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The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law

John Quigley*

Extradition law has traditionally reflected the character of international law as law between states. Extradition law developed to provide procedures whereby a person suspected of a crime but who was in another state could be surrendered to the first state for prosecution. The aim was to vindicate the right of the requesting state to prosecute persons who had violated its laws. The basic legal obligation was thus at the interstate level.

The interests of the individual being surrendered were obviously at stake, however. Thus, certain safeguards for the extraditee were introduced in extradition law. In spite of this development, the basic purpose of the law still was to determine whether the requesting state had a right to the surrender, not whether the extraditee had a right not to be surrendered.

Recent litigation has focused attention on the rights of the extraditee. This development has occurred with the emergence of a law of human rights that provides individuals with an extensive array of rights under international law. Human rights law, which emerged as positive law in the mid-twentieth century, departed from the traditional state-oriented character of international law by positing that individuals possess rights in their capacity as individuals.

The issue of the human rights of the individual has been raised in situations in which there is reason to believe that the rights of the extraditee will be violated by the requesting state. The requested state may be presented with evidence that the extraditee would be tried under procedures that lack fundamental fairness, that he may be tortured during interrogation, or that he may be subjected to cruel or degrading punishment.

This Article explores the interests of the extraditee in such situa-

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1 "State," unless otherwise indicated, is used in this Article in the meaning of "nation state."
tions and raises the question of the role of human rights law in a court’s decision about extradition.

I. Extradition Procedure and the Rule of Non-Inquiry

International extradition in the United States is handled by the federal government, not by the states. The United States has a right to extradition of a person from abroad and a foreign state has a right to extradition from the United States only if there exists an extradition treaty, typically bilateral, that requires the surrender in the particular situation. If a foreign state wants the United States to surrender a person who is in the United States, a federal court examines the request.

A hearing is held by a federal magistrate, who decides the question of extraditability on the basis of the applicable extradition treaty. The magistrate must decide whether the crime charged is one covered by the extradition treaty, which would typically mean serious, non-political offenses. The magistrate also must decide if the offense involved is an offense under United States law, since, under extradition treaties, states typically may seek extradition only if the offense is deemed a crime by both the requesting and the requested states. The magistrate must decide whether the person the authorities have identified is the one the requesting state has named as its suspect. Finally, the magistrate must determine whether the requesting state has probable cause to believe that the person has committed the offense in question. Should the magistrate make a finding of extraditability, the Secretary of State must decide whether to surrender the extraditee to the requesting state. A magistrate’s finding of extraditability is reviewable by a federal district judge on application for the issuance of a writ of habeas corpus.

The issue of anticipated mistreatment of the extraditee has long troubled the federal courts in extradition cases. Extraditees on occasion have argued that, if surrendered to the requesting state, they will be treated in a manner that would violate their rights. They may assert that their lives would be in danger in the prisons of the requesting state and that the requesting state will not ensure their safety. They may assert that they will be tortured in the requesting state.

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7 Ex parte La Mantia, 206 F. 330 (S.D.N.Y. 1913).
state, or that their trials will be conducted in violation of due process.

Confronted with these arguments, the federal courts have typically ordered extradition. Some have said that the issue is irrelevant, an approach that has come to be called the rule of non-inquiry, that is, that the federal court will not inquire into the legality of the proceedings that can be anticipated in the requesting state. Some federal courts, however, have addressed the extraditee's argument and have taken evidence on his allegation of expected mistreatment. These cases suggest that, if the extraditee's rights would be violated in a serious way, the courts might bar extradition.

A case frequently cited in contemporary cases involving these issues is *Neely v. Henkel*,11 decided by the United States Supreme Court in 1901. In that case, a person being extradited to Cuba on charges of embezzlement from the Cuban postal department argued that, if surrendered, he would be tried in Cuba on the basis of procedures that did not conform to guarantees found in the United States Constitution. He said that Cuba had no habeas corpus protection, no prohibition against bills of attainder or ex post facto laws, and no provision for trial by jury.12 The Court replied that "those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."13 The Court said that even where the extraditee is a United States citizen, the criminal procedure safeguards of the United States Constitution do not apply.14 United States citizenship, it said, does not give the extraditee a right to "a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled."15

In *Glucksman v. Henkel*,16 a 1911 United States Supreme Court case, an extraditee sought by Russia for forgery said that the government of Russia did not have sufficient evidence of his guilt.17 Finding probable cause, the Court said that it would not speculate whether Russia could produce enough evidence to convict. The Court concluded that it was "bound by the existence of an extradition treaty to assume that the trial will be fair."18

The issue that first gave cause for concern involved requests for the extradition of persons who had been convicted in absentia in the requesting state, a practice permitted in a number of European

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12 Id. at 122.
13 Id.
14 Id. at 123.
15 Id.
16 221 U.S. 508 (1911).
17 Id. at 511.
18 Id. at 512.
Under extradition procedure, a person already convicted could be extradited on presentation of proof of the conviction, without presentation of evidence. The United States courts were uncertain whether to order extradition on presentation of proof of a conviction in absentia, or whether to require a showing of probable cause.

The difficulty with in absentia convictions was resolved in the late nineteenth century by requiring a showing of probable cause. The Secretary of State, in response to a request from Great Britain for divulgence of United States policy on the matter, enclosed a letter written by the United States Attorney in New York, indicating that extradition would be ordered in such cases, but that proof of probable cause would be required. The letter indicated the rationale for requiring proof of probable cause by stating that "the return of persons whose presence for other reasons might be desired in a foreign country, could be secured with much ease if the record of a conviction par contumace was sufficient for that purpose."

The in absentia conviction issue arose frequently on requests from Italy under the United States-Italy extradition treaty of 1868. Italian courts were, at that time, permitted to convict persons in absentia, and, on a number of occasions, Italy requested the extradition of persons so convicted. Though the federal courts have consistently maintained that in absentia convictions will not bar extradition, they nevertheless have treated such cases cautiously.

In *Ex parte Fudera*, for example, the court refused to order extradition of a man convicted in absentia of murder in Italy. The evidence presented to the court consisted of the oral testimony of a police officer who investigated the case. The court characterized this evidence as hearsay and found it insufficient to establish probable cause.

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20 G. Hackworth, *Digest of International Law* 52, 130 (1942).
22 Par contumace means in absentia.
26 Id. at 592.
27 Id.
28 Id. Normally, hearsay evidence is permitted in an extradition proceeding to establish probable cause. Rice v. Ames, 180 U.S. 371, 375-76 (1901). The Federal Rules of Evidence do not apply to extradition proceedings. Fed. R. Evid. 1101(d)(3); Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984) (evidentiary rules of criminal litigation not applicable to extradition proceedings). An extradition practitioner has expressed the view that "if courts feel sufficiently uncomfortable about the fairness of the fate awaiting the accused, they may be more lenient in granting him scope to put on a defense here, or may
The court was similarly cautious in *Ex parte La Mantia*, where the extraditee had also been convicted of murder in absentia. The court denied extradition because the extraditee had not been adequately identified, stating at the same time that a conviction in absentia would not be a bar to extradition.

In *United States ex rel. Argento v. Jacobs*, the extraditee had been convicted in absentia in Italy in 1951 for a murder that occurred in 1922. Extradition was sought in 1959. The district court expressed serious concern over the fact that the extraditee had been convicted in absentia:

If the order of the United States Commissioner is upheld, petitioner will be surrendered to the Italian authorities and his life sentence put into effect. He will not be given an opportunity to defend himself on the charge of murder.

While this procedure of trial of a defendant, in absentia, on a criminal charge, particularly one as serious as murder, does not comport with our ideas of justice or fairness, it must be remembered that petitioner is an Italian National and alleged to be a fugitive from the country. The offense was committed in Italy and is governed by Italian law which permits the trial of a criminal case in absentia.

Petitioner’s conviction, however, having been rendered in absentia, this Court must inquire into the evidence of criminality, as extradition is not warranted simply by a showing of the in absentia conviction.

The district court then examined the witness statements and found a lack of probable cause. The court reasoned that in extradition cases involving in absentia convictions the court “must scrutinize the evidence carefully to determine at least a reasonable probability that the petitioner was guilty of the crime.” While that is the normal probable cause standard, the court’s language suggests that the fact of the in absentia conviction colored its review of the evidence, making it more skeptical than it otherwise would have been.

In *In re Mylonas*, a Greek national who had taken up residence in Alabama was sought by Greece after having been convicted in absentia of embezzlement. The district court judge who conducted the extradition hearing decided that the extradition request had to fail because of Greece’s delay in making its request, which came three

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29 206 F. 330 (S.D.N.Y. 1913).
30 In fact there was some confusion as to whether he had been tried in absentia or had simply been bound over for trial. The court said that, for purposes of its decision on extradition, it did not matter which was the case. Id. at 331.
31 Id. at 330.
33 *Id.* at 879.
34 *Id.* at 879-83.
35 *Id.* at 883.
years after the in absentia trial. The extraditee had been a member of the town council of a Greek town, and the charges alleged that in that capacity he had embezzled town funds. The judge scrutinized the proceedings carefully, leading him to conclude that the charges were pretextual. He delved deeply into the Greek trial proceedings, finding “contradictions, variations and changes of position” in the testimony of several witnesses.

The judge concluded that the charges had been filed at the instance of an opposition political group that had come to power, and that the charges were political in character. On that basis he found Mylonas non-extraditable under the extradition treaty. The judge cited no authority for his conclusion that the charge was a political offense, and it is unlikely he could have found any. The prevailing doctrine on political offenses required that the act be done as part of a struggle for political power. This was clearly not the case in the extraditee’s alleged offense. The judge expanded the political offense exception to avoid extraditing a person he thought was being treated unfairly by the courts of the requesting state. While giving lip service to the doctrine that in absentia convictions do not preclude extradition, he was not following the non-inquiry approach.

In addition to the circumvention of the rule of non-inquiry through a hard look at probable cause or through liberal interpretation of exceptions to the rule, an apparent deviation from the rule has occurred in some in absentia conviction cases. In these cases the court appears to have been influenced in favor of extradition by assurances that the extraditee would have a new trial upon return to Italy. In In re Macaluso, for example, the Italian consul testified before the magistrate that the extraditee, convicted in absentia of a kidnap-murder, could be given a new trial under Italian procedure. The magistrate ordered extradition after finding Italy’s proof of guilt to meet the probable cause standard, and the Secretary of State surrendered the extraditee to Italian authorities. Similarly, in In re D’Amico the court entered a finding of extraditability after it was represented to the court on behalf of Italy that the extraditee, convicted in absentia of kidnapping and robbery, would be retried after

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37 Id. at 721.
38 Id.
39 Id. at 720.
40 Id. at 721.
41 In re Castioni, [1891] 1 Q.B. 149.
42 187 F. Supp. at 721.
44 Id. at 238.
45 Id. at 242.
Other courts have ordered extradition, however, despite Italy’s failure to provide for retrial. In *Gallina v. Fraser*, the district court ordered extradition of a man convicted in absentia twice in Italy of armed robbery, even though, it said, Italy evidently did not plan a new trial. The court of appeals affirmed. It alluded to the fact that in some similar cases the Department of State had demanded that Italy retry the extraditee after surrender, but said that whether or not Italy conducted a retrial was not relevant to the court’s determination of extraditability. Having said that, the court went on, however, to say that, in one of the extraditee’s in absentia convictions, a lawyer had represented him at the trial, and, in the other case, alleged confederates were before the court during the proceedings. The court thus implied that had the extraditee not been represented, and had no confederates been present, it might have reexamined the rule of non-inquiry. After reciting cases in which courts did not consider the type of proceedings awaiting the extraditee, the court of appeals discussed its reservations about the rule of non-inquiry, stating that it could imagine situations where the extraditee, upon extradition, “would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination of [the rule of non-inquiry].”

While the courts have not expressly refused to extradite because of an in absentia conviction, they have expressed concern over the matter. For example, in *United States ex rel. Bloomfield v. Gengler*, two extraditees were sought by Canada, where they had been tried on charges of importation of hashish. The extraditees were present at the Canadian trial and represented by counsel. After the close of evidence, the trial judge dismissed the charges for a variance between the indictment and the proof presented at trial. An appeals court disagreed with the trial judge and, as it was permitted to do under Canadian procedure, itself entered a judgment of

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47 Id. at 651 n.3.
49 Id. at 866.
50 278 F.2d 77 (2d Cir. 1960).
51 Id. at 78.
52 Id.
53 Id. at 79.
54 Id. Italian procedure again passed muster in the federal courts in *Esposito v. Adams*, 700 F. Supp. 1470 (N.D. Ill. 1988). In that case the court ordered extradition even after concluding that Italian procedures “were far from lacking even the barest rudiments of a process calculated to arrive at the truth of the accusations.” Id. at 1481.
55 507 F.2d 925 (2d Cir. 1974).
56 Id. at 926.
57 Id.
The extraditees argued that because they were not present at the appellate proceedings, they had been convicted in absentia. The court acknowledged, however, that in an appropriate case inability to assert a defense might be so repugnant to its sense of decency as to bar extradition. Other courts have nevertheless taken the position that the United States considered the trial procedures in the requesting state before concluding an extradition treaty with it, and that extradition would be undermined by a rule that required that the requesting state conduct a trial in the manner in which it would be conducted in the United States because most extradition partners of the United States have procedural systems that differ from that of the United States. The Secretary of State has on occasion required Italy to agree to retry a person tried in absentia. Federal courts that have declined to consider possible unfairness in the anticipated proceedings in the requesting state have said that it is the Secretary of State who is to consider this issue when he decides whether to surrender the extraditee. Nevertheless, some courts appear to have been influenced by the requesting state's plan to provide a new trial for the extraditee. Those courts that have relied on the Secretary of State to consider the issue may have misplaced their reliance because the Secretary of State has only rarely refused to surrender a person found extraditable by a magistrate.

In addition to the problem of in absentia convictions, courts frequently have addressed concerns of extraditees regarding lack of protection from enemies in the requesting state, political persecution, cruelty in interrogation and punishment, and various unfair trial procedures. In Nicosia v. Wall, an extraditee was sought by Panama on a charge of having, in his capacity as Minister of the Pre-

58 Id.
59 Id. at 928.
60 Id. at 928-29.
61 Id. at 928.
63 Ahmad v. Wigen, 726 F. Supp. 389, 410 (E.D.N.Y. 1989), aff'd, 910 F.2d 1068 (2d Cir. 1990) (citing Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960)).
64 In re Sindona, 450 F. Supp. 672, 694 (S.D.N.Y. 1978); Quinn v. Robinson, 785 F.2d 776 (9th Cir. 1986).
65 See, e.g., supra notes 46-47 and accompanying text.
67 442 F.2d 1005 (5th Cir. 1971).
sidencia in the government of Panama, obtained improper mortgage financing from the Social Security Bank of Panama. The court of appeals suspected that the government of Panama had a political vendetta against the extraditee. It cited certain notes referring to the 1967 United Nations Protocol Relating to the Status of Refugees that the Department of State had recently sent to Panama in similar situations. Having become a party to the Protocol, the United States had agreed not to return any refugee who had a well-founded fear of political persecution in the state seeking extradition. The court of appeals consequently remanded to the district court for a determination of whether the extraditee might be persecuted for his political opinions if surrendered. The court thus recognized that a requirement of human rights law relating to political refugees must be taken into account by a federal court in assessing a request for extradition.

In Peroff v. Hylton, an extraditee sought by Sweden on securities fraud charges had been investigated by the United States Department of Justice on narcotics importation charges and had been given the benefit of a witness protection agreement in that connection. He argued that there were "potential assassins" in Swedish prisons, and that his surrender would therefore jeopardize his life. The court said that a "denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice." The court concluded that there was no reason to believe that Sweden could not protect the extraditee in prison.

In Sindona v. Grant, an extraditee sought by Italy on charges of having participated in a fraudulent bankruptcy said that he had political enemies in Italy and presented a photograph from a street demonstration in which a participant displayed a slogan reading "Death to Sindona." The court said that "the degree of risk to Sindona's

68 Id. at 1006.
69 Id.
72 442 F.2d at 1006-07.
74 Id. at 1248.
75 Id. at 1249.
76 Id.
77 Id. Similarly, in In re Geisser the extraditee was found extraditable despite her fear that she might be killed in a Swiss prison by those against whom she had given information. 697 F.2d 745 (5th Cir. 1980), cert. denied, 450 U.S. 1091 (1981).
78 619 F.2d 167 (2d Cir. 1980).
79 Id. at 174.
life from extradition is an issue that properly falls within the exclusive purview of the executive branch.\(^8^0\) Also, the district judge who issued the extradition order said that questions of possible unfairness in the anticipated proceedings were for the Secretary of State, but he did assess allegations that Sindona made about the quality of criminal justice in Italy.\(^8^1\) The judge concluded that

Sindona has not made even a threshold showing that he would be subjected to procedures in Italy which would be so violative of human rights as to prevent extradition. There is no indication in the material submitted by Sindona that the Republic of Italy subjects accused persons to anything approaching summary proceedings or ‘kangaroo courts,’ which occur in nations which disregard human rights. Italy has a criminal justice system which comports with standards of the civilized world.\(^8^2\)

The district judge acknowledged that Italy was experiencing “difficulties in the administration of its court system and its prisons,” but he cited a letter from the Department of State indicating that United States military personnel who had been tried in Italian courts “have not been subjected to inhumane or degrading punishment in Italy.”\(^8^3\) Thus, despite the fact that the judge concluded that he need not take evidence regarding the Italian system of justice, by considering such evidence he implied that if the allegations were serious enough they might be a bar to a finding of extraditability.\(^8^4\)

In Armbjornsdottir-Mendler v. United States,\(^8^5\) an extraditee sought by Iceland on narcotics importation charges complained that if surrendered to Iceland she would be held in solitary confinement during interrogation.\(^8^6\) She argued that this would involve treatment “antipathetic to a federal court’s sense of decency,”\(^8^7\) and that she therefore should not be surrendered.\(^8^8\) The court of appeals said that it was not necessary to inquire into the extraditee’s allegation because her allegations were uncorroborated and to be considered “[i]n light of Iceland’s outstanding human rights record.”\(^8^9\)

In Prushinowski v. Samples,\(^9^0\) a Hassidic Jew being extradited on theft charges to the United Kingdom argued that, if he were imprisoned in the United Kingdom, then his dietary needs could not be met, he would be unable to eat, and he would starve.\(^9^1\) The court of

\(^8^0\) Id.
\(^8^1\) In re Sindona, 450 F. Supp. 672, 694 (S.D.N.Y. 1978).
\(^8^2\) Id. at 695.
\(^8^3\) Id.
\(^8^4\) Id.
\(^8^5\) 721 F.2d 679 (9th Cir. 1983).
\(^8^6\) Id. at 683.
\(^8^7\) Id. (quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960)).
\(^8^8\) Id.
\(^8^9\) Id.
\(^9^0\) 734 F.2d 1016 (4th Cir. 1984).
\(^9^1\) Id. at 1018.
appeals suggested that the United Kingdom could cope with the extraditee’s dietary needs and said that the extraditee’s problem would be of his own making and ordered extradition. While maintaining that “constitutional questions of deprivation of rights are addressed only to the acts of the United States Government and not to those of a foreign nation, at least for purposes of determining questions of extraditability,” the court nonetheless said:

Seldom, however, can a principle of law be carried to absolute extremes without developing fissures. It is unlikely that extradition would be ordered if the facts were established . . . that the prisons of a foreign country regularly opened each day’s proceedings with a hundred lashes applied to the back of each prisoner who did not deny his or her God or conducted routine breakings on the wheel for every prisoner.

It was unclear whether the court meant that extradition in such a case would be denied by a court or by the Secretary of State.

In In re Burt, a case in which West Germany sought surrender on a murder charge, the extraditee argued that the sixteen years that had elapsed since the alleged offense would make it difficult for him to be given a fair trial in West Germany. The court of appeals replied by providing reasons why that delay had occurred and by holding that extradition was proper so long as there was no violation of “exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishments employed by the foreign jurisdiction.” In this case the court found no such violation.

In Demjanjuk v. Petrovsky, the extraditee was sought by Israel on World War II murder and war crimes charges. The court of appeals discussed the question of whether Israel had jurisdiction over these charges and concluded that it did. Citing Gallina, the court said that it would not inquire into potential irregularities in the anticipated Israeli proceedings “[i]n the absence of any showing that Demjanjuk will be subjected to ‘procedures antipathetic to a federal court’s sense of decency.’” The court’s language suggests that in an appropriate situation it would inquire into the quality of the proceedings awaiting the extraditee.

In Linnas v. INS, the United States was deporting, rather than extraditing, a man to the Soviet Union, but was doing so with the understanding that the Soviet Union would try the man on World

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92 Id. at 1019.
93 Id. at 1018.
94 Id. at 1019.
95 737 F.2d 1477 (7th Cir. 1984).
96 Id. at 1486-87.
97 Id. at 1487.
98 Id. at 1487.
100 Id. at 583 (quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960)).
War II war crimes charges. He argued that he would be denied certain procedural safeguards at his anticipated trial in the Soviet Union, although he was not specific as to what unlawful treatment he expected.\textsuperscript{102} The court of appeals, citing Gallina, found no evidence of potential treatment in the U.S.S.R. “antipathetic to a federal court’s sense of decency.”\textsuperscript{103}

In Ahmad v. Wigen,\textsuperscript{104} the extraditee was a West Bank Arab and a naturalized United States citizen sought by Israel for murder. He was alleged to be a member of a terrorist group called the Abu Nidal Organization.\textsuperscript{105} The charges alleged that as a member of that organization he carried out an armed attack on a passenger bus, killing its driver. These events allegedly occurred in the West Bank territory under the military occupation of Israel.\textsuperscript{106} The extraditee argued that, if surrendered, he would be tortured during interrogation, he would be convicted on his own or his alleged confederates’ coerced confessions, and he would be incarcerated in indecent facilities. He argued that extradition under these circumstances would violate due process of law under the United States Constitution and would violate internationally recognized human rights norms.\textsuperscript{107}

The district court heard evidence that it was the practice of Israel’s security police to use force in the interrogation of Arabs arrested in the West Bank on security-related charges.\textsuperscript{108} The court quoted from a human rights report on Israel by the Department of State that said: “Reports of beatings of suspects and detainees continue, as do reports of harsh and demeaning treatment of prisoners and detainees.”\textsuperscript{109} The court also alluded to a 1987 report commissioned by the government of Israel on the use of force by the security police during interrogations.\textsuperscript{110} This report said that force was routinely used, both to extract a confession for use at trial and to gain information about the organizations of which the suspect was a member.\textsuperscript{111} The Israeli report, known as the Landau Report, said that when psychological methods are insufficient to get a statement, “a

\begin{itemize}
  \item \textsuperscript{102} Id. at 1032.
  \item \textsuperscript{103} Id. at 1032 (quoting Gallina, 278 F.2d at 79).
  \item \textsuperscript{104} 726 F. Supp. 389 (E.D.N.Y. 1989), aff'd, 910 F.2d 1063 (2d Cir. 1990).
  \item \textsuperscript{105} Id. at 417.
  \item \textsuperscript{106} Id. at 394.
  \item \textsuperscript{107} Id. at 409.
  \item \textsuperscript{108} Id. at 416.
  \item \textsuperscript{109} Id.; DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, 101ST CONG., 1ST SESS. 1378 (1989).
  \item \textsuperscript{110} Id. (citing Report of the [Israeli] Commission of Inquiry into Methods of Interrogation of the General Security Service in Regard to Hostile Terrorist Activity of 1987 (popularly known as “Landau Report” after its chair, Moshe Landau, former Chief Justice of the Supreme Court of Israel)).
\end{itemize}
moderate measure of physical pressure is not to be avoided.""\(^{112}\) This amounted to a directive to investigators to use force against suspects. The government of Israel approved the report, thereby making the directive its own."\(^{113}\) The Landau Report also said that in security-related cases a confession was virtually always the primary evidence against the accused,"\(^{114}\) and that interrogators, if required to testify as to how they gained the confession, often falsely denied that they had used force."\(^{115}\)

The extraditee in \textit{Ahmad v. Wigen} argued that the policy of Israel's government called for the use of force against him during interrogation because he was a West Bank Arab charged with a security-related offense and because he was alleged to be a member of an anti-Israel terrorist organization."\(^{116}\) In an affidavit submitted to the court describing the procedures that would be used after surrender, the Ministry of Justice of Israel implicitly acknowledged that the extraditee would be interrogated."\(^{117}\)

The district court, acknowledging Israel's policy in favor of the use of force in interrogations, held that it could not find that this policy would be applied to the extraditee."\(^{118}\) The court reasoned, first, that two other persons recently extradited from the United States to Israel, John Demjanjuk and Ziad Abu Eain, had not been physically abused."\(^{119}\) John Demjanjuk,"\(^{120}\) however, did not meet the criteria indicated by the government of Israel for use of force because it was unlikely that he had any information about terrorist activities."\(^{121}\) Ziad Abu Eain was an Arab sought on security-related charges,"\(^{122}\) and he had, in fact, alleged physical abuse."\(^{123}\)

Second, the district court reasoned that because the extraditee had been away from the Middle East for two years, any knowledge he might have about terrorist activities or the Abu Nidal organization would be "stale."\(^{124}\) This fact was significant to the court because "[a]s the Landau [R]eport states, ‘top priority’ of interrogation is to

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\(^{114}\) Landau Report, supra note 110, at 2.19.

\(^{115}\) Id. at 2.24.

\(^{116}\) 726 F. Supp. at 409.

\(^{117}\) Id. at 422 (Affidavit of Dorit Beinish, State Attorney, Ministry of Justice) (referring to "his interrogation" as an event that will occur after surrender).

\(^{118}\) Id. at 417.

\(^{119}\) Id.

\(^{120}\) Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).

\(^{121}\) \textit{Ahmad}, 726 F. Supp. at 417.


\(^{123}\) \textit{Ahmad}, 726 F. Supp. at 417.

\(^{124}\) Id.
gather information 'for the purpose of preventing and foiling [terrorist acts]. . . . Obtaining evidence to bring a suspect to trial is not the top priority of . . . investigative work'.” Based on this prioritizing by the Israelis, the court held that the extraditee "[did] not fit the profile of the ordinary security suspect against whom the secret police might have reason to exert pressure.”

The court's analysis involved a misreading of the Landau Report. While the report did say that the interrogators' highest priority was general information about the hostile organizations, as opposed to information to use against the suspect at trial, it did not say that interrogators refrained from using force when the only information to be obtained from a particular suspect was information for use at that suspect's trial. On the contrary, the report made clear that the policy was to use force to obtain confessions for use at trial.

Finally, the district court was influenced by the Israeli government's promise not to mistreat Ahmad after his extradition. It cited the affidavit of the Ministry of Justice of Israel, which stated, "we offer our assurance that if Atta is extradited to Israel, his interrogation will not employ torture, physical or psychological, or inhumane treatment or improper means, as described in the testimony before the Court.”

Although the court thus found that abuse was not likely, it said that potential mistreatment in the requesting state was relevant on an extradition decision. It said that a judge in an extradition proceeding should "determine the nature of treatment probably awaiting petitioner in a requesting nation to determine whether he or she can demonstrate probable exposure to such treatment as would violate universally accepted principles of human rights.” “We cannot blind ourselves,” said the court, “to the foreseeable and probable results of the exercise of our jurisdiction.” The district court called this requirement a "due process exception to the rule of non-inquiry.”

The court defined "[t]orture and cruel and unusual punishment" to include "threats and other inhumane psychological harms including trickery designed to cause despair, [which could be] even
more painful and more effective than physical pressure."\textsuperscript{135} The court did not require that the anticipated torture or cruel treatment be condoned by the government of the requesting state. Accordingly, the court found that "[e]ven if the probably inhumane act is unauthorized by the requesting nation and is applied by those abusing power, it could constitute a basis for non-extradition."\textsuperscript{136} The district court cited a 1983 opinion of the European Commission of Human Rights, in which an extraditee had argued that he would be tortured in Turkey, the requesting state, even though the Turkish government had tried to stop torture.\textsuperscript{137}

The Second Circuit affirmed the district court's finding of extraditability, but admonished the district court for taking evidence on how Israeli authorities were likely to treat Ahmad after extradition. According to the court of appeals, "the interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced."\textsuperscript{138} The court said that it was the practice of the Secretary of State to refuse extradition if the extraditee would be treated improperly.\textsuperscript{139}

Despite the admonition of the court of appeals in Ahmad v. Wigen, the federal case law on extradition does reflect judicial concern about the potential treatment of an extraditee by the requesting state. The cases have not been uniform in their approach to an extraditee's plea of anticipated ill treatment. Some have held that it is not relevant, while others have examined the allegations and concluded that they were not well established before entering a finding of extraditability. These courts thus have implied that they would refuse to order extradition if they were convinced that serious unlawful treatment would be visited upon the extraditee. To date, however, no federal court has applied this reasoning to bar a requested extradition.

II. The Relevance of Human Rights Law

The district court's allusion in Ahmad v. Wigen to human rights law introduced an element not mentioned in earlier cases. Extradition law came into being long before the emergence of human rights law. Considerations of the rights of the extraditee were not, for the most part, deemed to play a role.

In the mid-twentieth century, however, the law of human rights emerged as a body of law binding on states. That body of law is held

\textsuperscript{135} Id. at 415.
\textsuperscript{136} Id.
\textsuperscript{137} Id. (citing Altun v. Federal Republic of Germany, 36 Eur. Comm'n H.R. 209, 233-35 (1985)).
\textsuperscript{138} Ahmad, 910 F.2d 1063, 1071 (2d Cir. 1990).
\textsuperscript{139} Id.
by courts of the United States to be binding on them, even apart from any treaty obligation that the United States has assumed. \[140\] Human rights law is relevant to extradition law in that among the human rights norms binding on states are prohibitions against prolonged arbitrary detention \[141\] and against torture or other cruel, inhuman, or degrading treatment or punishment. \[142\] International human rights law requires states to provide fair trials with a presumption of innocence and the rights to present a defense and to be represented by counsel. \[143\] It also gives rights to the individual regarding speech, assembly, conscience, equality, and privacy. \[144\]

In applying human rights law to extradition law, one issue to be addressed is whether, if a requesting state violates these rights with respect to an extraditee, the violation is imputed to the requested state. Additionally, one must consider whether the court should use international human rights standards to assess the treatment awaiting the extraditee. Finally, the question arises whether the court is under an obligation to assess the anticipated treatment of the extraditee, or whether it may consider that it is not responsible for potential violations of human rights by the requesting state.

In general, a court need concern itself only with the propriety of its own actions or of the actions of administrative officials under its jurisdiction (e.g., police officers and judges of lower courts). The United States Supreme Court has held, however, that there may be instances in which a court is responsible for the fact that by its decision it may facilitate an unlawful act by a party for whose actions it is not otherwise responsible. In \textit{Shelley v. Kraemer}, \[145\] the Court said that a court that enforces a racially discriminatory contract does, by the act of giving enforcement, facilitate the discrimination, because without the enforcement the contract would have no meaning. \[146\]

Two United States servicemen contesting their surrender to West Germany by the United States Army under the North Atlantic Treaty Organization’s agreement on status of forces \[147\] made such an argument in \textit{Holmes v. Laird}. \[148\] West Germany sought them for trial


\[142\] \textit{Restatement, supra note 140}, § 702(d); \textit{International Covenant on Civil and Political Rights, supra note 141}, art. 7.

\[143\] \textit{International Covenant on Civil and Political Rights, supra note 141}, art. 14.

\[144\] \textit{Id.}, arts. 17-19, 21-22.

\[145\] 334 U.S. 1 (1948).

\[146\] \textit{Id.} at 13.


on charges of attempted rape. The two had already been convicted in a West German court but were in the custody of the United States Army. They brought suit against the Secretary of Defense in a federal district court, arguing that they should not be surrendered because they had been denied a speedy trial (the trial having taken place six months after the charge); they had been denied their request to be represented by a United States civilian attorney and were unable to communicate because of the language barrier with the German attorney who represented them; they had been denied the right to confront the prosecution because they were excluded from the courtroom while the victim testified; and they had been denied a fair appeal because no verbatim transcript was made of the trial proceedings.

The two servicemen argued that if the United States Army surrendered them, this would constitute "governmental involvement" in the allegedly unfair trial procedures. The court of appeals, however, citing Neely v. Henkel, held that there was no right to be tried under United States procedures where trial was to be conducted in another country and that the surrender by United States authorities did not violate the rights of the two servicemen. Because it found that the treatment they would receive was fair, the court of appeals did not address the petitioners' argument that a surrender where unfair procedures were anticipated would mean that United States courts were acting unlawfully.

In Ahmad v. Wigen, the district court acknowledged that if a United States court turns an extraditee over to a state that will commit rights violations, then the United States court itself is involved in those violations. In that case the court considered a hypothetical situation in which an individual was involved in a civil war of liberation against a dictatorial government and was sought by that government to be surrendered from the United States. The court said that "to enforce extradition orders under such circumstances may implicate our courts in grave injustices and cruel repressions." As for potential mistreatment of an extraditee, it said that a court must consider "the foreseeable and probable results of the exercise of our jurisdiction."

The Ahmad district court stated that a judge "has the power and responsibility to ensure that the judicial function is not abused in any

\[^{148}\text{Id. at 1214.}\]
\[^{149}\text{Id. at 1217.}\]
\[^{150}\text{459 F.2d at 1218-19.}\]
\[^{151}\text{See supra text accompanying notes 131-134.}\]
\[^{152}\text{Ahmad, 726 F. Supp. at 405 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).}\]
\[^{153}\text{Id.}\]
\[^{154}\text{Id.}\]
\[^{155}\text{Id.}\]
way [and] that anybody extradited will be treated fairly in the state to which he or she is being extradited. That applies both to trial and to treatment before trial, incarceration and to punishment, if any.”

Thus, if a court extradites to a state where torture will be administered, the judicial function is abused.

The district court’s approach in Ahmad is consistent with the obligations of a state with respect to human rights. Human rights law requires states to treat persons in given ways, but a state is not liable for every human rights violation committed by every other state. The American Convention on Human Rights requires states parties to ensure human rights “to all persons subject to their jurisdiction.”

The European human rights convention requires states parties to “secure to everyone within their jurisdiction” the rights it defines.

These formulations could be read as inapplicable to a requested state, since it is not the state that inflicts the unlawful treatment. On the other hand, the extraditee is “within” the jurisdiction of the requested state (the European formulation), or “subject” to its jurisdiction (the American formulation). Therefore, it could be argued that the court must ensure the extraditee’s rights, regardless of who might actually inflict the unlawful treatment.

This issue was considered by the European Court of Human Rights in Soering v. United Kingdom, a case cited extensively by the district court in Ahmad v. Wigen. The United States requested extradition from the United Kingdom of a German national sought by Virginia on a capital murder charge. After the United Kingdom decided to surrender him, the extraditee complained to the European Commission on Human Rights, which administers the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which the United Kingdom is a party. The extraditee argued that surrender would violate his rights since, if convicted of capital murder in Virginia, he would be sentenced to death and confined on death row there.

He argued that the length

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158 Id. at 399.
160 European Convention, supra note 66.
161 Id., art. 1.
162 Neither the European nor the American convention is directly applicable to a United States court. The European convention binds those European states that have ratified it. The United States has signed the American Convention but has not ratified it. The two conventions are cited here rather as an indication of the approach taken in international human rights law generally.
164 Ahmad, 726 F. Supp. at 413-15.
166 213 U.N.T.S. 221, Europ. T.S. No. 5.
167 As related in Ahmad, 726 F. Supp. at 413.
and conditions of incarceration on death row constituted cruel treatment under the European Convention. The United Kingdom responded that it was not responsible for whatever treatment Soering might be given in the United States.

The Commission referred the case to the European Court of Human Rights, the highest decision-making body under the European Convention. The court decided that incarceration on Virginia's death row would constitute cruel treatment and ruled the United Kingdom would be in violation of the convention if it surrendered Soering for a trial on capital murder charges there. Referring to the Convention's "special character as a treaty for the collective enforcement of human rights and fundamental freedoms," the court said that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective." The court stated that Article 1 of the European Convention "cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention." The court found, however, that these considerations cannot "absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction." The district court in Ahmad found the Soering decision to be "an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration or lack of due process at trial in the requesting country," reflecting the "present status of international and human rights law on this issue."

The European Commission on Human Rights has on a number of occasions said that extradition would be unlawful if the extraditee could be expected to be tortured or otherwise physically mistreated by the requesting state. The Commission has repeatedly held that either expulsion or extradition is unlawful if the deportee or extraditee can be expected to be treated in ways that violate Article 3 of

168 Id.
169 European Convention, supra note 66, arts. 52-53.
172 Id. at ¶ 86.
173 Id.
174 Ahmad, 726 F. Supp. at 414.
175 Id. at 415.
the European Convention.\textsuperscript{176} In \textit{X v. Federal Republic of Germany}, the Commission said that extradition would be unlawful if there was a risk of torture in the requesting state.\textsuperscript{177} In \textit{X v. Austria & Yugoslavia}, the Commission said that extradition might raise an issue under the Convention's article prohibiting torture or cruel treatment if it appeared that the rights of the extraditee would be violated in the requesting state.\textsuperscript{178} Throughout its decisions, the European Commission has repeatedly reaffirmed this position.\textsuperscript{179}

In the context of rights of individuals in wartime, states are deemed responsible for rights violations by other states. The four Geneva conventions of 1949 on the conduct of warfare, many of whose provisions are aimed at protecting the rights of individuals in wartime, all require the states parties to "ensure respect" for individual rights by other states parties.\textsuperscript{180} This provision was based on a concept that the rights of individuals in wartime could be protected effectively only if states encouraged other states to comply. The four Geneva conventions thus operate on the premise that a state has obligations not only itself to protect the rights of the individual, but also to ensure that other states do the same.

An international treaty on the prevention of torture prohibits extraditing a person to a state where he would be tortured. The United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment states that no party "shall expel, return [\textit{refouler}] or extradite a person to another State where there are substantial grounds for believing that he would be in

\begin{flushright}
\textsuperscript{179} See, e.g., Soering v. United Kingdom, No. 14038/88, ¶ 94 (Eur. Comm'n on Hum. Rts. 1989) (report in which the Commission recalled its "case-law that a person's deportation or extradition may give rise to an issue under Article 3 of the convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article"); Altun v. Federal Republic of Germany, 36 Eur. Comm'n H.R. 209 (1983) (extradition precluded in face of the risk that the charges filed in the requesting state were false and that, since the individual was suspected of interfering with criminal proceedings against the murderers of a political figure, torture might be used to extract information from him); \textit{X v. Switzerland}, 34 Eur. Comm'n H.R. 205 (1981) (extradition might raise issue under art. 3 if rights of extraditee would be violated in requesting state); Amekrane v. United Kingdom, 16 Y.B. Eur. Conv. on Hum. Rts. 356 (Eur. Comm'n on Hum. Rts. 1973) (extradition precluded if torture or other ill treatment is anticipated).
\end{flushright}
danger of being subjected to torture.\textsuperscript{181} The Inter-American Convention to Prevent and Punish Torture states that "[e]xtradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state."\textsuperscript{182}

Courts in Germany and France have taken the same position. The government of Germany, appearing before the European Court of Human Rights in \textit{Soering}, said that the German courts hold that extradition should be denied where inhuman or degrading treatment is anticipated in the requesting state.\textsuperscript{183} Similarly, French courts have declined to extradite where there was an indication of violations of human rights standards by the requesting state. The standard these courts have developed is to deny extradition if the requesting state would treat the extraditee in a manner that violates French conceptions of public order.

In \textit{In re Croissant},\textsuperscript{184} a German national fought extradition requested by West Germany, taking his case to the Conseil d'Etat, France's highest administrative tribunal, which has the power to quash a government decision to extradite. Croissant pointed out that after his alleged offense the German penal statute that he had allegedly violated had been amended to include a monetary fine as a possible penalty, in addition to the term of imprisonment provided by the statute in its original form.\textsuperscript{185} He contended that this constituted ex post facto legislation and that his extradition would therefore violate French public order, which does not recognize ex post facto legislation.\textsuperscript{186} The Conseil said that this change in the German statute was to the benefit of the defendant and therefore did not constitute ex post facto legislation.\textsuperscript{187}


\textsuperscript{185} \textit{Id}.

\textsuperscript{186} \textit{Id}.

\textsuperscript{187} \textit{Id}. This case was cited by France's government attorney as standing for the proposition that the Conseil d'Etat refuses extradition where the extraditee would be treated in a manner that would violate French public order. \textit{In re Fidan}, Judgment of Feb. 27, 1987, Conseil d'Etat, 1987 D.S. Jur. 305, 306 (conclusions of Mr. Bonichot, government attorney).
In *In re Lujambio-Galdeano*, the Conseil d'Etat stated the broad proposition that it would not extradite to a requesting state whose judicial system did not respect basic rights. Spain sought the extradition of several Basque separatists on murder charges, and the French government ordered extradition. The Basque extraditees argued before the Conseil that the procedures followed by Spain's courts to try Basque separatists on charges related to separatism were in violation of basic due process norms. They said that they would be tortured, that they would be tried in a special court established in Madrid to handle such cases, and that a 1980 Spanish statute had authorized domicile searches without articulable suspicion, wiretaps, and mail openings in the cases of persons deemed terrorists. The Conseil, apparently on the basis of its finding that Spanish law forbade torture, that the special court in Madrid had jurisdiction not only over terrorism but over other serious crimes as well, and that the limitations on rights were justifiable, decided that Lujambio-Galdeano's rights would not be violated after surrender. The Conseil refused to bar the extradition, because, it said, "contrary to the allegations of the claimant, the Spanish judicial system respects the fundamental rights and liberties of the individual, as is required by the general principles of the law of extradition." The Conseil thus recognized that observance by the requesting state of the basic rights of the extraditee is a prerequisite for extradition.

In the case of Memik Fidan, the Conseil d'Etat applied this principle to block an extradition on the grounds that the extraditee would be treated in violation of French public order. In that case, Turkey sought extradition on a charge of murder of a Turkish national residing in France. The French government asked the Turkish government whether the death penalty would be imposed, as its imposition would violate French public order. The Turkish government replied that the death penalty did not apply to the charge as made against Fidan, because the death penalty only applied to the charge of premeditated murder, a charge not made against Fidan. France then decided to extradite, stipulating to the Turkish government that it was doing so on the understanding that the death penalty would not be applied. The Conseil d'Etat nonetheless held the extradition order invalid, finding that imposition of the death penalty violates French public order, and that France did not have

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188 1985 J.C.P. II No. 20346.
189 Assertions of extraditees described in conclusions of Mr. Genevois, Commissaire du Gouvernement, *id.*
190 *id.*
192 *Id.* at 306.
193 *Id.*
the agreement of Turkey not to impose the death penalty.\footnote{Id. at 510. The government attorney had questioned the propriety of extraditing even if the requesting state had agreed not to impose the death penalty, arguing that such an agreement would bind only the executive branch of the Turkish government, but not its judiciary. \textit{Id.} at 308 (conclusions of Mr. Bonichot, government attorney).}


Additionally, according to France's attorney general, French courts of appeal refuse extradition if an extraditee would, in presenting a defense, be denied any of the rights deemed rules of France's \textit{ordre public}.\footnote{\textit{Fidan}, 1987 \textit{D.S.} Jur. at 306 (conclusions of Mr. Bonichot, government attorney).}

The Supreme Court of Ireland refused to extradite in a case in which it thought that the extraditees would be physically mistreated. Dermot Finucane and James Pius Clarke had escaped from a jail in Northern Ireland and had gone to the Republic of Ireland, where the United Kingdom sought their extradition. The Supreme Court of Ireland found that there was a "probable risk" that they would be beaten if they were returned to that prison, and on that basis refused to extradite them.\footnote{\textit{Irish High Court Bars Extraditing 2 in I.R.A.}, \textit{N.Y. Times}, Mar. 15, 1990, at A3, col. 4; \textit{Anger as Irish Judges Free Two Terrorists}, \textit{The Times} (London), Mar. 14, 1990, at 1, col. 1.}

Similar concerns about due process prompted the Attorney-General of Ireland to refuse to seek the extradition of a man sought by the United Kingdom on an allegation of providing weapons to the Irish Republican Army in Northern Ireland.\footnote{\textit{The Times} (London), Dec. 14, 1988, at 1, col. 1.} The Attorney-General said that extensive publicity about the case in the United Kingdom made it unlikely that an impartial jury could be seated.\footnote{\textit{Id.} at 6, col. 1 (statement released by Attorney-General John Murray).}

When a requesting state violates the human rights of an extraditee, it is violating not only an obligation to the individual it injures, but also an obligation to all other states. Human rights norms are obligations at the inter-state level. By virtue of human rights law, states agree with other states that they will treat individuals according to certain standards.

The fact that human rights obligations run not only to the individual but also to the state stems from the concept that protection of human rights benefits all states. The United Nations Charter's provision on human rights states:

\begin{quotation}
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among na-
\end{quotation}
tions based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(c) universal respect for, and observance of, human rights and fundamental freedoms for all . . . 200

Thus, the Charter views human rights enforcement as a precondition for amicable relations among states. Similarly, the International Court of Justice has recognized that human rights law involves obligations *erga omnes* (among all states).201 A state is obligated to every other state to comply with human rights norms.

This rule, that states must be concerned about compliance by other states, is not unique to human rights law. While states are not responsible for violations of international law committed by other states, they are responsible if they provide assistance that facilitates a violation by another state.202 The United Nations Security Council, for example, required states to impose diplomatic and economic sanctions on Southern Rhodesia after a government was set up there in violation of the self-determination right of its majority population.203 The Council's rationale was that if states continued normal relations with Southern Rhodesia, they would be assisting the government of Southern Rhodesia in its violation of the rights of its people.

Human rights law provides an appropriate standard by which to assess the treatment that the extraditee might be given in the requesting state. One problem for the United States federal courts is that they have not taken the position that the guarantees provided by the Constitution are binding on the requesting state in its treatment of the extraditee. In *Gallina*, the United States Court of Appeals for the Second Circuit referred instead to "a federal court's sense of decency."204

It is not clear what the "federal court's sense of decency" standard might involve. It could mean that the court was in effect using due process of law but by a different name. Human rights law would seem, however, to provide an appropriate standard because human rights law is binding on the United States. The United States courts are, as previously indicated, bound to apply human rights law when it

200 U.N. Charter art. 55.
204 Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).
is relevant to cases that come before them.\textsuperscript{205}

Human rights law includes a full panoply of procedural safeguards applicable to criminal cases. A body of law has developed, through human rights treaties and the jurisprudence of human rights tribunals,\textsuperscript{206} that requires states to meet certain standards with respect both to the kinds of acts they consider crimes and to the manner in which they treat suspects. Many human rights norms form part of customary international law, which is part of the common law.\textsuperscript{207} Federal courts have held, for example, that they must observe the human rights norms prohibiting torture\textsuperscript{208} and arbitrary detention.\textsuperscript{209}

As previously noted, the French courts have approached the issue using the concept of French "public order," rather than an international law standard. They find that those principles of criminal procedure required by France's constitution constitute principles of "public order," and that these include the prohibition against ex post facto legislation and the right of an accused to a defense.\textsuperscript{210} Beyond constitutional provisions, the French courts say that there are other criminal law rules of public order, but they have difficulty identifying them. Some French courts have refused to extradite to Italy if the extraditee had been convicted in absentia, whereas others have agreed to extradite.\textsuperscript{211} France's government attorney has acknowledged that the French "public order" concept is "uncertain and changeable."\textsuperscript{212} No one can draw up "a complete catalogue of what constitute rules of public order because the character of some of them is a matter of debate."\textsuperscript{213} Public order "evolves because it depends on changes in concept as regards criminal law issues."\textsuperscript{214}

For the federal courts in the United States, one possible approach is due process and related protective principles found in the jurisprudence of the United States Supreme Court under the Bill of Rights of the United States Constitution. This would be somewhat similar to the use by French courts of the public order concept. As

\begin{itemize}
  \item \textsuperscript{205} See supra note 140 and accompanying text.
  \item \textsuperscript{206} E.g., the European Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the American Court of Human Rights.
  \item \textsuperscript{207} The Paquete Habana, 175 U.S. 677 (1900).
  \item \textsuperscript{208} Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
  \item \textsuperscript{209} Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (affirmed on basis of U.S. constitutional law, but noting that its conclusion was consistent with the prohibition against arbitrary imprisonment in human rights law).
  \item \textsuperscript{210} In re Fidan, Judgment of Feb. 27, 1987, Conseil d'Etat, 1987 D.S. Jur. 305, 307 (conclusions of Mr. Bonichot, government attorney).
  \item \textsuperscript{211} Id. at 306-07.
  \item \textsuperscript{212} Id. at 307.
  \item \textsuperscript{213} Id.
  \item \textsuperscript{214} Id.
\end{itemize}
indicated above, however, courts of the United States have been reluctant to find that the requesting state must comply with the United States' Bill of Rights in its treatment of the extraditee.

In *Soering*, however, the European Court of Human Rights did something quite similar to utilizing the Bill of Rights to govern extraditee treatment. It said that the standards by which the United Kingdom is itself governed, including the European Human Rights Convention, are applicable when the United Kingdom extradites. The United Kingdom must ensure that the requesting state follow those standards, or at least those aspects of those standards that were relevant in the situation.  

This did not mean that Virginia had to use the same procedures that the United Kingdom might use to conduct an investigation and trial, and to impose and carry out punishment. If such identity of process were required, there would rarely be a possibility of the surrender of an extraditee. However, the European Court said that where the standard was so basic as whether treatment were "inhuman" or "degrading," then the United Kingdom must ensure that the requesting state act in accordance with the standards applicable to the United Kingdom itself.

A second approach available to federal courts in extradition cases is the human rights standard mentioned previously. This was the approach taken by the district court in *Ahmad v. Wigen*. There the court used international human rights law as the standard by which a violation by the requesting state of the extraditee's rights would be determined. The argument for that approach (though no rationale is elaborated in the district court's opinion in *Ahmad v. Wigen*) is that human rights law is binding on all states, and that a state's obligations under human rights law involve not only a duty to refrain from violating the rights of individuals, but also a duty to refrain from contributing to a human rights violation by surrendering an individual to a state where a violation has a substantial chance of occurring.

As a third possible standard, a court of the United States might decide to use the United States Constitution's Bill of Rights protections in determining whether to surrender an extraditee to a requesting state that would violate his rights, but use human rights law as an aid in determining the content of the United States constitutional provisions. This is a process which courts of the United States have frequently used to determine the content of constitutional provisions for domestic application.

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216 See supra notes 131-34 and accompanying text.

All three methods are likely to achieve comparable results in most instances. Any egregious violation of rights will be prohibited by the United States Constitution or by human rights law.

III. The Likelihood of Anticipated Ill Treatment

In some instances a court in the requested state is confronted with a human rights violation that has already occurred in the requesting state. In the more typical situation, however, the court is confronted with evidence that ill treatment will occur after surrender. If the court is to consider this evidence as relevant, it must determine whether a violation is likely to occur. This raises the question of what standard of likelihood the court should use. Possible standards could range from a virtual certainty that the violation will occur to, at the other extreme, a slight possibility that it will occur.

In Soering, the United Kingdom argued that it should not have to concern itself with potential violations by the United States, but that if it had to, then only those violations that were "certain, imminent and serious." It said that the evidence would have to demonstrate beyond reasonable doubt, that ill treatment would ensue.

Apparently, Soering, if convicted of any degree of murder, would meet one element set by Virginia law for capital murder, namely, killing more than one person. There remained, however, the question of whether he would be found guilty, and the European Court did not have access to all the incriminating and exculpatory evidence that might be presented at a trial of Soering in Virginia.

During extradition proceedings in the United Kingdom, a forensic psychiatrist examined Soering and testified that he suffered from "an abnormality of mind due to inherent causes" that "substantially impaired his mental responsibility for his acts." This mental condition raised the possibility that Soering might be acquitted by reason of insanity, or that if he were convicted, it might be a mitigating circumstance in sentencing. Soering's age was also a factor that might be a mitigating circumstance. He was nineteen at the time of the offense, and the fact that a convicted person is young is typically deemed a mitigating factor in a capital punishment decision. In addition, Virginia law required as a condition of imposition of capital

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219 Id.
220 Id. at ¶ 12.
221 Id. at ¶ 21.
222 Id. at ¶¶ 11, 44-46.
punishment—even after conviction of capital murder—a showing either that the crime reflected "vileness" or that the offender exhibited "future dangerousness."223 It was not clear that either of these would be found, particularly in light of Soering's mental condition.

The European Court of Human Rights said that the United Kingdom must concern itself with the potential violations "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."224 The court found that the United Kingdom would violate the Convention if it extradited Soering, despite all of the obstacles in the path of imposing on him a death sentence.

In *Ahmad v. Wigen*, the district court posed the issue as whether the extraditee "can demonstrate probable exposure" to treatment that would violate human rights norms.225 This is more stringent than the "real risk" standard used by the European Court in *Soering*.

A standard of probability is overly strict. Particularly in cases involving potential torture, it is a difficult standard to meet. In refugee law, where a similar issue arises, a lower standard of proof is used. Refugees qualify for political asylum if they will be persecuted in their state of origin. Under international law, a state is prohibited from returning a refugee to a state "where his life or freedom would be threatened" on account of his race or certain other factors.226 This standard is written into U.S. law as "a well-founded fear of persecution,"227 which the United States Supreme Court reads to require a showing of something less than a probability of persecution.228 The Supreme Court's standard is akin to the "real risk" standard used by the European Court. If there is a "real risk" that an extraditee's rights will be violated, extradition should not be ordered.

States that are reluctant to extradite because of the anticipated treatment of the extraditee have frequently sought assurances from the requesting state. In *In re Flores*, an extradition requested by Chile from Argentina on a capital charge, Argentine courts were not prepared to order extradition because Argentina had abolished the death penalty. The Supreme Court of Chile indicated that it would

223 Id. at ¶ 43.
224 Id. at ¶ 91.
228 INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (stating that "one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place"); Note, Immigration & Naturalization Service v. Cardoza-Fonseca: Liberalizing United States Asylum Law, 10 Houston J. Int'l L. 295, 313 (1988).
endeavor to comply with Argentina's wishes that the death penalty not be imposed. An Argentine court ruled that this was not a sufficient assurance. The Argentine Supreme Court, on appeal, held that extradition should be ordered only if the Chilean executive agreed to commute any death sentence that might be imposed.\footnote{229 In re Flores, 5 Ann. Dig. 289 (C.J.N. 1929).}

In \textit{Ahmad v. Wigen}, the district court relied heavily on an assurance from the Ministry of Justice of Israel that the extraditee would not be tortured.\footnote{230 See supra notes 128-30 and accompanying text.} In \textit{Soering}, the United Kingdom secured an agreement from the United States that the death penalty would not be imposed.\footnote{231 Wash. Post, Aug. 2, 1989, at A24, col. 1.} Many extradition treaties give a requested state the right to demand, as a condition of surrender, that the requesting state not impose the death penalty.\footnote{232 See infra note 255.}

Courts in the requesting state have not always acted in accordance with the agreement given by the requesting state. For example, in 1884 Portugal extradited a man to Spain on condition that the death penalty not be imposed. The Spanish court imposed the death penalty, but the executive then commuted the penalty.\footnote{233 In re Fidan, Judgment of Feb. 27, 1987, Conseil d'Etat, 1987 D.S. Jur. 305, 308 (conclusions of Mr. Bonichot, government attorney) (citing 1987 \textit{JOURNAL DU DROIT INTERNATIONAL} 755).} Similarly, in \textit{Soering}, even after the United States assured the United Kingdom that the death penalty would not be imposed, the Virginia court proceeded with the original indictment, which included a capital charge.\footnote{234 Quigley & Shank, supra note 170, at 247 n.40.} Before trial, however, the capital charge was dropped, and Soering was tried for non-capital murder.\footnote{235 Wash. Post, Sept. 5, 1990, at C3, col. 6.}

Thus, the status of agreements regarding the treatment of extraditees is not free from doubt. They constitute agreements by the requesting states to act in certain ways. It is not clear, however, that they bind the courts of the requesting states. If it appeared that the extraditee was about to be executed, it is not clear what remedy the requested state would have to stop the execution. If the extraditee were in fact executed, it is not clear what recourse the requested state would have. Though the reliability of these agreements may be questioned, it is probable that they serve to decrease the likelihood of particular rights violations. It is therefore appropriate that these agreements be taken into consideration by the courts.

\section*{IV. Individual Rights in Extradition Treaties}

As indicated above, extradition primarily involves a relation between states, but the rights of the extraditee have also been given
consideration. Extradition law contains numerous features that protect extraditees. As human rights law developed in the twentieth century, extradition protections increased.\footnote{M. Bassiouni, International Criminal Law: Procedure 405 (M. Bassiouni ed. 1986).} States have chosen the states with which to conclude treaties in part on the basis of their view of how those states are likely to treat extraditees. States typically have not concluded treaties with states in whose legal process they lack confidence. It has been said that extradition is "an act of confidence in the system of justice of the requesting state."\footnote{Fidan, 1987 D.S. Jur. at 307 (conclusions of Mr. Bonichot, government attorney) (citing Travers, Le Droit Pénal International, 4 Sirey No. 2133 (1921)).}

In the eighteenth century extradition was typically handled—in the United States and in other states—exclusively by the executive branch of government, with no judicial role.\footnote{M. Bassiouni, International Extradition and World Public Order 505 (1974).} This practice was criticized on the ground that the political branch of government might not objectively peruse the evidence of guilt.\footnote{See I. J. Moore, supra note 21, at 90 (1891).} In the Webster-Ashburton Treaty of 1842,\footnote{Convention as to Boundaries, Suppression of Slave Trade, and Extradition, Aug. 9, 1842, 8 Stat. 572, T.S. No. 119.} the United States and Britain agreed that they would afford a judicial hearing to extraditees.\footnote{In re Metzger, 46 U.S. (5 How.) 176, 182 (1857).} Most states today do likewise.\footnote{M. Bassiouni, supra note 238, at 505.} The purpose of the judicial hearing is to provide fair treatment for the extraditee.\footnote{2 A. McNair, International Law Opinions 44 (1956) (Opinion of the Law Officers of the Crown, Oct. 4, 1815).}

In the United States, as in other states, an extraditee has certain rights during the extradition process.\footnote{Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983) (noted in Extradition: Habeas Corpus Relief Based on an Immunity Agreement, 25 Harv. Int’l L.J. 450 (1984)); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975).} An extraditee is entitled to seek habeas corpus review of a magistrate’s finding of extraditability.\footnote{Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976), cert. denied, 429 U.S. 1062 (1977).} If the authorities have granted immunity from prosecution in the United States or abroad,\footnote{Plaster, 720 F.2d at 344-45.} the United States may not thereafter extradite the individual because "the breach by the government of an enforceable prosecutor-defendant agreement violates the defendant’s right to due process of law."\footnote{id. at 352. See also In re Geisser, 627 F.2d 745, 755 (5th Cir. 1980), cert. denied sub nom. Bauer v. United States, 450 U.S. 1031 (1981).}

Many extradition treaties provide that a state is not required to extradite a person if it has already tried the person for the offense in question (the rule of \textit{non bis in idem}).\footnote{E.g., Extradition Treaty, Oct. 13, 1983, United States-Italy, art. 6, T.I.A.S. No. 10837.} This rule protects the indi-
individual from being placed twice in jeopardy for the same offense.\textsuperscript{249} Extradition treaties also typically do not require extradition if the statute of limitations applicable in the requesting state on the offense in question has run.\textsuperscript{250} Here, the requested state forces the requesting state to abide by its own rules of criminal procedure.\textsuperscript{251}

The rule that extradition is required only if the offense in question is an offense in the requested state\textsuperscript{252} protects the extraditee from being surrendered for trial on offenses of unusual types.\textsuperscript{253} The requirement of a finding of probable cause protects the extraditee against being surrendered to a requesting state that has no substantial evidence of guilt.\textsuperscript{254}

Many extradition treaties provide that if extradition is requested on a capital charge, the requested state may seek assurances that the requesting state will not sentence the extraditee to death.\textsuperscript{255} Even in the absence of such a provision, a requested state that itself has no capital punishment for the offense in question has the right to refuse to extradite if capital punishment would be imposed.\textsuperscript{256} While this provision allows the requested state to adhere to its own principles regarding capital punishment, it also acts as a safeguard for the extraditee.

The doctrine of specialty in extradition law also protects the rights of an extraditee. Under this doctrine, which is reflected in most extradition treaties, the requesting state may prosecute the extraditee only for the offenses on which extradition is sought.\textsuperscript{257} This doctrine protects the integrity of the extradition treaty, because if a requesting state could prosecute for other offenses, the limitations in the treaty would be undermined.\textsuperscript{258} The doctrine also protects the extraditee from prosecution on additional charges and thus provides a safeguard for the individual.\textsuperscript{259} The extent of this protection is, of course, limited in that the extraditee may have no effective remedy if the requesting state in fact prosecutes on additional charges.\textsuperscript{260}

\textsuperscript{250} E.g., Extradition Treaty, supra note 248, art. 8.
\textsuperscript{251} Fidan, 1987 D.S. Jur. at 307 (conclusions of Mr. Bonichot, government attorney).
\textsuperscript{252} Collins v. Loisel, 259 U.S. 309, 311 (1921).
\textsuperscript{253} Fidan, 1987 D.S. Jur. at 306 (conclusions of Mr. Bonichot, government attorney).
\textsuperscript{254} Collins, 259 U.S. at 316-17.
\textsuperscript{256} M. Bassiouni, supra note 238, at 460-61.
\textsuperscript{257} Id. at 352-53.
\textsuperscript{258} Id. at 354.
\textsuperscript{259} Legal Aspects of Extradition Among European States 21 (Council of Europe 1970).
\textsuperscript{260} M. Bassiouni, supra note 238, at 356-57.
The exception in extradition law for political offenses also protects extraditees. Most extradition treaties do not require extradition for political offenses. 261 This exception came into being in the nineteenth century, under the impact of ideas of protecting the political freedom of the individual. The political offense exception was connected to the concept of giving asylum to those against whom reprisals might be taken in their home states because of their political views. 262 The exception reinforces the right of asylum, which gives those who may be persecuted for political opinion a right to refuge abroad. 263 Traditionally, states have resisted surrendering individuals who may be tried less for specific acts than for their political views.

A 1985 revision of the United States-United Kingdom extradition treaty 264 required a magistrate to deny extradition if the extraditee establishes

by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions. 265

This language was inserted by the United States Senate as an amendment to the treaty as negotiated between the United States and United Kingdom, primarily because the revised extradition treaty restricted the political offense exception 266 and the senators wanted a safeguard against the use of extradition to gain custody of exiled political opponents. 267

The 1985 provision, for the first time in any United States extradition treaty, barred extradition where the request, though based on probable cause with respect to an extraditable offense, is motivated by an aim of persecuting the extraditee. 268 Also for the first time under any United States extradition treaty, a magistrate must deny extradition if the extraditee would be prejudiced at trial because of

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261 Id. at 371.
262 Id. at 372-75.
263 J. SHEARER, EXTRADITION IN INTERNATIONAL LAW 175 (1971).
265 Id., art. 3(a) (as amended in 132 CONG. REC. S9120 (daily ed. July 16, 1986)).
his "race, religion, nationality, or political opinions." The magistrate thus must examine the trial procedures that face the extraditee if there is reason to believe that the extraditee would be prejudiced. The scope of such an examination is not clear. It was inserted by senators wary of the trial procedures used in Northern Ireland to try Irish revolutionaries. Senator Eagleton said that it meant only that the extraditee would be permitted to prove that he or she would as an individual be persecuted, and thus that the trial might not be conducted fairly.

The dominant view among the senators, however, was that the language required an examination of the fairness of the justice system under which the extraditee would be tried. They saw it as inconsistent with a concept of non-inquiry. They were concerned that the procedures used in Northern Ireland to try Irish revolutionaries lacked due process, and they wanted to prevent extradition of Irish revolutionaries for trials in Northern Ireland until the system of trial there was reformed. Under this interpretation, the magistrate would be required to examine the administration of justice broadly, to determine whether it comported with due process.

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269 See supra note 265.
272 132 Cong. Rec. S9167 (daily ed. July 16, 1986) (statement of Sen. Eagleton). Sen. Eagleton noted that the provision is not intended to give courts authority generally to critique the abstract fairness of foreign judicial systems. It is directed at the treatment to which this particular person will be subjected. And it is directed at the likelihood of prejudice by reason of race, religion, nationality, or political opinions. A court may not deny extradition because it concludes that a foreign tribunal does not provide every procedural safeguard provided by U.S. courts. Rather, the test should be whether the procedures that would be applied to the requested person, on account of his race, religion, nationality, or political opinions, would be so unfair as to violate fundamental notions of due process.

Id. See Groarke, supra note 268, at 1530-31.
273 Note, supra note 267, at 477; Scharf, supra note 270, at 266.
274 Groarke, supra note 268, at 1530.
275 132 Cong. Rec. S9257 (daily ed. July 17, 1986) (statement of Sen. Kerry). Sen. Kerry explained: What I and other of my colleagues on the committee found particularly disturbing was the administration’s contention that the administration of justice system in Northern Ireland was not only fair, but entirely justifiable under the circumstances. Thus, the administration of justice system in Northern Ireland has become acceptable to this administration. It is not acceptable to the U.S. Senate and that is the reason for article 3(a). This is the fundamental point which the courts must address once this treaty is ratified.

A protective provision also appears in the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. According to the Convention, a state party is generally obligated to extradite to another state party that seeks a suspect on a drug trafficking charge, if the two states have a bilateral extradition treaty. However, the requested state may refuse to extradite:

where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

V. Implications for Extradition to the United States

The broad use of human rights considerations in extradition law is relevant not only when the United States is the requested state, but also when it is the requesting state. This point was made dramatically in the Soering case, in which the United States was unable to gain extradition because of its use of death row incarceration. After the European Court ordered the United Kingdom not to extradite Soering on a capital charge, the United States agreed that Soering would not be sentenced to death, and the United Kingdom surrendered him on that basis. The United States may anticipate similar difficulties in other death penalty cases.

State practice against imposition of the death penalty has increased in recent years. Many of the United States’ extradition treaties permit the other state to seek an assurance from the United States that a person sought will not be subjected to capital punishment. In Western Europe, most states have ratified a treaty in which they have agreed not to use capital punishment in peacetime. At the United Nations, a draft treaty calls for the abolition of capital punishment.

Apart from capital punishment per se, human rights treaties

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277 Id., art. 6(2).
278 Id., art. 6(6).
280 Quigley & Shank, supra note 170, at 244 n.18.
281 See supra note 255.
prohibit the execution of persons who were younger than eighteen at the time of the offense or over seventy, and international bodies have moved in the direction of calling for a prohibition against the execution of the mentally retarded. A number of persons who were under eighteen at the time of the offense have been sentenced to death in recent years in the United States and many sentenced to death are believed to be mentally retarded.

Additionally, capital cases in the United States present a potential violation of the prohibition in human rights law against racial discrimination. Discrimination on the basis of race—in capital punishment and generally—is prohibited by conventional and customary human rights law. At least one study has suggested that capital punishment in the United States is imposed more frequently where the victim of the crime was white than where the victim was black. This raises the question of whether, in the many discretionary decisions that ultimately lead to imposition of capital punishment, racial bias plays a role. According to the United States Supreme Court, before a capital sentence will be reversed for racial bias, it must be demonstrated either that those who exercised discretion in the instant case acted out of racial bias, or that the legislature maintained the death penalty “because of an anticipated racially discriminatory effect.”

Another potential human rights violation in United States death penalty procedure is the method of selecting the jury. In a voir dire procedure, all prospective jurors are questioned about their opinions on the death penalty. Those who say that they oppose it, such that they could not impose it, are excused from service on the jury. Although the United States Supreme Court has approved this proce-

\[284\] International Covenant on Civil and Political Rights, supra note 141, art. 6(5); Arnett, Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles, 57 U. Cin. L. Rev. 245, 252 (1988).

\[285\] American Convention on Human Rights, supra note 159, art. 4(5).


\[288\] AMNESTY INTERNATIONAL, supra note 286, at 42.


dure, it is believed to result in the exclusion from the jury of liberal-minded persons and produce a jury that is more racially prejudiced than a non-capital jury and more likely to convict. United States Supreme Court Justice Thurgood Marshall said that death-qualified jurors have a "pro-prosecution bias" and are "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions." According to Justice Marshall, "[t]he very process of death qualification focuses attention on the death penalty before the trial has even begun" and as a result "predispose[s] the jurors that survive it to believe that the defendant is guilty." This conclusion was confirmed by a study of the impact of death-qualifying questioning.

The United States Supreme Court said it would "assume that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," but held that "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." In contrast, the International Covenant on Civil and Political Rights calls for a "fair and public hearing by a competent, independent and impartial tribunal." Death qualified juries may not meet this standard.

Another potential problem in capital, and to some extent in other, criminal cases is appellate review. The scope of review on appeal is more limited in the United States than in many other states

293 Lockhart, 476 U.S. at 188 (Marshall, J., dissenting). See also Thompson, Cowan, Ellsworth & Harrington, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts, 8 LAW & HUM. BEHAV. 95, 103 (1984) (experiment showing that persons who, on the basis of their beliefs, would be eligible to serve on a capital jury construed evidence more favorably to the prosecution than did those who would be ineligible).
294 Lockhart, 476 U.S. at 188 (Marshall, J., dissenting). See also Ellsworth, Bukaty, Cowan & Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 LAW & HUM. BEHAV. 81, 88-89 (1984) (experiment showing that persons, who on the basis of their beliefs, would be eligible to serve on a capital jury are substantially less likely to accept a plea of insanity than those who would be ineligible).
295 Lockhart, 476 U.S. at 188 (Marshall, J., dissenting).
296 Honey, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 LAW & HUM. BEHAV. 121, 126-28 (1984) (experiment showing that persons who were subjected to the death-qualification process are more likely to convict and to sentence to death).
297 Lockhart, 476 U.S. at 173.
299 International Covenant on Civil and Political Rights, supra note 141, art. 14(1). See also European Convention, supra note 66, art. 6(1) ("an independent and impartial tribunal"); American Convention on Human Rights, supra note 159, art. 8(1) ("a competent, independent, and impartial tribunal").
because appellate courts in the United States typically do not inquire deeply into the facts as found by the trial court. Thus, if the trial court makes a questionable factual finding, an appellate court is not likely to change it.

An example of the limited scope of appellate review is State v. Apanovitch, in which a woman was raped and murdered late at night in her apartment, apparently by an intruder. Apanovitch was convicted and sentenced to death on the basis of evidence that he was a house painter and had been painting the woman’s apartment earlier on the day of her death, that a contract to paint the apartment was found inside the apartment, and that he had expressed to neighbors a sexual interest in the victim. Evidence was presented at trial that blood of type A was found in the victim’s vagina, and Apanovitch had blood of that type, but it appeared that the victim did as well. Thus the blood could have been that of the victim. There was no evidence that Apanovitch was present in or near the victim’s apartment at the time of the crime. Without indicating which evidence supported a finding of guilt, the Ohio Supreme Court upheld the conviction.

Another potential violation of human rights norms in United States criminal proceedings is the fact that, with respect to a number of defenses to crime, the accused is required to prove innocence. In some states of the United States, a defendant charged with murder who says that he was provoked by the victim must prove provocation by a preponderance of the evidence, and in some states the accused also has the burden of proving insanity, duress, and, in one state, self-defense.

Under international human rights law, an accused enjoys a presumption of innocence. Outside the common law countries, it is

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301 33 Ohio St. 3d 19 (1987).
302 Id. at 30-31 (H. Brown, Sweeney, Locher, JJ., concurring in part and dissenting in part).
303 Id.
304 Id. at 24. The decision was a four to three vote. The three dissenting judges would have overturned the verdict for lack of evidence.
309 International Covenant on Civil and Political Rights, supra note 141, art. 14(2); European Convention, supra note 66, art. 6(2); American Convention on Human Rights, supra note 159, art. 6(2).
almost universally true that, where the accused raises a defense, the prosecution must prove that it is not applicable.\textsuperscript{310} Thus, the presumption of innocence as understood in most states means that the accused may not be required to prove a defense. If an accused must prove a defense, uncertainty by the trier of fact of the validity of the defense often results in conviction. In other words, conviction occurs when the trier of fact is uncertain about guilt. In contrast, the presumption of innocence means that there may be no conviction unless guilt is established to a high degree of certainty.

Each of the preceding questionable practices in the United States could weigh against extradition to the United States. Imposition of the death penalty, race discrimination in sentencing, death qualification of juries, limited appellate review, and misplaced burdens of proof all pose potential human rights problems. Thus, the fact that more weight is being given to human rights considerations in extradition decisions may make it more difficult for the United States to gain extradition in a variety of situations.

VI. The Importance of Considering Human Rights

The rule of non-inquiry has one legitimate field of application. A court of the United States should not have to determine that a requesting state will follow procedures identical to those of the United States with respect to an extraditee. Similarly, courts abroad should not condition extradition to the United States on a requirement that United States courts follow procedures like their own in trying criminal cases. Such a requirement would assure that extradition would rarely be granted and would thus undermine the entire system of extradition. Even if substantial differences in procedure are found, that should not bar extradition.

Apart from this issue of differences in trial procedure, it is not clear that a rule of non-inquiry exists in the federal courts. Although courts and commentators have said that there is such a rule,\textsuperscript{311} the practice is sufficiently uneven to cast doubt as to its existence.\textsuperscript{312} Courts have frequently explored an extraditee's allegation about potential unjust treatment and have found him extraditable only after satisfying themselves that there is no reason to believe that unjust treatment will be given.

If a rule of non-inquiry exists, it is inconsistent with human rights law. A leading specialist in extradition law has written that "[t]he emergence of the individual as a recognized participant in the

\textsuperscript{310} Quigley, supra note 306, at 342.
\textsuperscript{311} See Scharf, supra note 270, at 268.
\textsuperscript{312} See, e.g., Bassiouni, Extradition Reform Legislation in the United States: 1981-1983, 17 AKRON L. REV. 495, 571 (1984) (stating that there is "based on'increasing dicta in the court opinions reason to believe that the rule of non-inquiry could be eroded given the appropriate case").
processes of extradition and the applicability of internationally protected human rights are likely to curtail if not eliminate the rule of noninquiry.\textsuperscript{313} The manner in which the requesting state is likely to treat an extraditee should be considered where there is reason to believe that it may violate standards recognized by human rights law as necessary for a fair proceeding.

Unless this inquiry is made, a requested state contributes to a violation of human rights. It becomes an accomplice of the state that directly violates rights. In recent decades, it has become accepted that a state must not facilitate a violation of international law by another state,\textsuperscript{314} and this principle includes international law obligations concerning human rights.\textsuperscript{315} States thus have a responsibility to ensure that they do not contribute to a human rights violation by another state.

Extradition law in the United States has long reflected concern for the rights of extraditees. The procedures followed by the federal courts to decide extraditability have involved significant safeguards. The federal courts have, albeit in a halting and uneven fashion, exhibited concern for the rights of an extraditee in the requesting state. Courts have frequently purported to follow a rule of non-inquiry while in fact giving consideration to anticipated mistreatment. The emergence of human rights law has reinforced the federal courts' concern and has made it obligatory. The federal courts are required by human rights law to bar extradition to a state that may violate the extraditee's rights.

\textsuperscript{313} M. Bassiouni, supra note 238, at 466.
\textsuperscript{314} See supra note 202 and accompanying text.