the preamble of the Extradition Treaty between the European Union and the United States asserts the general purposes of the

64. U.S.-It. Extradition Treaty, *supra* note 55, art. II.
65. GARCIA & DOYLE, *supra* note 32, at 7; Semmelman, *supra* note 37, at 1202.
66. U.S.-It. Extradition Treaty, *supra* note 55, art. V.
67. GARCIA & DOYLE, *supra* note 32, at 2.
68. *Id.*
69. U.S.-It. Extradition Treaty, *supra* note 55, art. V.
70. *See id.* at 4.
71. GARCIA & DOYLE, *supra* note 32, at 3.
72. *See id.*
73. U.S.-E.U. Extradition Treaty, *supra* note 58.

contracting parties in entering into the agreement.[74] These treaties are meant to achieve cooperation between contracting states by emphasizing the rights of individual citizens, giving deference to other judicial systems, and ensuring that the contracting parties are allowed to protect their own citizens from crimes committed against them or within their physical territories.

Nevertheless, extradition treaties present particular problems in their execution. There are a vast number of extradition treaties that have been revised within the last fifteen years, yet extradition requests have become high profile media topics where critics of the extradition request claim these requests infringe upon state sovereignty. This Comment will address three issues relevant to the problems that arise in interpreting and executing treaties. First, this Comment will explore the rule of noninquiry, a framework adopted only in U.S. courts. Second, it will address double criminality and the problems in its application. Third, it will address the issues that arise when one contracting nation to an extradition treaty protects certain acts of individuals while the other contracting nation either does not recognize that right or criminalizes the act. These three issues present recurring concerns in extradition treaties, leading to a call for rethinking the structure as well as the overall purpose of extradition treaties.

A. The Rule of Noninquiry

Under the rule of noninquiry, a court presented with an extradition request is prohibited from examining the criminal justice system of the country soliciting extradition.[75] Not all U.S. courts use this rule, but those that do follow a certain procedure when doing so. This rule is an absolute bar against any evaluation of the requesting country's criminal justice system; the inquiring court cannot consider the possibility of abuse by the foreign judicial system if the fugitive is surrendered to the requesting country.[76] Furthermore, this rule prohibits a comparison between the judicial system of the country where the fugitive is currently located and the judicial system of the receiving country.[77] This is important because most judicial officers would not want to hold that their

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74. *Id.* ("DESIRING to combat crime in a more effective way as a means of protecting their respective democratic societies and common values, HAVING DUE REGARD for rights of individuals and the rule of law, MINDFUL of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law . . . .").

75. Semmelman, *supra* note 37, at 1198.

76. *Id.*

77. *Id.*

own judicial system is inadequate or incompetent as compared to another country's judicial system. One of the reasons this rule exists is because the U.S. Judicial Branch gives deference to the President and the Senate's power to draft treaties. Under the United States Constitution, it is within the Executive Branch's power to enter into treaties with the advice and consent of the United States Senate.[78] Because these treaties are entered into by the leaders of nations, it is fair to conclude that the treaties were drafted with consideration given to the judicial systems of both countries. Extradition treaties are a sign of international cooperation, and thus the contracting parties most likely have stable foreign relations prior to drafting extradition treaties. Extradition is tasked to the countries' leaders, and its execution is tasked to the stated authorities; the role of the court is minimal until there is a trial.

One critic of the noninquiry rule, scholar Jacques Semmelman, believes the extraditing country must examine the requesting country's justice system in order to determine if that country would protect the defendant from human rights violations, such as torture.[79] Semmelman believes it is the duty of U.S. judges and magistrates to evaluate a foreign country's justice system to ensure fugitives' human rights are protected.[80] Furthermore, he claims the Executive Branch should not be given the sole right to decide extradition requests because it is motivated by political rather than human rights concerns; the Executive Branch's concerns over foreign relations and political expediency will always outweigh any concern over individual rights of fugitives.[81] Therefore, Semmelman calls for a different procedure, one requiring the courts to conduct a limited investigation into how the requesting country's judicial system has handled similar cases in the past.[82] This assessment is similar to the interest-balancing test often seen in transnational civil litigation cases,[83] where the court speculates whether a fugitive will be guaranteed a fair trial without any kind of mistreatment. If a court concludes that honoring the extradition request would put the fugitive's well-being and judicial proceedings in jeopardy, it would bind the Secretary of State from sending the fugitive to the requesting country.[84]

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78. U.S. CONST. art. II, § 2, cl. 2.
79. *See* Semmelman, *supra* note 37, at 1199-1200.
80. *Id.*
81. *Id.*
82. *Id.* at 1200.
83. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 687 (Vicki Been et al. eds., 5th ed. 2011).
84. Semmelman, *supra* note 37, at 1200.

The desire to protect sovereignty is a motivation of the noninquiry rule. The concern over sovereignty is recognized in extradition treaties.[85] These agreements are predicated on the mutual respect that countries possess for each other's sovereignty and their interest in adjudicating crimes committed within their territories and against their citizens.[86] Extradition treaties are written as a reassurance that this cooperation will "combat crime in a more effective way as a means of protecting their respective democratic societies and common values."[87] From this perspective, it seems inappropriate for U.S. courts to evaluate the judicial systems of other countries when extradition requests are filed properly with the Secretary of State and the requesting country is a party to a bilateral treaty currently in force. In fact, many U.S. courts have adopted the rule of noninquiry, leaving the actual substance of the request to be handled by the State Department and the Secretary of State.[88]

A major critique of the rule of noninquiry is that it is an invention of the U.S. courts, established through decades of case law.[89] Furthermore, not all U.S. courts use the rule of noninquiry, resulting in its uneven application in lower courts.[90] Because some countries may not apply the rule at all, this unevenness extends across judicial systems. In foreign courts, the same unevenness in application of the rule of noninquiry exists.[91] This could lead to a disparity in the number of extradition requests fulfilled due to the varying degrees of application in different courts and countries.

As discussed previously, *Soering* highlights the issues associated with executing an extradition request. This case is an example of foreign courts completely ignoring the rule of noninquiry when presented with an extradition request. In *Soering*, the ECtHR was presented with the issue of whether Soering, a German citizen[92] who was residing in the United Kingdom at the time of his arrest for check fraud,[93] would face the death penalty in the United States.[94] The United States requested Soering's extradition to face murder charges in Virginia,[95] a state where

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85. *See* U.S.-E.U. Extradition Treaty, *supra* note 58 (using the language "HAVING DUE REGARD for the rights of individuals and the rule of law").
86. *Id.*
87. *Id.* pmbl.
88. Semmelman, *supra* note 37, at 1200.
89. *See id.* at 1198-1201.
90. *Id.*
91. *See* Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at 6 (1989).
92. *Id.* at 1.
93. *Id.* at 4.
94. *Id.* at 1.
95. *Id.* at 4.

the death penalty is still allowed in capital cases.[96] The main question for the court was whether Soering's extradition would possibly expose him to ill treatment, including punishment that would violate article 3 of the ECHR.[97] The court held that his extradition would violate article 3 of the ECHR because if Soering was sentenced to death he would suffer mental anguish while awaiting his execution.[98] The length of time he would spend on death row and the appeals process, both of which would add to his mental suffering, weighed heavily in the court's decision.[99] For the court, his death sentence did not need to be certain to find extradition to be improper; there only needed to be a possibility that Soering could suffer.[100]

This is a classic case of uneven resolution in extradition cases because of the rule of noninquiry. The ECtHR's evaluation of Virginia's capital punishment laws violates the U.S. rule of noninquiry. The ECtHR explicitly states, "[T]he United Kingdom has no power over the practices and arrangements of the Virginia authorities."[101] In essence, the court speaks to the sensitive issue of sovereignty. The individual states of the United States have the authority to draft their own penal statutes and impose their own sentencing requirements.[102] On the other hand, the United Kingdom is bound to other treaties meant to protect human rights. In this case, the ECtHR evaluated the quality, procedure, and even predicted the outcome of Soering's case in Virginia.[103] The court conducted their analysis despite the Attorney General of Virginia's assuring the court that if Soering were to be convicted of murder in Virginia, the Attorney General would make a case against applying the death penalty, voicing all of the concerns listed by the court in the Soering opinion.[104] This begs the question, Should the ECtHR investigate another country's judicial system in order to predict the outcome of Soering's case? Arguably the ECtHR is not in a position to evaluate the outcome of capital cases tried by Virginia lawyers, in Virginia courtrooms, and in front of juries comprised of Virginia citizens. Their expertise does not lie in the application of U.S. common law in capital

96. VA. CODE ANN. § 19.2-264.4 (1980).
97. *Soering*, 11 Sur. Ct. H.R. (ser. A) at 6.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 27.
102. *See* U.S. CONST. amend. X.
103. *See* Soering, 11 Eur. Ct. H.R. (ser. A).
104. *Id.* at 9.

cases, especially when many European countries have abolished the death penalty long before *Soering* came to the court.[105]

The issues arising out of the rule of noninquiry circle back to concerns surrounding sovereignty. A nation has a right to structure its judicial system as it sees fit, and, in the United States, individual states are given latitude to structure their own penal codes as their state legislatures decide.[106] Foreign nations will inevitably disagree over specific issues, such as the conflict over sentencing in *Soering*, but is that disagreement enough to bar extradition? The lack of uniformity in the rule of noninquiry across contracting parties to extradition treaties creates a lack of uniformity in extradition decisions. Deference should be given to the treaties invoked. If contracting parties are concerned over one country's use of capital punishment, the countries can address that concern by inserting a specific provision into the treaty.[107] Interest balancing is not a task that courts can perform effectively; courts will always find their interests to be of higher value.[108] Treaties should be drafted in such a way that either prevents this type of interest balancing, or these concerns should be addressed by other agreements.

B. Double Criminality

Double criminality, also referred to in some texts as dual criminality,[109] plays an important role in the drafting and execution of extradition treaties. Broadly speaking, double criminality is rooted in the idea that contracting parties to a treaty or any agreement concerning international criminal law share similar values and legal prescriptions; it is when two countries both consider the same action illegal.[110] Double criminality is not exclusive to extradition law, but can be found in other topics of international criminal law.[111] When used in extradition law, double criminality is a prerequisite for extradition.[112] Countries began incorporating double criminality into extradition treaties to ensure reciprocity as these treaties evolved into a means to combat crime.[113]

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105. *Id.* at 5.

106. *See* U.S. CONST. amend. X.

107. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., art. 7, Mar. 31, 2003, T.I.A.S. No. 07-426 [hereinafter U.S.-U.K. Extradition Treaty].

108. BORN & RUTLEDGE, *supra* note 83, at 687.

109. GARCIA & DOYLE, *supra* note 32, at 9.

110. Leah Gardocki, *Double Criminality in Extradition Law*, 27 ISR. L. REV. 288, 288 (1993).

111. *Id.*

112. GARCIA & DOYLE, *supra* note 32 at 10.

113. Schaumburger, *supra* note 20, at 39; Gardocki, *supra* note 110, at 289.

Currently, double criminality is also a measure to protect individual rights.[114]

The first method involves both countries collaborating on creating a specific list of extraditable offenses in treaties.[115] The second method is to list extraditable offenses and also include a separate provision that states dual criminality is required.[116] Lastly, using a third method, the treaty can list crimes included in both countries' penal codes and qualify them as extraditable.[117]

While seemingly straightforward, issues can arise in the treaty's execution. Most notably, problems occur when it becomes necessary for a government to interpret a foreign country's penal code.[118] An example of this occurs during the analysis of criminal defenses that are recognized in one country but not the other. There can be confusion when a country must decide if certain defenses in criminal trials are recognized by both countries, most notably the insanity defense.[119] Because of these interpretation issues, critics of double criminality favor the development of international cooperation in criminal matters.[120] These critics believe extradition should be based more on "shared opinions of the community of states about acts of a certain kind" and less on the double criminality requirement.[121]

While double criminality is now almost boilerplate language in most of the extradition treaties involving the United States,[122] there is still the question of whether certain rights that shield fugitives must also be recognized by both of the states that are parties to an extradition treaty. Consider the scenario where one country recognizes a right, but the country requesting the fugitive's extradition does not recognize that same right. Because treaties do not address this issue directly, it is decided on an ad hoc basis.[123]

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114. *Id.*

115. GARCIA & DOYLE, *supra* note 32, at 10.

116. *Id.*

117. *Id.*

118. Gardocki, *supra* note 110, at 290.

119. *Id.*

120. *Id.* at 293 (quoting H.H. Jescheck, *Die internationale Rechtshilfe in Strafsachen in Europe*, 66 ZS&W 531-32 (1954)) (explaining that he would like to abolish the requirement of double criminality completely); *id.* (quoting C. Markees, *Rapport suisse. Les problemes actuels de l'extradition*, 3-4 REVUE INTERNATIONALE DE DROIT PÉNAL 747-57 (1968)) (explaining that double criminality should be replaced by provisions that the criminal law of the requested states must also protect the legal goods damaged by the act imputed to the fugitive)).

121. *Id.* at 294.

122. GARCIA & DOYLE, *supra* note 32, at 10.

123. *See id.*

An example of this complexity can be seen in a case involving an extradition treaty between Germany and the United States.[124] Because of the rise of Nazi Germany before and during World War II, the Republic of Germany instituted strict laws against neo-Nazi activity.[125] Certain acts conducted within Germany's physical territory, such as the distribution of anti-Semitic propaganda, were criminalized. These laws are unique to the German criminal code; no other country affords citizens protection against neo-Nazi propaganda.[126] Gary Lauck, a U.S. publisher famous for distributing neo-Nazi propaganda, was arrested by the German police in Demark for those activities in September 1995.[127] He was a U.S. citizen who had not visited Germany for nearly twenty years prior to his arrest.[128] In the United States, Lauck could avoid punishment for his neo-Nazi publications because he was protected by the First Amendment, even though the same acts were illegal in Germany.[129] The three countries involved in his extradition did not possess a shared view of free speech; Germany specifically criminalized his activities, the United States protected him through the First Amendment, and Denmark also protected his actions through legislation.[130] Furthermore, Denmark and Germany were also parties to the Council of Europe's European Convention on Extradition (ECE).[131] The ECE supersedes the bilateral treaties that member nations enter into individually,[132] making Lauck's case even more complicated. Lauck was eventually extradited to Germany where he was tried and found guilty of distributing neo-Nazi propaganda.[133]

C. Differing Rights

Countries may differ regarding what rights and protection they afford their citizens. For example, not every country recognizes a citizen's protection from double jeopardy. Double jeopardy is defined as "[t]he fact of being prosecuted or sentenced twice for substantially the same offense."[134] The operation of double jeopardy in extradition

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124. *See* Thomas F. Muther, Jr., *The Extradition of International Criminals: A Changing Perspective*, 24 DENV. J. INT'L L. & POL'Y 221 (1995).
125. *Id.* at 221.
126. *Id.*
127. *Id.*
128. *Id.* at 221-22.
129. *Id.* at 222.
130. *Id.* at 222, 225.
131. *Id.* at 223.
132. *Id.*
133. *Gary "Gerhard" Lauck Profile*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/profiles/gary-gerhard-lauck (last visited Oct. 23, 2014).
134. BLACK'S LAW DICTIONARY 598 (10th ed. 2014).

requests is not completely predictable. Double jeopardy sometimes attaches to the actions of a U.S. citizen,[135] and courts have said it will not be applied to terrorist activities regardless of other countries' court decisions regarding the same acts.[136]

In 1997, the United States Court of Appeals for the District of Columbia reviewed a case involving Omar Mohammed Ali Rezaq, a Palestinian who hijacked a plane departing from Malta, where he shot, injured, and killed several passengers, including two U.S. citizens.[137] The hostage situation ended when Egyptian commandos stormed the airplane.[138] Eventually, Rezaq was charged by Maltese authorities for attempted murder, murder, and hostage taking.[139] He pled guilty to those charges and was sentenced to twenty-five years in prison, but only served seven of those years in Maltese prison.[140] Through contacts in Nigeria, FBI agents transported Rezaq to the United States where he was indicted and tried for air piracy.[141] The United States District Court for the District of Columbia sentenced him to life in prison.[142] On appeal, he attempted to argue that double jeopardy would prevent the court from trying his case, however, the D.C. Circuit quickly dismissed his argument.[143] While the court acknowledged that his defenses came out of "the international nature of the crime of air piracy,"[144] it would not bar his trial in the United States on the grounds of his right against double jeopardy because the elements of air piracy charged in the United States are different from the Maltese charges and because the rights contained within the U.S. Constitution will not apply to foreign nationals.[145] When analyzing air piracy, the court strained to emphasize that the reason air piracy is different is because it is committed onboard an aircraft and because the U.S. statute seeks to protect different interests.[146]

The D.C. Circuit's dismissal of Rezaq's invocation of double jeopardy is logical. The U.S. Constitution exists to protect U.S. citizens,

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135. Alyssa Newcomb, *Amanda Knox's Guilty Verdict Raises Specter of Extradition*, ABC NEWS (Jan. 30, 2014), http://abcnews.go.com/International/amanda-knoxs-guilty-verdict-raises-specter-extradition/story?id=22296604.

136. United States v. Rezaq, 134 F.3d 1121, 1130 (D.C. Cir. 1998).

137. *Id.* at 1126.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1127.

143. *Id.* at 1128.

144. *Id.* at 1127.

145. *Id.* at 1128.

146. *Id.* at 1129.

and thus a foreigner convicted of terrorist activities by another nation that affected U.S. citizens cannot use the supreme law of the land in his favor. It then logically follows that certain rights attach to a U.S. citizen when they go abroad, one of which is double jeopardy. This is also the argument made in favor of denying Amanda Knox's extradition.[147] Knox was first tried in Italy and her case was again tried in an Italian appeals court in Florence, and U.S. attorneys have argued that double jeopardy should protect her from possible extradition to Italy.[148]

The question presented by the trials of Knox and Rezaq is whether they should be protected by the rights afforded to them by their home countries, thus allowing Knox to stay in the United States. As a U.S. citizen, Knox is afforded certain rights, and it is a magistrate's task to determine if her rights would be violated by her extradition to Italy.[149] The D.C. Circuit mentioned in *Rezaq*, "It is certainly possible that a treaty could contain a double jeopardy provision more restrictive—that is, barring more prosecutions—than the Constitution's Double Jeopardy Clause."[150] This is again an issue over sovereignty. Can each nation impose on certain fugitives its own standard doctrine and legal system to advance its interests in protecting its own citizens?

VI. REVISITING AND REPURPOSING EXTRADITION TREATIES

Extradition treaties serve a legitimate purpose and are a guarantee between the contracting nations that cooperation will occur when matters arise that will invoke the treaty.[151] Historically, they have covered many different types of crimes and have protected various national interests shared by contracting countries.[152] However, it is time to rethink the way that these treaties are structured and what they are designed to achieve. Recently, countries involved in extradition procedures criticize the way these matters are handled, claiming a country will put its own interests before extradition requests, which leads to a number of denials of extradition requests.[153] This would not be a surprise, as this Comment has

147. Messia & Almasy, *supra* note 14.

148. *Id.*

149. Alyssa Newcomb, *Amanda Knox's Guilty Verdict Raises Specter of Extradition*, ABC NEWS (Jan. 30, 2014), http://abcnews.go.com/International/amanda-knoxs-guilty-verdict-raises-specter-extradition/story?id=22296604.

150. *Rezaq*, 134 F.3d at 1128.

151. U.S.-U.K. Extradition Treaty, *supra* note 107.

152. *See* Schaumburger, *supra* note 20.

153. Ted Bromund, *The Numbers Behind the Extradition Controversy*, COMMENTATOR (Oct. 15, 2012, 12:47 PM), http://www.thecommentator.com/article/1817/the_numbers_behind_the_extradition_controversy.

shown by discussing the issues that occur in the application of these treaties. In order to revive the faith in extradition treaties, it is important to ask (1) what purpose should an extradition treaty serve and (2) how should extradition treaties be executed so that contracting parties do not feel that their sovereignty is being infringed upon?

Extradition treaties are fairly broad in their application, pertaining to mostly ordinary crimes committed amongst private citizens.[154] However, the issues that arise when certain rights and crimes do not overlap show the inadequacy of these agreements. The structure of extradition treaties should evolve to provide more predictability to the extradition process. One solution is to treat crimes that have an inherent international nature, such as terrorist acts and drug trafficking, differently. They should be taken out of the traditional extradition procedure and should instead be filtered through legal channels separate from extradition treaties.[155] Examples of this structure are those treaties and agreements with more specific purposes, including the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances and the Convention on Offenses and Certain Other Acts Committed on Board Aircraft.[156]

It would be beneficial for a country to not treat all crimes equally. Treaty provisions readily provide for exceptions to military offenses and political matters.[157] There is a current trend towards treating drug trafficking and acts of terrorism differently, and it may be time to also draft separate agreements that cover other offenses. In an era where national security is vulnerable due to advances in technology, extradition treaties in their current form could be inadequate in handling certain offenses. Treaties should be repurposed to distinguish between security offenses, terrorism offenses, and acts involving rights such as the freedom of speech. By repurposing treaties and by drafting more specific agreements there would be more predictability in the extradition process. If the idea of a treaty is truly to cooperate, then treaties should be repurposed towards a shared goal.

Sovereignty will always be an issue in international agreements. Countries will not readily chip away at their own sovereignty.[158] However, if a treaty is repurposed to attack or prevent one kind of incident, such as

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154. Schaumburger, *supra* note 20, at 4.

155. Muther, *supra* note 124, at 228.

156. *Id.* at 228 n.46.

157. *See* Extradition Treaty with the Republic of Colombia, U.S.-Colom., Sept. 14, 1979, S. Treaty Doc. 97-8; U.S.-It. Extradition Treaty, *supra* note 55; U.S.-U.K. Extradition Treaty, *supra* note 107.

158. BORN & RUTLEDGE, *supra* note 83, at 881.

foreign securities, then the issue of sovereignty is cabined to only one interest of the contracting countries. One of the issues with current extradition treaties is their broad language describing applicable crimes. By being more specific in the drafting of a treaty, countries can better evaluate what their interests are, what is best for their citizens, and what type of agreement they should enter into to benefit their country without jeopardizing foreign relations.

This solution calls for a fair amount of work on all of the law-making bodies of a country. However, it is important to remember what events can unfold if treaties are not revitalized. When extradition treaties are not invoked and when proper channels are not involved, countries will sometimes resort to legally sanctioned kidnapping[159] or covert operations with foreign governments to execute criminals.[160] After the cocaine and crack epidemics that swept across the United States in the 1970s and 1980s, the U.S. Executive Branch put into force orders that named Pablo Escobar, notorious Colombian drug lord, an enemy of the United States.[161] The Executive Branch sanctioned his assassination by U.S. Armed Forces.[162] In the 1990s, the U.S. government entered into operations with the Colombian government to execute Pablo Escobar.[163] In addition, in *United States v. Alvarez-Machain*, the U.S. government kidnapped foreign criminals who were allegedly guilty of crimes committed against U.S. citizens or within the United States.[164] These methods are dangerous and directly opposed to the atmosphere of cooperation that extradition treaties are designed to create.

Extradition treaties must evolve in order to address national security concerns. It is clear that ordinary crimes such as simple burglary are not comparable with international drug trafficking. It is not logical to have one treaty that covers such a wide array of crimes. The broadness of extradition treaties allows for a great amount of latitude in the execution of extradition requests; a country may not want to honor an extradition request if the language of an extradition treaty leaves room for interpretation. In order to adequately prevent transnational crime and to maintain international cooperation, contracting nations should draft specific treaties for specific crimes, laying out hard-line procedures.

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159. United States v. Alvarez-Machain, 504 U.S. 653, 657 (1992).
160. THE TRUE STORY OF KILLING PABLO (History Channel 2002).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Alvarez-Machain*, 504 U.S. at 657.

Extradition treaties should evolve as times change and as transnational crime becomes an increasing concern for every nation.

VII. CONCLUSION

Extradition treaties have constantly evolved as governments shift and the landscape of transnational crime has become more complex.[165] In the modern era, extradition treaties can still serve one of their fundamental purposes of protecting countries from all types of crime.[166] However, this can only be done by revisiting the current treaties in force and contouring them towards specific goals and crimes. The rules of comity and the cooperation facilitated by extradition treaties show that respect between nations is of high regard. To ensure that respect for a nation's sovereignty will be maintained, extradition treaties should evolve with more specific purposes. While this is a heavy task for every government, it is necessary to achieve stable cooperation in the battle against transnational crime.

165. *See* U.S.-U.K. Extradition Treaty, *supra* note 107.
166. U.S.-It. Extradition Treaty, *supra* note 55.