Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty

Mark E. DeWitt

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol47/iss2/13

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
COMMENTS

EXTRADITION ENIGMA: ITALY AND HUMAN RIGHTS VS. AMERICA AND THE DEATH PENALTY

Mark E. DeWitt

Over the past several decades, the rendition of fugitives from the jurisdiction of one sovereign state to another has become increasingly complex. Customary international law does not require the surrender of fugitives by a foreign state to the jurisdiction of another state. This

---

1. See GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 33 (International Studies in Human Rights Vol. 17, 1991). This complexity is the result of increased procedural and substantive protections given to the fugitive by human rights treaties. See generally id. at 33, 79-90 (describing several examples of such protections). The complexity is compounded for the United States by the fact that extradition may not occur to or from the United States without a treaty. See 18 U.S.C. §§ 3181, 3184 (1994); see also Ethan A. Nadelmann, The Evolution of United States Involvement in the International Rendition of Fugitive Criminals, 25 N.Y.U. J. INT'L L. & POL. 813, 814-15, 822-23 (1993) (describing the nature and history of U.S. extradition practice). The United States is reluctant to join multilateral extradition conventions due to the complexity of the U.S. judicial system, particularly its common law tradition, jurisdictional relationships, and complicated rules of evidence. See id. at 827.

2. Broadly defined, customary international law is a "[b]ody of consensual principles which have evolved from customs and practices civilized nations utilize in regulating their relationships . . . hav[ing] great moral force." BLACK'S LAW DICTIONARY 816 (6th ed. 1990).

3. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 cmt. a (1987) ("Extradition is not required by customary law, and many states do not extradite except as bound to do so by treaty."); cf. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 6-13 (1974) [hereinafter BASSIOUNI, WORLD PUBLIC ORDER] (describing the historical and modern approach to the duty to extradite); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5-7 (3d. ed. 1996) [hereinafter BASSIOUNI, LAW AND PRACTICE] (same). Many states, including the United States, require a treaty in order for extradition to occur. See 18 U.S.C. §§ 3181, 3184 (1994); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra, § 475 cmt. a (1987). More formally defined, extradition is "[t]he surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY, supra note 2, at 585. In Latin, extradition translates to extradere, which means "forceful return of a person to his sovereign." BASSIOUNI, LAW AND PRACTICE, supra, at 2.

535
process, commonly known as extradition, usually occurs only when the two nations are bound by either a bilateral or multilateral treaty. With the ascension of international human rights agreements, however, extradition no longer occurs solely in the context of such treaties. Since the adoption of the Universal Declaration of Human Rights by the United Nations in 1948, human rights agreements have become both more prevalent and more assertive in international relations, wrestling their way into the once sacred arena of sovereign treaty power and usurping control from traditional extradition law.

4. See Bassiouuni, World Public Order, supra note 3, at 13, 19 (describing bilateral and multilateral extradition schemes). Simply stated, a bilateral treaty is a treaty between two nations, whereas a multilateral treaty is a treaty with more than two nations as signing parties. See Webster's Collegiate Dictionary 112, 764 (10th ed. 1993) (defining bilateral and multilateral).

5. For purposes of this Comment, "human rights agreement" refers to any convention, treaty, general agreement, or other multilateral international instrument designed to promote individual rights.


8. See Quigley, supra note 6, at 429-30 (commenting that the development of human rights has lead to greater protections for fugitives, and has affected the process by which nations negotiate extradition treaties). See also generally Gilbert, supra note 1, at 79-90
Before the advent of human rights agreements, nations often afforded fugitives judicial proceedings prior to extradition, but these proceedings typically did not involve complex scrutiny of the likely consequences of surrender.\(^9\) Known as the rule of non-inquiry, this practice prevented judicial officers from examining the judicial and penal conditions of the state requesting extradition.\(^10\) Four reasons are given for this practice. First, inquiring into the legal systems of foreign states infringed upon foreign affairs, an arena traditionally belonging to heads of state.\(^11\) Second, the judiciary could not adequately investigate judicial and penal conditions inside foreign states.\(^12\) Third, courts expressed reluctance at (discussing the complex interaction between human rights agreements and extradition law with particular attention to the European Convention, and noting how human rights have put substantive limitations upon states' ability to extradite fugitives).

9. See BASSIOUNI, LAW AND PRACTICE, supra note 3, at 486, 492 (explaining how U.S. courts have often “refused to inquire into the processes by which a requested state secures evidence of probable cause to request extradition, the means by which a criminal conviction is obtained in a foreign state, or the penal treatment to which a relator may be subjected upon extradition” and how government officials often argue against expansive judicial involvement); cf. Nadelmann, supra note 1, at 882 (concluding that Congress and the courts have afforded the executive branch deference in matters of extradition policy and process); Michael P. Shea, Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering, 17 YALE J. INT'L L. 85, 87 (1992) (noting that because extradition was considered a subject of foreign diplomacy, courts did not involve themselves formally in the process until the mid-1800s). Traditionally, the judicial role in extradition served little purpose other than to ensure that all papers were in order. See id. at 89. Judges in the requested state reviewed the applicable treaty for validity, confirmed the fugitive's identity, ensured that dual criminality existed (meaning that the crime charged was punishable in both states), and considered whether probable cause existed to believe the fugitive had committed the offense. See id. For a complete discussion of a more modern extradition procedure, see generally GILBERT, supra note 1, at 33-68.

10. See Quigley, supra note 6, at 403; Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 CORNELL L. REV. 1198, 1198 (1991); Kathleen F. Elliot, Comment, 18 SUFFOLK TRANSNAT'L L. REV. 347, 351 (1995); David B. Sullivan, Note, Abandoning the Rule of Non-Inquiry in International Extradition, 15 HASTINGS INT'L & COMP. L. REV. 111, 116 (1991). During the 1700s, extradition typically occurred without any judicial involvement. See Quigley I, supra note 6, at 430. Before the middle part of the nineteenth century, courts played a minimal role in extradition proceedings, because extradition decisions were believed to be matters of foreign policy best left to heads of state. See Shea, supra note 9, at 87.

11. See Semmelman, supra note 10, at 1229; Shea, supra note 9, at 93. The primary concern was that a refusal to extradite would harm foreign relations with the requesting state, possibly leading to retaliatory measures. See Semmelman, supra note 10, at 1230-31. Therefore, it was argued that diplomats, such as the U.S. Secretary of State, were in the best position to protect a fugitive’s rights and balance foreign relations concerns. See id. at 1230; see also Sullivan, supra note 10, at 121-23 (discussing the Secretary of State’s political flexibility in extradition matters).

12. See Shea, supra note 9, at 93. Lacking any investigative power or agency, a court could not substantiate any claim by a fugitive or a government, making the controversy
judging the legal system of a foreign state because it encroached upon
the idea of state sovereignty. 13 Fourth, judicial scrutiny of unfamiliar for-

gn legal systems based upon a dissimilar ideology sometimes prevented
the extradition of dangerous criminals. 14 Therefore, because of these rea-
sons, courts deferred to heads of state in extradition proceedings and of-

ten required that any complaints involving human rights issues be di-
rected to the executive branch rather than to the courts. 15 Heads of state,
it was argued, were better equipped to consider factors such as foreign
policy and the desire to honor treaty obligations. 16

In addition to the rule of non-inquiry, the vast majority of extradition
treaties were bilateral, binding only the state seeking extradition of the
fugitive to its jurisdiction (requesting state) and the state considering ex-
tradition from its jurisdiction (requested state). 17 Problems may often
surface in these treaties, since the only interested parties are the two na-
tions bound by the treaty. 18 The complicated process of re-negotiating a
bilateral treaty can cause nations to ignore possible concerns until a crisis

13. See Shea, supra note 9, at 93; see also Sullivan, supra note 10, at 119 (noting that
the reason for the rule of non-inquiry is that the courts should not "supervis[e] the integ-
"rity of the judicial system of another sovereign nation").

14. See Shea, supra note 9, at 93. Proponents of the rule of non-inquiry commonly
argue that the rule facilitates the extradition of dangerous criminals, such as international
terrorists and members of organized crime. See id. at 93 n.39; see also Kent Wellington,
Note, Extradition: A Fair and Effective Weapon in the War on Terrorism, 51 OHIO ST. L.J.
1447, 1450 (1990); cf. infra notes 242-54 and accompanying text (discussing the possible
harms of the inability to extradite fugitives between the United States and Italy).

15. See Shea, supra note 9, at 95. For example, United States courts often regard a
decision by the Secretary of State to surrender a fugitive as evidence that the individual
will receive fair treatment once extradited. See id. at 96; see also Sullivan, supra note 10, at
121 (noting that the Secretary of State is better able to ensure procedural fairness than a
court). All extradition requests, after judicial review and approval, come before the Secret-
ary of State, who has complete discretion in either granting or denying the extradition
request. See Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980); see also
Semmelman, supra note 10, at 1203. In addition, U.S. courts interpret part of the Extrad-
iton Act as preventing judicial review of a Secretary of State’s final extradition decision.
See 18 U.S.C. § 3186 (1994) (stating that it is the Secretary of State, and not the courts,
who orders extradition); Escobedo, 623 F.2d at 1105 (holding that the Secretary’s decision
is not subject to judicial review).

16. See Shea, supra note 9, at 95; see also supra note 11 (discussing why heads of state
can better balance individual rights and foreign policy concerns).

17. See BASSIOUNI, WORLD PUBLIC ORDER, supra note 3, at 13-14; GILBERT, supra
note 1, at 20. Most nations preferred bilateral treaties because they could tailor the trea-
ties to meet the specific needs of each nation. See id. at 20. To this day, the majority of
extradition agreements remain bilateral, although multilateral arrangements have gained
popularity. See id.; see also BASSIOUNI, WORLD PUBLIC ORDER, supra note 3, at 13-14,
19.

18. See BASSIOUNI, WORLD PUBLIC ORDER, supra note 3, at 15.
erupts. Conversely, where multilateral treaties existed, they served mainly to establish uniform extradition procedures within a given region, ultimately giving little more protection to individual rights than a bilateral agreement. Accordingly, most extradition requests, whether under a bilateral or multilateral treaty, involved only the governments of two nations—the requesting state and the requested state. Regardless of the type of extradition treaty in place, the decision to extradite usually received only cursory judicial review, under the rule of non-inquiry, by a court in the requested state. The final extradition decision was left to the requested nation's head of state. Therefore, extradition commonly occurred without any significant judicial review, instead serving primarily

19. See id. This reluctance can lead to a neglect of important human rights issues by the responsible diplomatic and political factions of the two nations party to a bilateral arrangement, and force the judiciary of one nation to step in and take action. See infra Part III (detailing the Venezia decision).

20. See GILBERT, supra note 1, at 20-25. In fact, the overall simplicity in some of the multilateral agreements actually decreased procedural protections by setting the "minimum standard of joint convictions." Id. at 21-22. For example, the European Extradition Convention of 1957, one of the largest treaties in terms of completed extraditions, allowed extradition between member states without proof of a prima facie case against the fugitive. See id. The treaty actually reduced the protections provided in the Federal Republic of Germany, and forced Germany to conclude supplementary agreements in order to regain the lost protections. See id. at 22. In addition, the treaty allowed nations to enter reservations, that, in the opinion of the government of Belgium, would lead to a greater number of disputes than under the bilateral system. See id. A multilateral arrangement often must appeal to the lowest common denominator among its members in order to gain support, which leads to the ultimate failing of many multi-party extradition arrangements to protect human rights adequately. See id.

21. See id. at 35-36 (giving a brief overview of extradition procedure and the types of notice that are necessary to initiate an extradition request). For a bilateral treaty, this statement is self-evident, since the treaty involves only two parties. For a multilateral treaty, the common idea was to simplify extradition between nations in a given region rather than to add any protections for those subject to extradition. See BASSIOUNI, LAW AND PRACTICE, supra note 3, at 11 (commenting that states often enter into multilateral treaties to "reduce[e] or eliminat[e] the divergence and uncertainty characteristic of multiple bilateral treaties and diverse national legislation . . . [and attempts to] harmonize national systems, if not unify them with respect to the practice"); see also GILBERT, supra note 1, at 20 (stating that multilateral extradition treaties, such as the European Extradition Convention of 1957, must work to satisfy all parties, and therefore represent a "compromise at the lowest level").

22. See Shea, supra note 9, at 87-89 (discussing the limited judicial role in traditional extradition practice); see also Semmelman, supra note 10, at 1201-03 (explaining the typical request to the U.S. Government for extradition of a fugitive to a foreign nation). In some jurisdictions, such as the United States, this process does not involve a full trial. See id. at 1202.

23. See supra notes 11 and 15 (discussing the role of the head of state in extradition decisions).
as a tool of foreign policy used at the discretion of national governments.  

Traditional extradition law changed with the advent of human rights agreements, which imposed affirmative obligations upon member nations. Under these agreements, closer scrutiny of the requesting nation's internal affairs is required in order to give substance to an individual's rights. As a result, many human rights agreements created quasi-judicial bodies to provide nations with uniform guidance in implementing agreements and also to provide individuals with an avenue of judicial review operating outside of the restraints of national courts. The latter

24. Cf. Sullivan, supra note 10, at 120-21 (noting that supporters of the rule often justify it as preventing the erosion of the executive's foreign affairs power and the ability to provide "flexibility in conditioning extradition"); Shea, supra note 9, at 88 (arguing that traditional extradition decisions were primarily governmental prerogatives because many nations circumvented judicial involvement in extradition decisions); Sullivan, supra note 10, at 121 (noting that U.S. courts are hesitant to adjudicate matters that involve U.S. treaty obligations).

25. See Quigley, supra note 6, at 415-16. Starting in the mid-twentieth century, human rights agreements took the form of binding obligations, independent of any concurrent treaty obligations. See id. Therefore, extradition protections for the fugitive increased as human rights law developed. See id. at 430.

26. See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) 4, 34 (1989) (adjudicating an extradition request in light of the European Convention for the Protection of Human Rights and Fundamental Freedoms); see also infra Part II.A (discussing Soering). The European Court on Human Rights stated in Soering, "the object and purpose of the [European] Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective." Soering, 161 Eur. Ct. H.R. (ser. A) at 34. The court's statement supports the view that agreements such as the European Convention require that member states inquire into the judicial and penal systems of the requesting state in order to avoid "any foreseeable consequences of extradition suffered outside [the requested state's] jurisdiction" that would violate individual human rights. Id.

27. See ICCPR, supra note 7, at 28, at 179 (creating the United Nations Human Rights Committee (UNHRC)); European Convention, supra note 6, at 19, at 234 (creating both the European Commission of Human Rights and the European Court of Human Rights). Because these judicial bodies were created by a human rights agreement, they represent a tool for implementation of the obligations created by the agreements. Cf. William Schabas, The Abolition of the Death Penalty in International Law, 91-92, 219 (2d. ed. 1997) (stating that the UNHRC "considers the obligations of States parties [under the ICCPR] in the context of [its] two implementation mechanisms" and referring to the European Court as a "highly developed implementation mechanism" intended to "interpret and apply" the European Convention). For example, the UNHRC hears matters "only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law." Id. art. 41(1)(c), at 182. As such, members to the UNHRC function as "independent experts" outside the control of any single organization, including the United Nations itself. See Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights 44-45 (1994). The most significant impact of the ICCPR
function represented perhaps the most important feature of these agreements, because, for the first time, individuals were given the power to allege human rights violations and have these challenges against the actions of a sovereign state recognized before an international judicial body. Freed from the jurisdictional restraints of national courts, the judicial bodies created by human rights agreements directly incorporated many of the advances in human rights agreements into extradition law. A profound effect of this integration was the balancing of the "right to life" in the context of capital punishment against the desires to maintain international cooperation in criminal matters. With several ground-
international human rights agreements, through their treaty-spawned judicial bodies, have intruded into the realm of extradition law by incorporating human rights standards into extradition proceedings involving the death penalty. The resulting amalgam of human rights and extradition practice has subordinated extradition law to human rights norms, and forced many states to restrict the conditions under which they would surrender fugitives subject to capital punishment. Therefore, as a staunch proponent of the death penalty, the United States has begun to experience difficulty when seeking extradition of fugitives for capital crimes.

In addition to international judicial pressure opposing the death penalty, in 1996, the United States' death penalty practice came under fire in a European national court. The Italian Constitutional Court, over-
turning the decision of the Italian Supreme Court and Prime Minister, refused to allow extradition of a death penalty fugitive to the United States, asserting that the fugitive’s right to life, as protected under the Italian Constitution, trumped the bilateral extradition treaty between the two nations. For the Italian court, human rights superceded any international obligations owed under an extradition treaty. The actions of the Italian Court clearly herald the possible emergence of a new trend whereby the United States may find itself in direct conflict with foreign national courts when trying to obtain extradition for capital crimes.

This Comment first discusses three major international decisions involving the attempted extradition of fugitives subject to capital punishment in the United States. This Comment then examines how these cases have affected the landscape of death penalty extradition law, particularly when the United States is the requesting state. This Comment next analyzes the Italian court’s decision refusing an extradition to the United States and the likely consequences of this decision. This Comment concludes that the Italian court’s decision initiates a trend whereby national courts will become more active in enforcing human rights agreements, which will pressure the United States to choose between restricting its use of capital punishment or losing its ability to reclaim death penalty fugitives through extradition proceedings.

I. BRAVE NEW WORLD—RISING GLOBAL REJECTION OF CAPITAL PUNISHMENT AND THE ASSURANCES PRINCIPLE

While many nations either have abolished or limited the use of the death penalty, the use of capital punishment in the United States has

39. See id. (stating that extradition to face proceedings for a crime punishable by death is improper because it would interfere with the basic protection of life provided by the Italian Constitution).
40. See Andrea Bianchi, International Decision, 91 Am. J. Int’l L. 727, 733 (1997) (stating that the decision “attests to the increasing difficulty in obtaining extradition from European countries of fugitives charged with crimes punishable by death in the United States and elsewhere” and signals the “emergence of a European ordre public” against extradition to states with capital punishment); see also infra Part V (describing the implications of the Italian Constitutional Court decision, and the difficulties it creates for the American judicial system).
41. Since 1976, on average, over two countries per year have abolished the death penalty. See The Death Penalty: Facts & Figures (last modified Aug. 1997) <http://www.amnesty.org/ailib/intcam/dpfacts.html>. Since 1985, more than 25 countries have abolished the death penalty, while only four have reintroduced it. See id. Of these four, one again abolished the death penalty, and the other three have yet to perform an execution. See id. According to Amnesty International, as of July 10, 1997, 99 countries had abolished the death penalty either de jure (having passed laws proscribing its use) or de facto
increased\textsuperscript{42} since the Supreme Court reinstated its constitutionality in 1976.\textsuperscript{43} This state of affairs has created tension between the United States and abolitionist nations.\textsuperscript{44} To resolve this conflict, the United States engaged in the use of flexible bilateral extradition treaties.\textsuperscript{45} Typi-
Extradition Enigma

Extradition treaty language provides that a requested state may ask for "assurances," or "guarantees" as they are sometimes called, satisfactory to the requested state that the requesting state will not impose capital punishment in a particular case. If adequate assurances are not provided, the requested state has the right to refuse extradition. The typical treaty, however, provides no express definition of adequate assurances. More importantly, most nations leave the decision of ade-

Extradition Treaty dealing with capital punishment, typical of U.S. extradition treaties, states that:

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

Extradition Treaty, June 8, 1972, U.S.-U.K., art. IV, 28 U.S.T. 227, 230 [hereinafter U.S.-U.K. Extradition Treaty]. The phrase "assurances satisfactory to the requested Party" is the primary source of the flexibility, especially since the decision of what is and is not "satisfactory" ultimately is made by a head of state in the requested state and is not subject to judicial review. See generally Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 16-20 (1989) (outlining the U.S.-U.K. extradition procedure and noting that, under the treaty and domestic law, a U.K. court may not review the U.K. Secretary of State's decision to extradite on grounds that he failed to consider a possible breach of the European Convention). Thus, the ultimate decision is left in the hands of diplomats, who may use this flexibility to accommodate foreign relations. Cf. Semmelman, supra note 10, at 1199 (recognizing the argument that leaving the extradition decision solely in the hands of the executive branch may cause an undue concern for "political expediency" at the expense of human rights).

46. See U.S.-U.K. Extradition Treaty, supra note 45, art. IV, at 230; see also Extradition Treaty, Oct. 13, 1983, U.S.-Italy, art. IX, 35 U.S.T. 3023, 3031 [hereinafter U.S.-Italy Extradition Treaty] (providing that "assurances must be refused unless the requesting Party provides such assurances as the requested Party considers sufficient"); Extradition Treaty, Dec. 3, 1971, U.S.-Canada, art. 6, 27 U.S.T. 983, 989 [hereinafter U.S.-Canada Extradition Treaty] (stating that "extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient").

47. See U.S.-Italy Extradition Treaty, supra note 46, art. IX, at 3031 (stating that assurances must be given or extradition may be refused); U.S.-Canada Extradition Treaty, supra note 46, at 989 (allowing the refusal of extradition if assurances from the requesting state are not received).

48. See U.S.-U.K. Extradition Treaty, supra note 45, art. IV, at 230 (stating only that assurances must be "satisfactory to the requested Party that the death penalty will not be carried out"). Taken contextually, the treaty alone provides no boundaries for what constitutes "satisfactory" assurances. See id. Indeed, past cases reflect a disparity in approaches to the issue. For example, the United Kingdom, until the decision in Soering, considered a promise to make proper "representations" to the sentencing judge satisfactory assurance under the U.S.-U.K Extradition Treaty. See Soering, 161 Eur. Ct. H.R. (ser. A) at 19. The proper "representations" consisted of statements to the sentencing judge that the United Kingdom desired that capital punishment not be imposed. See id. Canada, under the U.S.-Canada Extradition Treaty, determined that no assurances need be given except for "exceptional" cases. See Ng v. Canada, Communication No. 469/1991, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994), at
quacy within the discretion of government officials rather than the courts. 49

The inherent and purposeful flexibility of the "assurances" principle ultimately proved to be a double-edged sword. While the principle eased tensions over the death penalty between national governments, the increased protections given by international human rights agreements clashed with the discretion extradition treaties gave government officials in most death penalty extraditions. 50

II. BALANCING HUMAN RIGHTS AND THE "RIGHT TO LIFE" WITH THE SOVEREIGN NATION AND CAPITAL PUNISHMENT

The advent of human rights agreements resulted in several significant limitations on extradition. 51 In the context of capital punishment, various


49. See Soering, 161 Eur. Ct. H.R. (ser. A) at 14-15, 17-19 (stating that the decision to extradite based upon assurances rested with the United Kingdom's Secretary of State); Kindler, 14 HUM. RTS. L.J. at 308 (noting that the decision to seek assurances under the U.S.-Canada Extradition Treaty is made by the Canadian Minister of Justice). In Soering, although the United Kingdom Divisional Court expressed some displeasure with the sufficiency of the assurances given by the United States, it was restricted to reviewing the U.K. Secretary of State's decision for "illegality, irrationality, or procedural impropriety." 161 Eur. Ct. H.R. (ser. A) at 18, 37-38. Thus, the court adjudicated the matter not independently, but through the eyes of the Secretary of State. See id. at 18 (stating that the "test in an extradition case would be that no reasonable Secretary of State could have made an order for return in the circumstances"). Although stricter scrutiny is given when the fugitive's life is at stake, the U.K. courts, prior to Soering, would not review any Secretary of State decision solely because the Secretary failed to consider possible breaches of the European Convention. See id. at 18-19. Taken in sum, the actions of U.K. courts, prior to Soering, show a strong affinity for the rule of non-inquiry. See supra notes 9-16 and accompanying text (discussing the rule of non-inquiry); see also infra Part II.A (discussing Soering).

50. See Quigley, supra note 6, at 438-39 (stating that the rule of non-inquiry and extradition law are "inconsistent with human rights law"); Shea, supra note 9, at 111 (noting that Soering represented the incompatibility of modern human rights and traditional extradition law); id. at 125-37 (discussing the discretionary nature of the extradition process and the expanding judicial role in providing parameters for such discretion); see also supra notes 9-16 and accompanying text (describing the rule of non-inquiry and its rationale). The flexibility of giving assurances could not be reconciled with the desire to provide uniform protection for individuals subject to extradition. See Soering, 161 Eur. Ct. H.R. (ser. A) at 36-38 (noting the inadequacy of assurances in protecting extradited individuals). In Soering, although the U.K. Secretary of State initially approved Soering's extradition, the European Court of Human Rights decided that the assurances given by the U.S. prosecuting attorney were not enough to preclude a violation of Soering's rights under the European Convention. See id.

51. See GILBERT, supra note 1, at 79-90 (discussing human rights provisions and their applicability to and limitation on extradition); Quigley, supra note 6, at 430 (noting that as human rights laws have developed, individuals subject to extradition have obtained in-
agreements stress the "right to life" in varying degrees of importance. Nations that are party to such agreements must look to both national law and human rights agreements to provide appropriate standards when deciding to extradite fugitives in death penalty cases. Also, as mentioned,
conflicts between national law and human rights obligations frequently occur because individuals subject to extradition are empowered to challenge the sovereign actions of the requested state. Thus, the absolute concept of national sovereignty cannot co-exist peaceably with the international concept of human rights. Rather, a delicate balance must be struck.

rights law by international and regional courts as well as quasi-judicial bodies).

54. See European Convention, supra note 6, at 236 ("the [European Human Rights] Commission may receive petitions . . . from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties. . . ."). The United Kingdom's adherence to this provision ultimately allowed Soering to challenge the U.K. extradition decision before the European Court. See Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) 4, 30-31 (1989). Had this provision not been present, Soering, under the traditional rule of non-inquiry, would not have had the opportunity for a substantive review of his claim. See id. at 15, 18 (noting that the U.K. Divisional Court refused Soering's habeas corpus claim because it was premature and, in addition, the U.K. court would not review an extradition decision on grounds that it breached the European Convention); see also supra notes 9-24 and accompanying text (discussing the rule of non-inquiry and traditional judicial review of extradition decisions).

55. See Bassiouni, supra note 51, at 241-42 (noting the tension between these two concepts); cf. John Quigley, The Rule of Non-Inquiry and Human Rights Treaties, 45 CATH. U. L. REV. 1213, 1217 (1996) (stating that modern human rights law provides courts the opportunity to abandon the rule of non-inquiry). Both Quigley and Bassiouni believe that the development of human rights law has led to the abandonment of the rule of non-inquiry. See id.; cf. Bassiouni, supra note 51, at 241-42 (stating that international human rights law has lead to the "erosion of national sovereignty with respect to practices within the context of the administration of criminal justice"). This abandonment erodes sovereignty by forcing requested states to assess the conditions within the requesting state. See O'Boyle, supra note 53, at 97 (stating that Soering requires a state to assess conditions in the requesting state); Johan D. van der Vyver, Sovereignty and Human Rights in Constitutional and International Law, 5 EMORY INT'L L. REV. 321, 393-94 (noting that "the meaning attributed to sovereignty in international law, like its constitutional counterpart, has been subordinated to the protection of human rights"). Such a result gives the requested state a degree of control that invades the "international independence of a state . . . [and its] right and power [to] regulat[e] its internal affairs without foreign dictation." BLACK'S LAW DICTIONARY, supra note 2, at 1396 (defining sovereignty); Judge Edward D. Re, Human Rights, International Law, and Domestic Courts, 4 CARDOZO J. INT'L & COMP. L. 1, 1-2 (1996) (commenting that "the existence of human rights implies a limitation upon the unfettered sovereignty of states, as well as a duty upon nations to respect these rights."); W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, in HUMAN RIGHTS LAW 545, 548 (Philip Alston ed., 1996) (arguing that "no serious scholar still supports the contention that internal human rights are [protected by national sovereignty] and hence insulated from international law [concerning human rights]").

56. This was precisely the problem faced by the European Court in Soering. See 161 Eur. Ct. H.R. (ser. A) at 33-36. The European Court had legitimate concerns about limiting the agreement only to violations that occur inside member states. See id. Such a decision would allow member states to extradite to non-member states without regard for the European Convention. See id. In addition, the court had to consider the effect of interposing in U.S.-U.K. treaty obligations and possibly creating a 'safe-haven' in the United Kingdom for fugitives wishing to avoid extradition to the United States. See id. The resul-
A. The European Court of Human Rights: Soering v. United Kingdom

The European Court of Human Rights57 (European Court) took an important step towards achieving this balance when it held that surrendering a death penalty fugitive to the United States without greater assurance against the imposition of capital punishment would violate the European Convention.58 In 1985, Jens Soering, a German national, and his girlfriend, Elizabeth Haysom, fled the United States after the murder of Haysom’s parents in Bedford County, Virginia.59 They were arrested for fraud the following year in the United Kingdom, and the United States requested their extradition to stand trial for murder.60 Soering objected to his extradition for capital murder, punishable by death, and ultimately challenged the United Kingdom Secretary of State’s decision to extradite him before the European Court.61

57. The European Court of Human Rights and the European Commission of Human Rights (European Commission) exist as part of the European Convention. See European Convention, supra note 6, art. 19, at 234. The European Commission receives all complaints from individuals, and decides whether the complaint is admissible. See Bernhardt, supra note 28, at 299. If the complaint is admitted, the Commission attempts to reach an amicable settlement. See id. If the Commission cannot resolve the dispute, either the Commission or the interested state may bring the matter before the European Court, provided jurisdiction is recognized by the interested state. See id. at 299-300; see also supra note 28 (discussing the ability of individuals to file petitions under the European Convention). The European Court has final decision for any matter. See Bernhardt, supra note 28, at 300; see also supra note 28 (discussing the ability of member states to refuse jurisdiction). The European Court normally sits with nine members, although in some cases a full plenary court of 25 to 40 judges may be called. See Bernhardt, supra note 28, at 301. For a more complete discussion of the European Court by the Vice-President of the Court, see id. at 297-314.


59. See id. at 11. Soering, the son of a German diplomat, attended the University of Virginia with Haysom. See Carlos Santos, Life Focused on Winning Freedom,Former U.Va. Scholar Insists, “I Didn’t Do It”, RICHMOND TIMES-DISPATCH, Mar. 24, 1996, at A8. Soering, who once stated that they referred to their crime as “our little nasty,” contests his guilt to this day. See id. Haysom was extradited without incident, pled guilty, and was sentenced to 90 years imprisonment. See id. The Virginia parole board denied her release in May 1995. See Carlos Santos, Parole Board Denies Haysom Early Release, RICHMOND TIMES-DISPATCH, May 24, 1995, at B4.


61. See id. at 30-31.
After a plenary review, the European Court handed down a decision that forever altered the process of international extradition. In *Soering*, the Court held that the United Kingdom’s decision to extradite Soering to the United States under a charge of capital murder would violate Article 3 of the European Convention, which protects individuals against “inhuman or degrading treatment or punishment.”

62. Soering’s case was heard with 18 judges present, and resulted in an unanimous decision by the European Court. See *id.* at 8; Bernhardt, *supra* note 28, at 312-13.

63. See O’Boyle, *supra* note 53, at 94 (noting that Soering was a “landmark decision” in extradition law as well as international jurisprudence); Lillich, *supra* note 53, at 703-04 (stating that the decision was an “exceptional and precedent-making one,” even though the Court refrained from holding that death row conditions alone violated the European Convention).


65. European Convention, *supra* note 6, art. 3, at 224. Article 3 of the European Convention also protects individuals against torture. *See id.* The European Court declared that the time of confinement on death row, averaging from six to eight years, along with the age and mental state of Soering at the time of the crime, amounted to a breach of Article 3. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 44-45.

age at the time of the crime as well as his mental state, were significant factors for the court, but it also recognized the "death row phenomenon" as a major factor in its decision. The European Court believed that the conditions on death row, particularly the psychological and physical anguish of awaiting execution, when combined with the length of detention, created a phenomenon that exceeded the European Convention's threshold for inhuman or degrading treatment or punishment.

Soering marked a dramatic change in the landscape of extradition law. Before Soering, many European states operated under traditional extradition procedures with little regard for the requirements of human

67. Soering was 18 when the murders were committed. See Soering, 161 Eur. Ct. H.R. (ser. A) at 11.

68. Soering supposedly suffered from "folie à deux," a mental abnormality where a person becomes immersed in the identity of another, and is therefore highly susceptible to that other person's suggestions. See id. at 14. Soering argued that Haysom, through folie à deux syndrome, had persuaded him to murder her parents. See id. In the United Kingdom, folie à deux reduces the culpability of the offender's actions, and acts as a defense to murder, lowering it to manslaughter. See id.

69. The "death row phenomenon," as recognized by the Court, consists of two elements: (1) the length of imprisonment prior to execution, which the Court found to be on average six to eight years; and (2) the conditions on death row, mainly the extreme psychological stress and strict custodial regime employed by the prison. See id. at 42-43. The Court held that the death row phenomenon violated Article 3 of the European Convention. See id. at 44-45.

Another important factor that contributed to the European Court's decision was the involvement of the Federal Republic of Germany. See id. at 12-13. The West German government formally requested Soering's extradition to Germany to stand trial after Soering was interviewed by a German prosecutor. See id. at 12. The U.K. government believed that the evidence against Soering collected by the prosecutor would not amount to a prima facie case in Germany, and therefore proceeded with the U.S. request. See id. at 12-13. Addressing the issue, the European Court noted the Commission and United Kingdom's argument that extradition to Germany would create a double standard whereby fugitives subject to requests from alternative jurisdictions without the death penalty would be better protected than those who were not. See id. at 44. The Court stated that this argument presented a "circumstance of relevance" to its decision. Id.

70. See supra at 44-45.

71. See Stephan Breitenmoser & Gunter E. Wilms, Human Rights v. Extradition: The Soering Case, 11 Mich. J. Int'l L. 845, 879-83 (1990) (stating that the Soering decision represented a new age in international law where individuals would have greater rights under extradition treaties); O'Boyle, supra note 53, at 93-94, 106-07 (noting that Soering was a highly important decision for human rights and will likely result in increased extradition challenges in national and international courts). Soering imposed a duty upon requested states to consider the treatment a fugitive will receive in the requesting state. See Soering, 161 Eur. Ct. H.R. (ser. A) at 34-36. In addition, Soering was the first international human rights case to recognize the death row phenomenon. See Lillich, supra note 53, at 703-04.

72. See supra notes 9-24 and accompanying text (noting that judicial review was usually limited to the sufficiency of the request, that is, whether all the proper formalities had been observed, instead of any substantive review of the possibility of human rights viola-
Many states felt that the obligation to consider such agreements during extradition applied only to violations occurring within the requested state, and that challenges to an extradition decision could not be based on possible future harm occurring in a nation not party to the agreement. The Soering decision rejected this view by holding that member states must prevent both real harm within their own jurisdiction, as well as prevent "all and any foreseeable consequences of extradition suffered outside their jurisdiction." Consequently, when making extradition decisions, member states may consider their own concerns, but

73. Cf. Shea, supra note 9, at 88-89. Prior to Soering, U.K. courts would not review decisions of the U.K. Secretary of State based solely upon allegations that the Secretary had failed to consider possible breaches of the European Convention. See Soering, 161 Eur. Ct. H. R. (ser. A) at 18; see also supra note 49 and accompanying text (discussing the nature of review by U.K. courts in such situations).

74. See Soering, 161 Eur. Ct. H.R. (ser. A) at 32-33 (discussing the United Kingdom’s arguments against the application of Article 3 of the European Convention to extradition decisions); see also Regina C. Donnelly, Case Comment, Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 348 (1990) (stating that the Soering decision was a departure from the European Court’s usual discussion, because it concentrated on the possibility of future, rather than past, violations of Article 3 in a non-member, rather than member, state).

If Soering had been subjected to torture in a U.K. prison, a clear violation of Article 3 would exist, because the torture had occurred within a member state. See European Convention, supra note 6, art. 3, at 224 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). Alternatively, Soering addressed the possibility of a violation in a non-member requesting state. See Soering, 161 Eur. Ct. H.R. (ser. A) at 34-36. This presented not only the problem of the applicability of Article 3 to non-member states, but also the problem of considering harm not yet inflicted. See O’Boyle, supra note 53, at 96-98. Thus, the Court would be applying the European Convention to the possible future actions of non-member states based upon predictions of possible treatment. See id. (discussing the European Court’s approach to this dilemma). This constituted a large part of the United Kingdom’s argument in Soering, and was expressly rejected by the European Court. See Soering, 161 Eur. Ct. H. R. (ser. A) at 33-34.

In addition, in arguing against the application of Article 3 to extradition proceedings involving non-member states, the United Kingdom asserted in Soering that it would interfere with rights and obligations under treaties, and force member states into evaluating the judicial systems of non-member states. See id. at 33. In essence, the United Kingdom argued all the traditional justifications for the rule of non-inquiry. See supra notes 9-16 and accompanying text (discussing the justifications for the rule of non-inquiry).

75. Soering, 161 Eur. Ct. H.R. (ser. A) at 33-34. Such a result culminates in the subjection of national sovereignty to human rights. See O’Boyle, supra note 53, at 96-97. The European Court not only adjudicated the actions of the member state (the United Kingdom), but it also examined the sovereign actions of a non-member state (the United States) before they occurred and without absolute evidence that they would. See Soering, 161 Eur. Ct. H.R. (ser. A) at 32-50 (analyzing the actions of the United States and United Kingdom, and giving justifications for the decision to apply a foreseeability standard to the U.K.’s extradition decision); see also supra note 56 (discussing the European Court’s balancing of national sovereignty and human rights).
also must consider the requirements of the European Convention. Thus, Soering created uniformity within Europe to the extent that it established the level of scrutiny necessary for extradition to a state that imposes the death penalty. Outside of Europe, the Soering decision has been noted as providing persuasive reasoning for both national courts and other international human rights bodies to reexamine their treatment of extradition law.

B. United Nations Human Rights Committee—Post-Soering Death Penalty Extradition Cases Under the ICCPR

The United Nations Human Rights Committee (UNHRC) also has dealt with the complex issues presented in Soering. In two separate cases, the UNHRC reviewed the extradition of death penalty fugitives from Canada to the United States. In these two cases, unlike the facts

---

76. See Soering, 161 Eur. Ct. H.R. (ser. A) at 33-34; see also Breitenmoser & Wilms, supra note 71, at 879, 881 (noting the European Court's implicit rejection of the concept that extradition is a matter solely between states); Donnelly, supra note 74, at 347 (stating that the Soering decision meant that the European Convention takes precedence over any concurrent extradition treaty obligations with a non-member state).

77. See Soering, 161 Eur. Ct. H.R. (ser. A) at 33-34. It is important to note that all member states give great deference to the competency of the European Court. See Bernhardt, supra note 28, at 303. Member states have respected all decisions of the court without exception, despite the lack of any unequivocal requirement to do so. See id. at 303-04. Additionally, member states are unlikely to denounce any decision by the court, since public opinion would likely oppose such action. See id. at 303. Thus, the “foreseeable consequences” test within Soering is applicable to all member states. See Soering, 161 Eur. Ct. H.R. (ser. A) at 34 (referring to the “foreseeable consequences” test as a responsibility of all member states).

78. See O'Boyle, supra note 53, at 106-07 (noting that Soering will be a “fertile source of doctrine” for courts outside the European Convention); Shea, supra note 9, at 111, 126 (stating that Soering encourages a revisitation of the justifications underlying current extradition practices).


of the Soering case, the Canadian Minister of Justice had decided not to seek any assurances that the death penalty would not be imposed. Thus, a critical issue for the UNHRC was not the level of assurances required, but rather if any assurances were necessary at all. While the UNHRC found a human rights violation in only one of the cases, the reasoning in each decision was relatively uniform in its approach to the issues involved in death penalty extradition.

1. Setting the Stage for Change: Kindler v. Canada

In Kindler v. Canada, the UNHRC attempted to achieve a delicate balance between state sovereignty and human rights. Although the UNHRC found no violation of ICCPR, the Committee established a framework it would use to address death penalty extradition. The case involved Joseph Kindler, a convicted murderer and kidnapper who had escaped from Pennsylvania authorities and fled to Canada. After his arrest in Canada in 1987, U.S. officials requested his extradition, and Canada proceeded to extradite Kindler without seeking assurances that the death penalty would not be imposed. Kindler appealed, and the

84. See infra notes 116-18 and accompanying text (discussing the similarities of Kindler and Ng and the standards established by the two decisions).
85. See Kindler, 14 HUM. RTS. L.J. at 314 (laying out the relevant considerations for death penalty extradition).
86. See id. at 307-09. In 1982, Kindler was arrested for the death of a burglary suspect who had agreed to give testimony exposing a burglary ring in which Kindler was involved. See Edward Colimore, Double Escapee Caught a 2d Time in Canada, PHILADELPHIA INQUIRER, Sept. 7, 1988, at B4. Kindler beat the witness to death with a baseball bat and pipe, tied a cinder block around his neck, and threw the body into the Delaware River. See Toni Locy, TV Tip Leads to Capture of Phila. Killer in Canada, PHILADELPHIA DAILY NEWS, Sept. 7, 1988, at 4. A Pennsylvania jury convicted Kindler in 1983 for kidnapping and murder, and recommended that he be put to death. See id.; see also Kindler, 14 HUM. RTS. L.J. at 308. Shortly before his sentencing, Kindler escaped the Philadelphia Detention Center by sawing through the bars on his cell window and climbing a barb-wire fence. See Scott Flander, City Murderer Flees in Canada, PHILADELPHIA DAILY NEWS, Oct. 27, 1986, at 3. He made his way to Canada and was arrested in 1985, only to escape again in 1986 before Canada could extradite him to the United States. See id. Kindler and another prisoner broke through a skylight and lowered themselves to the street below using a rope made of bedsheets. See id. Finally, in 1987, Kindler, at this point on the FBI’s Most Wanted list, was captured in Canada after several friends recognized him from a taped segment of TV’s “America’s Most Wanted.” See Colimore, supra, at B4. Kindler had assumed an alias and was arrested at his job. See id.
87. See Kindler, 14 HUM. RTS. L.J. at 308. The Minister of Justice for Canada has discretion to seek assurances under the Canadian Extradition Act of 1985. See id. Section 25 of the Act gives the Minister of Justice power to order the surrender of a fugitive who has been approved for extradition. See id.
Supreme Court of Canada held that the decision to extradite Kindler without assurances did not violate the Canadian Charter of Rights and Freedoms. Kindler challenged the Canadian Court's decision before the UNHRC, arguing that his rights were violated under the ICCPR. Canada, however, extradited Kindler the day the Supreme Court of Canada announced its opinion, ignoring the UNHRC's request to halt extradition. Despite the Canadian government's actions, the UNHRC found that no violation of the ICCPR had occurred. Although the UNHRC established that Canada had an obligation under the ICCPR to examine any possible violations of Kindler's rights by the United States, the Committee did not validate Kindler's claims that the death penalty itself was "cruel and inhuman treatment" or that conditions on death row in

88. See Kindler, 14 HUM. RTS. L.J. at 308; see also Kindler v. Canada (Minister of Justice) [1991] 2 S.C.R. 779, 780. The Canadian Charter of Rights and Freedoms (Canadian Charter) is the Canadian equivalent of the U.S. Bill of Rights. See Frank Iacobucci, Judicial Review by the Supreme Court of Canada Under the Canadian Charter of Rights and Freedoms: The First Ten Years, in HUMAN RIGHTS, supra note 28, at 93, 96. The Supreme Court of Canada may declare legislation invalid if it conflicts with the protections contained within the Canadian Charter. See id. at 94. The protections include civil liberties (such as freedom of religion), basic legal rights (such as the right to a fair trial), and various democratic rights (such as the right to vote). See id. at 96.

89. See Kindler, 14 HUM. RTS. L.J. at 307-08. Specifically, Kindler alleged that "the death penalty per se constitutes cruel and inhuman treatment or punishment, and that conditions on death row are cruel, inhuman and degrading . . . [and] the judicial procedures in Pennsylvania, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice." Id. at 308. Kindler, a white male, also alleged racial bias in the imposition of the death penalty, but did not provide any evidence supporting his claim. See id.

90. See id. at 308, 314.

91. See id. at 314. The UNHRC expressed its "regret" that Canada did not comply with the request to halt extradition. See id.; see also Keith Highet & George Kahale III, International Decisions, 87 AM. J. INT'L. L. 128 (1993).

92. See Kindler, 14 HUM. RTS. L.J. at 309 (establishing a "necessary and foreseeable consequence" standard). Note the similarity between the UNHRC's approach and the European Court's approach in Soering. See id.; see also supra note 75 and accompanying text (discussing the "foreseeable consequence" standard enunciated by the European Court in Soering). Both decisions require the requested state to apply a foreseeability standard to extradition decisions that necessarily involves inquiries into the requesting state. See Kindler, 14 HUM. RTS. L.J. at 309; Soering, 161 Eur. Ct. H.R. (ser. A) at 34-35 (1989). Such a practice, at least for national courts, would be in direct conflict with the rule of non-inquiry. See supra notes 9-16 and accompanying text (discussing the rule of non-inquiry). Although they do not expressly state the intent, both the UNHRC and the European Court apply their respective human rights agreements in a way that, if followed, forces nations to abandon the rule of non-inquiry and traditional theories of extradition and national sovereignty. See discussion infra Part II.C. (showing how the decisions of the UNHRC and European Court have changed extradition law).

93. Kindler, 14 HUM. RTS. L.J. at 309. The UNHRC referred to Article 7 of the ICCPR, which reads: "No one shall be subjected to torture or to cruel, inhuman or de-
Pennsylvania failed to meet the "basic requirements of justice." The UNHRC stated that the ICCPR does not prohibit the death penalty, and furthermore, that Kindler had presented no evidence that the conditions on Pennsylvania's death row violated the ICCPR. The UNHRC also determined that the ICCPR does not require state parties to refuse extradition in death penalty cases or to seek assurances from the requesting state.

9. Kindler, 14 Hum. RTS. L.J. at 308, 314. The UNHRC believed that Kindler had received an opportunity to challenge his conviction, both in the United States and Canada. Cf. id. at 314 (stating that Kindler was extradited "following extensive proceedings in the Canadian Courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction [in the United States]"). The UNHRC carefully selected its language, expressing a desire that in circumstances similar to these, assurances would have been a proper measure. See id. Also, the Committee did not rule out the possibility that if particular facts were different, a violation could occur. See id. (noting the factors which, if sufficient, "could constitute a violation" of the ICCPR).


96. See Kindler, 14 Hum. RTS. L.J. at 314 (holding that Article 6 of the ICCPR does not require the requested state to seek assurances, but noting that extradition decisions may not be made "arbitrarily or summarily."). The UNHRC's decision in Kindler creates an unusual paradox for requested states subject to the ICCPR. Although the requested state need not seek any assurances under the ICCPR, the UNHRC's decision in Kindler requires that the requested state consider any foreseeable risk of real harm within the requesting state. See id. at 313-14. Therefore, two options exist. First, a state could carefully weigh the possibility of harm, and, after deciding no risk existed, extradite without assurances as was done in Kindler and Ng. See Ng v. Canada, Communication No. 469/1991, U.N. GAOR, Hum. RTS. Comm., 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994), at 189, 190; Kindler, 14 Hum. RTS. L.J. at 307-08. Instead, the state could seek assurances against capital punishment and avoid any need to consider the possibility of harm. Cf. Marian Nash Leich, Extradition: Exemptions from Extradition, 1981-88 Cumulative Digest of United States Practice in International Law 746-47 (1993) (discussing the resolution in the aftermath of Soering, where the United Kingdom received absolute assurance that Soering would not face the death penalty from both the federal government and Virginia authorities, preventing violation of the European Convention). By requesting assurances, there would be no possibility for violation of the ICCPR because the requesting state would fulfill its ICCPR obligation (barring any other type of human rights violation). Cf. id. (noting the success of Soering's extradition once
Despite its failure to find a violation of the ICCPR, the UNHRC established several factors that should be examined in matters similar to the Kindler case. These factors included the fugitive's relevant personal attributes, the specific conditions on death row, and "whether the proposed method of execution is particularly abhorrent." The UNHRC recognized the Soering decision, but distinguished it from the facts pres-

the assurances were received). Since this second option involves no risk of committing a violation, a requested state is unlikely to choose the first option, barring other concerns, since it leaves the state subject to a finding of a violation by the UNHRC if the UNHRC does not agree with the requested state's assessment of the foreseeable risk of harm. See Soering, 161 Eur. Ct. H.R. (ser. A) 4, 45 (1989) (disagreeing with the U.K. Secretary of State's assessment of harm, and finding that extradition violated the European Convention). Thus, while Kindler appears to leave the issue of seeking assurances untouched, implicitly it provides a requested state with reason to seek assurances against capital punishment. Cf. Kindler, 14 HUM. RTS. L.J. at 309 (stating that "a State party clearly is not required to guarantee the rights of persons within another jurisdiction" but if the State makes a decision regarding extradition, and the "necessary and foreseeable consequence is that the person's rights will be violated in another jurisdiction, the State party itself may be in violation of the Covenant"). This implicit incentive to seek assurances must be weighed by the requested state against the desire for amiable foreign relations and international cooperation in criminal matters when it considers death penalty extradition. See id. at 311 (noting that Canada believed that asking for assurances would lead to an increase in the number of fugitives seeking protection from American courts).

97. See Kindler, 14 HUM. RTS. L.J. at 314.

98. See id. The UNHRC, giving "careful regard" to the European Court's decision in Soering, considered the same personal factors as those used in Soering, namely age and mental state. Id. Neither factor was relevant to Kindler, since he was above the age of majority and introduced no evidence of mental state during his crime. See id.

99. See id. Kindler offered "no specific submissions" of any mistreatment or possible effects of prolonged detention on death row. Id. at 311-12, 314. Instead, he relied primarily upon the death row phenomenon argument on its face. See id. at 311-12. The UNHRC, however, had already limited the scope of the argument, disagreeing with the European Court in finding that "prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons." Id. at 309 (quoting its earlier decision in Pratt and Morgan v. Jamaica, Communication Nos. 210/1986, 225/1987, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 222, U.N. Doc. A/44/40 (1989)).

100. See id. at 314. The proposed method of execution in Pennsylvania was lethal injection, which the Court agreed with Canada to be one of the least painful methods available. See id. at 311.

Once again, note the similarity between the UNHRC's approach and the approach taken in Soering. See Soering, 161 Eur. Ct. H.R. (ser. A) at 44-45 (stating that the conditions on death row and the personal circumstances of Soering (age and mental state) were important factors to be considered); see also supra note 75 and accompanying text (discussing the foreseeability standard adopted by the European Court in Soering); supra note 92 (discussing the similarity of the two approaches used in Soering and Kindler). The main difference in these decisions resulted from the UNHRC's refusal to recognize the death row phenomenon as a component of ICCPR violations. See Kindler, 14 HUM. RTS. L.J. at 314. The Committee recognized that many of the delays in execution resulted from numerous appeals by the prisoner, and therefore, it required a more extensive factual base to support any challenge against the penal conditions within a requesting state. See id.
ent in *Kindler*.\(^\text{101}\) The UNHRC noted that both age and mental state were relevant concerns in *Soering*, but that those factors were not at issue in *Kindler*.\(^\text{102}\) The Committee also noted that *Kindler* had presented little evidence as to prison conditions in Pennsylvania, the possible effects of the long delay before execution, or the chosen method of execution, lethal injection, which would support the finding of a violation.\(^\text{103}\)

2. *Same Rhyme, Different Reason*: *Ng v. Canada*

Building upon the framework established in *Kindler*, the UNHRC, in *Ng v. Canada*,\(^\text{104}\) determined that a death penalty fugitive's extradition to the United States would violate the ICCPR.\(^\text{105}\) By doing so, the UNHRC clarified what types of conduct by the requesting state would violate the ICCPR. Charles Chitat Ng, suspected of having committed twelve murders in California during 1984 and 1985,\(^\text{106}\) fled to Canada, and subsequently was charged and convicted in Canada for killing a security guard during a theft attempt.\(^\text{107}\) In 1987, U.S. authorities requested Ng's extradition, and after several appeals, the Supreme Court of Canada held that Ng's extradition without assurances, like *Kindler*'s, did not violate the Canadian Charter of Rights and Freedoms.\(^\text{108}\)

\(^\text{101}\) See *Kindler*, 14 HUM. RTS. L.J. at 314.
\(^\text{102}\) See id.; see also supra note 98 (discussing *Kindler*'s age and mental state).
\(^\text{103}\) See *Kindler*, 14 HUM. RTS. L.J. at 314.
\(^\text{105}\) See id. at 206.
\(^\text{106}\) See id. at 189. Charles Ng, a British subject born in Hong Kong and a U.S. resident, and his accomplice Leonard Lake feared the coming of a nuclear holocaust. See id.; Charles Finnie, *The Traveling Ng Show*, 15-OCT Cal. Law. 39 (1995). In preparation, the two men stocked their Calaveras County, California cabin and bunkers with weapons, food, and "sex slaves." See id. The two men enticed or kidnapped their victims, inflicted sexual torture, abuse, and ultimately death. See id. Both men fled to Canada and were captured in 1985. See Ken Ellingwood, *O.C. Gets 6 Tons of Paperwork on Transferred Murder Case*, L.A. TIMES, Aug. 6, 1995, at B1. Lake killed himself with cyanide several days after his arrest. See id. Ng spent over six years in Canada before his extradition to the United States, which, through pure coincidence, occurred on the same day as *Kindler*'s extradition. See id.; see also Ng, U.N. Doc. A/49/40 (1994), at 189; *Kindler*, 14 HUM. RTS. L.J. at 308. Since returning to California, Ng has spent another seven years torturing the California legal system, and as of January 1998, has not been tried. See *Evidence Destroyed in Slaying in Which Mass Murder Suspect Is Charged*, L.A. TIMES, Oct. 19, 1997, at A33 [hereinafter *Evidence Destroyed*] (noting that Ng is scheduled for trial sometime in 1998). The cost of the trial, more than $6 million to date, far exceeds the cost of O.J. Simpson's trial, and evidence linked to the case once had to be moved by an 18-wheeler truck. See Ellingwood, supra; Finnie, supra, at 39.
\(^\text{108}\) See id. at 189-90. The decision to extradite was made the same day as *Kindler*'s case, and after the cases were announced, Canadian authorities transferred both men back
Unlike its decision in *Kindler*, the UNHRC disagreed with the Canadian Minister of Justice’s decision to extradite Ng, holding that the action had violated the ICCPR. Applying the test enunciated in *Kindler*, the UNHRC focused almost exclusively upon the method of execution. The UNHRC found that California’s primary method of execution, cyanide gas asphyxiation, violated the ICCPR. The UNHRC reaffirmed that any punishment must “cause the least possible physical and mental suffering” and that recent evidence concerning the use of the gas chamber suggested that this method of execution caused significant pain and agony. Therefore, the UNHRC believed that the extradition of Ng to California, without assurances, violated the ICCPR Article 7 requirement against “cruel, inhuman or degrading treatment or punishment.” The UNHRC requested that Canada attempt to persuade the United States not to impose capital punishment, and take steps to ensure that similar situations would not arise in the future.

to U.S. soil within a matter of hours. See Hight & Kahale, *supra* note 91, at 128. Ng, like *Kindler*, also had made an immediate appeal to the UNHRC, which subsequently was ignored by the Canadian government. See *id.* at 131.


110. See *id.* The UNHRC made no mention of Ng’s age or mental state, most likely because Ng’s counsel relied extensively upon the death row phenomenon argument, and did not raise the other factors. See *id.* at 199-200, 205 (noting that Ng’s counsel quoted from the *Soering* decision, and argued that the death row phenomenon provided a basis for finding a violation of the ICCPR). The only mention of the “personal factors” considered in *Soering*, and mentioned in *Kindler*, was that the death row phenomenon had produced an effect on Ng’s mental state while in prison. See *id.* at 200; see also *supra* notes 98-100 and accompanying text (outlining the relevant factors used in *Kindler*).

111. See Ng, U.N. Doc. A/49/40 (1994), at 205. Ng provided evidence that cyanide gas asphyxiation could take up to twelve minutes to kill its victim, with noticeable pain and agony. See *id.* at 200.

112. *Id.* at 205. The UNHRC reaffirmed the standard it originally set forth in General Comment 20[44] on Article 7 of the ICCPR. See *id.*

113. See *id.* Ng submitted evidence that during execution by cyanide gas, victims often remained conscious, suffered obvious pain and agony, convulsed, drooled, and soiled themselves. See *id.* at 200.

114. *Id.* at 205; see also ICCPR, *supra* note 7, art. 7, at 175.

115. See Ng, U.N. Doc. A/49/40 (1994), at 206. Whether the request will be followed, or if it will be successful, remains to be seen since Ng has yet to stand trial. See Evidence Destroyed, *supra* note 106, at A33. The conflict that arose in Ng is still a matter a debate between the Canadian executive and judicial branches. In December of 1997, a Canadian appeals court blocked the decision of the Justice Minister of Canada to extradite two Canadians to Washington state without assurances against capital punishment. See *Top Canada Court Takes Extradition Case*, NEWS TRIB. (Tacoma), Dec. 5, 1997, at B3. The case was accepted for review by the Supreme Court of Canada, which will face issues almost identical to those presented in Ng. See *id.*
The Ng decision established that the UNHRC was willing to tread the same ground as the European Court in Soering. The UNHRC expressed a desire that requested states incorporate ICCPR standards into their extradition proceedings. Similar to the affect of Soering on states party to the European Convention, the Ng and Kindler decisions helped to create a level of uniformity for nations party to ICCPR by establishing the obligations of requested states in death penalty extraditions.

C. A New World Order? Death Penalty Extradition After Soering, Kindler, and Ng

The decisions of the European Court and the UNHRC resolved the conflict between human rights and extradition with a clear winner—human rights. After the decisions in Soering, Kindler, and Ng, little doubt

116. See Ng, U.N. Doc. A/49/40 (1994), at 204-205. The UNHRC performed the same balancing that took place in Soering, namely, national sovereignty versus human rights. Cf. id. (weighing the interests of the Canadian government against the obligations of the ICCPR). Like the European Court, the UNHRC applied the ICCPR in a way that eroded national sovereignty in favor of broader application of human rights principles. Cf. id. at 192, 204-05 (deciding that the UNHRC had jurisdiction for claims of human rights violations during extradition proceedings, and stating that in certain circumstances, the obligations of the ICCPR would outweigh national interests and extradition treaty obligations); see also supra note 75 and accompanying text (discussing how Soering advances human rights at the expense of national sovereignty).

117. See id. at 203 (“A State party to the Covenant must ensure that it carries out all its other legal commitments in a manner consistent with the Covenant.”).

118. See id. at 203-04. A nation party to the ICCPR must, after the decisions in Kindler and Ng, consider whether there is a real, foreseeable risk that extradition will lead to a violation of the ICCPR. See id. at 203; Kindler v. Canada, 14 HUM. RTS. L.J. 307, 309 (1993).

119. See Soering, 161 Eur. Ct. H.R. (ser. A) at 35-36 (1989) (requiring that member states make extradition decisions in light of their obligations under the European Convention). Clearly, the European Court believed that regardless of the safeguards provided within an extradition treaty, the European Convention warranted independent consideration. See Donnelly, supra note 74, at 347 (stating that member states must give priority to the European Convention over concurrent extradition treaty obligations); Roecks, supra note 29, at 205-06 (arguing that Soering held that the European Convention provides fugitives with substantive and procedural rights).

The UNHRC took a view similar to the European Court, but was less assertive about the need for assurances against capital punishment as safeguards against violation of the ICCPR. See Kindler, 14 HUM. RTS. L.J. at 313-14 (stating that a member state must execute all treaty obligations “in a manner consistent with” the ICCPR, however, the Article 6 provision, discussing the death penalty does not mandate assurances against capital punishment).

To underscore the importance of the decisions by these bodies, it is important to note the effect of their respective human rights agreements. As of 1993, 32 nations have joined the European Convention, with new applications for membership from Central and Eastern Europe under consideration. See Bernhardt, supra note 28, at 300-01. By 1993, over 122 nations were signatories to the ICCPR. See McGoldrick, supra note 27, at xlivii. In
remains that human rights agreements, in the eyes of international human rights bodies, take precedence over bilateral extradition treaties, particularly when the death penalty is involved. The notion of the sovereign state engaging in extradition procedures uninhibited by judicial control no longer has a place under the new human rights regime.

In light of the decisions of the European Court and the UNHRC, a state engaging in death penalty extradition must be aware of three new considerations. First, when the requested state is member to a human rights agreement, such as the European Convention or the ICCPR, and is extraditing to a non-member state, it still must comply with the relevant obligations imposed by that agreement. More simply stated, the member state’s obligation to prevent foreseeable harm does not stop at its border. This obligation typically falls under the responsibility of the

---

1992, the United States became the 115th nation to ratify the ICCPR. See William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 BROOK. J. INT’L L. 277, 277 (1995). The U.S. ratification of the ICCPR has raised numerous problems, primarily because the Senate included controversial reservations, including two reservations aimed at limiting the application of the ICCPR to U.S. capital punishment. See id. at 277-80. For a complete discussion of the United States’ ratification of the ICCPR, see generally U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS (Hurst Hannum & Dana D. Fischer eds., 1993).

120. See O’Boyle, supra note 53, at 106 (stating that extradition to jurisdictions that retain the death penalty will be more difficult and perhaps impossible for member states of the European Convention); Roecks, supra note 29, at 215-16 (noting that Kindler and Ng obligate ICCPR member states to assess whether the penal systems of requesting states meet ICCPR human rights standards).

121. See Shea, supra note 9, at 111 (stating that Soering provided grounds upon which national courts could depart from the rule of non-inquiry and examine the human rights records of requesting states); see also Roecks, supra note 29, at 216 (noting that Kindler and Ng turned the requested state into a “human rights forum,” where the human rights condition of non-member states will be judged by the standards of the ICCPR).

122. Cf. Roecks, supra note 29, at 205-06 (describing the effects of Soering on a state’s ability to extradite death penalty fugitives).

123. See Kindler, 14 HUM. RTS. L.J. at 156 (“If a State party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”); see also Soering, 161 Eur. Ct. H.R. (ser. A) at 35 (stating that “in the Court’s view this inherent obligation not to extradite [under certain threat of torture, inhuman or degrading punishment] also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment...” (emphasis added)).

124. See Soering, 161 Eur. Ct. H.R. (ser. A) at 34-35. The requested state must not only protect a fugitive’s rights inside its own borders, but it also must provide constructive protection of the fugitive’s rights outside its borders once the fugitive is in the requesting state. See id. In essence, a fugitive is given a set of rights he would not otherwise have (unless the requesting state is party to the applicable human rights agreement), and carries these rights with him into the requesting state. See Roecks, supra note 29, at 205, 215-16
head of state, when the requested nation's law gives the head of state discretion in making such decisions.\textsuperscript{125} Before the state may extradite, the head of state must consider not only violations of the agreement resulting in real harm within the state's own jurisdiction, but also any foreseeable violations within the requesting state.\textsuperscript{126} Second, the member state must incorporate these obligations into its extradition law.\textsuperscript{127} Review of an extradition decision cannot be limited solely to the language of an extradition treaty; it also must include scrutiny of the requesting state's legal and penal system for compliance with the standards of the relevant human rights agreement.\textsuperscript{128} In practical terms, this means that a review of

\begin{itemize}
\item See Gilbert, supra note 1, at 36 (noting that "it is left to the executive to make its own decision on the case before authorising the fugitive’s surrender . . . "); Semmelman, supra note 10, at 1198 (stating that, in the United States, "[a] defendant who anticipates unfair or abusive treatment following extradition may seek relief on that ground only from the Secretary of State, who has discretion to deny the extradition request").
\item See Soering, 161 Eur. Ct. H.R. (ser. A) at 34 (refusing to absolve requested states from responsibility for "all and any foreseeable consequences of extradition suffered outside their jurisdiction"); see also Kindler, 14 Hum. RTS. L.J. at 309, 313 (holding the requested state responsible for any foreseeable risk of real harm within the requesting state).
\item Cf. Soering, 161 Eur. Ct. H.R. (ser. A) at 35-36 (finding that where a real risk of violation exists, the member state has a responsibility under the European Convention to refuse extradition); Roecks, supra note 29, at 200 (noting how the European Court meshed extradition law with the obligations of the European Convention when it found "an inherent obligation not to extradite" if it was foreseeable that the fugitive would be subjected to torture in the requesting state).
\end{itemize}

The UNHRC also incorporated obligations under the ICCPR into extradition law. See Kindler, 14 Hum. RTS. L.J. at 314. The UNHRC noted that while Canada itself did not impose the death penalty, any extradition that involved a real risk of a violation of Article 6 of the ICCPR (the provision concerning the death penalty) would be a violation enforceable against the member state. See id. In addition, Article 2(3)(b) of the ICCPR requires that member states protect individuals by ensuring judicial, administrative, or legal review of claims. See ICCPR, supra note 7, art. 2(3)(b), at 174. Although the language of the provision appears to provide broad discretion to states in determining how to satisfy this protection, states nevertheless must apply the ICCPR to any governmental entity that addresses a matter involving a ICCPR-based right. See Quigley, supra note 55, at 1224 n.71.

\begin{itemize}
\item See Kindler, 14 Hum. RTS. L.J. at 313; Soering, 161 Eur. Ct. H.R. (ser. A) at 35-36. For example, in Soering, the European Court stated that the "object and purpose" of the European Convention required that its provisions be interpreted and applied in a way that made the protections offered "practical and effective." Id. at 34. The Court expanded Article 3 of the European Convention to encompass extradition by finding that any contrary result would be incompatible with the "underlying values" of the Convention. Id. at 35. After Soering, any requested state within the European Convention must consider not only practiced extradition law, but also potential human rights violations within the requesting state. See id. at 36 (stating that an extradition decision, in addition to traditional procedure, "inevitably involves an assessment of conditions in the requesting..."
the head of state's decision to extradite should be provided, and it must go beyond traditional extradition law by providing a greater focus on human rights.129 Third, to comply with the two previous principals, national courts in the requested state should abandon the rule of non-inquiry and become active participants in the extradition process.130

country against the standards of Article 3 of the [European] Convention"); see also Quigley, supra note 6, at 426 (noting that Soering made the European Convention an integral part of extradition decisions in the United Kingdom).

129. Cf. Quigley, supra note 6, at 438-39 (commenting that “[I]f a rule of non-inquiry exists, [which leaves the decision in the hands of the executive,] it is inconsistent with human rights law" and requires courts to refuse extradition to a state which may violate the fugitive's human rights).

130. Cf. Quigley, supra note 55, at 1224-25 (stating that the UNHRC expects national courts to enforce the protections created within the ICCPR). These protections are applicable to extradition proceedings. See Kindler, 14 HUM. RTS. L.J. at 313-14; see also O'Boyle, supra note 53, at 106-07 (noting that Soering increased the involvement of domestic courts in extradition proceedings); Shea, supra note 9, at 111 (noting that Soering presented the opportunity for European judges to abandon the rule of non-inquiry in extradition proceedings). On the most basic level, the co-existence of human rights law and the rule of non-inquiry cannot be maintained. See Quigley, supra note 6, at 438. As international courts create greater protections for individuals subject to extradition, as in Soering, national courts may be persuaded, or even forced, to block extradition on humanitarian grounds. See O'Boyle, supra note 53, at 106-07 (noting that Soering will provide persuasive reasoning for domestic courts subject to human rights agreements similar to the European Convention).

Neither the European Court nor the UNHRC expressly called for greater judicial involvement. See supra Parts II.A.-B (discussing the holdings of the European Court and the UNHRC). The reasoning in the cases of these two quasi-judicial bodies, however, provides a solid foundation upon which a domestic court may expand the nature of its inquiry. See Shea, supra note 9, at 111. Involving domestic courts may be highly desirable for requested states, since both the European Court and the UNHRC pay particular attention to judicial proceedings within the requested state. See, e.g., Ng v. Canada, Communication No. 469/1991, U.N. GAOR, Hum. RTS. Comm., 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994), at 189; Kindler v. Canada, Communication No. 470/1991, views adopted on July 30, 1993, 14 HUM. RTS. L.J. 307, 314 (1993); Soering, 161 Eur. Ct. H.R. (ser. A) at 16-20. In addition, neither the European Court nor the UNHRC may hear a matter until all domestic remedies have been exhausted. See ICCPR, supra note 7, art. 41(1)(c), at 182; European Convention, supra note 6, art. 26, at 238. Therefore, a requested state may maintain control over its extradition decisions and mitigate the involvement of international courts by increasing the involvement of their domestic courts. Cf. Quigley, supra note 55, at 1223-29 (discussing the enforcement obligations of national courts, and the subsequent interpretation of those obligations by national courts). Finally, both the ICCPR and the European Convention contain provisions which anticipate that domestic courts will be active participants in enforcing human rights protections. See ICCPR, supra note 7, art. 2(3)(b), at 174 (providing that parties to the ICCPR must ensure that a "competent judicial, administrative or legislative authority") determines the rights of the individuals under the ICCPR); European Convention, supra note 6, art. 13, at 232 (stating that "[e]veryone . . . shall have an effective remedy before a national authority"); see also Quigley, supra note 55, at 1224-25 (noting that the UNHRC emphasizes the priority of national courts enforcing ICCPR obligations and polls domestic courts to determine the level of compliance).
Rather than limit its inquiry to procedural matters within the requested state, courts should examine any possible violation of human rights agreements resulting from extradition. In essence, courts should take an active role in ensuring that the state complies with the first two considerations.

The application of these three general principles result in an increased "internationalization of domestic adjudication." National courts, free from their traditional restraints, may begin to participate in the pro-

---

131. See Kindler, 14 Hum. RTS. L.J. at 313-14; Soering, 161 Eur. Ct. H.R. (ser. A) at 34-36. Naturally, this must be the case if the state wishes to prevent a violation of the human rights agreement. See id. at 44-45 (finding that extradition, although permissible under the U.S.-U.K. Extradition Treaty, would trigger a violation of Article 3 of the European Convention). Of course, violations still may be avoided under the traditional extradition practice, which leaves the decision largely within the discretion of the head of state. See Kindler, 14 Hum. RTS. L.J. at 314 (finding that the Canadian Minister of Justice's decision not to extradite did not violate the ICCPR because the decision was made after "careful consideration"). But see infra Part IV (discussing Venezia and the Italian Constitutional Court's finding that the discretionary power to extradite, left in the hands of the Justice Minister, was contrary to the Italian Constitution). The involvement of the judiciary, however, would provide greater protection against the intervention of international human rights bodies and the surrendering of national sovereignty to international human rights interests. See supra note 75, (discussing the erosion of national sovereignty by human rights law); infra note 133 (discussing the responsibilities and benefits of domestic court involvement in extradition decisions).

132. See Francesco Francioni, The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 15, 16 (Benedetto Conforti & Francesco Francioni eds., 1997) (stating that "national judges have greater opportunities and responsibilities than in the past, both for shaping a new consciousness of international human rights in domestic law, and for providing effective remedies against breaches . . . [which are] an indispensable instrument for expanding the scope of the judicial function [into human rights]"); A.W. Bradley, The United Kingdom, The European Court of Human Rights, and Constitutional Review, 17 CARDOZO L. REV. 233, 249 (1995) (stating that "there appears to be emerging a sort of European quasi-constitutional or common law, the maintenance of whose uniform minimum standards is considered the responsibility not only of the [European] Convention's organs but also that of the domestic judiciary").

133. Lillich, supra note 53, at 713 (quoting Judge Buergenthal). This quotation references the decisions in Soering, Kindler, and Ng, which helped to advance the process by which international adjudication permeates domestic law. See id. These decisions provide a solid basis for national courts to adopt standards analogous to those developed by international human rights bodies. See id. at 711-12; see also Shea, supra note 9, at 111. The decisions do not represent binding precedents, but nevertheless provide a source of persuasive authority and justification for greater domestic judicial involvement in the human rights arena. See Lillich, supra note 53, at 712.

134. See supra notes 10-16 and accompanying text (discussing traditional extradition law and the rule of non-inquiry). Although the decisions in Soering, Kindler, and Ng provide the reasoning to enable a court to free itself from traditional constraints, not all courts have been willing to do so. See Shea, supra note 9, at 113-14 (noting the initial reluctance of U.K. courts to fully adopt the Soering reasoning).
gressive development of international human rights jurisprudence. Because nearly all advances have resulted from the holdings of international bodies, most national courts consider decisions such as Soering, Kindler, and Ng valuable guides for the venture into international human rights adjudication.

III. THE VENEZIA DECISION: THE SOVEREIGN NATION REDEFINED?

The Italian Constitutional Court, in Venezia, faced a situation similar to those faced by the European Court in Soering and the UNHRC in Kindler and Ng. The Court had to balance its "human rights agreement"—the Italian Constitution—against the need for international cooperation in criminal matters and favorable relations with the United States. Like the European Court and UNHRC, the Italian Court concluded that extraditing a fugitive to the United States to face a real risk of capital punishment would violate Italy's "agreement" if extradition occurred. Thus, the Court applied its agreement (the Italian Constitution) to a nation not party to the protections explicitly afforded by that agreement, and therefore placed those protections above Italy's bilateral treaty obligation with the United States.

A. From Pasta to Prison—The Rise and Fall of Pietro Venezia

Italian national Pietro Venezia came to America in 1977, working for several years as a waiter at local Italian restaurants. In 1988, Venezia bought his own restaurant, an upscale establishment named Buccione's

---

135. See Lillich, supra note 53, at 701-02, 713. Many commentators, including Torkel Opsahl, a former member of the UNHRC, believed that the future development of human rights would come both directly and indirectly from national courts. See id. at 701-02 & n.14; see also discussion infra Parts IV, V (arguing that Venezia represents a significant advance in human rights by a national court).

136. See Lillich, supra note 53, at 700-02, 711-13 (noting that reference to international human rights standards, as interpreted by international human rights bodies, has become more commonplace in national courts throughout the world).

137. See In re Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 4 to 5 (contrasting the U.S.-Italy Extradition Treaty, and its goal of "reciprocal judicial assistance" against the Italian Constitution, and its "absolute guarantee" of the right to life).

138. See id. (stating that the right to life is an "absolute parameter" under Italian law, and therefore the U.S.-Italy Extradition Treaty's provision allowing "assurances" to be given to the Justice Minister is unconstitutional and extradition cannot occur).

139. See id. pt. II, para. 4 (stating that the right to life is an absolute guarantee to be measured against "the Constitutional legitimacy of the general law granting extradition . . . and of the laws that provide for the execution of international treaties on extradition, and judicial assistance").

140. See Arnold Markowitz, Pasta to Die For?, MIAMI HERALD, May 29, 1994, at 6.
in Miami’s Coconut Grove. Venezia’s restaurant was initially profitable, bringing in over one million dollars in revenue in 1989. Venezia’s income tax returns, however, showed cumulative losses of over one million dollars during a subsequent four-and-a-half year period. In addition, starting in 1990, Venezia continually failed to pay the monthly sales tax to state officials.

Over his years as a restaurateur, Venezia had established an elite clientele, which included mayors, executives, lawyers, and several prominent federal and state judges. When a major judicial corruption scandal surfaced in mid-1991, Venezia, who had apparently been looking the other way while bribes were passed, was forced to testify against several of his patrons. As a result, Venezia’s power lunch pasta haven suffered a drastic drop in business as former customers avoided Buccione’s, fearing that the scandal was contagious.

Besides the problems caused by the courtroom scandal, Venezia also suffered from financial problems caused by his failure to pay state sales

---

141. See id. Venezia’s first restaurant, named Tarantino’s after his home province in Italy, opened in 1981. See id. In 1988, Venezia bought Buccione’s for $600,000. See id. Venezia had troubles with the government from the start. See id. When the Florida Division of Alcohol, Beverage, and Tobacco investigated Venezia’s financial backers for Buccione’s, it found that seven of the thirteen listed investors claimed they had no involvement in financing the enterprise. See id.

142. See id.

143. See id. Venezia avoided using a cash register until 1992. See id. Venezia simply told patrons what they owed, and evidence suggested that he often double-billed and padded bills. See id.

144. See id. Venezia also failed to pay a $600 accident insurance judgment, a $700 restaurant supply bill, and a $2,000-plus roof repair bill for his house. See id.

145. See id. Among his regular customers were Florida county court Judge Alfonso Sepe and former Circuit Judge John Gale. See id. Venezia’s association with power paid off when he was arrested for drunk driving in 1984 and Judge Sepe sealed the record and reduced Venezia’s punishment to a $300 fine. See id. For that, the judge received several “on the house” meals. Id. Venezia also often took payment for Sepe’s regular lunches from a defense attorney who was friends with the judge. See id. In exchange, the judge would appoint the attorney to indigent defendants at state expense. See id. Venezia’s other friend on the bench, Judge Gale, frequented his establishment but rarely was seen paying the bill. See id.

146. See id. Venezia testified only after giving several perjurious statements. See id. First, after testifying that he had records of Judge Sepe’s attorney-sponsored lunches, Venezia claimed he had lost the records. See id. He then claimed he destroyed the records to protect the judge. See id. Finally, Venezia turned over the records, which where as incriminating for Venezia as they were for Sepe. See id. The records showed that Venezia had an unusual billing system which often involved padding bills or double-charging customers. See id. Ultimately, the defense attorney who had paid for Judge Sepe’s lunches, upwards of $10,000, was indicted by a federal grand jury and later convicted of bribery. See id.

147. See id.
tax. In December 1993, the Florida Department of Revenue froze Venezia's account, based on a delinquent tax bill of over $41,000. Venezia received a notice of action, signed by Collection and Enforcement Specialist Donald Bonham. Venezia, enraged, tracked Bonham down and shot him four times at the doorstep of his house. Several days later, Venezia left the country.

An international manhunt ensued, lasting more than four months before authorities finally tracked down Venezia in his home province of Taranto, Italy. In April 1994, armed with an international arrest warrant and posing as insurance adjusters, Italian police approached Venezia's childhood home in Laterza and captured Venezia when he answered the door. Before reaching the local police station, Venezia broke down crying, and made a full confession.

148. See id. Florida authorities imposed a tax lien for delinquent sales tax payments totaling over $23,000. See id.

149. See id. The tax inspections evidently began soon after the judicial corruption trial, where Venezia testified against Judge Sepe. See id. Venezia completed a deposition for the FBI about the bribery charge, which, in turn, sparked an investigation into his tax practices. See Robert Graham, Allies at Odds over Extradition, FIN. TIMES (London), July 8, 1996, at 9.

150. See Markowitz, supra note 140, at 6. Bonham signed the order, but did not have any direct participation in the actual decision. See id.

151. See id. On December 23, 1993, Venezia called the tax office where Bonham worked and threatened to kill tax workers. See id. Immediately prior to the shooting at 11:30 a.m. on December 24, 1995, neighbors saw Venezia prowling Bonham's neighborhood for some time. See id. Bonham had just returned from the grocery store with arms full of groceries when Venezia approached him and began shouting. See id. After a brief exchange, Venezia shot Bonham multiple times, then returned to his car and drove away. See id. Venezia has since claimed the gun went off accidentally. See Italian to Stand Trial, SUN SENTINEL (South Fla.), Apr. 16, 1997, at 30.

152. See Markowitz, supra note 140, at 6. Prior to leaving the country on December 27, 1993, Venezia confessed to his girlfriend, a commercial litigation lawyer, and also typed a letter of confession. See id. The letter blamed both the government and the media for destroying Venezia's business and forcing him to kill. See id. Together, Venezia and his girlfriend contacted a defense firm, and went to the firm's office early on December 27, 1993. See id. While at the office, Venezia destroyed all copies of his letter and then left the country. See id.

153. See id. Neither the lawyers nor Venezia's girlfriend knew Venezia's whereabouts, but authorities had a strong suspicion that he had left for Italy. See id. The FBI sent information about the case to Rome, but diplomatic bureaucracy delayed the investigation for two months before Italian officials in Venezia's home province of Taranto received it. See id.

154. See id.

155. See id.
B. Crier for the Cause

After Venezia confessed, the United States and Italy began extradition proceedings. In November 1994, a local appeals court approved the extradition request, but Venezia appealed the decision to the national court of appeals. One year later, the appeals court upheld the decision of the lower court. The Italian Justice Minister subsequently reviewed the extradition request, pursuant to the 1983 extradition treaty between the United States and Italy and Italian extradition procedure. Pursuant to his power, the Justice Minister asked for assurances from U.S. officials that the death penalty would not be imposed. After the U.S. Department of Justice gave its assurances against capital punishment, the Italian Justice Minister gave final approval to the extradition request on December 14, 1995.

156. See Graham, supra note 149, at 9. Pursuant to the treaty between the United States and Italy, the United States made a certified request for extradition to the Italian government. See id.; see also U.S.-Italy Extradition Treaty, supra note 46, art. X, at 3031-33 (outlining the necessary documents that must accompany an extradition request). For fugitives not yet convicted in a U.S. or Italian Court, Article X of the treaty requires the following: 1) information identifying the probable location of the fugitive, and a physical description; 2) a statement describing the facts of the case; 3) copies of the relevant law describing the elements of the charged offense; 4) copies of the relevant law describing the available punishments for the offense; 5) copies of the laws describing the statute of limitations for prosecution for the offense; 6) "a certified copy of the arrest warrant"; 7) a summary of facts and evidence providing a "reasonable basis" for the belief that the fugitive committed the offense; and 8) documents authenticating that the fugitive sought is the person named in the arrest warrant. See id. at 3031-33.

157. See Graham, supra note 149, at 9.

158. See id.

159. See id.

160. At the time in question, the Justice Minister's duties were being performed by Prime Minister Lamberto Dini. See id. The Justice Minister, under Italian law, is entrusted with the discretionary authority to deny or approve extradition. See In re Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 3.1.

161. See Graham, supra note 149, at 9.

162. See id. Under Article 698 of the Italian Code of Criminal Procedure, death penalty extradition may take place only when assurances are received that the death penalty will not be imposed. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 4 to 5. Evaluation of the sufficiency of the assurance was left within the Justice Minister's discretion. See id.

163. See Graham, supra note 149, at 9; see also Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 4 to 5 (discussing the Italian Code of Criminal Procedure requirement that assurances against capital punishment be sought before extradition is granted). The Dade County prosecutor who attempted to gain Venezia's extradition agreed not to seek the death penalty, and her agreement was forwarded to the Italian government via the Justice Department. See John Tagliabue, Italians' Extradition Ruling May Hamper War on Organized Crime, HOUSTON CHRON., June 28, 1996, at 22A.
During this time, Venezia's attorneys created strong public and political support for Venezia. The death penalty in Italy was the subject of considerable debate, and Venezia's case became an ideal opportunity for anti-death penalty groups to rally together. The case gained political significance, and the extradition order was blocked by the ruling of


165. See Tagliabue, supra note 163, at 22A. According to an Italian survey conducted in 1991, nearly 60% of Italians favored re-introducing the death penalty. See id. By February 1996, that number dropped to 45.7%. See id. The Italian Constitution, since its approval in 1947, has prohibited the death penalty, except in certain military cases in wartime. See id.; see also COST: [Constitution] art. 27 (Italy).

166. Cf. Tagliabue, supra note 163, at 22A (noting the reactions of various political members and anti-death penalty groups). Opponents of the death penalty, including several members of the Italian government, believed that Venezia's case presented the opportunity, through a Constitutional Court decision, to eliminate any possibility of the re-introduction of the death penalty. See Extradition Blocked Over Death Penalty, EDMONTON J. (Canada), June 28, 1996, at F12. [hereinafter Extradition Blocked]; Italy Denies Extradition of Dade Suspect: Ruling Seeks to Save Man Wanted in Murder From Electric Chair, SUN SENTINEL (South Fla.), June 28, 1996, at 12A [hereinafter Italy Denies Extradition].

167. See Italy Denies Extradition, supra note 166, at 12A. Giovanni Leone, former Italian President, gave significant support to Venezia's cause, describing it as "one of historic character." See Tagliabue, supra note 163, at 22A. In addition, at the initiative of Parliament member Pietro Alò, a motion was submitted to Parliament. See ANASTASIA, supra note 164, at 35-45. The motion led to a debate over the nature of the American system, where many members of Parliament expressed their doubt about the sufficiency of U.S. assurances. See id. In the opinion of several Italian Senators, the U.S. Constitution gave the states complete autonomy in handling state law crimes, and therefore assurances from the federal government were unenforceable. See id. The Senate also noted the initial failure of the Governor of Florida to provide independent assurances, as well as the cultural and political environment of Florida. See id. Senator Alò, along with other members, stressed that capital punishment had been a priority of the current Governor, and upcoming elections in Florida could cast doubt on any assurances made by the Governor. See id. The Italian Senate motion passed unanimously, and called for the refusal of extradition by the Justice of Ministry. See id. The Justice Minister, however, signed the extradition decree, and Venezia was secretly transported to Rome. See id. Senator Alò managed to block the immediate extradition, so Venezia could see his family one last time. See id. During this period, the Ministry of Justice announced that sufficient assurances had been received, and extradition would proceed despite the Senate motion. See id. After the announcement, the Italian House of Representatives approved a new motion asking the government not to extradite Venezia, and to refer the matter to Parliament. See id. These sequence of events eventually helped lead to the case coming before the Italian Constitutional Court. See id.
a regional administrative tribunal. The tribunal then forwarded the case to the Italian Constitutional Court.

C. The "Right to Life" and "Assurances" Revisited

By the time the case reached the Italian Constitutional Court, political sentiment had reached a zenith. Support for the refusal of Venezia's extradition reached across political lines. Many viewed the Venezia case as a contest between Italian sovereignty and American strong-arm politics. In addition, Italy was displeased with current practices by the U.S. judicial system. Venezia's supporters felt that the case provided the perfect opportunity to simultaneously silence Italian support for the death penalty, establish Italy as a world leader in the international abolitionist movement, and send a political message to the United States. Under substantial public pressure, the Italian Constitutional Court struck down the implementing legislation for the capital punishment provision of the 1983 U.S.-Italy Extradition Treaty and analogous portions of the

168. See Graham, supra note 149, at 9. After garnering substantial political support, Venezia's lawyers brought a special appeal before the Rome regional administrative tribunal which resulted in a suspension of the Justice Minister's decision to proceed with extradition. See id.

169. See id. at 9. For a discussion of the Italian Constitutional Court, see infra Part IV.B.

170. See supra notes 164-68 and accompanying text (discussing the political forces at work in Italy during Venezia's attempted extradition).

171. See Extradition Blocked, supra note 166, at F12. Support for Venezia crossed the political spectrum, including the Communist Refoundation Party, the Party of the Democratic Left, the Green Party, the CDU Party, the National Alliance Party, and the Forza Italia Party. See ANSASTASIA, supra note 164, at 37-39; Extradition Blocked, supra note 166, at F12; Graham, supra note 149, at 9.

172. See Extradition Blocked, supra note 166, at F12. Italy's Deputy Speaker of the Senate described the controversy as a battle between the Italian Constitution and attempts to put "political relations with the United States" before Italy's basic rights. Id. The Deputy Speaker's position can be attributed to the fact that many Italians disapprove of the American way of life and dislike American politics. See Graham, supra note 149, at 9.

173. See Graham, supra note 149, at 9. The Italian media provides broad coverage of executions in the United States, usually accompanied by negative commentary on the American judicial and penal system. See id. Public sentiment also was affected by recent difficulties surrounding the case of Silvia Baraldini, an Italian national convicted of terrorism. See id. Italian officials tried for several years to obtain transfer of Baraldini to Italy to serve the remainder of her sentence, but U.S. officials refused on grounds that they believed her treatment in Italy "would be too soft." Id.

174. See Italy Denies Extradition, supra note 166, at 12A. One member of the Italian government stated that, "[t]his sentence reiterates without a shadow of doubt the principle that our judicial system completely rejects the death penalty," Graham, supra note 149, at 9, and that the decision represented a "victory for human dignity." Italy Denies Extradition, supra note 166, at 12A.
Italian Code of Criminal Procedure as contrary to the Italian Constitution.\textsuperscript{175}

In \textit{Venezia}, the Italian Constitutional Court expressed two primary concerns. First, the court stated that the Italian Constitution provides an absolute "right to life" and explained that this guarantee must be applied in extradition proceedings involving countries that impose the death penalty.\textsuperscript{176} The court noted that although the treaty between the United States and Italy offered the flexibility of assurances against the death penalty, the right to life is absolute, and any decision to extradite must be examined in light of that absolute right.\textsuperscript{177} Consequently, both the deci-

\textsuperscript{175} See \textit{In re Venezia}, June 25, 1996, n.223, Appendix, infra, pt. I, para. 2.2. The Court invalidated Article 698, paragraph 2, of the Italian Code of Criminal Procedure, which provided for the review of extradition requests by both a judicial court and the Justice Minister, as well as the domestic legislation implementing the U.S.-Italy Extradition Treaty. See \textit{Venezia}, June 25, 1996, n.223, Appendix, infra, pt. II, para. 5. The legislation left the adequacy of assurances provided by the requesting state within the discretion of the Justice Minister. See \textit{id}.

As late as 1993, the Italian government had extradited a death penalty fugitive to the United States without incident. \textit{See Italy Refuses to Return Murder Suspect}, TAMPA TRIB., June 28, 1996, at 2. The case involved John Barret Hawkins, a California resident wanted in connection with a murder-for-insurance scam. See \textit{id}. In order to obtain Hawkins' extradition, California authorities were forced to forego the death penalty. See Judy Shay, \textit{Hawkins Won't Face Execution: Penalty Bid Dropped to Allow Extradition}, L.A. DAILY NEWS, Oct. 4, 1991, at 3. Hawkins unsuccessfully challenged the decision before the Italian Supreme Court. See Judy Shay, \textit{Hawkins' Extradition Endorsed, Murder-for-insurance Suspect Loses Appeal}, L.A. DAILY NEWS, Apr. 30, 1992, at 3. This was the same court that endorsed Venezia's extradition but later was overruled by the Italian Constitutional Court. See Graham, \textit{supra} note 149, at 9. Hawkins, on the other hand, was extradited to the United States and sentenced to 25 years to life. \textit{See Italy Refuses to Return Murder Suspect, supra}, at 2.

\textsuperscript{176} See \textit{Venezia}, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 3.1 to 4. The Constitutional Court concluded that the constitutional protection of the right to life rose above the need for international judicial assistance and was applicable to any and all government actions. See \textit{id}. pt. II, para. 5. This position is very similar to that taken by the UNHRC and European Court when applying the protections contained in the ICCPR and the European Convention. See \textit{supra} Part II.C (discussing the practical effects of the decisions by the UNHRC and European Court). It is argued that the European Court and UNHRC have evolved into international constitutional courts, enforcing their obligations in a manner consistent with the practice of a national constitutional court. See Bernhardt, \textit{supra} note 28, at 301-04 (stating that the European Convention has become a "'Human Rights Constitution' with the European Court as its ultimate interpreter).

\textsuperscript{177} See \textit{Venezia}, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 3.1 to 5. Simply stated, the court held that no flexibility exists for the Italian government—either the assurance provides an absolute guarantee, or it must be refused. See \textit{id}. Any contrary result, in the court's view, would abrogate the right to life protected by the Italian Constitution. See \textit{id}.
The Italian Constitutional Court's second concern focused on the nature of "assurances." The court first noted the opinion of the lower court administrative judge that any assurances given by the U.S. federal government could not be sufficient, because Venezia's trial would take place in a Florida state court where federal assurances would have questionable enforceability. Later in its argument, however, the court stated there was "no question" as to the interpretation of the Supremacy Clause of the U.S. Constitution, and rejected Venezia's concerns as to the enforceability of the U.S. federal government's assurances. The court neglected to expand on either of these views, leaving an unanswered question as to its position on the issue. Rather than resolve

178. See id. pt. I, para 2.2; id. pt. II, para 3.1. Thus, the court rejected the Italian government's contention that Venezia's appeal to the Italian Supreme Court had resolved the issue of constitutional violation. See id., pt. II, para. 2. The court held that where a right as basic as the right to life is concerned, a narrow review, such as the one performed by the Italian Supreme Court, is insufficient and could be revisited. See id. pt. II, paras. 3 to 3.1.

179. See id. pt. II, para 5. Like the bilateral extradition treaties between the United States and the United Kingdom and the United States and Canada, the U.S.-Italy Extradition Treaty allowed for death penalty extradition if the requesting state provided sufficient assurances that the death penalty would not be imposed. See U.S.-Italy Extradition Treaty, supra note 46, art. IX, at 3031.

180. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 2.4. The U.S. Constitution forbids states to enter into treaties with foreign nations. See U.S. Const., art. I, § 10, cl. 1. Therefore, any extradition pursuant to a treaty must pass through the federal government. See id. art. II, § 2, cl. 2. The Italian administrative court, like the Italian Senate, believed any federal assurances against the death penalty would be limited by the autonomy of the individual states. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 2.4; see also supra note 167 (discussing the Italian Senate motion opposing extradition). Therefore, it could not meet the requirement of absolute assurance. See id.

181. U.S. Const., art. VI, cl. 2. The Supremacy Clause declares that all laws made pursuant to the Constitution and all treaties made under the authority of the United States shall be the "supreme Law of the Land" and supersede any state law or state constitutional provision. See id. It is the position of the U.S. government that international treaties have supremacy over state law. See Graham, supra note 149, at 9. Thus, in the eyes of U.S. authorities, any federal assurance would be absolute. Cf. id. (noting U.S. government arguments on how the Supremacy Clause affects the nature of state death penalty statutes).

182. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, para. 5. The court did not agree with Venezia's argument that he would have insufficient judicial remedies should the United States break its promise not to impose capital punishment. See id. The court's view differs from the views expressed by the Italian Senate and the lower administrative court. See supra note 167 (noting the views of the Italian Senate); supra note 180 and accompanying text (noting the view of the administrative court).

183. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 2.4; id. pt. II, para. 5. Although the court stated that no question existed as to the interpretation of the Supremacy Clause, it never concretely expressed what it believed the interpretation to be.
these divergent views and address whether the assurances were sufficient, the court instead rejected the entire concept of assurances, on the grounds that providing assurances could not adequately protect the right to life guaranteed by the Italian Constitution. Once the right to life exists, the court stated, the principle of sufficient assurances becomes constitutionally inadmissible when left to the discretion of government officials. Therefore, because any treaty, law, or regulation must conform to the absolute protection of the right to life, the discretionary assurances provision within the U.S.-Italy Extradition Treaty was improper under Italian law, requiring the invalidation of the provision's implementing legislation. In order to protect the rights recognized within the Italian Constitution, the court believed that any assurances given by a requesting state that imposes the death penalty must be absolute.

IV. Missing Links: Understanding the Italian Constitutional Court's Reasoning

After Venezia, U.S. officials expressed concern about the effect of the Italian Constitutional Court's decision. Questions loomed as to the

See id.

184. See id. The court found the flexibility inherent in delegating the decision of the adequacy of assurances to the Justice Minister unconstitutional. See id. The discretion left to the Justice Minister, in the court's view, could not be reconciled with the absolute nature of the right to life as protected by the Italian Constitution. See id.

185. See id. pt. II, para. 5 to 6. The court believed that the right to life, within the Italian Constitution, could not co-exist with a treaty that infringed upon the absolute guarantee of that right. See id. By entrusting the final decision on extradition to the Justice Minister, the court believed adaptations of policy or political concerns could subordinate the right to life to other interests. See id.

186. See id. pt. II, paras. 5 to 6. Consequently, Venezia could not be extradited to the United States for any crime punishable by the death penalty. See Italian Court Bars Extradition, supra note 44, at A10. However, under Italian law, Venezia may be tried in Italy. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, para. 6. Although he may draw a life sentence under Italian law, the Italian parole and pardon procedures are considerably more relaxed than those in the United States. See Italy Refuses To Extradite Suspect in Miami Killing, ORLANDO SENTINEL, June 28, 1996, at A9. Venezia's trial began in Italy in October 1997, and part of the testimony was taken in Miami in April 1998. See Karen Shaw, Traveling Justice: Ailing Widow is Allowed to Testify in Miami for Murder Trial of Italian Man, SUN SENTINEL (South Fla.), Apr. 29, 1998, at 3B. Closing arguments for the trial are scheduled to take place in Italy in June 1998. See id.

187. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 5 to 6. Therefore, the assurance given by the United States, although absolute by the understanding of both federal and state authorities, does not provide the assurance required by the Italian Constitution. See id. But see infra Part IV.A (arguing that the Italian court ignored an interpretation which would have preserved the treaty and constitutional concerns).

188. See Tagliabue, supra note 163, at 22A. A U.S. Department of Justice spokesman was quoted as saying, "I think it serves as a bad omen." Id. The U.S. Embassy spokesman in Rome responded that no comment or challenge to the decision would occur until
possible implications of the decision on U.S.-Italian judicial collaboration efforts. To understand the possible effects of the decision, it is first necessary to discuss the reasons for the decision in Venezia. Accordingly, several factors may help explain the court's justification for invalidating the capital punishment provision of the U.S.-Italy Extradition Treaty.

A. The Not-So-Sure Assurances Problem

In its ruling, the court provided conflicting views of the U.S. federal government's power to give assurances that were enforceable against the state courts of Florida. Initially, the court appeared to accept the administrative judge's doubt as to the ability of the federal government to provide assurances against the imposition of the death penalty in a state proceeding. In a later discourse, however, the Italian Constitutional Court expressed a different belief when it appeared to say that the U.S. Supremacy Clause would control the enforceability of federal assurances over the state. Instead of resolving the issue, the court declared that the remedies available under U.S. law were irrelevant. Rather, the relevant concern was the intrinsic insufficiency of both the extradition treaty and domestic Italian law, which left the judgment of the reliability

189. See Italian Court Bars Extradition, supra note 44, at A10. The U.S. Department of Justice expressed particular concern over the possible effect of the ruling on extradition proceedings for members of organized crime. See Richard Bashor, Citing Florida's Death Penalty, Court Rejects Extradition to U.S., CHICAGO TRIB., June 28, 1996, at 8. The 1983 U.S.-Italy Extradition Treaty served as the primary tool by which such fugitives were brought to American courts. See id.

190. See supra notes 179-83 and accompanying text (discussing the Italian court's treatment of the assurance issue).

191. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 2.4. This statement occurs within the discussion of the administrative judge's findings, but the court's opinion leaves unclear exactly what strength the court attaches to the argument, or if it disagrees with the statement at all. See id.

192. See id. pt. II, para. 5. This statement appears to refute the earlier statement attributed to the administrative judge. See id. pt. I, para. 2.4. However, the court couched the language in terms of Venezia's doubts and not the reasoning of the administrative judge. See id. pt. II, para. 5. Thus, the court rejected Venezia's argument without explanation, but never expressly rejects the statement of the administrative judge. See id. This leaves unclear the actual belief of the court. See id.

193. See id. This would seem to be the most logical place for the court to address exactly what type of assurances the U.S. federal government is capable of, then compare those assurances to what is required by the Italian Constitution. The court, however, declined to discuss the issue, instead addressing the discretion left to the Justice Minister of Italy in extradition decisions. See id.
of assurances at the discretion of the Justice Minister of Italy. The court believed, could not be reconciled with the absolute nature of Italian constitutional protections.

The court's reasoning ignored a basic consideration: if the court believed that the federal government could, upon request, give absolute assurances on behalf of the state (Florida), then the alleged unconstitutional discretion given to the Justice Minister would be moot, provided that such a guarantee was obtained. Therefore, the most obvious way to protect constitutional concerns and also mitigate damage to the U.S.-Italy Extradition Treaty would have been to construe the treaty, or perhaps applicable Italian law, as requiring absolute assurances in death penalty extradition.

194. See id. The court seemed to be most troubled by the absence of Italian constitutional standards in extradition decisions, and not by the problem of the sufficiency of U.S. assurances. See id. pt. II, paras. 4 to 5 (noting the position of the right to life as a constitutional guarantee superceding the extradition treaty).

195. See id. pt. II, para. 4 (stating that the right to life is an "absolute parameter of evaluation of the Constitutional legitimacy of the general [Italian] law on granting extradition").

196. Thus, if the Justice Minister requested and received absolute assurances, any acceptance of those assurances as adequate would not violate the court's constitutional concerns. Cf. Bianchi, supra note 40, at 729-30 (noting that the Italy-Morocco Extradition Treaty allows the requesting state to substitute the Italian penalty in place of the death penalty in order to obtain extradition); see also Leich, supra note 96, at 746-47 (detailing the aftermath of the Soering case, where Soering was extradited to the U.S. under a first degree murder charge instead of capital murder). In Soering, rather than risk an outright refusal and possibly harm U.S.-U.K. judicial cooperation, the United Kingdom collaborated with U.S. officials to obtain extradition for first-degree murder (which has no possibility of capital punishment) rather than the original request of extradition for capital murder. See id. In these instances, the courts have let the political branches craft solutions that foster continued cooperation.

The Florida prosecutor in charge of the Venezia case agreed not to seek the death penalty if Venezia was extradited. See Tagliabue, supra note 163, at 22A. The Italian Court never mentioned the agreement, perhaps because an absolute assurance against capital punishment was never requested by the Justice Minister. See Graham, supra note 149, at 9 (stating that U.S. Justice Department had made "undertakings" that Venezia would not face capital punishment).

197. As mentioned, a similar result occurred in the aftermath of the Soering case. See supra note 96 (discussing the aftermath of the Soering decision). After the European Court determined that the extradition of Soering for capital murder would violate the European Convention, the U.K. and U.S. governments agreed to extradite Soering for a charge of first degree murder, which, in Virginia, was not punishable by the death penalty. See Leich, supra note 96, at 746-47. In addition, the federal government secured a concession from Virginia authorities that U.S. law, via the agreement between the two national governments, prohibited a prosecution for capital murder. See id. Thus, Soering was extradited for murder, and the "absolute" assurance was obtained through the concession of Virginia authorities. See id.
The court’s decision to bypass such an interpretation suggests two possible explanations. First, the court may not have had unequivocal faith in the ability of the U.S. federal government to enforce treaty obligations upon the states through the Supremacy Clause. If true, the court could have required absolute assurance by suggesting, or mandating, that the state give absolute assurances to the U.S. federal government prior to any extradition decision by Italian officials. Such a practice would have provided the absolute right to life which the court wished to protect, while leaving the extradition treaty intact. By ignoring this interpreta-
tion,\textsuperscript{202} the court’s decision pointed toward the second explanation—namely that concerns existing beyond the need for reconciliation of the extradition treaty and the Italian Constitution necessitated the invalidation of a portion of the extradition treaty.\textsuperscript{203}

\textbf{B. The Special Nature of the Italian Constitutional Court}

To fully understand what those other concerns were, it is important to examine the second factor in the Italian Constitutional Court’s reasoning. Like other judicial systems, the Italian courts, including the Constitutional Court, often perform judicial functions that result in judicial legislation.\textsuperscript{204} Unlike other judicial systems, however, the Italian Constitutional Court often performs quasi-political functions resulting in judicial legislation.\textsuperscript{205} The Constitutional Court, unique in the Western world, frequently operates in the gray area between judicial and legisla-

\textsuperscript{202} See \textit{Venezia}, June 25, 1996, n.223, Appendix, infra, pt. II, para. 5. ("The relevant point here is not the point regarding the remedies provided for by the foreign laws, but the intrinsic insufficiency of the mechanism provided for by [the treaty and Italian law] . . . against the constitutional rule [of the right to life].").

\textsuperscript{203} See id. pt. II, para. 4. Discussing the relevance of the death penalty in Italy, the court stated that the prohibition of the death penalty, as a punishment "contrary to the sense of humanity," implies a principle "that in many senses can be considered Italian." \textit{Id.} The court noted that the right to life "is the first of the inviolable Rights of Man, recognized by Article 2 [of the Italian Constitution]." \textit{Id.} The court therefore placed the greatest interest in protecting the absolute nature of the right to life, and established the right as an "absolute guarantee" in the evaluation of extradition treaties and laws. \textit{See id.} Rather than interpret the Constitution in a way that preserved both the constitutional right and the extradition treaty, the court instead subjected the treaty to rigid constitutional examination. \textit{See id.}

In addition, the court was under substantial political pressure to deny the extradition of Venezia. \textit{See supra} notes 164-74 and accompanying text (discussing the political circumstances surrounding \textit{Venezia}). Political sentiment is an important concern in Italian judicial review. \textit{See infra} notes 204-15 and accompanying text (noting the political sentiment and how such concerns affect the court and its role in the Italian legal system).

\textsuperscript{204} See Giuseppe Di Federico, \textit{Italy: A Peculiar Case, in THE GLOBAL EXPANSION OF JUDICIAL POWER} 233, 233-34 (C. Neal Tate & Torbjörn Vallinder eds., 1995). Di Federico explains the "law explosion" in Italy in which the Italian courts have become the primary recourse for the definition of citizen rights. \textit{See id.} at 233. Di Federico notes that many of these decisions expand beyond the case decided into a legislative role by defining "who gets what, when, and how." \textit{Id.} at 234.

\textsuperscript{205} See Enzo Cheli & Filippo Donati, \textit{Methods and Criteria of Judgment on the Question of Rights to Freedom in Italy, in HUMAN RIGHTS, supra} note 28, at 227, 230-31. Cheli and Donati note that not only does the Constitutional Court enforce the will of the Italian Constitution against the political majority, but, at times, it also enforces the will of the political majority against the Constitution through decisions that closely parallel a legislative power. \textit{See id.} at 231.
tive functions. While the court may consider only issues brought before it by judges or parties who request constitutional guidance, its decisions are not bound by historical judicial restraints. The judgment of the court is often “abstract,” meaning that the court will focus on the

206. See id. at 231. The authors note that the court performs both judicial and legislative functions. See id. Originally, the court was restricted by law from examining political interests or from usurping legislative functions from the Italian Parliament. See id. at 233. The measure never met with any significant success and has since become functionally inoperative. See id.

207. See id. at 230. This limitation carries a lesser significance in Italy because of the peculiar nature of public prosecution. See Di Federico, supra note 204, at 234. Public prosecutors, as well as judges, are largely independent from any supervision by the other branches of government, giving them freedom to construct their own judicial agenda without fear of retaliation. See Carlo Guarnieri, Judicial Independence and Policy-Making in Italy, in THE GLOBAL EXPANSION OF JUDICIAL POWER 245-48, 251 (C. Neal Tate & Torbjörn Vallinder eds. 1995). Both the public prosecutors and judges enjoy the same status, recruit from the same body of attorneys, and together govern themselves through the Higher Council of the Judiciary, which is comprised of colleagues elected by the prosecutors and judges. See id. at 247-48.

208. Cf. Cheli & Donati, supra note 205, at 242 (explaining that the court’s review of a case is often more political than judicial and it frequently acts as an innovator of constitutional law). At its conception, the Court had three fundamental objectives: guarantee the “rigidity” of the Italian Constitution against transient political influence, introduce a “judge of freedoms” entrusted with the protection of human rights, and adjudicate controversies between governmental bodies. Id. at 228-29. Because of its unique position, the court often becomes more concerned with abstract principles rather than rigid constitutional rules, leading to a compromise of the first objective by treating constitutional provisions as principles to balance against the interests at stake. See id. at 233-34. Therefore, the Constitutional Court often “operates predominantly as the moving agent of processes of innovation and reform” by using its independence from the other branches to develop a political power. Id. at 242.

Because of its aggressive approach, the court “has made itself the direct interpreter . . . of the demands emerging from the social body, but not recognised by the [political] party system.” Id. at 243. But cf. Michael Mandel, Legal Politics Italian Style, in THE GLOBAL EXPANSION OF JUDICIAL POWER, supra note 207, at 261, 267 (stating that “rarely does constitutional litigation become the symbol of a political movement or cause”). Venezia would appear to be the exception to that assertion. See Italian Court Bars Extradition, supra note 44, at A10 (stating that Venezia’s case became a “rallying point” for anti-death penalty activists and officials in Italy).

In addition to its political independence, the Constitutional Court, rather than protect the constitution solely by invalidating laws, uses “pre-emptive strikes” to guide constitutional development. See Cheli & Donati, supra note 205, at 234. For example, the court often circumvents the requirement that it may only hear questions presented by judges or interested parties. See id. It does so by “rais[ing] before its own jurisdiction a preliminary question of constitutionality in relation to the judgment of the other [original] question,” in effect directing judicial review to areas unforeseen in the original legal question at issue. See id. Therefore, the court may use the question at hand as a springboard to address a multitude of related issues. See id. Finally, the court has acquired a broadened power when invalidating laws. See id. at 235. When a law is found unconstitutional, the court may decide which other rules also must be declared unconstitutional as a result of the original judgment. See id.
limits imposed by the Italian Constitution as well as the desired result of the law in question.\textsuperscript{209} Additionally, and more importantly, the decision usually will be based upon constitutional principles rather than rules of law.\textsuperscript{210} Controversies are judged not by rules of constitutionality, but rather in terms of balancing constitutional principles against the interests at stake.\textsuperscript{211} Therefore, in carrying out its duties of interpreting and safeguarding the Italian Constitution, the court may, in effect, indirectly legislate matters beyond the controversy at hand by establishing and defining the principles of Italian society, rather than providing strict rules of law to be obeyed by other governmental bodies.\textsuperscript{212} Because of this unique quality, it becomes highly important to consider the political circumstances surrounding any decision.\textsuperscript{213}

\textsuperscript{209} See Cheli & Donati, supra note 205, at 230. This is very different from the U.S. Supreme Court, which is limited to adjudicating concrete controversies. See U.S. CONST. art. III, § 1, cl. 2. The Italian Constitutional Court's political power and judicial independence is much greater, allowing it to balance constitutional rules against the interests at stake in a much broader sense. See Cheli & Donati, supra note 205, at 234. The Constitutional Court treats constitutional rules as principles "aiming at the protection of certain interests or expressing certain values" instead of rigid rules immune from contraction or expansion. See id. The combination of the peculiar nature of Italian prosecutors and judges, when mixed with the scope and nature of Constitutional Court review, makes the Italian court unique among both common law and civil law nations. See id. at 230-31.

\textsuperscript{210} See Cheli & Donati, supra note 205, at 233 ("[T]here is a tendency on the part of Italian constitutional justice not to treat the content of the Italian constitution as absolute rules, but rather as principles, aiming at the protection of certain interests or expressing certain values."). Thus, the Italian court becomes a judicial and political legislator, integrating social agendas with constitutional principles. See id. at 243.

\textsuperscript{211} See id. at 233-34. The Constitutional Court typically engages in two types of balancing. See id. at 258-59. In the first type, the Constitutional Court may balance the interests behind legislation. See id. at 258. The balancing acts as a secondary control upon legislative functions, and does not involve application of the court's quasi-political powers. See id. The second form of balancing is the type in question in Venezia, where the court balances the interests at stake with constitutional values. See id. at 259; see also In re Venezia, June 25, 1996, p.223, Appendix, infra, pt. II, paras. 4 to 6 (discussing the dual concerns of "constitutional principles" and "reciprocal judicial assistance" interests). It is in this type of balancing that the Constitutional Court exercises part of its quasi-political power by "superimpos[ing] its own evaluation of the interests at stake onto that determined by the legislator." Cheli & Donati, supra note 205, at 260.

\textsuperscript{212} See Cheli & Donati, supra note 205, at 233-34, 242-43.

\textsuperscript{213} See Martin A. Rogoff, Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court, 11 AM. U. J. INT'L L. & POL'Y 559, 640-41, 657-58 (1996) (noting that domestic courts are interpreting national constitutions within the context of international agreements, and that such decisions require consideration of the surrounding political factors).

An unusual paradox emerges when Venezia is analyzed with a clear recognition of the Italian Constitutional Court's unique position. If, in fact, the court does rely on principles rather than rigid constitutional rules, why does the Constitutional Court consistently refer
The *Venezia* decision is no exception. The struggle to prevent the extradition of Venezia created a political maelstrom in Italy, one that Italian politicians felt could best be calmed by a Constitutional Court judgment. Through *Venezia*, the Constitutional Court was presented with an opportunity to settle the death penalty issue permanently. The court's independence, prestige, and quasi-political power provided the opportunity for a definitive end to the death penalty controversy, and also reiterated Italian opposition to capital punishment in the United States. The court balanced the law—the extradition treaty with the United States—against the principle—the right to life. *Venezia* established that the Italian Constitution provides a right to life that may not be abridged in any fashion. Furthermore, the court relied upon the

to the right to life as an absolute rule of Italian law. See *Venezia*, June 25, 1996, n.223, Appendix, *infra* pt. II, paras. 4 to 5. Two possible reasons exist. First, the court is noted for its strong judicial activism when confronted with rights to freedom, the right to life being the foremost freedom. See Cheli & Donati, *supra* note 205, at 243. Second, the court emphasized in *Venezia* that the right to life is a principle "that in many senses can be considered Italian." *Venezia*, June 25, 1996, n.223, Appendix, *infra* pt. I, para. 4. Thus, while the court sees the right to life as a principle, the balancing undertaken in *Venezia* results in an absolute rule—that the guarantee of the right to life is an inviolable principle enforceable against the Italian government and its laws and treaties. Cf. *id.* pt. II, para. 4 (stating that the right to life is enforceable against the exercise of any governmental power).

214. Cf. Graham, *supra* note 149, at 9 (noting the heavy involvement of several prominent Italian political figures). Pressure for a constitutional review came from various members of Italy's political parties. *See id.*

215. See Tagliabue, *supra* note 163, at 22A (discussing the shift of public sentiment towards eliminating the death penalty). Any internal backlash over the decision seems unlikely because many Italians viewed the controversy as a chance to take a stand against American politics. See Graham, *supra* note 149, at 9. After the decision, the typical Italian newspaper headline read, "Court defies U.S." and one politician called the decision an "honour to Italy." *See id.*

216. See *supra* notes 204-15 (discussing the independence and quasi-political power of the Constitutional Court).

217. See *Venezia*, June 25, 1996, n.223, Appendix, *infra* pt. II, paras. 4 to 6. The court established the right to life as an absolute parameter limiting the power of the Italian government. See *id.* Therefore, no abrogation of this right could occur outside of constitutional reform. Cf. *id.* pt. II, para. 5 (stating that the "prohibition of the death penalty is constitutionally protected"). For the United States, the decision marked another signal of international discontent over the conditions of U.S. capital punishment. See *Italian Court Bars Extradition, supra* note 44, at A10 (noting the "general European unhappiness" over U.S. capital punishment); *Italy Refuses to Return Murder Suspect, FLA. TODAY, June 28, 1996, at 7B (stating that the ruling "added another prominent voice to the growing European opposition of capital punishment—even at the risk of ignoring international pacts").

218. See *Venezia*, June 25, 1996, n.223, Appendix, *infra* pt. II, paras. 4 to 5. The Court refers to the right to life as both a constitutional rule and as a constitutional principle. See *id.* pt. I, para. 3.2; *id.* pt. II, paras. 4 to 5; see also *supra* note 213 (discussing the possible reasons for the contradiction).

presumption that Italian society values this right above international obligations. This allowed Italy to take a more prominent stance regarding human rights and simultaneously assert itself against American politics. Instead of a creative interpretation or expressing the need for reform, the Court appeared to send a message to America: perhaps it is time to re-examine the need for the death penalty in the age of human rights.

C. The Contributions of the European Court and the UNHRC

The Italian Constitutional Court made its decision in the wake of decisions such as Soering, Kindler, and Ng. Although the court did not stated that the absolute guarantee of the right to life influences the exercise of the powers of every part of the Italian government. See id. The Constitutional Court then established the right to life as an “absolute parameter” when evaluating extradition laws. See id.

220. See pt. II, paras. 4 to 5. The Court recognized the “old, and well established principle pacta sunt servanda”—obligations must be kept. Id. pt. I, para. 3.2. It also realized that non-cooperation in international criminal matters may result in the requested state becoming a safe haven for international fugitives. See id. This possibility was a chief concern of both the European Court and the UNHRC in their earlier decisions. See supra note 198 (discussing the European Court’s and UNHRC’s recognition of the need for international judicial cooperation and preventing the creation of safe-havens for fugitives). However, the Italian court made only a brief mention of these concerns. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. I, para. 3.2. Instead, it focused upon the fact that the discretion given to the Minister of Justice in obtaining assurances and the nature of those assurances as defined by the treaty provision were unconstitutional. See id. pt. II, para. 5.

221. See Graham, supra note 149, at 9 (quoting one politician as saying “[t]his sentence reiterates without a shadow of doubt the principle that our judicial system completely rejects the death penalty”). Rejecting American politics was perhaps not the intention of the Constitutional Court, although such a result was precisely what many Italian politicians hoped to accomplish. Cf. Extradition Blocked, supra note 166, at F12 (noting an Italian politician’s statement that the decision was a victory over American politics).

222. See supra notes 196-203 and accompanying text (arguing that the court ignored an interpretation which would protect the right to life and leave the extradition treaty intact).

223. Cf. Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, para. 4. (stating that the death penalty is a punishment “contrary to the sense of humanity”). Italian politicians who had campaigned for the court to hear Venezia’s case celebrated the decision as a blow against the United States and its support for the death penalty. See Graham, supra note 149, at 9 (quoting one politician who praised the decision as “historic”); Extradition Blocked, supra note 166, at F12 (noting that the decision received broad acceptance by members across the political spectrum).

224. See supra Part II (explaining the Soering, Kindler, and Ng decisions and their impact on extradition law). The Italian Constitution explicitly recognizes the importance of international law and values in interpreting its constitution. See COST. [Constitution] art. 10 (Italy); see also Francioni, supra note 132, at 19 (noting that the Italian Constitution is influenced by a “‘international’ model represented by a system open to the values of the international society and subject to the primacy of international law”). When enforcing human rights, however, Italians tend to view them from the perspective of domestic rules. See id. at 60 (“[W]hen Italian courts protect human rights, they are inclined to understand the latter in light of domestic rules rather than international ones.” (emphasis added)).
mention any of these decisions, it is unlikely that Venezia was decided in a vacuum.\textsuperscript{225} As a member of the European Convention and the ICCPR, Italy must look to Soering as a guiding principle, and to Kindler and Ng as providing further instruction.\textsuperscript{226} The ultimate result of those decisions was to advance human rights by freeing the judicial branch from the rule of non-inquiry,\textsuperscript{227} limiting extradition as a foreign policy tool,\textsuperscript{228} and as-

Before the decision of the Italian Constitutional Court, Venezia had submitted his case for review by the European Commission on Human Rights. See Bianchi, \textit{ supra} note 40, at 730. The European Commission asked that Venezia not be extradited until it had examined Venezia's application. See \textit{id}. This delay allowed Venezia to bring his case before the administrative court and Italian Constitutional Court, and the Commission dismissed the application after the Constitutional Court reported its decision. See \textit{id}. 225. \textit{See} Rogoff, \textit{ supra} note 213, at 636-41, 657-59 (discussing how national courts assist in the development of international law); \textit{see also} supra note 224 (explaining how Italian courts prefer to enforce international values through domestic rules). Rogoff notes that domestic courts often look to international standards when interpreting constitutional provisions. See Rogoff, \textit{ supra} note 213, at 640. He explains that in such cases it is important to consider political factors that may affect how a domestic court chooses to interpret an international agreement. See \textit{id} at 657. Using this logic, Italy's decision in Venezia was affected by two central issues—existing international human rights jurisprudence, via the UNHRC and European Court, and the political forces at work within Italy at the time of the court's decision. See \textit{id} at 640, 657; Graham, \textit{ supra} note 149, at 9 (describing the existence of a "vocal anti-extradition campaign" concerning Venezia).

226. \textit{See} Soering, 161 Eur. Ct. H.R. (ser. A) 4, 35 (1989) ("It is normally for the [European] Convention institutions . . . [to determine] potential violations of the Convention. However, . . . a departure from this principle is necessary, in view of the serious and irreparable nature [of the risk of the fugitive suffering inhuman or degrading treatment] . . . [and] to ensure the effectiveness of the safeguard."); Roecks, \textit{ supra} note 29, at 205, 215-16 (noting that Soering provided a fugitive with substantive and procedural rights, and Kindler and Ng required requested states to inquire into the human rights conditions of the requesting state). The decision in Soering has been respected by all members of the European Convention, including Italy. See Breitenmoser & Wilms, \textit{ supra} note 71, at 873. The Constitutional Court also must look to the Kindler and Ng cases as guides for interpretation of international standards, thereby incorporating the international law principles established by those cases into domestic law. See Quigley, \textit{ supra} note 55, at 1224-25 (stating that the UNHRC requires domestic courts of member states to enforce the obligations of the ICCPR).

227. \textit{See} \textit{ supra} Part II.C (discussing how the Soering, Kindler, and Ng provided a legal foundation for abandoning the rule of non-inquiry).

228. \textit{See} Shea, \textit{ supra} note 9, at 111 (noting that Soering justified granting less deference to a head of state in extradition proceedings). By incorporating international human rights standards into extradition law, the decisions of the European Court and the UNHRC have established judicial review on an international level, thus preventing member states from making arbitrary or summary extradition decisions. See Ng v. Canada, Communication No. 469/1991, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994), at 189, 205 (stating that "[t]he Committee notes that the extradition of Mr. Ng would have violated [the ICCPR] if the decision to extradite without assurances had been taken summarily or arbitrarily"). Thus, extradition decisions must conform to a more uniform standard and must not be used by heads of state to curry favor or provide political retaliation. \textit{Cf.} Shea, \textit{ supra} note 9, at 86-87, 110 (discussing how Soering has altered the role of the judiciary in extradition proceedings and allowed courts to aban-
serting the supremacy of international conventions over extradition law.229

*Venezia* represented perhaps the next step in the integration of international human rights with traditional extradition law. The *Venezia* decision did not subordinate extradition treaties to international conventions, but rather to judicial interpretation according to the requested state’s constitutional laws and principles.230 The key difference in *Venezia* was that, rather than examining the judicial and penal conditions within the requesting state and weighing the relevant personal factors such as the age or mental state of the fugitive, the Constitutional Court advanced what could be termed the rule of “anti-inquiry.”231 Instead of refusing to inquire into conditions within the requesting state because it invades national sovereignty, exceeds the scope of permissible powers,232 don the traditional deference afforded to heads of state).

229. *See* Donnelly, *supra* note 74, at 347 (stating that *Soering* imposed the standards of the European Convention upon a member state’s extradition treaties with non-member states); Roecks, *supra* note 29, at 215-16 (noting that *Kindler* and *Ng* obligate member states of the ICCPR to assess the conditions in the requesting state according to ICCPR standards).

230. *See* *Venezia*, June 25, 1996, n.223, Appendix, *infra*, pt. II, para. 5; *see also* Bianchi, *supra* note 40, at 732 (noting that “[h]by avoiding the international law issues in the case, the Constitutional Court also avoided addressing whether, and, if so, when, the principles and values enshrined in national constitutions are to prevail over international law in case of conflicting requirements”). Thus, the Constitutional Court, in effect, “exports” its own human rights law into the United States by denying extradition of fugitives subject to the death penalty. *Cf.* Lillich, *supra* note 53, at 712-13 (noting that the “cross-fertilization” of international and national court decisions in human rights jurisprudence has allowed national courts to “participate in the progressive development of human rights law on the international plane”).

231. The term “anti-inquiry” is a creation of the author used in an attempt to provide a normative label for the inquiry advanced by the *Venezia* court. The rule of non-inquiry stands for the proposition that courts will not inquire into the judicial systems of requesting states. *See* Quigley, *supra* note 6, at 403. In comparison, a rule of “anti-inquiry” instead would stand for the proposition that the court would refuse to review judicial and penal conditions within a requesting state because, empirically, the law in the requesting state clearly contradicts the law within the requested state. *Cf.* *Venezia*, June 25, 1996, n.223, Appendix, *infra*, pt. II, para. 4 (discussing the contradiction between the right to life within the Italian Constitution and the concept of capital punishment). Thus, any action taken with regard to an extradition request by a requesting state imposing the death penalty would be based upon the court’s reading of its own domestic law because it is viewed as in direct conflict with the requested state’s laws to a degree that moots any further inquiry. *Cf. id.* pt. II, para. 6 (deciding that the conflict between the Italian Constitution and the extradition treaty demands the invalidation of the capital punishment provision’s implementing legislation). In *Venezia*, the real underlying struggle involved the Italian right to life against the American “right” to capital punishment, two principles which were, in the court’s opinion, irreconcilable. *Cf. id.* pt. II, para. 4 (noting that the right to life is an Italian principle, and calling capital punishment “contrary to the sense of humanity”).

232. *See* Shea, *supra* note 9, at 93 (noting that such an inquiry traditionally was part of the foreign affairs power, an arena historically left to the discretion of heads of state).
or because of a presumption of compliance with human rights standards, the Italian court decided that because of the existing treaty language, it simply cannot inquire into the internal conditions of the requesting state. The court reasoned that internal considerations of the requested state—here, Italian constitutional law—oppose extradition regardless of the sufficiency of the requesting state's assurances against imposition of the death penalty or the sufficiency of its judicial and penal systems.

V. THE "SOVEREIGN" CHOICE: POSSIBLE IMPACTS OF VENEZIA

An examination of human rights advances over the past few decades reveals a general progression in limiting national sovereignty over death penalty extradition decisions through more assertive human rights agreements and quasi-judicial decisions. Initially, countries signed human rights agreements that imposed little direct control over national theory is often based upon the idea that adjudication of these issues would intrude upon foreign affairs, and that courts could not properly consider diplomatic concerns. See id.; Semmelman, supra note 10, at 1229-30 (arguing that, in the United States, the Secretary of State is in a better position to deal with the foreign concerns presented by an extradition request).

See Sullivan, supra note 10, at 116, 120-21 (stating that often courts will not evaluate the judicial conditions in the requesting state because the existence of an extradition treaty proves that a political decision about the sufficiency of such conditions has already been made).

See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, para. 5 (explaining that "[t]he relevant point here is not the point regarding the remedies provided for by the foreign laws, but the intrinsic insufficiency of . . . the [extradition] treaty . . . [when examined] against [the right to life]").

See id., pt. II, paras. 3.1 to 6.

For example, the Universal Declaration, first signed in 1948, contained no affirmative obligations. See Universal Declaration, supra note 7; John Quigley, The International Covenant On Civil and Political Rights and the Supremacy Clause, 42 Depaul L. Rev. 1287, 1288 (1993). The ICCPR, which was based upon the rights in the Universal Declaration, was adopted in 1966 and contained binding obligations for signatory states. See id. However, the ICCPR did not enter into force until 1976, mainly because of lengthy delays in obtaining the necessary number of national ratifications. See id. The European Convention was signed in 1950, but it did not require member states to abolish the death penalty until 1983. See European Convention, supra note 6, at 222; Protocol No. 6, supra note 52, at 538. Each of these agreements, along with a variety of other instruments, have contributed to the growing abolition of the death penalty. See Schabas, supra note 27, at 295-309 (discussing the factors that have contributed to the growing trend of world-wide abolition of the death penalty). That, in turn, has limited the requested state's ability to freely extradite death penalty fugitives to other countries without regard for the fugitive's rights once within the requesting state. See Gilbert, supra note 1, at 83-88 (discussing the European Convention and the limitations it has placed upon death penalty extradition).
As human rights recognition developed, quasi-judicial bodies created by human rights agreements gradually pushed nations into conformity by establishing international standards for extradition. Finally, with the new international standards providing a strong foundation, the Italian Constitutional Court moved to police international human rights within its own national courts. This decision limited the discretion of the Justice Minister of Italy to use extradition as a foreign policy tool, and put additional pressure upon the United States to conform to international human rights standards. Ultimately, under Venezia, the sovereign nation either must join the ranks of abolitionist nations or face constant obstacles when trying to extradite for capital offenses.

237. See Quigley, supra note 236, at 1288 (noting that the Universal Declaration contained no obligations enforceable against member states); see also Breitenmoser & Wilms, supra note 71, at 879-81 (stating that the traditional theory of extradition law was based upon a relationship between two nations that was independent of any consideration of individual rights, and was "basically aimed at the protection of the sovereign power of the requested State").

238. See supra Part II.C (discussing the new international standards for extradition proceedings created by the decisions of the European Court and the UNHRC).

239. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, paras. 3.1 to 6; see also Francioni, supra note 132, at 15-16 (discussing the responsibilities of national courts in addressing human rights); Lillich, supra note 53, at 711-13 (noting the increasing role of national courts in international human rights jurisprudence); Quigley, supra note 55, at 1226-29 (discussing the actions of several national courts in policing human rights during extradition proceedings).

240. See Venezia, June 25, 1996, n.223, Appendix, infra, pt. II, para. 5. In any future treaty negotiations, the discretion left to Italian government officials will be severely curbed, and the United States will face pressure to provide more affirmative guarantees that it will not impose the death penalty. See supra note 230 (arguing that the Italian decision "exports" Italy's human rights standards to the United States).

241. See Bassiouni, supra note 51, at 240-42. Bassiouni notes that "[h]istorically, the notion of sovereignty has been a bar to the application of international substantive legal norms to national criminal justice processes" but that "[i]nternational human rights law... has... influenced the erosion of national sovereignty with respect to practices within the context of the administration of criminal justice." Id. at 240-41. Thus, the Italian decision, as a contribution to the development of international human rights law and extradition law, erodes the sovereignty of other nations by moving the pendulum closer to a national rejection of the death penalty and constructing obstacles for nations who continue its use. Cf. CAPITAL PUNISHMENT, supra note 45, at 25 (stating that "[d]eath penalty jurisprudence [by domestic courts] provides one of the most dramatic examples of this synergy between international and domestic human rights law").

Italy did not stop with its decision in Venezia. On April 3, 1997, at the urging of the Italian Government, the UNHRC adopted a resolution on the abolition of the death penalty. See Death Penalty News, March 1997 (visited Apr. 5, 1998) <http://www.amnesty.org/ailib/intcam/dp/dpnmar97.html>. The resolution, which passed by a 27-11 vote with 14 abstentions, asks member states to place a moratorium on executions and elevates the death penalty issue to a matter of international concern over human rights. See id. The
A. Short-Term Effect: "Oh give me a home, where there's terrorists in Rome"

In the immediate future, Venezia's impact will most likely be contained within Italy. Venice's final result is that Italy may no longer extradite fugitives to any country that imposes the death penalty absent a treaty guaranteeing absolute assurance against capital punishment. Therefore, Italy runs a high risk of becoming a short-term haven for those wishing to escape American justice.

Primary among those wishing to escape capital punishment will be terrorists and members of organized crime. The chief purpose of the 1983 U.S.-Italy Extradition Treaty was to simplify proceedings for the exchange of members of the Italian Mafia. Since the treaty was signed, resolution requires the Secretary General of the U.N. to prepare an annual report on the death penalty. See id. On April 3, 1998, Italy again supported a similar UNHRC resolution, which was co-sponsored by 63 nations and passed by a 26-13 vote with 12 abstentions. See Hands Off Cain: News of the Week (last visited Apr. 5, 1998) <http://handsofficain.org/english/home.html>. The action by the UNHRC is unquestionable evidence of the growing abolitionist nature of world politics, and shows a desire to promote human rights over traditional notions of state sovereignty. See id.

242. The unique nature of the Italian Constitutional Court, as well as the complex political climate in Italy, make it likely that few nations will follow the Venice decision in the near future. See supra notes 164-74 and accompanying text (discussing the Constitutional Court's unique position as well as the political circumstances surrounding the Venice decision).

243. See Bianchi, supra note 40, at 733 (stating that after Venice, "the extradition of fugitives charged with crimes punishable by death in the United States has been ruled out under Italian constitutional law, at least pursuant to the existing Extradition Treaty"); Tagliabue, supra note 163 (noting that the court declared the capital punishment provision in the U.S.-Italy Extradition Treaty unconstitutional, and put future cooperation between the United States and Italy in doubt).


245. See Italian Court Bars Extradition, supra note 44, at A10 (stating that many alleged Mafia members were extradited under the U.S.-Italy Extradition Treaty's capital punishment provision); Dyckman, supra note 244, at 7A (suggesting that the inability to extradite death penalty fugitives would make Italy an attractive home for international terrorists).

246. Cf. Italian Court Bars Extradition, supra note 44, at A10 (noting that many Mafia members were extradited under the treaty). For a complete discussion of the U.S.-Italy Extradition Treaty, see Paolo Mengozzi, A View From Italy on Judicial Cooperation Be-
many members of the Mafia have been extradited upon assurances that the United States would not seek the death penalty. Without the capital punishment provision, the United States will have difficulty in continuing its fight against Mafia members and organized crime.

In addition, international terrorists could find Italy to be an ideal haven from American authorities. Although Venezia involved an Italian national, in a prior case the court established that “citizen,” within the meaning of Italian Constitution, covers both Italian nationals and foreigners when applying constitutional protections. Without a capital punishment provision, the United States could be powerless in recovering terrorists from Italy through diplomatic channels.

B. Long-Term Effect: The Death Penalty No Longer a Capital Idea

The unique nature of the Italian Constitutional Court makes it difficult to predict the long-term impact of the Venezia decision. Although the decision represents a change in the landscape of extradition law, it remains to be seen how other nations will navigate the new territory.

---


247. See Italy Refuses to Return Murder Suspect, supra note 175, at 2 (noting that many fugitives, including alleged Mafia figures, were extradited from Italy with assurances that U.S. authorities would not seek capital punishment).

248. See Bashor, supra note 189, at 8 (describing the concerns of the U.S. Department of Justice over the effect of Venezia on future criminal assistance between the United States and Italy). The United States may not surrender or receive extradition of a fugitive in the absence of a treaty. See 18 U.S.C. § 3184 (1994); see also BASSIOUNI, LAW AND PRACTICE, supra note 3, at 6; Quigley, supra note 55, at 1213 (discussing extradition between the U.S. and other nations).

249. See supra note 245 and accompanying text (discussing the possibility of Venezia protecting international terrorists from extradition to the United States).

250. See In Re Cuillier, Ciamborrani, and Vallon, reprinted in 78 INT'L L. REP. 93, 98-100 (1988) (holding, in a 1979 decision, that principles of equality within the Italian Constitution require that both citizens and foreigners be given the same constitutional protections in extradition proceedings). This case originally appeared in Italian. See In Re Cuillier, Ciamborrani, and Vallon, June 21, 1979, n.54, Giur. Cost. 1979, 413.

251. See supra notes 1 and 248 (stating that extradition to the United States may not take place in the absence of a treaty); see also Dyckman, supra note 244, at 7A (arguing that Venezia will make Italy an attractive home for international terrorists).

252. Since few nations employ such a politically involved court, it is difficult to predict what type of case would allow for a national court outside of Italy to apply the Venezia rationale. See supra notes 164-74, 204-15 and accompanying text (discussing the Constitutional Court and the politics of the Venezia case); supra notes 242-51 (arguing probable short-term effects).

253. See Lillich, supra note 53, at 700-03 (discussing how national courts have applied international human rights law). Lillich notes that many of the constitutions of the former British colonies (mostly in Africa, Asia, the Caribbean, and the Pacific) are based upon
One thing is certain— as capital punishment continues to decline throughout the world, the appeal of the Italian approach should grow.\textsuperscript{254} Historically, before the \textit{Venezia} decision, the general trend of human rights courts was to increase the judicial role in examining the conditions of the requesting state.\textsuperscript{255} Once the number of abolitionist countries significantly outnumbers the retentionist countries, however, such a detailed proceeding will seem almost counterproductive because the prohibition on capital punishment may have become part of customary international law.\textsuperscript{256} National courts within the requested state may move towards the reasoning employed in \textit{Venezia} and refuse extradition of a death penalty fugitive based upon conflicts between the extradition treaty and constitutional law, international norms, or human rights obligations of the requested state.\textsuperscript{257} At that point, the United States will find itself with a choice: either keep the death penalty at the expense of losing extradition for capital offenses, or join the ranks of abolitionist nations.\textsuperscript{258}

---

\textsuperscript{254} Cf. Bassiouni, \textit{supra} note 51, at 249 ("[W]hen a significant number of states representing the major legal systems of the world have adhered to a given convention, it may become part of customary international law and . . . principles which have become universally accepted may also rise to the level of peremptory norms of international law."); Rosen & Journey, \textit{supra} note 30, at 163-64 (noting that the increased global rejection of the death penalty is leading towards a change in international law). Thus, as more and more states reject capital punishment, prohibition of the death penalty may become customary international human rights law, allowing for the indirect application of international human rights law in the interpretation of constitutional standards. Cf. Bassiouni, \textit{supra} note 51 at 243-44, 249 (discussing the methods by which domestic law may transform into international law). Therefore, the underlying principles of \textit{Venezia} could gain global acceptance.

\textsuperscript{255} \textit{See supra} Part II.C (discussing the impacts of Soering, Kindler, and Ng).

\textsuperscript{256} \textit{See supra} note 254 and accompanying text (explaining the end result of a situation where the number of abolitionist nations outnumber retentionist nations). Ultimately, the examination of judicial conditions inside the requesting state will become moot because the prohibition of capital punishment will have become part of customary international law. \textit{See supra} note 231 and accompanying text (explaining the concept of "anti-inquiry").

\textsuperscript{257} Such a result would parallel Lillich's concept of "the internationalization of domestic adjudication and . . . the manner in which international law increasingly penetrates and transforms national law." Lillich, \textit{supra} note 53, at 713 (quoting Judge Buergenthal).

\textsuperscript{258} Perhaps a harsh statement, but consider that three major decisions within the last seven years, \textit{Soering}, Ng, and \textit{Venezia}, have held extradition to the United States to be
VI. CONCLUSION

The landscape of extradition law has changed with the Italian Constitutional Court's decision in Venezia. Unlike the decisions of the European Court and the UNHRC, the impact of the decision cannot be surmised easily. Venezia could gain widespread acceptance and become an important guide for future extradition controversies involving capital punishment, or it could become a judicial aberration that treads too far for other courts to follow. Whatever result occurs, it will not occur in a vacuum. As the death penalty issue becomes more and more bipolar, and international standards provide increased protection for human rights, the reasoning of Venezia may become more appealing. The enigmatic interaction between state sovereignty, human rights, and extradition law may soon crystallize into a new age where sovereign nations retaining the death penalty find themselves at the mercy of national courts once satisfied to remain uninvolved in the extradition process, but now acting as vanguards for international human rights. If this occurs, countries that continue to use the death penalty, including the United States, must either reconsider its practical importance, or watch the "long arm of justice" become considerably shorter.

impermissible because of capital punishment. See supra Parts II.A, II.B.2, III (discussing Soering, Ng, and Venezia). With such a poor track record in recent years, and in light of the fact that many bilateral U.S. extradition treaties use language nearly identical to the that in the U.S.-Italy Extradition Treaty, future attempts to gain extradition of death penalty fugitives will most likely result in continued controversy. See supra notes 45-50 and accompanying text (discussing the typical U.S. extradition treaty and how it conflicts with human rights law).

Some evidence suggests that U.S. states which use the death penalty are seeing a decline in its popularity with juries. See Peter Finn, Given Choice, Va. Juries Vote for Life, WASH. POST, Feb. 3, 1997, at A1 (stating that death sentences have dropped recently in four states—Virginia, Georgia, Indiana, and Maryland—because jurors are given the option to sentence criminals to life without parole). Opponents of the death penalty point out that when alternative sentences are offered, public support for the death penalty drops below 50%. See Death Penalty Information Center: Public Opinion (last visited Apr. 5, 1998) <http://www.essential.org/dpic/dpic7.html>.
THE REPUBLIC OF ITALY
IN THE NAME OF THE ITALIAN PEOPLE
Sentence No. 223-1996

THE CONSTITUTIONAL COURT

Consisting of: Dr. Mauro FERRI, Attorney, President; Prof. Luigi MENGONI; Prof. Enzo CHELI; Dr. Renato GRANATA; Prof. Giuliano VASSALLI; Prof. Francesco GIUZZI; Prof. Cesare MIRABELLI; Prof. Fernando SANTOSUSSSO; Dr. Massimo VARI, Attorney; Dr. Cesare RUPERTO; Dr. Riccardo CHIEPPA; Prof. Gustavo ZAGREBELSKY; Prof. Valerio ONIDA; Prof. Carlo MEZZANOTTE, Judges.

Has pronounced the following:

SENTENCE

In the case of the legitimacy of Article 698, paragraph 2, of the Code of Criminal Procedure, and of Law May 26, 1984, No. 225 (Ratification, and Execution of the Extradition Treaty between the Republic of Italy, and the United States of America, signed in Rome on October 13, 1983), for that portion which concerns execution of Article IX of said Treaty, in the case initiated with ordinance issued on March 20, 1996 by the Regional Administrative Court for the Region of Lazio concerning the appeal submitted by Pietro Venezia against the Ministero di Grazia e Giustizia (Justice Department), filed with the number 404 in the Ordinance Registry for 1996, and published in Gazzetta Ufficiale of the Republic No. 16, First Special Series, for 1996.

Having seen the entry of appearance in legal proceedings of Pietro Venezia, and of the Government of the United States of America, and the Intervention Act of the President of the Cabinet of Ministers (Presidente del Consiglio dei Ministri);

Having heard the Relating Judge Francesco Guizzi at the Hearing of May 28, 1996;

Having heard the attorneys, Mario Salerni for Pietro Venezia, Giuseppe Frigo, and Giorgio Luceri for the Government of the United States of America, and the State Attorney, Carlo Salimei, for the President of the Cabinet of Ministers.

PART I: AFTER ASCERTAINING THE FACTS
1. Against the Decree of The Ministero di Grazia e Giustizia of December 14, 1995, with which the extradition of the Italian citizen Pietro Venezia was granted to the Government of United States – Pietro Venezia was the object of a restrictive measure issued on December 30, 1993 by the Judge for Dade County (Florida) with the charge of first degree homicide – the person who is the object of the extradition presented an appeal to the Regional Administrative Court for Lazio, with the purpose of obtaining the annulment, after obtaining the suspension, of the above mentioned decree.

As a reason for this action, the appealing party argued the illegitimacy of the Ministerial Decree, saying that Article 698, paragraph 2 of the Code of Criminal Procedure, and Law May 26, 1984, No. 225 (Ratification, and Execution of Extradition Treaty between the Republic of Italy, and the United States of America, signed in Rome on October 13, 1983), are in violation of the Constitution, with regard to that portion which concerns the execution of Article IX of said Treaty.

2. After rejecting the exceptions relating to lack of jurisdiction which had been proposed by the Office of State Attorney, the Court temporarily suspended the Ministerial Decree which is the object of the appeal, and at the same time initiated the case for constitutional legitimacy of Article 698, paragraph 2 of the Code of Criminal Procedure, - in connection with Articles 2, 3, 11, and 27, fourth paragraph of the Constitution – and of Law No. 225 of 1984, with regard to that portion which concerns the execution of Article IX of said Treaty.

2.1. The Bench observes that the appealed Decree is not to be considered a political act, and therefore it is submitted to the judgment of the Administrative Judge. It would lead to the conclusion of two complete separate procedural phrases, even though they might be connected because one presupposes the other, and there is no doubt that the Administrative Authority could perform its own activity of evaluation. In this manner, the Administrative Jurisdiction would be included in the final decision, even though it might not be extended to the review of the conditions necessary to sustain the request for extradition which have been ascertained by the first degree Judge pursuant to Article 704 of the Code of Criminal Procedure. With the same kind of autonomy, the Administrative Judge could decide on the objections related to the legitimacy of the laws on which the exercise of the Ministry's power is based, since the verification of the preliminary assumption of legitimacy of the administrative act, pursuant to the provisions of Articles 24, and 113 of the Con-
stitution, is part of his responsibility.

2.2. With regard to the specific motivation concerning the relevance, the Administrative Court for Lazio recalls the jurisprudence of the Constitutional Court regarding the admissibility of the objections raised by the Judge (transmitting the case) who temporarily suspended the appealed act until the resubmission to the Court following the judgment referring to its constitutionality (Ref. Sentence No. 440 of 1990, and Ordinance No. 24 of 1995). Therefore, the question would be pertinent in relation to the precautionary request for suspension of the appealed decree, which would seem — *prima facie* — to be lacking reasons for non-validity because of excess of power and errors of procedure, because it is properly motivated with regard to the reliability of the guarantees provided by the United States Government that capital punishment would not be inflicted upon the person who is the object of extradition, and, in any case, it would not be executed.

Such a decision is obviously illegitimate because it was taken on the basis of laws that were considered unconstitutional. The possibility of extraditing an Italian citizen so that he can be subjected by the requesting Country to criminal proceedings for a crime punishable with the death penalty — even though subordinated to conditions, or sufficient guarantees related to the non-application, or non-execution of such a penalty — would conflict with the fundamental principles of the Constitution, independently from the kind of guarantees that might be provided. From this point is derived the evident lack of justification of the question.

2.3. First of all, according the transmitting Judge, Article 2 of the Constitution, which recognizes and guarantees the inviolability of human rights, must be emphasized; among these is the right to life, which is absolute, as laid out in the Sentence of this Court, No. 54 of 1979. At the same time, it must be remembered that with this specific reference to Article 11 — granting of the extradition *sub condicione* — the Italian Government presented a reservation to the European Convention of Extradition, ratified with Law January 30, 1963, No. 300, with the commitment to refuse the extradition for crimes punishable with capital punishment in the requesting Country.

2.4. There could also be a violation of Article 27 of the Constitution because of the risk of different subjective evaluations, in different historical-political climates, because the denounced clause entrusts to the
discretional evaluation of the Ministero di Grazia e Giustizia – according to non-defined criteria – the judgment on the guarantees of the requesting Country, which might not give that certainty imposed by the aforementioned constitutional parameters, since the guarantee will be based only on the power of the Government entity giving such guarantee to enforce its application. And in this respect Article VI of the United States Constitution is of no assistance, because the Treaty lacks an effective protection since the Federal Government is not bound to particular forms or types of guarantees, which in any case will be limited by the autonomy of the individual States.

The a quo Judge quotes Article 3, which concerns the principle of equality that would be violated for the different attitude of the Italian Government in signing conventions with other Countries – recently with Romania, Hungary, and Morocco – which established a direct limit for the Judge of the requesting Country not to inflict, or not to execute the death penalty. And lastly he objects to the contrast with Article 11 of the Constitution, emphasizing that the article admits "limitations to sovereignty" only if, and when "necessary to institutions that guarantee peace and justice among the Nations."

3. The President of the Cabinet of Ministers intervened, as represented and defended by the State Attorney, arguing for inadmissibility, or at least the lacks of grounds of the Appeal.

3.1. The appeal would be inadmissible because the control over the legitimacy of the administrative act granting the extradition is limited to the Government decision, and cannot be expanded to the jurisdictional case discussed before the Court of Appeal having territorial jurisdiction, and later, in front of the Supreme Court during the appeal concerning the substance of the case. The two decisions could not overlap, since the judicial authority is empowered to examine the requirements provided for by the law and by the international convention, and because the Ministry is empowered to evaluate, on the basis of considerations which are also of a political nature (even contingent) on the status of the diplomatic relations with the requesting Country, whether to grant the extradition or not. The relationship between the two phases, jurisdictional, and political-administrative, is clearly provided for by Article 701 of the Code of Criminal Procedure.

The Regional Administrative Court for Lazio could not expand its control to include the decision regarding the rights of the person to be extradited, already evaluated by the judicial authority: It could only limit
Itself to judge the legitimate interests alleged by this person with regard to the safeguard of the correct procedure, and with regard to the legitimacy of the political evaluations made by the Ministry; moreover, the judicial authority could not know the objections to the laws which are at the basis of the appealed decision. In the opinion of the State Attorney, only those laws which grant the Ministry discretional power could be placed in doubt, while the transmitting Judges raised for discussion the extradition action, recalling the subjective rights of the person to be extradited, among them the right to life, which have already been examined by the principal judge.

3.2. With regard to the substance, the case would be without justification in any case, and, according to the Sentence No. 54 of 1979 of this Court, would not be relevant: The law invoked on that occasion consented to the extradition without any limitations or guarantees, even for crimes punishable with death penalty, whereas the law at the basis of this appeal assumes guarantees that the death penalty would not be applied, or executed, if the request for the extradition were to be granted. Also the reference to the reservation objected to by Italy to the European Convention on Extradition would not be relevant, because that Treaty was signed before the one with the United States.

The law in dispute connects the extradition act to the existence of certain objective and binding parameters - that, in the opinion of the Supreme Court - are to be found in the commitment of the United States Federal Government with the peculiar characteristics of international obligation, rendered effective and mandatory for the Federal Government by Article VI of the Constitution of 1787. On the other hand, a similar situation exists in our laws, in the case extradition is obtained only for certain crimes: In this case, Article 720 of the Code of Criminal Procedure binds the Judicial Authority to the conditions imposed by the extraditing Country which are freely accepted. Therefore, the international obligation is included in a law of our Country, while according to the institutions of the United States, the compliance with this international obligation would be assured - because of the Federal structure - directly by a Constitutional Law. In this particular case the Supreme Court points out - “the capital punishment must be considered as non-existing any more, or in any case, non-operative.”

Therefore, there should not be any violation of the indicated Constitutional parameters.

Article 27, fourth paragraph, of the Constitution, cannot be read out of context, but must be coordinated with Article 26 - pertinent in its speci-
ficity - and with both Articles 10 and 11, that extend Constitutional protection to the generally recognized principles of international law, among these the old, and well established principle \textit{pacta sunt servanda} (obligations must be kept). The prohibition of the death penalty cannot deny this fundamental form of international judicial collaboration, that is put into effect through extradition. Of significance is Article 26 of the Constitution, that allows the extradition of an Italian citizen "when it is specifically provided for by International Conventions," but excluding it for political crimes.

Rendering absolute the prohibition for crimes punishable with the death penalty would configure a right of asylum, or, at least, an unjustifiable right to be subjected to the Italian criminal jurisdiction for the most serious crimes (Article 9 of the Criminal Code), and this would be in open violation, according to the State Attorney, of the principle of territorial jurisdiction of the criminal law.

4. Notified both by the \textit{a quo} judge and by the appealing party, the United States Government - assuming itself to be the interested party for the legitimacy of the extradition act - joined in the action, arguing for the lack of justification of the question of ratification and execution of the Extradition Treaty.

4.1. In the substance, the arguments developed by the defense of the President of the Cabinet of Ministers regarding the point of the binding commitment of the requesting Government must be recalled; also it is stressed that - pursuant to Article I, Section X, of the United States Constitution - the Federated States cannot sign international treaties, because these are within the exclusive competence of the Federal Authority, and they are bound to observe the provisions of same as clarified by the jurisprudence of the Federal Supreme Court. Therefore, the guarantees provided by the United States Government with the verbal notes of July 28, 1994, August 24, 1995, and January 12, 1996 are to be considered binding for the State of Florida and for its Judges. In the case of a violation, the United States Government would place into effect the necessary remedies directed to cause the Federal Court to intervene.

5. Also the private party (defendant) joined in the action, asking for the declaration of Constitutional illegitimacy of the denounced Laws. The person subject to extradition points out that the treaty between Italy and the United States does not give sufficient protection to the defendant charged with a crime punishable in the territory of the United States...
with the death penalty: while better protection is given, for example, by the treaty between Italy and Morocco, which provides for the substitution of the death penalty with the penalty established by the Italian laws for the same crime. Therefore, there would not be a reasonable assurance about the non-imposition or non-execution of the death penalty, since Article VI of the United States Constitution refers to the treaties between the States of the Union, and not with international Countries, among which the extradition treaty is included.

PART II: *AFTER CONSIDERING THE LAW*

1. The question of the Constitutional legitimacy of Article 698, paragraph 2, of the Code of Criminal Procedure, and of Law May 26, 1984, No. 225 (Ratification, and Execution of Extradition Treaty between the Republic of Italy, and the United States of America, signed in Rome on October 13, 1983), with regard to that portion which concerns the execution of Article IX of said Treaty, which provides for the extradition for crimes, also those punishable with capital punishment, against the commitment taken by the requesting Country - with guarantees considered sufficient by the requested Country - not to punish with the death penalty, or if this has already been imposed, not to execute it, has come under examination by this Court.

2. The participation of the Government of the United States of America is admissible, since it is a party legitimized to oppose in the proceedings *a quo*, as is the case in Venezia's appeal - which had been notified to the United States Embassy in Italy - and in the decisions for suspension taken by the Regional Administrative Court for Lazio, legally notified. The substantial right to a legitimate interest corresponds to the formal profile, related to both the substance of the object of the question, and to the constitutionality objection to laws that are the basis of the request and of the granting of extradition, one of which is the law establishing the execution of the extradition treaty in which the United States Government is one of the contracting parties.

3. Therefore, it is necessary to evaluate the admissibility of the question raised within a case pending before the Regional Administrative Court for Lazio, regarding the legitimacy of the decree granting the extradition of Pietro Venezia by the Ministero di Grazia e Giustizia, at the request of the Government of the United States of America. The State Attorney observes on this point that this case concerns the legitimate in-
terest of the person to be extradited in the correct application of the po-

tical-administrative power of the Ministry, and not the right to life,

which has already been taken under consideration by the non-

administrative judges who have exclusive jurisdiction in both grades

(Court of Appeal, and - for the appeal on substance - Supreme Court).

The denounced laws would not be relevant, because they are related to

the ordinary jurisdiction, for which the Ministerial Decree is an insur-

mountable obstacle.

3.1. The objection must be rejected.

Article 697 of the Code of Criminal Procedure orders that the delivery

do a person to a foreign Country can take place only by force of extradi-

tion; and Article 698, paragraph 2, provides for court, and procedural

guarantees for acts punishable with the death penalty by the Law of the

foreign Country, conditioning the granting of the extradition decree to

do the decision of the ordinary jurisdiction in relation to the guarantees fur-

nished by the requesting Country, and their consequent evaluation by

the Ministero di Grazia e Giustizia.

The decree contested before the Administrative Judge, which refer-

ences the right to life of the person to be extradited, has also considered

the guarantees furnished by the foreign Country. Therefore the doubt

regarding the constitutionality of Article 698, paragraph 2 of the Code of

Criminal Procedure is relevant because it ascribes a power to the Minis-

try that, in this case, was in fact used; also relevant is the doubt regarding

the law on execution of the Treaty, No. 225 of 1984, since this law grants

power to the two Authorities (judicial, and administrative), indicated in

the aforementioned Article 698.

It cannot be argued that the a quo judge had invoked subjective rights,

not included in his knowledge: The verification of the legitimacy of the

appealed decree - verification exercised in light of the observance of the

laws regulating the actions of the Ministry - must be exercised also with

regard to constitutional legality, this being the first due verification that

evry Judge must exercise. This verification of legality, however, cannot

be construed as being limited to the principles of the administrative ac-

tion in a narrow sense if it insists on rights, or on interests protected (to

the highest degree) by the Constitution. The question can be admitted

on these grounds.

4. The substance of the question is justified.

The prohibition of the death penalty has a particular relevance - as the

prohibition of penalties contrary to the sense of humanity would be - in
the first part of the Constitution. Introduced by the fourth paragraph of Article 27, it implies a principle “that in many senses can be considered Italian” - these words are taken from the Report of the Committee to the Constitutional Assembly, in the section devoted to civil rights - principle that, “confirmed in the phases, and in the system of freedoms of our Country, had been removed during the reactionary, and violent times,” is represented in the Constitutional System, as a projection of the guarantee granted to the fundamental right to life, which is the first of the inviolable Rights of Man, recognized by Article 2.

The absoluteness of this Constitutional guarantee has an influence on the exercise of the powers granted to all public entities of our republican system, and in this case on those powers through which international cooperation is realized for the purpose of reciprocal judicial assistance. Therefore, Article 27, fourth paragraph, read in light of Article 2 of the Constitution, is to be considered an absolute parameter of evaluation of the Constitutional legitimacy of the general law on granting extradition (Article 698, paragraph 2, of the Code of Criminal Procedure), and of the laws that provide for the execution of international treaties on extradition, and judicial assistance.

5. This Court has already reaffirmed that the participation of the Italian Government in the execution of penalties “that in no case, and for no type of crime, could be inflicted in Italy in times of peace” is by itself in violation of the Constitution (Sentence No. 54 of 1979). The point now under examination is if the “guarantees” or “insurance” provided for by the aforementioned Article 698, paragraph 2, and by Law May 26, 1984, No. 225 of ratification, and execution of the Extradition Treaty between the Government of the Republic of Italy, and the Government of the United States of America, signed in Rome on October 13, 1983; and in particular if this law is in conformance with the Constitution, with regard to the part which provides for execution of Article IX of such Treaty, where the law provides for the refusal of the extradition in the case of crime being punishable with the death penalty in accordance with the laws of the requesting party. The exception is in cases where such party “commits itself with guarantees, considered sufficient by the requested party, not to inflict the death penalty, or if such penalty is inflicted, not to have it executed”.

As already mentioned, the procedure established by Article 698, paragraph 2 of the Code of Criminal Procedure is based on a double control made, cases by case, by the Judicial Authority, and by the Ministero di Grazia e Giustizia about the “sufficiency” of such guarantees. Therefore,
the extradition is granted (or denied) after evaluations made by the Italian authorities on the individual requests with verifications within the limits indicated above. This solution offers, in abstract, the advantage for the requested Country of following a flexible policy, and allows for adaptations, over a period of time, based on considerations of criminal policy; but in our juridical system, in which the prohibition of the death penalty is constitutionally protected, the expression “sufficient guarantees” directed to the granting of extradition for crimes punishable with capital punishment pursuant to the law of the foreign Country - is not constitutionally admissible. Because the prohibition pursuant to Article 27, fourth paragraph of the Constitution, and the rights based on it - first of all the essential right to life - impose an absolute guarantee.

The doubts of the private party with regard to the existence of judicial remedies in the United States Law system protecting the obligations contained in international treaties signed by the Federal Government are without justification, and there is no question about the interpretation of Article VI of the U.S. Constitution. The relevant point here is not the point regarding the remedies provided for by the foreign laws, but the intrinsic insufficiency of the mechanism provided for by the Code of Criminal Procedure, and by the law concerning execution of the treaty under examination, against the constitutional rule: The absolute nature of the constitutional rule is invalidated by the presence of a law that leaves to discretionevaluations, case by case, the judgment of the degree of dependability of guarantees given by the requesting Country.

6. Therefore, the declaration of the illegitimacy of Article 628, paragraph 2 of the Code of Criminal Procedure, and of Law No. 225 of 1984, with regard to that portion that provides for execution of Article IX of the Extradition Treaty between the Italian Government and the Government of the United States of America is to be demanded, because they are in conflict with Articles 2 and 27, fourth paragraph of the Constitution. Obviously, the remedy provided for Article 9, third paragraph, of the Criminal Code remains applicable, with respect to the alternative obligations of our Country (to deliver or to punish): At the request of the Ministero di Grazia e Giustizia, the defendants convicted of crimes perpetrated in a foreign Country are punishable according to the Italian laws, with the penalty of at least three years of imprisonment, when extradition was not or could not be granted (Sentence No. 54 of 1979, no 7 of Considerato in Diritto).

The objections raised with reference to Articles 3 and 11 of the Constitution are included in this decision.
PART III: JUDGMENT

FOR THESE REASONS
THE CONSTITUTIONAL COURT

a) declares the constitutional illegitimacy of Article 698, paragraph 2, of the Code of Criminal Procedure;

b) declares the constitutional illegitimacy of Law May 26, 1984, No. 225 (Ratification and Execution of the Extradition Treaty between the Republic of Italy, and the United States of America, signed in Rome on October 13, 1983), with regard to that portion which provides for the execution of Article IX of aforementioned Treaty.

This was decided in Rome, at the seat of the Constitutional Court, in the Palazzo della Consulta, on June 25, 1996.

Signed: Mauro FERRI, Presiding Judge
Francesco GUIZZI, Relating Judge
Maria Rosaria FRUSCELLA, Clerk

Filed in the Office of the Clerk on June 27, 1996
The Clerk
Signed: FRUSCELLA