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#### Recommended Citation

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# CRIMINAL LAW

## AUTUMN OF THE PATRIARCH: THE PINOCHET EXTRADITION DEBACLE AND BEYOND—HUMAN RIGHTS CLAUSES COMPARED TO TRADITIONAL DERIVATIVE PROTECTIONS SUCH AS DOUBLE CRIMINALITY

CHRISTOPHER L. BLAKESLEY\*

### I. INTRODUCTION

“Play with murder enough and it gets you one of two ways. It makes you sick, or you get to like it.” Dashiell Hammett, *Red Harvest* 102 (1929).

#### A. GENERAL

This article will analyze human rights law to see whether it plays any role in the protection of the individual in the face of international extradition or other international cooperation in criminal matters. I will consider two approaches to extradition and human rights that seem to be vying for position in the world arena and the tension between them. The first is to apply the traditional statist exemptions to extradition, which sometimes have enabled a few human rights protections. This ap-

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\* Christopher L. Blakesley is the J.Y. Sanders Professor of Law at the Louisiana State University Law Center. The title of this article is in honor of GABRIEL GARCIA MARQUEZ, *THE AUTUMN OF THE PATRIARCH* (1976). Prof. Blakesley was formerly in the Office of the Legal Adviser in the U.S. Department of State and has published extensively in the international criminal law arena. A few sections of this article have been adapted, updated, and expanded from the author's report on the subject of the Pinochet extradition to the American Branch of the International Law Association. He would like to thank the L.S.U. Law Center for Summer research funding that helped in feeling good while writing this article and his research assistants: Dan Stigall and Elena Arcos for their valuable assistance.

proach is based on the concept that states are the only subjects of international law. Thus, it is state's interests, rights, and obligations that are to be vindicated. If a fugitive is to be protected, it is because the state wills it so. The second approach considers the individual, at least to a degree, to be a subject of international law. It is the fugitive's interests and rights that are at issue and that human rights law protects. Thus, extradition law (treaties, custom, and domestic law) should include certain specific, basic human rights clauses or rules, through which the fugitive, if he obtains, will be exempt from extradition. These may include specific, wholesale human rights clauses in extradition treaties and domestic extradition laws. It can be argued that, even without a specific clause, established international human rights rules are incorporated by reference.

The battle between these approaches illustrates the tension between the value of protecting individual human rights in the criminal justice arena and the need to provide effective international law enforcement. Most recently, the process that led to the English decision not to extradite Augusto Pinochet to Spain exemplified the tension between these values.

It is interesting to wonder about the apparent oddity that many, though not all, human rights activists, who traditionally have been quite vigorously libertarian in protecting rights of individuals facing criminal justice systems of various nations (and, presumably still are in the run-of-the-mill cases), have become pro-prosecution hawks and quite weak on the incorporation of broad human rights protections for those brought before international tribunals or otherwise prosecuted for the more heinous international crimes. Some of the reactions to the Pinochet decision are representative. I will argue that if we are seriously going to try to end impunity for crimes against humanity and war crimes, it must be done in a way that is consistent with the highest protection of human rights interests for those being prosecuted. Otherwise, the system will ultimately fall of its own weight or become a tool of repression itself. If we are not scrupulous in protecting the accused from abuses and deprivation of civil liberties and ensuring related human rights protections for the accused during extradition, investigation, and trial, we will ultimately condemn the viability of human rights and criminal justice. As Justice Jackson warned in his opening statement as Chief Prosecutor in the Nuremberg Trials:

[B]efore I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. . . .<sup>1</sup> We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>2</sup>

The very same principles obtain in any criminal justice system, whether domestic or international. In fact, we have already seen this in relation to the War in Bosnia and Herzegovina. Article 10(2)(b) of the Statute for the Ad Hoc Tribunal for the former Yugoslavia provides that retrial may take place if the "national court proceedings were not impartial . . . ." This language probably refers to a situation of the kind suggested by the next phrase, which speaks of the accused being "shielded from international criminal responsibility." There may be situations where the International Tribunal would be more protective of the human rights of the accused than would be a national court, which may not be "impartial" or "well-disposed." Examples are plentiful. For example two Bosnian Serbs, sentenced to death for war crimes in Bosnia and Herzegovina,<sup>3</sup> were convicted after confessing, although their confessions were not corroborated,

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<sup>1</sup> The problem has already arisen in relation to the conviction and issuance of death sentences by a Bosnian military court of two Bosnian Serbs for war crimes.

<sup>2</sup> Justice Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement delivered November 20, 1945, in TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 168 (1992); see elaboration in Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFFR. 77 (1994); and in Christopher L. Blakesley, *Atrocity & its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 189 (Timothy L.H. McCormack & Gerry J. Simpson eds. 1997).

<sup>3</sup> See *Bosnia Convicts and Sentences to Death 2 Serbs*, 9 Int'l Eng. L. Rptr. 147 (No. 9, April 1993); John F. Burns, *2 Serbs to be Shot for Killings and Rapes*, N.Y. TIMES, March 31, 1993, at A6; David B. Ottaway, *Bosnia Convicts 2 Serbs in War Crimes Trial*, WASHINGTON POST, March 31, 1993, at A21.

were withdrawn, and the defendants claimed that they had been given under torture and repeated beatings. Scars and markings found on their bodies were consistent with the claims of torture. It is clear that Justice Jackson's warning is well-founded and is one that we should bear constantly in mind.

I will look at these issues through the prism of international extradition law and practice. Extradition is the traditional and the legal method for one nation-state to return a fugitive to another nation-state to face prosecution or to serve his or her sentence.<sup>4</sup> The traditional positivist approach to extradition is still predominant on most issues. It prescribes that the state is *the* subject of international law and that the individual is an object to be extradited. It is the state, not the individual, that has rights and obligations.<sup>5</sup> Barriers to extradition, therefore, obtain for the protection of the state and as the means for the state to insist on protection for its nationals, or to insist on the limits to which the requesting state must abide, upon prosecuting the extradited fugitive. This is a matter of sovereignty. Thus, limitations on and exemptions from extradition, like the double criminality principle—the principle of speciality, *ne bis in idem*—or the political offense exception apply at the prerogative and benefit of the state. They are not exclusively, or even primarily, aimed at protecting the fugitive, who, under this view, generally does not even have standing to raise their violation.<sup>6</sup> Rather, the fugitive's right to protection is derivative. The primary pur-

<sup>4</sup> CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF LIBERTY* 171-173 (1992). For its history from antiquity, through the Middle Ages, to the current time, *see id.*, at 173-190.

<sup>5</sup> *See, e.g.*, *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No. 3), 2 Eng. Rep. 97, 170 (H.L. 1999), [1999] 2 W.L.R. 827 (Lord Millett, stating: "[The classical theory of international law] taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law..."); William J. Aceves, *Liberalism and International Legal Scholarship; The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 131 (2000); Otto Lagodny & Sigrun Reisner, *Extradition Treaties, Human Rights and "Emergency-Brake" Judgments—A Comparative European Survey*, 65 REV. INT'L DR. PÉN. 543 (1994).

<sup>6</sup> *See supra* notes 8, 36, and 142-276 and accompanying text. *See also* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM J. INT'L L. 187, 189 (1998) (*citing* *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D.Fla. 1990) (noting "[a]s a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of protest by the sovereign involved."); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191, 222 (1992).

pose of limitations to and exemptions from extradition is to protect the sovereign interests of the state party or to allow the state party to maintain its sovereignty by protecting the interests of the person (object) whom they extradite.<sup>7</sup> For example, the political offense exception is applied to allow a state to protect its nationals, to avoid participation in the prosecution of the losers of a conflict over a cause,<sup>8</sup> or to protect a person from being extradited to a place where he or she will be persecuted for reasons of race, gender, ethnicity, religion, or politics.<sup>9</sup> Traditionally, therefore, the state, not the individual, is to raise these exemptions or limitations. The rule of non-inquiry is a classic statist rule. It is applied by courts to avoid considering the propriety of extradition, when questions about the fairness of the requesting state's justice system are raised. The requested state sees its interest in not embarrassing the requesting state as being stronger than the fugitive's interest in justice or fairness.<sup>10</sup>

This means that, in sum, human rights protections in extradition practice are only incremental and casuistic at best.<sup>11</sup> In addition, it will be shown that virtually all of the protections af-

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<sup>7</sup> See Dugard & Van den Wyngaert, *supra* note 6, at 187-189. Note that Noriega was, at least, a former head of state when he was found to have no immunity.

<sup>8</sup> See my discussion of these issues in BLAKESLEY, *supra* note 5, chs. 2-4; Blakesley, *The Law of International Extradition: A Comparative Study*, in INTERNATIONAL CRIMINAL LAW & PROCEDURE 147 (Dugard & Van den Wyngaert eds. 1997); BLAKESLEY, *The Individual Facing Transnational Cooperation in Criminal Matters: U.S. Report* (Max-Planck Inst. 2001, at press).

<sup>9</sup> See *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1146 (E.D. Cal. 1999) (*citng* *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986)).

<sup>10</sup> See, generally, *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999); *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (like many principles impacting habeas corpus, the rule of non-inquiry is shaped by concerns about institutional competence and separation of powers); *Martin v. Warden, Atlanta Pen.*, 993 F.2d 824, 829 (11th Cir. 1993) (the rule of non inquiry is a very significant principle which tightly limits the appropriate scope of judicial analysis in extradition cases); *In re Extradition of Manzi*, 888 F.2d 204, 206 (1st Cir. 1989) (explaining the rule of non-inquiry); *Barapind*, 72 F. Supp. 2d 1132, 1145 (E.D. Cal. 1999) (court cannot assess the "political climate" in the requesting state); *Lindstrom v. Gilkey*, 1999 WL 342320, at 11 (N.D. Ill. 1999) ("[a]n extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country, because such determinations are to be made solely by the executive branch.") (*citng* *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999)); John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213 (1996); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991).

<sup>11</sup> See Dugard & Van den Wyngaert, *supra* note 6.

forded to an accused person who is bound over for trial, already quite minimal in the United States, have been eroded, especially in relation to extradition proceedings. This article will consider the problems relating to some of these traditional limitations and protections and will compare them to the more interesting approach that calls for adoption of express human rights protections in extradition.<sup>12</sup>

#### B. IS THERE A NEED FOR A HUMANITARIAN EXCEPTION TO EXTRADITION?—OR WORRISOME TENDENCIES

Whatever slight human rights protections obtain for individuals charged with crime in either the domestic or the international systems may be eroded even further by an ironic partnership of anti-crime zealots and some human rights activists. Of course, it is most important to find a way to disestablish impunity for perpetrators of all crimes, especially crimes against humanity. A major theme of this article, however, is to warn against a tendency into which we all sometimes stumble. We allow ourselves to believe that short-cuts to the processes of “finding the truth” and eliminating impunity are appropriate in the face of the more horrendous crimes committed. This tendency is quite dangerous. It risks eroding human rights, especially those related to fair investigation, prosecution, and trial. Once a standard is set low or is lowered, it tends to remain low. It is sadly interesting to me that many vigorous proponents of human rights, who, by instinct are also vigorous promoters of protections against police and prosecutorial abuses, are tempted to seek shortcuts when it comes to fighting serious international evil.<sup>13</sup> This phenomenon reminds me of the tendencies of true-believers in the “war on drugs,” who believe that human rights in one arena are expendable for those in another. Also, some “freedom fighters” (demonized as terrorists by the other side—sometimes justifiably) equally as sincerely and zealously believe that their “war” is worth the erosion of civil liberty or human

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<sup>12</sup> See, e.g., *United States v. Watson*, 423 U.S. 417, 437 (1976) (citing *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975) for proposition that requiring a warrant for a public arrest of a felon would “constitute an intolerable handicap for legitimate law enforcement . . .” Justice Powell, concurring, added: “a constitutional rule permitting felony arrests only with a warrant or in exigent circumstances could severely hamper effective law enforcement . . .” See also discussion of this tension and balancing the competing interests in *Dugard & Van den Wyngaert*, *supra* note 6, at 188.

<sup>13</sup> Ofttimes, these individuals are non-lawyers.

rights that it causes.<sup>14</sup> Finally, many who considered themselves to be “conservative,” but were and are simple ideologues have recently “become” “born again” as “civil libertarians,” as it suits them in opposing the International Criminal Court, although they formerly have tried to erode protections afforded to those prosecuted for crime. National leaders often are exactly the same, eroding human rights of their citizens for a “greater good.” Some use important ideas and ideals nefariously. These are those who appropriate terms such as “terrorism,” “the war on drugs,” “morality,” “the rule of law,” “law itself,” “sovereignty,” “self-determination,” and even “human rights” for their own ulterior purposes.<sup>15</sup> All sides in ethnic, racial, class, and culturally based “wars,” use terms like “terrorist,” “bandit,” and “criminal” to demonize their “enemies,” to justify their promulgation of draconian policy or law or to justify taking extreme measures that they consider necessary to “defeat evil.” Those who argue for diminution of the already way too scant protections for even the worst of criminals facing extradition are stumbling down this very path.

If we are not careful, we may fall into the trap laid for all those who are too certain about the righteousness of their indignation. They become willing to do what is necessary to fulfill their righteousness. Recently, for example, in discussion of the eminently proper extradition of Elizaphan Ntakirutimana, it was argued that the procedural hurdles that had to be overcome before rendering Ntakirutimana to the International Criminal Court for Rwanda (ICTR) were “. . . unnecessary procedural complexities of American Extradition law . . .”<sup>16</sup> There is no doubt that criminals, including international criminals, will and do “take advantage of” (in every sense of the term) any procedural or substantive devices they have available to them. Abuse occurs, but abuse occurs just as often by governments when they prosecute or extradite. The answer for prosecuting or extraditing the perpetrators of the worst of crimes is not to panic, become vengeful, and eliminate the protections available, but to

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<sup>14</sup> Most of the erosion of the 4th, 5th, and 6th amendments, including the idea of probable cause, which I will discuss below, has been prompted by a zealous “war on drugs.” See, e.g., Blakesley, *TERRORISM, DRUGS*, *supra* note 4, at ch. 1.

<sup>15</sup> Blakesley, *TERRORISM, DRUGS*, *supra* note 4, at chs. 1, 3-4.

<sup>16</sup> Mary Coombs, *International Decision: In re Surrender of Ntakirutimana*, 184 F.3d 419, U.S. Court of Appeals, Fifth Circuit, Aug. 5, 1999, 94 AM. J. INT’L L. 171, 178 (2000).



insist on efficiency and fairness in policing, extradition, and prosecution. Efficiency must include efficient and mandatory compliance with the safeguards against official abuse in the name of righteous elimination of crime (and impunity). I have written about the tendency mentioned above, to backslide away from important human rights values upon a belief that the cause for which this is done makes the risk worth the candle.<sup>17</sup>

We need to work toward developing a society in which the rule of law may begin to compete more efficiently with violence and terror.<sup>18</sup> Do international law and its intersection with domestic law provide a means to stop atrocities caused by war crimes and crimes against humanity and to prosecute the accused, consistently with international norms of justice? The crimes against humanity and violations of human rights in the former Yugoslavia prompted the U.N. Security Council's Resolution 808: "There shall be established for the prosecution of persons responsible serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."<sup>19</sup> It was done similarly for Rwanda.<sup>20</sup> We have watched the ICTY and the ICTR attempt to address the problem. The momentum from these modern tribunals gave rise to

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<sup>17</sup> See, e.g., BLAKESLEY, *TERRORISM, DRUGS*, *supra* note 4, at chs. 1, 3-4; Blakesley, *Obstacles*, *supra* note 2, at 77; BLAKESLEY, *Atrocity & Its Prosecution*, *supra* note 2, at 189; Christopher L. Blakesley, *Observations on the Consolidated Text for the Statute for the Permanent International Criminal Court: Commentary & Critique of Parts 5 and 6 (Protections for the Accused in the Investigation, Prosecution, & Trial)* (also, in Monograph, *Nouvelles Études Pénal*, France, at 69) (1998); Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms in Symposium on Bosnia/Rwanda Tribunals and the Proposed ICC*, 25 *DENV. J. INT'L L. & POL'Y* 233 (1997); Christopher L. Blakesley, *Les Systèmes de Justice Criminelle Face au Défi du Crime Organisé*, 99 *REV. INT'L DR. PÉN.* 35 (1999).

<sup>18</sup> We have seen several indictments, including those of Mladic, Karadzic, and Milosevic, and a few convictions, some quite important. To date some 66 individuals have been publically indicted or convicted. Most of the indictees are still at large and we obviously do not know how long the list of secret indictees is. See *discussion in Kelly D. Askin, Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 *AM. J. INT'L L.* 97 (1999). On July 6, 1999, the former Bosnian Serb deputy prime minister, Radoslav Brdjanin was arrested for transfer to the Hague to be prosecuted pursuant to a secret indictment for atrocities carried out in Bosnia. Brdjanin was in control of an area of northwestern Bosnia where persecution and "cleansing" of the Muslim and Croat population occurred. BBC radio broadcast, July 6, 1999 at 10:36 GMT.

<sup>19</sup> U.N. SCOR, 48th Sess., 3175th mtg., U.N.Doc. S/Res/808 (1993).

<sup>20</sup> See U.N. SCOR, 49th Sess., 3453d mtg., U.N.Doc. S/Res/955 (1994).

the creation of the International Criminal Court.<sup>21</sup> Recent successes in these ad hoc tribunals and the potential we see in the creation of an international criminal court, if it meets due process standards, and some aspects of the Pinochet case may provide some hope.

Voltaire's "everyman" in *Candide* cynically assessed international law and the laws of war, as consisting of righteous brutality on a grand scale and simple suffering on a human scale.<sup>22</sup> Voltaire's assessment of international law, terror, and our own tendency to become barbaric can apply to our similar tendency to confuse justice with vengeance.<sup>23</sup> Exploitation of human weakness by the few with power may be the actual and most proximate culprit.<sup>24</sup> Primo Levi drove himself to despair (perhaps to suicide) over the issue of why common, every-day, "civilized" people may fall into a miasma of evil.<sup>25</sup> Sadly, many of us tend to distrust, denigrate, and discriminate against those whom we perceive as being different from us. This tendency is often manipulated by "leaders" who appropriate our weakness for their own nefarious purposes. We are made to believe that those "who are different" are dangerous.

Herman Melville also beautifully communicates what happens to us when we let hatred of our perceived "enemies" fester and well-up in us:

[a]ll that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil to crazy Ahab, were visibly personified, and made practically assailable in *Moby Dick*. He piled upon the whale's white hump the sum of all the general rage and

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<sup>21</sup> See, e.g., *Rome Statute of the International Criminal Court*, art. 5(1), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

<sup>22</sup> VOLTAIRE, *Candide* 5 (Appelbaum ed, 1991) (*Candide, ou l'optimisme*, 1759), cited in L.R. Beres, *Straightening the "Timber": Toward a New Paradigm of International Law*, 27 VAND. J. TRANSNAT'L L. 161, and fn. 7 (1994).

<sup>23</sup> See, BLAKESLEY, *TERRORISM*, *supra* note 4, at ch.1; P.D. JAMES, *Certain Justice* 8 (1997); Blakesley, *Obstacles*, *supra* note 2; Blakesley, *Atrocity*, *supra* note 2.

<sup>24</sup> See, BLAKESLEY, *TERRORISM*, *supra* note 4, at chs. 1-2.

<sup>25</sup> See, PRIMO LEVI, *I SOMMERSI E I SALVATI* (1986) (*THE DROWNED AND THE SAVED*) (1988). See also, ALBERT CAMUS, *LES JUSTES* (*THE JUST ASSASSINS*) (1958); cf., ALBERT CAMUS, *LA PESTE* (*THE PLAGUE*) (1947); Blakesley, *TERRORISM*, *supra* note 4, at ch. 1; SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (Strachey trans., Colledge ed. 1961). For an interesting fictional musing on the subconscious, see IRVIN D. YALOM, *WHEN NIETZSCHE WEPT: A STUDY OF OBSESSION* (1992).

hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it. Herman Melville, *Moby Dick*.

Herman Melville's genius prompts us to address our own tendencies through Captain Ahab. We sense the risk of our own potential for destructive rage, hatred, and violence. Melville's insight penetrates to the core of what I would bet includes all societies. Perhaps, if we are honest, there lurks in each of us the potential for it. Today we must look at ourselves in the face of what has become an omnipresent terroristic melodrama. Re-read *Moby Dick* and be reminded that this is not new.<sup>26</sup> Even those not directly injured in actual depredations have probably suffered moments of vicarious terror over the past few years. We have watched accounts of mass slaughter, rape and torture, terrorist attacks, and wars throughout much of the world. We shudder to think of those who have suffered and continue to suffer it directly. Most people in all countries and groups, I am sure, are sickened by it.

Are these horrors and the responses to them all of one cloth or, at least, do they risk becoming so? I will argue one way in which they are indeed of one cloth. Simone Weill and Thomas Merton were not far off in their belief that the monster, "the great beast" is the urge to collective power, "the grimmest of all the social realities of our time."<sup>27</sup> This lust for power is masked by the symbols of "nationalism, fundamentalism, of capitalism, fascism, racism,"<sup>28</sup> and I would add, morality, anti-terrorism, sovereignty, self-determination, and even democracy.<sup>29</sup> Even national security, which is "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so . . ."<sup>30</sup> belongs on this list of dangerous ideologies.

We must, individually and in our groups, explode the myth and defeat the beast. Every day it seems some institution, gov-

<sup>26</sup> We U.S. citizens need only to consider our past that included slavery, genocide of Native Americans, and racism.

<sup>27</sup> Thomas Merton, *The Answer of Minerva: Pacifism and Resistance in Simone Weil*, in MERTON, *THE LITERARY ESSAYS OF THOMAS MERTON* 134 (Brother Patrick Hart, ed. 1981).

<sup>28</sup> *Id.*

<sup>29</sup> Anything is vanity [and evil] if abused according to Biblical teachings.

<sup>30</sup> Merton, *supra* note 27, at 139 (quoting Simone Weill).

ernment, or group uses innocent children, women, and men as fodder in their "wars" against enemies; in their attempt to promote a perverted version of *lex talionis*. Some claim that the pusillanimous carnage is in retaliation for the slaughter of innocent children, women, and men aboard the Iranian Air Bus blown out of the sky by American forces. Others suggest that it was committed by those interested in thwarting prospects of peace in the Middle East. The melodrama of terrorism, war crimes, and crimes against humanity has penetrated each of our lives. As we see carnage, rage becomes more part of us. Innocent children, women, and men aboard Pan Am Flight 103 were used as fodder in some "cause" or "war." Two Libyans were recently prosecuted for their part in bringing down that flight. But consider the innocents slaughtered aboard the Iranian Air Bus, blown out of the sky by American forces. Perhaps the pusillanimous carnage wrought on Pan Am 103 was in retaliation for the slaughter of other innocent children, women, and men aboard the Iranian Air Bus.

### C. EMERGENCE OF PRO-ACTIVE HUMAN RIGHTS CLAUSES

The view that human rights for individuals are merely derivative of states' rights is beginning to be broken by the ad hoc tribunals for Rwanda and the former Yugoslavia and, we can hope, by the Statute for the Permanent International Criminal Court.<sup>31</sup> The Appeals Chamber of the International Tribunal for the former Yugoslavia stated in the *Tadic Case* that the derivative nature of human rights interests has more impact on domestic courts than in the international arena.<sup>32</sup>

I will show that the vision of individuals being "subjects" of international law (both as defendants and plaintiffs) is beginning to develop in some domestic systems. Human rights are protected directly and in increasing measure through enforce-

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<sup>31</sup> See YVES BEIGBEDER, *JUDGING WAR CRIMINALS* (1999); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* (1998); Blakesley, *Atrocity*, *supra* note 2, at ch. 8.

<sup>32</sup> See *Prosecutor v. Dusko Tadic a/k/a "Dule," Opinion & Judgment*, <[http://www.un.org/icty/tadic/trial2/judgement-e/tad-tj970507e.htm#\\_toc387417230](http://www.un.org/icty/tadic/trial2/judgement-e/tad-tj970507e.htm#_toc387417230)>; *In re Tadic*, No. 15-94-1-T, ¶¶ 2, 58-59 [Appeals Decision on Jurisdiction] (ICTY, June 23, 1995); *Prosecutor v. Tadic*, 105 INT. L. REP. 419 (1995); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber, July 15, 1999).

ment in domestic litigation and through other domestic institutions or mechanisms.<sup>33</sup> Thus, I will focus on extradition as one of the mechanisms for the potential development of human rights in general, especially for rights related to criminal prosecution.<sup>34</sup> This development is natural and important because extradition is at the intersection of international and domestic law and practice. So, I will explore several aspects of the traditional versus the more proactive human rights approaches to extradition.

Some nations, especially in Europe, are adopting the more proactive human rights approach in their extradition law and practice. Some are including new bars or limits to extradition based on international and domestic human rights protections. These include rights that arise not only from treaty and customary international law, but also from domestic legislation and constitutional principles. Indeed, some scholars see international norms protecting human rights as being of a constitutional order or character.<sup>35</sup> Some nations are considering the adoption of explicit human rights clauses into their extradition laws and treaties to replace the traditional, derivative protections. German extradition treaties, in the future, for example, will likely contain a clause reading something like: "extradition will not be granted, if it is contrary to international and Consti-

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<sup>33</sup> INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996). See also, Joan Fitzpatrick, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 242 (Hurst Hannum ed., 1999); Aceves, *Liberalism*, *supra* note 5, at 132, n. 16, citing: James A.R. Nafziger, *International Foreign Law Right Here in River City*, 34 WILLAMETTE L. REV. 1 (1998); Steven M. Schneebaum, *Human Rights in the United States Courts: The Role of Lawyers*, 55 WASH. & LEE L. REV. 737 (1998); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994); Jonathan Charney, *Universal International Law* 87 AM. J. INT'L L. 529 (1993).

<sup>34</sup> See, e.g., Blakesley, *TERRORISM*, *supra* note 4, at 281, *et seq.*; Otto Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*, 9 BEITRAGE UND MATERIALIEN AUS DEM MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, FREIBURG IM BREISGAU (1987); PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 489-689 (Albin Eser & Otto Lagodny eds., 1991).

<sup>35</sup> This may be considered to be part of the approach called "transnational law litigation." See Aceves, *Liberalism*, *supra* note 5, at 132; Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Harold Honjiu Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987).

tutional Basic Rights . . .”<sup>36</sup> Basic Rights in Germany include international human rights. They have a constitutional character in that they work like mandatory norms, which must inform every interpretation of any relevant clause in an extradition treaty or extradition law. This is a more aggressive human rights approach, which requires human rights clauses to be included explicitly in extradition treaties or, alternatively, to be read into them.

Traditionally, at least since the Peace of Westphalia, sovereignty has been sacrosanct, an unassailable attribute, indeed, the essence of, statehood.<sup>37</sup> Sovereignty, however, has suffered some erosion through progressive forces at work in democratic societies, often prompted by the human rights movement.<sup>38</sup> In the international system and in many domestic legal systems, it is arguable that an extradition treaty must be read to promote basic human rights.<sup>39</sup> Human rights norms inform and infuse the treaty. Ambiguous terms must be interpreted to be consistent with relevant human rights principles and gaps must be filled so as to promote human rights.<sup>40</sup> Traditionally, however, the opposite has been true; ambiguity was to be read in favor of extradition.

In the United Kingdom, the House of Lords found a way to apply a fairly rigid, statist, dualistic, and traditional rule of double criminality to avoid extraditing Augusto Pinochet to Spain. This article will apply this interesting combination of slouching toward human rights protection and recognizing criminal pre-

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<sup>36</sup> See Christopher L. Blakesley & Otto Lagodny, *Competing National Laws: Network or Jungle*, PRINCIPLES & PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 47-100 (MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, Freiburg im Breisgau, Germany, 1991).

<sup>37</sup> See Dugard & Van den Wyngaert, *Reconciling*, *supra* note 6, at n. 3.

<sup>38</sup> *Id.*; see also Albin Eser, *Common Goals & Different Ways in International Criminal Law: Reflections from a European Perspective*, 31 HARV. INT'L L. J. 117 (1990).

<sup>39</sup> *But see* United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992) (official abduction of accused, for purposes of prosecution in United States, although admittedly illegal under international law does not provide remedy of release, even upon protest of nation from which defendant was abducted). See also United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

<sup>40</sup> This is similar to how public policy principles function in the United States judicial system. Moreover, it is not that different in civilian or mixed jurisdictions, where legislation is null if in violation of important public policy. See e.g. French Code Civil art. 3; ANN. LA. CIV. CODE art. 7. For more on this see *supra* notes 290-304 and accompanying text.

scriptive jurisdiction over torture committed abroad by a former head of state. The decision, while important in many ways, fit clearly into the rank of traditional statist international law.

I will begin, therefore, with a discussion of traditional extradition law as reflected in the House of Lords Pinochet decisions and in Home Secretary Jack Straw's response to the Spanish request for Pinochet's extradition. I will then move to a broader analysis of extradition, human rights clauses, and the traditional means used by the United States to protect human rights, including the rule of double criminality, the doctrine of speciality, double jeopardy or *ne bis in idem*, and the political offense exception. These finally will be contrasted with the more aggressive human rights approach in circumstances where the fugitive may be extradited, formally or informally, to a nation that exercises the death penalty, torture, cruel and inhuman treatment, and the like.

A tension obviously exists between protecting a fugitive's basic human rights and protecting governmental interests in efficient law enforcement and prosecution.<sup>41</sup> This tension is really no different from the tension between the protection of individual civil liberties in the domestic criminal justice arena; rights and protections always abut up against the interests in efficient law enforcement.

## II. HUMANITARIAN EXCEPTION TO EXTRADITION?—PINOCHET NOT COMPETENT TO STAND TRIAL OR TO BE EXTRADITED?

Perfection, of a kind, was what he was after,  
 And the poetry he invented was easy to understand;  
 He knew human folly like the back of his hand,  
 And was greatly interested in armies and fleets;  
 When he laughed, respectable senators burst with laughter,  
 And when he cried the little children died in the streets.

W.H. Auden, *Epitaph on a Tyrant*<sup>42</sup>

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<sup>41</sup> Dugard & Van den Wyngaert, *Reconciling*, *supra* note 6, at 188-89 (arguing that a balancing of these interests is required and a framework established to provide guidance to states); Sharon A. Williams, *Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance*, 3 CRIM. L.F. 191, 222-23 (1992).

<sup>42</sup> In my opinion, the best (Spanish) book on Pinochet is ANTONIO REMIRO, *EL CASO PINOCHET. LOS LIMITES DE LA IMPUNIDAD*. MADRID: POLITICA EXTERIOR (BIBLIOTECA NUEVA, 1999. ISBN: 84-7030-725-8). Its author deals specifically with legal problems. From a wider, more political point of view, we also have TITO DRAGO: *EL RETORNO DE*

Extradition is an admixture of national and international law.<sup>43</sup> It presents an interesting tension between principles of dualism and monism,<sup>44</sup> between sovereignty and cooperation and between comparative and international criminal law. Extradition is the process by which one sovereign renders a fugitive to another for prosecution or to serve his sentence if already convicted. Essentially, it is the international mechanism for binding a person over for trial in another country. It would not seem inappropriate, therefore, to provide the protections generally available to an accused under domestic law at the stage of binding over for trial. We will see, however, that this is not the case under traditional extradition law and practice.

This section will consider some so-called "humanitarian" exemptions from extradition, such as refusing to extradite on the basis of the fugitive's physical infirmity or mental incompetency. These were the grounds that informed the English government's decision not to extradite Augusto Pinochet to Spain. The Spanish extradition request for Pinochet is quite well known by now, as is the House of Lords' decision that Pinochet did not enjoy former head of state immunity for acts of torture that he or his government committed during his reign.<sup>45</sup>

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LA ILUSION PINOCHET: EL FIN DE LA INMUNIDAD, (Barcelona: RBA, 1999). Lyonette Louis-Jacques, University of Chicago Law School Faculty, recommended the following: PINOCHET FACE A LA JUSTICE ESPAGNOLE (Paris: L'Harmattan, 1999); PINOCHET ANTE LA JUSTICIA ESPANOLA PERO LLEGA : PINOCHET ANTE LA JUSTICIA ESPANOLA (Santiago : LOM Ediciones : CODEPU, 1998); THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (Diana Woodhouse ed., Hart, forthcoming 2000); FALL PINOCHET(S) (Heiko Ahlbrecht/Kai Ambos (Hrsg); Baden-Baden : Nomos, (1999); WHEN TYRANTS TREMBLE: THE PINOCHET CASE (New York, NY: Human Rights Watch, 1999).

<sup>43</sup> Dugard & Van den Wyngaert, *Reconciling*, *supra* note 6, at 189.

<sup>44</sup> See O'CONNELL, *INTERNATIONAL LAW* 38 (2d ed. 1970), where monism and dualism are explained: "[Monism] is an emanation of Kantian philosophy which favours a unitary conception of law . . ." At the apex of this one system of law is international law, which predominates and controls domestic or national law. Dualism is associated with Hegelianism and law is considered to be an act of sovereign will. National or domestic law is different and separate from international law. These form two distinct spheres of legal action. *Id.* See also discussion in BLAKESLEY, ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS*, ch. 18 (5th ed. 2000); JORDAN J. PAUST, ET AL., *INTERNATIONAL LAW & LITIGATION IN THE U.S.* 27-28 (2000).

<sup>45</sup> For a presentation of the sequence of events leading up to the decision not to extradite Augusto Pinochet, see Aceves, *Liberalism*, *supra* note 5, at 160-171, discussing both the Spanish and the British proceedings.



Perhaps it is also not inappropriate that extradition be refused upon evidence of an individual's incompetence to stand trial, as British Home Secretary Jack Straw did in the Pinochet extradition case. First, Mr. Straw announced that he was "minded" to refuse extradition on "compassionate grounds."<sup>46</sup> On March 2, 2000, he confirmed this "mindedness" and decided to free Pinochet, who immediately returned to Chile.<sup>47</sup> Mr. Straw stated that either extradition or a trial in Britain, however desirable, was simply no longer possible on medical grounds. Pinochet was "unfit to stand trial and . . . no significant improvement in his condition could be expected."<sup>48</sup> The evidence of Pinochet's incapacity and the decision not to let a court make the judgment are hotly disputed.

Apparently in England, as in the United States, it is the prerogative of the executive branch to apply humanitarian grounds to refuse extradition.<sup>49</sup> It appears that Pinochet would have been extradited if Secretary Straw had found that he was competent to stand trial. It would seem appropriate to require the defense actually to prove his lack of competency. The test for competency to stand trial is whether the accused is capable of understanding the charges against him and to participate meaningfully in his defense. Secretary Straw's decision not to extradite was based mainly on his belief in Pinochet's mental incapacity, although he also mentioned Pinochet's physical de-

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<sup>46</sup> David Graves, *Judges to rule on Pinochet medical report next week*, THE DAILY TELEGRAPH, Feb. 10, 2000. See also Amnesty International, *Public Statement, Pinochet Case: Reaction to the Reported Questions Raised by Countries Requesting Extradition*, AIINDEX:EUR 45/32/00, Feb. 23, 2000. Interestingly, in the United States, a decision to deny extradition on humanitarian grounds is a function of the Secretary of State, not the judiciary. See *Martin v. Warden*, 993 F.2d 824, 830, n. 10 (11th Cir. 1993); *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997); *Sandhu v. Burke*, 2000 WL 191707, at 7-8 (S.D.N.Y. 2000), (citing *Extradition of Cheung*, 963 F.Supp. 791, 798-799 (D.Conn. 1997)). But cf. *Lindstrom v. Gilkey*, 1999 WL 342320 (N.D.Ill.1999). The issue of exemption from extradition for humanitarian reasons, as well as for reasons based on human rights, is discussed below.

<sup>47</sup> Reed Brody, Human Rights Watch, *Pinochet Case a Milestone, Report*, March 2, 2000 <<http://hrw.org/campaigns/chile98/precedent.htr>>; Mara D. Bellaby, *Ex-Dictator Pinochet leaves for Chile*, BATON ROUGE ADVOCATE, March 3, 2000, at A2.

<sup>48</sup> See *supra* notes 46-47 and Appendix.

<sup>49</sup> In the United States, it is the prerogative of the Secretary of State. See *Kin-Hong*, 110 F.3d at 110; *Martin*, 993 F.2d at 830, n. 10; *Sandhu*, 2000 WL 191707, at 7-8 (citing *Extradition of Cheung*, 963 F.Supp. at 798-799. But cf. *Lindstrom*, 1999 WL 342320. The issue of exemption from extradition for humanitarian reasons, as well as for reasons based on human rights, is discussed below.

terioration. Mr. Straw must have realized that Pinochet's physical deterioration was not relevant unless it impacted his capacity to enter a plea and to work with counsel. Certainly, an elderly person's physical capacity to withstand travel or a trial is pertinent to humanitarian concerns, and may impact on sentencing, but it is not sufficient to allow a court to deny extradition or prosecution altogether.<sup>50</sup>

Pinochet's Medical Report, which was the basis for Mr. Straw's decision to allow Pinochet to return to Chile, was leaked to the Spanish press. It is presented, as leaked, in an appendix to this article. The Medical Report was written by esteemed British doctors and was reviewed by British chief medical officer Dr. Liam Donaldson, who confirmed its quality and thoroughness.<sup>51</sup> It is important to determine whether Pinochet feigned the symptoms that allowed his apparent escape from earthly justice. The doctors who examined Pinochet concluded that his condition could not be feigned.<sup>52</sup> Although Mr. Straw clearly had the authority to make this decision, it would have been preferable for an English court to decide, so that we could have a judicial review of the medical-legal issues.

One important human rights value, which is also a basic criminal law principle, is that a person who does not have the mental capacity or competence to grasp the purpose of his punishment, to understand the proceedings against him, or to assist his counsel should not be prosecuted. All legal systems that honor human rights must have a mechanism for protecting those whom are not competent to stand trial. No doubt, sometimes even those people who have done the most evil things become incompetent. Deciding not to extradite Pinochet may or may not accommodate the important value of not trying people who are beyond earthly sanction due to incompetence, because

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<sup>50</sup> See 18 U.S.C. § 3184 (1994), which limits a court's authority to decide the existence of a treaty, the offense charged, and the quantum of the evidence offered. But note my discussion below on the continental trend to consider humanitarian grounds, including both mental and physical incapacity in relation to extradition. Moreover, in the United States, the Secretary of State has the discretion to refuse to extradite based on humanitarian grounds. See *Kin-Hong*, 110 F.3d at 110; *Martin*, 993 F.2d at 830, n. 10; *Sandhu*, 2000 WL 191707, at 7-8 (citing *Extradition of Cheung*, 963 F.Supp. at 798-799. *But cf. Lindstrom*, 1999 WL 342320.

<sup>51</sup> See *supra* note 46 and Appendix.

<sup>52</sup> See *supra* note 46 and Appendix.

we do not know whether Pinochet is actually incompetent.<sup>53</sup> It is ironic, of course, that a person charged with having violated the most basic human rights of so many may be the beneficiary of those human rights protections he mocked in a most heinous way. Nevertheless, we must remain worthy of our human rights principles. Even those who commit the most egregious evil simply cannot stand trial or be punished once they have become incompetent. If this is so, it would seem to follow that they cannot be extradited to stand trial, although it could be debated that the decision on competency to stand trial rests with the requesting state, not the requested state.

#### A. THE HOUSE OF LORDS' DECISIONS ON TORTURE AND IMPUNITY

The decision not to extradite Pinochet or to prosecute him in Britain was a terrible blow to the survivors of his torture and to the relatives of his victims, but some hope can be found in the decision whether Pinochet was immune from extradition or prosecution. Reed Brody, Advocacy Director for Human Rights Watch, tried to put a nice face on the situation, stating that, notwithstanding the non-extradition, the Pinochet case itself is a milestone.<sup>54</sup> Brody stated that, ". . .the very fact that [Pinochet] was arrested, and that his claim of immunity was rejected, has already changed the calculus of dictators around the world. The Pinochet case signified the beginning of the end of their impunity."<sup>55</sup> On February 3, 2000, for example, a Senegalese judge indicted the former Chadian dictator, Hissain Habré, on charges of torture,<sup>56</sup> and apparently former President of Indonesia, Suharto, decided not to seek medical care abroad, because of the risk of prosecution.<sup>57</sup> No doubt, then, some impunity was dissipated simply by Pinochet's arrest. Brody stated that, "a sea change is underway in how the world deals with the worst abuses."<sup>58</sup> In its attempt to make the best of the bad situation in Pinochet's release, however, Human Rights

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<sup>53</sup> For discussion of current abuse of this value in the United States in relation to imposing the death penalty, *see infra* notes 330-349 and accompanying text.

<sup>54</sup> Brody, *supra* note 47; Bellaby, *supra* note 47.

<sup>55</sup> Brody, *supra* note 47.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; Bellaby, *supra* note 47.

<sup>58</sup> Brody, *supra* note 47.

Watch may have overstated the legal value of the House of Lords' decision on impunity.

It is true that Pinochet's arrest, detention, and the House of Lords' decision that he was not immune as a former head of state from prosecution for torture, is very important—a milestone eroding impunity a bit. Nevertheless, there is a “downside” to the House of Lords' decision. The Lords clearly applied a straight-forward traditional, dualist position on torture, as well as all the other horrible crimes with which Pinochet was charged. The House of Lords majority actually insisted on applying classic, rigid, traditional extradition law, expounding a pedantic position on the “special use” of dual criminality. I will discuss this in more detail below, but for now, suffice it to say that the House of Lords held: (1) that for extradition to be allowed, not only must the fugitive's conduct be criminal in both states (Spain and England); in addition, (2) a common theory of jurisdiction over the conduct must obtain. This is the special use of double criminality that requires that the jurisdictional theory as well as the conduct proscribed be acceptable in the domestic law of the requested state.<sup>59</sup> The majority's view is, first, that torture was *not* a crime of universal jurisdiction prior to the promulgation of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>60</sup> and that, even if it were, it was not extraditable (or punishable) in England until promulgation of the Criminal Justice Act of 1988.<sup>61</sup> They insisted that jurisdiction be based on an explicit English “incorporation” of torture as a crime. Thus, although the House of Lords held that Pinochet was not immune from extradition or prosecution for torture, this was only on the basis of the Torture Convention and the Criminal Justice Act of 1988 (“Torture Convention”), which incorporated it.<sup>62</sup> This position is clearly antagonistic to the idea of torture being a universal crime or a crime that allows

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<sup>59</sup> For discussion of this, see *infra* notes 192-201 and accompanying text; see also BLAKESLEY, TERRORISM, *supra* note 4, at 215-276; Michael Birnbaum, *Pinochet and Double Criminality*, CRIM. L. REV. 127 (March 2000).

<sup>60</sup> G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No.51, U.N.Doc. A/39/51.

<sup>61</sup> *Criminal Justice Act of 1988* § 134(1), (2) and (3). See both the Second and the Third House of Lord's Decisions. David Turns, *Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom*, 4 J.OF ARMED CONFLICT L. 1 (1999).

<sup>62</sup> See *Ex Parte Pinochet*, *supra* note 45; CRIMINAL JUSTICE ACT OF 1988 § 134(1)(2)(3).

universal jurisdiction. Thus, the House of Lords did not embrace customary international law on universality of jurisdiction over heads of state and former heads of state for torture or other crimes against humanity, such as those allegedly committed by Pinochet and his cronies.<sup>63</sup>

Professor David Turns recently argued that the third House of Lords' decision in the Pinochet suite provides some hope for British jurisprudence on customary international law, but that the Majority, perhaps, could have and should have gone further. Lord Millett's minority opinion maintained that torture was a crime in the United Kingdom well before the incorporation of the Torture Convention, and at least by the time Pinochet came to power in 1973.<sup>64</sup> Lord Millett was a minority of one in the view that torture was a crime under customary international law<sup>65</sup> by that date, and that customary international law was part of English common law. Adoption of his view, however, does not appear likely in the near term.

Notwithstanding its limitations, even the majority opinion does add some momentum to a broader acceptance of the proposition that torture and all crimes against humanity violate both treaty law and customary international law. Eventually, the

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<sup>63</sup> This customary international law is established by many treaties and by several important judicial decisions. See e.g. London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, (Charter attached as Annex) art. 7, 59 Stat. 1544-1548, E.A.S. No. 472 (1945); and the Judgment of the International Military Tribunal at Nuremberg, 6 F.R.D. 69; reprinted at 41 AM. J. INT'L. L. 172 (1947), especially the *Doenitz* decision, in which Admiral Doenitz was convicted for conduct while head of the Nazi State for his very short tenure after replacing Hitler. See also *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (General Noriega was convicted, despite the fact that he was at least a former, if not a sitting, head of state). This is a positive aspect of the *Noriega* decision, notwithstanding all the negatives surrounding that case. See gen. M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000).

<sup>64</sup> See *Pinochet, III*, *supra* note 5; Turns, *supra* note 61. See also *Trendtex Trading Corp. v. Central Bank of Nigeria*, 1 Q.B. 529, 553-554 (1977) (a civil case, but relating to customary international law and sovereign immunity).

<sup>65</sup> Customary international law is binding authority. It is "general [state] practice accepted as law." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38. Put another way, customary international law derives from general and consistent practice of states followed by them out of a sense of legal obligation. See RESTATEMENT THIRD OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). See also *The Paquete Habana*, 175 U.S. 677 (1900). This is not unlike customary law in "Civil Law" systems, which generally is as binding as judicial decisions. See Christopher L. Blakesley, *The Impact of a Mixed Jurisdiction on Legal Education, Scholarship & Law*, ch. 3, in *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* (Vernon V. Palmer ed. 1999).

House of Lords may accept that these offenses are subject to universal jurisdiction, but that surely is for another day.

The English orthodox position on incorporation of customary international law, at least in theory, is that customary international law is automatically part of English law, as long as it is not in conflict with any statute in force or any judicial decision by an English appellate court.<sup>66</sup> In reality, however, English courts virtually never decide cases solely on the basis of customary international law, with a couple of limited exceptions. Exceptions of prize cases based on ancient Admiralty jurisdiction and in the Royal Warrant of 1945 (now defunct in all but name), which served for the prosecution of German, Italian, and Japanese (and, by extension, others such as Koreans, Taiwanese and even one Hungarian who served for Japan) war criminals after World War II.<sup>67</sup> The Royal Warrant was limited to war crimes. It did not cover crimes against humanity, although British military courts invariably held that crimes against humanity committed in enemy-occupied territory or during the conduct of military operations were subject to military law, hence, were war crimes.<sup>68</sup> These included: single unlawful killings, torture or other forms of maltreatment committed by civilian labor contractors employed by the local Japanese Civil

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<sup>66</sup> *The Paquete Habana*, 175 U.S. at 677.

<sup>67</sup> R. John Pritchard, *Changes in Perception: British and Military Perspectives on War Crimes Trials and their Legal Context (1942-1956)*, THE MILITARY DIMENSION, 5 A HISTORY OF ANGLO-JAPANESE RELATIONS (Ian Gow & Hiram Yoichi, eds., Tokyo Univ. Press & Macmillan, 2000) (copy of draft available in my office). David Turns, *Prosecuting Violations*, *supra* note 61. John Pritchard also notes that the Royal Warrant did not allow prosecution of those who had owed allegiance to the Crown, but who fought for the other side, such as some Sikhs who took oaths of allegiance to the Japanese Emperor. R. John Pritchard, *The Historical Experience of British War Crimes Courts in the Far East, 1946-1948*, 6 INT'L RELATIONS 311 (May 1978). The issue of whether customary international law establishes universality of jurisdiction is vigorously and adroitly disputed by Alfred P. Rubin, at least in the absence of jurisdiction to adjudicate—or some national interest in the matter, such as the passive personality or the protective principle. See ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 197, et seq. (1997) and in his THE LAW OF PIRACY 384 (2d ed. 1998). For lengthy analysis of these principles of jurisdiction, including their relationship to prescriptive, enforcement, and adjudicative jurisdiction, see Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 33-105 (2d ed. 1998).

<sup>68</sup> R. John Pritchard, *The Historical Experience*, *supra* note 67, at 319-20.

Administration (itself subject to military law and oversight in occupied territories).<sup>69</sup>

Jurisdiction to prosecute international conduct based on customary international law where individual liberty is at stake requires an act of Parliament in England and a statute in the United States.<sup>70</sup> This is quite appropriate, where to prosecute under circumstances such as when the elements of the offense are too vague, or where there is a question about *ne bis in idem*, would be dangerous. Many treaties were drafted by diplomats and non-criminal law specialists, so some "international crimes" in them or that developed through customary international law may be far too vague. Erosion of individual rights before the criminal bar is a realistic thing to worry about, especially when the perpetrator is charged with extremely heinous offenses. This may be particularly true in the current zeal to prosecute those who are charged with having committed crimes against humanity.<sup>71</sup> If we allow erosion of protections for these, we erode protections for us all.

The majority of the House of Lords did not even accept the view that torture was a universal crime under customary international law prior to the Torture Convention. Lord Millet said that it was, but cited no settled authority specific to torture for this. He did refer to several human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and even the Genocide Convention. He also cited the *Furundzija* decision out of the ICTY<sup>72</sup> and Burgers & Danelius' Handbook on the Torture Convention.<sup>73</sup>

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<sup>69</sup> See *id.*

<sup>70</sup> David Turns, *Prosecuting Violations*, *supra* note 61; R. John Pritchard, *Changes in Perception*, *supra* note 67. Trenchant criticism in Britain of Judge Cassese's decision in the *Tadic* case stemmed from this notion extending jurisdiction over conduct that was not covered by specific "legislation," in that it was said not to have been committed in an international armed conflict. Turns, *supra* note 61.

<sup>71</sup> See *supra* note 70.

<sup>72</sup> *Prosecutor v. Anto Furundzija*, 38 I.L.M. 317 (1999) (*citing* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), but holding that torture was a universal crime by 1998).

<sup>73</sup> See Herman Burgers & Hans Danelius, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT* (1988). Again, thanks to David Turns and R. John Pritchard for this.

### 1. *Torture: Actus Reus and Mens Rea*

The position taken by Home Secretary Straw and the House of Lords regarding the offense of torture is interesting. Straw agreed with the House of Lords that the Torture Convention, as incorporated into British Law in the Criminal Justice Act of 1988, section 134, requires *intent* to “[inflict] severe pain or suffering on another in the performance or purported performance of . . . official duties . . .” whether the suffering is caused by act or omission, and whether it is committed directly by the defendant or by aiding, abetting, consent, or instigation by an official or one acting on his behalf.<sup>74</sup> The House of Lords held that only those acts of torture attributable to Pinochet that occurred after the promulgation of this Act were extraditable or justiciable, if there were to be any prosecution in England.<sup>75</sup> It seems to me that the disappearances that continue to cause pain and suffering to the *desaparecidos* families and loved ones constitutes or should constitute a continuing offense of torture to those families.<sup>76</sup> This should give a basis for any nation to prosecute Pinochet (if he is competent) or his cronies. Nevertheless, the Spanish request for Pinochet’s extradition was refused by the British Government (along with requests from the Belgians, the French, and the Swiss). Amnesty International reported that all four of these nations that sought Pinochet are unconvinced that the medical report proves that Pinochet lacks the capacity to stand trial.<sup>77</sup>

### III. PINOCHET’S SITUATION IN CHILE

Now that Pinochet has been allowed to return to Chile, the Chilean people and government have the obligation and burden to determine his fate and to address the tension between the human rights of the accused and those of his victims. Chil-

<sup>74</sup> CRIMINAL JUSTICE ACT § 134 (1)(2)(3) (1988).

<sup>75</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, 2 W.L.R. 827 (1999).

<sup>76</sup> This seems to have been hinted at by the Belgian Elaborative Memorandum, to which Home Secretary Straw refers in ¶ 41 of his Statement, reported in M2 PRESSWIRE M2 Communications, Ltd., March 2, 2000.

<sup>77</sup> Amnesty International, Public Statement, Pinochet Case: Reaction to the Reported Questions Raised by Countries Requesting Extradition, AIINDEX:EUR 45/32/00, Feb. 23, 2000. The standard in the United States for competency to stand trial is generally defined as having sufficient ability to consult with counsel with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings. See *e.g.* *Dusky v. United States*, 362 U.S. 402 (1960).



ean authorities have taken significant steps to address this problem. The possibility of some sort of criminal action against Pinochet in Chile appears more likely than when he first returned. Pinochet faces at least eighty-three judicial complaints filed against him in Chile, in connection with allegations of his participation and ordering torture, executions, and disappearances from 1973 to 1990.<sup>78</sup> A Chilean court of appeals in Santiago held, on April 18, 2000, that it would not order former dictator Pinochet to undergo medical or health testing ahead of an April 26 hearing on whether to rescind his parliamentary immunity.<sup>79</sup> The hearing to consider stripping Pinochet's immunity was postponed pursuant to a request by Pinochet's counsel, who claimed that they needed more time<sup>80</sup> and that Pinochet was not well.<sup>81</sup> For this purpose, Pinochet's attorneys had filed a motion requesting the Court to order medical tests for their client ahead of the April 26 hearing.<sup>82</sup>

Pursuant to this April 26 hearing, the Santiago Court of Appeals decided that Pinochet's immunity should be lifted, so that the complaints against him can be heard.<sup>83</sup> The Appellate Court decision was appealed to the Chilean Supreme Court,<sup>84</sup> which affirmed that Pinochet may be stripped of his immunity.<sup>85</sup> Pinochet's counsel mounted a defense on grounds of Pinochet's incompetence to stand trial and his infirmity, similar to the defense raised successfully in England.<sup>86</sup>

Although the Supreme Court has eliminated Pinochet's immunity, prosecution may still be problematic. As I have noted, Pinochet's counsel are raising his incompetence to stand

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<sup>78</sup> *Chile Court Refuses to Order Pinochet Medical Tests*, AGENCE FRANCE-PRESSE, April 18, 2000, available at 2000 WL 2776693.

<sup>79</sup> *See id.*; *Chile Court Postpones Pinochet Immunity Hearing by One Week*, AFX NEWS, April 18, 2000, available at 2000 WL 18356680 (the hearing to strip Pinochet of his parliamentary immunity is postponed from April 12 until April 26).

<sup>80</sup> *See Court Delays Hearing on Immunity for Pinochet*, ORLANDO SENTINEL, April 18, 2000, at A6, available at 2000 WL 394967.

<sup>81</sup> *See* NEWS: Chile, THE TORONTO STAR, April 18, 2000, available at 2000 WL 19577412; *Chile Court Refuses to Order Pinochet Medical Tests*, *supra* note 78.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; Rafael Urbina, *Pinochet Loses Immunity, Opponents Seek Justice*, AGENCE FRANCE-PRESS, June 5, 2000, available at 2000 WL 2808296.

<sup>84</sup> *Id.*

<sup>85</sup> *See*, Anthony Faiola, *Chile Revokes Pinochet's Immunity; Ruling Opens Way for Historic Trial*, THE WASHINGTON POST, August 9, 2000, at A1.

<sup>86</sup> *Id.*

trial. The dissenting judges in the Court of Appeals decision to lift the immunity addressed this point. They noted that Chilean law allows Pinochet to avoid prosecution only if he is suffering from mental incompetency, more specifically, limited to incompetency stemming from "dementia." The American Convention on Human Rights, to which Chile is a party, provides that an accused person may not be prosecuted, unless he has the mental capacity to understand the charges against him, to defend himself, and to be able to consult with and assist his counsel

#### IV. HUMAN RIGHTS PROTECTIONS AND EXTRADITION

##### A. SELF-EXECUTING TREATIES AND THEIR IMPACT ON HUMAN RIGHTS IN EXTRADITION PRACTICE—GENERAL

A "self-executing treaty" is one that needs no implementing domestic legislation; it takes effect upon ratification.<sup>87</sup> It is aimed at the judiciary, not the legislature. In the United States, if a treaty is not self-executing, or if Congress has not passed enabling legislation, it does not create a cause of action or provide a remedy.<sup>88</sup> Non-self-executing treaties do not create adjudicative or enforcement jurisdiction in United States courts.<sup>89</sup> Thus, if a treaty is non-self-executing, it provides no specific legal effect, although it may influence policy or legislation. Human rights conventions generally are not considered self-executing in the United States.<sup>90</sup> In fact, to try to ensure this result, the United States often includes non-self-executing

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<sup>87</sup> See e.g. *United States v. Nai Fook Li*, 206 F.3d 56 (1st Cir. 2000).

<sup>88</sup> See PAUST, ET AL., *supra* note 44 at 75. See also *Sandhu v. Burke*, 2000 U.S. Dist. LEXIS 3584 (S.D.N.Y., Feb. 10, 2000), as well as the discussion and authority in notes 126-143, *infra*, and accompanying text. But see *Nai Fook Li*, 206 F.3d at 56 (holding that, "treaties do not generally create rights that are privately enforceable in the federal courts [as they are] primarily compacts between independent nations.); *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government to which the assertion of its interest against foreign powers is confided."); *Matta-Bellesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990). See also concurring opinion in *Nai Fook Li*, 206 F.3d 56 (Boudin and Selya, J.J., concurring).

<sup>89</sup> *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439, n. 16 (D. N.J. 1999).

<sup>90</sup> See gen. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999). See U.S. CONST., art. VI, § 2; 18 USC. § 3181 (1994); WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 734 (1968); *Head Money Cases*, 112 US 580 (1884); *Chew Heong v. United States*, 122 US 536, 540, 556 (1884). On the judicial provenance of self executing treaties, see Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J.

United States often includes non-self-executing declarations in its ratification instruments.<sup>91</sup> The principle of non-self-executing treaties in the United States, therefore, hampers human rights protection generally and in relation to extradition specifically.

It can be argued that the entire idea of considering treaties, duly entered and ratified, not to be self-executing is “unavoidably unconstitutional,” at least for purposes of supremacy.<sup>92</sup> The idea seems to be “inconsistent with the language, history, and purpose” of Article VI, paragraph 2, of the U.S. Constitution.<sup>93</sup>

The principle of non-self-executing treaties in the United States hampers human rights protection in relation to extradition. Article VI, paragraph 2, of the U.S. Constitution, of course, makes treaties that have received the “Advice and Consent” of the Senate, the “Supreme Law of the Land.”<sup>94</sup> On the other hand, most courts and commentators allow that treaties

INT'L L. 695 (1995); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI. KENT L. REV. 571 (1991); Connie de la Vega & Jennifer Brown, *Can a U.S. Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty*, 32 U.S.F. L. REV. 735, 762 (1998). On the other hand, extradition treaties and other agreements on cooperation in criminal matters are considered self-executing.

<sup>91</sup> Sloss, *Domestication*, *infra* note 92; *supra* notes 110-119 and accompanying text for a discussion of U.S. ratification of and reservations from the International Covenant on Civil and Political Rights.

<sup>92</sup> See, PAUST, ET AL., *supra* note 44, at 193-94. Jordan J. Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51, 55, 59, 63-64, 370-71 (1996); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 31 G.W.J. INT'L L. & ECON. 49, 64, 67-69 (1997).

<sup>93</sup> See Halberstam, *supra* note 92, at 64, 67-69 (1997); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L.REV. 1287 (1993); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the U.S. Still a Party?*, 21 BROOKLYN J. INT'L L. 277 (1995); PAUST, ET AL., *supra* note 44, at 192; Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198-204 (2d ed. 1996); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697-700 (1995); Carlos Manuel Vazquez, *The Self-Executing Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39, 44-49 (1993); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L.REV. 1082, 1101-1010 (1992). See also and compare *supra* notes 122-143, and accompanying text, as well as notes 144-155, *infra*, and accompanying text.

<sup>94</sup> U.S. CONST., ART. II, SECTION 2, ¶ 2 (two-thirds vote of those Senators present).

do not have the force of law in the United States, unless they are self-executing<sup>95</sup> or have been implemented by legislation.<sup>96</sup>

Self-executing treaties have been held to confer rights enforceable by private persons;<sup>97</sup> they are fully operative without

<sup>95</sup> See, *T.W.A., Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (providing, “. . . [t]he convention is [self-executing, thus] . . . no domestic legislation is required to give [it] the force of law in the United States . . .”) *But see* *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (suggesting in dictum that the issues of a treaty’s self-executing nature and its being “the Law of the Land” are separate). See also, *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439, n. 16 (D. N.J. 1999); *Jama v. Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353, 362 (D. N.J. 1998); *United States v. Carrillo*, 70 F. Supp. 2d 854, 858, n. 2 (N.D.Ill. 1999); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D.Cal. 1985); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir.), *cert. denied*, 502 U.S. 897 (1991); *Kwan v. United States*, 84 F. Supp. 2d 613 (E.D.Pa. 2000); *Sandhu v. Burke*, 2000 U.S. Dist. LEXIS 3584 (S.D.N.Y. Feb. 10, 2000); *United States v. Nai Fook Li*, 206 F.3d 56 (1st Cir. 2000).

<sup>96</sup> See *supra* notes 90-110 and accompanying text for a discussion of this.

<sup>97</sup> See *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439, n. 16 (D. N.J. 1999); *Jama v. Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353, 362 (D. N.J. 1998) (noting that plaintiffs submitted treaties in support of their ‘claim under the law of nations or international law’; *United States v. Carrillo*, 70 F. Supp. 2d 854, 858, n. 2 (N.D.Ill. 1999); *United States v. Salameh*, 54 F. Supp. 2d 236, 278-279 (S.D.N.Y. 1999) (“ . . . to provide for a private right of action, the treaty must be ‘self-executing,’ that is, it must prescribe [ . . . ] rules by which private rights may be determined”) (*citing* *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988)). *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D.Cal. 1985); *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir.), *cert. denied*, 502 U.S. 897 (1991); *Kwan v. United States* 84 F. Supp. 2d 613 (E.D.Pa. 2000); *Sandhu v. Burke*, 2000 U.S. Dist. LEXIS 3584 (S.D.N.Y. Feb. 10, 2000); *United States v. Nai Fook Li*, 206 F.3d 56, 68-78 (1st Cir. 2000) (Torruella, J., concurring in part and dissenting in part) (*citing* *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992), for its dictum: “if [an extradition treaty] is self-executing, it would appear that a court must enforce it on behalf of an individual”). *But see* *Nai Fook Li*, *supra*, at 68. The majority in *Nai Fook Li* states that “[t]he dissent relies on dictum from [*Alvarez-Machain*] for the proposition that treaties that are ‘self-executing’ in the usual sense are necessarily enforceable in domestic courts at the behest of affected individuals. In that case, however, the nature of the right being asserted (which arose out of a claimed violation of an extradition treaty) was at least arguably personal, see *U.S. v. Rauscher*, 119 U.S. 404, 424, 430-31 (1886). To enlarge the Court’s cryptic dictum into a general rule, contrary to the well-established principle[s] [that the self-executing character of a treaty does not by itself establish that a treaty creates private rights], requires too great a stretch.” *Id.*

See *gen.* *United States v. Saccoccia*, 58 F.3d 754, 767, n. 6 (1st Cir. 1995) (discussing the various views on this issue of whether self-executing treaties create private causes of action or remedies); see also *Saccoccia v. United States*, 69 F. Supp. 2d. 297, 299, et seq. (D. R.I. 1999) (habeas action claiming, *inter alia*, government interference in causing defense counsel to be arrested in Austria, causing, in turn, ineffective assistance of counsel, and interference in attorney client privilege. All claims were dismissed, except for the interference with attorney client privilege, for which an evidentiary hearing was ordered). See also, John C. Yoo, *Globalism and the Constitution:*

implementing legislation.<sup>98</sup> It is held that to provide a private right of action, a treaty must be self-executing, “that is, ‘it must prescribe [ ] rules by which private rights may be determined.’”<sup>99</sup> The Ninth Circuit noted that “[o]n a general level, the Supreme Court has recognized that treaties can in some circumstances create individually enforceable rights . . .”<sup>100</sup> The proposition that self-executing treaties confer rights on private parties is not undisputed, though.<sup>101</sup>

Some courts and commentators argue that they give standing to individuals and create private causes of action and remedies.<sup>102</sup> Non-self-executing treaties,<sup>103</sup> on the other hand, are not enforced until legislation is passed incorporating or enabling them.

A vigorous debate has arisen over whether the idea of non-self-executing treaties is inconsistent with the Supremacy

*Treaties, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955, 1978-1979 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). Professor Yoo is challenged by Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999) (finding that history and the material available from the founding contradicts Professor Yoo’s position; confirms the opposite); Carlos Manuel Vasquez, *Response, Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156, 2157 (1999) (finding Professor Yoo’s position implausible from the textual and doctrinal standpoints); PAUST, ET AL., *supra* note 44, at 75.

<sup>98</sup> *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 439, n.16 (D. N.J. 1999).

<sup>99</sup> *United States v. Salameh*, 54 F. Supp. 2d 236, 278 (S.D.N.Y. 1999) (*citing Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988)).

<sup>100</sup> *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000); (*citing United States v. Alvarez-Machain*, 504 U.S. 657, 659-60 (1992)); *United States v. Rauscher*, 119 U.S. 407 (1886).

<sup>101</sup> *See United States v. Nai Fook Li*, 206 F.3d 56 (holding that, “treaties do not generally create rights that are privately enforceable in the federal courts [as they are] primarily compacts between independent nations . . .”) (*citing Head Money Cases*, 112 U.S. 580, 598 (1884)); *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 306 (1829) (stating that “the judiciary is not that department of the government to which the assertion of its interest against foreign powers is confided.”) . . . [E]ven where a treaty provides... benefits to a national of a given state, [that] individual’s rights are derivative through the states.”)

<sup>102</sup> *See PAUST, ET AL.*, *supra* note 44, at 75.

<sup>103</sup> For analysis of the various meanings that have been applied to the term non-self-executing treaties, *see David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999).

Clause.<sup>104</sup> Professor John Yoo argues that the British and colonial approaches to treaty making and treaty enforcement, as well as the experience under the Articles of the Confederation, the debates at the Constitutional Convention, and the debates in some of the state ratifying conventions do not provide conclusive or definitive support for the proposition that treaties automatically become the law of the land upon ratification.<sup>105</sup> In fact, claims Professor Yoo, some of this historical evidence supports the position that all, or at least most, treaties do not have the force of law and, therefore, may be ignored by the courts, the citizens, and other state or federal officials who enforce domestic law.<sup>106</sup> Professor Carlos Manuel Vasquez counters, arguing that the Supremacy Clause is more correctly read to call for a “default rule,” whereby a treaty automatically will be considered the law of the land, unless the treaty itself is entered with an explicit reservation that clearly provides that the treaty is considered non-self-executing.<sup>107</sup>

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<sup>104</sup> See e.g. Yoo, *Globalism*, *supra* note 97; Yoo, *Treaties and Public Lawmaking*, *supra* note 97. Professor Yoo is challenged by Martin S. Flaherty, *History Right?*, *supra* note 97; Carlos Manuel Vasquez, *Response, Laughing at Treaties*, *supra* note 97.

<sup>105</sup> See Yoo, *Globalism*, *supra* note 97, at 1976 (discussed in Vasquez, *Laughing at Treaties*, *supra* note 97, at 2155-2157).

<sup>106</sup> See Yoo, *Treaties and Public Lawmaking*, *supra* note 97, at 2227; Yoo, *Globalism*, *supra* note 97 (noted and challenged by Vasquez, *Laughing at Treaties*, *supra* note 97, at 2155, 2206-2217).

<sup>107</sup> Vasquez, *Laughing at Treaties*, *supra* note 97, at 2155, 2157-2158. Recent U.S. ratifications appear to substantiate the “default rule” view—the government has felt it necessary to include a specific non-self-executing reservation in its ratification. Not clarifying the issue of the impact of self-executing treaties significantly, the United States Supreme Court, in *Breard v. Green*, noted that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern implementation of the treaty in that State, but did note that the Vienna Convention on Consular Relations arguably confers a right to consular assistance following arrest. *Breard v. Green*, 523 U.S. 371, 375-6 (1998). For further discussion of *Breard v. Green* and the Vienna Convention on Consular Relations, see *infra* notes 373-389 and accompanying text. The United States Government certainly invokes the Vienna Convention to protest other nations’ failure to provide United States nationals with proper notice or access to consular officials. *State v. Reyes*, 740 A.2d 7, 10 (Del. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 676 n.3 (D.V.I. 1999) (citing United States condemnation of the Islamic Republic of Iran for preventing U.S. diplomats from communicating with U.S. hostages in violation of the Vienna Convention). See also Andrew Selsky, *Ortega: American Prisoner will be Tried*, AP, Oct. 11, 1986 (article noting that U.S. officials explicitly relied on the Convention to visit a U.S. national imprisoned in Nicaragua in 1986) (noted in *Superville*, *supra* this note, at 676, n. 2, and available at 1986 WL 3073140).

Given the current viability in the United States of the notion of non-self-executing treaties, it may be wise, in order to protect individuals being extradited, to establish, either a specific human rights clause barring extradition that would have to be incorporated into each extradition treaty for each particular human right considered appropriate or to expand the traditional exemptions to extradition to include more human rights protections. The reality in United States extradition practice is that no human rights clauses are being incorporated and the traditional exemptions to extradition are being significantly constricted, rather than expanded.

#### B. DETERMINING WHICH TREATIES ARE SELF-EXECUTING—MORE ON THE STATUS OF HUMAN RIGHTS CONVENTIONS

To establish whether a given treaty is self-executing, courts look to the intent of the signatory parties, as manifested by the language of the instrument and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.<sup>108</sup>

Treaties that condemn conduct as criminal are non-self-executing.<sup>109</sup> It is accepted that the President and the Senate will not make criminal law by treaty. I have noted that most human rights treaties are also considered non-self-executing. This is generally because the Senate, upon giving its Advice & Consent so indicates. This was the case for The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>110</sup> and [t]he International Covenant on Civil and Political Rights.<sup>111</sup> The Torture Convention, in article III, section 1, provides: “[N]o State Party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture . . . .”<sup>112</sup> The Torture

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<sup>108</sup> *United States v. Salameh*, 54 F. Supp. 2d 236, 279 (S.D.N.Y. 1999) (citing *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976)); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (“interpretation of a treaty must begin with the language of the treaty itself, and the clear import of the language controls”).

<sup>109</sup> This is based on the ancient principles: *nulla poena sine lege* (no punishment without law) and *nullum crimen sine lege* (no crime without law).

<sup>110</sup> G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No.51, U.N.Doc. A/39/51 (1989).

<sup>111</sup> G.A. Res.2200A (XXI), U.N. GAOR, 21st Sess., Supp.No.16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. See discussion in Quigley, *supra* note 10, at 1235.

jected to torture . . .”<sup>112</sup> The Torture Convention, as noted, has been held to be non-self-executing.<sup>113</sup> At the time the Convention was sent to the Senate for advice and consent, Secretary of State George Schultz included a “Declaration Regarding the Non-Self-Executing Nature of the Convention,” which provided, in part: “[t]he United States reserves that articles 1 through 16 of the Convention are not self-executing.”<sup>114</sup> Articles 1–16 are the Convention’s protective provisions, designed to protect individuals from the proscribed acts and, as indicated in Article 1, quoted above, to ensure that no state party will send a fugitive, by way of extradition or other means, to a place where these depredations may well occur. Finally, to close the embarrassing circle of U.S. action, Congress has not promulgated legislation granting jurisdiction to federal courts to hear claims involving the Torture Convention’s protective provisions.<sup>115</sup>

On the other hand, the principle of non-self-executing treaties was judicially created, so the issue of whether a given treaty is or is not self-executing should be decided by the judiciary.<sup>116</sup> Moreover, some argue persuasively, at least in terms of supremacy in contexts other than that of creating criminal sanc-

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<sup>112</sup> *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at art. III § 1, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No.51, U.N.Doc. A/39/51. It received the Advice and Consent of the Senate on October 27, 1990, see, 135 Cong.Rec. S.17491.

<sup>113</sup> See e.g. *Barapind v. Reno*, 72 F. Supp. 2d 1132, 1149 (E.D.Cal. 1999); *Extradition of Cheung*, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997).

<sup>114</sup> Declaration adopted by the Senate, specifically incorporating this statement in its Resolution of Advice and Consent to the Ratification of the Convention, 136 Cong.Rec. S17486 (Oct. 27, 1990). Articles 1-16 of the Convention that were considered non-self-executing, are the protective provisions of the Convention.

<sup>115</sup> See e.g. *Igartua De La Rosa v. United States*, 32 F.3d 8, 10, n.1 (1st Cir. 1994); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999); *White v. Paulsen*, 997 F. Supp. 1380, 1385-87 (E.D. Wash. 1998); *Extradition of Cheung*, 968 F. Supp. 791, 803, n. 17 (D. Conn. 1997); *Calderon v. Reno*, 39 F. Supp. 2d 943, 956-7 (N.D.Ill.1998).

<sup>116</sup> *Quigley, Rule of Non-Inquiry*, *supra* note 113, at 1237-1239. This is a judicially created concept “that is patently inconsistent with express language in the Constitution ... [which provides] that ‘all Treaties ... shall be the supreme Law of the Land.’” PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 51 (1996) (citing, U.S. CONST. ART. III, CL. 2; U.S. CONST. ART III, SEC. 2, CL. 1: “[T]he judicial power shall extend to all Cases ... arising under ... Treaties ...” (emphasis added). See BLAKESLEY, ET. AL., *INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS* 1087-88 (4th ed. 1995).



tions, that the notion of non-self-executing treaties is anathema and unavoidably unconstitutional.<sup>117</sup>

Nevertheless, the Second Circuit, in *Gallina v. Fraser*,<sup>118</sup> recognized in dicta a potential exception. The court noted that there could be some “procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination” of the exception to the principle of non-inquiry.<sup>119</sup> The Ninth Circuit took up the gauntlet in 1999, noting that some jurisdictions “have discussed the possibility of a humanitarian exception to extradition, tracing the idea” from *Gallina v. Fraser*.<sup>120</sup>

Congress recently promulgated legislation implementing Article 3 of the Torture Convention. This was part of the Foreign Affairs Reform and Restructuring Act [FARR Act].<sup>121</sup> Thus, although the Torture Convention is not considered self-executing, Article 3 has been enabled. The FARR Act provides that it is “the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . . .”<sup>122</sup> Following the promulgation of the FARR Act, the Department of State prescribed regulations to implement Article 3 of the Torture Convention. These Regulations state:

[p]ursuant to [18 U.S.C. sections 3184 and 3186], the Secretary [of State] is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition . . . . [Incident to the U.S. obligations under Article 3 of the Convention], the Department [of State] considers the question of whether a person facing extradition from the U.S. is ‘more likely than not’ to be tortured in [the requesting state] . . . .<sup>123</sup>

The principle of non-self-executing treaties prevents any impact that human rights might have on extradition or deportation, except insofar as these treaties allow courts to broaden the

<sup>117</sup> See PAUST, ET AL., *supra* note 44, at 192, n.1; PAUST, *supra* note 118, at 51, 55, 59, 63-64, 370-371; Halberstam, *United States Ratification*, *supra* note 95, at 49, 64, 67-69.

<sup>118</sup> *Gallina v. Fraser*, 278 F.2d 77, 79 (2nd Cir. 1960).

<sup>119</sup> *Id.*

<sup>120</sup> *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1010 (9th Cir. 2000).

<sup>121</sup> Foreign Affairs Reform & Restructuring Act [FARR Act], Pub.L. No. 105-277, § 2242, 822. See discussion in *Cornejo-Barreto*, 218 F.3d at 1004.

<sup>122</sup> FARR Act, at § 2242(a).

<sup>123</sup> 22 C.F.R. § 95.2 (2000).

traditional exemptions from extradition as a disguised method of applying human rights protections, or otherwise to so interpret extradition treaties. Therefore, to protect individuals being extradited, either a specific human rights clause barring extradition would have to be incorporated into each extradition treaty or the traditional exemptions to extradition would have to be expanded by interpretation to include more human rights protections. United States practice has been, albeit meagerly and reluctantly, to use the traditional, statist exemptions to extradition as repositories for human rights protections. The quality of this protection has never been great and has been diminishing, along with other protections for those accused of crime, over the past several years. No human rights clauses have been incorporated and the traditional exemptions to extradition are being significantly constricted.

### C. EXTRADITION PRACTICE IN THE UNITED STATES PRESENTS SERIOUS HUMAN RIGHTS PROBLEMS

Extradition and other international cooperation in criminal matters present serious constitutional and human rights problems. Although extradition treaties usually state that extradition will be allowed for extraditable offenses<sup>124</sup> committed within the requesting state's jurisdiction, extradition treaties provide that if the offense also occurred within the territory of the requested state, the requested state may prosecute first and extradite later. Extradition treaties contain a *ne bis in idem* clause, but the im-

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<sup>124</sup> Extraditable offenses are of two types, depending on the treaty involved. These are discussed in BLAKESLEY, *TERRORISM*, *supra* note 4, at 212-217. The traditional method was to enumerate specific offenses that were to be extraditable. If an offense was not listed, it was not extraditable. Recently, most nations have moved to a "no-list" method, whereby the treaty will simply indicate that extradition is possible for any offense which may receive a specified minimum amount of punishment in each country (generally around one year). See, e.g., *Treaty of Extradition Between the United States and Italy*, 35 UST 3023, Oct. 13, 1983, US-IT entered into force 1984, at art. II (1) ("[A]n offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by more a severe penalty."). See also *U.S.-French Extradition Treaty, of Jan. 6, 1909, 37 Stat. 1526, as amended by Supplementary Convention of Feb. 12, 1970, 22 U.S.T. 407*. On July 9, 1997, the President transmitted a new Extradition Treaty with France to the Senate for its Advice & Consent, which has not yet been forthcoming. Treaty Doc. 105-13, 105th Cong. 1st Session, *Message from the President of the United States transmitting Extradition Treaty Between the U.S. & France, signed at Paris, April 23, 1996*. Article 2 of this treaty reads similarly to that with Italy and most of our recent extradition treaties.

fact of its protection is open to doubt.<sup>125</sup> Also, extradition treaties require that the offense charged be one for which jurisdiction obtains under the circumstances in both the requested state and the requesting states.<sup>126</sup> U.S. courts have not allowed many basic, minimal safeguards applicable to criminal proceedings to apply to extradition. Documents of questionable authenticity are tolerated and used in a manner that does not allow the fugitive to confront the witnesses or to challenge evidence against him. The fugitive does have the right to counsel, but the exclusionary rule may not apply. Affirmative defenses, like insanity or self-defense, may not be allowed.<sup>127</sup>

A fugitive has the right to resist extradition through judicial proceedings.<sup>128</sup> He may adduce evidence countering the requesting country's claim of probable cause. He may also be allowed some discovery to help defend against being extradited.<sup>129</sup> Offenses must be extraditable<sup>130</sup> and many pre-World War II treaties did not cover crimes such as drug trafficking, money laundering,<sup>131</sup> racketeering, mail fraud, wire fraud, and securi-

<sup>125</sup> *E.g.* United States v. Jurado-Rodriguez, 907 F. Supp. 568, 577-78 (E.D.N.Y. 1995) (where defendant was convicted and punished in Luxembourg for money laundering (a continuing narcotics trafficking offense) and then was extradited to the United States upon a proviso that he not be prosecuted upon facts that had been used to convict him in Luxembourg. The issue was what the term "facts" in the Luxembourg extradition order meant.)

<sup>126</sup> *See e.g.* U.S. Italian Extradition Treaty, *supra* note 124.

<sup>127</sup> These are presented in Kester, *Some Myths of United States Extradition Law*, 76 GEO L.J. 1441, 1443-1445 (1988).

<sup>128</sup> *Id.* at 1456 (logging the types of judicial challenges and actions are available to the accused fugitive, in addition to defending against extradition in the hearing proper).

<sup>129</sup> Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986) *cert. denied*, 197 S.Ct. 271 (1986) (abuse of discretion not to allow discovery).

<sup>130</sup> *See e.g.* Hatfield v. Guay, 87 F.2d 358 (1st Cir. 1937), *cert denied*, 300 U.S. 678 (1937); Quinn, 783 F.2d at 691; Kester, *Myths*, *supra* note 127, at 1462.

<sup>131</sup> Kester, *Myths*, *supra* note 127, at 1463. Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCH. L. REV. 749 (1996); Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters - A United States Perspective*, 22 G.W. J. INT'L L. & ECON. 465, 485 (1989); Amir Licht, *Games Commissions Play: 2X2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 128, n.176 (1999).

*See also e.g.* Task Force Adopts Proposals to Fight Drug-Money Laundering, 54 BNA BANKING RPT. 312 (Feb. 19, 1990) (15 nation taskforce has undertaken to cooperate, including exchange of information between the authorities in each country on laundering methods and flows, suspects, inquiries, and judicial decisions, relating to extradition, freezing assets and confiscation of goods); Zagaris & Bornheim, *Thrift Briefs*,

ties crimes—including insider trading.<sup>132</sup> This prompted the Departments of State and Justice and their counterparts in other countries to move away from treaties that had an exclusive list of extraditable offenses to treaties utilizing broad, sweeping no-list, dual criminality, extraditable offense clauses.<sup>133</sup> The increase in sophisticated transnational crime has made extradition and cooperation more important than ever.<sup>134</sup> U.S. legislation has tended to enhance penalties, making many more crimes extraditable under the recent no-list treaties, although the inclusion of the death penalty in the Anti-Drug Abuse Act of 1988<sup>135</sup> inhibits cooperation.

European nations sometimes provide even less protections in extradition cases. However, they do attempt to protect human rights in the administrative context. Some have a parallel system of administrative courts,<sup>136</sup> whose purpose is to protect people from administrative abuse of rights or abuse of power and other violations. The French *Conseil d'Etat*, the sophisticated administrative court system, has imposed itself into the arena of extradition in order to protect individual liberties and human rights. This administrative court system is designed to allow a form of appeal to its set of courts sensitive to civil liberties. The *Conseil d'Etat* has drawn criticism for imposing itself into the domain governed by the *Code de Procedure Penal* that contains the Extradition Law. The regular criminal procedure law does not give recourse to the judge-made law of that protective body.<sup>137</sup> The French administrative law has developed in a way that protects human rights and liberty from official abuse.

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54 BNA BANKING RPT 115 (Jan. 22, 1990) (noting European engagement toward uniform action and broad cooperation in fields of extradition, mutual assistance, prosecution, and enforcement to combat drug abuse and trafficking, including money laundering).

<sup>132</sup> *Insider Trading to Become Basis for U.K. Extradition*, 1 BNA INT'L SEC. REG. RPT. (No. 6), at 4 (March 2, 1988) ("all insider trading offenders will be extraditable by the end of this year..."). For example, Switzerland has promulgated a law criminalizing insider trading. STGB, CP, CP. ART. 161 (entered into force, July 1, 1988).

<sup>133</sup> Kester, *Myths*, supra note 127, at 1463.

<sup>134</sup> Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 G.W. J. INT'L L. & ECON. 465, 466 (1989).

<sup>135</sup> Pub.L.No. 100-690, § 7001, 102 Stat. 4181 (amending 21 U.S.C. § 848 (1970)) (see also broad enforcement measures in 1988 Act, to be codified in 31 U.S.C. §5311); cited and discussed in Zagaris, *Dollar Diplomacy*, supra note 134, at 474, 548.

<sup>136</sup> *Id.* at 429.

<sup>137</sup> *Id.* at 430.

U.S. law provides no direct appeal from a magistrate's decision to certify him for extradition.<sup>138</sup> To make extradition administrative, as some have argued, would be a serious mistake, because we have not developed the administrative court structure that could protect against abuse. The judiciary is required to protect civil liberty.

D. EARLY HUMAN RIGHTS PROTECTIONS WERE REPOSITED IN TRADITIONAL EXCEPTIONS TO EXTRADITION<sup>139</sup>

Around 1853, a fugitive slave from Missouri, named John Anderson, entered Canada on the underground railway to what he hoped would be freedom. In 1860, however, proceedings began for his extradition back to Missouri for the murder of Seneca T. Diggs. Anderson, indeed, had killed Diggs in Missouri and was likely to be convicted of murder under Missouri law, as the simple fact that he had killed a human being was sufficient for probable cause. Normally, a fugitive is not allowed to posit affirmative defenses, so, it appeared that Anderson was extraditable. Canada, however, recognized a specialized form of self-defense (also applicable to extradition) based on the fact that he had killed Diggs to escape from slavery. The Queens' Bench, on habeas corpus, held that surrender should be forbidden unless the offense charged was also punishable in Canada.<sup>140</sup> This was actually an application of the double criminality provision as a "human rights" exception to extradition.

The result of the *Anderson* case is eminently proper, but we have seen that this protection is unavailable in U.S. law. The double criminality condition does not extend to any defenses available at trial or even to those applicable to preliminary hearings. Thus, a fugitive's claims of alibi or other defenses, such as

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<sup>138</sup> *David v. Attorney General*, 699 F.2d 411, 413 (7th Cir. 1983); *Ornelas v. Ruiz*, 161 U.S. 502, 508 (1896).

<sup>139</sup> See gen., Dugard & Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187 (1998); BLAKESLEY, *TERRORISM*, supra note 4; Blakesley, *The Law of International Extradition: A Comparative Study*, ch. 6 in INTERNATIONAL CRIMINAL LAW & PROCEDURE (Dugard & Van den Wyngaert eds. 1996); BLAKESLEY, *THE INDIVIDUAL FACING TRANSNATIONAL COOPERATION IN CRIMINAL MATTERS: U.S. REPORT* (Max-Planck Inst. 2000, at press).

<sup>140</sup> *Ex parte John Anderson*, [1860] L.T. Rep. (N.S.) 622, (discussed in Ryan, *Ex parte John Anderson*, 6 QUEENS L.J. 382 (1981)). The Canadian court actually denied extradition because the extradition request failed to use the words "of his malice aforethought, and thereby committed murder." *Id.* at 387.

insanity or even self-defense, are normally irrelevant in an extradition hearing and do not bar extradition.<sup>141</sup>

An "alibi" defense may be admissible if it obliterates probable cause for extradition. If, however, it merely controverts evidence presented by the requesting state, it is not admissible<sup>142</sup>. The *Anderson* decision was actually a very early application of the double criminality provision functioning as a "human rights" exception to extradition. I will consider these permutations on double criminality and human rights below. This makes the decision by Home Secretary Straw not to extradite Pinochet on grounds of Pinochet's physical and mental incompetence to stand trial quite interesting. Could this be a movement toward allowing more defenses to be presented at the extradition phase? The importance of this aspect of the decision will be indicated below, as I consider more specifically the impact of human rights and humanitarian law on extradition. Thus, situations like those of John Anderson, or even of Pinochet, call for human rights exceptions to extradition.<sup>143</sup> In the *Anderson* case, the Queen's Bench actually applied the double criminality principle as if it were a human rights exemption. It would be more straightforward simply to adopt a human rights exception to extradition, although this has not recently been found viable in the United States. Germany, on the other hand, as well as other European nations, has moved closer to adopting such human rights exemptions.<sup>144</sup>

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<sup>141</sup> See, e.g., *Collins v. Loisel*, 259 U.S. 309, 312 (1922); *Charlton v. Kelly*, 229 U.S. 447, 462 (1913); *Bloomfield v. Gengler*, 507 F.2d 925, 927-28 (2d Cir. 1974); *United States v. Galanis*, 429 F. Supp. 1215, 1224-26 (D. Conn. 1977); *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978); *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973); 6 *Whiteman*, DIGEST OF INT'L LAW, at 1003 (1968).

<sup>142</sup> See, e.g., *Extradition of Gonzalez*, 52 F. Supp. 2d 725, 738-739 (W.D. La. 1999); *Maguna-Celaya v. Haro*, 19 F. Supp. 2d 1337 (S.D. Fla. 1998); *Extradition of Contreras*, 800 F. Supp. 1462, 1469 (S.D. Tex. 1992). Sometimes, promises made by governmental officials with actual or apparent authority to make them, including a promise that extradition will not be sought, in exchange for cooperation, will be enforced and an attempted extradition denied. See, *Extradition of Drayer*, 190 F.3d 410, 413 (6th Cir. 1999) (accepting the possibility of refusing extradition, but holding that the fugitive failed to prove U.S. collusion or apparent authority).

<sup>143</sup> Again, the irony of applying human rights protections to one who is charged with having abused them so horrifically, is apparent, as is the comparison of a fugitive slave killing to escape with a tyrant. Still, it seems to me that if human rights principles are to apply at all, they must apply to the worst of us, just like anyone else.

<sup>144</sup> See, e.g., the 1999 Portuguese law on International Cooperation, *Cooperação Judiciária Internacional*, Article 6; Italian *Codici di Procedura Penale*, art. 698, ¶ 1, and art

It becomes clear, therefore, that extradition has been impacted by application of human rights law.<sup>145</sup> This has been so for ages, although disguised as traditional positivistic and statist exemptions, such as dual criminality. Some human rights conventions to which the United States is a party prohibit extradition in certain circumstances. For example, the Convention Against Torture<sup>146</sup> provides that a fugitive should not be extradited if there are substantial grounds for believing that he would be in danger of being subjected to torture and other cruel, inhuman, or degrading treatment or punishment.<sup>147</sup> Many argued that the Convention Against Torture required England to extradite Pinochet and, indeed, Home Secretary Straw agreed with the House of Lords that the Torture Convention required this, but only as incorporated into British Law in the Criminal Justice Act of 1988, section 134.<sup>148</sup> The House of Lords held that only those acts of torture attributable to Pinochet that occurred after the promulgation of this Act were extraditable.<sup>149</sup>

The 1978 decision of the European Court of Human Rights *Ireland v. United Kingdom*<sup>150</sup> is interesting in this regard. British interrogation of suspected IRA terrorists in August and October 1971, by methods involving sensory deprivation and noise (including a continuous loud and hissing noise from a portable

705, ¶ 2 (Italy 1988); EUROPEAN CONVENTION ON HUMAN RIGHTS, arts. 2 and 8. Lagodny and Reisner note that Denmark, Finland, France, Iceland, Luxemburg, the Netherlands, Norway, and Sweden, all inserted a reservation to their adoption of the European Convention on Extradition that provided for the requested state to refuse extradition if the surrender would result in severe consequences as far as the fugitive's health is concerned or on account of his or her age. Otto Lagodny & Sigrun Reisner, *Extradition Treaties, Human Rights and "Emergency-Brake" Judgments - A Comparative European Survey*, 65 REV. INT'L DR. PENAL 543,546, 547-562 (1994) (including authority). See also, OTTO LAGODNY, *National Report: Germany*, in THE INDIVIDUAL IN FACE OF INTERNATIONAL COOPERATION IN CRIMINAL LAW (Max-Planck Institute 2000) (manuscript on file with author)

<sup>145</sup> Christine Van Den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L. Q. 757 (1990).

<sup>146</sup> *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No.51, U.N.Doc. A/39/51.

<sup>147</sup> *Id.* at art. 3.

<sup>148</sup> Criminal Justice Act § 134 (1), (2) and (3) (1988).

<sup>149</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate (III)*[1999] (U.K.), 2 All E.R. 97, 170 (H.L. 1999), [1999] 2 W.L.R. 827; Michael Birnbaum, *Pinochet and Double Criminality*, CRIM. L. REV. 127 (March 2000).

<sup>150</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 35 (1978);

power generator located next to the interrogation room) was unanimously held by the European Court of Human Rights to be "inhuman and degrading treatment" and "torture" contrary to international law (and in particular contrary to Article 3 of the European Convention on Human Rights). Judgment was rendered on January 18, 1978, after the ECHR had received evidence from the two governments and heard testimony from 119 witnesses. Other disorientation methods regarded as torture were wall-standing for prolonged periods, hooding, deprivation of sleep and deprivation of food and drink. One paragraph in the court's findings is particularly worthy of note, at the end of section 240 in the judgment:

a "breach" results from the mere existence of a law which introduces, directs or authorizes measures incompatible with the rights and freedoms safeguarded; this is confirmed unequivocally by the *travaux préparatoires* (Document H (61) 4, pp. 384, 502, 703 and 706). [ . . . ] The absence of a law expressly prohibiting this or that violation does not suffice to establish a breach since such a prohibition does not represent the sole method of securing the enjoyment of the rights and freedoms guaranteed.<sup>151</sup>

The United States Senate provided upon ratifying the treaty that extradition should be denied "if it is more likely than not that he would be tortured."<sup>152</sup> On the other hand, the "rule of non-inquiry" has been held to prevent courts from admitting evidence about potential torture of the fugitive to be returned to the requesting state by way of extradition.<sup>153</sup> It was held that it is for the Secretary of State, not the judiciary, to decide whether to deny extradition on such humanitarian grounds.<sup>154</sup> The

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<sup>151</sup> *Id.* at § 240 (1978). It should be noted, however, that the European Convention on Human Rights does not by itself provide a cause of action in relation to offenses committed under color of law in non-signatory states. For analysis of the distinctions between "inhuman and degrading" treatment and "torture," at the time of the Ireland v. United Kingdom decision, see R. John Pritchard, *Lessons from British Proceedings against Japanese War Criminals*, 3:2 HUM. RTS. REV. 104 (Summer 1978).

<sup>152</sup> 136 Cong. Rec. S17,492 (daily ed. Oct. 27, 1990); *Multilateral Treaties Deposited With the Secretary-General Status as of 31 December 1994* 177 (1995) (indicating ratification by the United States on October 21, 1994). John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1217-18 (1996).

<sup>153</sup> Sandhu v. Burke, 2000 U.S. Dist. LEXIS 3584 (S.D.N.Y. Feb. 10, 2000) (*citing* Ahmad v. Wigin, 910 F.2d 1063, 1066 (2d Cir. 1990)).

<sup>154</sup> *Id.*



Covenant on Civil and Political Rights,<sup>155</sup> although it has no express provision on extradition or non-extradition, has been construed by courts in Canada, among other countries, to prohibit a requested state to extradite, if it appears that the requesting state will violate any right implicated by the Covenant.<sup>156</sup> United States law, however, has not gone that far. The United States government has made significant reservations to most human rights conventions, including those mentioned above, which make the conventions difficult to apply.<sup>157</sup> One of the reservations is often that the treaty will not be self-executing.

### 1. *Classic Double Criminality*

The United States Government and courts, for the most part, have also limited double criminality almost to the disappearing point.<sup>158</sup> Thus, in current practice, double criminality does not work as it should or even as it once did to protect human rights in the extradition context. The same is true for other traditional exemptions from extradition (speciality, political offense exception, etc.). Before getting into a deeper discussion of human rights exceptions to extradition, a brief analysis of double (or dual) criminality is in order because it seems at first blush that in the *Pinochet* case and other cases of the most serious crimes against humanity, the idea of dual criminality seems almost superfluous,<sup>159</sup> yet it was at the center of the House of Lords' decision. The House of Lords held that there was sufficient evidence to extradite Pinochet for conduct that was criminal in both Spain and the United Kingdom. Home Secretary Straw found that the Spanish request for extra-

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<sup>155</sup> *The International Covenant on Civil and Political Rights*. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No.16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>156</sup> See, e.g., *Kindler v. Canada*, 14 HUM. RTS. L.J. 307, 308 (1993); *Ng v. Canada*, 15 HUM. RTS. L.J. 149 (1994); *Cox v. Canada*, 15 HUM. RTS. L.J. 410 (1994); Quigley, *Rule of Non-Inquiry*, *supra* note 140, at 1218-1223.

<sup>157</sup> See generally FIRMAGE, ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS*, ch. 10 (5th ed. 2000); see also, Christopher L Blakesley, *The Regionalization of International Criminal Law & the Protection of Human Rights in International Cooperation in Criminal Proceedings*, 65 REV. INT'L DE DR. PÉNAL 493 (1994); David Sloss, *The Domestication*, *supra* note 103.

<sup>158</sup> See *infra* at notes 167-170 and 184-190 and accompanying text.

<sup>159</sup> Certainly, insofar as certain crimes are universally proscribed, it is superfluous. Cf., Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT'L L. 510, 514 (1996).

dition was "well-founded as a matter of Spanish law."<sup>160</sup> Dual criminality is not superfluous, however, if it acts as a repository for human rights exemptions. It may be important unless one considers crimes against humanity to have a strict liability character.<sup>161</sup> In the past, it did provide such a repository, sometimes working as a means to promote fairness in the process and to ensure important individual rights.<sup>162</sup> This is no longer true.

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<sup>160</sup> Editorial, *Of Extraditions*, 8 N.J. LAW. WKLY, 550 (March 15, 1999)

<sup>161</sup> Strict liability for war crimes and crimes against humanity is not unheard of. For example, command responsibility for the most serious war crimes or crimes against humanity has been held to allow conviction upon strict liability. *See, e.g.*, In re Yamashita, 327 U.S. 1 (1946) (Murphy, J., dissenting) (General Tomoyuki Yamashita was charged with an offense and convicted for having: ". . . unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and "other high crimes . . ." *Id.* at 28. *See also*, HOWARD S. LEVIE, DOCUMENTS ON PRISONERS OF WAR 294 (1979). The mental element was at least willful blindness, or some argue strict liability. Some argue that this is strict liability. *See*, R. John Pritchard, *Changes in Perception: British and Military Perspectives on War Crimes Trials and their Legal Context (1942-1956)*, in THE MILITARY DIMENSION, 5 A HISTORY OF ANGLO-JAPANESE RELATIONS (Ian Gow: & Hiram Yoichi, eds., Tokyo Univ. Press & Macmillan, 2000). Justice Murphy in his dissent seems convinced that it was strict liability, as he quoted the above-noted charge and stated that it was "unworthy of the traditions of our people." *Id.*, at 28. Others argue, on the other hand, that the findings of the Military Commission (that convicted Yamashita) do not bear out either a strict liability standard or a presumption of commander knowledge, when such massive atrocities occur. *See*, Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 121, n.181 (2000) (citing *Prosecutor v. Delalic*, No. IT-96-21-T at para. 384 (ICTY Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trial/2/judgment/part1.htm>) (*Celebici Trial*). The ICC Statute provides in art. 28(1) that for such a conviction it must be proved that a military commander "knew or, owing to the circumstances at the time, should have known," about the actual or impending criminal conduct. Rome Statute of the Int'l Crim. Ct. art. 28(1)(a), U.N.Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998)

<sup>162</sup> *See, e.g.*, *Factor v. Laubheimer*, 290 U.S. 276, 300 (1933); *Collins v. Loisel*, 259 U.S. 309, 317 (1922); *Kelley v. Griffin*, 241 U.S. 6 (1915); *Pettit v. Walshe*, 194 U.S. 205, 217 (1904). *See* discussion of the link between double criminality and fairness in an early article by Edward Wise, *Some Problems of Extradition*, 15 WAYNE ST. L. REV. 709, 718-19 (1969). Moreover, in 1969, the Association Internationale de Droit Pénal held an important Congress on extradition, wherein the General Rapporteur, Schulz, raised the connection between exceptions to extradition and human rights. *See, e.g.*, Hans Schulz, *The Classic Law of Extradition and Contemporary Needs*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 309 (M. Cherif Bassiouni and Ved P. Nanda eds., 1973). This is mentioned in Dugard & Van den Wyngaert, *Reconciling, supra* note 6, at 212, n.70 (stating that the *Association Internationale de Droit Pénal* was first to draw attention to this link, in 41 REV. INT'L DE DROIT PÉNAL 12, 15 (1970), and in adopting a comprehensive resolution in Rio de Janeiro in 1994, this was reinforced).

Today the protections of double criminality have been limited to near meaninglessness, at least in the United States.<sup>163</sup> Lately, it has been limited to requiring that the offense(s) for which extradition is sought be serious crimes in both countries.<sup>164</sup> United States courts hold that dual criminality is satisfied if the offense charged is "substantially similar" or analogous in the law of the requesting and requested states.<sup>165</sup> This has pretty well eviscerated the impact of dual criminality as a protection.<sup>166</sup>

The principle of double criminality, *réciprocité d'incrimination*, founded on the long-standing international principle of *nulla poena sine lege*, requires that a fugitive be extradited only for conduct that is criminal and punished to the prescribed

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By the way, I do not consider the decision in Pinochet (No. 2) that the House of Lords ought to re-hear the immunity and extradition questions, because of the appearance of possible bias on the part of Lord Hoffman, due to his relationship with Amnesty International, had anything to do with the ultimate decision by Jack Straw not to extradite. While in general terms, such conflict of interest or bias may be a human rights issue, it may be better to call it a matter of natural justice, as David Turns suggested to me.

<sup>163</sup> See Kester, *supra* note 127, at 1462.

<sup>164</sup> Defendants have argued, for example, that since the offense charged (mail fraud, for example) may be punished in the United States, even if there is no theft involved, the accused may not be extradited (or, if extradited, not prosecuted) for that offense, when the requested country's law requires theft. This argument is rejected: "[The defendant's] alleged offense was stealing; the significance of his use of the mails and of interstate transportation and facilities is 'jurisdictional only' in that it permits him to be prosecuted under federal law." *United States v. Sensi*, 879 F.2d 888, 893, 894 (D.C. Cir. 1989).

<sup>165</sup> See Kester, *Myths*, *supra* note 127, at 1462; *Ross v. U.S. Marshall for the E.D. of Oklahoma*, 168 F.3d 1190, 1195-1196 (10th Cir. 1999); *Murphy v. United States*, 199 F.3d 599, 601-602 (2nd Cir. 1999) (dual criminality does not bar extradition when the statute of limitations has run in the United States, but not in the requesting state); *Dual criminality only bars extradition for conduct that is not criminal in both states*; *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998); *Lo Duca v. United States*, 93 F.3d 1100, 1111 (2d Cir. 1996) (the Italian offense, "association, mafia type," is analogous to 18 U.S.C. §§ 1961-63 (1994) and 18 U.S.C. § 371 (1994). Moreover, it is the conduct that one considers, not the denomination); *Bozilov v. Seifert*, 983 F.2d 140 (9th Cir. 1992); *United States v. Riviere*, 924 F.2d 1289, 1301 (3d Cir. 1991); *Theron v. United States*, 832 F.2d 492, 497 (9th Cir. 1987); *Brauch v. Raich*, 618 F.2d 843, 847 (1st Cir. 1980) ("substantially analogous"); *Messina v. United States*, 728 F.2d 77, 79-80 (2d Cir. 1984) ("in nature of extortion" "similar"); *Extradition of Valdez-Mainero*, 3 F. Supp. 2d 1112, 1116 (S.D. Cal. 1998); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1067 (S.D.N.Y. 1987) ("substantially similar"); *Extradition of Schweidenback*, 3 F. Supp. 2d 118 (D. Mass. 1998).

<sup>166</sup> Kester, *Myths*, *supra* note 127, at 1462.

minimum by the law of both parties.<sup>167</sup> Every U.S. extradition treaty contains a double criminality provision. Historically, cases in which the principle of double criminality determined the outcome of the request were abundant. It has been a very important principle because of the sharp divergences among the criminal laws of various countries or the vast difference in punishment meted out for different offenses. Its value is apparent when one considers the varying proscriptions and punishments for offenses such as euthanasia, suicide, adultery,<sup>168</sup> and abortion. It becomes even more important if general human rights protections relating to a fair trial are repositied therein. The stretching and straining required to do his would not be necessary if straight-forward human rights clauses were adopted. Some doctrinal criticism claims that dual criminality is too onerous, but it is not onerous at all. The rule is satisfied if the requesting state submits, along with the rest of its evidentiary documentation, an affidavit of relevant law containing the statute that makes the action in question criminal. Most recent treaties have added a general double criminality provision, such as: "An offense, however denominated, shall be [extraditable] only if it is punishable under the laws of both parties . . . by deprivation of liberty for a period of more than one year or by a more severe penalty."<sup>169</sup>

a) Double Criminality and United States Federalism

International extradition is an exclusively federal prerogative,<sup>170</sup> although states may call on the federal government to

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<sup>167</sup> *E.g.*, *Ross*, 168 F.3d at 1196 (Theft Act of No. Ireland is substantially analogous to U.S. mail and wire fraud statutes); *Murphy*, 199 F.3d, at 601-602 (dual criminality only bars extradition for conduct that is not criminal in both states). Moreover, it is the conduct that one considers, not the denomination. *US v. Baramdyka*, 95 F.3d 840, 845 (9th Cir.1995); *United States v. Baramdyka*, 95 F.3d 840 (9th Cir. 1995); *United States v. Khan*, 993 F.2d 1368, 1372-73 (9th Cir. 1993). *See gen.*, BLAKESLEY, *TERRORISM*, *supra* note 4, at ch. 3; M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: U.S. LAW & PRACTICE*, at 324 (1987) (looseleaf, discussing the interrelationship of dual criminality and reciprocity).

<sup>168</sup> *See, e.g.*, Ellen Goodman, *The Hidden Suffering of Women in Afghanistan*, *BOS. GLOBE*, Dec. 6, 1998, at D7 (showing the value of dual criminality for human rights protection).

<sup>169</sup> 1984 U.S-Italy Extradition Treaty, Art. 2, TIAS 10837 at Art. II.

<sup>170</sup> BLAKESLEY, *TERRORISM*, *supra* note 4, at 187-190; Bassiouni, *INTERNATIONAL EXTRADITION* 71, et seq. (2d ed. 1987); 6 WHITEMAN, *DIGEST OF INTERNATIONAL LAW*, 731-38 (1968).

seek extradition for them. The fact that each state maintains its own substantive criminal law and criminal justice systems, along with those of the federal system, sometimes has caused problems interpreting and applying dual criminality provisions. Although there is often a variance among the states' laws for particular offenses, virtually all common crimes are defined and enforced by the several states of the Union. The resulting set of parallel or competing sets of laws and jurisdictional principles has been the cause of dual criminality problems for the courts and has prompted some important decisions by the United States Supreme Court.

In the famous *Factor v. Laubenheimer* case,<sup>171</sup> for example, Great Britain had requested the extradition of a fugitive for the crime of "receiving money knowing the same to have been unlawfully obtained."<sup>172</sup> The fugitive had been apprehended in Illinois where the extradition hearing was to be held before a federal magistrate. For extradition to work, an offense must be made extraditable by an applicable treaty and the relevant conduct must be proscribed and made punishable by both the requesting and the requested states to the degree required by the treaty.<sup>173</sup> More recent extradition treaties do not list specific extraditable offenses, but simply require that the conduct charged be proscribed as a serious offense in each country.<sup>174</sup> Britain properly made its extradition request, but the fugitive had been apprehended in Illinois, a state that had not made that particular conduct criminal. Thus, the question arose as to whether the rule of double criminality was satisfied. The Supreme Court was faced with a unique question: should dual criminality be de-

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<sup>171</sup> *Factor v. Laubenheimer*, 290 US 276 (1933).

<sup>172</sup> *Id.* at 303.

<sup>173</sup> See *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1989); BLAKESLEY, *TERRORISM*, *supra* note 4, at 224-250. Recently, the U.S. Congress promulgated the Judicial assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda, Pub. L. 104-106, Div.A., Title XIII, § 1342, Feb. 10, 1996, 110 Stat. 486, provided that: "... [18 U.S.C. § 3181, et seq.], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition . . . , shall apply in the same manner and extent to the surrender of persons, including United States citizens, to—(A) [the ICTY]; and (B) [the ICTR] . . . ."

<sup>174</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476(c) (1987). See, e.g., *Extradition Treaty Between Switzerland and the United States*, art. 2, 31 Stat. 1928, as amended by 49 Stat. 3192, as amended by 55 Stat. 1140; *Extradition Treaty Between the United States and Germany*, 32 U.S.T 1485, T.I.A.S. 9785, 1220 U.N.T.S. 269, Supp. Treaty, March 11, 1993.

terminated by the law of the state in which the fugitive is found, by the law of the majority of states, by federal law, or on the basis of some other criterion? The Supreme Court held the fugitive to be extraditable on a different ground,<sup>175</sup> but stated very clearly what its solution to the double criminality dilemma would be: “[t]he conduct with which Factor was charged was a crime in Great Britain, was within the provisions of the Treaty of 1931, between the two countries, and was a crime under the law of many states, if not Illinois, punishable either as receiving money obtained fraudulently or by false pretenses, or as larceny.”<sup>176</sup>

Even before the *Factor* decision, courts in the United States generally held an offense to be extraditable if it was “generally recognized as criminal” in the United States.<sup>177</sup> It is still not fully clear, however, what “generally recognized as criminal” means. *Factor* and subsequent decisions following it appear to hold that a judge will determine whether there are a sufficient number of states that have criminalized the action in question to legitimize the extradition.<sup>178</sup> The currently popular “no-list” approach to extraditability, which determines extraditability on the basis of the gravity of the potential penalty rather than on the basis of a list of specifically enumerated offenses, might appear to help solve the problem.<sup>179</sup> It does not fully do so, however. For an

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<sup>175</sup> The Supreme Court resolved the problem by holding that the offense or the actions described in the extradition papers need not be denominated criminal in the same language by the law of the requested state. It is only necessary that the offense or the actions constituting the offense be enumerated as extraditable in the treaty, and that those actions constitute some kind of an offense in the requested state, even though perhaps denominated differently. Thus, it held that receiving money known to have been obtained unlawfully was equivalent to fraud, which the treaty covers. *Factor*, 290 U.S. at 292, 303.

<sup>176</sup> *Id.* at 300, 303.

<sup>177</sup> *Collins v. Loisel*, 259 U.S. 309 (1922). More recently, *see, e.g., Therion v. U.S. Marshal*, 832 F. 2d 492, 496 (9th Cir. 1987); *United States v. Lehder-Rivas*, 668 F. Supp. 1523, 1427 (M.D. Fla. 1987); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1067 (S.D.N.Y. 1987); *Matter of Extradition of Russell*, 789 F.2d 801 (9th Cir. 1986) (Australian offense of conspiracy, which did not require an overt act, satisfied dual criminality); *Brauch v. Raiche*, 618 F.2d 843, 850-51 (1st Cir. 1980) (rejecting strict congruity of offenses); *United States v. Kaulukukui*, 520 F.2d 726, 731 (9th Cir. 1975).

<sup>178</sup> Some earlier cases had held that the law of the place of the hearing should be determinative of the double criminality issue: *Collins v. Loisel*, 259 U.S. 309, 314-17 (1922); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); *Currier v. Vice*, 77 F.2d 130 (9th Cir. 1935).

<sup>179</sup> *See I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW* 148 (1971).

action to be extraditable under the no-list theory, the conduct still must be a crime of sufficient gravity in both states. The no-list method merely eliminates dependency on a specific and quickly dated list of offenses. Its adoption does not alter the basic problem of determining what is criminal in the U.S. when certain conduct is criminalized in some states of the Union and not in others. On the other hand, the growing trend to allow extradition when the conduct is "similar" or "analogous to" crimes in the other state does "resolve" the government's problem by severely limiting the effect and value of the double criminality principle as a protection at all. Mail and wire fraud<sup>180</sup> and transportation offenses traditionally caused serious dual criminality problems because there generally is no direct foreign counterpart<sup>181</sup> especially after recent broad construction in U.S. courts, wherein no fraud is required, just mailing or wiring a transmission that is in "furtherance of a scheme to defraud."<sup>182</sup> RICO presents similar problems.<sup>183</sup> Recent United States extradition treaties, such as that with Switzerland specifically address some of these problems. Article 2 of the U.S.-Switzerland extradition treaty provides:

1. An offense shall be . . . extraditable only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year. . . . 2. For the purpose of this Article, it shall not matter: (a) whether the laws of the Contracting Parties define the criminal act as the same offense; or (b) whether the offense is one for which [U.S. federal law] requires proof of interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce,

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<sup>180</sup> 18 USC. § 1341; 18 USC. § 1343 (1994).

<sup>181</sup> Kester, *Myths*, *supra* note 127, at 1462. "Transportation offenses" are those acts made criminal under federal law having as a necessary element, in addition to the substantive elements of the particular offense (theft, prostitution, etc.), the transportation, transporting, or transfer across state or foreign borders of persons, articles, or other items related to the offense. The Commerce Clause of the U.S. Constitution provides the authority for federal jurisdiction. Federal jurisdiction must be established in this or some other manner, or we would have a quagmire of competing jurisdiction. Furthermore, many of the "transportation offenses" tend to involve organized crime, thus, making the funding, expertise, and larger investigative and prosecutorial capabilities of the federal system even more important.

<sup>182</sup> *Id.*

<sup>183</sup> See, Christopher L. Blakesley, *General Report: The Criminal Justice System Facing the Challenge of Organized Crime*, 69 REV. INT'L DE DR. PÉN. 69, 82, et seq. (1999).

such matters being merely for the purpose of establishing jurisdiction in a United States federal court . . .<sup>184</sup>

In *United States v. Sensi*,<sup>185</sup> in 1989, the defendant's double criminality argument was rejected. The D.C. Circuit noted, "[The defendant's] alleged offense was stealing; the significance of his use of the mails and of interstate transportation and facilities is 'jurisdictional only' in that it permits him to be prosecuted under federal law."<sup>186</sup> The jurisdictional language is simply the trigger for federal jurisdiction of federal crimes particularly important for the federal government, either because of the difficulty of state prosecution or the importance of the type of crime or offender.<sup>187</sup> On the other hand, sometimes interstate transportation of stolen property or such like will not be extraditable, where it is the transportation that is the gravamen of the offense. If the foreign state does not have an equivalent offense and sees this point, it will not be extraditable.

#### b) Special Application of the Double Criminality Provision

A specialized use of double criminality that generally works to deny extradition, even when the offense on which the extradition requested is based constitutes a crime in each state and is listed in the treaty as extraditable, will be labeled the "special use" of double criminality. Extradition will be denied when the theory of jurisdiction maintained by the requesting state is not accepted by the requested state. The *Pinochet* decision by the House of Lords held that extradition would be proper, because the jurisdictional theory for the extraterritorial criminal conduct was extant and consistent (regarding torture, for example) in both Spain and the United Kingdom.<sup>188</sup> The extant rule and one problem it may present are illustrated by the well publicized

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<sup>184</sup> Switzerland–United States Extradition Treaty, *supra* note 174, at art. 2.

<sup>185</sup> *United States v. Sensi*, 879 F.2d 888, 893, 894 (D.C. Cir. 1989).

<sup>186</sup> *Id.* at 893, 894. *See also*, *Ross v. U.S. Marshall of Oklahoma*, 168 F.3d 1190, 1195 (10th Cir. 1999); *United States v. Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988); *Emami v. United States*, 834 F.2d 1444, 1450 (9th Cir. 1987); *Extradition of Tan Yee Chun*, 674 F. Supp. 1058 (S.D.N.Y. 1984) (the jurisdictional trigger for a federal crime did not bar crimes from being analogous to Hong Kong crimes so as to bar extradition.).

<sup>187</sup> *E.g.*, *Herbage*, 850 F.2d at 1463.

<sup>188</sup> *See R. v. Bow Street Metropolitan Stipendiary Magistrate and Others* 2 W.L.4 827 (1999).



*Abu Daoud* case.<sup>189</sup> In 1974, the government of Israel formally requested the French government to arrest Abu Daoud pursuant to article 10 of the French-Israeli Extradition Convention<sup>190</sup> and to an arrest warrant issued by Israeli judicial authorities on charges relating to the 1972 Munich Olympics massacre. The Paris Court of Appeal decided, *in camera*, that the continued provisional detention of Abu Daoud for extradition would not be proper under French law and under the terms of the extradition treaty between France and Israel in effect at the time of the alleged offense.<sup>191</sup> The point of that decision was that Israel's request, based on acts against Israeli nationals in Munich by non-Israeli nationals, asserted the jurisdictional principle of passive personality,<sup>192</sup> to which France did not adhere at the time of the events in Munich.<sup>193</sup> Although France had promulgated a law that approved the assertion of jurisdiction in such cases three years subsequent to the events in Munich and eighteen months prior to the *Abu Daoud* decision,<sup>194</sup> the Paris Court of Appeal held that this law could not be applied retroactively.<sup>195</sup>

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<sup>189</sup> Carbonneau, *Terrorist Acts—Crimes or Political Infractions? An Appraisal of Recent French Extradition Case*, 3 HASTINGS INT'L & COMP. L. REV 265, 284, n.108 (1980); Note, *The Abu Daoud Affair*, 11 J. INT'L L. & ECON. 539 (1977). Although the court of appeal considered the issue of Abu Daoud's provisional detention pursuant to requests from both the former Federal Republic of Germany and Israel, only the latter relates to the rule of double criminality.

<sup>190</sup> Convention on Extradition, Nov. 12, 1958, France-Israel, 805 U.N.T.S. No. 251.

<sup>191</sup> Note, *The Abu Daoud Affair*, 11 J. INT'L L. & ECON. 539, 552 (1977).

<sup>192</sup> The passive personality theory or basis of jurisdiction is based on the nationality of the victim. The nation whose national was injured or killed has jurisdiction to prosecute the offense. For analysis of the principle's application in Europe and in the U.S., see, Blakesley, *TERRORISM*, *supra* note 4, at 131-137.

<sup>193</sup> The fugitive, Abu Daoud, was released before Israeli officials in France were contacted. It was reported that Israel would have sought extradition for acts of terrorism allegedly committed by Abu Daoud in Israel, thus eliminating this double criminality problem. See Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 VA. J. INT'L L. 495, 501 (1977).

<sup>194</sup> Act of July 11, 1975, Loi No. 75-624, J.O., July 13, 1975, at 7219 (Fr.), 1975 D.S.L. 259. This act amended article 689, of the French *Code de Procédure Pénal* to become that article's paragraph 1 (*discussed in* Blakesley, *Extraterritorial Jurisdiction*, in II INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS at 33, 67, -70 (Bassiounti, ed., 2d ed. 1998); BLAKESLEY, *TERRORISM*, *supra* note 4, at ch. 3.

<sup>195</sup> Note, *Abu Daoud*, *supra* note 193. Extradition treaties, of course, do not criminalize actions; they merely recognize offenses as being extraditable. Thus extradition agreements generally are applied *retroactively* without violating the principle of *nulla poena sine lege* or traditional protections against *ex post facto* laws. The *US - French Supplementary Convention* contains a specific declaration of retroactively. *U.S. - French*

The decision not to extradite when the requested state's law on jurisdiction does not accept the jurisdictional theory asserted by the requesting state seems to be standard in France,<sup>195</sup> the United States, and international extradition practice.<sup>197</sup>

E. *NE BIS IN IDEM*, OR THE PROTECTION AGAINST DOUBLE JEOPARDY IS VIRTUALLY MEANINGLESS IN EXTRADITION<sup>193</sup>

The principle of *ne bis in idem* is broader than the United States protection against double jeopardy.<sup>199</sup> Moreover, *ne bis in idem* is based on the principle that prosecution is prohibited "for the same 'facts,' and not only for the same or substantially the same crimes arising out the same facts."<sup>200</sup>

A defendant in the United States always faces the possibility of successive prosecutions for conduct that forms part of the same transaction. This has been held not to violate the double jeopardy clause of the U.S. Constitution.<sup>201</sup> This is partly a func-

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*Supplementary Convention to Extradition*, art II, Feb. 12, 1970, 22 U.S.T. 407, T.I.A.S. No. 7075. This article was agreed to without discussion during the negotiations. For background on retroactivity, see WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 753 (1968).

<sup>196</sup> Cf. *Fornage Case*, 84 J. du Palais 229 (1873) (reported in 2 J.B. MOORE, INTERNATIONAL LAW DIGEST 261 (1906): "But the law cannot give to the French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor the territorial statute, would constitute a violation of international law . . ." *Id.*).

<sup>197</sup> *Id.* at 259-68 & nn.370-81 and accompanying text.

<sup>198</sup> See, e.g., *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1989); BLAKESLEY, TERRORISM, *supra* note 4.

<sup>199</sup> See, e.g., *Elcock v. United States*, 80 F. Supp. 2d 70, 81, n. 15 (E.D.N.Y. 2000); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION; UNITED STATES LAW & PRACTICE 600-601 (3rd ed. 1996).

<sup>200</sup> See, e.g., GERMAN BASIC LAW (*Grundgesetz*), art. 103(3) (prohibiting multiple prosecutions for the same "act"); Peter Wilkitzki, *Defences, Exceptions and Exemptions in the Extradition Law and Practice and the Criminal Policy of the Federal Republic of Germany*, 62 REV. INT'L DR. PÉN. 280 (1991); CLAUS ROXIN, STRAFVERFAHRENSRECHT 132, 356 (23d ed. 1993); MAUNZ-DURIG, GRUNDGESETZ: KOMMENTAR, ART. 103(3) 13-16 (1993) (noting that *ne bis in idem* inquires into whether the facts underlying the original prosecution are the same, rather than whether the elements of the offense are the same, as in a United States double jeopardy inquiry. This is discussed in *Elcock*, 80 F. Supp. 2d at 81-82.

<sup>201</sup> U.S. CONST., AMD. V: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." See, e.g., Daniel Richman, *Bargaining About Future Jeopardy*, 49 Vand. L. Rev. 1181, 1187 (1996); Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625 (1995). Some of the United States do provide protection against

tion of the United States Government's attempt to counter organized and complex crime, including, of course, narcotics trafficking and money laundering. It goes beyond that, however. The concept of "dual sovereignty," for double jeopardy purposes in the United States provides that a prior state prosecution is no bar to a federal prosecution and vice-versa.<sup>202</sup> Although the Supreme Court has never addressed the issue, the "dual sovereignty rule" has been held to obtain in the international extradition setting, as well.<sup>203</sup>

The rules relating to what conduct will be barred from prosecution on the basis of double jeopardy in the United States further limits the protection afforded. The 1932 U.S. Supreme Court decision in *Blockburger v. United States*,<sup>204</sup> created the so-called *Blockburger test*, which provides that the Double Jeopardy Clause of the Fifth Amendment will not protect a defendant from subsequent prosecution, as long as "each offense [charged in the trial or plea proceeding] contains an element not contained in the other . . ." <sup>205</sup> or "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of fact which the other does not." <sup>206</sup> This test originated as a device to determine congressional intent relating to cumulative sentencing but has been applied in many other contexts. In 1993, the Supreme Court reiterated this test and enshrined it as the exclusive analytical method for determining the validity of successive prose-

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successive prosecutions beyond the federal Supreme Court limits. See Ronald J. Allen and John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 823-24 (1985); Lear, *Contemplating*, *supra* this note, at 665, n.175 (collecting state citations, including at least twenty-three states that do this).

<sup>202</sup> WAYNE R. LAFAVE, CRIMINAL LAW 145, n.82 (3d ed. 2000).

<sup>203</sup> See, e.g., *United States v. Rezaq*, 134 F.3d 1121, 1128 (D.C. Cir. 1998); *United States v. Guzman*, 85 F.3d 823, 826 (1st Cir. 1996) (trial in the Dutch Antilles did not bar a U.S. trial); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1362 (11th Cir. 1994) (Bahamas and U.S.); *Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir. 1984).

<sup>204</sup> *Blockburger v. United States*, 284 US 299, 304 (1932).

<sup>205</sup> *United States v. Dixon*, 509 U.S. 688, 710 (1993) (reiterating and enshrining as the sole test and exclusive analytical mode for successive prosecutions on the same transaction) (noted in Richman, *Bargaining*, *supra* note 201, at 1188); *Blockburger*, 284 U.S. at 304.

<sup>206</sup> *Id.* at 304 (discussed in WAYNE R. LAFAVE, CRIMINAL LAW 689 (3d ed. 2000)).

cutions.<sup>207</sup> Thus, for illegal importation of narcotics aboard an airplane, a defendant, convicted for that importation could be convicted subsequently for unlawfully transporting the narcotics into the United States and for possession of the same narcotics aboard a plane without proper documentation. Thus, from this single transaction, we have illegal importation of narcotics, unapproved transport of narcotics, and undocumented transport of the drugs.<sup>208</sup> It does not even make a difference when the elements of a subsequently prosecuted offense seem to be fully subsumed within those of a crime prosecuted before, something that occurs frequently under RICO or CCE.<sup>209</sup> In addition, subsequent prosecution is possible, even if otherwise barred, if the action is brought by a "separate sovereign."<sup>210</sup>

#### F. THE PRINCIPLE OF SPECIALITY AS AN EXAMPLE OF U.S. FAILURE TO MEET HUMAN RIGHTS OBLIGATIONS IN EXTRADITION<sup>211</sup>

While the principle of double criminality requires a correspondence between a fugitive's alleged acts and the laws of the requested and requesting countries, the doctrine of speciality requires a correspondence between the charges contained in

<sup>207</sup> *Blockburger*, 284 U.S. at 304; *Dixon*, 509 U.S. at 710.

<sup>208</sup> *United States v. Flores-Peraza*, 58 F.3d 164, 167-68 (5th Cir. 1995); *United States v. Franchi-Forlando*, 838 F.2d 585, 589-91 (1st Cir.1988). See also, *Knapp v. Leonardo*, 46 F.3d 170, 178 (2d Cir.1995) (holding that the double jeopardy clause—and *Blockburger*—were not violated even when defendant was acquitted on intentional murder charges, but subsequently tried and convicted of reckless murder).

<sup>209</sup> *Racketeer Influenced & Corrupt Organizations Act*, 18 U.S.C. §§ 1961-1968 (1984); *CCE, Racketeer Influenced & Corrupt Organizations Act*, 21 U.S.C. § 848 (1998); see also, *Drug Abuse Prevention & Control Act*, 21 U.S.C. § 848 (1998) (discussed in Blakesley, *Rapport General, Les Systèmes de Justice Criminelle Face au Défi du Crime Organisée: Topic II, La Partie Spéciale*, 69 REV. INT'L DE DR. PÉN. 35 (1999) (English version at 69, Spanish version at 101); Dorean Koenig, *The Criminal Justice System Facing the Challenge of Organized Crime: U.S. Report, Topic II*, 44 WAYNE ST. L. REV. 1351 (1998); Peter J. Henning, *Same Title, U.S. Report, Topic I (General Part)*, 44 WAYNE ST. L. REV. 1305 (1998); Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime US Report, Topic IV*, 44 WAYNE ST. L. REV. 1400 (1998); Richman, *Bargaining*, *supra* note 205, at 1189; Lear, *Contemplating*, *supra* note 205, at 629; and Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 928 n.43 (1958) (noting egregious circumstances relating to narcotics trafficking).

<sup>210</sup> See, e.g., *Heath v. Alabama*, 474 US 82, 88 (1985) (holding that even each state of the United States is a separate sovereign for purposes of double jeopardy, proscribing conduct as criminal and determining punishment, as long as the state conforms to minimum constitutional standards. It held that a state and a municipality within that state may not prosecute for the same criminal act.)

<sup>211</sup> See, e.g., *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1989).

the indictment and the facts presented to the extraditing judge.<sup>212</sup> The universal principle of speciality requires that a person not be prosecuted or be re-extradited to a third state for any offense other than that for which he was extradited.<sup>213</sup> A typical, traditional statement of the rule of speciality reads:

No person surrendered by either [party] to the other shall be triable or be punished for any crime or offense committed prior to his extradition, other than the offense for which he was delivered up, nor shall such person be arrested or detained on civil process for a cause accrued before extradition, unless he has been at liberty for one month after having been tried, to leave the country, or, in the case of conviction, for one month after having suffered his punishment or having been pardoned.<sup>214</sup>

Article 19 of the 1997 Treaty of Extradition between the U.S. and France, currently before the Senate for its advice and consent, reads:

1. A person extradited under this Treaty shall not be detained, tried, convicted, punished, or subjected to any restriction of his freedom in the territory of the Requesting State for any act prior to the person's surrender, other than the offense for which extradition has been granted, except in the following cases:

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<sup>212</sup> *United States v. Sensi*, 879 F.2d 888, 894-95 (D.C. Cir. 1989). An example of the rule is presented in the article XII of The Treaty of Extradition Between the U.S. and the U.K., 28 U.S.T. 227, 233: "A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted . . ."

<sup>213</sup> The law of most nations provides for the principle of speciality even in the absence of a treaty stipulation requiring it. *See*, *United States v. Rauscher*, 119 U.S. 404 (1886) and its progeny; including *United States v. Monsalve*, 173 F.3d 847 (2d Cir. 1999), *United States v. Lui Kin-Hong*, 110 F.3d 103, 115 (1st Cir.1997) (re-extradition to third state), *Sensi*, 879 F.2d, at 894-95. I agree with Professor Shearer that the term "speciality" is preferable to the more often used "specialty," because it approximates more closely the French term *specialité* which was the original term used for the principle. For additional general discussions of the subject, see HSU, *Du Principe de la spécialité en Matière d'extradition* (1950); I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 146-47, 237-38, 242-43 (1971). There are many cases in which the principle of speciality is pivotal. *See, e.g., Rauscher*, 119 U.S. at 407; *Fiocconi v. Att'y Gen. Of U.S.*, 339 F. Supp. 1242 (S.D.N.Y. 1972); *United States v. Ditommaso*, 817 F.2d 201, 212 (2d Cir. 1987); *United States v. Molina-Chacon*, 627 F. Supp. 1253 (E.D.N.Y. 1986); *United States v. Vreeken*, 603 F. Supp. 715 (D. Utah 1984).

<sup>214</sup> 1909 Extradition Treaty between France and the United States, Jan. 6, 1909, art. 7, 37 Stat. 1526, 1531, 791 U.N.T.S. 237.

(a) when the Requested State has given its consent. A request for such purpose may be submitted, together with the documents listed in Article 10, and any statements made by the person extradited concerning the offense for which any statements made by the person extradited concerning the offense for which the consent of the Requested State is requested;

or

(b) when, having had the opportunity to do so, the person extradited did not leave the territory of the Requesting State within 30 days of his final release, or returned to the territory of the Requesting State after having left it.

2. If the denomination of the offense for which a person has been extradited is altered during the proceedings under the laws of the Requesting State or such a person is charged with a differently denominated offense, the person shall be prosecuted or sentenced provided the offense under its new legal description is:

(a) based on the same set of facts contained in the extradition request and its supporting documents; and

(b) punishable by the same maximum penalty as, or lesser maximum penalty than, the offense for which he was extradited.<sup>215</sup>

It is clear from this treaty language, which represents the current and traditional U.S. position, that the U.S. Departments of State and Justice will generally be favorable to allowing prosecution of an individual for crimes other than those for which he was extradited if the requested state does not object! In addition, the material elements of an offense, not its denomination, determine the crimes for which a person may be prosecuted after extradition.<sup>216</sup> The United States' position is that the determination of what is and is not within the doctrine of speciality should be based on United States law, while taking into consideration the law of the foreign state.<sup>217</sup> The tendency seems to be to interpret treaty terms, such as "offenses independent from,"

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<sup>215</sup> Treaty of Extradition Between the United States and France, signed at Paris, April 23, 1996, presented to the Senate, July 9, 1997, art. 19. This Treaty has not received the Senate's Advice and Consent at this writing.

<sup>216</sup> *United States v. Sensi*, 879 F.2d 888, 894-95 (D.C. Cir. 1989).

<sup>217</sup> *United States v. Garcia*, No. 97-3222, 2000 WL 363183 at \*1-2 (11th Cir. 2000).

in a manner that will be deemed not to violate the doctrine of speciality; i.e., to allow prosecution as expansively as possible.<sup>218</sup>

*1. Application of the Doctrine of Speciality*

a) Effect if Violated

If a tribunal finds the doctrine of speciality to have been violated, the fugitive must be released from custody and allowed to leave the country, before he may be tried for offenses for which he was not extradited. If the fugitive does not leave after having been given notice and adequate time to do so, he may be prosecuted.

b) Personal Rights Created? Standing?

Do treaties on international cooperation in criminal matters, including extradition treaties, create domestically enforceable rights in individuals? The traditional answer to the question is no, although this is a matter of debate. Even though these treaties are self-executing, only states are considered subjects of international law; so only they have had rights, obligations, and interests.<sup>219</sup> Thus, under this view, if a treaty provides some protection to the individual subject to extradition, the right to assert this protection or protest a violation is that of the extraditing state, not the individual himself. Thus, traditionally, most of the "protections" found in extradition treaties and other instruments of international cooperation in criminal matters have been read by U.S. courts to provide "standing" only to governments.

On the other hand, there has developed a split among the Circuits over whether a returned fugitive has standing to raise a violation of the rule of speciality. The classic Supreme Court decision on standing and the rule of speciality is *United States v. Rauscher*.<sup>220</sup> *Rauscher* held that a court cannot refuse to apply a speciality provision even if it does not explicitly confer the right to the defendant himself; to so refuse would create "an implication of fraud upon the rights of the party extradited, and of bad

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<sup>218</sup> See, e.g., *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998); *United States v. Lazarevich*, 147 F.3d 1061, 1063-64 (9th Cir. 1998).

<sup>219</sup> See, gen., OLIVER, ET AL., *INTERNATIONAL LEGAL SYSTEM*, *supra* note 161, chs. 2, 10, and 11.

<sup>220</sup> *Rauscher*, 119 U.S. 407.

faith to the country which permitted his extradition."<sup>221</sup> Moreover, Supreme Court dictum in the 1992 *Alvarez-Machain* decision<sup>222</sup> reinforced the impression that the accused, returned fugitive should be able to object to prosecution on different charges, as articulated in *Rauscher*, at least when the extraditing country protests.

By the same token, however, it is clear that if the extraditing state consents to the prosecution, the returned fugitive, except perhaps in the Tenth Circuit,<sup>223</sup> will have no chance to raise the issue of the violation of his interests. Even if the requested state simply does not formally protest, some circuits hold that the defendant has no standing to raise the issue. Despite the language in *Rauscher*, the rule of speciality has been read by several circuits to be "[assertable] only by the extraditing state."<sup>224</sup> The federal circuits are split on whether an individual has standing to raise it.<sup>225</sup>

<sup>221</sup> *Id.* at 422.; *cf.*, *United States v. Billman*, No. 94-5526, 1996 WL 267329, at \*2, n.5 (4th Cir. 1996); *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220 (2d Cir. 1934).

<sup>222</sup> *United States v. Alvarez Machain*, 504 U.S. 655, 659-60 (1992) (providing that if the U.S.-Mexico Extradition Treaty were applicable, defendant would have standing to raise rights and protections under it).

<sup>223</sup> *United States v. Levy*, 905 F.2d 326, 328, n.1 (10th Cir.1990) (returned fugitive has standing to object to prosecution).

<sup>224</sup> The principle of *speciality* requires that a person not be prosecuted for any offense other than that for which he was extradited, or be re-extradited to a third state. *United States v. Rauscher*, 119 U.S. 407 and its progeny. The remedy is that the fugitive must be released and allowed to leave. *See, e.g.*, *In re Dilasser*, 9 I.L.R. 377 (*Cour de Cassation* 1952). Cases holding defendant not to have standing to raise the principle include *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989). *But see*, *Leighnor v. Turner*, 884 F.2d 385, 388 (8th Cir. 1989) ("an extradited fugitive may raise whatever objections . . . that [the surrendering state] may have").

<sup>225</sup> *See gen.*, BLAKESLEY, *TERRORISM*, *supra* note 4, at 250; Note, *International Extradition, the Principle of Speciality, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1029-30, n. 56 (1992); Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907, 924, n. 83 (1992). *Compare* *United States v. Kaufman*, 874 F.2d 243, 243 (5th Cir. 1989) (*per curiam*) (denying petition for rehearing, stating that only a nation-party to a treaty may complain of a breach of the treaty); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) (noting that, "[t]he right to insist on application of the principle of speciality belongs to the requested state, not to the individual whose extradition is requested . . ."); *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973) ("the principle of specialty has been viewed as a privilege of the asylum state . . . rather than a right accruing to the accused..."); *with* *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989) ("[t]he extradited individual . . . can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty . . ."); *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988); *Leighnor v. Turner*, 884



The term "standing" to raise an objection is not well-used in this context. It really is more related to whether the speciality principle is considered "self-executing." If it is "self-executing," a returned fugitive may object without protest from the extraditing country. If it is not self-executing, the defendant is dependent on the extraditing state's protest.<sup>226</sup> The circuits holding that the returned fugitive does not have standing include the First,<sup>227</sup> Third,<sup>228</sup> Fifth,<sup>229</sup> Sixth,<sup>230</sup> Seventh,<sup>231</sup> and often the Second<sup>232</sup> and D.C. Circuits.<sup>233</sup> On the other hand, if the nation that extradited the fugitive protests, all of these circuits allow the defendant to object to the prosecution. He is again entirely dependent on the requested state's protest.<sup>234</sup> The Second and Fifth Circuits have held that it will be assumed that no protest will be forthcoming from the sending state, when the prosecution is for charges "not totally unrelated" or "of the same character" as those for which defendant was extradited.<sup>235</sup>

Those courts providing that the fugitive has standing under *some* circumstances include the Second, Eighth, Ninth, Tenth

F.2d 385, 388 (8th Cir. 1989) (The notion that the accused has no standing to challenge a violation of an extradition treaty is "without merit." "[A]n extradited individual may raise whatever objections to his prosecution that [the surrendering country] might have."); *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987).

<sup>226</sup> Jacques Semmelman, *The Doctrine of Speciality in the Federal Courts: Making Sense of United States v. Rauscher*, 34 VA. J. INT'L L. 71, 138-140 (1993).

<sup>227</sup> *See, e.g., United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981).

<sup>228</sup> *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3rd Cir. 1997).

<sup>229</sup> *United States v. Kaufman* 874 F.2d 242, 243 (5th Cir. 1989) (per curiam).

<sup>230</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) (noting that, "[t]he right to insist on application of the principle of speciality belongs to the requested state, not to the individual whose extradition is requested . . ."), *cert. denied*, 475 U.S. 1016 (1956).

<sup>231</sup> *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990).

<sup>232</sup> *See, e.g., Cabrera v. Warden*, 629 F. Supp 699, 701 (S.D.N.Y. 1986); *United States v. Molina-Chacon*, 627 F. Supp. 1253, 1264 (E.D.N.Y. 1986) ("Courts have recognized that the doctrine is a privilege of the asylum state, not the individual right of one accused.").

<sup>233</sup> *Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D. D.C.1993) ("the rule of speciality is not a right of the accused but is a privilege of the asylum state' and therefore [defendant] has no standing to raise this issue.").

<sup>234</sup> Semmelman, *The Doctrine of Speciality*, *supra* note 227.

<sup>235</sup> *Id.* at 138 (citing *Fiocconi v. Atty. Gen of U.S.*, 462 F.2d 475, 481 (2d Cir. 1972) (refers to French-U.S. treaty as conferring the right, only if requested nation "formally protested" when it is for an offense "of the same character."); *United States v. Paroutian*, 299 F.2d 486, 490-91 (2d Cir.1962) (only when not "totally unrelated").

and Eleventh Circuits.<sup>236</sup> Most of these decisions consider the defendant's right to be strictly derivative.<sup>237</sup> The sending state may nullify any defendant's attempt to raise an issue by consenting to the additional charges being prosecuted.<sup>238</sup> A few circuits hold that a defendant has standing to raise what might have been raised by the asylum state.<sup>239</sup> Some circuits have held that the proper view is to consider the rule of speciality to be *prima facie* self-executing; a defendant's rights under the rule may only be overridden by express consent of the extraditing nation.<sup>240</sup>

The Tenth Circuit holds that the defendant has standing to assert violations under an extradition treaty, whether or not the requested state protests.<sup>241</sup> The Fifth Circuit is undecided on the issue.<sup>242</sup> Overall, there is no doubt that danger exists that a returned fugitive may be prosecuted in several circuits for addi-

<sup>236</sup> See, e.g., *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (defendant may raise rights under treaty, but only if treaty allows sending state to do so); *United States v. Levy*, 905 F.2d 326, 328, n.1 (10th Cir. 1990) (extradited person has standing to claim a violation of the rule of speciality); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989) (individual has standing to allege any violation that the extraditing state might consider a breach); *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curiam); *United States v. Khan*, 993 F.2d 1368, 1373-75 (9th Cir. 1993); *United States v. Marconi*, 899 F. Supp. 458, 463 (C.D. Cal. 1995) ("[s]peciality is based on international comity, and therefore 'exists only to the extent that the surrendering state wishes.'")

<sup>237</sup> See, e.g., *Leighnor v. Turner*, 884 F.2d 385, 389 (8th Cir. 1989); John J. Barrett III, Note, *The Doctrine of Speciality: A Traditional Approach to the Issue of Standing*, 29 CASE W. RES. J. INT'L L. 299, 302, & nn.17-19 (1997); Jacques Semmelman, *Doctrine of Speciality*, *supra* note 227, at 138.

<sup>238</sup> Semmelman, *Doctrine of Speciality*, *supra* note 226, at 138; Barrett, Note, *Speciality: A Traditional Approach*, *supra* note 237, at 302.

<sup>239</sup> See, e.g., *United States v. Puentes*, 50 F.3d 1567, 1571 (11th Cir. 1995); *United States v. Marconi*, 899 F. Supp. 458, 463 (C.D. Cal. 1995); *United States v. Cuevas*, 847 F.2d 1417, 1426-27, n.23 (9th Cir. 1988) (defendant can raise the rule of speciality claims "which might have been raised by the asylum state").

<sup>240</sup> Semmelman, *Doctrine of Speciality*, *supra* note 226, at 138 (citing former position in the 2nd Circuit: *United States v. Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934)).

<sup>241</sup> *Levy*, 905 F.3d at 328, n.2; Barrett, Note, *Speciality*, note 237, at 302.

<sup>242</sup> *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998) (whether a defendant has standing to raise the doctrine of speciality is undecided in the 5th Circuit); *United States v. Kaufman*, 858 F.2d 994, 1009, n.5 (5th Cir. 1988) (declining to address the standing issue); *United States v. Tse*, 135 F.3d 200, 205, n.3 (1st Cir. 1998) ("We do not suggest that defendant cannot raise the issue of speciality. The government has not raised the issue of standing and we do not reach it. We only note that the doctrine does not extend any independent protection to the defendant").

tional offenses to those for which he was extradited.<sup>243</sup> A trend is developing to allow the defendant standing to raise issues related to speciality, at least under one of the above-noted circumstances.<sup>244</sup> The danger to the protective value of the rule of speciality rests as much in judicial interpretation of the term "same offense" as in the issue of standing to raise the issue. This is manifest in *United States v. Kaufman*, where the Fifth Circuit held, similarly to the Second Circuit, that so long as the offenses prosecuted after extradition are "of the same character" or not "totally unrelated" to the offenses for which defendant was extradited, the defendant is not allowed to object unless the extraditing nation has *formally objected*.<sup>245</sup> The Fifth Circuit stated the following when it denied rehearing: "only an offended nation can complain about the purported violation of an extradition treaty . . ." <sup>246</sup> In the prior judgment on the merits of the case, the *Kaufman* court held: ". . . viewed in the light of the underlying purpose of the *Rauscher* rule, the trial of the extraditees for a separate but similar offense in another jurisdiction would not be an act of bad faith against the requested country such as would constitute a violation of the rule of speciality." If an extraditing country protests the receiving state's prosecution of *charges* different from those for which the accused was extradited, all circuits would be hard put not to follow the rule.

The overall weakness of the speciality protection, however, is predominant. The accused fugitive may be prosecuted inappropriately, first because the extraditing nation may fail to protest, and second because the term "*different charges*" is usually read in a manner significantly favorable to allowing prosecution for additional offenses. For, example, in *Kaufman*, the Fifth Circuit held, trying to distinguish *Rauscher*:

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<sup>243</sup> See, e.g., *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962) (allowing prosecution for receipt and concealment of heroin, even though the extradition was only for trafficking); J. Soma, T. Muther, & H. Brissette, *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 328, n.61 (1997).

<sup>244</sup> See *supra*, notes 223-248 and accompanying text.

<sup>245</sup> *United States v. Kaufman*, 858 F.2d 994, 1007-09 (5th Cir. 1988). See also *Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D. D.C.1993) ("the rule of speciality is not a right of the accused but . . . a privilege of the asylum state and therefore [defendant] has no standing to raise the issue").

<sup>246</sup> *Kaufman*, 874 F.2d at 243.

Just as correcting a technical variance in the indictment should not be considered as charging 'a separate offense' for purposes of the rule of speciality, [U.S. v. Proustian, 299 F.2d 486, 490-91 (2d Cir.1962)], neither should a separate indictment for *a crime of the same character as the crime for which the extraditees were initially extradited....* (emphasis added)<sup>247</sup> . . . Thus viewed, in light of the underlying purposes of the *Rauscher* rule, the trial of the extraditees for a separate but similar offense in another jurisdiction would not be an act of bad faith against the requested country such as would constitute a violation of the rule of speciality . . .<sup>248</sup>

Some of the language in *Kaufman* makes it appear that even if the extraditing country protested prosecuting the extraditee on offenses other than those for which he was extradited, if these offenses were "of a similar nature" or "of the same character," even a protest by the extraditing nation would be to no avail.<sup>249</sup>

The essential point is that judicial analysis of the rule of speciality has been inconsistent, perfunctory, even incoherent.<sup>250</sup> Finally, for any fugitive to be protected a right must be incorporated into U.S. law by self-executing treaty, by legislation, or the Constitution itself.<sup>251</sup> Recall that the rule of speciality will not bar prosecution of the returned fugitive for any extraditable offense established by the facts of the extradition documentation, even though the denomination of the offense may not be within the extradition request.<sup>252</sup>

## 2. Scope of the Doctrine of Speciality

### a) Parole or Probation

The rule of speciality has been held not to bar a parole board from considering pre-extradition charges, for which the accused had not been extradited, to increase the parole guide-

<sup>247</sup> *Kaufman*, 858 F.2d at 1008.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1008-1009.

<sup>250</sup> See Note, *International Extradition, the Principle of Speciality, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1031 (1992).

<sup>251</sup> See *infra* discussion on the Incorporation Doctrine and Self-Executing Treaties.

<sup>252</sup> See, *Collins v. Loisel*, 259 U.S. 309 (1922); *Bryant v. United States*, 167 U.S. 104 (1897); 4 J. MOORE, DIGEST OF INTERNATIONAL LAW 316 (1906). The law of most nations provides for the principle of speciality even in the absence of a treaty stipulation requiring it, as in *United States v. Rauscher*, 119 U.S. 407 (1886).

line range.<sup>253</sup> It has been held not to apply to probation revocation or to an imposition of a four-year concurrent sentence for a probation violation.<sup>254</sup>

b) Procedural or Evidentiary Rules

The rule of speciality has been held not to apply to the evidentiary or procedural rules applicable in a United States trial.<sup>255</sup> For example, it was even held that in the face of an extradition order from the extraditing country that forbade prosecution for aiding and abetting or conspiracy in a drug case, pursuant to 18 U.S.C. section 2, the rule of speciality did not preclude an instruction to the jury on the theory of vicarious liability, as approved by the Supreme Court in *Pinkerton v. United States*.<sup>256</sup>

c) Sentencing

The doctrine of speciality has been held not to apply to sentencing.<sup>257</sup> The scope of proof relating to other offenses that may be considered in the sentencing hearing, may not be limited by the extraditing nation.<sup>258</sup> In *United States v. Lazarevich*, for example, the Ninth Circuit held that enhancement of the defendant's sentence upon evidence of offenses for which he was not extradited did not violate the rule of speciality.<sup>259</sup> In *Lazarevich*, the evidence used to enhance the defendant's sentence related to child abduction, for which the Dutch Government had expressly refused to extradite. Defendant was convicted for making a false statement on the child's passport application. Even though the false statements were found to have been made to facilitate the abduction, use of the evidence of abduction to enhance the sentence was held not to violate the rule of

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<sup>253</sup> *Leighnor v. Turner*, 884 F.2d 385, 390 (8th Cir. 1989).

<sup>254</sup> *United States v. Lazerman*, No. 98-50339 U.S. App. LEXIS 17837 (9th Cir. 1999).

<sup>255</sup> *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1413-14 (11th Cir. 1989) (evidence of money laundering, for which extradition was specifically refused, could be used to prove a drug conspiracy, for which extradition was granted); *United States v. Gallo-Chamorro*, 233 F.3d 1298, 1304 (11<sup>th</sup> Cir. 2000).

<sup>256</sup> *United States v. Gallo-Chamorro*, 48 F.3d 502 (11th Cir. 1995); *Gallo-Chamorro*, 233 F.3d at 1304. *Pinkerton v. United States*, 328 U.S. 640 (1946).

<sup>257</sup> *United States v. Garcia*, No. 97-3222, 2000 WL 363183, at \*1-2 (11th Cir. 2000).

<sup>258</sup> *Id.* at \*2-3.

<sup>259</sup> *United States v. Lazarevich*, 147 F.3d 1061, 1063-64 (9th Cir. 1998).

speciality.<sup>260</sup> The Ninth Circuit cited the 1995 Supreme Court decision *Witte v. United States* to the effect that “use of evidence of related criminal conduct to enhance a defendant’s sentence for a separate crime . . . does not constitute punishment.”<sup>261</sup> The *Lazarevich* decision followed the Supreme Court decision in *United States v. Watts*,<sup>262</sup> which had overturned two Ninth Circuit decisions holding that a sentencing court could not consider underlying charges upon which defendant had been acquitted.<sup>263</sup> Thus, it has been unavailing to argue that no “technical gloss from the [Sentencing Guideline’s] principle of relevant conduct’ should overcome the plain meaning of ‘punishment.’”<sup>264</sup>

In *United States v. Keesee*,<sup>265</sup> a sentencing judge considered for sentencing purposes conduct other than that for which defendant had been extradited from Germany. The Ninth Circuit held that this did not violate the rule of speciality in the U.S.–Germany Extradition Treaty. A person is not “punished” for non–charged conduct simply because the court considers that conduct at sentencing.<sup>266</sup> Other federal circuits have done the same in the extradition context.<sup>267</sup> This logic is strained when the sentence may be and often is enhanced on the basis of such conduct considered by the judge. Nevertheless, it is the reality of sentencing and the rule of speciality in the United States.

### 3. *Speciality and “Waiver” of Extradition*

Some U.S. Circuit Courts of Appeal have held that the principle of speciality has no application for cases where the fugitive has “waived” extradition (i.e., has agreed to be returned without formally being extradited) or to cases of deportation.<sup>268</sup> On the

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *United States v. Watts*, 519 U.S. 148 (1997).

<sup>263</sup> *Id.*

<sup>264</sup> *Lazarevich*, 147 F.3d at 1064.

<sup>265</sup> *United States v. Keesee*, No. 96-50388, U.S. App. LEXIS 16366 (9th Cir. 1997).

<sup>266</sup> *Id.*; *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

<sup>267</sup> *See, e.g.*, *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995); *United States v. Davis*, 94 F.2d 182 (4th Cir. 1992); *Leighnor v. Turner*, 884 F.2d 385 (8th Cir. 1989).

<sup>268</sup> *United States v. Ditommaso*, 817 F.2d 201, 212 (2d Cir. 1987) (“subsequent decisions have narrowly construed the doctrine of speciality by limiting *Rauscher’s* holding to cases involving a formal extradition”); *United States v. Molina-Chacon*, 627 F. Supp. 1253 (E.D.N.Y. 1986) (where defendant waived extradition and was deported

other hand, where the fugitive was handed over as a matter of comity, rather than pursuant to a treaty, some Circuits have held that the rule of speciality obtains.<sup>269</sup> Also, the rule of speciality, even if otherwise applicable, will not make any difference in the sentencing context. As noted above, even in cases of extradition pursuant to treaty, decisions in many Circuits permit prosecution for offenses other than those for which extradition was granted if the assent of the requested state is obtained. Once new information is obtained, sometimes a new extradition request, including the new evidence, is made of the requested state, even though the fugitive has already been rendered.<sup>270</sup>

In sum, when a fugitive has been extradited to the United States, treaty language should not only be interpreted on the basis of the relevant extradition treaty, but also on the basis of the judgment to extradite and the surrender document. If the surrendering nation has forbidden prosecution for certain offenses or simply not extradited for certain offenses, this approach makes it clear on the basis of sovereignty and international law that the requested state may insist that the U.S. Government follow the rendering state's conditions and limitations. This is true pursuant to general international law, including treaty law, custom, and general principles.<sup>271</sup> To prosecute anyway violates all of these principles. Nevertheless, such practice occurs.<sup>272</sup>

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instead, speciality does not apply); *United States v. Valot*, 625 F.2d 308 (9th Cir., 1980). Dep't of State of Am. Embassy, Ottawa, telegram, Oct. 16, 1962, MS Dep't State file 242.1115, Surratt, Lonnie Rayvon/9-2562, (cited in *WHITEMAN*, 6 *DIGEST OF INTERNATIONAL LAW* 1107 (1968); *Letter from Assistant Legal Adviser Whiteman to Theodore C. Brown, Office of Attorney General of N.C.*, Nov. 5, 1962, MS Dep't State file 242.1115, Surratt, Lonnie Rayvon/10-2462, (cited in *WHITEMAN*, *DIGEST*, *supra* note 269, at 1106).

<sup>269</sup> *United States v. Evans*, 667 F. Supp. 974, 979 (S.D.N.Y. 1987) ("... this case appropriately falls among that class of cases in this Circuit holding the specialty doctrine applicable when extradition is obtained through acts of comity by the surrendering government instead of by treaty.").

<sup>270</sup> *Fiocchini v. Att'y General*, 462 U.S. F2d 475 (2d Cir. 1972).

<sup>271</sup> See, e.g., *United States v. Puentes*, 50 F.3d 1567, 1571-1572 (11th Cir. 1995); *United States v. Levy*, 905 F.2d 326, 328, n.1 (10th Cir. 1990). See *gen. BLAKESLEY, TERRORISM*, *supra* note 4 ch. 3.

<sup>272</sup> See, e.g., *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994).

## V. HUMAN RIGHTS BARS TO EXTRADITION

## A. HUMAN RIGHTS AND THE DEATH PENALTY

"If I can prove that this punishment is neither useful nor necessary, I will have furthered the cause of humanity." Cesare Beccaria, *Dei delitti e delle pene* (1764).

Most "developed" countries have abolished the death penalty, considering it to be a cruel, absurd form of vengeful retribution. The United States, on the other hand, continues to expand the numbers of those sitting on death row (already in the several hundreds), where they sit for decades awaiting their execution. The United States is alone among the G7 nations to continue this, for which it has been criticized by Amnesty International, among many other groups. On this point, the U.S. is in the company of Afghanistan, Pakistan, Libya, Iran, Iraq, the People's Republic of China, Korea and few other rogue states.

Several European nations and the European Union itself have protested the United States' use of the death penalty. For example, the European Union announced that it is going to submit a resolution to the Human Rights Commission calling for an end to capital punishment. It does not mention the United States by name, but clearly the report is strong criticism.<sup>273</sup> Also, the French have been fully aware of the execution of American Betty Lou Beets, among others. Several articles in France have brought attention to her execution and that of Odell Barnes, also of Texas, for example.<sup>274</sup> The French news media have asserted that Barnes may have been framed, and French politicians are getting great political mileage from it. For example, a French mayoral candidate notoriously traveled to Texas to visit with Barnes.<sup>275</sup> Political grandstanding notwithstanding, the criticism strikes a chord, as several U.S. states are facing embarrassing police corruption scandals, and are being forced to release scores of innocent prisoners from death row

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<sup>273</sup> Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. TIMES, Feb. 26, 2000, at A8.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*



and hundreds from long prison terms, due to planted evidence, trumped-up charges, and other abuses.<sup>276</sup>

An increased emphasis on protecting individual rights creates impediments to extradition.<sup>277</sup> Another very important human right protection that impacts extradition is the rule that individuals not be subjected to torture, to cruel, degrading, or unusual punishment. Also, the right to life has been recognized as a basic human right.<sup>278</sup> It could be argued that the right to life includes the right not to have that life terminated as punishment for crime.<sup>279</sup> This section will consider issues relating to the death penalty, extradition, and human rights.

European opposition to the death penalty has led to a rule prohibiting extradition to death penalty nations, unless agreements are reached that the death penalty will not be sought or imposed. The European position has had an impact on U.S. practice. The landmark *Soering* case, decided by the European Court of Human Rights,<sup>280</sup> caused much discussion in Europe and America and has had a significant impact.<sup>281</sup> The decision noted the difficult tension between law enforcement interests and the protection of human rights, discussed in our introduction. The European Court stated:

[I]nherent in the whole of the [European] Convention [on Human Rights] is a search for a fair balance between the demands of the general

<sup>276</sup> Matt Lait, Scott Glover, & Tina Daunt, *Scandal Could Taint Hundreds of Convictions*, L.A. Times, Feb. 17, 2000, at A1.

<sup>277</sup> C. Van Den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L. Q. 757 (1990).

<sup>278</sup> For example, the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at Art. 3 (1948), and the Covenant on Civil and Political Rights [ICCPR], 999 U.N.T.S. (1976), begin their listing of individual human rights with the right to life. Article 6 of the ICCPR and the Human Rights Committee's General Comment 6, expand upon the right to life. See Universal Declaration, at art. 3; ICCPR, at art. 6; and Human Rights Committee, General Comment 6, U.N. Doc HRI/GEN/1, at 5. Discussed in HENKIN, ET AL., HUMAN RIGHTS 886, et seq. (1999).

<sup>279</sup> See HENKIN, ET AL. HUMAN RIGHTS, *supra* note 279, at 886-922. See also, David Rieff, *The Killing Fields*, L.A. TIMES, Feb. 13, 2000, at Book Review 1.

<sup>280</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989) (reprinted in, 11 EUR. HUM. RTS. REP. 439 (1989)); Breitenmoser & Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990).

<sup>281</sup> Van Den Wyngaert, *Applying the European Convention*, *supra* note 278; Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 IND. INT'L & COMP. L. REV. 1 (1999); Breitenmoser & Wilms, *Human Rights*, *supra* note 281.

interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.<sup>282</sup>

### 1. *The Soering Facts*

The Commonwealth of Virginia charged Jens Soering with murdering his girlfriend's parents. He was found and arrested in England, pursuant to a U.S. extradition request. The European Court of Human Rights, in its judgment issued July 7, 1989, held that extradition to the United States would constitute "inhuman treatment" in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>283</sup> because he may be sentenced to death and have to face the "death row phenomenon," i.e., languishing on death row for years.<sup>284</sup> The most important feature of the decision is that a requested state, as a party to the European Convention on Human Rights, is responsible for what happens to the person they extradite. The responsibility results from the obligations under the Convention, which must be interpreted in a manner that promotes the protection of the individual; where

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<sup>282</sup> Dugard & Van den Wyngaert, *Reconciling*, *supra* note 6, at 187. The Dugard and Van den Wyngaert thesis is that analysis and clearer knowledge about this tension and a coherent theory of the role of human rights in the extradition arena serves the interests of both the individual, the international criminal law enforcement community, and the various states. *Id.* at 188.

<sup>283</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

<sup>284</sup> The Court did not consider the dilemma it would face if courts in the United States were to decide that the death penalty would be imposed quickly. The Court did reject the argument that the long delay on death row is caused by the accused himself, due to all the appeals taken: "[n]evertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full." *Soering v. United Kingdom*, 161 Eur. Ct. H.R., at para. 106.

ambiguity exists, it must be read so as to promote human rights, rather than some other value. The European Court did point out that not every right, under the Convention would necessarily bar extradition. It decided that Article 3 would bar extradition, but left open the issue of whether other protections, such as the "fair trial" guarantees of Article 6, would also be a bar.<sup>285</sup>

Soering was eventually extradited to Virginia, after a promise was obtained from the Virginia Attorney General that the death penalty would not be sought. United States prosecutorial authorities, in reaction, are finding ways to accommodate nations that insist on a promise that a capital sentence will not be imposed. I have advised prosecutors who have warrants outstanding for fugitives alleged to have committed murder about how best to word a document to be signed by the governor of their state or any other appropriate official that will satisfy a European government to which the fugitive has fled. The Justice and State Departments insist that state officials prove that the document is signed by the official holding the authority to bind the state to the commitment. Thus, the European decision in *Soering* is having an impact on U.S. domestic criminal procedure at a very basic level.

The *Soering* judgment also had a direct impact on the interpretation of national law in Europe. For example, the German Federal Constitutional Court held that, in interpreting the German Basic Law, the contents and development of the European Convention of Human Rights must be affirmed. This means that the German Constitutional Court considers the practice of the European Court of Human Rights to be a persuasive source of law. It serves as an essential means of interpreting the contents of the German Basic Rights.<sup>286</sup>

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<sup>285</sup> Decisions of the European Court of Human Rights are binding on the parties to the European Convention on Human Rights. The European Court has applied article three to other cases, including *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 23 Eur. H.R. Rep. 413 (1996) (where it was applied to a Sikh militant who was suspected by India of terrorism and would have faced danger of serious ill-treatment if returned to India); *Ahmed v. Austria*, 1996-V Eur. Ct. H.R. 2195, 24 Eur. H.R. Rep. 278 (1996) (fugitive would face danger of execution or mistreatment by another clan, if returned); *D. v. United Kingdom*, 1997- III Eur. Ct. H.R. 777, 24 Eur. H.R. Rep. 423 (1997) (fugitive dying of AIDS would face degrading treatment if returned to St. Kitts). *But see*, *Kindler v. Canada*, UN. Doc. CCPR/48/D/470/1991 (1993); *Ng. v. Canada*, U.N. Doc. A/49/40, vol.II, at 189 (1993). These cases and others are discussed in HENKIN, ET AL., *HUMAN RIGHTS*, *supra* note 279, at 912-914.

<sup>286</sup> *See* 74 Decisions of the Federal Constitutional Court, 358, 370 (1987).

Thus, the *Soering* judgment strengthened the trend in Germany to promote human rights by broadening the scope of human rights deemed to be repositied within the German Basic Law. Human rights norms are incorporated by reference. In the past, the dominant argument had been that only those Basic Rights under Article 16, namely the constitutional obligation not to extradite nationals and the right of asylum, could be legal obstacles to extradition.<sup>287</sup> The recent trend, strengthened by *Soering*, is that the Basic Law (and all its individual rights) is to be interpreted expansively to be a bar to extradition.<sup>288</sup> The question now is not whether Basic Rights have any function at all in extradition, but how broad or how narrow will be the range of Basic Human Rights protections in extradition. Indeed, Article 25, Sentence 2, of the German Basic Law includes customary international law.<sup>289</sup> This trend in Germany is also occurring in other European nations.<sup>290</sup>

Some of the human rights that may be considered to be of a constitutional nature, sufficient to require refusal to extradite, may include: the death penalty prohibition; the prohibition against torture; inhuman treatment or punishment;<sup>291</sup> the protection against prosecution or aggravation of the accused's circumstances based on race, religion, nationality, political opinion;<sup>292</sup> the right to a fair trial;<sup>293</sup> possibly even the risk of being sentenced to life imprisonment, without possibility of parole;<sup>294</sup> and even when there is danger to the fugitive's health, family life or even privacy.<sup>295</sup> Sometimes these and other protec-

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<sup>287</sup> See H. Gruetzner, P.G. Poetz, *Internationaler Rechtshilfeverkehr*, in STRAFSACHEN § 8, note 308 (2d. ed. 1980).

<sup>288</sup> See Otto Lagodny, *Grundrechte als Auslieferungs-Gegenrechte*, 41 Neue Juristische Wochenschrift 2146-2150 (1988).

<sup>289</sup> See Otto Lagodny & Sigrun Reisner, *Extradition Treaties, Human Rights and "Emergency-Brake" Judgments—A Comparative European Survey*, 65 REV. INT'L DR. PEN. 543, 546, 547-562 (1994).

<sup>290</sup> *Id.* at 562-572.

<sup>291</sup> *Id.* at 551-552.

<sup>292</sup> *Id.* at 552-554.

<sup>293</sup> *Id.* at 559-560.

<sup>294</sup> Lagodny & Reisner, *Extradition Treaties*, *supra* note 290, at 551.

<sup>295</sup> *Id.*, at 554-556. See European Convention on Human Rights, at arts. 2 and 8; S Breitenmoser, *Der Schutz der Privatsphäre gemäss Art. 8 EMRK*, 39 *Schriftenreihe des Instituts für Internationales Recht und Internationale Beziehungen* (Basel 1986). Lagodny and Reisner note that Denmark, Finland, France, Iceland, Luxemburg, the Netherlands, Norway, and Sweden, all inserted a reservation to their adoption of the European

tions reside behind the “*ordre public*” clauses in extradition treaties.<sup>296</sup> These sorts of human rights and humanitarian protections may or may not have been what motivated Home Secretary Straw in his decision not to extradite Pinochet.

Some national extradition laws or articles in criminal procedure codes relating to extradition have contained specific “fundamental rights clauses” as early as the 1970s and 1980s. For example, the 1988 Italian *Codice di Procedura Penale* provided that extradition would be refused if the fundamental rights of the fugitive are at risk of violation.<sup>297</sup> The 1975 Portuguese Extradition Act did the same.<sup>298</sup> These would include all those rights that are required for a fair trial. The consequence of this is that extradition treaties, in the future, should contain a clause that reads something like this: “Extradition will not be granted if it is contrary to international and constitutional basic rights . . . .” Thus, European nations have promulgated their laws on judicial assistance in criminal matters to be consistent with this protection. For example, the 1999 Portuguese law on International Cooperation, *Cooperação Judiciária Internacional*, Article 6 reads:

Art. 6 General negative requirements of international co-operation

1- The request of assistance is refused when:

- a) The procedure does not comply with or respect the requirements set forth by the ECHR, or other relevant international instruments in the field, ratified by Portugal;
- b) There are serious grounds to believe that the assistance is required with the purpose to prosecute or punish a person because of race, religion, sex, nationality, language, political or ideological beliefs, or his or her belonging to a certain social group;

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Convention on Extradition that provided for the requested state to refuse extradition if the surrender would result in severe consequences as far as the fugitive’s health is concerned or on account of his or her age. Lagodny & Reisner, *Extradition Treaties*, *supra* note 290, at 554.

<sup>296</sup> *Id.* at 561-562.

<sup>297</sup> *Codici di Procedura Penale*, art. 698, ¶ 1, and art 705, ¶ 2 (Italy 1988); Lagodny & Reisner, *Extradition Treaties*, *supra* note 290 at 547-548, nn.19-20.

<sup>298</sup> “Provar-se que a pessoa reclamada será sujeita a processo que não ofereça garantias jurídicas de um procedimento penal que respeite as condições internacionalmente reconhecidas como indispensáveis à salvaguarda dos direitos do Homem, ou cumprirá a pena em condições desumanas.” Extradition Act (Portugal), art. 3, ¶ 1h (1.Alt.) (Aug. 16, 1975); Lagodny & Reisner, *Extradition Treaties*, *supra* note 290, at 548, n.21.

- c) There is a risk of worsening the procedural position of a person because of any of the grounds mentioned in the previous sub-paragraph;
- d) It may lead to trial by an exceptional court or if it is related to the execution of a decision of a court of that nature;
- e) If the fact to which it refers is punishable with the death penalty or other penalty which may cause an irreversible injury to the integrity of the person;
- f) If it relates to an offense punishable with imprisonment or a safety measure which are perpetual or with an undetermined duration.

2 - The above-mentioned in sub-paragraphs e) to f) is not [to be] an obstacle to co-operation:

- a) If the requesting State has previously commuted the death penalty or other penalty which may cause an irreversible injury to the integrity of the person, by means of an irrevocable act, binding to its Courts or other entities with power for the execution of the penalty;
- b) If, regarding extradition for offenses punishable, according to the law of the requesting State, with imprisonment or a safety measure which are perpetual or with an undetermined duration, the requesting State provides guarantees that such penalty or safety measure will not be applied or executed;
- c) If the requesting State accepts the conversion of the same penalties or measures by a Portuguese court according to the provisions of the Portuguese law applicable to the crime which generated the sentencing;
- d) If the request relates to the assistance mentioned in sub-paragraph f) of paragraph n. 1 of article 1 [general MLA], requested on the basis of the relevance of the act for the intended non-application of such penalties or measures.

3 - [How to decide if the guarantees mentioned in 2-b are sound]

4 - The request is also refused if reciprocity is not guaranteed [with one exception]

5 - When assistance is denied on the basis of paragraphs 1-d), e) and f), art 32-5 applies. [aut dedere, aut judicare]<sup>299</sup>

The constitutional character of the Basic Rights functions as a set of mandatory norms, which must inform every interpretation of any relevant clause in an extradition treaty and extradition law. Ambiguity must be read to promote the Basic Rights.

#### B. UNITED STATES PRACTICE—CAPITAL PUNISHMENT AND THE DEATH ROW PHENOMENON AS TORTURE, CRUEL, UNUSUAL AND DEGRADING PUNISHMENT

Behind you swiftly the figure comes softly,

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<sup>299</sup> Law No. 144/99, August 13, 1999, on International Judicial Cooperation. The full text is available on <<http://www.verbojuridico.net/>>. Thanks to Jorge Godinho of Macau for this.

The spot on your skin is a shocking disease.  
 Clutching a little case,  
 He walks briskly to infect a city  
 Whose terrible future may have just arrived...  
 W.H. Auden, *Gare du Midi*.

Nobody has the right to take away man's life, because nobody has given it to him.  
 Fyodor Dostoevski

Public opinion in the United States has always favored the death penalty, although in the summer of 2000 there was a bit of slippage. Efforts of scholars, students, and the participants in the "Innocence Project" have used DNA testing another evidence or means to establish the innocence of tens of individuals who had been on death row. The large number of people languishing there strongly suggests that some innocent people must be part of that population and that some innocents certainly must have been executed.<sup>300</sup> The fact that many death row inhabitants have been found innocent makes this state supported murder (what else can one call it when the state kills an innocent person?). Still, former Governor George W. Bush of Texas, now President (amazingly and pathetically in my view) stated that no such errors have occurred in Texas.<sup>301</sup>

The recognition that innocent people have been and are on death row gives even more credence to the position taken by the European Court of Human Rights in the *Soering* case and to the

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<sup>300</sup> See, e.g., *Fatal Flaws: Innocence and Death Penalty in the USA*, Amnesty Int'l, at <<http://www.amnestyusa.org/rightsforall/dp/innocence/innocent-6html>>; JIM DWYER, PETER NEUFELD, & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); *Rights for All: Death Penalty in the U.S.A.*, Amnesty Int'l, at <<http://www.amnestyusa.org/rightsforall/dp.html>>; . Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber-Bush Confident in System Rife with Problems*, CHI. TRIB., June 11, 2000, available at 2000 WL 3674831; Gay Alcorn, *Death Penalty Flaws Exposed*, THE AGE, June 13, 2000, at 2.

<sup>301</sup> See, Kris Axtman, *After the Execution, A DNA Test Death Penalty Debate*, CHRISTIAN SCI. MONITOR, Aug. 8, 2000, available at 2000 WL 4430060; Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1; Alcorn, *supra* note 301; James Gill, *Executioner's Song in Texas*, NEW ORLEANS TIMES-PICAYUNE, Dec. 12, 1999 at 7B; Editorial, THE CALGARY SUN, December 14, 1999, at A15; Damian Whitworth, *Death Row Haunts 'Merciless' Bush*, TIMES OF LONDON, Jan. 4, 2000, at A12; Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1992).

European Union's general policy opposing the death penalty in the United States. The right to life is recognized as a basic human right in many human rights instruments and in most constitutions. I would argue that the right to life includes the right not to have that life taken away as punishment for crime.

*1. Background on the Death Penalty in the United States*

In 1925, Texas Governor "Ma" Ferguson granted a five-day stay in the execution to two African-American men who were to be hanged for their conviction of "criminal assault on a white woman." Ferguson granted the stay, saying that such an execution would be "barbarous." One might have thought that this sensibility was based on the barbarity of a death sentence, which was often the fate of an African-American having trivial eye contact with a white woman, or based on the horror of hanging a person by the neck, or on the evil of its generally racist application. In reality, however, what Ferguson considered to be barbarous was the fact that the hanging was scheduled to be carried out on a Sunday. Five days later, on a Friday, the hanging was acceptable to Ferguson and was duly carried out.<sup>302</sup>

The U.S. Supreme Court occasionally has found a given imposition of the death penalty to be cruel and unusual punishment.<sup>303</sup> On the other hand, the Court has never held any particular form of execution to be unconstitutional. On February 24, 2000, in fact, the Court rejected, in a 5-4 decision, a death row inmate's claim that electrocution in Alabama's electric chair was cruel and unusual punishment.<sup>304</sup>

In the 1960s, the NAACP Legal Defense and Education Fund and the American Civil Liberties Union began a program of massive resistance to the application of the death penalty. This ultimately resulted in a moratorium on the execution of

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<sup>302</sup> *1925: Death & Texas, in Our Pages 100, 75, and 50 Years Ago*, INT'L HERALD TRIB., June 8, 2000, available at 2000 WL 4122433.

<sup>303</sup> See *Coker v. Georgia*, 97 S.Ct. 2861 (1977) (death penalty unconstitutional for rape of an adult). But see 1995 Louisiana law that provides the option for the death penalty for the rape of victims younger than the age of twelve years. In 1996, the Louisiana Supreme Court upheld LA. REV. STAT. ANN. § 14:42(C) (1995), which provides for the death penalty for rape of a child under the age of twelve years, even if the victim is not killed. *State v. Wilson*, 685 So.2d 1063, 1073 (La. 1996).

<sup>304</sup> But if anyone has ever witnessed an electrocution, they know how barbarous it is, as the "client's" head is hooded, so that folks will not have to watch his eyes pop out or the blood gush out of every orifice.



capital prisoners that lasted a decade, from 1967 until 1977. Not until 1984 did execution become fairly common again in the United States. Since that time, capital punishment has become commonplace, if not epidemic. Amnesty International reiterated the condemnation of United States practice with renewed vigor.<sup>305</sup> Many argue that the death penalty is still applied in an arbitrary and discriminatory fashion.

The death penalty is considered by many to be a human rights violation. Over the past two decades, executions have risen nearly exponentially. By June 15, 2000, there had already been 136 prisoners put to death in Texas during the five-and-one-half years George W. Bush was governor.<sup>306</sup> Texas also accounted for eleven executions between the turn of the 20<sup>th</sup> century and February 23, 2000, and for 227 since 1982.<sup>307</sup> That is one-third of the executions in the United States during that period. It is reported that Texas executes on average a convict every two weeks.<sup>308</sup> Florida executed its first prisoner by lethal injection on February 23, 2000, under a "stronger" death penalty bill signed into law in January 2000, by Governor Jeb Bush. This while the State of Florida leads the country in the number of *wrongfully convicted* death row prisoners released since 1973.<sup>309</sup>

In June 2000, it seemed that a slight change in momentum was developing—a weakening in "pro-death penalty" public opinion. The New Hampshire Legislature voted to abolish the death penalty in May 2000, but the New Hampshire Governor vetoed the act and the state legislature failed to override the veto.<sup>310</sup> Perhaps most importantly, Republican Governor of Illinois George Ryan, who personally is in favor of the death penalty, imposed a moratorium on executions in his state because

<sup>305</sup> *Rights for All: Death Penalty in the USA*, Amnesty Int'l, at <<http://www.amnestyusa.org/rightsforall/dp.html>>.

<sup>306</sup> Alan C. Miller & Judy Pasternak, *Records Show Bush's Focus on Big Picture*, Jan. 2, 2000, L.A. TIMES, at A1.

<sup>307</sup> Michael Ellison, *Bush to Decide on Execution Today of Man With IQ of 70*, THE GUARDIAN (London), Aug. 9, 2000, available at 2000 WL 25044997.

<sup>308</sup> David A. Vise, *Clinton Delays Execution Under New Clemency Rules*, WASH. POST, Aug. 3, 2000, at A-2.

<sup>309</sup> Comment, *Execution Moratorium*, ARIZONA DAILY STAR, Feb. 15, 2000, at 10A; Opinion, *High Wrongful Conviction Rate Calls for Execution Moratorium*, PALM BEACH POST, Feb. 24, 2000, at 19A; Editorial, *Governor Ryan's Brave Example*, N.Y. TIMES, July 3, 2000.

<sup>310</sup> See News in Brief, CHI. SUN-TIMES, June 28, 2000, available in 2000 WL 6683081.

of its “shameful” record of sentencing innocent people to death. Illinois courts have released thirteen former death row inmates.<sup>311</sup> Other states are contemplating similar moratoria. Florida’s courts have released eighteen from death row over the past few years, but Florida Governor Jeb Bush has stated that Florida will have no moratorium.

The debate over the death penalty has been marked by consideration of several major questions and issues:

1) is the imposition of the death penalty inherently cruel and unusual punishment within the meaning of the Eighth Amendment?

2) what procedural protections are necessary to prevent the arbitrary and discriminatory imposition of capital punishment?

3) even given the procedural protections afforded in the post-*Gregg*<sup>312</sup> era, is the death penalty imposed in a discriminatory manner? and

4) under what circumstances is the nature of the defendant such that it would be cruel and unusual to impose a sentence of death?

Beyond these philosophical and moral questions, the issue of a faulty system executing individuals that are innocent of the crimes with which they have been charged has taken the forefront in U.S. discussion.

## 2. *Flaws in the System*

### a) To Execute Or Liberate the Innocent<sup>313</sup>

Given our human solidarity in imperfection,<sup>314</sup> it is certain that all legal systems are flawed. This being so, Governor Ryan of Illinois, one of 38 states that has the death penalty, has placed

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<sup>311</sup> *Governor Ryan’s Brave Example*, *supra* note 310.

<sup>312</sup> *Gregg v. Georgia*, 96 S.Ct. 2909 (1976) (holding that the death penalty was not per se in violation of the Eighth Amendment and providing guidelines for avoiding capricious or discriminatory application).

<sup>313</sup> See, *gen.*, JIM DWYER, PETER NEUFELD, & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

<sup>314</sup> See Albert Camus, *Réflexions sur la Guillotine*, in *Réflexions sur la Peine Capitale* (Symposium by Arthur Koestler & Albert Camus 1957).

a moratorium on executions.<sup>315</sup> The thirteen Illinois men found innocent after sitting on death row include Anthony Porter, who suffered there for fifteen years, coming within two days of his execution before being found innocent.<sup>316</sup> Students, faculty, and journalists chronicled enough new evidence, trial errors, incompetence of defense counsel, and prosecutorial misconduct to prompt legal action that ultimately exonerated him and many others. Another one of the thirteen, Dennis Williams, spent eighteen years on death row before DNA evidence allowed him finally to be exonerated and released.<sup>317</sup> Perhaps the most well-known of those death row inmates found to have been innocent are Rolando Cruz and Alejandro Hernandez, who were sentenced to death in 1985 for the 1998 rape and murder of ten-year-old Jeanine Nicarico. Alleged police and prosecutorial misconduct ultimately led to their convictions, but DNA evidence led to the 1995 exoneration and release of Cruz and Hernandez.<sup>318</sup> These events and others were sufficient to prompt a change in momentum in the United States from pro to anti-death penalty and even a moratorium in several states.<sup>319</sup>

Texas, like most states, maintains appallingly low standards of legal representation for capital defendants. In Texas, of the 134 death sentences issued during George W. Bush's tenure as Texas governor up to July 1, 2000, there were forty whose defense counsel presented no evidence at all nor even one witness at the sentencing phase. Several of them failed to introduce evidence of defendants' cognitive disabilities or low IQs. Psychiatrist James Grigson, called "Dr. Death," testified for the prosecution in twenty-nine cases about the dangerousness of

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<sup>315</sup> NACDL, *News, Illinois Halts Executions*, THE CHAMPION, March 2000, at 12; Martha Irvine, *Death Penalty Suspended in Illinois*, AP ONLINE, Feb. 1, 2000, available at 2000 WL 12386692; Martha Irvine, *Illinois Suspends Death Penalty*, AP ONLINE, Jan. 31, 2000, available at 2000 WL 12386400.

<sup>316</sup> This was due in large part to the courage, ingenuity and perseverance of some Northwestern University law and journalism students under the tutelage of Professors David Protess and Lawrence Marshall, and a most important series of articles in the Chicago Tribune by Ken Armstrong and Maurice Poseley among others.

<sup>317</sup> NACDL, *News*, *supra* note 316; Irvine, *Illinois Suspends*, *supra* note 316.

<sup>318</sup> Amnesty Int'l, *People Released From Death Row, Part of the A.I. Report on Innocence and the Death Penalty*, available at <[www.amnestyusa.org/rightsforall/dp/innocence/innocent-6.html](http://www.amnestyusa.org/rightsforall/dp/innocence/innocent-6.html)>.

<sup>319</sup> *Id.*; see also Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, Feb. 5, 2000, N.Y. Times, at A1.

the defendant.<sup>320</sup> This stopped when Grigson was expelled from the American Psychiatric Association for his untrustworthy testimony.<sup>321</sup> Forty-three defense counsel in Texas have been disbarred or sanctioned. Yet former Governor Bush has boasted that no innocent person could ever have been given the death penalty in Texas.<sup>322</sup>

However, the facts belie the accuracy of this statement. Generally, court-appointed counsel are paid very little. There has been disclosure of police and prosecutorial corruption, planting of evidence, framing defendants, suppression of exculpatory evidence, coerced confessions, perjury, judicial acceptance of questionable evidence, race playing a role in committing defendants to death, among others in the awful litany of serious violations of the law that accompany capital sentencing and execution.<sup>323</sup> These flaws were disclosed in a report issued in June 2000 by Columbia Law Professor James Liebman<sup>324</sup> and others, making it clear that innocent people have been executed, therefore murdered, in the United States. This horrific recognition has prompted renewed debate over the death penalty in the United States and created some momentum against the death penalty.

b) The Death of David Martin Long<sup>325</sup>

The surreal and perverse atmosphere surrounding the death penalty in the United States was shockingly portrayed by the Texas execution of murderer David Martin Long. Long had slaughtered three women with a hatchet in 1986. Shortly before Long was to be executed, he attempted suicide with a drug overdose. Texas' perverse and liberal use of taxpayer money to

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<sup>320</sup> See, Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber—Bush Confident in System Rife with Problems*, CHI. TRIB., June 11, 2000, available in 2000 WL 3674831; Gay Alcorn, *Death Penalty Flaws Exposed*, THE AGE, June 13, 2000, at 2, available in 2000 WL 2165273.

<sup>321</sup> *Id.*

<sup>322</sup> Gay Alcorn, *Death Penalty Flaws Exposed*, The Age, at 10, 2000 WL 2165273 (June 13, 2000).

<sup>323</sup> See, e.g., JAMES LIEBMAN, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000); Douglas Holt, *Study: Most Death Cases have Significant Flaws*, CHI. TRIB., June 12, 2000, at A7; *Study Cites 68% Error Rate in Capital Appeals*, REUTERS, June 13, 2000, in <<http://news.findlaw.com/news/s/20000612/crimecapitaldc.html>>.

<sup>324</sup> LIEBMAN, *supra* note 323.

<sup>325</sup> See, *gen.*, *supra* note 301.

thwart Long's attempt to cheat the executioner is emblematic of our pathology. First, the state refused to provide his lawyers with funding to hire a psychiatrist to assist at trial. Yet when it came time to kill him, Texas paid for an emergency air-evacuation trip from Huntsville, Texas, (where death row is located) to Galveston, Texas, for life-saving intervention. The next day, and before his attending physician thought he should have been released, Texas brought a plane to Galveston for a chartered flight back to Huntsville, where Long was executed as scheduled with another drug overdose (his lethal injection).

c) Betty-Lou Beets

On February 24, 2000, the State of Texas executed 62-year-old, mentally impaired great-grandmother Betty-Lou Beets. The Texas Board of Pardons and Paroles denied clemency and Governor Bush refused to intervene, saying that he had seen the evidence and felt that she was guilty.<sup>326</sup> The U.S. Supreme Court refused to stay the execution around thirty minutes before it began. The jury that sentenced her to death never heard evidence indicating the murderer's history of physical, sexual, and emotional abuse (and the battered woman's syndrome), which could have been a mitigating circumstance, eliminating the death penalty for her. Beets, dubbed the "Black Widow" by prosecutors and the press, committed horrific crimes and was convicted in 1983 for killing her fifth husband, Dallas firefighter Jimmy Don Beets, whose body was found on her property. She was also convicted of shooting her second husband, Mr. Bill Lane.<sup>327</sup> Also, Beets was charged, but never prosecuted, for the murder of her fourth husband, Doyle Wayne Barker, whose body was also found on her property.

d) Executing the "Insane"

The Supreme Court has held that a state may not execute a person who is insane at the time of the proposed execution.<sup>328</sup>

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<sup>326</sup> John Williams & Kathy Walt, *Bush Denies Stay: Beets Put to Death*, Houston Chron., Feb. 25, 2000, at A1.

<sup>327</sup> See *id.*

<sup>328</sup> *Ford v. Wainwright*, 106 S.Ct. 2595 (1986); *cf.*, *Penry v. Lynaugh*, 109 S.Ct. 2934, 2954 (1989) (dictum to the effect that, "it may indeed be cruel and usual punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions.")

The Court noted that in such a case, the condemned is unable to assist his or her counsel in trying to stay or avoid the execution and is unable to understand the sanction to be imposed, so here there is no doubt that execution is clearly mere vengeance. It is illegal, therefore, in all fifty states, to execute insane individuals.<sup>329</sup> The Louisiana Supreme Court faced the issue of whether to drug a psychotic death row inmate to give him a brief episode of synthetic sanity, so that he may be executed.<sup>330</sup> The Louisiana trial court, over objection of counsel, ordered the forcible and continuous administration of psychotropic drugs, until defendant's execution is carried out.<sup>331</sup> The Louisiana Supreme Court denied defendant's appeal<sup>332</sup> and rehearing.<sup>333</sup> The U.S. Supreme Court, however, granted certiorari<sup>334</sup> and eventually remanded the case back to Louisiana. On remand, the trial court again approved forcible medication, but the Louisiana Supreme Court reversed, holding that the State can not credibly claim, under the Louisiana Constitution, that it is in the death row inmate's interest to be forced to take anti-psychotic drugs to get him into shape to be executed.<sup>335</sup>

The Arkansas Supreme Court held in 1999 that prison officials may medicate an inmate forcibly with anti-psychotic drugs to keep him from harming others or himself, even if the collateral effect of this is to restore his competence to be executed.<sup>335</sup>

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<sup>329</sup> See, e.g., *State v. Allen*, 15 So.2d 870 (La. 1943) (it is not lawful to execute a murderer who became insane while on death row); WAYNE LAFAVE & AUSTIN SCOTT, *CRIMINAL LAW* § 4.4(c) (2d ed. 1986); Comment, *Mentally Ill Murderers: An Orwellian Solution from a Southern State*, 9 N.Y.L. SCH. J. HUM. RTS. 541, 547-48, n.55 (1992). Professor Alfred P. Rubin reminded me that Harold J. Berman's book, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) sheds light on the Western practice of refusing to execute condemned murderers who are insane, until they regain their sanity. Apparently, the Church insisted that no one be consigned to eternal damnation and suffering, until he or she receives the opportunity to confess and take communion. These sacraments would have no spiritual effect, unless the party has a "sound mind." See, BERMAN, *LAW AND REVOLUTION*, *supra* this note, at 166; Alfred P. Rubin, *Book Review*, 80 AM. J. INT'L L. 222, n.1 (1986).

<sup>330</sup> *Perry v. Louisiana*, 610 So.2d 746 (La. 1992)

<sup>331</sup> See discussion in Comment, *Mentally Ill Murderers*, *supra* note 330.

<sup>332</sup> *State v. Perry*, 543 So.2d 487 (La. 1989) (three justices dissenting).

<sup>333</sup> *State v. Perry*, 545 So.2d 1049 (La. 1989), *vacated and remanded* 111 S.Ct. 449 (1990).

<sup>334</sup> *Perry v. Louisiana*, 111 S.Ct. 449 (1990).

<sup>335</sup> *State v. Perry*, 610 So.2d 746, 754 (La. 1992).

<sup>335</sup> *Singleton v. Norris*, 992 S.W.2d 768 (Ark. 1999). See John W. Parry, *Trend: The Year in Review-Part I*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 781, 786 (1999).

The state of Arizona enacted a law in 1999 authorizing the use of anti-psychotic medication and other treatment of mentally-ill death row inmates who otherwise would be incompetent for execution.<sup>337</sup> The Kentucky Supreme Court held that it is not error to accept a guilty but mentally ill plea but that such a plea could not bar the death penalty for the defendant, based on his mental illness.<sup>338</sup>

e) Executing Minors & Incompetents

The United States has ratified the International Covenant on Civil and Political Rights. It insisted, however, on including reservations, including one providing that Article 6(5) (relating to the execution of juveniles), would not apply to the United States. The U.N. Human Rights Committee has found that this reservation is inconsistent with the object and purpose of the Covenant, hence void.<sup>339</sup> The U.S. Supreme Court did actually set aside the death sentence of a murderer who was 15 years old when he committed his horrible crime.<sup>340</sup> No majority of justices, however, was willing to agree to a bright line that would prohibit the execution of persons who commit murder at age 15 or below.<sup>341</sup> In fact, in 1989, the Court held that the Eighth Amendment prohibition against cruel and unusual punishment poses no bar to the execution of persons who commit a capital offense at the age of 16 or 17.<sup>342</sup> It also held that it is not cruel and unusual punishment to execute a person who is mentally retarded, having the reasoning capacity of a 7-year-old.<sup>343</sup> It is reported that, as of autumn 1999, there were seventy individuals on death row who committed their offenses when they were under the age of eighteen.<sup>344</sup>

<sup>337</sup> Ariz. H.B. 2478 (1999) (noted in Parry, *Trend*, *supra* note 336, at 786).

<sup>338</sup> Kentucky v. Ryan, 5 S.W.3d 113, 114-117 (Ky. 1999). See Parry, *Trend*, *supra* note 336, at 788.

<sup>339</sup> PAUST, ET AL., INTERNATIONAL LAW, *supra* note 44, at 76 and authority therein cited.

<sup>340</sup> Thompson v. Oklahoma, 108 S.Ct. 2687 (1988).

<sup>341</sup> *Id.*, at 2706 (O'Connor, concurring, objected to the establishment of the 15 years of age bright line).

<sup>342</sup> Stanford v. Kentucky, 109 S.Ct. 2969 (1989).

<sup>343</sup> Penry v. Lynaugh, 109 S.Ct. 2934, 2956 (1989).

<sup>344</sup> Robert E. Shepherd, *The Juvenile Court in the 21st Century*, 14 CRIM. JUST. 48, 50-51 (1999).

### 3. *The Supreme Court Continues to Make it More Difficult to Obtain Redress*

Despite all of the unfairness, inequality of application, errors, and police or prosecutorial corruption, legislation and Supreme Court jurisprudence have continued to make it even more difficult for death row inmates to have their claims heard. The opportunity for a habeas corpus action in a federal court was severely limited by the Anti-Terrorism and Effective Death Penalty Act of 1996, which limits the right to petition for habeas corpus to one year from the final disposition of the defendant's case.<sup>345</sup> In *Herrera v. Collins*, the United States Supreme Court had already made it much more difficult for a convicted person to raise a claim of innocence.<sup>346</sup>

The deck was stacked further by a sharply divided Supreme Court (in a 5-4 plurality), when it held in June 2000, that convicted killers are barred from telling jurors that they would be ineligible for parole if sentenced to life in prison.<sup>347</sup> Virginia killer Bobby Lee Ramdass' death sentence was held valid even though he was not allowed to give jurors this information which might have made a difference in the decision to kill. Four justices dissented, arguing that the decision condones "acute unfairness." The *Ramdass* ruling clarified the Court's 1994 decision in *Simmons*, which held that defendants have the right to tell jurors about their ineligibility for parole when prosecutors urge jurors to impose a death sentence based on a claim of the defendant's "future dangerousness." Ramdass was sentenced to death for the extremely cold-blooded murder of convenience store clerk Mohammed Kayani, which he committed during a week-long crime spree. The state court jury based its

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<sup>345</sup> 28 U.S.C. § 2244 (d)(1)(A); see, e.g., *Nichols v. Bowersox*, 172 F.3d 1068, 1071 (8th Cir. 1999).

<sup>346</sup> *Herrera v. Collins*, 506 U.S. 390 (1993). Thus, although the prosecution and police authorities in Texas, along with Governor Bush claimed that Gary Graham, who was executed on June 22, 2000, had received several opportunities to present his evidence of innocence of the murder for which he was executed, in reality, he was functionally prevented from doing so, first by incompetent counsel, and then by the law which disallowed any revisitation of the case, from having a full hearing of his claim. Even if he was guilty, the process was a travesty. See, Johathan Alter, *A Reckoning On Death Row: You Don't have to be soft on crime to see we're killing people without being sure they're guilty*, NEWSWEEK, July 3, 2000, available in 2999 WL 21083490.

<sup>347</sup> *Ramdass v. Angelone*, 120 S.Ct. 2113 (June 12, 2000) (plurality opinion refusing to apply *Simmons v. United States*, 512 U.S. 154 (1994)).



death sentence on their finding that he was “a continuing threat to society.”

Ramdass brought a *habeas corpus* action in federal court after all of his appeals were rejected in state courts. He argued that he was wrongly barred from telling jurors about his ineligibility for parole under Virginia’s three-strikes law. Justice Anthony M. Kennedy, in his opinion for the plurality, said federal courts could not help Ramdass because “the Virginia Supreme Court’s decision to deny (him) relief was neither contrary to, nor an unreasonable application, of” the Court’s 1994 decision in *Simons*. Kennedy was joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas. Justice Sandra Day O’Connor joined in the result, writing a concurring opinion.

Justice John Paul Stevens wrote the dissent for Justices David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer, stating:

[t]here is an acute unfairness in permitting a state to rely on a recent conviction to establish a defendant’s future dangerousness while simultaneously permitting the state to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible and therefore not a future danger . . . . Even the most miserly reading of the opinions in [the 1994 decision] supports the conclusion that [Ramdass] was denied one of the hallmarks of due process . . . .<sup>348</sup>

#### 4. Death Penalty and Violation of the Vienna Consular Convention

In *Breard v. Greene*,<sup>349</sup> the Commonwealth of Virginia convicted Paraguyan national Angel Breard and condemned him to

<sup>348</sup> *Id.* at 2128 (Stevens, J., dissenting).

<sup>349</sup> *Breard v. Greene*, 523 U.S. 371 (1998). See, e.g. Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630 (1999); Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307 (1999); Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 IND. INT’L & COMP. L. REV. 1 (1999); Roger Alford & Peter Bekker, *International Legal Developments: International Courts & Tribunals*, 33 INT’L LAW. 537 (1999); Curtis Bradley, *Breard, Our Dualist Constitution and the International Conception*, 51 STAN. L. REV. 529 (1999); David Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999); Michael Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Frederic L. Kirgis, *Agora: Zschernig v. Miller & the Breard Matter*, 92 AM. J. INT’L L. 704 (1998); Car-

death. Upon his arrest, Breard had not been notified of his right to consult a Paraguayan consular officer, as required by the Vienna Convention on Consular Relations.<sup>350</sup> The U.S. Supreme Court held that the defendant's failure to assert his Vienna Consular Convention right in the Virginia courts procedurally defaulted any claim he might have had. It also held that the state authorities' violation of the Vienna Convention had no continuing consequences of a nature that would allow Paraguay to sue under the Eleventh Amendment immunity exception. Paraguay protested and the Department of State requested Virginia's governor to stay Breard's execution. The Governor denied the request for a stay. Paraguay filed an action with the International Court of Justice under Article 36(1) of the ICJ Statute and the Optional Protocol Concerning Compulsory Settlement of Disputes, requesting the ICJ to hold that the United States had violated Article 36 of the Vienna Convention and sought an order to require Virginia to vacate Breard's conviction. These efforts failed and Breard was executed. Not clarifying the issue of the impact of self-executing treaties significantly, the United States Supreme Court in *Breard* reasoned that, absent a clear and express statement to the contrary, the procedural rules of the forum state govern implementation of the treaty in that state, but noted that the Vienna Convention on Consular Relations arguably confers a right to consular assistance following arrest.<sup>351</sup> The United States government certainly invokes the Vienna Convention to protest other nations'

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los M. Vazquez, *Agora: Breard & the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998).

<sup>350</sup> The Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261, at Art. 36, provides in relevant part:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state: ... (b) if [the defendant] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

Breard claimed that his rights under the Convention (under Article VI) were violated and the Paraguayan Government also protested.

<sup>351</sup> *Breard*, 118 S.Ct. 1352, 1354-55 (1998).

failure to provide United States nationals with proper notice or access to consular officials.<sup>352</sup>

Similarly, following the Supreme Court's lead, lower courts have held that a violation of the Vienna Convention on Consular Relations<sup>353</sup> notice requirement *does not require* exclusion of evidence obtained as a result of post-arrest custodial interrogation.<sup>354</sup> The Ninth Circuit noted:

[W]e need not decide whether to accept the government's argument that Article 36 creates no individually enforceable rights . . . . We agree with the government's alternative position that assuming that some judicial remedies are available for the violation of Article 36, the exclusion in a criminal prosecution of evidence obtained as the result of post-arrest interrogation is not among them.<sup>355</sup>

The court noted that the Ninth and other Circuits have held in recent years that an exclusionary rule is not available for treaty violations.<sup>356</sup> The Vienna Convention itself does not indicate expressly whether it provides a private right of action for its enforcement. On the other hand, it does state in its Preamble that "the purpose of such privileges and immunities [as set forth in the Vienna Convention] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts on behalf of their respective States."<sup>357</sup> The courts in the United States are split over whether this preambular language, as well as similar language found in various parts of the Convention itself, foreclose a private right of action for enforcement of rights under the Convention.<sup>358</sup> Even if the Vienna Convention were

<sup>352</sup> See *supra* note 107 and authority cited therein.

<sup>353</sup> *Vienna Convention on Consular Relations*, *supra* note 351, at Art. 36.

<sup>354</sup> *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Vienna Convention on Consular Relations*, *supra* note 351 at Preamble (*discussed in United States v. Salameh*, 54 F. Supp. 2d 236, 279 (S.D.N.Y. 1999)).

<sup>358</sup> *Salameh*, 54 F. Supp. 2d at 279. Compare *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. App. 1998) ("[t]here is no reported authority for the idea that a violation of the [Vienna Convention] creates any legally enforceable individual rights"), and *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (suggesting in dictum that a private party may not seek redress for treaty violations, unless the treaty is self-executing). On the other hand, the Fourth Circuit, in *Paraguay v. Allen*, 134 F.3d 622, 629 (1998), while affirming the District Court, did *not* affirm the dictum noted above, either to the effect that the Convention is not self-executing or that it is not enforceable by individuals, because it provides no rights of action on private indi-

considered to be self-executing, and to confer private rights, it has been held that it *does not follow* that this includes the right to suppress evidence obtained in an interrogation conducted after failure to notify the accused of his right to consular assistance.<sup>359</sup>

Not all courts have taken this view. A Delaware court, for example, held the opposite, noting that,

[t]he text of the Vienna Convention, the intention of the drafters, and the prevailing view among this nation's courts lead this Court to conclude that Defendant's motion to suppress should be granted for the following reasons: (1) the Vienna Convention is the Law of the Land under Article VI, Section 2 of the United States Constitution; (2) the police conduct in this case violated Article 36 of the Convention; (3) Defendant, a Guatemalan citizen, has asserted a Vienna Convention violation in a timely manner [by raising it in a motion at the pre-trial, suppression motion stage]; (4) Defendant has shown adequate prejudice to exist; and; (5) a violation of Article 36 is ground for suppressing incriminating statements made by foreign nationals while in police or government custody.<sup>360</sup>

*Pacta sunt servanda* is a *jus cogens* principle<sup>361</sup> requiring that treaties be enforced.<sup>362</sup> A minor, claiming Salvadoran national-

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viduals. *See also*, *Melendez v. State*, 4 S.W.3d 437, 441 (Tex. 1999); *United States v. \$69,530.00 in U.S. Currency*, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998) (denying motion to suppress evidence for violation of the Vienna Convention, but stating that "it appears to this court that Claimant does indeed have a right to be informed that he could communicate with the Nigerian Consulate and that this right was violated."). *Cf.*, *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (reasoning that, even if the Vienna Convention were held to create individual rights, it certainly does not create constitutional rights nor does it convert violations of treaty provisions into constitutional rights); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1095 (S.D. Cal. 1998) (discussing the "murky" inquiry and muddled issue of whether the Vienna Convention confers individual rights, but holding that a violation of notice provisions in the Vienna Convention does not rise to the level of a *Miranda* violation, so as to require suppression of evidence). Not clarifying the issue very much is *Breard v. Greene*, 118 S.Ct. 1352, 1354-55 (1998) (reasoning that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern implementation of the treaty in that State, but noting that the Vienna Convention on Consular Relations arguably confers a right to consular assistance following arrest).

<sup>359</sup> *Lombera-Camorlinga*, 206 F.3d at 886; *Salameh*, 54 F. Supp. 2d at 279.

<sup>360</sup> *State v. Reyes*, 740 A.2d 7, 14 (Del. 1999).

<sup>361</sup> A *jus cogens* norm is a peremptory norm that nullifies treaties, legislation, and case-law that is inconsistent with it. *See*, *The Vienna Convention on the Law of Treaties*, Arts. 53 and 64, 1155 U.N.T.S. 331 (May 23, 1969). These norms function much like essential constitutional principles.

ity, charged with murder, had his case "transferred" from the juvenile court system to the regular, criminal district court for trial on the charges.<sup>363</sup> The juvenile claimed that Article 36(b) of the Vienna Convention entitled him to have his consular officials notified and that he should have been informed that he had the right to speak to a consular official. He also claimed that failure to do this constituted a jurisdictional error, equivalent to that caused by failure to meet the mandatory notice requirements to make a transfer from juvenile to adult criminal court, under the Texas Family Code.<sup>364</sup> The defendant then urged that the notice requirements in Vienna Convention, Article 36, had the same status and effect.<sup>365</sup> The Texas Court of Appeals declined to so hold, noting that it is not settled that an individual has standing to assert a violation of the Vienna Convention on Consular Relations.<sup>366</sup>

## VI. EXPLICIT HUMAN RIGHTS PROVISIONS IN EXTRADITION TREATIES<sup>367</sup>

Increasingly, United States Government requests for extradition and even handovers under Status of Forces Agreements have been overridden by international (European) and foreign courts that have ruled international human rights provisions take precedence. I will mention two cases in which concerns over potential U.S. capital punishment resulted in litigation in which courts were reticent to approve extradition to the United

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<sup>362</sup> United States v. Superville, 40 F.Supp.2d 672, 676, n. 2 (V.I. 1999) (citing William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 293 (1998)).

<sup>363</sup> Melendez v. State, 4 S.W.3d 437 (Tex. 1999).

<sup>364</sup> Texas Family Code, Section 54.02, authorizes a juvenile court to waive its exclusive original jurisdiction in some circumstances and, thus, to transfer a minor to the appropriate district court for criminal proceedings. To do this, notice is required and, if not satisfied, jurisdiction in the district court is improper. See §§ 53.04, 53.05, 53.06, and 53.07. Discussed in *Melendez v. State*, 4 S.W.3d 437, 440 (Tex.App. 1999).

<sup>365</sup> *Melendez*, 4 S.W.3d at 440-41.

<sup>366</sup> *Id.* (citing, *inter alia*, Breard v. Greene, 118 S.Ct 1352, 1354-55 (1998)); In re Stephanie M., 7 Cal. 4th 295 (Cal. 1994) (holding that failure to satisfy the the Vienna Convention on Consular Relations notice requirements does not deprive a juvenile court of jurisdiction to hear a custody and parental termination proceeding).

<sup>367</sup> See *gen.*, BLAKESLEY, TERRORISM, *supra* note 4, at 281.; Blakesley & Lagodny, *Network or Jungle*, in PRINCIPLES & PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW (Albin Eser & Otto Lagodny, eds. 1992).

States, where the death row syndrome was seen to violate provisions of international human rights conventions.<sup>368</sup>

International human rights provisions and customary international law may apply to certain applications of money laundering and asset forfeiture.<sup>369</sup> United States law and provisions of various international law enforcement conventions enable prosecutors to seize, freeze, and retain custody of property that is claimed to be an instrumentality or part of the proceeds of illegal activity. These laws and conventions allow the prosecutors to shift the burden of going forward and the burden of proof to the property owners or possessors, who are required to establish that the property was not used in or based on the proceeds of illegal activities. In some instances this may violate human rights law.<sup>370</sup>

In 1989, the Supreme Court narrowly held that prosecutors could include defense attorneys' fees as forfeitable assets under prevailing federal law.<sup>371</sup> In a 5-4 decision, the Court concluded that the clear statutory language, as well as compelling governmental purposes in adopting the legislation, justified forfeiture.<sup>372</sup> It held that neither the Sixth Amendment right to counsel nor the Fifth Amendment Due Process Clause were violated by fee forfeiture.<sup>373</sup> Forfeiture of instrumentalities used in committing drug-related crimes and the illegal proceeds of

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<sup>368</sup> For background on the cases, see, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 28 I.L.M. 1063 (1989); see also, *Soering v. United Kingdom*, 11 HUM. RTS. L.J. 3-35 (1990); Breitenmoser & Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845 (1990); Steinhardt, *Recent Developments in the Soering Litigation*, 11 HUM. RTS. L.J. (1990).

<sup>369</sup> For background on the application of international human rights provisions to the forfeiture of attorneys' fees, see Richard J. Wilson, *Human Rights and Money Laundering: The Prospect of International Seizure of Defense Attorney's Fees*, 3 CRIM. L.F. 85 (1991).

<sup>370</sup> See Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation: Traps for the Unwary in International Trust Matters*, in *Symposium: The International Trust Part II*, 32 VAND. J. TRANSNAT'L L. 1023, 1102-1108; Michael Abbell and Mark Sherman, *The Bill of Rights in Transnational Criminal Litigation*, THE CHAMPION 22-29 (1992); Berta E. Hernandez, *RIP to IRP—Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235 (1993).

<sup>371</sup> *Monsanto*, 491 U.S. 600.

<sup>372</sup> *Id.*

<sup>373</sup> *Monsanto*, 491 US 600 (1989) (citing *Caplin & Drysdale Chartered v. United States*, 491 US 617 (1989)).

crimes is required by the signatories of the U.N. Convention Against Illicit Traffic in Narcotics.<sup>374</sup>

Unsettled questions arise, however, under both Conventions as to whether attorneys' fees were contemplated by the drafters as seizable assets, and whether attempts to seize attorneys' fees as "proceeds" will survive scrutiny in the European Court of Human Rights. One scholar concludes that the exemption language of the Conventions implies the inclusion of defense attorneys.<sup>375</sup> He further concludes that, even if attorneys are not included, a series of human rights provisions, enforceable by the European Court, would defeat any attempt to seize attorneys' fees, regardless of the source.<sup>376</sup> Among the most likely sources of protection will be the European Convention on Human Rights, the same source of protection against efforts by the United States to obtain persons wanted for murder. In particular, the provisions guaranteeing the right to fair trial, "equality of arms" and access to court,<sup>377</sup> the presumption of innocence,<sup>378</sup> and the right to counsel of choice.<sup>379</sup> These rights are eroding within the United States, as I just noted, so any influence from the European or other regime of human rights will be most beneficial. For instance, the *Deweere* case<sup>380</sup> may enable a defendant under investigation for money laundering to avoid being forced to face the unconscionable dilemma presented by current United States jurisprudence: requiring him to choose between paying a lawyer to represent him, thereby subjecting himself and the lawyer to criminal charges if the money with which payment is made is determined to be proceeds, or to go unrepresented by counsel of choice in the proceedings. Moreover, the Supreme Court decision in *Verdugo-Urquidez*,<sup>381</sup> in addition to raising questions about the viability of human rights protections for non-U.S. nationals or residents when abroad, also raises questions as to Fourth Amendment protections for

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<sup>374</sup> 28 I.L.M. 493, 504-07 (1989).

<sup>375</sup> Wilson, *supra* note 369, at 87.

<sup>376</sup> *Id.*

<sup>377</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 221 [hereinafter "European Convention on Human Rights"].

<sup>378</sup> *Id.* art. 6(2)

<sup>379</sup> *Id.* art. 6(3).

<sup>380</sup> *Deweere*, 1980 Y.B. Eur. Conv. On H.R. (Eur. Ct. H.R.) 464.

<sup>381</sup> *See*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

aliens both abroad and in the United States. The decision may also raise questions as to rights of United States citizens in some circumstances when they are abroad. The *Alvarez-Machain* holding<sup>382</sup> that official abduction of a foreign national does not prohibit his trial in the United States raises questions that have been quite fully addressed.

Increasingly, to the dismay of United States law enforcement officials and legislators, international human rights conventions are influencing and taking precedence over the implementation of many international criminal cooperation conventions. For example, Canada is insisting that the participants in the Inter-American Enterprise for Initiative and Regionalization upgrade their human rights protection and mechanisms for ensuring the protection.<sup>383</sup> As various portions of the Western Hemisphere organize into economic and political systems,<sup>384</sup> they will further develop mechanisms to promote human rights along with cooperation in criminal matters. As these issues are linked, the United States may be motivated to increase its protection of human rights. The international trend is important because, as both United States statutes and judicial decisions take a more "conservative" tack, foreign and international legislators, policymakers, and courts are taking more liberal positions on the application of international human rights provisions. This may eventually require the United States to either decide to "go it alone" in extraterritorial criminal matters or to step on board the train of human rights in this arena.

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<sup>382</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>383</sup> See *Central American Developments*, in 7 INT'L ENF. L. RPTR (Issue 11) at 441 (November 1991).

<sup>384</sup> See, e.g., Emilio J. Cardenas, *The Treaty of Asunción: A Southern Cone Common Market (Mercosur) Begins to Take Shape*, WORLD COMPETITION, June 1992, at 65.



VII. A RELEVANT ASIDE: POTENTIAL REMEDIES FOR VIOLATIONS OF HUMAN RIGHTS BY WAY OF EXTRADITION OR OTHER ABUSES OF MUTUAL COOPERATION IN CRIMINAL MATTERS—*ALVAREZ-MACHAIN* AND *COUMOU*: ABDUCTION AND TORTIOUS, DE-FACTO EXTRADITION (OR, A COMMON LAW TORT)<sup>385</sup>

The Supreme Court has held that abduction of a foreign national by United States agents is not a violation of an extradition treaty, unless the treaty explicitly provides that it is.<sup>386</sup> Although the *Alvarez-Machain* abduction was criticized as a violation of customary international law, and this was all but recognized by the Supreme Court, to date no criminal action has been taken against the United States agents and it has been held that the Fifth Amendment Due Process Clause does not protect an alien who is not within United States territory.<sup>387</sup> On the other hand, the Ninth Circuit refused to foreclose the possibility that an abducted person could receive damages pursuant to the Torture Victim Protection Act<sup>388</sup> and the Alien Tort Claims Act of 1789<sup>389</sup> if it were proved that Drug Enforcement Agency agents threatened Alvarez-Machain during interrogation, withheld food throughout the interrogation, incarcerated him under a false name so that it was impossible for the United States Government to respond to inquiries about his whereabouts from his family and the Mexican Government, and denied him adequate medical treatment.<sup>390</sup> Each of these allegations was made and, if proven, would serve to create an atmosphere of fear and isolation, imposing "gratuitous suffering" in violation of Due Process.<sup>391</sup> One would certainly hope that egregious violations of a person's human rights under international law would give rise to tort damages. We ought to be concerned about power being allowed to reside in agencies and agents that will increase abuse if they have impunity.

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<sup>385</sup> *Coumou v. United States*, 107 F.3d 290 (5th Cir. 1997); *Coumou v. United States*, 1995 WL 2292 (E.D. La. 1995); *Coumou v. United States*, 1995 WL 294158 (E.D. La. 1995).

<sup>386</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 668-69 (1992).

<sup>387</sup> *Alvarez-Machain v. United States*, 107 F.3d 696, 702 (9th Cir. 1996) (reviewing civil claims relating to abduction).

<sup>388</sup> Torture Victim Protection Act, § 2(a), codified in the statutory notes to 28 U.S.C. § 1350 (1994).

<sup>389</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

<sup>390</sup> *Alvarez-Machain*, 107 F.3d 696, 701-702 (9th Cir. 1996).

<sup>391</sup> *Id.* at 702.

One hopeful sign was that tort damages were, in fact, awarded in relation to what amounted to a de-facto extradition of Louisiana-based ship Captain Coumou, a United States citizen and resident of New Orleans. He was the owner and master of the M/V Nordic, a coastal freighter of Honduran registry. The Nordic departed port in Colombia on June 2, 1992, with a load of cement bound for St. Marc, Haiti. Shortly after leaving port, Coumou began to suspect that a member of his crew might have concealed narcotics in the containers of cement on the ship. Coumou made radio contact with the United States Coast Guard station in Miami, advising them of his suspicions. He asked them to board and search his vessel. The Coast Guard acknowledged the transmission but made no definitive response to Coumou's request. Later, a Coast Guard Law Enforcement Detachment (Ledet) operating off a naval warship intercepted the Nordic on the high seas. Ledet's commander had radio discussions with Coumou about boarding.<sup>592</sup>

As the Elrod tracked the Nordic in anticipation of the Ledet boarding, its commander communicated the situation to Comcaribron. Finally, the State Department obtained permission from both Honduras and Haiti to board the Nordic. By the time it was boarded, the Nordic had sailed into Haitian territorial waters. The United States Government was aware by this time that Coumou was a United States citizen. Coumou repeated his suspicions that drugs were aboard. The armed Ledet boarding party searched the vessel but found no contraband. Coumou then told them how to search the vessel and where to look for the drugs. The Coast Guard had taken control of the vessel by this time. The Nordic exited Haitian territorial waters and returned to international waters, but it became clear that an exhaustive search of the Nordic's cargo of bags and pallets of cement would not be possible at sea. While a decision was pending from headquarters on what to do, Coumou was ordered to steer a northerly course, so that the vessel would remain in international waters. Coumou initially refused. He acquiesced only after Lieutenant Kondratowicz told him that if

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<sup>592</sup> At the time the ELROD made its initial contact with the NORDIC, Coumou informed Lieutenant Kondratowicz about his previous radio transmission to the Coast Guard and repeated his suspicions directly to the LEDET commander. Kondratowicz received confirmation that Coumou previously had contacted the Coast Guard on June 2, but was not told the content of the prior communications.

he did not comply, the Ledet would take command of the helm. Thus forced to comply, Coumou was arrested on the High Seas.<sup>393</sup>

Finally, Comcaribron issued instructions for the Nordic to proceed to St. Marc, where its cargo would be searched more thoroughly as it was off-loaded. This directive was given because the Coast Guard had secured the Haitian government's permission to undertake a United States law enforcement operation within Haiti's sovereign territory. The Ledet was ordered to remain on board the Nordic during the remainder of the voyage, and the Elrod was instructed to escort the vessel into St. Marc. When the Nordic arrived at St. Marc, several Haitian officials boarded to meet with Coumou. After this initial encounter the Haitian presence at the dock was token; only a handful of policemen merely observed the transfer of cargo. Soon after arrival, the Nordic began off-loading its cargo under the direct supervision of the Ledet.

For the duration of the off-loading, the Ledet maintained a secure perimeter around the Nordic. On the third day of the off-loading this Coast Guard crew discovered cocaine hidden in the cement. Haitian police officials watched the field-testing of the cocaine but made no move to take charge of the situation.<sup>394</sup> Coumou and his crew were held in the captain's cabin under armed guard pending their disposition. Once the cocaine was discovered, the Haitian government "decided" to assert its jurisdiction and "requested" custody of Coumou, his crew, and his vessel. There was evidence that United States officials had suggested that this might be a good thing for the Haitians to do. Officials in the United States had apparently decided prosecution would not be worth the effort and cost. The situation reports and related memoranda before the decision-makers at this level were grossly deficient and inaccurate. In particular, there was no indication that Coumou had been the one who had requested a boarding, nor that the Nordic was in international waters during the boarding. False reports were made that the Nordic was a "mother ship," about Coumou's demeanor and

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<sup>393</sup> WAYNE R. LAFAVE, ET AL., *CRIMINAL PROCEDURE* § 3.5(1), at 178 (2d. ed. 2000).

<sup>394</sup> The cocaine was ultimately delivered into the custody and control of Commander Mizell, the Coast Guard attache at the United States embassy in Port-au-Prince.

conduct during the boarding,<sup>595</sup> and a significant exaggeration of the Haitian government's negligible role in the seizure of cocaine.

After considering this misinformation, the Washington decision-makers decided to "defer" to Haiti's "request." Accordingly, the order was issued to turn the Nordic and her crew over to Haitian authorities.

Coumou was incarcerated in a Haitian dungeon for six months. The experience was a nightmare. During this time, he suffered from malnutrition, infections, and diseases, including bronchitis, pneumonia, kidney infection, chronic back pain, nerve disorder, fungal and eye infection, chronic diarrhea, dehydration, and marasmus, and he witnessed numerous atrocities, perpetrated both by Haitian officials and other prisoners, including beatings and torture, some of which ended in the death of the victim. He lost well over 100 pounds. Coumou was finally tried and acquitted on November 22, 1991. Despite his acquittal, the Haitian government refused to return his ship, money, or passport. Coumou left the country the day after his acquittal, having been informed by his attorney that the Haitian government was appealing the acquittal and that he might be thrown back into prison.<sup>596</sup> After Coumou returned to New Orleans, he continued to suffer from physical ailments caused by his incarceration in Haiti as well as anxiety and alcoholism, and was diagnosed with post-traumatic stress disorder. Coumou filed suit naming the United States as defendant and alleging that his injuries had been caused by the government's tortious conduct. After a trial in New Orleans limited to the issue of liability, the court entered a memorandum opinion finding the United States liable for Coumou's injuries.<sup>597</sup>

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<sup>595</sup> The situation reports ultimately reaching the higher echelons of Coast Guard command regarding the initial contact between the LEDET and the NORDIC indicated that Coumou was "belligerent" and "uncooperative" and that his prior radio transmission appeared to be a "ploy" to draw suspicion from his vessel. At trial, however, Lieutenant Kondratowicz contradicted these reports, testifying that Coumou was cooperative and that he never considered his prior transmission to be a "ploy." The United States did not account for the discrepancy between these reports and Kondratowicz's trial testimony.

<sup>596</sup> Coumou was also forced to sign over to his attorney a power-of-attorney giving her control of the NORDIC and pay her fee of \$45,000 or face the same risk of returning to prison in Haiti.

<sup>597</sup> *Coumou v. United States*, 107 F.3d 290, 294 (5th Cir. 1992).

## A. A TORTIOUS, DE-FACTO EXTRADITION

The District Court for the Southern District of Louisiana held that a tortious de-facto or functional extradition had been executed by the Coast Guard, without any of the protections required by the extradition process. The idea seemed to be that to hand over an American citizen to a foreign government under these circumstances was tortious. The Government appealed.

*1. Agents of the U.S. Government do not have the legal authority to take action against U.S. citizens that would be illegal, just because they happen to be abroad*

The Fifth Circuit held that liability might obtain on the basis of common law tort principles.<sup>398</sup> It would appear clear that the conduct that United States officials committed against a United States citizen through the auspices of foreign officials was egregious and at least tortious. If the Coast Guard or any United States agency can “transfer” U.S. nationals to foreign police by forcing the citizen from international waters to the territory of the “accepting” state, U.S. nationals are clearly at risk and their rights are eroded. Thus, the Fifth Circuit was not at all persuaded by the Government’s argument that its entire decision to hand over Captain Coumou to the Haitian authorities and its entire method of doing so was a matter of policy and, therefore a “discretionary function” not subject to suit because of sovereign immunity.<sup>399</sup>

*2. Even if Haiti independently had requested to have the captain delivered to its jurisdiction and control, this would have to be done with reasonable care<sup>400</sup>*

Courts have generally drawn a line between planning or policy level decisions and decisions or conduct at the operational level, merely incident to carrying out governmental policy.<sup>401</sup> The Fifth Circuit also held that the United States has no policy interest in treating informants in the same way that it treats suspected criminals. The Government had a duty to use reasonable care to inform Haiti that Captain Coumou had co-

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<sup>398</sup> *Id.* at 294-96.

<sup>399</sup> *Coumou*, 107 F.3d at 286.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

operated; failure to do this may have been a breach of its duty. It is one thing to have a policy to accommodate foreign sovereignty when a United States national commits a crime in that territory, by handing him over to the foreign officials who request it. It is quite another to take a citizen who is perceived by some officials to be involved on the high seas to a nation willing to take him, to abscond with his property and to jail him. This was a de-facto extradition done without reasonable care. The Fifth Circuit remanded Coumou's suit for the district court to determine whether the government's failure to convey information to Haitian authorities constituted a breach of its duty of reasonable care. Although the outcome was favorable, it would have been better if the court had recognized the human rights protections. It is clear that human rights protections were violated. Even the courts ignored them, as they are not seen as self-executing.

### VIII. CONCLUSION

Perhaps we can find some hope in the Pinochet scenario, in the ad hoc tribunals for the former Yugoslavia and for Rwanda, and in the Statute for the International Criminal Court. Even with the serious deficiencies that each of these incidents and institutions have, perhaps one day we might rise to the standard articulated by the Nuremberg Principles. Nuremberg Principle No. I provides the basis for the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, as well as for the Permanent International Criminal Court. It reads: "[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." Beccaria understood that impunity impeded both peace and justice: "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."<sup>402</sup> Individual criminal responsibility and protection of individual human rights must merge to become the cornerstone of any international criminal prosecution or of any extradition. These are concomitant requirements of any prosecution of international crime.

Moral society seems always to have developed or perceived, for good or for ill, the relationship between the authority to

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<sup>402</sup> Beccaria, *Dei delitti e delle pene* (1764) (translated in J. FARRAR, CRIMES & PUNISHMENTS 193-94 (1880)).

punish and expiation; between the need to punish and to be punished.<sup>403</sup> Anciently, *lex talionis* called for an eye for an eye,<sup>404</sup> for the “benefit” of the punished as much as the punishers.<sup>405</sup> When murder, theft, or assault were committed, society and the perpetrator had to have their “taint” purged.<sup>406</sup> If the perpetrator became a fugitive, it was necessary to obtain his person or a proxy to purge the taint.<sup>407</sup> The Code of Manu provided that there could be no possibility of happiness for the criminal or for society without punishment; rest, and happiness for the sinner and for society had to be obtained through a soul-purging punishment of the wrongdoer.<sup>408</sup> The Cheyenne required purging through punishment and the “breaking of the arrows” ceremony for the crime of tainting the food or water supply.<sup>409</sup> Intra-tribal murder “required the keeper of the arrows to cleanse the tribe of the spectre of death . . .” through punishment of the perpetrator.<sup>410</sup> “Cleansing qualities” of fire made it a favored method of capital punishment. Nero used burning at the stake to propitiate Vulcan, the god of fire.<sup>411</sup> Punishment has been the mechanism to rid the society of crime’s destructive plague.<sup>412</sup> Although ancient punishment is repugnant to us today, the mystical need to use it to make society whole—for reconciliation—has been understood. Dostoyefsky makes this clear in his book *Crime and Punishment*, as do many great authors.

<sup>403</sup> See discussion in Blakesley, *TERRORISM*, *supra* note 4, at chs. 1, 4.

<sup>404</sup> Exodus 21:24; Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT’L L. & POL. 1, 11 (1986).

<sup>405</sup> See, e.g., I Kings 2: 28-34 (blood atonement).

<sup>406</sup> *Id.*

<sup>407</sup> See, e.g., Judges Chs. 15; 19 and 20. When the perpetrator was not obtainable, sometimes the village believed to be where the perpetrator was hiding or at least was from had to be utterly destroyed. See *id.* This caused many blood feuds. BLAKESLEY, *TERRORISM*, *supra* note 4, at ch. 1.

<sup>408</sup> CODE OF MANU, Bk. VII, 18, 23-24; Bk. VIII, 17.

<sup>409</sup> See ROBERT FAIRBANKS, A DISCUSSION OF THE NATION STATE STATUS OF AMERICAN INDIAN TRIBES: A CASE STUDY OF THE CHEYENNE NATION 31 (1976) (unpublished LL.M Thesis, available in the Columbia University Law Library).

<sup>410</sup> M. FOUSTEL DE COULANGES, *LA CITÉ ANTIQUE*, Liv. III, Ch. XIII (1864); KARL LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

<sup>411</sup> GRAEME NEWMAN, *THE PUNISHMENT RESPONSE* 43 (1985).

<sup>412</sup> See STROM, *ON THE SACRAL ORIGIN OF THE GERMANIC DEATH PENALTIES* 14, 208 (1942); see also VON HENTIG, *PUNISHMENT, ITS ORIGIN, PURPOSES & PSYCHOLOGY* 83, 84 (1973).

Perhaps we have evolved beyond the extremes of this need to propitiate the gods. Perhaps not. There is no doubt, however, that justice is *required* for real peace. But justice to be truly just must be fair and tempered with mercy. This is why the claim that to allow trials for the violation of international humanitarian law endangers peace is ultimately spurious. Those who have suffered the pain of terror, torture, rape, and slaughter of loved-ones will hold that pain within themselves. They and humanity need catharsis, which prosecution may help provide. Whether a "peace" is imposed or not, someday, unless there is justice, rage will fester and we will face the same problem again. Mercy is also necessary in certain cases, but, as Hanna Arendt noted, mercy is not possible if there is no possibility of punishment!<sup>413</sup> It is not true and it is dangerous to suggest that somehow *not* punishing those who commit atrocities lends itself to peace. By the same token, prosecuting or punishing without being scrupulous in ensuring fairness and justice is just about as dangerous.

This article has analyzed how certain aspects of human rights law and protection for the individual may impact extradition. We have considered two approaches to the application of individual rights in the field of extradition. The traditional positivist approach is still the one that most nations follow, and it is one that still sees the state as the essential subject of extradition. Statist barriers to extradition, therefore, obtain for what is seen as the protection of the state and as the means for the state to insist on the protection of its nationals. It is possible, however, that headway is being made toward abolishing the negative side of this positivist approach to include one that contemplates new bars to extradition. These arise from treaty, customary international law, and legislation, and involve rights of a constitutional order and character. The consequence of recognizing these rights would be that ambiguity in any treaty would be read to promote the Basic Human Rights; and that gaps would be filled so as to promote these rights.

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<sup>413</sup> See also, *gen.*, ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998).



APPENDIX: TRANSCRIPT OF THE PINOCHET HEALTH REPORT <sup>414</sup>

Senator Pinochet has a complex medical history, but the main medical problems at present are peripheral diabetic neuropathy and a recent progressive cerebrovascular lesion.

The diabetic neuropathy adds to his difficulties in walking and a noted tendency to postural hypotension.

The diabetes, along with his smoking in the past, will also have made damage to the arteries likely.

The cerebrovascular process has manifested itself in minor brain hemorrhages and temporary ischemic periods, but they are also the cause of progressive damage without acute symptoms.

There is clinical evidence of extensive brain damage, including bilateral lesions to the pyramidal tracts, which cause spasms and affect the base ganglions, producing periods of Parkinson's Disease.

The presence of primary reflexes indicates that lesions have occurred to the frontal lobes, and the lack of memory is compatible with bilateral damage to the structures of the temporal lobes.

The difficulties in the ability to comprehend are the result of the lack of memory. While many of the lesions can be attributed to areas of the brain irrigated by the basilar artery (which, as the brain scanner shows, is calcified), the damage to the frontal lobes indicates a more generalized arterial lesion.

Physically:

Senator Pinochet would at the moment be able to attend a trial, but as the periods of cerebrovascular lesions have progressed despite the excellent treatment (with correct controls of diabetes and arterial pressure and with anti-coagulant agents) a progressive deterioration of both his physical and mental condition is likely.

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<sup>414</sup> Signed by John Grimley Evans, Michel J Denham and Andrew J Lees on Jan. 6, 2000. Document reported by THE GUARDIAN (London), Feb. 16, 2000, at 1. The full text of the Pinochet medical report is currently available at <[http://www.guardianunlimited.co.uk/Pinochet\\_on\\_trial/Story/0,2763,190591,00.html](http://www.guardianunlimited.co.uk/Pinochet_on_trial/Story/0,2763,190591,00.html)>.

**Mentally:**

In our opinion, Senator Pinochet is not at the moment mentally capable of taking part in a trial with full knowledge of the facts. We base this opinion on:

Lack of memory both of recent and distant events. Limited ability to understand sentences and questions, due to loss memory and, consequently, inability adequately process verbal information. Loss of his ability to express himself in audible, succinct and relevant way. Periods of fatigue.

With these impediments he would be incapable of sufficiently following the process of a trial so as to instruct his lawyers.

He would have difficulty responding to the content and the implications of the questions asked of him, and he would not be aware of this difficulty.

His memory of distant events is diminished. He would have difficulty making himself heard and understood in his answers to questions.

We are convinced that the inabilities diagnosed are due to brain damage, as they are in their nature compatible with, and correspond to that phenomenon, and the formal neuropsychological tests did not show any of the signs of deliberate exaggeration of damage.

To be precise, those neuropsychological tests indicative of original intelligence and of level of education (like the WAIS vocabulary scale) indicate above-average ability.

**No depression**

At the moment, Senator Pinochet does not show any signs of clinical depression.

Situational stress, as a trial is likely to produce, causes psychological responses which could accelerate the development of vascular lesions.

We are told, however, that in the past Senator Pinochet has shown a notable ability to contain stress.

We are therefore unable to give any useful opinion on the possible effects on his health if he faces a trial. Most of the cases of lesions seem to have occurred in a series of tromboembolic episodes during September and October 1999.

Sufficient time has passed for most of the spontaneous recovery which might be expected after these episodes to have occurred.

Although it is characteristic of lesions due to cerebrovascular processes for daily fluctuations in functional capacities to occur, we consider a sustained and significant improvement of the latter to be unlikely.