THE RULE OF NON-INQUIRY AND HUMAN RIGHTS TREATIES

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I. INTRODUCTION

When a foreign state approaches U.S. officials and asks for the extradition to its territory of a person it suspects of violating its laws, the Secretary of State makes the final decision whether to surrender the person. Initially, however, a federal magistrate rules on whether the person is extraditable. Only if the magistrate so rules does the matter proceed to the Secretary of State for review.

On occasion, in the proceedings before the magistrate, the person whose surrender is sought asserts that the authorities of the requesting state will torture him, or subject him to some other violation of basic human rights. The response of the magistrate is likely to be that the potential ill-treatment is irrelevant to a finding of extraditability. The federal courts follow the "rule of non-inquiry," which provides that the magistrate does not inquire into the claim of anticipated ill-treatment. Rather, this issue of inquiry is left to the Secretary of State, who may consider potential ill-treatment in deciding whether to surrender the person.

In the 1990s, the United States ratified two human rights treaties that require states to refuse to extradite if ill-treatment is anticipated. These two treaties arguably require the courts to address the issue of human rights violations instead of leaving such inquiry to the Secretary of State.

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2. Id. § 3184 (1994).
3. Id.
4. See Neely v. Henkel, 180 U.S. 109 (1901) (declaring an act constitutional though it does not secure rights to an accused in a foreign land); Koskotas v. Roche, 931 F.2d 169 (1st Cir. 1991) (reasoning that the rule of non-inquiry precluded the court from inquiring into the motives of foreign government); Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990) (holding that the courts will consider only whether the alleged offender's crimes fall within the extradition treaty).
5. See infra notes 28, 35-36 (referring to treaties ratified by the United States).
This Article reviews the case law on the rule of non-inquiry and analyzes the two human rights treaties to determine whether they require the federal courts to abandon the rule.

II. THE FEDERAL COURTS' RULE OF NON-INQUIRY

Scenario: A federal magistrate is presented with a request to extradite Second Story Man (SSM) to Ruritania on a burglary charge. SSM is being held in a federal detention facility. A bilateral extradition treaty between the United States and Ruritania requires the United States to extradite for burglary if Ruritania can demonstrate probable cause that the person committed the offense. The U.S. attorney has presented evidence on Ruritania's behalf to the magistrate sufficient to establish probable cause. SSM's lawyer proffers evidence showing that if extradited, SSM is likely to be tortured by police interrogators in Ruritania. The proffered evidence consists of (1) human rights organizations' reports that the Ruritania police customarily brutalize suspects; (2) press reports regarding discrimination in Ruritania against members of an ethnic minority to which SSM belongs (discrimination that is reflected frequently in police brutality); and (3) a Ruritanian lawyer prepared to testify on points one and two as a result of her practice experience.

The U.S. Attorney objects to the introduction of this evidence, arguing that if torture is a risk, the Secretary of State will have the option to refuse to extradite. The U.S. Attorney cites federal court precedents instructing magistrates to ignore potential rights violations in the requesting state.

The lawyer, in reply, is unable to refer to a case in which a federal court refused to find extraditability because of potential ill-treatment, but does cite cases where federal courts expressed concern about potential mistreatment, but refuted the person's claim that mistreatment awaits him. The lawyer also cites two human rights treaties that, he argues, forbid extradition if there is a risk of abuse. He notes that the existing federal case law does not consider these treaties because the United States only recently became a party to these treaties. The lawyer argues that the protection the Secretary of State affords is insufficient because the Secretary may be reluctant to affront Ruritania, which is a political ally currently assisting the United States in a peace-keeping operation. Only if the matter is considered in a judicial forum, he argues, can the risk be assessed objectively. Moreover, he says there is no established procedure whereby a person being extradited may present to the Secretary of State evidence regarding the risk of mistreatment. Thus, the person has no means of
ensuring that the Secretary of State will understand the seriousness of the risk of mistreatment.

This scenario reflects the context in which the application of the rule of non-inquiry arises. The basis for the foreign state's request typically would be a bilateral extradition treaty. In U.S. practice, a foreign state has a right to extradition only if an extradition treaty is in force that requires the surrender. Under federal court procedure, a district court magistrate hears evidence presented by the U.S. Attorney on behalf of the requesting state and makes a finding whether the person is extraditable. In reaching its decision, the magistrate decides whether the extradition treaty covers the crime charged, and whether the requesting state has probable cause to believe that the person committed the offense. On application for a writ of habeas corpus a federal district judge has the authority to review a magistrate's finding of extraditability. Thereafter, review may be sought in the court of appeals and in the Supreme Court.

If the magistrate makes a finding of extraditability, and if that finding is not reversed on review, the matter proceeds to the Secretary of State, who decides whether to extradite. Normally the Secretary of State follows the finding of extraditability and surrenders the person; but the Secretary may refuse to do so, particularly if ill treatment in the requesting state is anticipated.

If an extraditee asserts before a magistrate that he will be detained or tried under procedures that violate basic rights, the magistrate is likely to ignore such a plea. In Neely v. Henkel, the Supreme Court refused to consider the procedures awaiting an extraditee that might violate the ex-

6. 18 U.S.C. § 3184 (1994); see United States v. Rauscher, 119 U.S. 407, 414-15 (1886) (explaining that the existence of treaties with other countries resolves the question of whether the United States should extradite); Argento v. Horn, 241 F.2d 258 (6th Cir.) (holding that a valid treaty is required for extradition and that an extradition treaty with Italy was not terminated but merely was suspended during war), cert. denied, 355 U.S. 818 (1957).
9. 18 U.S.C. § 3184 (1994); see Collins v. Loisel, 259 U.S. 309, 311-12 (1922) (determining whether the charged crime is covered by extradition treaty); Ex parte La Mantia, 206 F. 330 (S.D.N.Y. 1913) (holding that enough evidence exists to charge the accused with murder).
11. 18 U.S.C. § 3186 (1994); see Factor, 290 U.S. at 304 (holding that the Secretary of State has authority to order extradition).
12. The term "extraditee" is used in this Article to mean a person whose extradition is sought by a foreign state under an extradition treaty.
traditee's basic rights. In *Neely*, the person being extradited to Cuba argued that if surrendered he would be tried under Cuban procedure, which provided for no jury trial, no habeas corpus protection, and no protection against bills of attainder or ex post facto laws. Rejecting this argument, the Supreme Court said that although the enumerated protections were not available in Cuban courts, the person could, nonetheless, be found extraditable. The Court stated that an extraditee is not entitled to "a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled."

Federal courts follow the approach taken in *Neely* even if the extraditee refers not to the general mode of trial in the requesting state, but to facts suggesting that he, in particular, may be treated unfairly. A contemporary example is *Ahmad v. Wigen*. Following a magistrate's finding of extraditability, the extraditee sought habeas corpus relief. The district judge heard extensive evidence presented by the extraditee that he might be tortured in the requesting state. The district judge found, however, that this evidence did not show a likelihood of torture and ruled the man extraditable. The Second Circuit affirmed the finding of extraditability but criticized the district court judge for hearing evidence about potential torture, explaining that "[a] consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge."

The Second Circuit stated it was left to the Secretary of State's discretion alone to consider potential ill-treatment in the requesting state. Citing an earlier decision of its own, the court elaborated that "the degree of risk to [appellant's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch." Citing another earlier decision, the court noted, "it is not the business of our courts to

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14. *Id.* at 122-25 (holding that no right to trial, similar to a trial in the United States, need exist in a foreign country for extradition to take effect).
15. *Id.* at 122.
16. *Id.* at 122-23 (reasoning that although appellant is a United States citizen, he is not immune from criminal punishment when he commits crimes in other countries).
17. *Id.* at 123.
18. 910 F.2d 1063 (2d Cir. 1990).
20. *Id.* at 420.
21. *Ahmad*, 910 F.2d at 1066.
22. *Id.* at 1067.
23. *Id.* at 1066 (citing Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980)) (seeking denial of extradition for fraudulent bankruptcy, claiming he had political enemies in Italy, and presenting a photograph from a street demonstration in which a participant displayed a slogan reading "Death to Sindona"), *cert. denied*, 451 U.S. 912 (1981).
assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.\textsuperscript{24}

The rule of non-inquiry is rationalized on the basis that the Secretary of State may refuse to surrender, and that the United States may minimize the risk of rights violations by avoiding extradition treaties with states in which procedural protections are weak.\textsuperscript{25} The rule of non-inquiry reflects the character of extradition as a procedure involving rights and obligations between states,\textsuperscript{26} rather than as a procedure designed to protect individuals.

III. HUMAN RIGHTS TREATIES AND EXTRADITION

Although extradition is a matter between the requested state and the requesting state, the emergence in the mid-twentieth century of human rights law brought pressure to abandon the rule of non-inquiry. One commentator on extradition law remarked that “[t]he emergence of the individual as a recognized participant in the processes of extradition and the applicability of internationally protected human rights are likely to curtail if not eliminate the rule of non-inquiry.”\textsuperscript{27}

A key international instrument leading in this direction is the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which provides:

1. No State Party shall . . . extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.\textsuperscript{28}

\textsuperscript{24} Id. (citing Jhirad v. Ferrandina, 536 F.2d 478, 484-85, cert. denied, 429 U.S. 833 (1976)).

\textsuperscript{25} Koskotas v. Roche, 931 F.2d 169, 173-74 (1st Cir. 1991).

\textsuperscript{26} The term “state,” unless otherwise indicated, is used in this Article to mean “nation state.”

\textsuperscript{27} M. Cherif Bassiouni, International Extradition and World Public Order 466 (1974).

The Convention Against Torture came into force for the United States in 1994. The United States Senate, in consenting to its ratification, entered an "understanding" that the extradition of a suspect should be denied only "if it is more likely than not that he would be tortured." The United States entered no other qualification to the applicability of this provision.

The Convention Against Torture does not specify which branch of government must ensure that extradition is denied if torture is anticipated, referring to the agency making this determination only as the "competent authorities." When President Reagan submitted the Convention Against Torture to the Senate for its advice and consent to ratification in 1988, he included a proposed qualification: "The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases . . . ."

This statement would have meant that the courts should not consider the question of anticipated treatment of the extraditee, and thus that the rule of non-inquiry prevails. However, the Senate did not give its consent to the Convention Against Torture during President Reagan's term in office.

Two years later, when President Bush submitted the Convention Against Torture to the Senate, he omitted any comparable language. It is not clear from the record precisely why this change was made. One may infer from the omission either that President Bush and/or the Senate changed their view and opposed the rule of non-inquiry in torture cases, or that they deemed it better not to deal with the matter with qualifying language. In any event, the omission leaves the matter without Presidential or Congressional expression of opinion on the issue.


33. Id. at 7.

Another human rights treaty relevant to the rule of non-inquiry is the International Covenant on Civil and Political Rights, which obliges states to guarantee an extensive array of rights in criminal proceedings. The United States became a party to the International Covenant in 1992. Although the International Covenant contains no express provision on extradition, it has been construed to require a state to refrain from extraditing a person to a state that would violate any covenant-protected right. The Human Rights Committee (Committee), a body of legal experts established under the International Covenant to hear allegations of state party violations, has construed the provision in this manner. The Committee exercises the function of interpreting the International Covenant.  


36. See, e.g., id. art. 7 (highlighting torture, cruel, inhuman, or degrading treatment or punishment), art. 9 (enforcing right to prompt appearance before a judge and right of habeas corpus), art. 10 (sustaining right to humane conditions of incarceration), art. 14 (requiring right to be presumed innocent; right to be informed of a charge; opportunity to prepare a defense; speedy trial; right to counsel; right to cross-examine witnesses; privilege against self-incrimination; right if convicted to an appeal; double jeopardy protection), art. 15 (prohibiting ex post facto laws).

37. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992) (President Bush stating, in part, "I ... ratify and confirm the said Covenant, subject to the said reservations, understandings and declarations" (typescript, copy on file with author). The United States submitted its instrument of ratification on June 8, 1992, and under the Covenant, it enters into force three months after this submission. See International Covenant, supra note 35, art. 49. Thus, the Covenant entered into force for the United States on September 8, 1992.

38. See infra notes 41-64 and accompanying text (providing examples of how the International Covenant has been construed). See also International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, which lacks a provision on extradition where discrimination in the requesting state is anticipated. Like the International Covenant, the Convention is implemented by a committee that has never considered the inquiry issue. By the same logic used by the Human Rights Committee, however, the implementing committee could well construe the Convention to require inquiry. If that were done, the Convention would confront U.S. courts with the issues analyzed in this article regarding the Convention Against Torture and the International Covenant. The United States became a party to the "International Convention On The Elimination Of All Forms Of Racial Discrimination" in 1994. See MULTILATERAL TREATIES, supra note 29, at 92 (indicating U.S. ratification on Oct. 21, 1994, which meant entry into force on Nov. 20, 1994).

39. International Covenant, supra note 35, art. 28 (describing that the committee is to be composed of 18 elected members who are to be nationals of the state parties to the covenant).

40. General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights; Addendum, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the
The Committee considered this issue in three cases in 1993-94, all involving Canada’s extradition of persons facing the possibility of execution in the United States. In the first case, decided in 1993, Joseph Kindler had been convicted of murder in Pennsylvania.\footnote{Kindler v. Canada, U.N. Hum. Rts. Comm., Communications No. 470/1991, dec. of July 30, 1993, reprinted in 14 HUM. RTS. L.J. 307, 308 (1993).} After the jury recommended the death penalty, but before the court imposed the sentence, Kindler escaped and fled to Canada.\footnote{Id.} While extradition proceedings were pending for his surrender to U.S. authorities, he filed a complaint with the Human Rights Committee, asking the Committee to inform Canada that his extradition to Pennsylvania to face execution would violate the Covenant.\footnote{Id.} Kindler argued that the death penalty constituted cruel or inhuman treatment as the Covenant prohibited,\footnote{Id.} and alternatively, that the long-term close confinement of persons sentenced to death in Pennsylvania was cruel and inhuman.\footnote{Id.}

Canada objected, arguing that it should be responsible under the Covenant only for violations occurring within Canada, but not for violations committed in the United States.\footnote{Id.} The Covenant does not expressly provide that a state party must refrain from facilitating another state’s violations, or that it must deny extradition if the requesting state might violate Covenant-protected rights.\footnote{Id.} The Covenant contains only a general obligation to comply with the Covenant: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .”\footnote{International Covenant, supra note 35, art. 2; Kindler, 14 Hum. Rts. L.J. at 308.}

Rejecting Canada’s reasoning, the Committee read this provision as requiring a state, requested by another to extradite a person, to consider

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42. Id.

43. Id.; see Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, to which Canada is a party and whereby a state party to the International Covenant may consent to having the Human Rights Committee hear complaints by individuals who allege that the state has violated their rights under the International Covenant.

44. Kindler, 14 Hum. Rts. L.J. at 308; International Covenant, supra note 35, art. 7 (prohibiting cruel, inhuman or degrading treatment).

45. Kindler, 14 Hum. Rts. L.J. at 308. While the case was pending before the Committee, Canada extradited Kindler to Pennsylvania. Id.

46. Id.

47. Id.

potential violations by the requesting state, even if the requesting state is not a party to the International Covenant. The Committee said:

[1]f a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person’s rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. . . . For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. 49

Later in its decision, the Committee restated this point in slightly different terms: “If a State party extradites a person within its jurisdiction in circumstances such 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.” 50

Although the Committee ruled that Canada must consider whether the requesting state might violate Covenant-protected rights, it disagreed with Kindler’s contention that his Covenant-protected rights would be violated in Pennsylvania. 51

The Human Rights Committee reiterated the views expressed in Kindler in another 1993 case. The United States alleged Charles Chitat Ng committed multiple murders in California, but he had not been arrested there. 52 Ng was in Canada, and the United States sought his extradition. 53 Like Kindler, Ng complained to the Human Rights Committee, 54 arguing that in California he would be tried for a capital offense and that capital punishment, in general, violated the Covenant. 55 He suggested alternatively that execution in California’s gas chamber was cruel and inhuman and adduced extensive evidence about prior executions in that gas

50. Id. at 313.
51. Id. at 313-14 (stating that the death penalty is not prohibited by the Covenant and that Kindler had not submitted evidence to show how Pennsylvania treated death row inmates, nor evidence about his psychological make-up and how he might be affected by death row confinement).
53. Id. at 149.
54. Id.
55. Id.
Canada extradited Ng to California without awaiting the Committee's decision.57

On the merits of Ng's argument, Canada objected as it had in Kindler, explaining that it should not be responsible for actions the United States might take regarding Ng.58 The Committee disagreed, repeating its language from Kindler regarding a "real risk" of a rights violation following extradition.59 It then found that the gas chamber, as used in California, inflicted unnecessary suffering constituting cruel and inhuman treatment.60 On this basis, the Committee found that Canada violated the Covenant by extraditing Ng to California.61 The Committee asked Canada "to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party [Canada] to ensure that a similar situation does not arise in the future."62

The third case, decided in 1994, involved Keith Cox. The United States sought Cox for extradition from Canada to Pennsylvania on a charge of capital murder.63 The Committee did not revisit its views concerning the obligations of a requested state. Writing on the assumption that the requested state must consider a risk of the requesting state's possible rights violations, the Committee found that Canada would commit no violation of the Covenant through extradition of Cox to the United States.64

Thus, the International Covenant, like the Convention Against Torture, forbids extradition if rights violations are anticipated.65 The International Covenant applies across a broader range of potential violations by requesting states than does the Convention Against Torture because

56. Id. at 154; see International Covenant, supra note 35, art. 7 (prohibiting cruel, inhuman, or degrading treatment or punishment).
58. Id. at 152.
59. Id. at 156 ("[I]f 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.").
60. Id. at 157.
61. Id.
62. Id. According to the Optional Protocol, supra note 43, art. 1, states adhering to the Optional Protocol authorize the Committee to "receive and consider communications," but the provision does not expressly provide that states must abide by the Committee's decision.
64. Id. at 416-17.
65. This Article will not analyze in detail the issue of the degree of likelihood of such a violation before the duty to refuse surrender arises.
the coverage of rights in the International Covenant is more extensive.\textsuperscript{66} However, both treaties require that the United States refrain from extraditing to a state where rights violations are anticipated.\textsuperscript{67}

IV. International Practice on Inquiry vs. Non-Inquiry

Neither the Convention Against Torture, nor the Human Rights Committee in its construction of the International Covenant, indicates whether courts must inquire into potential ill-treatment in the requesting state, or whether the courts may leave such inquiry to the executive branch, as is the practice in the United States where the matter is left to the Secretary of State. There is, however, considerable international guidance suggesting that such inquiry is a function incumbent upon the courts.

The International Covenant contains a provision requiring that courts of a state party apply the International Covenant.\textsuperscript{68} A state party must ensure the observance of Convention-protected rights by all relevant institutions, including courts.\textsuperscript{69} It is obliged "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an

\textsuperscript{66} See supra notes 28-34 and accompanying text (discussing the Convention Against Torture and the International Covenant).

\textsuperscript{67} Two regional human rights treaties to which the United States is not a party similarly forbid extradition where ill-treatment is anticipated. The first, the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, art. 13, 25 I.L.M. 519, 524 states that:

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

The second agreement on this subject is the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222, 224 as construed by the European Court of Human Rights in \textit{Soering v. United Kingdom}, 11 Eur. H.R. Rep. 439 (1989) (explaining that extradition is prohibited if there is a real risk of exposure to inhuman or degrading treatment or punishment), and by the European Commission of Human Rights in \textit{X v. Germany}, 1963 Y.B. EUR. CONV. ON H.R. 462, 480 (precluding extradition if treatment can be anticipated), and in \textit{X v. Austria & Yugoslavia}, 1964 Y.B. EUR. CONV. ON H.R. 314, 328 (raising an extradition issue under the Convention's article prohibiting torture or cruel treatment if it appears that the rights of extraditee may be violated in the requesting state). \textit{See also} Amekrane v. U.K., 1973 Y.B. EUR. CONV. ON H.R. 356, 376 (questioning extradition where torture or other ill-treatment is anticipated); \textit{X v. Switzerland}, 24 Eur. Comm'n of H.R. Dec. & Rep. 205, 219 (1980) (extradition might raise issue under art. 3 if rights of extraditee would be violated in requesting state); Altun v. Federal Republic of Germany, 36 Eur. Comm'n H.R. Dec. & Rep. 209, 231-35 (1984) (finding that extradition may be denied even where the individual was suspected of interfering with criminal proceedings against the murderers of a political figure and where torture might be used to extract information from him).

\textsuperscript{68} International Covenant, supra note 35, art. 2.

\textsuperscript{69} \textit{Id.}
effective remedy.” Further, and importantly, a state party is obliged “[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.”

Thus, while the International Covenant contemplates that administrative authorities, such as the Secretary of State, will play a role in rights enforcement, it expects all state agencies, courts included, to be used. All branches of government must apply the International Covenant if it is relevant to decisions they make.

If there is any doubt that the International Covenant requires domestic courts to apply the rights analysis, instruction can be gained from the manner in which the courts of state parties have implemented the provisions. A strong indication of state practice is that, apart from the United States, no state party to the International Covenant has entered a qualifying statement reducing the level of applicability of the International Covenant’s provisions in its courts.

Another indication that judicial enforcement is contemplated is that the Human Rights Committee, as part of its monitoring of how states

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70. Id. art. 2(3)(a).
71. Id. art. 2(3)(b). The wording of this subsection is grammatically open to the construction that the state has a choice as to which of the three branches will enforce the Covenant. However, this subsection, as it reads in the French and Spanish texts of the Covenant, is open to no such construction. Those texts, as translated into English by this author, read: “ensure that the competent judicial, administrative, or legislative authority or any other authority competent under the legislation of the state shall rule on the rights of a person who makes the claim.” This formulation makes it clear that any branch of government that deals with a matter involving a Covenant-based right must apply the Covenant. When one official text of a treaty is ambiguous, but another is precise, the one that is precise must be followed because the applicable rule of construction is to read the text in the different languages in such a manner that they make sense in all the languages. Vienna Convention on the Law of Treaties, May 23, 1969, art. 33, U.N. Doc. A/CONF.39/27 (1969) (entered into force Jan. 27, 1980). The five official texts of the International Covenant, all equally authentic, are written in Chinese, Russian, English, Spanish, and French. See International Covenant, supra note 35, art. 53.
73. Vienna Convention on the Law of Treaties, supra note 71, art. 31, ¶3(b) (indicating that the manner in which states have applied the treaty is a guide to the interpretation of a treaty provision); see LORD McNAIR, THE LAW OF TREATIES 424-29 (1961) (showing that “practical construction” of a treaty provision by a state is evidence of what it is intended to mean).
74. MULTILATERAL TREATIES, supra note 29, at 118-30.
comply with the Covenant,\footnote{75} asks states whether their courts apply the International Covenant.\footnote{76} This pattern of questioning shows that the Committee views domestic judicial enforcement as a requirement of the International Covenant. State parties usually reply that their courts apply the International Covenant.\footnote{77}

Further, the Human Rights Committee has stressed the importance of domestic judicial enforcement as an obligation assumed by state parties.\footnote{78} The Committee stressed that it would be incompatible with the object and purpose of the International Covenant for a state party to "reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)),"\footnote{79} and further, "a State could not make a reservation to article 2, paragraph 3 of the Covenant, indicating that it intends to provide no remedies for human rights violations."\footnote{80}

In the specific instance of extradition where ill-treatment is a risk, the practice of domestic courts is in the same direction. Courts often deem it their obligation to deal with potential ill-treatment in a requesting state,

\begin{footnotes}
\footnote{75}{International Covenant, \textit{supra} note 35, art. 40 (requiring periodic reports to the Committee by state parties).}
\footnote{76}{See, e.g., \textit{Report of the Human Rights Committee}, U.N. GAOR, 44th Sess., Supp. No. 40 at 12 (§153), U.N. Doc. A/44/40 (1989) (addressing question to Norway); \textit{id.} at 21 (§98) (addressing question to Mexico); \textit{id.} at 44 (§192) (addressing question to the Netherlands); \textit{id.} at 120-21 (§546) (addressing question to Italy).}
\footnote{77}{Cindy A. Cohn, \textit{The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights}, 13 HUM. RTS. Q. 295, 316-20 (1991). See, e.g., \textit{Report of the Human Rights Committee, supra} note 76, at 44 (§194) (reply of the Netherlands that 58 judgments in Dutch courts mentioned Covenant articles, that Covenant rights are enforceable in Dutch courts, and that "[a]ny legislative act contrary to a provision of the Covenant would become inapplicable"); \textit{id.} at 121 (§549) (reply of Italy that treaties become domestic law without specific adoption, that parliament had nonetheless enacted a law stating that the Covenant would be domestic law, and that the courts frequently cite the Covenant); \textit{Report of the Human Rights Committee, U.N. GAOR, 43d Sess., Supp. No. 40 at 83 (§368), U.N. Doc. A/43/40 (1988) (reply of France that 20 decisions of French courts rely on the Covenant); \textit{id.} at 137-38 (§588) (reply of Japan that under its constitution, treaty provisions prevail over domestic legislation before Japanese courts, and that this rule applies to the Covenant).}
\footnote{78}{\textit{General Comment, supra} note 40, at 843 ("The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction.")}
\footnote{79}{\textit{id.} at 842.}
\footnote{80}{\textit{id.} at 843.}
\end{footnotes}
rather than leave the matter to the executive branch. If ill-treatment is anticipated, it is the duty of the court to block extradition.

The widespread nature of this practice is reflected in an extradition provision in the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a treaty not relating to human rights, and to which the United States is a party. According to the Convention, a state party must, at the request of another state party, extradite a person charged with illicit drug violations. However, the requested state “may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions.” This provision presumes that courts will typically be the agency determining whether an extraditee faces discrimination in the requesting state.

The practice of foreign courts supports this interpretation. In Germany, for example, courts refuse to find extraditability if they anticipate inhuman or degrading treatment in the requesting state. Swedish practice is the same, as demonstrated by its Supreme Court refusing to extradite a Soviet teenager who hijacked a Soviet airplane. While in custody in Sweden, the youth attempted suicide. The court heard psychiatric testimony that the youth would “go under” mentally if sent to a Soviet penal facility. Based both on his mental condition and on the court’s...

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81. See e.g. Ahmad v. Wigen, 726 F. Supp. 389, 412 (E.D.N.Y. 1989) (explaining that even though the executive branch conducts foreign policy, the court must exercise its independent judgment in an extradition case); see also infra notes 182-234 and accompanying text (describing precedent for ignoring the rule of non-inquiry).
82. Ahmed, 726 F. Supp. at 412 (explaining that courts may not compromise judicial integrity).
84. Multilateral Treaties, supra note 29, at 282 (showing ratification on Feb. 20, 1990); see also 135 Cong. Rec. 31,383 (1989) (noting ratification subject to three express understandings).
85. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, supra note 83, art. 6(2), at 507.
86. Id. art. 6(6) (emphasis added).
89. Sweden Won't Deport, supra note 88, at A29; Soviet Hijacker, supra note 88, at A25.
assessment that Soviet penal facilities did not meet international standards, the court refused to extradite him.  

Argentina’s courts refused to extradite a man facing capital punishment in Chile. Argentina abolished the death penalty, and its courts were not prepared to order extradition to a state where the death penalty would be imposed. The Supreme Court of Chile indicated that it would endeavor to comply with Argentina’s wishes. A lower Argentine court stated this was not a sufficient assurance. On appeal, the Argentine Supreme Court held that extradition should be ordered only if the Chilean executive agreed to commute any death sentence that might be imposed. Here, the Argentine courts operated on the basis of Argentine public policy, rather than on the basis of a treaty prohibition against capital punishment. Nevertheless, the case is relevant for present purposes because it was the Argentine courts, rather than the executive, that addressed the issue.

French courts also consider their state’s own public policy (ordre public) and deny extradition if the requesting state would treat the extraditee in a manner that violates basic fairness as understood in France. The Conseil d’État, which has the power to quash a government extradition order, blocked a requested extradition to Turkey where capital punishment awaited the extraditee. In that case, Turkey sought extradition on a murder charge. The French government inquired whether Turkey planned to execute the man, explaining to the Turkish government that the death penalty violates French ordre public. The Turkish government replied that the death penalty was available under Turkish law only for premeditated murder, which had not been charged in the instant case. In ordering the extradition, the French government indicated that it was acting on the understanding that Turkey would not execute the

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93. Id. at 289.
94. Id.
95. Id.
96. Id.
97. Id. at 290.
99. Id.
100. Id.
101. Id. at 306.
man. The Conseil d'État quashed the extradition order, however, because France failed to secure Turkey's agreement not to execute.

The Supreme Court of Ireland refused to extradite two men who escaped from a jail in Northern Ireland and fled to the Republic of Ireland. The United Kingdom sought their extradition, but the court refused, finding a "probable risk" that they would be beaten if returned to the Northern Ireland jail. The United Kingdom lost on another extradition request from the Republic of Ireland, when Ireland's Attorney General refused even to initiate the court proceeding that could lead to a finding of extraditability. In that case, the United Kingdom sought the extraditee for allegedly supplying weapons in Northern Ireland to the Irish Republican Army. The Attorney General of Ireland found that there had been extensive negative press coverage in the United Kingdom about the man and about his alleged act. On the basis of this publicity, the Attorney General concluded that "it would not be possible for a jury [in the United Kingdom] to approach the issue of his guilt or innocence

102. Id.
103. Id. at 310. The government attorney questioned the propriety of extraditing even if the requesting state agreed not to impose the death penalty, arguing that such an agreement would bind only the executive branch of the Turkish government, but not its judiciary. Id. at 308 (discussing the conclusions of Mr. Bonichot, a government attorney); see also Judgment of July 7, 1978 (Klaus Croissant), Conseil d'État, 1978 Lebon 292 (Act. jur. D.A. 1978.559, chron. Dutheillet de Lamothe et Robineau), reprinted in 106 J. DU DROIT INT'L 90, 92 (1979); Case of Lujambio-Galdeano, 1985 J.C.P. II, No. 20346 (Conseil d'État, Sept. 26, 1984) (where Basque separatists argued that they would be tried through unfair procedures if surrendered to Spain, the Conseil inquired into the anticipated Spanish procedures and found that "contrary to the allegations of the claimant, the Spanish judicial system respects the fundamental rights and liberties of the individual, as is required by the general principles of the law of extradition") (translation by author). French courts are split on the question of whether French ordre public is violated, and thus whether extradition is precluded, if the extraditee was already convicted in the requesting state but was convicted in absentia. See Delmerle, J.C.P. II., No. 6493 (Douai, Feb. 1, 1951) (noting Magnol), cited in Case of Memik Fidan, 1987 D.S. Jur. at 306; Case of Manenti, Cour d'appel de Paris, Jan. 7, 1987, noted in Charles Rousseau, Jurisprudence francaise en matiere de droit international public, 93 REVUE GENERALE DE DROIT INT'L PUBLIC 457, 462-63 (1989) (refusing extradition). But see id. at 463-64 (noting that some French appellate courts hold to the contrary).


105. Gorman & Oakley, supra note 104, at 12; Irish High Court, supra note 104, at A3.


107. Id.
108. Id.
free from bias," and on that basis the Attorney General refused to initiate extradition proceedings.109

The international practice of employing judicial inquiry regarding human rights violations, given the International Covenant and the Convention Against Torture, suggests that the obligation to refrain from extraditing where ill-treatment is anticipated is read to impose an obligation on courts to make the inquiry that federal courts in the United States decline to make.

V. THE HUMAN RIGHTS TREATIES AS LAW IN THE UNITED STATES

Relevant international institutions and the courts of other states of the world read the Convention Against Torture and the International Covenant to require a court inquiry regarding whether an extraditee will be mistreated.110 This requirement, however, is binding on U.S. courts only if the treaties constitute domestic law in the United States.111 Under the Constitution's Supremacy Clause, a treaty is the "supreme Law of the Land."112 This seems to require that courts apply the two treaties as law. However, when the United States Senate consented to presidential ratification of the two treaties, the Senate specified in special declarations that the treaties should not be deemed "self-executing."113 President George Bush endorsed the Senate's position when he ratified the International Covenant,114 and President Clinton also supported the non-self-executing language when he ratified the Covenant Against Torture.115 As a result,

109. Id.
110. See supra notes 65-67 and accompanying text (providing examples where extradition has been forbidden).
111. U.S. CONST. art. VI, cl.2.
112. Id. "Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." Id.
113. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992) (stating that the provisions of Articles 1 through 27 of the International Covenant on Civil and Political Rights also are not self-executing); 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990) (stating that the provisions of Articles 1 through 16 of the Convention Against Torture are not self-executing). Under the federal code, however, district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994); Bodemüller v. United States, 39 F. 437, 439 (W.D. La. 1889) (asserting the district court's jurisdiction over a claim challenging a decision of the French-American commission, an 1880 treaty establishment). Thus, a private cause of action based on a treaty may be heard in federal court.
114. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY. COMP. PRES. DOC. 1008 (June 5, 1992).
115. President Clinton signed the instrument of ratification on Sept. 19, 1994, subject to all Senate qualifications. (The Office of Legal Adviser, U.S. Department of State, supplied information to the author).
the United States ratification of both treaties was subject to the Senate's declaration.

If binding on the courts and read broadly, these declarations might mean that a court must disregard the two treaties when an extraditee cites them as a bar to a finding of extraditability. However, the Supreme Court construes the Supremacy Clause as meaning that if a treaty provision creates a right, the courts should allow a party that appears to be a beneficiary of that right to assert it. The Supreme Court uses the term "self-executing" for treaty clauses that provide rights upon which an individual party may rely in court.

When the Senate provided that the two treaties were not to be "self-executing," it may have intended that the treaties' provisions not be invoked before the courts under any circumstances. However, after the Senate Foreign Relations Committee approved the language that the International Covenant should not be deemed "self-executing," the Committee sent a letter to the full Senate explaining that in keeping the Covenant as non-self-executing, it intended only to ensure that a private cause of action not be based on the Covenant.

The Committee was apparently wary of creating, by treaty, a federal cause of action over and above those previously authorized by Congress. Indeed, it is probable that a new cause of action in the federal courts cannot be created absent an act of Congress, which a treaty is not. In the extradition context, however, an extraditee has no need for a special cause of action to invoke the Convention Against Torture or the International Covenant. Rather, the extraditee is brought into court involuntarily and invokes the treaty to defeat extradition.

If a court entertaining an extradition request considers one of the two treaties, it is not allowing a plaintiff to base a cause of action on the

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116. See Asakura v. City of Seattle, 265 U.S. 332, 341-43 (1924) (holding that a city ordinance violated the provisions of a treaty aimed at establishing equality between American citizens and Japanese citizens residing in the United States). The Court noted that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Id. at 342 (citations omitted).

117. Cook v. United States, 288 U.S. 102, 119 (1933) (interpreting self-executing as not requiring legislation in order to authorize an action pursuant to the provisions of a treaty).

treaty. The extraditee is the object of extradition proceedings rather than the moving party. This is true even though once a magistrate decides that the person is extraditable, it is open to the extraditee to file a habeas corpus action to challenge the ruling. Here the cause of action is one in habeas corpus. The extraditee needs no additional basis for filing. The issue is not that of a cause of action, but, rather, that of the substantive law to be applied. Here, the treaties are relevant because they require a court’s inquiry.

An additional consideration for the courts in deciding whether to decline application of the two treaties, given the Senate declaration, is that if courts do not apply the treaties, they place the United States in violation. In the case of the International Covenant, as indicated above, the treaty text expressly requires that courts comply. If a court construes the Senate declaration as freeing it of the obligation to apply the International Covenant, the court puts the United States in violation of its obligations under the International Covenant. If a domestic law provision admits of two constructions, one of which would put the United States in violation of its international obligations, courts will choose the other construction in order to maintain the integrity of the international obligation.

VI. THE COURTS’ POWER TO DETERMINE SELF-EXECUTION

Even if one assumes, however, that the Senate intended to preclude invocation of the two treaties more broadly, it is not clear that the Senate declaration concerning self-execution binds a federal court. Under established precedent, the courts, rather than the Senate, decide whether a treaty provision is self-executing.

Although the Senate declarations were intended to be communicated to the Secretary-General, and thus to the other state parties, and were in

119. See supra text accompanying notes 68-71 (discussing the courts’ obligation to apply the treaty).
120. See The Over The Top, 5 F.2d 838, 842 (D. Conn. 1925) (“Unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it.”)
121. E.g., Foster v. Neilson, 27 U.S 253, 314 (1829) (holding that courts must equate treaties with congressional legislation), overruled in part by United States v. Percheman, 32 U.S. 51, 88 (1833) (reinterpreting a treaty as securing individual private property rights prior to the cession of territory but not affecting the holding under Foster that treaties are supreme law); Frolova v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985) (“Whether a treaty is self-executing is an issue for judicial interpretation . . . .”); see also Covey T. Oliver, Treaties, the Senate, and the Constitution: Some Current Questions, 51 Am. J. Int’l L. 606, 609 (1957) (discussing the established role of the courts in determining whether a treaty is self-executing).
fact so communicated, they were not written as part of the treaty. Under international procedures, the text of the treaty and any reservations to the text constitute a "treaty." If Under the Supremacy Clause, however, only a "treaty" becomes the "Law of the Land." Thus, it is doubtful that a court should consider a declaration part of what the Supremacy Clause proclaims the supreme Law of the Land.

The determination of a treaty's composition has been litigated only once. The matter arose in connection with a bilateral treaty between Canada and the United States. This treaty involved the production of power, available through the use of the Niagara River, to facilities located along the United States and Canadian border. In its resolution regarding consent to the treaty, the United States Senate included a reservation whereby the United States reserved the right to redevelop its portion of the power generated only through an act of Congress. The Power Authority of the State of New York sought a license to use the Niagara River for the state's anticipated power project. The Federal Power Commission dismissed the Authority's license application, contending it was not authorized to grant such a license given the Senate's reservation. The court of appeals held that the statement was of no effect to Canada, because it addressed only rights to the U.S. portion of the river. Because the reservation affected only U.S. aspects of river usage, it was not a true reservation and thus, was not a valid part of the treaty. As a result, the Commission did have the authority to issue licenses for the use of the river, and the treaty was valid even without the Senate reservation's applicability to the Canadian government.

This precedent notwithstanding, the Restatement of the Foreign Relations Law of the United States maintains that a Senate reservation or

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122. Vienna Convention on the Law of Treaties, supra note 71, art. 2(1)(a) (defining "treaty" as an agreement in either a single instrument or two or more related instruments); id. art. 2(1)(d) (defining "reservation" as a statement made by a state purporting to modify the effect of the treaty); id. arts. 19-23 (describing various aspects of reservations).
123. U.S. Const. art. VI, cl. 2.
124. See id.
126. Id. at 539.
127. Id.
128. Id.
129. Id.
130. Id. at 541.
131. Id. at 541-42.
132. Id.
understanding of non-self-execution binds the courts. Further, the Restatement provides that the Senate can withhold its consent entirely, or it may consent on specified conditions. The Restatement, however, provides little substantiation in the Senate's consent process, referring only to the fact that presidents typically notify other states and the depository agency of the declaration:

The President generally includes a verbatim recitation of any proposed reservation, statement of understanding, or other declaration relevant to the application or interpretation of the treaty contained in the Senate resolution of consent, both in the instrument notifying the other state or the depositary of United States ratification or accession and in the proclamation of the treaty.

The Restatement view might seem justified based on the rationale that a greater power includes a lesser power. The Constitution, however, in giving the Senate the power of consent to treaties, did not contemplate any power of imposing a condition. The Constitution granted the President the power to negotiate treaties, and the Senate the power to give advice and to grant (or withhold) consent. The import of this provision is that the Senate may make suggestions to the President (the advice function) and then may say "yea" or "nay" to the treaty (the consent function). While a President who ignores the Senate's advice runs the risk that the Senate may withhold consent, the Constitution does not contemplate a power in the Senate to impose terms not contained in the

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134. Id. at cmt. b. The Restatement explains that "[s]ince the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate on its consent." Id.
135. Id.
136. U.S. Const. art. II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur").
137. Id.

The United States Senate, as part of the treaty-making power, may place a condition upon its approval of a treaty by including in its resolution of advice and consent a reservation, understanding, or some other declaration or statement. If the President is not satisfied with a condition attached by the Senate, he may return the treaty to the Senate with further explanation and for further consideration or he may simply fail to execute a ratification, thus leaving the treaty unperfected so far as the United States is concerned.

Id.
treaty as negotiated by the President. The Senate enjoys a veto power, not a power of revision.\textsuperscript{139}

When the Senate appends a consent resolution with certain statements regarding a treaty's application, but those statements are reflected neither in the treaty text nor in a reservation, the statements have no constitutional status, even if the President reports those statements to the depository agency. The President's act of reporting such statements does not turn such statements into law.

A Senate declaration is a statement accompanying ratification expressing U.S. policy, but does not derogate obligations of the United States under the treaty.\textsuperscript{140} Indeed, that is why the statement is denominated "declaration" rather than "reservation."\textsuperscript{141}

A statement made in a declaration may, under certain circumstances, be considered a reservation, even though it is not so named. The generally accepted definition of "reservation" is "a unilateral statement, however phrased or named, made by a State, . . . whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."\textsuperscript{142} Under this definition, if a statement labelled "declaration" exempts the state from complying with a treaty obligation, it is a reservation. Indeed, the Human Rights Committee fol-

\textsuperscript{139} See U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{140} See Whiteman, supra note 138, § 17 at 138 (indicating that such statements "are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty"); see also Jordan J. Paust, Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1257, 1267-68 (1993) (arguing that a non-self-executing declaration makes no sense in the realm of human rights treaties since it would derogate from substantive rights of the treaty).

\textsuperscript{141} See Stefan A. Riesenfeld & Frederick M. Abbott, Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties, 67 Chi.-Kent L. Rev. 293, 296-97 (1991) (further defining "declaration"). These authors note: We believe that the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration is not law. The Senate does not have the power to make law outside the treaty instrument.

Id.

\textsuperscript{142} Vienna Convention on the Law of Treaties, supra note 71, art. 2(1)(d).
follows this definition in determining which qualifying statements are reservations.\footnote{143} Under this definition, the declarations regarding non-self-execution in the Convention Against Torture and the International Covenant are not reservations because they do not exempt the United States from complying with the obligation of domestic enforcement. Although the declarations have the potential of being read as exempting the United States from complying with the obligation of domestic enforcement, the more logical reading, as indicated,\footnote{144} is that they do not.

\section*{VII. Rights Provisions in Treaties as Self-Executing}

If the Senate declarations in the International Covenant and the Convention Against Torture do not bind the courts, the courts must themselves decide whether the Covenant norms are norms of domestic law. Since the two treaties became effective in the United States, no court has ruled on whether any of their provisions constitute domestic law.\footnote{145} The starting point in analyzing whether the treaties are binding is the Supremacy Clause of the United States Constitution, which provides that treaties are the "Law of the Land" and that "the Judges in every State shall be bound thereby."\footnote{146}

The Supremacy Clause refers only to state court judges, given that the purpose of the clause was to ensure federal supremacy over the states in this matter.\footnote{147} However, the Supreme Court held that federal courts also

\begin{footnotes}
\item[143] General Comment, supra note 40, at 841.
\item[144] See supra note 118 and accompanying text (discussing Senate committee letter on meaning of "non-self-executing").
\item[145] See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 818-19 \& n.26 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the rights provisions of the International Covenant do not create a cause of action for individuals in the courts of state parties), \textit{cert. denied}, 470 U.S. 1003 (1985); cf. United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (stating that individuals typically cannot assert individual rights under a treaty); Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976). For two cases decided after U.S. ratification of the International Covenant in which U.S. courts of appeal responded on the merits to a party's invocation of the Covenant without questioning its applicability as domestic law, see Freedom to Travel Campaign v. Newcomb, 82 F.2d 1431, 1442 (9th Cir. 1996) (declining to apply the International Covenant's provisions on freedom of movement within a state, and freedom to leave a state, on grounds that they were factually inapplicable to plaintiff's claim of a right to travel to a different state); White v. Johnson, 79 F.2d 432, 440 n.2 (5th Cir. 1996) (declining to apply the International Covenant's article on torture or cruel treatment on grounds that a U.S. reservation to that article limited its meaning to what the United States understands to be "cruel and unusual punishment" under the Eighth Amendment of the U.S. Constitution).
\item[146] U.S. \textit{Constr.} art. VI, cl. 2.
\item[147] \textit{Id.}
\end{footnotes}
are bound by the Supremacy Clause based on the "Law of the Land" language.\textsuperscript{148} The Court stated that any treaty provision capable of judicial enforcement should be applied by the courts, and one aspect of applying such provision is permitting a private litigant to rely upon the treaty as the basis for a cause of action.\textsuperscript{149}

U.S. courts routinely hold rights provisions in treaties to be self-executing. A treaty requiring that foreigners arrested in the United States be advised of their right to contact their country's consul, for example, has been read to give a right that the arrestee can assert in court.\textsuperscript{150} Another example is a provision common in extradition treaties stating that extradition is available only for certain offenses, and that once a person is extradited on a given offense, he may not be tried for additional offenses. Courts deem such a provision as affording a right the extraditee can assert.\textsuperscript{151}

The Court of Appeals for the Ninth Circuit has provided the most elaborate self-execution analysis of treaty provisions in federal case law, identifying four factors for a court to consider: "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution."\textsuperscript{152}

A court applying this four-prong test to the rights provisions of the Convention Against Torture or the International Covenant would conclude that these provisions are self-executing. First, the obvious purpose of a treaty provision granting a particular human right is that the contracting parties afford all persons that right. Second, certain domestic procedures and institutions are appropriate for direct implementation—namely the courts. Third, methods of enforcement other than domestic courts are weak. Fourth, the immediate and long-range social conse-

\textsuperscript{148} Foster v. Nielson, 27 U.S. 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."). \textit{Overruled in part} by United States v. Percheman, 32 U.S. 51 (1833).

\textsuperscript{149} See, e.g., United States v. Calderon-Medina, 591 F.2d 529, 531 n.6 (9th Cir. 1979) (finding that a foreigner's private cause of action arose out of a regulation based on a treaty), \textit{rev'd sub. nom.} United States v. Rangel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980).

\textsuperscript{150} See id. (acknowledging a cause of action based on the purported violation of a regulation promulgated in compliance with a treaty).

\textsuperscript{151} United States v. Rauscher, 119 U.S. 407, 427-29 (1886) (citing Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878) holding that a person extradited to the United States could not be tried for an offense other than that for which he was extradited).

\textsuperscript{152} Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), \textit{cert. denied}, 420 U.S. 1003 (1975).
quences of non-self-execution are serious because individuals may be subjected to onerous deprivations of rights.

Thus, if a federal court is faced with an extradition request, and the extraditee asserts that rights protected under either the Convention Against Torture or the International Covenant would be violated by the requesting state, the court should deem as domestic law both the relevant right and the provision of each of the two treaties that precludes extradition.  

VIII. Policy Considerations Involved in the Rule of Non-Inquiry

In practice, the Secretary of State's inquiry role has had little impact on extradition. Although several times the Secretary of State has required Italy to re-try a person convicted in absentia, the Secretary has rarely refused to surrender a person found extraditable by a magistrate. Because secretaries of state inevitably consider the request in the context of U.S. relations with the requesting state, a refusal to extradite because of anticipated ill-treatment may complicate relations with the requesting state. In addition, because of this political element, little consistency can be expected from one case to the next, or from one administration to the next.

Inquiry issues associated with extradition can be handled better by a court than by the executive branch because the required inquiry involves factual issues with legal elements. In Ng, for example, the issue was whether execution in a particular gas chamber constituted torture or inhuman treatment. Greater regularity can be achieved if courts make such determinations.

Originally, extradition was entirely an affair of the executive branch. Officials in the executive branch responded to an extradition request by


154. Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960) (referring to Italian cases in which the U.S. Secretary of State demanded a retrial of persons convicted in absentia).


156. See Semmelman, supra note 153, at 1199 n.3 (citing testimony and authors who hold this view).


158. Id.
applying existing extradition treaties. Out of concern that the political branch might be less than objective, the United States and United Kingdom took the lead in the nineteenth century in the use of judicial hearings. Today, a judicial hearing is the universal practice. The reason for this development is the same that calls for judges to exercise the power of inquiry: to provide fair treatment for the extraditee.

Exercising the power of inquiry, a Secretary of State occupies the same awkward position that the Department of State held until 1976 on the issue of sovereign immunity. Until 1976, when a foreign state sought to be excused as a defendant in a U.S. court, the State Department gave the court its opinion as to whether immunity was appropriate; the courts required the Department’s advice. This approach proved unsatisfactory, however, because the State Department was unable to follow a consistent course in considering these requests. In particular, the Department found it difficult to disregard the identity of the state making the request and the United States’ relationship with that state.

In 1976, Congress determined the State Department should no longer address sovereign immunity matters, rather, the courts should address them. The Foreign Sovereign Immunities Act of 1976 set standards for the courts to apply in determining when foreign states are entitled to im-

159. Bassion, supra note 27, at 505.
160. See 1 John B. Moore, A Treatise on Extradition and Interstate Rendition 90 (1891) (noting an example of American and British politicians using extradition in effecting policy decisions).
161. A Treaty to settle and define boundaries between the United states and the possesssions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases, Aug. 9, 1842, U.S.-Britain, 8 Stat. 572. See In re Metzger, 17 F. Cas. 232, 233 (S.D.N.Y. 1847) (noting a treaty between the United States and England that favored the use of the judiciary in extradition cases), habeas corpus denied, 46 U.S. (5 How.) 176, 182 (1847) (noting the court’s lack of jurisdiction to issue habeas corpus relief to an extraditee).
162. See Bassion, supra note 27, at 505.
164. Jack B. Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dep’t St. Bull. 984 (1952) (letter to Attorney General from State Department).
munity from suit. As a result of the Act's implementation, the issue of foreign sovereign immunity has been largely de-politicized, and the government's practice has become more uniform.

The same considerations apply to the rule of non-inquiry. Congress could instruct the courts to make the inquiry. Since the rule of non-inquiry is not based on the Constitution, Congress could change it. An end to the rule of non-inquiry also would relieve the Secretary of State of the awkward role of balancing the interests of justice in the particular case against the interest of the United States in its relations with the requesting state.

Even in the absence of congressional action, the courts could abandon the rule of non-inquiry. It has been suggested that the federal statutes require the rule's application to extradition because courts have been silent on the subject. The case law, however, does not base the rule on the federal statutes, and judicial silence is hardly a firm basis. The rule of non-inquiry is a rule of judicial origin, and the federal courts could abandon it on policy grounds, even if the courts are not persuaded that the human rights treaties require them to do so.


168. See David A. Brittenham, Note, Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach, 83 COLUM. L. REV. 1440, 1443 (1983) (stating that the Foreign Sovereign Immunities Act "has been largely successful in affording private parties the opportunity to have claims arising out of the commercial activities of foreign states adjudicated in federal courts, without engendering serious diplomatic repercussions").

169. The House Judiciary Committee proposed a bill requiring the courts to conduct an inquiry into the level of fairness to be received by the extraditee in the requesting country. H.R. 3347, 98th Cong., 2d Sess. § 3194(d)(2)(D)(ii) (1984) (stating that the court should deny extradition if the person "would, as a result of extradition, be subjected to fundamental unfairness"). The proposal's extradition reform was not enacted.

170. See In re Extradition of Howard, 996 F.2d 1320, 1330 n.6 (1st Cir. 1993). The court explained:

The government suggests that the Constitution mandates the rule of non-inquiry. We disagree. . . . Rather, the rule came into being as judges, attempting to interpret particular treaties, concluded that, absent a contrary indication in a specific instance, the ratification of an extradition treaty mandated non-inquiry as a matter of international comity.

Id.


172. See Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) (finding the rule of non-inquiry based on international comity with the requesting state and making no mention of any acts of Congress); cf. Semmelman, supra note 153, at 1212-13 (citing Neely v. Henkel, 180 U.S. 109 (1901), as representing a Supreme Court conclusion that the rule of non-inquiry is based on statutes). In Neely, however, the statutes in question related only to the special case of extradition to a territory under U.S. occupation, in which case extradition was based entirely on statute rather than on an extradition treaty. Id.
IX. ARGUMENTS IN FAVOR OF THE RULE OF NON-INQUIRY

A number of policy considerations have been raised favoring the inquiry function to remain with the Secretary of State. It has been argued, for example, that the Secretary is better able than a court to ensure fair treatment for an extraditee because the Secretary can discuss the matter with the authorities of the requesting state, and, if necessary, demand as a condition of surrender that the requesting state act in a particular fashion towards the extraditee.\(^{173}\) While it may be true in principle that the Secretary of State is better positioned to negotiate,\(^{174}\) it is also true that the Secretary may be under pressure to ignore the risk of mistreatment for fear of jeopardizing relations with the requesting state. Moreover, it is not true that the courts are unable to gain assurances from the requesting state.

In *Ahmad v. Wigen*,\(^ {175}\) when the habeas judge considered evidence regarding the risk of torture for the extraditee in Israel, the government of Israel made representations on the record to the court that it would treat the man fairly.\(^ {176}\) The kind of assurance the Israeli government provided is more explicit and more public than any assurance that a Secretary of State is likely to exact from a requesting state.

In addition, it is argued in support of the rule of non-inquiry that a court-conducted inquiry is, by its nature, more public than a Secretary of State's representations and runs the risk of jeopardizing United States relations with the requesting state and damaging other foreign relations objectives.\(^ {177}\) This argument may have made sense in the by-gone era when human rights were barely an issue in state-to-state relations, but, at this late date, the argument is obsolete. States routinely consider human rights in their relations with other states.\(^ {178}\) Moreover, the risk of jeop-
ardizing foreign relations is probably less if a court, rather than the Secretary of State, makes the determination to refuse to surrender, because the judiciary is a less political branch.  

It also is argued in support of the rule of non-inquiry that refusing extradition on grounds of a potential violation of the extraditee's rights may constitute a violation of the applicable extradition treaty, since the treaty probably will not include an exception for situations in which the requesting state may violate rights. However, if the United States bears a treaty obligation to refuse to surrender an extraditee when rights violations are anticipated, then it would violate that treaty obligation by effecting the surrender. Thus, the United States would violate a treaty regardless of its decision.

Such a conflict of treaty obligations is not in fact present. An extradition treaty silent on the issue of the requesting state's potential violation of an extraditee's rights would not necessarily be in conflict with an explicit human rights obligation assumed in another treaty. In most instances, the states that are party to the bilateral extradition treaty would also be parties to the Convention Against Torture or the International Covenant since both enjoy widespread adherence. If the bilateral extradition treaty is silent on the issue, but the human rights treaty addresses it, then the intent of the parties is that no surrender be made in such a situation.

Finally, the argument that an inquiry might violate the extradition treaty is not in fact an argument for the rule of non-inquiry, but an argument against even the Secretary of State's surrender. If the Secretary of State blocks a surrender, the requesting state might consider that act a violation of the extradition treaty, just as if a court blocked the surrender.

Given that neither the Constitution nor a statute requires the application of the rule of non-inquiry, the policy issue is the controlling factor for a federal court not inclined to address the issue on the basis of the human rights treaties. When a court addresses the rule on the basis of the treaties, the policy factors are nonetheless relevant, and they clearly bolster a rejection of the rule and the conduct of an inquiry. The policy arguments raised in support of the rule are insubstantial and those raised against the rule are persuasive.

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179. Kester, supra note 155, at 1481-82.
180. Semmelman, supra note 153, at 1231.
181. Multilateral Treaties, supra note 29 (showing 86 states as parties to the Convention Against Torture); id. at 117-18 (showing 129 states as parties to the International Covenant).
Many federal magistrates and judges presented with situations involving the potential for severe rights violations of an extraditee have indicated unease concerning the rule of non-inquiry.\(^{182}\) An extradition practitioner sums up the case law as follows: "If courts feel sufficiently uncomfortable about the fairness of the fate awaiting the accused, they may be more lenient in granting him scope to put on a defense here, or may become exceptionally demanding of technical perfection in the extradition request."\(^{183}\)

In a Second Circuit case, in which the extraditee claimed he would be subject to unfair procedures in the requesting state, the court provided a broad statement suggesting that a court should entertain evidence of potential ill-treatment.\(^{184}\) While refusing to entertain the evidence the man offered, the court stated in dictum that it would reexamine extradition in cases where it found the potential ill-treatment so egregious as to be "antipathetic to a federal court's sense of decency."\(^{185}\)

The notion that in extreme cases inquiry should be undertaken appears in other appellate decisions as well. A man the Israeli government sought on war crimes charges alleged that Israel would violate his procedural rights in a variety of ways.\(^{186}\) The Sixth Circuit stressed that it would not inquire into potential irregularities in the Israeli proceedings "in the absence of any showing that Demjanjuk [the extraditee] will be subjected to procedures 'antipathetic to a federal court's sense of decency.'"\(^{187}\)

When Germany sought the surrender of a man for a murder committed nineteen years earlier, the extraditee argued that the passage of so much time diminished the likelihood that he could be tried fairly.\(^{188}\) In reply, the Seventh Circuit held that extradition would be ordered so long as there was no violation of "constitutionally impermissible factors as race, color, sex, national origin, religion, or political beliefs, and in accordance with such exceptional constitutional limitations as may exist because of particularly atrocious procedures or punishments employed by

\(^{182}\) Rosado v. Civiletti, 621 F.2d 1179, 1197 (2d Cir. 1980) (noting the application of due process principles to extradition cases); Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (expressing concern regarding the application of the non-inquiry rule), cert. denied, 364 U.S. 851 (1960).

\(^{183}\) Kester, supra note 155, at 1446-47.

\(^{184}\) Gallina, 278 F.2d at 79.

\(^{185}\) Id.


\(^{187}\) Id. at 583 (quoting Gallina, 278 F.2d at 79).

\(^{188}\) In re Burt, 737 F.2d 1477, 1486-87 (7th Cir. 1984).
the foreign jurisdiction. The court found the instant situation insufficient to meet this standard. The court, nonetheless, demonstrated in dicta that it would not extradite if serious violations of rights were anticipated.

Sought on theft charges by the United Kingdom, a Chassidic Jew claimed that he would starve to death in a British prison because the prison could not satisfy his dietary needs and because he would not eat non-conforming food. The Fourth Circuit explained that such a predicament would be self-induced and concluded that the British prison could likely serve him food meeting his requirements. In dicta, however, the Fourth Circuit stated:

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

In another example, a woman requested for narcotics importation argued that she would be held in solitary confinement during interrogation in Iceland and objected to her surrender on that basis. In light of Iceland's outstanding human rights record, the Ninth Circuit refused to consider the woman's prediction concerning the treatment awaiting her because it was "uncorroborated." Hypothetically, adhering to the court's rationale, if the woman had presented stronger evidence, the court would have considered it.

A man, sought by the Italian government, called the criminal justice system of Italy into question, much as the extraditee had tried to do with the Cuban criminal justice system in Neely v. Henkel. The extraditee argued that Italy's criminal procedure "violates all American notions of due process, decency and human rights," claiming that there was no right

189. Id. at 1487.
190. Id.
191. Id. at 1484 (citing Plaster v. United States, 720 F.2d 340, 348-49 (4th Cir. 1983)).
193. Id. at 1019, 1019 n.1.
194. Id. at 1019.
196. See id. (rejecting inquiry because the evidence the petitioner presented was too attenuated).
to confront witnesses and that proceedings were excessively delayed.\textsuperscript{198} The district court cited contrary evidence that Italy permitted cross-examination of witnesses and opined that procedures in Italy were generally fair.\textsuperscript{199} The court ordered extradition, but only after concluding that Italian procedures "were far from lacking 'even the barest rudiments of a process calculated to arrive at the truth of the accusations.'"\textsuperscript{200}

Judicial misgivings about non-inquiry also have appeared in cases in which a foreign state requested the extradition of a person that state had already convicted \textit{in absentia}.\textsuperscript{201} The foreign state typically cited the \textit{in absentia} conviction to show probable cause that the person had committed the offense.\textsuperscript{202} The federal courts have nonetheless demanded proof, out of concern that if the person were surrendered, he might be incarcerated on the basis of conviction at a trial at which he had no opportunity to present a defense.\textsuperscript{203} In some instances, to satisfy the magistrate's concern that the extraditee would be imprisoned in Italy on the basis of an earlier \textit{in absentia} conviction, the government of Italy agreed to give the extraditee a new trial.\textsuperscript{204}

In another representative case, Canada convicted two men for importing hashish.\textsuperscript{205} At their trial in Canada, the judge dismissed the charge because of a variance between the indictment and the offered proof.\textsuperscript{206} However, as a result of the prosecution's appeal, the appellate court, in a proceeding at which the two men were not present, reversed the trial court and entered a judgment of conviction.\textsuperscript{207} In the United States, the pair objected to their extradition on the grounds that they had been convicted \textit{in absentia} since they had not been present at the Canadian appellate proceedings.\textsuperscript{208} The Second Circuit replied that they had not been

\begin{itemize}
\item \textsuperscript{198} \textit{Id.} at 1480.
\item \textsuperscript{199} \textit{Id.} at 1481.
\item \textsuperscript{200} \textit{Id.} (quoting Rosado v. Civiletti, 621 F.2d 1197, 1197-98 (2d Cir. 1980)).
\item \textsuperscript{201} United States ex. rel Argento v. Jacobs, 176 F. Supp. 877, 879 (N.D. Ohio 1959).
\item \textsuperscript{202} \textit{Id.} at 883.
\item \textsuperscript{203} \textit{Ex parte Fudera,} 162 F. 591, 592 (S.D.N.Y. 1908), \textit{appeal dismissed sub nom.} Italian Government v. Asaro, 219 U.S. 589 (1911); Jacobs, 176 F. Supp. at 879; see also \textsc{Moore}, \textit{supra} note 160, at 133; 4 \textsc{Green H. Hackworth}, \textsc{Digest of International Law} \S 317, 132 (1942). The Secretary of State, in response to an extradition request by Greece, indicated that proof of probable cause would be demanded prior to extradition). \textit{Id.}
\item \textsuperscript{204} \textit{In re} Extradition of D'Amico, 177 F. Supp. 648, 651 n.3 (S.D.N.Y. 1959); Charles C. Hyde, \textit{A Report of a Recent Extradition Case: Re Macaluso,} 7 Ill. L. Rev. 237, 238 (1912) (unreported case) (written by counsel for the Italian government in the case).
\item \textsuperscript{205} United States \textit{ex rel.} Bloomfield v. Gengler, 507 F.2d 925, 926 (2d Cir. 1974).
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.} at 928.
\end{itemize}
tried in absentia, because they had been present at their trial.\textsuperscript{209} The Second Circuit noted, however, in dicta that “[i]nability to assert a defense” might be “so antipathetic” to the court’s “sense of decency” as to bar extradition.\textsuperscript{210} Nevertheless, courts have inquired as to the sufficiency of criminal processes in foreign countries.\textsuperscript{211}

For instance, in \textit{Ahmad v. Wigen},\textsuperscript{212} the district court entertained extensive evidence regarding potential torture, on the theory that such evidence might suffice to upset the court’s sense of decency.\textsuperscript{213} The Israeli government sought the extraditee, a Palestinian, on terrorism-related charges including murder,\textsuperscript{214} and the extraditee claimed he would be tortured during interrogation.\textsuperscript{215} The district court judge considered oral and documentary evidence that Israel’s security police routinely used physical force in interrogating Palestinians detained on such charges.\textsuperscript{216} The district judge said that a magistrate should “determine the nature of treatment probably awaiting petitioner in a requesting nation to determine whether he or she can demonstrate probable exposure to such treatment as would violate universally accepted principles of human rights.”\textsuperscript{217} Entitling such an approach a “Due Process Exception to the Rule of Non-Inquiry,”\textsuperscript{218} the judge explained, “We cannot blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction.”\textsuperscript{219}

More importantly, the district court judge considered the international rule requiring inquiry. In doing so, he relied upon the decision of the European Court of Human Rights that ordered the United Kingdom to deny extradition to the United States for a capital trial in Virginia, because of the anticipated impact on the extraditee of the length and conditions of incarceration on Virginia’s death row.\textsuperscript{220} The judge found the international standard sufficient to justify ignoring the rule of non-inquiry, where a serious violation of rights awaits the extraditee.\textsuperscript{221}

\begin{thebibliography}{999}
\bibitem{209} \textit{Id.} at 928-29.
\bibitem{210} \textit{Id.} at 928.
\bibitem{211} See \textit{infra} notes 216-31 and accompanying text (citing examples where federal courts evaluate criminal procedures of other countries).
\bibitem{213} \textit{Id.} at 416.
\bibitem{214} \textit{Id.} at 394. The charges included murder, attempted murder, causing harm with aggravated intent, attempted arson, and conspiracy to commit a felony. \textit{Id.}
\bibitem{215} \textit{Id.} at 409, 416.
\bibitem{216} \textit{Id.} at 416.
\bibitem{217} \textit{Id.} at 410.
\bibitem{218} \textit{Id.}
\bibitem{219} \textit{Id.}
\bibitem{220} \textit{Id.} at 413 (referring to Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989)).
\bibitem{221} \textit{Id.} at 413-14.
\end{thebibliography}
Even after the court of appeals decision in Ahmad v. Wigen, a district court in the same federal circuit, in Gill v. Imundi, read the international rule of inquiry narrowly as prohibiting inquiry only by a habeas judge, but not necessarily by an extradition magistrate. This district court noted in the petitioner’s argument that Ahmad precludes inquiry by a habeas judge but not by an examining magistrate, and stated, “Ahmad does, nevertheless, rather clearly foreclose, if not an extradition judge’s than [sic] a federal habeas court’s inquiry into such conditions . . . .”

To explain why a federal court of appeals’ effort to preclude inquiry by an examining magistrate would be futile, the district court noted that the United States Attorney has no right to appeal from a denial of extraditability by a magistrate. The court of appeals in Ahmad focused strongly on the scope of review via habeas corpus, but also referred to the Secretary of State’s role in making the inquiry as an exclusive role.

The Gill court’s point, however, is telling. The higher federal courts have no way of keeping an examining magistrate from inquiring because an examining magistrate has the unreviewable power to make a finding of non-extraditability. Thus, the most the courts can do is prevent inquiry by a habeas judge, because a finding by a habeas judge is appealable.

The federal court’s displeasure with the rule of non-inquiry accords with the international practice rejecting the rule. Taking an approach consistent with international practice, however, would not be a complete innovation in federal law. In 1985, the United States amended its extradition treaty with the United Kingdom by adding a provision requiring a magistrate to deny extradition if the extraditee shows:

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

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223. Id. at 1050.
224. Id. at 1050 n.23. “A ruling that such considerations are beyond the competence of the extradition judge would be unenforceable since a determination by an extradition magistrate to withhold certification under 18 U.S.C. § 3184, on whatever ground, is unappealable.” Id.
226. Id. at 1067.
228. See supra text accompanying note 10 (explaining American court procedure and appealability of federal district court’s judgement on writ of habeas corpus).
229. Supplementary Treaty of June 25, 1985, text in 132 Cong. Rec. 16,558 (1986) (reciting art. 3(a) of the Supplementary Extradition Treaty signed on June 25, 1985 by the
This provision barred extradition where the request, though based on probable cause of an extraditable offense, is motivated by an aim of persecuting the extraditee.\textsuperscript{230} It requires the court's inquiry to determine whether the person being extradited faces discriminatory treatment. Members of the Senate proposed the provision due to a concern over special procedures the United Kingdom used to try Irish revolutionaries in Northern Ireland.\textsuperscript{231} While the scope of the required inquiry is not clear,\textsuperscript{232} this provision mandates that a magistrate examine the general fairness of the judicial procedures that will be used to try the person being extradited.\textsuperscript{233} Aware of the rule of non-inquiry, the Senate, through the amendment, demonstrated its intent not to follow the rule.\textsuperscript{234} Creating this rule allowed the courts to follow a standard, likely in a consistent fashion, and further prevented leaving the matter to the discretion of the Secretary of State.

The fact that the Senate called for judicial inquiry in the above extradition treaty demonstrates that it did not find significant policy factors against such an approach. The resulting provision reinforces the views of many courts that have concluded that if significant rights violations can be expected, an American court should not facilitate illegality by surrendering a person under an extradition treaty.


\textsuperscript{232} M. Cherif Bassiouni, The “Political Offense Exception” Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy, 15 DENV. J. INT’L L. & POL’Y 255, 277 (1987); see also Scharf, supra note 231, at 277; In re Extradition of Smyth, 61 F.3d 711, 716-19 (9th Cir. 1995) (observing the difficulty that the district court encountered regarding the scope of inquiry because the matter was of first impression).

\textsuperscript{233} Talcott, supra note 229, at 476-77; Scharf, supra note 231, at 266.

\textsuperscript{234} See Groarke, supra note 230, at 1530 (explaining that amendment alters the traditional rule of non-inquiry); In re Extradition of Howard, 996 F.2d 1320, 1330 (1st Cir. 1993) (“The Supplementary Treaty openly alters this traditional practice [the rule of non-inquiry].”)
XI. CONCLUSION

The emergence in the mid-twentieth century of human rights law reflects a maturing of international law from the nineteenth century paradigm of a legal order operating only on the state-to-state plane. The federal rule of non-inquiry was consistent with international practice at the time it was developed. Today, however, it is at odds with international practice and as such has been repudiated by the international community. Specifically, it has been repudiated in two human rights treaties, to both of which the United States is a party. The federal courts are bound by these developments to conduct an inquiry if an extraditee faces persecution in the requesting state. The federal courts should give heed to these developments and reject the rule of non-inquiry.