

TOWARD THE ENFORCEMENT OF UNIVERSAL HUMAN RIGHTS THROUGH ABROGATION OF THE RULE OF NON-INQUIRY IN EXTRADITION

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I. INTRODUCTION

In June of 1995, the Mexican government requested the extradition of former Deputy Attorney General Mario Ruiz Massieu, who was accused of engaging in a cover-up in the investigation of the assassination of his own brother, a top official in Mexico's ruling party. A federal magistrate who reviewed the extradition request, sitting in Newark, New Jersey, denied the government's request, ruling that witness statements taken in Mexico were "incredible and unreliable" because they were taken in a country which was infected with "massive corruption growing out of the cocaine-smuggling trade," and that Mexico "has admittedly practiced torture in the questioning of suspects." The magistrate also suggested that statements were further tainted because the witnesses did not have counsel

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present when they were given.¹ This magistrate thus joined a number of other federal judicial officials who conduct full judicial inquiry into the protection of human rights in the criminal justice system of the receiving state, here Mexico. His and other judicial decisions are part of a growing international trend to abandon or radically narrow the rule of non-inquiry.

The rule of non-inquiry is part of extradition law in the United States and other countries. It asserts that the sending country will not look behind the receiving country's request for extradition to the quality or severity of criminal justice in that country because such inquiry is an invasion of the requesting country's sovereignty and a violation of international principles of comity. The rule of non-inquiry tacitly assumes that the quality of justice in the receiving country is addressed in the initial decision to execute an extradition treaty with the country in question, as well as in the content of the treaty itself. Thus, under the rule, neither the criminal processes to which the defendant will be subjected, nor the potential conditions of confinement or severity of punishment in the receiving country are relevant factors for consideration by the reviewing authority in the sending state. New critical scholarship has asserted that the rule of non-inquiry, devised at the turn of the century in the United States, should be abandoned.² I will not replicate those arguments in depth

1. Robert L. Jackson & Juanita Darling, *U.S. Judge Won't Extradite Former Mexico Official*, L.A. TIMES, June 23, 1995, at A1. The most adventurous of the court decisions in this protracted litigation arose when the government changed tactics after repeated failure to obtain an extradition order for Ruiz Massieu, and instead shifted to deportation proceedings. A federal district court in New Jersey reviewed the authority of the Secretary of State to order deportation and found the unreviewable nature of that authority to be, *inter alia*, an unconstitutional delegation of judicial powers to the executive branch. The decision finds unconstitutional 8 U.S.C. § 1251(a)(4)(C)(I), which, according to the court, had not been construed previously. *Ruiz Massieu v. Reno*, 915 F. Supp. 681 (N.J. 1996). The government successfully appealed the grant of a permanent injunction against the deportation proceeding of Ruiz Massieu. Without reaching the broader constitutional claims addressed by the lower court, the Court of Appeals recently held that Ruiz Massieu must exhaust available administrative remedies before pursuing federal court review. *Ruiz Massieu v. Reno*, 91 F.3d 460, (3d Cir. 1996).

2. See, e.g., John B. Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L & COM. REG. 401 (1990); Lauren Sara Wolfe, Gill & Sandhu v. Imundi: *Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries*, 13 LOY. L.A. INT'L & COMP. L.J. 1009 (1991); David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP L. REV. 111 (1991); Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85 (1992); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 80-5 (1993); Valerie Epps, Note, *International Decision: Treaties-United States-United Kingdom Extradition Treaties-Rule of Expanded Political Offense-Type Exception*, 90 AM. J. INT'L L. 296 (1996). *But see* Michael P. Scharf, Note, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary United States-United Kingdom Extradition Treaty*, 25 STAN. J.

here. The critics, however, struggle to articulate a standard by which such review should take place, or a remedy when the reviewing authority anticipates serious violations of human rights in the receiving country.

I propose here that judicial inquiry should be permitted so long as both the sending and receiving states are parties to international human rights instruments which define each country's common acceptance of binding principles of international human rights in the criminal process. Whenever the reviewing authority finds it more likely than not that a human right commonly subscribed to by the two countries would be violated, the extradition request should be denied unless assurances can be obtained that the receiving government will not violate the rights in question and a means of review for compliance with those assurances is provided. Failure to adhere to these principles itself amounts to a violation of human rights, in that most such instruments provide for "effective remedies"³ in the domestic courts for their enforcement. In short, shared human rights commitments must take precedence over mere notions of comity or political considerations.⁴

II. THE NOW-OBSOLETE ORIGINS OF THE RULE OF NON-INQUIRY

In the United States, the rule of non-inquiry was developed judicially in 1901 in the United States Supreme Court's decision of *Neely v. Henkel*.⁵ The Court rejected a contention by the extraditee that, if surrendered to Cuba, he would not be tried under procedures which conformed to guarantees found in the United States Constitution. The Court held that the safeguards of the United States legal system, and in particular its criminal procedures, are inapplicable to crimes committed in foreign jurisdictions.⁶ Other rationales have developed, in the United States and abroad, to justify the use of the rule of non-inquiry. In general, these include assertions that court review of decisions on the operation of overseas legal systems would involve the courts in foreign affairs. This

INT'L. L. 257 (1988); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991) (arguing for strict adherence to the rule of non-inquiry).

3. See, e.g., International Covenant on Civil and Political Rights, Article 2.3(a). See generally discussion in JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 386-391 (1996).

4. An argument might also be made that in the case of reluctance by the receiving country to accept basic human rights norms through treaty ratification, the sending country should apply customary international human rights norms to the receiving country to ascertain its legal obligations.

5. *Neely v. Henkel*, 180 U.S. 109 (1901).

6. *Id.* at 123.

argument is expressed through the political question doctrine or its international analog, the act of state doctrine, under which the courts may decline consideration of issues that are more appropriately undertaken by the political branches of government. Another argument is that courts lack the investigative machinery to verify claims of alleged abuses of human rights in foreign legal systems. Still another is that review of the legal systems of states with differing ideologies allows notorious criminals to escape punishment.⁷ None of these reasons, including those originally offered in *Neely*, can withstand scrutiny in the face of the developing law of international human rights.

The premises underlying the *Neely* decision have been undermined with the passage of time. There, the person being extradited argued that the Cuban legal system failed to conform with the requirements of the United States Constitution. No argument was offered that the country's legal system could not measure up against a universally accepted international human rights standard because no such standards existed at that time; they did not formally come into being as a body of law until after World War II. Understandably, the Court was reluctant to extend United States constitutional guarantees to another country. Moreover, the person to be extradited had no real case or controversy alleging an actual violation of his rights by the Cuban legal system; nor did he offer proof that the Cuban legal system was likely to treat him badly in fact. He offered only general allegations that Cuba did not provide habeas corpus or jury trial protection, nor did it prohibit ex post facto laws. He did not offer proof as to how he had been or might be affected by such failures in Cuban law.⁸ Today, such proof is easily available through extensive human rights reporting by both domestic and international monitors or through expert testimony. In the context of political asylum claims, for example, the Cuban legal system routinely comes under close scrutiny and has been held to violate human rights norms inherent in the law of political asylum.⁹

Asylum judges make findings of fact and law about the quality of justice, often basing their findings on submissions from the applicant for asylum as to that issue as found in human rights reports from credible governmental and non-governmental offices. In fact, the extensive and detailed annual reports on human rights country conditions prepared by the

7. These arguments are collected and analyzed in Shea, *supra* note 2, at 93.

8. *Neely*, 180 U.S. at 122.

9. See, e.g., Matter of Toboso-Alfonso, Int. Dec. 3222, (BIA 1990), (granting withholding of deportation to a gay Cuban because he could not expect to find adequate protection in the Cuban legal system if he were returned there).

United States Department of State are now generally considered a model of accuracy and fairness, and have been a great help to judges in their assessment of the risks of return of putative asylees.¹⁰

There is also little evidence that the executive branch is any more capable of exercising the fact-finding function than the judicial branch, and some evidence to demonstrate the contrary. For example, in the United States, the executive branch has negotiated extradition treaties with many countries whose governments have since changed to repressive regimes. While the State Department reserves the right to terminate an extradition treaty where fundamental fairness cannot be preserved, the United States has never done so in its history.¹¹ Finally, the executive branch, acting through the Justice Department in extradition proceedings, may have ethical conflicts in distancing itself from the interests of foreign governments. In an affidavit describing the role of the executive branch in the extradition process, submitted by the State Department in an extradition proceeding in New York, the Department asserted that "the Department of Justice, through the office of the United States Attorney, will represent the legal interests of the requesting State at the hearing"¹² It is hard to imagine how the government of the United States can represent the interests of the receiving state in extradition, and then neutrally assess the potential human rights consequences of extradition prior to the extraditee's surrender in the same proceeding.

III. EROSION OF THE RULE OF NON-INQUIRY IN INTERNATIONAL AND DOMESTIC COURTS

Courts in the United States have shown increasing interest in abandonment of the rule of non-inquiry. A series of decisions in the United States uses the standard set out in the decision of *Gallina v. Fraser*. Where the Second Circuit United States Court of Appeals observed that judicial inquiry is appropriate when "the relator, 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.¹³

10. This has not always been true. In the years of the Reagan and Bush administrations, during which the State Department's country reports became extremely politicized, human rights organizations published an annual *critique* of the reports, arguing their factual inaccuracy and errors, and adding information relevant to human rights concerns. The need for such correction, in itself, argues for removal of the fact-finding function of the judicial branch.

11. WOLFE, *supra* note 2, at 1029.

12. State Department affidavit in *Gill and Sandhu v. Imundi*, quoted in Paust, *supra* note 3, at 387.

13. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). The *Gallina* court's reasoning has been questioned more recently in the appeal from a well-

Despite this narrow and strict standard for abandonment of the rule, courts in the United States have begun to question the application of the rule of non-inquiry. Similar trends are discernible in Canada and the United Kingdom.¹⁴

An interesting and very recent case, for example, is the January 1996 decision of a New Jersey federal district court judge in *Sidali v. INS*.¹⁵ There, the court refused extradition and granted habeas corpus relief, finding that the government had not established probable cause to believe that the petitioner had committed a crime in Turkey, although the highest reviewing court of that country had upheld his conviction for rape and murder. The judge provides an excellent analysis of arcane criminal procedure in Turkey, noting that the petitioner was acquitted by two separate trial courts before his conviction was upheld on appeal when the prosecution petitioned a reviewing tribunal to reexamine both the factual and legal sufficiency of the lower courts' decisions to acquit.

The strictness with which the *Gallina* standard for waiver of the rule of non-inquiry is applied, however, has created great difficulty for those who seek to inquire into potential human rights violations by the receiving country. Typical is the protracted litigation arising from a request by the Indian government to extradite two gentlemen named Sandhu and Gill, begun in the late 1980's and still in progress today. In an attempt to challenge their extradition, the two men offered extensive evidence that the Indian government systematically engaged in terrorism against Sikhs. They were twice rejected by a federal magistrate who held that such evidence was outside judicial purview, as such review is reserved for the State Department.¹⁶ The federal district court, on review of the application for extradition by writ of habeas corpus, granted the writ, in large measure because of a finding that a confession of a third party implicating Gill and Sandhu in the crimes for their extradition was tainted. Indian courts themselves had found the confession to be involuntary and

reasoned decision granting extradition to Israel, but, relying on the reasoning of the *Soering* decision, *infra*, n. 16, observing that a court which extradites to a state that violates human rights makes the court a party to the violation. *Ahmad v. Wigen*, 726 F. Supp. 389, 410 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

An excellent compilation of decisions which erode the rule of non-inquiry can be found in John B. Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COM. REG. 401 (1990). See also SULLIVAN, *supra* note 2.

14. Cases from Canada and the United Kingdom are collected in Shea, *supra* note 2, at 113-119.

15. *Sidali v. INS*, 914 F. Supp. 1104 (N.J. 1996). No appeal was reported in the case at the time of this writing.

16. WOLFE, *supra* note 2, at 1016.

untrue; the Indian decisions had not been revealed to the United States courts in a timely fashion. The judge specifically declined, however, the broader invitation to review the anticipated mistreatment of the men on their own return to India.¹⁷ The grant of habeas corpus relief included an option for the government to file new extradition complaints. When the government availed itself of this option, another United States Magistrate Judge, in the most recent of this long line of decisions, again declined to permit the introduction of evidence that the men would be subjected to torture and extrajudicial execution if extradited, agreeing *reluctantly* that he must follow the law of the circuit on application of the rule of non-inquiry.¹⁸

Aside from judicial reluctance to intervene in this area, perhaps the most difficult issue to resolve is that of an appropriate remedy. It is often asserted that a decision not to grant a petition for extradition because close judicial inquiry will make the sending country a "haven for international criminals" given that the only effective remedy in such situations is the release of the defendant from custody.¹⁹ While this is often offered as a theoretical problem, it rarely occurs in actuality. Perhaps the best example is the case involving Jens Soering, a German national who sought review of Britain's decision to extradite him to the United States in the European human rights system.²⁰ Soering's extradition was sought in connection with charges of capital murder in Virginia. When he prevailed at the European Court of Human Rights, prosecutors in Virginia eventually relented on their pursuit of the death penalty and assured British authorities that capital punishment would not be sought. Soering was extradited, convicted of murder, and sentenced to life without parole.²¹ The

17. See discussion in *Matter of Sandhu and Gill*, 1996 U.S. Dist. LEXIS 11828, at 3-4 (S.D.N.Y., Aug. 19, 1996).

18. *Id.* at 13.

19. See, e.g., WOLFE, *supra* note 2, at 1037.

20. Soering prevailed in the European Court on the claim that conditions on death row in Virginia were so egregious that his return to face the "death row phenomenon" would constitute cruel, inhuman or degrading treatment under international human rights law. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser.A)(1989), reprinted in 11 Eur. H.R. Rep. 439 (1989). The United States was so concerned about its potential liability for violations of *Soering* that it included an express reservation to Article 7 of both the Torture Convention and the International Covenant on Civil and Political Rights, limiting the meaning of "cruel, inhuman or degrading treatment or punishment" in the latter to the meaning of cruel and unusual punishment under the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77 (1993).

21. Steinhardt, *Recent Developments in the Soering Litigation*, 11 HUM. RTS. L.J. 453, 454 (1990). For a full discussion, see Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991); Quigley & Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to*

requirement that assurances be given before the sending state surrenders the individual to be extradited goes a long way toward addressing the "haven for international criminals" argument. Moreover, the *Soering* decision contains two implicit premises which should operate in all extradition cases: first, the sending state is responsible for the consequences of its actions in surrendering a person to potential abuse of human rights; and second, human rights principles must prevail over the law of extradition.

A more difficult problem, in my view, is that of the consequences of the receiving government's failure to fulfill its assurances. A recent example from my own practice is relevant here. In 1994, the International Human Rights Law Clinic at American University was contacted by United States lawyers representing Joseph Kindler, an American who escaped to Canada following his conviction for murder and death sentence in Pennsylvania in 1983. These lawyers represented Kindler after his return from Canada by extradition.

Kindler was extradited from Canada in a case which drew international attention. The Canadian Supreme Court ordered his extradition and that of another prisoner, Charles Ng, in opinions which sharply divided on the question of whether extradition to face the death penalty in the United States would violate the Canadian Charter of Rights and Freedoms.²² The Human Rights Committee of the International Covenant on Civil and Political Rights also reviewed the decision under its powers to hear individual complaints against states parties. In a divided decision, the Committee found that Kindler's extradition from Canada to face the death penalty would not violate Article 7 of the International Covenant on Civil and Political Rights, in that Kindler's facts were distinguishable from *Soering's*. Counsel for *Kindler* had not alleged poor conditions or the effects of delay in the Pennsylvania death penalty regime, and there had been no simultaneous request for extradition to a non-death penalty jurisdiction, as had been the case with Germany in the *Soering* litigation.²³

The United States had apparently assured the Canadians that review of Kindler's murder conviction would comply in all respects with

Virginia?, 30 VA. J. INT'L L. 241 (1989). The decision has been criticized as an overreaching by the Court. Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background of the Soering Case*, 11 MICH. J. INT'L L. 1073, 1078-1080, 1090-1095 (1990).

22. *Kindler v. Canada (Minister of Justice)*, 84 D.L.R.4th 438, 67 C.C.C.3d 1 (1991). See discussion in Shea, *supra* note 2, at 114-119.

23. *Kindler v. Canada*, Communication No. 470/1991, Decision of 30 July 1993, reported in 14 HUM. RTS. L.J. 307 (1993).

due process.²⁴ After his extradition, Kindler's United States defense counsel asserted to me that his appeals in the United States legal system were being given short shrift by the courts, generally on grounds of procedural bar, waiver, and collateral estoppel. His lawyers inquired whether there was any recourse for this failure to provide fundamental due process, which they felt had been part of the basis for the Canadian executive branch and the courts' willingness to return Kindler to the United States. The Canadian government had purportedly expressed some interest in intervention in the appellate process but had no means, other than by diplomatic note, to intervene in the jurisdiction of the United States courts. On consultation with colleagues, our conclusion was that there is no legal basis, and no legal precedent, for intervention in the proceedings based on "breach of promise" by the receiving state. Our conclusion was that Kindler had only diplomatic, not judicial, recourse. This lack of ability to monitor the assurances, or to take action in the event of non-compliance by the receiving state, also needs a judicial solution.

The International Human Rights Law Clinic handled a case involving the application of the rule of non-inquiry. *Calum Ian Innes v. United States* was an appeal from denial of a petition for habeas corpus seeking a bar on extradition of Mr. Innes from the United States to France, where he had been convicted in absentia in 1982 of various offenses having to do with importation of illegal drugs, smuggling, and fraudulent profits.²⁵ French authorities commenced the extradition process by filing a complaint in the Western District of Louisiana, where Mr. Innes was serving time on a federal conviction, in December 1992. A federal magistrate certified Mr. Innes as extraditable after an extensive hearing on the issue, and Mr. Innes filed a timely petition for writ of habeas corpus in the United States District Court for the Western District of Louisiana. The writ was denied in June 1993, and Mr. Innes filed a pro se notice of appeal when the district court denied his request for appointment of appellate counsel. The Clinic was approached to undertake his appeal on a pro bono basis on August 23, 1993. The same day, unknown to us, the Secretary of State signed a warrant for the transfer of Mr. Innes to France. On August 27, 1993, Mr. Innes was surrendered to authorities in France. Not knowing the exact whereabouts of our client, the Clinic entered an appearance on August 31 and sought an emergency stay of removal, or in the alternative, for Mr. Innes' return to the United States. The motion was

24. The assertion by Kindler's lawyers to this effect were part of their conversations with me, and are not apparent from a review of the Canadian litigation surrounding his surrender.

25. *Calum Ian Innes v. United States*, No. 93-5112 (5th Cir. Ct. App.).

denied as moot, but the appeal was not dismissed. Briefing of the case went ahead as scheduled.

The *Innes* appeal raised two principal questions: first, whether the executive branch violated court rules and separation of powers by intentionally removing Innes from the jurisdiction, knowing of his pending appeal; and second, whether the French government's guarantee of "trials de novo" as a curative for the 1982 in absentia trials could meet minimal standards of international human rights norms accepted as binding by both the United States and France by virtue of their common ratification of the International Covenant on Civil and Political Rights (ICCPR). Among other fair trial guarantees, the ICCPR requires in article 14(3)(d) that the defendant be tried *in his presence*. The second issue is the concern of this paper.²⁶ Our brief asserted that the mutual ratification by France and the United States of the ICCPR establishes a *minimum floor* for due process and fair trial considerations in both countries. Under these criteria, there is little doubt that the French procedures for trial de novo after trial in absentia violate the norms of the ICCPR and other international human rights instruments. Such has been the position of both the Human Rights Committee²⁷ and the European Court of Human Rights²⁸ when reviewing cases involving denial of the right to trial in one's presence.

Unfortunately, the court never reached the issue. Following full briefing and oral argument of the case, a short memorandum decision dismissed the appeal as moot in August 1994.

26. The first issue also raises fascinating issues of international law beyond the scope of this article. The practice of removal of the extraditee during the pendency of his appeal is apparently on the rise. We were aware of a number of such cases in addition to our own. In no case, to our knowledge, did the court intervene to return the extraditee; all courts which have reached the issue have dismissed the appeal as moot. While a stay order barring removal may protect the appellant, many are unrepresented by counsel and unaware of the risk of not seeking a stay. We did make the argument that another United States Court of Appeal had used the All Writs Act to order the return of John Demjanjuk, alleged to be Ivan the Terrible, a notorious guard at Treblinka, from Israel when he had been deported improperly from the United States. That case is an unreported bench ruling, *Demjanjuk v. Petrovsky*, No. 85-3435, 1993 U.S. App. LEXIS 20596 (1993).

27. See, e.g., *Mbenge v. Zaire*, cited in DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 425 (1994), and general discussion, *id.* at 425-429.

28. Cases in the European human rights system seem to uniformly read the right to presence at one's trial (or appeals) in the strictest sense. In *Poitrimol v. France*, 18 E.H.R.R. 130 (1994), for example, the Court found a right to "presence" on appeal, through counsel, even where the defendant himself intentionally absconded. A helpful discussion of this issue is found in P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 319-322 (2d ed. 1990).

IV. THE STRENGTHENING OF UNIVERSAL HUMAN RIGHTS OBLIGATIONS AND THE BROADENING OF EXTRADITION TREATIES TO CONFORM TO THOSE OBLIGATIONS

A total of 135 nations now have ratified the International Covenant on Civil and Political Rights, including the United States.²⁹ It is hard to imagine a treaty that can be characterized more accurately as *universal* in its application. The treaty carefully delineates rights to fair trial and appropriate punishment in a fashion that could permit judicial interpretation in the context of an extradition request. Moreover, article 2 of the Covenant requires, as noted above, that effective remedies for vindication of the treaty rights be adopted by the parties to the treaty. This requirement alone militates toward abrogation of the rule of non-inquiry and recognition of the *Gallina* exception articulated above. However, the United States has taken on a number of other treaty obligations that speak directly to the extradition process.

Most specifically, the Torture Convention, to which the United States has been a party since 1994, explicitly prohibits extradition from a State Party "to another State where there are substantial grounds for believing that [the extraditee] would be in danger of being subjected to torture."³⁰ Application of this provision in the Sandhu and Gill litigation, discussed above, seems appropriate, in that both the United States and India have ratified the treaty, but it is never mentioned by the courts in any of their deliberations. A similar provision is contained in Article 9 of the International Convention Against the Taking of Hostages, which requires that extradition:

shall not be granted if the requested State Party has substantial grounds for believing: (a) That the request . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or (b) That the person's position may be prejudiced (i) for any of the reasons mentioned in subparagraph (a) . . . , or (ii) for the reason that communication with him by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected.

29. International Covenant on Civil and Political Rights, 1968, 6 I.L.M. 368. Information on the current number of ratifying countries is taken from the United Nations Treaty Database on the World Wide Web.

30. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984, 23 I.L.M. 1027 at art. 3.1.

This treaty was also ratified by the United States in 1984.³¹

The Convention Relating to the Status of Refugees and its accompanying Protocol, to which the United States is also a party, use the language of *persecution* or *threats to life and freedom* on account of race, religion, nationality, membership in a particular social group, or political opinion as grounds for non-return or expulsion of refugees.³² Finally, the Third Restatement of the Law of Foreign Relations, in its commentary, notes that:

[e]xtradition is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution, or because the person sought belongs to a particular political movement or organization, or if there is substantial ground for believing that the person will not receive a fair trial in the requesting state.³³

A substitute for the *Gallina* exception to the rule of non-inquiry might be gleaned from the foregoing treaty provisions, as well as the language of the Supplemental Extradition Treaty between the United States and the United Kingdom (Supplemental Treaty).³⁴ In article 3(a), the Supplementary Treaty prohibits extradition "if the person sought establishes . . . by a preponderance of the evidence 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." This language, taken in part from the international standard for the establishment of a claim of political asylum, abrogates the rule of non-inquiry. It then couples the evidence to be permitted with a reasonable standard of proof — preponderance of the evidence — for establishment of the claim. Moreover, unlike the traditional, unappealable extradition inquiry before a federal magistrate, the Supplementary Treaty stipulates, in article 3(b), that decisions by the magistrate are immediately appealable by

31. Covenant Against the Taking of Hostages, 1979, 18 I.L.M. 1456.

32. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (entered into force, April 22, 1954), at arts. 1(A)(2) and 33(1); Protocol Relating to the Status of Refugees, 6 I.L.M. 78 (1967). The United States has ratified the Protocol, which incorporates the Convention by reference, and incorporated the refugee definition into domestic legislation as part of the Immigration and Nationality Act, 8 U.S.C. §§1101(42), 1253(h).

33. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS, at 476, Cm. h., g., at 711.

34. *Reprinted in* Senate Committee on Foreign Relations Report, Supplementary Extradition Treaty With the United Kingdom, S. EXEC. REP. NO. 17, 99th Cong., 2d Sess. E, 15-17 (1986).

either party to the federal district court or court of appeal, as appropriate.³⁵ This congressionally established standard for abrogation of the rule of non-inquiry makes the judiciary the appropriate locus for review of compliance by the receiving state with basic norms of international human rights.

The standard finds its roots not only in the language of human rights treaties binding on the United States, but also in the European Convention on Extradition, under which eighty-five percent of all extraditions in the world take place each year.³⁶ Convention article 3(2) provides that extradition shall not be granted:

if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons.³⁷

One treatise on international judicial assistance notes that the United States "strenuously resisted" such language but ultimately agreed to some version of it in treaties with three countries: Ireland in 1984, Jamaica in 1983, and the United Kingdom.³⁸ This pattern of action by the State Department, coupled with congressional action on the subject, show a clear willingness by the other branches to permit judicial review of the question of potential inequities in the criminal justice system of the receiving country.

Unfortunately, the limited judicial interpretations of the Supplemental Treaty to date indicate a continued reluctance by courts to intervene in extradition proceedings. In *United States v. Howard*, the First

35. Cases and commentary on this legislatively-established exception to the rule of non-inquiry note that it was adopted as a concession to those in the United States Congress who opposed a broader effort to sharply narrow crimes designated as *political* under the United States-UK extradition treaty. The scholarly output on the advisability of this course of action was heated. See, e.g., Scharf, *supra* note 2 (arguing for strict application of the rule of non-inquiry); Note, *Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System*, 12 LOY. L.A. INT'L & COMP. L.J. 249 (1989) (arguing for broad application of the treaty exception because of the serious breaches of the right to fair trial posed by the Diplock courts).

36. Otto Lagodny, *Human Rights in the Field of Extradition*, 62 INT'L REV. PENAL L. 45, 47 (1991).

37. MICHAEL ABBELL & BRUNO RISTOW, 4 INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL EXTRADITION 108-109, 211-212, A-47 (1990). There are also similarities with the United Nations Model Extradition Code, Article 3(b), *reprinted in* M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE 459, 460 (1994).

38. ABBELL & RISTOW, *supra* note 37, at 108, 211.

Circuit United States Court of Appeals found that the petitioner, an African-American citizen accused of a particularly brutal murder of a white female in the United Kingdom, had not established sufficient proof of systematic racial prejudice in England to carry his burden of proof of prejudice directed toward him.³⁹ The Court of Appeals, however, notes that the new treaty language "openly alters [the] traditional practice" of non-inquiry.⁴⁰

A more troubling decision is that of the Ninth Circuit United States Court of Appeals in *United States v. Smyth*. There, the District Court refused to extradite based on an analysis of the potential harm to which James Smyth would be exposed on return to Northern Ireland.⁴¹ The Court of Appeals found that Mr. Smyth, convicted of attempted murder of a prison officer in Belfast, had not established by a preponderance of the evidence that his potential punishment or restrictions in Maze Prison in Northern Ireland would be due to his affiliation with the Irish Republican Army and not merely to his escape from prison.⁴² The extensive evidence offered by the petitioner, as well as the refusal of United Kingdom officials to cooperate with the fact-finding efforts of the trial judge, militate against extradition if the reviewing court were to have applied the extensive jurisprudence of asylum law on the issue of well-founded fear of persecution based on political opinion.⁴³ Note should be made here of the fact that both the United States and the United Kingdom are parties to the Torture Convention's specific prohibition on extradition where there is a strong probability of torture, a standard which no court examined. While there is a question as to whether the potential retaliation against Smyth would amount to torture, this explicit prohibition in international human rights law should not have been ignored.

39. *United States v. Howard*, 996 F.2d 1320 (1st Cir. 1993). The decision seems correct on the record before the court, in that the petitioner offered little specific evidence as to prejudice directed toward him. The petitioner argued for a per se rule, once evidence of prejudice was established. *Id.* at 1331. The reviewing court, justifiably in this author's view, rejected that standard and the sufficiency of the proof to establish specific prejudice directed at the petitioner. The case is discussed in Mary B. McDonald, *Extradition Law—Supplementary Extradition Treaty Between United States and United Kingdom—Interpreted as Partial Abrogation of the Rule of Non-Inquiry*, 18 SUFFOLK TRANSNAT'L L. REV. 391 (1995).

40. *Howard*, 996 F.2d at 1330.

41. *In Re Extradition of Smyth*, 863 F. Supp. 1137 (N.D. Cal. 1994).

42. *United States v. Smyth*, 61 F.3d 711 (9th Cir. 1995). Some of my concerns with the reasoning of *Smyth* at the Court of Appeals were shared by Valerie Epps in her Note on the case, Epps, *supra* note 2. She concludes that the court "reveals very little legal analysis and an almost willful urge to reverse findings of fact." Epps, *supra* note 2, at 299.

43. See generally DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW* 126-138 (1991).

V. CONCLUSION

The rule of non-inquiry, like many rules of international law generally, is based on now obsolete views of sovereignty and the appropriate role for an independent and fully informed judiciary. For almost twenty years courts in the United States have applied a standard for the grant or denial of political asylum in this country which requires the court to weigh and balance the information about the extent to which a refugee might be exposed to potential dangers of persecution, torture, denial of a fair trial, or many other human rights violations in their country of origin. No one, the State Department included, has argued that the courts lack sufficient expertise to make these judgments, or that such matters are better left to the discretion of the Executive branch. In fact, the traditional practice of heavy reliance by courts or asylum hearing officers on the opinion of the State Department as to the viability of the asylum claim, either specifically or more generally, has yielded to the expertise of the courts, due to both the high volume of cases and the relative lack of information provided by the State Department.⁴⁴

Abandonment of the rule of non-inquiry is not a change in policy nor a major leap in fact-finding for the courts, despite their apparent reluctance to fulfill what is not only a need but an established international obligation. The language of three now well-established extradition treaties with the United Kingdom, Ireland, and Jamaica provides a framework for abrogation of the rule of non-inquiry that was agreed to by the Executive branch and adopted by Congress. Some European countries have gone further. It is now statutorily provided in Switzerland and Austria that no extradition can proceed if the requesting state's procedures are not in compliance with human rights standards.⁴⁵ There is no reason not to apply the more modest framework proposed here more generally to all extradition cases. To do so would bring the United States into closer conformance with the practice of the European extradition regime, a regime which is applied in the vast majority of the world's cases.

44. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, REPRESENTING ASYLUM APPLICANTS: AN ATTORNEY'S GUIDE TO LAW AND PRACTICE 84 (1995), "An Asylum Officer . . . is not required to wait for comments from the State Department before deciding whether to grant asylum." But see SARAH IGNATIUS, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 133 (1993), "[t]he [State Department] opinion letters continued to play a role in asylum adjudication, although less than the almost total reliance on them under the previous INS examiners." Ignatius notes that, for her study, a response of "no additional information" or no response at all constituted as many as eighty percent of all State Department responses to INS asylum cases.

45. Christine VanDenWyngaert, *The Political Offense Exception to Extradition: How to Plug the Terrorist Loophole Without Departing from Fundamental Human Rights*, 62 INT'L REV. PENAL L. 291, 307-308 (1991).