Expanding Judicial Scrutiny of Human Rights in Extradition Cases

After Soering

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I. INTRODUCTION

In the Soering Case,¹ the European Court of Human Rights (European Court) held that Great Britain would violate the European Convention on Human Rights (European Convention)² if it extradited Jens Soering to the United States to face murder charges and a potential death sentence. The decision captured world attention because the case had tabloid appeal—U.S. prosecutors believed Soering had collaborated with Elizabeth Haysom, his girlfriend and the heiress to the Astor steel fortune, to murder her parents—and because the decision condemned as inhuman and degrading the conditions on death row in U.S. prisons.³

Opponents of capital punishment hailed the decision as evidence that the death penalty was no longer a legitimate means of punishment under evolving international norms of justice. More generally, human rights activists asserted that Soering signaled a new era in international jurisprudence in which treaties, notably extradition treaties, would be construed to vest rights in individuals, not simply in states.⁴ Critics countered that the decision infringed on bilateral extradition treaties and would make Europe a safe haven for fugitive felons.⁵

Soering has sparked a reexamination of the traditional judicial role in extradition in the United Kingdom, the United States, and Canada. In these countries Soering fuels the arguments of lawyers and judges who, no longer trusting assurances of the government, seek to conduct their own inquiries into judicial processes and penal treatment in states requesting extradition. This nascent trend could alter significantly the judicial role in international

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extradition, in which the judge is currently little more than a functionary and the diplomat is both lawmaker and fact finder. *Soering* and its small but growing progeny also highlight the singular status and influence of the European Court, which is quickly becoming one of the world’s foremost sources of human rights law.

This article examines *Soering* and subsequent cases against the backdrop of traditional extradition law. Part II surveys the traditional legal approach to extradition, setting forth principles and justifications. Part III reviews the activist approach of the European Court. Part IV discusses the collision between the traditional approach and the activist approach, precipitated by the *Soering* decision. Part V looks at the initial consequences of *Soering* for traditional extradition law and practice in the United Kingdom, Canada, and the United States. Part VI argues that much of the rationale supporting the traditional limited judicial role in extradition law has faded as information on foreign legal systems has become more accessible, and as international human rights norms have solidified and gained increasing acceptance by both courts and national governments. Part VI then outlines a proposal for a new extradition jurisprudence based on *Soering* and its progeny.

II. TRADITIONAL EXTRADITION LAW

Traditionally, extradition law is based on treaties. Two states typically agree in a bilateral treaty to surrender to each other fugitives charged with any offenses considered extraditable under the agreement. A state seeking extradition of a fugitive (the requesting state) addresses its requests to the government of the state where the fugitive is present (the requested state), and the government invariably acts upon these requests. Domestic extradition statutes occasionally supplement substantive treaty law, but in general they merely specify extradition procedures.6

Courts played no formal role in the extradition process until the middle of the nineteenth century.7 Extradition was seen strictly as a foreign policy matter and thus best left to the head of state and his ministers. Monarchs regarded the fugitive as part of the currency of diplomacy, in the same way as their modern counterparts now look upon foreign aid, military supplies or a barrel of oil. The surrender of a fugitive often raised sensitive political concerns that

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6. This pattern holds true especially in common law countries. In the United States, for example, the only extradition statute, the Extradition Act of 1848, 18 U.S.C. §§ 3181-3195 (1988), does no more than specify the procedures by which a foreign state must request a fugitive, and by which officials must arrest and surrender the fugitive. An alternative formulation occurs when a state promulgates extradition law in domestic legislation, and then molds extradition treaties to fit its national law. M. Cherif Bassiouni, *United States Extradition Law and Practice* 53 (2d rev. ed. 1987).

required the attention of political officials in the government. The head of state enjoyed absolute discretion in carrying out extradition agreements and could surrender fugitives or refuse their surrender without answering to any domestic authority.

The extradition law that developed from these beginnings assigns a major role to government officers, leaving a very restricted one for courts. The law prevents judges from inquiring into judicial and penal conditions in the requesting country (the rule of non-inquiry) and creates a pattern of judicial deference to government decisions at all levels of the process. This traditional allocation of authority between the government and the courts rested on two premises: 1) extradition is a foreign policy matter; and 2) judges lack adequate information on foreign legal systems. These premises are now obsolete.

A. The Judicial Role in the Extradition Process

Extradition law has gradually evolved from its nineteenth century roots. Most countries now delegate some extradition responsibilities to judges, but the ultimate decision to surrender a fugitive remains largely a government prerogative, as nearly all states circumscribe the judicial role in the extradition process. Extradition statutes in the United States require a judge to play

8. See, e.g., In re Metzger, 17 F. Cas. 232 (C.C.S.D.N.Y. 1847) (No. 9,511) (in chambers review of French extradition request); In re Robbins, 27 F. Cas. 825 (C.C.D.S.C. 1799) (No. 16,175) (extradition of impressed British seaman who escaped during mutiny in which officers were killed); see also infra note 34 (discussing political consequences of these cases).

9. See infra Part VI.

10. See generally SHEARER, supra note 7.


12. SHEARER, supra note 7, at 198-200.

13. While Part II.A focuses on U.S. law, the same principles and rationales apply to extradition law in the United Kingdom and Canada. Courts in these three countries follow the same general principles of extradition law. See infra notes 35-61 and accompanying text (discussing role of judicial deference to head of state and rule of non-inquiry in extradition decisions).

This article confines its analysis to these states for three reasons. First, all have similar traditions, particularly with respect to the role of judges in developing law through adjudication. Common law judges treat extradition requests as cases in which the fugitive appears before the court. Most countries, including many Continental countries with civil law regimes, limit the judicial role in extradition to an advisory opinion delivered to the government upon request before it decides to extradite. VAN DEN WIJNGAERT, supra note 11, at 38. Second, the legal remedies available to fugitives are similar in the United States, the United Kingdom, and Canada. They include habeas corpus petitions to courts and petitions to the government. Extradition remedies vary widely, however, throughout the rest of the world. Id. at 39-40 (discussing range of remedies, including no remedy, administrative remedies, judicial remedies, and hybrids of judicial and administrative remedies). Finally, while the United States and Canada are not parties to the European Convention, they clearly look to the Convention and its mechanisms for advice on human rights issues. This article seeks to demonstrate that the jurisprudence of the European Court influences courts in non-signatory states.

The principle difference among extradition decisions from the three states derives from the constitutional separation-of-powers concerns voiced in opinions by U.S. courts. However, U.K. and Canadian
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a role that is more administrative than judicial.\footnote{See Extradiion Act of 1848, 18 U.S.C. §§ 3181-3195 (1988).}

The judicial officer in an initial extradition proceeding is generally a magistrate, a fact that indicates the diminished judicial role in the process.\footnote{See, e.g., R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Council of Civil Service Unions & Another, 1984 I.R.L.R. 309 (Q.B.) (U.K.), available in LEXIS, Enggen Library, Cases File, at *50 ("Any decisions as to what constitutes a matter of national security... are solely for her Majesty's Government. These are not matters for [judges] to examine, much less determine."); The Zamora, [1916] 2 App. Cas. 77, 107 (U.K.) ("Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law..."); Operation Dismantle v. The Queen, 18 D.L.R.4th 481, 500 (1985) (Can.) (Wilson, J., dissenting) (issue presented by challenge to testing of air-launched cruise missiles in Canada was "not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes").}

The magistrate's duty is to certify whether sufficient evidence exists to warrant the return of the fugitive to the requesting state. The requesting state must establish four factors: 1) that it has a valid extradition treaty with the requested state;\footnote{International law imposes no duty to extradite in the absence of an extradition treaty. SHEARER, supra note 7, at 23-27.} 2) that the person sought is the same person who is before the court; 3) that the acts charged in the complaint constitute a crime in both the requesting state and the requested state;\footnote{This requirement is known as the double-criminality rule. See infra note 254 and accompanying text.} and 4) that there is probable cause to believe that the accused committed the acts charged.\footnote{See, e.g., Hooker v. Klein, 573 F.2d 1360, 1365-66 (9th Cir.) (allowing requesting state to renew application for extradition on same charges as application earlier denied), cert. denied, 439 U.S. 932 (1978); In re Gonzalez, 217 F. Supp. 717, 720 (S.D.N.Y. 1963) (declaring result of first extradition proceeding not binding on renewed proceedings); Ex parte Schorer, 195 F. 334, 337-38 (E.D. Wis. 1912) (deeming second arrest and extradition proceeding permissible even when first attempt did not succeed).}

If the magistrate refuses to certify a request for extradition, the requesting state has no recourse to a higher authority, but it may renew its request before another magistrate.\footnote{It is more difficult to gain an extradition certification by filing a second request when the initial magistrate's denial rests on the political offense exception. For a critique of the non-appealability of political offense-based denials, see Lubet, supra note 18, at 259-62.} This remedy usually suffices since most refusals rest on technical grounds, such as failure to file all required papers. The new request simply corrects the technical deficiency.\footnote{Magistrates in the United States are appointed by the judges of each federal district court and serve a variety of delegated judicial functions. See 28 U.S.C. §§ 631, 636 (1988). The Extradition Act permits federal judges, state judges, or magistrates acting under the authority of federal judges to issue a warrant for arrest of the fugitive, hold a hearing, and certify extradition. 18 U.S.C. § 3184 (1988). In practice, however, magistrates perform most certifications. See Koskotas v. Roche, 740 F. Supp. 904, 911 n.3 (1990) (U.S. attorney generally seeks extradition warrant from federal magistrate).}

On the other hand, if the magistrate certifies the extradition, the fugitive cannot appeal, as the decision
is not a "final order." A fugitive can therefore challenge the certification of extradition only by filing a writ of habeas corpus. Habeas corpus review in this context is limited. A court may determine only whether the magistrate had jurisdiction, whether the offense charged was within the scope of the extradition treaty, and whether any evidence supported the finding of probable cause. Recent decisions, however, have added constitutional considerations to this limited inquiry. These precedents permit a court to inquire whether the United States has facilitated extradition on the basis of the fugitive's race, color, sex, national origin, religion, or political beliefs, and whether in presenting the request it infringed the fugitive's due process rights. These considerations do not greatly broaden the scope of habeas corpus review, however, because a fugitive may not challenge any actual or potential unconstitutional actions on the part of officials of the requesting state. A habeas corpus petitioner may present constitutional challenges only to the actions of officials in the requested state, and these officials generally do little more than arrest the fugitive and help the requesting state present the proper papers. As with many countries, extradition treaties of the United States contain provisions barring extradition when the requested state considers the offense charged by the requesting state to be a "political" one. Most of the instances in which extradition magistrates have gone beyond a limited, ministerial inquiry have involved political offense cases. If the magistrate determines that

21. In Jhirad v. Ferrandina the Second Circuit explained this principle:

Orders of extradition are sui generis. They embody no judgement on the guilt or innocence of the accused but serve only to insure that his culpability will be determined in another and, in this instance, a foreign forum . . . . Extradition orders do not, therefore, constitute "final decisions of a district court," appealable as of right under 28 U.S.C. § 1291 [(1988)]. 536 F.2d 478, 482 (2d Cir.), cert. denied, 429 U.S. 833 (1976). British and Canadian courts have ruled similarly. See, e.g., R. v. Governor of Pentonville Prison, [1991] 2 App. Cas. 64 (U.K.) (section 11 of British Extradition Act of 1870 provides for habeas corpus review, rather than direct appellate review, of magistrate's decision to certify extradition); Schmidt v. The Queen, 39 D.L.R.4th 18, 33 (1987) (Can.) (holding that, under Canadian extradition statute, courts can review extradition cases only upon receipt of habeas corpus petition); Atkinson v. United States, 1971 App. Cas. 197 (U.K.) (extradition magistrate's decision on legal matters "subject only to habeas corpus proceedings"); see also 1 V.E. HARTLEY BOOTH, BRITISH EXTRADITION LAW AND PROCEDURE 107 (1980) ("The fugitive has a statutory right to apply for habeas corpus under the 1870 [Extradition] Act and although this is not strictly an appeal from the Magistrate's Order . . . [the court] does reconsider matters of law.").

22. Jhirad, 536 F.2d at 482. The same is true in the United Kingdom and Canada. However, since in these nations the government makes a final decision to surrender the fugitive immediately following certification, the fugitive's habeas petition may also raise the question of the reasonableness of the government's decision to extradite. In the United States, because the Secretary of State's decision on whether to extradite comes at the end of the process and is not subject to judicial review, this ground is unavailable to a fugitive seeking relief through a habeas corpus petition. See infra notes 51-55 and accompanying text.

23. See, e.g., In re Extradition of Burt, 737 F.2d 1477 (7th Cir. 1984); for a similar case in Canada, see Schmidt, 39 D.L.R.4th at 35; see also infra note 42.

24. Professor Lubet notes: "The United States, though lacking a constitutional or statutory provision, has included the political offense exception in each of its 96 treaties of extradition." Lubet, supra note 18 at 250 & n.17 (listing all nations with which United States has bilateral extradition treaties).
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the offense charged is political—and here he has substantial discretion—then he may refuse to certify extradition. For example, U.S. courts have applied—some might say extended—the political offense exception in the extradition treaty between the United States and the United Kingdom (U.S.-U.K. Extradition Treaty) to block the surrender of Irish Republican Army (I.R.A.) members accused of murdering British policemen and soldiers.

Legislative responses to the political offense exception illustrate the two opposing models of extradition law: "executive" and "judicial." Proponents of an executive model criticize the rule entrusting the political offense determination to the judiciary and argue that because the determination is political, like most aspects of extradition, elected officials should make the decision. They also doubt the institutional competence of courts to ascertain conditions in the requesting country. Under the executive model, therefore, courts are to act purely as administrators, certifying that probable cause exists and that the crime charged is listed in the extradition treaty. In the wake of the I.R.A. cases, the executive model gained strong support, and some members of Congress attempted to transform the U.S. extradition statute from one that merely specifies the procedures to be followed in requesting and carrying out an extradition into a law granting the Secretary of State exclusive control over the political offense determination.

Proponents of the judicial model, on the other hand, argue that a judge's essential duty to protect individual rights requires her to exercise an active role in all extradition decisions. Under this view courts should both inquire into

25. Judicial discretion, as delegated to magistrates, arises from the fact that extradition treaties fail to define political offense, a term subject to a variety of interpretations. See John Patrick Groarke, Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty, 136 U. Pa. L. Rev. 1515, 1518-19 (1988) ("There is no current universally accepted definition of a 'political offense.' Consequently, states have different views as to the scope of the exception.").


27. See, e.g., In re Mackin, 668 F.2d 122 (2d Cir. 1981); In re McMullen, No. 3-78-1899 Mag. (N.D. Cal. May 11, 1979), reprinted in Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 294 (1981) and in 132 CONG. REC. S9146 (daily ed. July 16, 1986); see also Lubet, supra note 18, at 24 n.35.

28. See, e.g., Lubet, supra note 18, at 280. Professor Lubet argues that elected officials should make all sensitive, discretionary decisions in extradition, including evaluation of the requesting state's legal procedures and penal practices and determination of whether the charged act is political. See Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 96 (1981) (testimony of Prof. Steven Lubet).


30. Bills advocating an executive model of extradition review were introduced in the early 1980s. These bills would have allocated the political offense determination to the Secretary of State. See, e.g., S. 1762, 98th Cong., 1st Sess. (1983), reprinted in S. REP. NO. 241, 98th Cong., 1st Sess. (1983); see also Hughes, supra note 29, at 313 nn.211-12.

31. See, e.g., Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. (1984). This bill would have expanded the judicial role in extradition by, inter alia, allowing judges to determine whether an extradition
the conditions in the requesting country and decide whether a request for an offender is actually politically motivated. Courts should refuse to extradite unless completely satisfied by these inquiries. Underlying the judicial model, therefore, is the notion that the fugitive's human rights are the preeminent consideration in an extradition case, and that the courts, as impartial arbiters, are best equipped to protect these rights.

The U.S. judiciary continues to exercise some discretionary authority over political offense determinations, since all legislative initiatives to reconfigure extradition law along either the executive or judicial models have failed. The political offense exception in U.S. extradition law remains narrowly tailored and explicitly provided for by treaty, as it extends judicial discretion over only a small, discrete class of extradition cases. The application of the political offense exception has not altered the tradition of restricted judicial involvement and executive primacy in extradition law.

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32. For example, the House of Representatives' most recent attempt, the Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. (1984), if enacted, would have imposed an affirmative duty on courts to inquire into both existing conditions and political motivations. See also H.R. REP. No. 998, 98th Cong., 2d Sess. 5-6 (1984).

33. See Hughes, supra note 29, at 318 (concluding that courts are best first decisionmakers in this area, although Secretary of State also important).

Various proposals for sharing power in extradition between the government and the judiciary lie between these two models. Some commentators argue that courts should be allowed to suspend the rule of non-inquiry and refuse to extradite only in egregious cases, while deferring in all other cases to government assertions about the fairness of procedures and treatment in the requesting nation. See, e.g., id. at 320-22; Leslie Anderson, Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception, in 1983 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES: TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 153, 164 (John M. Lummis et al. eds., 1983). Hughes and Anderson believe that political considerations and the failure to provide for judicial review would prevent proposals for reform based on the executive model from adequately protecting human rights. They also argue that the judicial model sanctions an inquiry into the requesting state's legal system and motives not contemplated by the extradition treaty, and imposes the laws of the requested state on the requesting state. See Anderson, supra, at 163-64; Hughes, supra note 29, at 320-21.

34. See 1982 CONG. Q. ALMANAC 411-12 (providing history of legislative efforts to amend Extradition Act following I.R.A. cases).

However, the next controversial political offense ruling by a federal judge could rekindle congressional interest in reform. Both major efforts to rewrite the U.S. extradition statute stemmed from public outcry over controversial judicial rulings in political extradition cases. Congress originally adopted the Extradition Act in response to In re Metzger, 17 F. Cas. 232 (C.C.S.D.N.Y. 1847) (No. 9,511) (in chambers review of French extradition request) and In re Robbins, 27 F. Cas. 825 (C.C.D.S.C. 1799) (No. 16,175) (extradition of impressed British seaman who escaped during mutiny in which officers were killed). Likewise, recent attempts at reform were prompted by dissatisfaction with judicial decisions in the I.R.A. cases. BASSIOUNI, supra note 6, at 48-50.
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B. The Rule of Non-Inquiry

1. The Rule

Extradition law traditionally has blocked judicial inquiry into the fairness of judicial procedures and penal conditions in the requesting country at any stage of extradition proceedings. Neither a magistrate certifying an extradition nor a court hearing a habeas corpus petition was permitted to consider evidence of human rights abuses in the requesting country.\(^{35}\)

This rule of non-inquiry has been justified on four general grounds. First, judicial inquiry into conditions overseas would involve courts in foreign affairs, considered the prerogative of the head of state. In the United States, this argument finds expression in the language of the political question doctrine, which since *Marbury v. Madison*\(^ {36}\) has barred Article III courts from considering issues that the U.S. Constitution assigns to the political branches. Second, courts are ill-equipped to discover the truth about conditions overseas and lack the investigative machinery to verify claims of human rights abuses in other states.\(^ {37}\) Third, judges are reluctant to pass judgment on their foreign counterparts, arguing that probing the legal system of another state infringes on that state’s sovereignty.\(^ {38}\) Finally, permitting judicial scrutiny of legal systems in states with different ideologies hinders extradition proceedings and allows notorious criminals to escape punishment.\(^ {39}\)

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36. 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); see also Baker v. Carr, 369 U.S. 186 (1962) (establishing criteria for discerning non-justiciable political questions).


38. The Canadian Supreme Court has stated this rationale clearly:

It would cripple the operation of our extradition arrangements if extradition judges were to arrogate the power to consider defences that should properly be raised at trial [in the requesting state]. How would we react to foreign courts exercising this kind of pre-emptive jurisdiction in relation to trials in this country? *Mellino*, 40 D.L.R.4th at 91. *See also* Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.) ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."); *cert. denied*, 424 U.S. 833 (1976).

39. This argument is usually advanced by commentators who view extradition as a weapon against international crime, e.g., terrorism. See, e.g., Kent Wellington, *Extradition: A Fair and Effective Weapon in the War on Terrorism*, 51 OHIO ST. L.J. 1447, 1450 (1990).
2. Potential Exceptions to the Rule

A few judicial decisions leave open the possibility that a court might suspend the rule of non-inquiry in egregious circumstances, without providing a clear exception to the rule. The first such ruling in the United States was *Gallina v. Fraser.*\(^{40}\) In *Gallina,* a habeas corpus petitioner challenged his extradition to Italy on the grounds that an Italian court had convicted him in absentia, thereby depriving him of the opportunity to confront his accusers or conduct a defense. The court upheld the magistrate's extradition certification, citing the rule of non-inquiry and stating that: "[W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition."\(^{41}\) Apparently, so categorical a rule made the court uneasy, as it admitted that: "Nevertheless, we confess to some disquiet at this result. We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above."\(^{42}\)

The *Gallina* court did not specify the egregious circumstances necessary for a judge to block an extradition. Subsequent decisions have done little to shed light on the limits of a "federal court's sense of decency," and no court has invoked the phrase to bar an extradition.\(^{43}\) Indeed, most courts since *Gallina* have strictly adhered to the old rule of strict non-inquiry.\(^{44}\) The few decisions citing the "federal court's sense of decency" treat it as the outer limit

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\(^{40}\) 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

\(^{41}\) Id. at 78.

\(^{42}\) Id. at 79. The Canadian Supreme Court has drawn a similarly vague outer limit on the rule of non-inquiry:

> In some circumstances the manner in which the foreign State will deal with the fugitive on surrender . . . may be such that it would violate the principles of fundamental justice to surrender an accused . . . [such as when] the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience . . . .

Schmidt v. The Queen, 39 D.L.R.4th 18, 39-40 (1987) (Can.). As in *Gallina,* this language was not essential to the court's holding, which sanctioned the extradition of a habeas petitioner despite potential double jeopardy problems. Moreover, as in the United States the reference to "fundamental justice" lacks supporting precedent, as the Canadian Supreme Court has yet to block an extradition on those grounds. See United States v. Allard, 40 D.L.R.4th 102 (1987) (Can.) (petitioner must establish that he faces "simply unacceptable situation"); *Mellino,* 40 D.L.R.4th 74 (courts may intervene only if surrender of fugitive would violate principles of fundamental justice).

\(^{43}\) Ambjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) ("[The *Gallina* exception has yet to be employed in an extradition case."); see also Anderson, supra note 33, at 156; Hughes, supra note 29, at 306 (no court has found circumstances in extradition case to warrant use of *Gallina*); John G. Kester, Some Myths of United States Extradition Law, 76 Geo. L.J. 1441, 1480 (1988) (*Gallina* test is often acknowledged but never invoked).

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of the rule of non-inquiry, but do not give it content.45

C. Deference to the Head of State

Restricted judicial review of extradition decisions by the head of state is a corollary to the rule of judicial non-inquiry. Diplomats, rather than judges, do most of the adjudicating in extradition matters. The Secretary of State or Foreign Minister enjoys broad discretion to interpret the relevant law (treaties), consider the equities (human rights concerns), and balance competing considerations (the need for international criminal law enforcement and the diplomatic interest in honoring international agreements). Normally the province of judges, this weighing and balancing in extradition cases has devolved onto officials who serve at the pleasure of the head of state. Judges themselves play a lesser role, serving in most cases as functionaries who rarely question the judgment of policymakers.

Courts thus generally require that fugitives seeking to challenge extradition on human rights grounds should appeal to the government, not to the courts.46

45. In United States ex rel. Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974), the Second Circuit noted that petitioners' "[i]nability to assert a defense might . . . [violate] a federal court's sense of decency." The court did not decide the issue, but rather permitted extradition despite petitioners' conviction in absentia because it found no merit in their claim that they had not been able to assert a defense:

Here there is no indication that, despite representation by counsel, [petitioners] had any defense to make, other than their legal one challenging the indictment. Indeed, it affirmatively appears that Canadian counsel each expressly waived calling any witnesses and rested solely on the legal argument, and that the trial court's ruling was made after close of all the evidence.

Id. at 928 (citation omitted).

Habeas corpus petitioners have also invoked the "sense of decency" phrase outside the context of extradition. In Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), for example, three U.S. citizens falsely convicted in Mexico and physically abused in Mexican jails were allowed to complete their sentences in a U.S. federal prison under an agreement between Mexico and the United States. Once in the United States, they challenged their continued incarceration, arguing that it rested on convictions obtained under conditions devoid of due process. The court agreed to consider the merits of the claim because "a petitioner incarcerated under federal authority pursuant to a foreign conviction cannot be denied all access to a United States court when he presents a persuasive showing that his conviction was obtained without the benefit of any process whatsoever." Id. at 1198. The court cited Gallina as supporting authority: "[T]his court has theoretically indicated that the presumption of fairness routinely accorded the criminal process of a foreign sovereign may require closer scrutiny if a relator persuasively demonstrates that extradition would expose him to procedures or punishment 'antipathetic to a federal court's sense of decency.'" Id. at 1195.

Fearing that ruling otherwise would hinder future humanitarian exchanges between the United States and Mexico, the court ultimately denied the petitions. Id. at 1201.

One commentator argues that these decisions represent an "erosion of the rule of non-inquiry." See Hughes, supra note 29, at 303-12. This characterization goes too far, however, because all these statements favoring suspension of the rule have been voiced in dicta; no court has actually overturned an extradition or foreign conviction on these grounds.

46. See, e.g., Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) ("[D]egree of risk to [petitioner's] life is an issue that properly falls within the exclusive purview of the executive branch."); Koskotas, 740 F. Supp. at 917 ("A[llthough] [petitioner] is free to raise Greece's allegedly illicit motives and the physical threat to his life with the Secretary of State, the courts are not the proper forum for consideration of those matters."). For a similar holding in the United Kingdom, see Atkinson v. United States, 1971 App. Cas. 197 (U.K.) ("[T]he Act does provide a safeguard. The Secretary of State always has power to refuse to surrender [a fugitive] . . . whenever in his view it would be wrong, unjust or oppressive to surrender the
This practice rests on the belief that the government, specifically the Foreign Minister or Secretary of State, has the best information on the judicial and penal practices of the requesting state. Further, since the government conducts foreign policy, it can best weigh human rights concerns against other factors, such as the need to honor treaty obligations.

In the United States, courts generally view the Secretary of State's decision to present the extradition request as a signal of confidence that the fugitive will receive fair treatment in the requesting state. The State Department generally does not present extradition requests from governments whose human rights records are widely condemned. United States courts also give great weight to executive branch interpretations of extradition treaties. Finally, U.S. courts interpret a provision of the Extradition Act, which states that the Secretary of State "may order the person [whose extradition has been certified by a magistrate] . . . to be delivered to an authorized agent [of the requesting state]," to preclude judicial review of the Secretary's final decision. The fugitive must thus exhaust all habeas corpus appeals before the Secretary of State makes a final decision on whether to extradite. A U.S. court's decision to certify extradition is therefore not final, as the Secretary of State retains discretion to extradite or to refuse to surrender the fugitive.

The process is similar in the United Kingdom, except that the fugitive may seek judicial review of the Foreign Minister's final decision to extradite.

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47. See Schmidt, 39 D.L.R. 4th at 41.
48. Kester, supra note 43, at 1480. Thus the government's request for extradition on behalf of a requesting state implies its recognition of that state's ability to grant justice to the fugitive. An exception to this practice is In re, 628 F. Supp. 1370 (C.D. Cal. 1986), in which the executive presented Yugoslavia's extradition request for the surrender of an accused war criminal, despite allegations of human rights abuses in that nation. The district court permitted the extradition because it refused to consider his alleged crimes "political offenses." The Ninth Circuit refused to stay extradition to permit appeal of the denial of habeas corpus petition. Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986).
49. See, e.g., Demjanjuk v. Petrovsky, 716 F.2d 571, 579 (6th Cir. 1985) (State Department's interpretation of U.S.-Israel extradition treaty "entitled to considerable deference").
51. See, e.g., United States v. Doherty, 786 F.2d 491, 499 n.10 (2d Cir. 1986) ("[T]he Secretary of State is not bound to extradite even if the certificate is granted."); Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980) ("Assuming that the magistrate's decision is in favor of extradition, the Executive's discretionary determination to extradite the fugitive . . . is not generally subject to judicial review."); see also Anderson, supra note 33, at 160 (noting lack of provision for judicial review of Secretary of State's extradition decisions).
52. See Lubet, supra note 18, at 260.
53. Refusals of extradition requests are very rare; see infra note 262 and accompanying text.
54. See, e.g., Re Chinoy, CO/792/89 (Q.B.) (1990), available in LEXIS, Enggen Library, Cases File, at *3 ("Domestic remedies are, for the moment, exhausted. I say for 'the moment' because the final stage domestically, if there is to be return to the United States, would be an order by the Secretary of State. It is indicated to us that such an order is very likely to be challenged by way of judicial review . . . .").
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British courts employ a standard first articulated in Associated Provincial Picture Houses v. Wednesbury Corp., which permits a court to strike down executive decisions only when "no reasonable" executive official would have made them.\(^5\) Canadian courts also review the government's final decision to extradite,\(^5\) and like their British counterparts Canadian judges generally defer.\(^5\)

Jens Soering's experience illustrates the British approach. Before seeking relief from the European Court, Soering pleaded his case in British courts.\(^5\) He argued that the Foreign Secretary had violated Article IV of the U.S.-U.K. Extradition Treaty by failing to obtain an ironclad promise from Virginia prosecutors not to seek the death penalty. Article IV allows the requested state to refuse to surrender capital felons unless the requesting state gives assurances that the death penalty will not be carried out.\(^5\) Virginia prosecutors agreed only to inform the sentencing judge of the British government’s desire that Soering not be executed. Soering argued that this "assurance" fell far short of the requirements the treaty provision imposed on the Foreign Secretary. The divisional court disagreed.\(^6\) It held that Article IV granted the Foreign Secretary discretion to evaluate the adequacy of any assurances made by the requesting state. The court stated that although the assurance obtained left "something to be desired" and was probably not what the treaty intended, the decision was not so unreasonable as to violate the Wednesbury standard.\(^6\)

Soering's experience demonstrates the extent to which traditional extradition law has confined the judicial role.

\(^5\) E.g., Kindler v. Canada, No. 21,321, slip op. at 6 (Sept. 26, 1991) (Can.) (Cory, J., dissenting) (reviewing Foreign Minister’s extradition decision).
\(^5\) However, in Schmidt v. The Queen, 39 D.L.R.4th 18, 40 (1987) (Can.), the Canadian Supreme Court cautioned:

[Although] [b]lind judicial deference to executive judgement cannot ... be expected ... [extradition] is an area where the Executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states.

\(^5\) The European Court of Human Rights only accepts petitions from individuals who have exhausted all domestic remedies. Brian Walsh, Foreword to 1 VINCENT BERGER, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS at xiii (1989); see also European Convention, supra note 2, arts. 24-25.
\(^5\) Article IV of the U.S.-U.K. Extradition Treaty provides:

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

\(^6\) Id. at *12.
III. The European Court of Human Rights

The deferential approach to extradition adopted by judges on national courts contrasts sharply with the activist tradition of the European Court of Human Rights. While the decision invalidating the extradition of Jens Soering because of "inhumane" conditions on death row was a dramatic, ground-breaking ruling, it was neither without precedent nor particularly surprising in light of the European Court's record in human rights law.

A. The European Convention on Human Rights

The European Court was established under the European Convention on Human Rights (European Convention), adopted by the European nations comprising the Council of Europe in 1950. A total of twenty-three states have now signed the Convention. The European Convention was not the first international declaration of human rights, but it was the first to provide institutional machinery for supervision and enforcement of those rights.

The provisions of the European Convention are interpreted and given force by both the European Commission on Human Rights (Commission) and the European Court. The Commission screens the European Court's docket by attempting to settle disputes and, failing that, by determining whether the European Court has jurisdiction to hear them under the Convention. If it cannot mediate a settlement, the Commission publishes an opinion that either explains why the application is inadmissible or limits the issues the European Court may consider. The European Court may not "reach out" to decide cases not referred to the Court by the Commission or resolve issues not explicitly formulated in the Commission's report. For the vast majority of individual applicants, the Commission is the agency of last resort.

Rulings of the European Court bind the parties only if they submit to its jurisdiction. This requirement rarely becomes an issue. Almost all the European Convention's contracting states have consented to the European Court's jurisdiction, and individuals are eager to submit to the Court's

65. Id. at 3.
66. Id. at 4.
67. In 1983, for example, the Commission opened 3,150 provisional files. However, it formally registered only 499 applications, and it declared 407 of these inadmissible, sending a mere 29 on to the Court. In 1986, the Commission declared inadmissible 395 applications and sent 45 to the Court. MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 55 (1990).
68. Moreover, as of January 1, 1990, all contracting states had agreed to recognize the right of individuals to apply to the Commission for relief. Id. at 42.
authority, since they are usually the parties seeking relief. As a result, the issue of personal jurisdiction is not regularly a contentious one.69

B. The Jurisprudence of the European Court of Human Rights

Bolstered by the broad acceptance of its authority, the European Court forged a variety of innovations in international human rights law prior to its decision in Soering. Many of these innovations are remarkable not so much for the particular rights protected, but for the scope of the protection.

The line of decisions in which the European Court interpreted the European Convention’s protection of privacy and family life provides a good example.70 In the Dudgeon Case,71 the European Court ruled that the mere existence of laws criminalizing certain homosexual acts in Northern Ireland, without actual proof of injury from these laws, violated Article 8 of the Convention. Petitioner Dudgeon had never been prosecuted for homosexual activity. Nonetheless, he contended that the existence of anti-sodomy laws had caused him psychological distress and thus violated Article 8. The European Court agreed, and held that anti-sodomy laws violated the European Convention.72 Although this finding was progressive, it was not innovative, in that most member states of the Council of Europe no longer banned homosexual activity.73 The noteworthy aspect of the decision was that it held that "psychological distress" caused by the existence of such laws constituted a

69. Contrast this approach to jurisdiction with that of the International Court of Justice, where jurisdiction is frequently disputed. See MERRILLS, supra note 64, at 8. The European Court has another advantage: judges agree more often, id. at 36, and their frequently unanimous decisions resonate with more force than the International Court’s dissent-filled opinions. CLORIS C. MORRISON, JR., THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM 33 (1981).
70. Article 8 of the European Convention provides that:
   (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
   (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
European Convention, supra note 2, art. 8.
72. The Court stated that:
   In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life . . . : either he respects the law and refrains from engaging—
even in private with consenting male partners—in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.
Id. at 18 (citation omitted).
73. Id. at 23-24.
sufficient injury on which to grant relief. In most jurisdictions this injury would not warrant judicial intervention.

The European Court's restrictions on wiretapping under Article 8 provide another example. The European Court ruled in *Malone* and *Klass and Others* that it could examine wiretapping procedures even though applicants offered no specific proof of the extent to which their privacy was invaded. The Court held that since wire-tapping is generally shrouded in secrecy and difficult to substantiate, requiring an applicant to prove its extent would violate the spirit of Article 8. This was so, the Court concluded, because an applicant may not forfeit a right conferred by the European Convention "by the simple fact that the person concerned is kept unaware of its violation.

The European Court has given other provisions of the European Convention broad effect. In *Piersack*, for example, the Court formulated a two-pronged test to guarantee the right to an impartial tribunal provided in Article 6(1) of the Convention. The first prong is unremarkable: a court must ascertain whether "the personal conviction of a given judge in a given case" was prejudiced. The second prong, however, requires a court to determine whether the tribunal appeared fair, that is, whether the tribunal "offered guarantees sufficient to exclude any legitimate doubt in this respect."

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74. Id. at 17.
75. See, e.g., *Hardwick v. Bowers*, 760 F.2d 1202 (D.C. Cir.), *rev'd on other grounds sub nom. Bowers v. Hardwick*, 478 U.S. 186 (1986) (denying standing to married couple to challenge Georgia's statute criminalizing sodomy, but granting standing to homosexual who had shown likelihood of prosecution by presenting evidence of past attempts to indict him under anti-sodomy law); *R. v. Secretary of State for Home Dep't ex parte Zia Mehmet Binbasi*, 1989 Imm. App. R. 595 (Q.B.), *available in LEXIS*, Enggen Library, Cases File (refusal of U.K. immigration court to disturb Foreign Secretary's denial of political asylum to homosexual who claimed persecution if returned to Northern Cyprus, given that nation's statute criminalizing homosexual behavior); see infra notes 147-158 and accompanying text.
78. Id. Compare this position with that of the U.S. Supreme Court. The Supreme Court has held that wiretaps are unconstitutional. See *United States v. United States District Court*, 407 U.S. 297 (1972) (requiring prior judicial approval of wiretaps); *Katz v. United States*, 389 U.S. 347 (1967) (same). However, in *Laird v. Tatum*, 408 U.S. 1 (1972), the Court held that a claim that a domestic military surveillance system violated the First Amendment was non-justiciable, since the plaintiffs failed to show that the surveillance system spied on them personally. This decision required plaintiffs in wiretapping cases to offer specific allegations and proof of surveillance, whereas the European Court in *Malone* and *Klass and Others* found that the nature of wiretapping made it unfair to impose such a burden. See JANIS & KAY, supra note 67, at 220 (discussing comparison).
79. 53 Eur. Ct. H.R. (ser. A) (1982). In *Piersack* the applicant claimed that since the judge who presided over his murder trial had previously headed the section of the prosecutor's office that initiated the prosecution, the tribunal was not impartial. Agreeing, the European Court did not question the judge's personal impartiality, but focused on appearances: "What is at stake is the confidence which the courts must inspire in the public in a democratic society . . . . It is sufficient to find that the impartiality of the 'tribunal' which had to determine the merits . . . of the charge was capable of appearing open to doubt." Id. paras. 30-31.
80. Id. para. 30.
81. Id.
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Court ruled similarly in the *De Cubber Case*, in which appellant challenged a Belgian judicial proceeding in which the presiding judge had previously served as investigating judge on the case. The Belgian government contended that since individual judges faced huge workloads, a single judge was bound to handle different aspects of the same case, and avoiding this result would require the government to restructure its judicial system at great cost. The European Court held, however, that the European Convention superseded any such considerations. Rather, the appearance of impartiality was crucial, and an individual who served as investigating judge could not later serve as presiding judge.

Although these rulings have greatly expanded the protection of human rights, the European Court's most striking innovations come from its interpretations of Article 3, which provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." In *Ireland*
v. United Kingdom,\textsuperscript{86} for example, the European Court distinguished among "torture," "inhuman treatment," and "degrading treatment." Authorities in Northern Ireland, using extrajudicial powers of arrest, detention, and interrogation, subjected a total of fourteen individuals suspected of I.R.A.-driven terrorist activities to five unusual interrogation techniques.\textsuperscript{87} The European Court determined these practices to be "inhuman treatment"\textsuperscript{88} and "degrading treatment."\textsuperscript{89} The techniques, however, did not constitute torture. The Court reasoned that torture required both intense cruelty on the part of the perpetrator and substantial physical suffering on the part of the victim. Although some of the fourteen detainees had lost weight and developed severe psychiatric symptoms, the Court held that none had suffered physical injury of the magnitude required for a finding of torture.\textsuperscript{90}

In Tyre,	extsuperscript{91} the European Court considered an Isle of Man statute that permitted imposition of judicial corporal punishment. The Court ruled that corporal punishment consisting of three strokes of a birch club constituted "degrading punishment" under Article 3, even though the applicant did not suffer severe or enduring physical harm, and despite the substantial safeguards under which the punishment was administered.\textsuperscript{92} The European Court found

\textit{T}orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in, or incidental to lawful sanctions.

\textit{Id.} art. 1. The U.N. Torture Convention, however, neither defines "inhuman or degrading treatment or punishment" nor offers a guide for judicial application of those terms.


\textsuperscript{87} The techniques included: 1) forcing prisoners to remain for long periods in a spread-eagle position against the wall, 2) covering prisoners' heads with a dark bag, 3) maintaining a loud noise in the room, 4) depriving prisoners of sleep, and 5) reducing prisoners' allotment of food and drink. \textit{Id.} at 41.

\textsuperscript{88} The Court first focused on the effects of the treatment on the detainees:

The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3.

\textit{Id.} at 66.

\textsuperscript{89} The Court determined that "[t]he techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance." \textit{Id.}

\textsuperscript{90} The Court reached this conclusion by investigating the intent of the treatment:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

\textit{Id.} at 67.


\textsuperscript{92} Safeguards included prior medical examination, presence of a doctor, attendance of the schoolboy's parents, presence of a senior police supervisor, and detailed regulations on the number of strokes and the
that corporal punishment was a per se assault on a person's dignity and physical integrity and thereby "degrading." 93 The Court further noted that the negative effects and indignity of corporal punishment were exacerbated by the delay between sentencing and execution. 94 Finally, the Court rejected the respondent government's contention that corporal punishment was an effective deterrent. Instead, the Court held that the rights established by Article 3 were absolute, and therefore the provision must be strictly construed. 95

The European Court again visited the issue of corporal punishment in Campbell, 96 in which parents of two Scottish schoolchildren, neither of whom had ever received corporal punishment, challenged the existence of the laws permitting its use. The Court ruled that this situation was sufficient for judicial consideration and concluded that: "provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment.'" 97 The Court ultimately held that the corporal punishment used by Scottish schoolteachers did not violate Article 3 since its use was supported by a majority of parents, and there was no evidence that the actual punishment used was humiliating or debasing. 98

IV. THE SOERING CASE: THE COLLISION OF TWO TRADITIONS

The European Court in Soering drew upon and extended these earlier innovations. In Soering the Court held that Great Britain's extradition of Jens

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93. This conclusion depended upon the close link between the indignity and the form of punishment: [T]he very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being . . . . [The applicant's] punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely the person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. [Id. para. 33.]

94. The Court wrote:

Admittedly, the relevant legislation provides that . . . birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him. [Id.]

95. The Court emphasized that "it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be." [Id. para. 31.]


97. [Id. para. 26.]

98. [Id. paras. 29-31.]
Soering to the United States would violate the European Convention. The decision articulated three considerations that could have profound consequences for extradition law: 1) the requested state is responsible for treatment of the fugitive following extradition if that treatment violates the Convention; 2) potential violations will be reviewed under a "substantial grounds" standard of proof; and 3) the definition of "inhuman or degrading treatment or punishment" under Article 3 of the European Convention now includes the effects of anticipated punishment.

A. The Facts of Soering

Jens Soering, a West German national born in 1966, spent his teenage years in the United States and enrolled at the University of Virginia in 1984, where he fell in love with Elizabeth Haysom, a fellow student. Haysom’s parents strongly opposed the relationship. Tension between the two couples grew, and according to Soering’s admission, he and Ms. Haysom eventually devised a plan to kill her parents. On the evening of March 30, 1985, Soering went to the parents’ house in Boonsboro, Virginia to discuss his relationship with their daughter. When they told him they would try to force the couple apart, he attacked them with a knife, inflicted massive stab wounds, and slit their throats.

Soering and Haysom fled in October 1985, only to be arrested in Great Britain in April 1986 for check fraud. In August 1986, the U.S. government requested their extradition under its treaty with the United Kingdom. Haysom did not challenge extradition, and on May 8, 1987, the United Kingdom surrendered her. She pleaded guilty as an accessory to the murder of her parents and agreed to testify against Jens Soering. She was sentenced on October 6, 1987 to ninety years’ imprisonment.

Soering fought his extradition. He argued before the certifying magistrate that he suffered from folie à deux, a psychiatric disorder that he claimed had diminished his responsibility for his acts. This argument did not persuade the magistrate, who committed Soering to detention to await the Foreign Minister’s extradition order. Soering applied to the divisional court for a writ of habeas corpus and for leave to apply for judicial review of the government’s

101. Id.
103. Id.
105. Lillich, supra note 100, at 129.
106. Id.
order. He also challenged the sufficiency of the assurances given by the prosecutors in Virginia.\textsuperscript{107} The divisional court denied the habeas corpus petition, and refused to find unreasonable the Foreign Minister's decision to accept the assurances.\textsuperscript{108} On June 30, 1988, the House of Lords rejected Soering's petition for leave to appeal,\textsuperscript{109} and on August 3, the Foreign Minister ordered Soering's surrender to the United States.

Soering next applied to the European Commission on Human Rights, as he had exhausted his remedies in the United Kingdom.\textsuperscript{110} He made three arguments.\textsuperscript{111} First, he contended that his extradition would expose him to the "death row phenomenon"—the prolonged uncertainty during the lengthy appeals process combined with the severe conditions of confinement on death row—which he alleged constituted "inhuman or degrading treatment or punishment," thereby violating Article 3 of the European Convention.\textsuperscript{112} Second, he asserted that his extradition would violate the guarantees of a fair trial contained in Article 6 of the Convention,\textsuperscript{113} because public legal aid in Virginia would not fund federal habeas corpus challenges to the death penalty. Third, he argued that the U.K. extradition system violated Article 13 of the European Convention\textsuperscript{114} because it failed to provide him with an "effective remedy before a national authority" for an Article 3 violation.

The Commission declared Soering's application admissible on November 10, 1988, and issued its report on January 19, 1989.\textsuperscript{115} The Commission rejected Soering's Article 3 claim by a vote of six to five. In the majority's view, the death row phenomenon did not constitute inhuman or degrading treatment or punishment.\textsuperscript{116} The Commission also unanimously rejected the Article 6 claim, reasoning that the British government could not be held directly responsible for the lack of funds for legal aid in Virginia.\textsuperscript{117}

\textsuperscript{107} Soering argued that the British Government violated Article IV of the U.S.-U.K. Extradition Treaty by failing to obtain an absolute assurance from Virginia prosecutors that they would not seek the death penalty. See supra notes 58-60 and accompanying text.


\textsuperscript{109} Lillich, supra note 100, at 130.

\textsuperscript{110} Article 26 of European Convention provides "[The] Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken." European Convention, supra note 2, art. 26.


\textsuperscript{112} Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, supra note 2, art. 3.

\textsuperscript{113} See supra note 84 (quoting text of Article 6).

\textsuperscript{114} Article 13 of the Convention provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention, supra note 2, art. 13.


\textsuperscript{116} Soering Commission Report, reprinted in id. at 67-68; see infra notes 136-137 and accompanying text.

\textsuperscript{117} Soering Commission Report, supra note 116, at 68.
However, it upheld Soering's Article 13 claim by a vote of seven to four, on the grounds that the U.K. extradition system had not provided Soering with an effective remedy for his Article 3 claim because it unduly restricted the ability of judges to review a fugitive's allegations of mistreatment. The Commission referred the case to the European Court on January 25, 1989.

B. The Soering Principles

The European Court held oral arguments in the Soering case on April 24, 1989, and delivered its judgment on July 7, 1989. It ruled that if the United Kingdom extradited Soering to the United States without assurances against imposition of the death penalty, it would violate the European Convention. Three principles underlay this result: 1) requested state responsibility; 2) standards of proof for potential violations; and 3) inhuman or degrading treatment or punishment.

1. Requested State Responsibility

The European Court first declared that requested states in extradition cases could incur liability for European Convention violations taking place after extradition to the requesting state. Thus if the United Kingdom extradited Soering, it would be held to have "subjected" him to any treatment he received in the United States that violated Article 3.

Article 3 does not discuss extradition. In fact, the European Convention mentions extradition only once, and then in a limited context. Nonetheless, the Commission, in a handful of decisions prior to Soering, had recognized that extradition or deportation may violate Article 3 when the fugitive faces an objective danger that the requesting state will violate his or her human rights.

118. Id. at 70-71.
120. Article 5, § 1 provides in part: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (f) the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition." European Convention, supra note 2, art. 5, § 1.
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on this principle of objective danger, and the Court took the opportunity to go further than the Commission. In most Commission decisions both the requested state and the requesting state were parties to the European Convention. The Commission had previously recognized the responsibility of the requested state when the requesting state was not a party to the European Convention, but the Commission had found no substantive Article 3 violations in these cases, so that its recognition of requested state responsibility had no effect.

The Soering decision, in contrast, held the requested state responsible under Article 3 and directly affected a requesting state not party to the European Convention. The Soering Court began by highlighting the need to make European Convention safeguards "practical and effective." The Court stressed that the Article 3 prohibition against inhuman treatment was absolute, warranting its application to extradition requests received by European Convention signatories from nonparty states: the spirit of Article 3 barred extradition of fugitives to states where they probably would face inhuman treatment. The Court denied that this holding gave extraterritorial effect to the European Convention; rather, it simply established the Convention obligations of the requested state. The Court stated it did not intend to extend its jurisdiction by dictating behavior to the requesting state:

Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention . . . . These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

122. Lillich, supra note 100, at 138.
123. See, e.g., Kirkwood, 57 Eur. Comm'n H.R. Dec. & Rep. at 158 (recognizing that British extradition of fugitive to United States might violate Article 3 if treatment in United States were sufficiently severe). For further discussion of Kirkwood, see infra notes 135-137 and accompanying text.
125. The European Court drew upon the U.N. Torture Convention, supra note 85, to aid its interpretation of Article 3:

That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that 'no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.
Id. at 34-35.
126. Id. at 33-34.
2. Standards of Proof for Potential Violations

A fugitive protesting his extradition who claims the requesting state violates the European Convention can allege only potential (not yet realized), rather than actual, violations. The European Court, in *Campbell*, held that threats of prohibited conduct may themselves violate Article 3, but specified no standard of proof for evaluating threatened or potential violations (beyond noting that the threat must be "sufficiently real and immediate"). The second extradition-related aspect of *Soering*, an innovation in Article 3 jurisprudence, was to articulate a standard of proof for potential violations.

The Court in *Soering* ruled that an extradition violated Article 3 "where substantial grounds have been shown for believing that the [fugitive], if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment in the requesting country." The European Court found that Soering faced such a danger because the Virginia prosecutors intended to seek the death penalty. The Court held that the "assurances" offered by the prosecutors were inadequate, as they promised merely to inform the sentencing judge that the United Kingdom opposed imposition of the death penalty. These promises alone, the Court concluded, did not reduce the risk of an Article 3 violation: "[O]bjectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed." This result created a new standard of proof for potential violations in extradition cases, requiring a requested state to demonstrate that violations of the Convention by a requesting state are highly unlikely.

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128. Id. para. 26.
130. The Court inferred that this conclusion was inescapable:
   If the . . . authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon."
131. Id. at 38.
132. The Court also ruled on Soering's claim that his extradition would violate the guarantee of a fair trial contained in Article 6, and the Article 13 guarantee of an effective remedy for Convention violations before a national authority. It ruled that the absence of legal aid in Virginia for collateral death penalty appeals was not such a "flagrant denial of a fair trial in the requesting country" as to violate Article 6, and that British judicial review of the executive's extradition decision was not so restrictive as to deny a domestic remedy and violate Article 13. Id. at 45, 47-48.
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3. "Inhuman or Degrading Treatment or Punishment"

The European Court also ruled that the "death row phenomenon" constituted "inhuman or degrading treatment or punishment" under Article 3. This third holding was the most dramatic part of the case. Without a substantive Article 3 violation, the Court's language on requested state responsibility and standard of proof for potential violations would have been no more than interesting dicta. The Court did not hold that the death penalty violated Article 3 per se. It explicitly refused to go that far, as it noted that Article 2 of the European Convention permits states to impose capital punishment. Instead, the Court limited itself to finding that the manner in which the death penalty was imposed in Virginia constituted inhuman or degrading punishment.

The Soering opinion's Article 3 holding contradicted an earlier decision by the European Commission. In 1984 the Commission had screened an application that bore a close resemblance to Soering's claims. The state of California sought the extradition from the United Kingdom of E.M. Kirkwood, who had allegedly killed two men in San Francisco and had been arrested upon arrival at Heathrow Airport. Under California law, conviction on a double-murder charge could bring a death sentence. After exhausting his appeals in U.K. courts, Kirkwood applied to the Commission to block extradition, arguing that the death row phenomenon was inhuman and degrading punishment. The Commission disagreed by one vote. Although it described the conditions of confinement and the anxiety-inducing effects of the lengthy death-penalty appeals process as "grave" and "severe," the Commission held that such treatment did not violate Article 3 for two reasons. First, California law allowed the applicant to accelerate the appeals process. Second, the applicant would have the opportunity to challenge the death row phenomenon in U.S. courts under the cruel and unusual punishment clause of

133. Article 2(1) of the European Convention states: "No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, supra note 2, art. 2, § 1. The Court further noted that nearly all member states had abolished the death penalty or no longer imposed it, a fact that might suggest an implicit agreement to "abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3." Soering, 161 Eur. Ct. H.R. (ser. A) at 40.

134. Although the European Court previously had no occasion to apply this reasoning to capital punishment, the Court recognized in Tyrer that the interval between sentencing and punishment can induce psychological effects that violate Article 3. Tyrer Case, 26 Eur. Ct. H.R. (ser. A) at para. 33 (1978). For further discussion, see supra notes 91-95 and accompanying text.


136. Id. at 186, 188, 190.
the Eighth Amendment of the U.S. Constitution. The Commission therefore found Kirkwood’s application inadmissible and upheld the United Kingdom’s decision to extradite him.\textsuperscript{137} The Commission’s concerns about the death row phenomenon in Kirkwood, however, contributed to the European Court’s finding in Soering that the death row phenomenon was "inhuman or degrading treatment or punishment."\textsuperscript{138}

There are several explanations for these disparate results in such similar cases. First, the European Court is not bound to follow Commission precedent or its own case law, although it generally gives substantial weight to both.\textsuperscript{139} Second, some of the factual particularities of Soering, which were absent in Kirkwood, played an important role in the European Court’s decision that extradition would violate the Article 3 prohibition against inhuman or degrading treatment: it found that Soering’s youth and alleged mental disorder would make his stay on death row particularly traumatic.\textsuperscript{140} Finally, the Court gave some weight to the submission of an extradition request by West Germany, which had no death penalty and was willing to prosecute Soering, who was a West German national. This gave the U.K. Foreign Secretary a reasonable alternative to surrendering Soering to authorities in Virginia.\textsuperscript{141}

One commentator has suggested that, but for such unusual facts, the European Court would not have invalidated Soering’s extradition, and therefore the Court meant to limit its ruling on the death row phenomenon to the most egregious cases.\textsuperscript{142} Such a narrow interpretation, however, ignores the Soering Court’s rejection of a major argument advanced in Kirkwood by the Commission in favor of extradition. The Commission in Kirkwood had found that the California appeals process was designed to protect the death row inmate, and that the inmate might choose to accelerate the process by waiving his appeal rights. In contrast, the Soering Court noted that:

\textsuperscript{137} Following extradition, Kirkwood was tried on two counts of first-degree murder. The jury split 11-1. Kirkwood pleaded guilty to two counts of second-degree murder on the eve of his second trial and received a sentence of 17 years to life. UPI, July 24, 1987, available in LEXIS, Nexis Library, Wires File.

\textsuperscript{138} See Soering v. United Kingdom, Eur. Comm’n H.R., App. No. 88/14,038, slip op. (Jan. 19, 1989) (6-5 majority opinion), reprinted in part in Soering Case, 161 Eur. Ct. H.R. (ser. A) at 54-83 (1989). The Commission’s majority opinion in Soering refused to find that the death row phenomenon violated Article 3. However, it held on other grounds that the application was admissible. Id. at 62-63. See supra notes 116-118 and accompanying text (discussing Commission’s ruling on Soering’s application).

The five dissenters argued, in three separate opinions, that the death row phenomenon violated Article 3. Id. at 73-74 (Forwein, dissenting), 77 (Trechsel, dissenting), 79-80 (Danelius, dissenting). The European Court adopted this view unanimously. The Court determined that the death row phenomenon was both "inhuman" and "degrading" and constituted both "treatment" and "punishment," since it generally used the four terms together ("inhuman or degrading treatment or punishment") or shortened the formula to "ill-treatment." Soering, 161 Eur. Ct. H.R. (ser. A) at 39-40, 44-45. As Richard Lillich has pointed out, this result is ironic, because the Court is generally considered more conservative than the Commission. See Lillich, supra note 64, at 13.

\textsuperscript{139} See MERRILS, supra note 64, at 13.

\textsuperscript{140} Soering, 161 Eur. Ct. H.R. (ser. A) at 43.

\textsuperscript{141} See id. at 44.

\textsuperscript{142} See Lillich, supra note 100, at 145.
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However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death. A death row inmate will naturally cling to life by fully exploiting the appeals process; it would thus be unfair to force him to choose between abandoning his appeal rights, thereby hastening his execution, and enduring the death row phenomenon.

V. RESPONSES TO THE SOERING DECISION

The European Court in Soering placed international human rights law on a collision course with traditional extradition law. The decision presented the prospect that judges in extradition proceedings might abandon the traditional rules of non-inquiry and deference to the head of state and conduct their own examination of the human rights records of requesting states. The Soering decision thus provides national court judges with the reasoning and principles necessary to block an extradition on humanitarian grounds.

The extent to which the Soering decision has altered and expanded the judicial role in extradition cases remains unclear. The decision has set off a judicial debate on the issue in the United Kingdom, Canada, and the United States. In the United Kingdom, the ruling has received only grudging acceptance. In Canada, a slim plurality on the highest court recently gave Soering a narrow construction over vociferous dissents that called for a broader reading. In the United States, two federal district courts have embraced the Soering approach, although a federal circuit court has curbed their efforts.

A. The United Kingdom: Bowing Reluctantly to the European Court

The Soering decision has had two effects in the United Kingdom. First, it has directly affected the government’s extradition practice. The Foreign

144. The European Court did not even mention the other argument in Kirkwood — the fugitive’s ability to contest the death row phenomenon in a U.S. court under "the cruel and unusual punishment" clause of the U.S. Constitution. This omission was probably less an oversight than a recognition of the U.S. Supreme Court’s increasing reluctance to halt executions on Eighth Amendment grounds. See Wilkens v. Missouri, 109 S. Ct. 2969 (1989) (capital punishment for individuals who committed capital crime at 16 or 17 years of age did not violate Eighth Amendment); Tison v. Arizona, 481 U.S. 137 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that resulted in murder is major and whose mental state is one of reckless indifference); Proffitt v. Florida, 428 U.S. 242 (1976) (imposition of death penalty not per se cruel and unusual punishment) (plurality); see also Richmond v. Lewis, 921 F.2d 933, 949-50 (9th Cir. 1990) (fulfillment of death sentence after defendant has spent 16 years on death row did not violate Eighth Amendment).
145. See supra notes 35-61 and accompanying text (discussing rules of non-inquiry and judicial deference).
Secretary ultimately extradited Soering, but only after obtaining from the Virginia prosecutors concrete assurances against seeking the death penalty, and it is likely that the practice of seeking such requests will continue. Second, the Soering decision has influenced the manner in which U.K. courts decide extradition cases. Two recent court decisions suggest that U.K. courts will reluctantly accept Soering, perhaps recognizing the United Kingdom's treaty obligations under the European Convention, but also suggest that these courts will read the decision narrowly so as to limit its impact.

1. Impact on Executive Extradition Practices

Following the Soering decision the British government faced a dilemma. If it abided by the decision and refused to extradite Soering, it would violate the U.S.-U.K. Extradition Treaty, which requires extradition in death penalty cases as long as the requesting nation provides assurances that are satisfactory to the requested nation. The United Kingdom had been ready to surrender Soering despite the flimsy assurances offered by Virginia prosecutors, and some commentators at the time predicted that a refusal to extradite Soering would bring reprisals from U.S. authorities when the United Kingdom requested the extradition of I.R.A. terrorists. On the other hand, the United Kingdom would breach its obligations under the European Convention if it extradited Soering.

Faced with this dilemma, the United Kingdom opted to honor its European Convention obligations. In a diplomatic note dated July 28, 1989, one month after the Soering decision, the British Foreign Secretary informed the Virginia prosecutors that the United Kingdom would not extradite Soering to face capital murder charges. Shortly thereafter, the prosecutors agreed to try Soering on first-degree murder rather than capital murder, and the United Kingdom surrendered him.

148. The Foreign Secretary stated that:
   Mr. Soering will be surrendered on condition that he will not be tried for capital murder or any other offence the penalty for which may include the imposition of the death penalty . . . Her Majesty's Government have concluded that if Mr. Soering were prosecuted for the offence of capital murder in the State of Virginia, there is no assurance that the State of Virginia could provide in his case that would ensure that the death penalty would not be imposed on Mr. Soering, or that it would not be carried out. Consequently, in accordance with the terms of Article IV of the Extradition Treaty, the surrender of Mr. Soering in respect of capital murder is refused.

Diplomatic Note from Her Majesty's Government to the U.S. State Department, quoted in Re Soering's Application, CO/1258/89 (Q.B.) (1989), available in LEXIS, Enggen Library, Cases File.

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The United Kingdom’s insistence on absolute assurances reversed its previous practice, as evidenced in the *Kirkwood* case. Only five years earlier, the Foreign Secretary had extradited E.M. Kirkwood without requiring prosecutors in California to renounce their plans for a capital sentence. The Foreign Secretary may switch its position at its discretion or may limit the application of the *Soering* rule to extraditions with similarly egregious facts. Given the powerful precedent set by acceptance of the authority of the European Court, however, it seems likely that *Soering* will continue to influence U.K. government decisions in extradition cases.

2. Soering in the Courts

The European Court’s decision in *Soering* affected the U.K. bench in two ways. First, it effectively reversed the rulings of the judges who had certified Soering’s extradition. Second, it repudiated the extradition tradition formulated by U.K. judges, who have generally been even less active than their Canadian and U.S. counterparts, and given greater deference to government determinations on whether to surrender a fugitive.

It thus is not surprising that the decision received only grudging acceptance in the first two U.K. cases that cite it. The first case, *Re Osman*, involved a request by Hong Kong for the extradition of Osman, who had allegedly committed murder in Hong Kong. Relying on *Soering*, Osman argued before the divisional court that his extradition would violate Article 6 of the European Convention, which provides guarantees of a fair trial. The court did not directly apply the *Soering* decision, because it found a lack of evidence to support Osman’s claim. It did not ignore *Soering*, however, nor did it rule out that case’s significance for extradition law—two important steps for a

150. Reuters, Apr. 19, 1985, available in LEXIS, Nexis Library, Wires File (discussing California Superior Court judge’s ruling that United States was required only to present British objections to death penalty at execution).

151. See supra note 55 and accompanying text.


153. European Convention, supra note 2, art. 6. Soering had raised this claim together with his Article 3 claim. While the European Court found no Article 6 violation, it did allow for that possibility in future cases: “The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.” Soering Case, 161 Eur. Ct. H.R. (ser. A) at 45 (1989). For further discussion, see supra note 132.

154. The court noted: “We do not decide whether this is or can be a factor to be considered by this court. Suffice it to say there is not here anything which could suggest the risk of ‘a flagrant denial’ such as the [Soering] Court thought might raise an Article 6 issue.” *Re Osman*, CO/252/90 (Q.B.) (1990), available in LEXIS, Enggen Library, Cases File, at *38.
judicial system that had once refused to consider the European Convention because it had not been adopted by Parliament.\footnote{See \textit{R. v. Secretary of State for Home Dep't ex parte Kirkwood}, 2 All E.R. 390 (Q.B.) (1984) (since Parliament never adopted European Convention, it was not part of British law, and Secretary of State did not have to consider it).}

The second U.K. case citing \textit{Soering, Ex parte Zia Mehmet Binbasi}, involved a challenge to the deportation and denial of political asylum to a homosexual from the Turkish Republic of Northern Cyprus.\footnote{R. v. Secretary of State for Home Dep't \textit{ex parte} Zia Mehmet Binbasi, 1989 Imm. App. R. 595 (Q.B.), \textit{available in LEXIS, Enggen Library, Cases File}.} The appellant asserted that \textit{Soering} barred extradition of an individual to a state that violated the European Convention in a way that would harm him; he argued that by criminalizing homosexual behavior Cyprus failed to protect the rights of consenting adult homosexuals, thus breaching Article 8 of the European Convention. The immigration court did not challenge this reading of \textit{Soering}. Instead, it found that the government's denial of political asylum was not so unreasonable as to warrant judicial interference. This finding was based on the fact that the European Court had never ruled on the status under the European Convention of Northern Cyprus's laws barring homosexual activity.\footnote{Id. at *18.} Furthermore, the appellant had not proved with certainty that he would engage in homosexual activity in Cyprus, let alone be punished for it.\footnote{The immigration court noted: [T]he Secretary of State cannot be criticized for failing to act upon the possibility, as yet untested before the European Court, that Northern Cyprus may be in breach of an Article of the Convention by continuing to regard as criminal certain types of conduct in which the applicant, if he returned to Northern Cyprus, might or might not choose to indulge. \textit{Ex parte Binbasi}, 1989 Imm. App. R. 595, \textit{available in LEXIS, Enggen Library, Cases File, at *18}.}

\textbf{B. Canada: A Narrow Reading in a Divided Court}

On September 26, 1991 the Canadian Supreme Court, in two sharply divided 4-3 rulings,\footnote{Kindler v. Canada, No. 21,321, slip op. (Can. Sept. 26, 1991); Ng v. Canada, No. 21,990, slip op. (Can. Sept. 26, 1991).} held that the Canadian Justice Minister's planned extradition to the United States of two fugitives charged with capital crimes did not violate the Canadian Charter of Fundamental Rights and Freedoms (Canadian Charter).\footnote{\textit{CAN. CONST.} (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).} Both the plurality and the dissenting opinions invoked \textit{Soering}, but each side interpreted the case differently.

The cases involved two U.S. citizens who sought to avoid extradition to the United States. Joseph Kindler was convicted of murder in Pennsylvania in 1983 and the jury recommended the death penalty. Before formal
sentencing, however, Kindler escaped to Canada.\textsuperscript{161} In 1985, Charles Ng fled to Canada shortly before prosecutors in California charged him with twelve counts of murder. Conviction on these charges in California could bring the death sentence.\textsuperscript{162}

Pennsylvania and California requested extradition pursuant to the extradition treaty between Canada and the United States (U.S.-Canada Extradition Treaty).\textsuperscript{163} Article 6 of the treaty, which is similar to Article IV of the U.S.-U.K. Extradition Treaty, allows the requested state to refuse extradition unless it receives satisfactory assurances that the death penalty will not be imposed.\textsuperscript{164} In response to both requests, after the extradition magistrate and one habeas court had refused to invalidate the extradition, the Canadian Minister of Justice ordered surrender without seeking any assurances.

Kindler and Ng each challenged the Minister's decision. The Canadian Supreme Court consolidated the cases and heard arguments on February 21, 1991. Kindler and Ng argued in their appeals (together with intervener Amnesty International) that extradition without assurances in death penalty cases violated section 7 (right to life and liberty)\textsuperscript{165} and section 12 (prohibiting cruel and unusual punishment)\textsuperscript{166} of the Canadian Charter. The Court ruled in favor of extradition in both cases, but produced two plurality and two dissenting opinions reflecting the sharp divisions among the justices.\textsuperscript{167}

\begin{itemize}
  \item \textsuperscript{161} Appellant's Factum at 1, Kindler v. Canada, No. 21,321 (Can., argued Feb. 21, 1991) (on file with author).
  \item \textsuperscript{162} Katherine Bishop, Murder Suspect's Bid to Stay in Canada Tests Pact, N.Y. TIMES, Feb. 13, 1991, at A18.
  \item \textsuperscript{164} Article 6 of the U.S.-Canada Extradition Treaty states: When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed. \textit{Id. art. 6.}
  \item \textsuperscript{165} Section 7 of the Canadian Charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.
  \item \textsuperscript{166} Section 12 of the Canadian Charter states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." \textit{Id.} § 12.
  \item \textsuperscript{167} Kindler v. Canada, No. 21,321, slip op. (Can. Sept. 26, 1991). Although only Kindler's name appears in the caption, these opinions in fact dispose of the companion case, Ng v. Canada, No. 21,990, slip op. (Can. Sept. 26, 1991), as well.
\end{itemize}
1. The Plurality's Narrow Reading of Soering

The two plurality opinions, by Justices McLachlin and LaForest, dismissed the claims of Kindler and Ng for similar reasons. First, they denied that extradition could implicate section 12, interpreting the Canadian Charter to proscribe only cruel and unusual punishment imposed by Canadian officials. Since the death penalty would be carried out by officials in Pennsylvania and California, each held that the sanction could not violate section 12: a contrary holding would "cast the net of the [Canadian] Charter broadly into extraterritorial waters." 168

Justice McLachlin's opinion defined the central issue as whether extradition without assurances would deprive the fugitives of their liberty without fundamental justice in violation of section 7. To prevail on this issue, the fugitive had to show that the requesting state presents "a situation that is simply unacceptable," 169 or one that "sufficiently shocks' the Canadian conscience." 170 This required a balancing test between national norms and other considerations. 171 Appellants and intervenor Amnesty International argued that extraditing a fugitive to face the death penalty would "shock the Canadian conscience," 172 and pointed out that the Canadian Parliament had abolished the death penalty for all but a few military offenses in 1976 and had rejected a proposal to reinstate the death penalty for civilian crimes in 1987. 173 Justice McLachlin refused to interpret this legislative activity as an unequivocal statement that the death penalty shocked the Canadian collective conscience, since the vote on reinstatement had been close, 174 reflecting a lack of consensus. 175

Other considerations mitigated any shock to the Canadian conscience. Justice McLachlin noted that the legal systems in the requesting U.S. states were products of democratic governance and include procedural safeguards similar to those provided by Canadian law. 176 He argued that courts in the

168. Kindler, slip op. at 12 (McLachlin, J.) (plurality opinion).
169. Id. at 16 (quoting United States v. Allard, 40 D.L.R.4th 104 (1988) (Can.)).
170. Id. (quoting Schmidt v. The Queen, 39 D.L.R.4th 18, 40 (1987) (Can.)).
171. The plurality concluded that:
At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations.

Id. at 16 (McLachlin, J.) (plurality opinion).
174. The vote was 148-127. Kindler, slip op. at 19 (McLachlin, J.) (plurality opinion).
175. Id. at 4 (LaForest, J.) (plurality opinion).
176. Id. at 9; see also id. at 20 (McLachlin, J.) (plurality opinion).
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requested state could go no further in their inquiry into conditions in the requesting country. "[W]e require a limited but not absolute degree of similarity between our laws and those of the reciprocating state." 177 Moreover, international comity and the interest of international law enforcement weighed in favor of extradition. Both opinions gave great weight to the Justice Minister’s contention that failure to extradite would create a "safe haven" for felons charged with capital crimes, who would flock to Canada to be shielded from punishment. 178 This would be especially true for U.S. criminals, such as Kindler and Ng, who could easily cross the long, relatively porous border between the United States and Canada.

Both plurality opinions implicitly rejected two key aspects of Soering. First, the plurality refused to extend state responsibility beyond Canada’s national borders and to apply section 12 to extradition, to avoid giving extraterritorial effect to the Canadian Charter. This decision departed from the broad holding in Soering that the requested state has a responsibility to ensure that the fugitive’s human rights are respected, and may not extradite if it is aware of a substantial risk of violation in the requesting country. 179 Second, Justice LaForest’s swing opinion (conferring the plurality) rejected the most innovative part of the Soering holding: the idea that the death row phenomenon violated human rights. He adopted instead the European Commission’s view in Kirkwood: the time-consuming death penalty appeals process was designed to protect the prisoner, who could voluntarily choose to forego its pressures. 180

Neither plurality opinion, however, disavowed Soering unequivocally. Justice LaForest, despite his skeptical view of the death row phenomenon, seemed to accept Soering for the proposition that extradition in capital cases where the fugitive was a youth or mentally disabled might violate the "fundamental justice" requirement of section 7. 181 This left the possibility that a future case with facts closer to those in Soering might warrant a judicial refusal to extradite. Justice LaForest’s approving citation of even an emaciated version of Soering is significant as an acknowledgement, however limited, of Soering’s persuasive value from a court beyond the reach of the European Convention. 182

177. Id. at 9 (McLachlin, J.) (plurality opinion).
178. Id. at 21 (McLachlin, J.) (plurality opinion); id. at 9 (LaForest, J.) (plurality opinion).
179. See supra notes 127-132 and accompanying text.
180. "It would be ironic if delay caused by the appellant’s taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice." Kindler, slip op. at 12 (LaForest, J.) (plurality opinion).
181. Id. at 8.
182. This was not the first time the Canadian Supreme Court invoked jurisprudence produced under the European Convention. See Schmidt v. The Queen, 39 D.L.R.4th 18, 39 (1987) (Can.) (citing Altun v. Germany, 5 Eur. H.R. Rep. 611 (1983) (Commission report)).
2. The Dissents' Broader Interpretation of Soering

Three justices dissented sharply in Kindler and Ng in two dissenting opinions. Justice Sopinka agreed with the plurality that section 7, rather than section 12, was the Canadian Charter provision applicable to these cases, but disagreed with the plurality's resolution of the section 7 issue. In his opinion, Canada's abolition of the death penalty in 1976 and its reaffirmation of this abolition in 1987 signaled that "public policy in Canada . . . stands clearly opposed to the death penalty." As such, extradition without assurances would "shock[ ] the conscience" and thus deprive the fugitive of liberty in violation of "fundamental justice." Justice Sopinka also attacked the safe-haven argument, arguing that the plurality presented a false choice between extraditing without assurances and not extraditing at all.

There was a further possibility offered by Article 6 of the U.S.-Canada Extradition Treaty: Canada could seek assurances that the death penalty would not be imposed and extradite on that basis.

The other dissenter, Justice Cory, viewed the prohibition in section 12 against cruel and unusual punishment as the legal provision most appropriate for analyzing the two cases. He argued that section 12 barred extradition when a fugitive faced capital punishment for four reasons: the historical reluctance of Canadian juries to impose the death penalty; Canada's abolition of the death penalty in 1976 and its affirmation of that step in 1987; Canada's ratification of international covenants for the protection of human rights; and the universal principle of human dignity. Justice Cory interpreted the Soering holding broadly, refused to limit its scope to Jens Soering's individual circumstances. He conceded that Soering was not binding on the Canadian Court, but treated it as a persuasive authority indicative of a "judicial trend

183. Kindler, slip op. at 5 (Sopinka, J., dissenting).
184. Id. at 4.
185. Under the plurality's analysis, Kindler and Ng would face the death penalty in the United States or would roam free in Canada. Id. at 6-7 (LaForest, J.) (plurality opinion).
186. Justice Sopinka argued that extradition without violation of the Canadian Charter could be achieved through negotiation with the United States:
   With the cooperation of the requesting state, it is possible to achieve the goals of an effective extradition system in a manner that does not deprive the fugitive of the protection of the Charter.
   In such circumstances, it is fundamentally unjust for the Canadian Government to extradite a fugitive without at least seeking assurances against the imposition of the death penalty.
   Id. at 5 (Sopinka, J., dissenting).
187. Id. at 11-13 (Cory, J., dissenting).
188. Id. at 27.
189. Id. at 22. Justice Cory cited several international covenants, including the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948), and the U.N. Torture Convention, supra note 85. Kindler, slip op. at 21-24 (Cory, J., dissenting). Neither of these accords explicitly prohibits capital punishment, but both express the general principle of respect for human life and dignity. However, as Justice Cory pointed out, Canada voted in favor of the Second Optional Protocol, which outlaws capital punishment in the territory of its signatories. Id.
190. Id. at 43.
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in the consideration of extradition cases where a fugitive may be subjected to cruel and unusual punishment or treatment.\textsuperscript{191} To embrace \textit{Soering}'s expanded vision of state responsibility, Justice Cory pointed to similar language used in section 12 of the Charter\textsuperscript{192} and Article 3 of the European Convention.\textsuperscript{193} The European Court in \textit{Soering} had interpreted the use of "to subject," which appears in both provisions, to mean "to put at risk of" in the extradition context.\textsuperscript{194} Justice Cory concluded that the same construction should be given to section 12 of the Canadian Charter.\textsuperscript{195}

Justice Cory also relied on \textit{Soering} to support the proposition that potential or threatened violations of Charter rights demand judicial intervention. Although he did not specify a standard for evaluating such cases, he cited with approval the European Court's ruling that a state has a duty not to extradite where the fugitive faces a "real risk of exposure" to proscribed treatment, or where an Article 3 violation would be a "foreseeable consequence[ ]" of extradition.\textsuperscript{196} Finally, both dissenters criticized the plurality's reliance on the safe-haven argument, arguing that there was no evidence to support such a claim. There had been no exodus of felons to Europe after the European Court blocked the surrender of Jens Soering.\textsuperscript{197}

C. The United States: Reexamining the Judicial Role

\textit{Soering} has had its most dramatic impact in the United States. This decision has given substance to vague dicta in prior cases concerning the possibility of applying human rights considerations to extradition. Consequently, U.S. courts have engaged in a major reexamination of the judicial role in extradition law. In \textit{Ahmad v. Wigen,} for example, a federal district court seeking to expand habeas corpus review cited \textit{Soering} as

\begin{itemize}
\item \textsuperscript{191} \textit{Id.} at 39.
\item \textsuperscript{192} \textit{CAN. CONST.} (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 12; \textit{see supra} note 166 (quoting § 12).
\item \textsuperscript{193} European Convention, \textit{supra} note 2, art. 3; \textit{see supra} note 112 (quoting Article 3).
\item \textsuperscript{194} Justice Cory argued that: "The position taken . . . [in \textit{Soering}] is that a decision to surrender a fugitive to a country in which that fugitive may face torture, or inhuman, or degrading treatment or punishment is a violation of the fugitive's right not to be 'subjected' to such treatment." \textit{Kindler,} slip op. at 43 (Cory, J., dissenting).
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.} at 42 (citing Soering Case, 161 Eur. Ct. H.R. (ser. A) at 35 (1989)). These two cases involved such severe crimes that Justice Cory could have adopted almost any probability standard for the imposition of the death penalty to qualify as a "real risk of exposure." The 12 murder charges against Ng made it highly likely that a court would impose capital punishment, while \textit{Kindler}'s risk was even greater, since under Pennsylvania law the jury's recommendation of the death penalty binds the sentencing judge. \textit{42 PA. CONS. STAT. ANN. § 9711} (1989).
\item \textsuperscript{197} Justice Cory noted that criminals often flee for reasons having little to do with one state's extradition regime: "[f]light may often be undertaken [merely] to avoid detection or trial." \textit{Kindler,} slip op. at 46 (Cory, J., dissenting).
\end{itemize}
respected precedent and relied upon the decision as a guiding framework. While this reasoning was criticized on appeal, the decision indicates Soering's provoking effect upon U.S. courts reviewing extradition cases. Most recently, in Gill v. Imundi, another district court has attempted to reconcile the different approaches taken in Ahmad. Both Ahmad and Gill suggest that some U.S. judges are seeking a broader role in extradition cases, a role that includes consideration of human rights in the requesting country.

1. Ahmad v. Wigen

In Ahmad Israel sought extradition of a Palestinian suspected of bombing a bus carrying civilians. Ahmad argued before the certifying magistrate that his alleged crime fell within the political offense exception to the U.S.-Israel Extradition Treaty. He also argued that Israel had failed to show probable cause, and that the magistrate lacked jurisdiction. After the magistrate granted the extradition order, Ahmad raised these objections again before Judge Weinstein of the Eastern District of New York in a habeas corpus petition, adding the argument that he would face procedures and treatment "antipathetic to a federal court's sense of decency" if he were extradited.

Ahmad requested an evidentiary hearing to demonstrate that the Israeli judicial and penal systems would violate his human rights. The U.S. government opposed the request, arguing that the court should apply the traditionally narrow scope of habeas corpus review and the rule of non-inquiry. Judge Weinstein granted the request, and the government unsuccessfully sought a writ of mandamus from the Court of Appeals for the Second Circuit. An unprecedented hearing ensued. For two weeks, Judge Weinstein heard evidence that included affidavits and documentation on Israeli legal process and prison conditions, and testimony from six witnesses including Palestinian experts, Harvard Law School Professor Alan Dershowitz, and an Israeli government representative who certified that Ahmad would not be subjected to abuse. Judge Weinstein attempted to square this novel hearing with the traditional role of the habeas corpus judge in an extradition case.

199. Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).
202. Ahmad, 726 F. Supp. at 395 (quoting Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960)).
203. See supra notes 21 and 35-39 and accompanying text (outlining traditional review standards).
204. Ahmad, 910 F.2d at 1063.
205. Ahmad, 726 F. Supp. at 395.
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proceeding. He seized on the *Gallina* "sense of decency" line of cases,\(^{206}\) and the few cases that have permitted the fugitive to challenge his surrender on constitutional grounds.\(^{207}\) He suggested a link between the constitutional defenses and those appealing to decency: an inquiry to determine whether the requesting state's criminal justice system satisfied the court's sense of decency would ensure that the court was not being used by the requesting state to deprive the fugitive of due process rights.\(^{208}\)

This due process argument differed from other constitutional arguments invoked in the extradition context. Previous cases had focused on the actions of officials in the requested state.\(^{209}\) In *Ahmad*, by contrast, practices in the requesting state were at issue. Judge Weinstein bridged this distinction by drawing on *Soering*'s expanded conception of state responsibility, arguing that the extradition court has a responsibility to ensure that the conditions awaiting the fugitive in the requesting country do not violate human rights.\(^{210}\) He held that the Due Process Clause of the U.S. Constitution applied because a U.S. court was asked to facilitate an extradition that potentially threatened the fugitive's human rights.

Judge Weinstein did not, however, measure the conditions awaiting Ahmad in Israel by U.S. due process standards, and he cited no due process decisions by U.S. courts.\(^{211}\) Instead, he judged conditions in Israel against international human rights norms. His primary source for these norms was *Soering*, which he discussed extensively under the heading "International Precedent." Judge Weinstein stated that "*Soering* constitutes an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration or lack of due process at trial in the requesting country. It reflects a persuasive though non-binding international standard."\(^{212}\) This assessment was a slight overstatement of *Soering*,\(^{213}\) which dealt with lack of due process at trial in...


\(^{207}\) See, e.g., In re Burt, 737 F.2d 1477 (7th Cir. 1984) (permitting constitutional challenge to extradition yet enforcing extradition order).

\(^{208}\) Judge Weinstein denied that such an inquiry infringed on the sovereignty of other states: "It should be emphasized that by conducting such an inquiry, we do not make it "the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." But neither can another nation use the courts of our country to obtain power over a fugitive intending to deny that person due process. We cannot blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction."

*Ahmad*, 726 F. Supp. at 410 (citations omitted).

\(^{209}\) See supra note 23 and accompanying text.

\(^{210}\) *Ahmad*, 726 F. Supp. at 414.

\(^{211}\) The *Gallina* decision's "sense of decency" language derived not from the Due Process Clause but from vague principles of equity, and the decision never explicitly mentioned the U.S. Constitution.

\(^{212}\) *Ahmad*, 726 F. Supp. at 414.

\(^{213}\) See supra note 132 (discussing *Soering*'s treatment of Article 6 "fair trial" issue).
dicta only, but it enabled Judge Weinstein to draw notions of due process from international human rights law rather than U.S. constitutional precedents, in order to legitimize his unprecedented injection of human rights concerns into an extradition case. Judge Weinstein also used Soering to guide his inquiry into human rights conditions in the requesting state. He quoted a passage from Soering to emphasize the need to balance human rights concerns against international law enforcement.214

Judge Weinstein’s view on the degree to which extradition judges should defer to decisions of the government departed substantially from previous rulings. He recognized that courts should treat the State Department’s decision to present an extradition request as a presumption that the requesting state will treat the fugitive fairly. He added an important caveat, however, that "[t]here may be instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused. Should such cases occur, the courts must be prepared to act."215 A habeas corpus petitioner could rebut the presumption by presenting strong evidence that his extradition would expose him to treatment violating international norms of human rights.216 The petitioner would bear the burden of going forward with the evidence—the burden of establishing a prima facie case.217 Judge Weinstein ruled that Ahmad had met this burden, based on reports of Israeli torture of Palestinians accused of violent acts against Israelis in the occupied territories.218

Judge Weinstein then turned to the issue of standard of proof. He required Ahmad to show by a preponderance of the evidence that he would face unfair treatment in Israel, thus declining to impose the higher standard of "clear and convincing" evidence. Perhaps mindful of the potential tension between his ruling and traditional judicial deference (which would have required a higher

214. Soering Case, 161 Eur. Ct. H.R. (ser. A) at 35 (1989). Judge Weinstein’s quotation of the passage reveals that he envisioned a judicial role in extradition cases that would balance competing policy considerations, a task judges perform in nearly every other legal domain:

[Just as national policies and international norms are taken into account by American courts ascertaining the scope of the political offense exception . . . so too must these considerations enter into the assessment of whether the likelihood of particular treatment in the requesting country constitutes such a violation of due process and fundamental fairness as to prevent extradition.

Ahmad, 726 F. Supp. at 414. Judge Weinstein also listed the factors set forth in Soering for assessing the severity of ill-treatment in the requesting country: courts should consider "all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim." Id. (quoting Soering, 161 Eur. Ct. H.R. (ser. A) at 39).


216. Id.

217. If petitioner makes such a threshold showing, the rule of non-inquiry yields and an evidentiary hearing may be conducted on the issue of probable due process to the accused in the requesting country." Id.

218. Id. at 416.
standard), Judge Weinstein noted: "We are not, as apparently British courts are, limited to deciding that ‘no reasonable secretary of state could have made an order for [extradition] in the circumstances.” Judge Weinstein ruled that Ahmad had failed to carry this burden: no extradited prisoner had ever suffered abuse by Israeli officials, and the Israeli government’s assurances that Ahmad would receive fair treatment were credible. He also approved the government’s decision to seek such assurances from Israel because "the extraditing nation has a continuing interest in assuring fairness to the extraditee." Having found the other grounds for challenging the extradition order without merit, Judge Weinstein denied Ahmad’s habeas corpus petition.

2. Ahmad in the Second Circuit

The Second Circuit affirmed Judge Weinstein’s denial of the habeas corpus petition on appeal, but sharply criticized his broad vision of habeas corpus review in extradition cases: "A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge . . . . Indeed, there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer." Instead, the Second Circuit held that the proper forum in which to raise human rights concerns in extradition cases is before the Secretary of State. The court concluded that Judge Weinstein should not have conducted a hearing on the treatment Ahmad would face in Israel. Indeed, the court noted in its closing remarks that there was no need to conduct such an inquiry:

So far as we know, the Secretary [of State] never has directed extradition in the face of proof that the extraditee would be subjected to procedures or punishment antipathetic to a federal court’s sense of decency. Indeed, it is difficult to conceive of a situation in which a Secretary of State would do so.

221. Id. at 420.
222. Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) (citations omitted).
223. Id. (citing Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980), and Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), cert. denied, 429 U.S. 833 (1976)).
224. The circuit court’s decision implied support for an executive model of extradition, requiring judicial deference to the government’s prerogative in foreign policy matters: Notwithstanding [precedent to the contrary], the district court proceeded to take testimony from both expert and fact witnesses and received extensive reports, affidavits, and other documentation concerning Israel’s law enforcement procedures and its treatment of prisoners. This, we think, was improper. The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.
Ahmad, 910 F.2d at 1067.
225. Id.
The court of appeals did not cite *Soering*, but it apparently thought that the European Court's decision changed nothing; judges in extradition cases still could not consider the requesting nation's human rights record. This is the traditional prevailing argument on judicial involvement in extradition proceedings. Thus, in response to Judge Weinstein's sharp tug at tradition, the Second Circuit rolled back even the limited autonomy U.S. judges had established in cases like *Gallina*.

3. Gill v. Imundi: Explaining Ahmad

In *Gill v. Imundi,* fugitive Sikhs accused of murder in India sought a writ of habeas corpus in the United States to block their extradition. They claimed that they would face biased legal proceedings, torture, and even death if extradited to India. Judge Sweet of the Southern District of New York upheld their petition on unrelated grounds, noting that he could not consider the petitioners' evidence of human rights abuse in India in light of the Second Circuit's ruling in *Ahmad*. He agreed, however, with Judge Weinstein's opinion that the proper scope of habeas corpus review in extradition proceedings should go beyond a ministerial inquiry to considerations of constitutional issues and principles of international law. He examined and found persuasive the petitioners' evidence of ill-treatment of Sikh prisoners in India, and only reluctantly accepted the Second Circuit's opinion in *Ahmad*.

Judge Sweet read the Extradition Act as evidence that Congress intended to give judges, "as members of relatively non-political departments, an important role in the avoidance of threatened dangers to liberty." In spite of the Second Circuit's decision in *Ahmad*, he considered the merits of petitioners' human rights claims. The affidavits and reports detailing abuse of Sikhs in police custody were a "substantial, chilling proffer from sources with at least surface credibility [that] had convinced this court of the justification for further judicial inquiry lest "[w]e . . . blind ourselves to the foreseeable and probable results of the exercise of our jurisdiction." The treatment awaiting these petitioners in India, Judge Sweet argued, was the type of abuse the Second Circuit considered in *Gallina* when it wrote that judges could refuse

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226. *See supra* notes 35-61 and accompanying text.
228. *Id.* at 1050 ("This lower court, although possessed of an imagination considerably less sanguine than that which found expression in *Ahmad*, is bound by that decision . . .") (footnote omitted).
231. *Id.* at 1048 (quoting *Ahmad* v. Wigen, 726 F. Supp. 389, 410 (E.D.N.Y. 1989), *aff'd on other grounds*, 910 F.2d 1063 (2d Cir. 1990)).
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to certify extradition when the fugitive faced conditions "antipathetic to a federal court's sense of decency." 232

Judge Sweet wanted to hold a hearing like that held by Judge Weinstein, 233 but he reluctantly adhered to the Second Circuit's ruling in Ahmad: "That step is now foreclosed to a habeas court, the promise of Gallina's dictum recently having been excised, without comment." 234 Judge Sweet criticized the Second Circuit's decision for abandoning the possibilities presented by Gallina and exercised in Soering, for trusting the Secretary of State to safeguard the petitioners' human rights. 235 He further argued that the Ahmad court's faith in the government did not comport with a previous Second Circuit ruling on the political offense exception. 236 Thus while he reluctantly accepted Ahmad's absolute formulation of the rule of non-inquiry with respect to habeas corpus judges, Judge Sweet refused to accept the Second Circuit's dicta that extradition magistrates should be barred from scrutinizing the legal process in the requesting country. 237 He pointed out that there was no way to enforce such a bar, since a magistrate's refusal to certify extradition was not subject to appeal by the government. Thus, he suggested, Ahmad bars only habeas courts, not extradition magistrates, from considering conditions in the requesting country. 238

VI. EXTRADITION REFORM: A PROPOSAL

Judges in the United Kingdom, Canada, and the United States have not dismissed Soering. Instead, they have utilized and even embraced it. Only one

232. 747 F. Supp. at 1048 (quoting Gallina, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960)).
233. "Whether evidence would in fact bear out the likelihood of petitioners being subjected to such treatment would require conducting a hearing. The strength of the proffer provides the substantial warrant for taking such a step toward re-examination of the rule of non-inquiry, as was contemplated by the Gallina court." Id. at 1049.
234. Id.
235. Judge Sweet's opinion stated that: Ahmad does not examine the proffer that was made to the habeas court nor acknowledge the concern, expressed in the noted past decisions of the circuit, that circumstances might come to pass where inquiry into such conditions became necessary. Instead the decision appears to block any such judicial inquiry by a habeas court based on its belief [that the Secretary of State would not extradite if the fugitive proved that he would face cruel treatment].
Id.
236. Judge Sweet noted that previous decisions in the circuit supported an active judicial role: [W]e recognize[,] that judgments by the executive branch on extradition matters may, out of understandable concern for the maintenance of friendly international relations, be constrained . . . . It is not apparent from the Ahmad opinion why it is so "difficult to conceive" that the same practical concerns and constraints noted in Mackin might operate in the context of an extradition determination involving a subject facing procedures or punishment antipathetic to a court's sense of decency.
Id. at 1050 n.24 (citing In re Mackin, 668 F.2d 122, 133 (2d Cir. 1981)).
237. See supra note 222 and accompanying text.
238. 747 F. Supp. at 1050.
court, the Second Circuit in *Ahmad*, has unequivocally rejected the notion of applying *Soering*-style jurisprudence to extradition law. Other courts have nonetheless accepted limited versions of the *Soering* decision by choosing to distinguish rather than disavow its reasoning. *Soering* invites a reexamination of the assumptions and rationales underlying the current extradition regime, in particular the traditional rules of non-inquiry and judicial deference to the government. Part VI argues that because these rationales no longer hold true, courts should follow a new approach to extradition. A court must inquire into conditions in the requesting state when a fugitive provides a strong showing that she will face mistreatment upon her surrender. A court would then evaluate conditions in the requesting state according to international human rights norms or, in the alternative, according to human rights criteria established by domestic statutes. The court would refuse to extradite in cases of mistreatment, unless the requesting state furnished assurances that it would treat the fugitive fairly.

### A. Extradition on Assurances: A Proposal for Human Rights and Extradition

The proposal could be introduced through statutory or treaty reform or through judicial practice. A statutory provision or treaty clause explicitly allowing courts in the requested state to hear evidence concerning conditions in the requesting state would provide a clear legal basis for judicial refusal to extradite on human rights grounds. However, past statutory revision efforts have not succeeded in the United States, a process of treaty-by-treaty revision would prove highly cumbersome, and no explicit statutory or treaty provisions currently exist to justify suspension of the rule of judicial non-inquiry. Yet the *Soering*, *Ahmad*, and *Gill* opinions and the dissents

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239. See supra notes 222-226 and accompanying text (discussing Second Circuit decision).

240. The proposed approach draws from that employed by Judge Weinstein in *Ahmad v. Wigen*, which achieved three goals. First, it helped protect Ahmad from violations of his human rights. Second, it expedited the surrender of a suspected terrorist. Third, it ensured that the Israeli government would not co-opt judicial authority in an abuse of human rights. *Ahmad* demonstrates that when a court finds evidence of a real risk of human rights violations after extradition, the interests of all parties will be protected by requiring assurances against such treatment.

241. See bills discussed supra notes 30-34.

242. See BASSIOUNI, supra note 6, at 54-55. Bassiouni favors making substantive changes in extradition law by domestic statute rather than by treaty since statutory change would provide for greater uniformity, and would obviate the need to renegotiate scores of bilateral extradition treaties each time Congress desired a change.

243. The only exception appears to be Article 3(a) of the Supplementary Extradition Treaty between the United States and the United Kingdom, which allows U.S. judges to scrutinize the criminal justice system of Northern Ireland to determine whether it is prejudiced against a fugitive. Supplementary Extradition Treaty, Dec. 23, 1986, U.S.-U.K., art. 3(3a), 132 CONG. REC. S9120 (daily ed. July 16, 1986).

The legislative history of this provision undermines any optimism that the provision might lead to similar provisions in other treaties. The U.S. Senate adopted the provision in the wake of two controversial "political offense exception" cases, in which judges refused to extradite I.R.A. members accused of murdering British officials. See cases cited supra note 27. In addition to stirring legislative reform attempts,
in Ng and Kinder articulate principles that will support an expanded judicial role without explicit statutory or treaty authorization. These principles provide courts with a legal and intellectual framework for incorporating human rights into extradition law.

Under a regime based on assurances, a fugitive could claim before the magistrate that if extradited, his human rights would be violated by action of the requesting state, such as an unfair trial or inhumane treatment. The fugitive would bear the burden of establishing a prima facie case. The magistrate would then hold an evidentiary hearing on procedures and penal treatment in the requesting state. The magistrate should bar any government testimony concerning the importance or sensitivity of diplomatic relations between the requesting and requested countries. The magistrate would refuse the extradition request upon finding that the fugitive had presented a prima facie case, unless the requesting state provided assurances that the fugitive would be treated properly.

Each party would have the same recourse as under the current extradition system in the event of an adverse verdict. If the magistrate found the fugitive’s evidence unpersuasive and granted the extradition request, the fugitive could petition a higher court for a writ of habeas corpus. If the magistrate denied these cases led some senators to call for renegotiation of the U.S.-U.K. Extradition Treaty to narrow the political offense exception. Other senators opposed any narrowing. The resulting compromise restrained judicial discretion over the treaty’s political offense exception but provided for judicial scrutiny of the criminal justice system in Northern Ireland. Thus the provision for scrutiny of a foreign legal system came at the cost of, and was essentially a substitute for, judicial control of the political offense determination. See Kelly D. Talcott, Note, Questions of Justice: U.S. Courts’ Powers of Inquiry Under Article 3(b) of the United States-United Kingdom Supplementary Extradition Treaty, 62 Notre Dame L. Rev. 474, 475-76 (1987).

244. A preponderance of the evidence standard reflects the fact that extradition is technically a civil, rather than criminal, matter, Abroad v. Wigen, 726 F. Supp. 389, 416 (E.D.N.Y. 1989), aff’d on other grounds, 910 F.2d 1063 (2d Cir. 1990), and recognizes the difficulty of proving by “clear and convincing” evidence the occurrence of future events in a place far removed from the court’s jurisdiction. Placing this burden upon the fugitive recognizes that the executive’s decision to seek extradition signals its confidence that the fugitive will receive fair treatment. See supra note 48 and accompanying text. To rebut this presumption, the fugitive could submit affidavits and other written exhibits showing a substantial likelihood of ill-treatment. See Ahmad, 726 F. Supp. at 415 (“[P]etitioner [may] come forward with a written submission showing a substantial probability that he or she can rebut the presumption of State Department propriety in assuming the fairness of judicial process in the requesting country.”).

245. Evidence would consist of reports and testimony from experts and representatives of the requesting state, and government officials from the requested state would be permitted to testify. The government’s presentation of the extradition request indicates its support of the requesting state’s petition. See supra note 48 and accompanying text. At the same time, though, the government also has detailed information on legal systems in foreign states that should be included in the testimonial evidence. However, the government’s position should not receive any more weight than that of any other expert witness, because it may have political, economic or diplomatic reasons to skew its testimony. But see Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 59 (1983) (testimony of M. Halperin) (arguing for deference to executive recommendations to be sought by court during hearing process).

246. In Gill v. Imundi, the court chastised the party seeking extradition for raising this issue: “Nor is it apparent why respondent in this proceeding has taken care to remind the court that this country has friendly relations with India.” 747 F. Supp. 1028, 1050 (S.D.N.Y. 1990).
extradition, the requesting state could renew its request before another magistrate.

A magistrate or court would evaluate a fugitive’s claim using criteria based on international human rights standards. Legislation proposed in the U.S. Congress sought to establish basic criteria for determining whether a fugitive would receive a fair trial abroad. However, national courts lacking statutory guidelines would refer to international law for standards to evaluate foreign legal systems. Adoption by national courts of the rulings of international courts and the provisions of U.N. conventions would endow extradition law with a uniformity it sorely lacks. Moreover, international law offers a growing body of specific human rights standards against which the legal systems of requesting nations may be measured.

B. Defending the Proposal

1. Legal Bases

Soering’s expanded conception of state responsibility supplies the most important justification for judicial scrutiny of human rights in extradition requests. The requested state has a responsibility under its own law, which may include constitutional provisions and international treaty commitments, to ensure that the fugitive’s human rights are not violated. This responsibility may require the requested state to ask what would happen to the fugitive following extradition. If a fugitive can show that the requesting country is likely to violate his human rights, then the magistrate or judge has the same responsibility to refuse extradition as she does to ensure fair, humane treatment to criminal defendants in her courtroom. This process does not give

247. To the extent that courts have previously attempted to scrutinize foreign legal systems, they have proceeded with no more guidance than that offered by vague pronouncements of "a federal court's sense of decency," Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960), and "a fair and impartial trial," Neely v. Henkel, 180 U.S. 109, 123 (1901). If Soering-style jurisprudence is to become a model for national courts in extradition cases, more specific criteria for judging the judicial and penal systems of foreign countries are needed. See Kester, supra note 43, at 1482.

248. These criteria included establishing whether the following rights existed: no ex post facto law, no bill of attainder, right to assistance of defense counsel, right to be present at trial, right to confront hostile witnesses, right to a compulsory process to secure witnesses, burden of proof on the government, right to trial by an impartial tribunal, right to be free from self-incrimination and right to a public trial. Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. (1984). See generally H.R. REP. No. 998, 98th Cong., 2d Sess. 61 (1984) (discussing H.R. 3347); Wellington, supra note 39, at 1453.

249. The U.N. Torture Convention, for example, provides a lengthy definition of "torture." See supra note 85. As discussed earlier, the European Convention and its interpretation by the European Court offer an entire system of detailed human rights standards. See supra notes 79-81 and accompanying text. Extradition judges on national courts could rely particularly on the European Court’s decisions on the elements of a fair trial. See, e.g., Piersack Case, 53 Eur. Ct. H.R. (ser. A) at paras. 30-31 (1984).

250. This due process analogy does not require the judge to apply identical standards of fairness to the fugitive and the criminal defendant. As suggested earlier, courts should apply standards to fugitives which draw upon international human rights law, while the standards applied to the criminal defendant
extraterritorial effect to domestic law, but merely ensures that judicial authority is not used to facilitate human rights violations by other states.251

Treaty construction provides a second legal justification for this proposal. A judge may justify denying an extradition request on the grounds of anticipated human rights violations in the requesting state by reading a reasonableness requirement into an extradition treaty. A court would interpret the requested state’s agreement to the treaty to exclude implicitly any extraditions that are unreasonable, including those involving potential human rights violations.252

Finally, two specific rules of extradition law embody the principle that a requested country may refuse to surrender a fugitive if his subsequent treatment would violate its national norms. Many extradition treaties allow the requested state to seek assurances that the death penalty will not be imposed or executed if the crime for which the fugitive is requested carries a death sentence in the requesting state.253 In addition, the double-criminality rule,
a long-standing tenet of extradition law, provides that no person shall be
extradited unless he has committed an act that constitutes a crime under the
laws of both the requesting and requested states. These rules prevent the
use of a state’s legal system and process to impose treatment that is not in
accord with its legal or moral norms.

The fact that courts lack the power to enforce commitments made by
foreign states and that a requesting state could thus provide assurances to win
extradition and then violate those assurances does not undermine an extradition
regime based on assurances. Courts can deter breaches by refusing the
next extradition request from the offending state. A court can also enlist
the assistance of the government. An official assigned to monitor a
fugitive’s treatment is unlikely to fail to report gross breaches of assurances,
especially if the trial is open to the public.

254. SHEARER, supra note 7, at 137. This rule requires only symmetry of offense, not symmetry of
punishment. In the Kindler case, however, intervenor Amnesty International suggested an alternative reading
of double criminality: the rule requires symmetry of treatment and punishment. See Factum of Intervenor
Amnesty International at 4, Kindler v. Canada, No. 21,990 (Can., argued Feb. 21, 1991) (on file with
author). This suggestion over-extends the rule, which courts have read narrowly to facilitate extradition.
For example, U.S. courts have ruled that the crime in the requesting nation need not bear the same name
as that in the requested nation. See United States v. Stockinger, 269 F.2d 681, 687 (2d Cir.), cert. denied
sub nom. Rauch v. Stockinger, 361 U.S. 913 (1959) (“It is immaterial that the acts in question constitute
the crime of theft and fraud in Canada and the crime of larceny in New York State. It is enough if the
particular acts charged are criminal in both jurisdictions.”).

255. See, e.g., Anderson, supra note 33, at 163.

256. The effectiveness of retaliatory denials of extradition requests may depend on the requesting
state’s governmental structure. Retaliatory denials will deter breach in states with centralized governments,
but they might be less effective in federal systems with prosecutorial authority distributed among several
localities, which in theory can each make or break assurances independently. An extradition court might
feel compelled to treat each prosecutor as a separate requesting “nation,” or require that all extradited
fugitives’ cases be handled by federal prosecutors in federal courts. Diplomatic and political realities,
however, make it unlikely that regional prosecutors will breach their promises. Doing so would cause
diplomatic embarrassment for the federal government, making the federal government less willing to
cooperate in future extraditions. The federal government must play some role in extradition through its
diplomatic office, and thus it retains some leverage over regional prosecutors even in the most decentralized
federal systems. Moreover, states remain a part of their larger federal unions and are unlikely lightly to
tarnish their nation’s international reputation.

257. When Judge Weinstein accepted Israeli assurances, he noted: “The State Department has indicated
that it plans to assign an American representative to consult with petitioner and to observe the prosecution
(citing Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963)), aff’d
here on other grounds, 910 F.2d 1063 (2d Cir. 1990). Judge Weinstein described Jimenez as a case in which
“the Secretary of State conditioned extradition on the understanding that Jimenez would be tried only for
the crimes specified and ordered a representative of the United States government to observe the
proceedings to determine that the condition was not violated.”

258. Judge Weinstein foresaw no risk in such an arrangement: “An open trial in a civilian court with
observation by a representative of the United States furnishes ample protection against abuse.” Id. at 420.
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2. **Normative Bases**

The growing recognition of human rights in the international community supports the increased judicial scrutiny of human rights in extradition requests. It is increasingly difficult in this environment for judges to ignore the consequences of certifying extradition to a country with a poor human rights record. This concern over human rights questions the wisdom of leaving the protection of those rights solely to the government of the requested state. It is misleading to speak of government discretion in extradition cases since a government is unlikely to make discretionary exceptions to terms of a treaty it negotiated itself. Further, very few treaties allow for denial of extradition based on treatment in the requesting state. The government may be reluctant to deny an extradition on human rights grounds not already included in the terms of the treaty, such as procedural unfairness or cruel penal treatment, no matter how meritorious the claims. Because human rights are not merely factors to be weighed in making foreign policy, but instead are inalienable entitlements worth protecting for their own sake, the unsupervised "balancing" of a fugitive's fate against diplomatic considerations is inherently suspect. As Judge Weinstein pointed out, "there may . . . be instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused." It is precisely for these circumstances that judicial review must be available.

While the Second Circuit found it difficult to imagine a scenario in which the Secretary of State would extradite a fugitive who faced violation of his human rights, it is in fact difficult to imagine a situation in which the executive could consider the rights of a fugitive independent of diplomatic pressures. If it were trying to court favor with that nation for military or economic reasons,

259. Compare U.N. Torture Convention, supra note 85, with European Convention, supra note 112, art. 3.

260. See Note, Executive Discretion in Extradition, 62 Colum. L. Rev. 1313, 1315-16 (1962) (noting that neither judicial opinions nor Extradition Act of 1848, 18 U.S.C. §§ 3181-3195 (1988), set direct limits on government's discretion whether to surrender in face of absolute treaty obligation, and concluding that Extradition Act "should probably be interpreted to grant the [government] only the limited discretion to differ from the courts in the matter of treaty interpretation").

261. Some treaties allow for denial of extradition in death penalty cases. See, e.g., U.S.-U.K. Extradition Treaty, supra note 26, art. IV. For the text of Article IV, see supra note 59. Beyond death penalty exceptions, however, only one provision among U.S. treaties allows for judicial scrutiny of the requesting nation's legal system: the Supplementary Extradition Treaty between the United States and the United Kingdom, containing special provisions on Northern Ireland. See Supplementary Extradition Treaty, supra note 243, art. 3(a).

262. See Anderson, supra note 33, at 160-62. Between 1941 and 1962, the U.S. Secretary of State refused to extradite after certification by the magistrate on only two occasions. See Note, supra note 260, at 1328. In both cases, the Secretary justified denial on the basis of narrow, technical grounds based on treaty provisions rather than on broad-based governmental discretion. Id. at 1316, 1328.

the executive might be tempted to overlook human rights violations in the requesting country.\textsuperscript{264}

In these cases the fugitive becomes a pawn in a geostrategic chess game. If extradition affects individual rights and such rights are important in themselves, a competence rationale calls for greater judicial involvement and less executive discretion.\textsuperscript{265} The judiciary is better positioned to assess the adequacy of any assurances that a fugitive's human rights will be safeguarded, because the government may favor expediency over justice, particularly when evaluating assurances from friendly nations. In \textit{Soering}, for example, the U.K. court was required to defer to its foreign minister's assessment of assurances given by Virginia prosecutors,\textsuperscript{266} whereby the prosecutors merely promised to inform the sentencing judge of the British government's opposition to the death penalty. Such an assurance represented no more than diplomatic politesse between the United Kingdom and the United States and did nothing to protect Soering from death row. The European Court held the assurances inadequate and refused to rely on them to uphold Soering's extradition under the European Convention.\textsuperscript{267} Following this ruling, the British Foreign Minister amended his position and agreed to surrender Soering only if the state of Virginia promised not to seek a death sentence.\textsuperscript{268} It took an external human rights court to force the British government to obtain the guarantees necessary to protect the fugitive's human rights.

3. \textit{The Political Question Doctrine}

Courts generally defer to elected officials because they view extradition as a political question of foreign policy.\textsuperscript{269} Yet the notion that extradition principally constitutes a foreign policy issue is anachronistic.\textsuperscript{270} Extradition

\textsuperscript{264}. See, \textit{e.g.}, \textit{In re Mackin}, 668 F.2d 122, 133 (2d Cir. 1981) (executive control of political offense determination might eviscerate exception "in practice in the case of extradition treaties with nations with which we are allied or whose favor we especially desire"); Gill v. Imundi, 747 F. Supp. 1028, 1050 n.24 (S.D.N.Y. 1990) ("ITIhe same practical concerns and constraints noted in Mackin might operate in the context of an extradition determination involving a subject facing procedures or punishment antipathetic to a court's sense of decency.").

\textsuperscript{265}. See \textit{Shearer}, supra note 7, at 197; Lubet, \textit{supra} note 18, at 284.


\textsuperscript{268}. In the end, Virginia authorities agreed to the new arrangement, sparing Soering the prospect of capital punishment and the associated "death row phenomenon." \textit{See supra} note 148 and accompanying text.

\textsuperscript{269}. See \textit{supra} notes 24-30and accompanying text (analyzing application of political question doctrine to extradition).

\textsuperscript{270}. Two hundred years ago extradition, and more generally the treatment of individuals by foreign nations, occupied a more central role in foreign affairs. Incidents in which foreign nations infringed the rights of individuals travelling abroad triggered angry reactions and tended to stir calls for war. The founders of the United States worried that such incidents might embroil them in the foreign entanglements
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is an infrequent proceeding between states that directly affects a relatively small number of people, and extradition policy rarely arises in the context of foreign relations. While a state may have a policy-driven interest in ensuring escaped fugitives are expeditiously returned, its interest in the return of any single fugitive, and thus in the outcome of any particular extradition request, is often negligible.

Treaties between foreign states directing the physical transfer of individuals define extradition law, and these elements require an active role by the government. Yet neither element makes extradition primarily a matter of

against which George Washington cautioned in his farewell address. See George Washington’s Final Manuscript of the Farewell Address (Sept. 19, 1796) in Felix Gilbert, To the Farewell Address: Ideas of Early American Foreign Policy 145 (1961) (“Tis our true policy to steer clear of permanent alliances, with our portion of the foreign world.”). The founders’ response to this danger was often to entrust the judiciary with the resolution of controversies involving the U.S. government’s treatment of foreigners. For example, the Alien Tort Statute, 28 U.S.C. § 1350 (1988), adopted in 1789 and still in force today, allows foreigners with grievances against the U.S. government to bring suit for damages in federal court. See Anthony D’Amato, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int’l L. 62 (1988).

The idea of allocating certain sensitive foreign policy issues to the judiciary, conceived during the isolationist years of the United States, continues to surface today. Courts rely upon it to justify judicial resolution of political offense exception cases. See, e.g., Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981) (“[A]llowing judges, rather than the Executive, to make the political offense determination ‘permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations.’”) (quoting Steven Lubet & Morris Czaczkes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. Crim. L. & Criminology 193, 200 (1980)).

271. Between 1945 and 1960, for example, U.S. magistrates certified an estimated 137 extradition requests—an average of less than 10 per year. See Note, supra note 260, at 1313 n.1. This figure does not include requests that were made but not certified, but it is nonetheless quite small, considering that the United States is party to over 100 extradition treaties. See Bassiou尼, supra note 6, at 31. Apprehensions and renditions of alleged criminals, particularly terrorists, are achieved far more commonly than by extradition in international practice. See Arthur W. Evans, The Apprehension and Prosecution of Offenders: Some Current Problems in Legal Aspects of International Terrorism, in LEGAL ASPECTS OF THE CONTROL OF INTERNATIONAL TERRORISM, 493-94 (Arthur W. Evans & John F. Murphy eds., 1978). However, recent data indicate increased extradition activity. For example, the U.S. Justice Department estimates that during fiscal year 1990, the United States extradited some 150 fugitives and made 600 extradition requests to foreign nations. Telephone Interview with Rex Young, International Affairs Division, United States Department of Justice (Feb. 11, 1992).

272. But see, e.g., James F. Clarity, Ireland to Tighten Law on Fugitives, N.Y. Times, Nov. 26, 1991, at A2 (describing Irish Prime Minister’s attempt to defuse tensions with United Kingdom by proposing legislation to ease extradition of I.R.A. members who have escaped to Ireland, and describing his demand that surrendered fugitives be treated fairly as quid pro quo for its passage). Professor Bassiouни argues that a bilateral U.S. extradition treaty reflects the overall status of diplomatic relations between the U.S. and its treaty partner. Thus, he points out, the U.S. government does not extradite to or seek extradition from nations with which it has severed diplomatic relations. Bassiouни, supra note 6, at 41.

273. Judicial denial of an extradition petition rarely so offends a foreign state as to poison diplomacy with that state. For example, after the United Kingdom refused to extradite Soering without assurances following the European Court’s judgment, there was no reported souring in relations with the United States.

The proposed system might in fact defuse diplomatic tensions by allowing the government to deflect responsibility for individual extradition denials onto the judiciary. See infra notes 292-293 and accompanying text.
foreign policy. Courts interpret treaties, and it is the essential judicial function to protect an individual's human rights. Determining the respective roles of the government and the judiciary requires a test that goes beyond labels such as "foreign affairs" or "deprivation of liberty:" the separation of powers debate contained in political offense exception cases provides such a test.

United States courts have held that the determination of whether a particular offense is "political" is justiciable under the U.S. Constitution. These rulings reject the notion that the mere involvement of foreign states in an issue grants the government a monopoly in extradition decisionmaking. Courts invoke the political question doctrine in international cases following their determination that no judicially manageable criteria can be developed to resolve the dispute. However, courts are equipped to decide what constitutes a political offense in the extradition context.

Evidentiary and fact-finding obstacles complicate the investigation of the motives of foreign officials not subject to subpoena. These obstacles render judicially unmanageable, and thus non-justiciable, the determination whether an extradition request for a crime is genuine or a politically motivated subterfuge. This set of evidentiary and informational concerns separating the justiciable from the non-justiciable is the crucial element of the political question doctrine in the extradition context, and the key to sharing power between the government and the judiciary.

Courts must be allowed to undertake any extradition-related inquiry that will yield judicially accessible and admissible evidence. Courts of the requested

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274. See, e.g., Baker v. Carr, 369 U.S. 186, 212 (1962) ("A court can construe a treaty and may find it provides the answer."); Eain, 641 F.2d at 514 ("It is clear that courts have authority to construe treaties.").

275. See supra notes 259-268 and accompanying text (discussing normative bases for proposal).

276. See supra notes 35-61 and accompanying text (discussing traditional judicial deference standards).

277. See, e.g., Eain, 641 F.2d at 513-15; In re Mackin, 668 F.2d 122, 133-37 (2d Cir. 1981).

278. "[A]s the Supreme Court has said, 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence.'" Eain, 641 F.2d at 514 (quoting Baker, 369 U.S. at 211).

279. E.g., Eain, 641 F.2d at 514-15 ("The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not. The resources to make that initial determination can ordinarily be sufficiently produced for judicial consideration."). (footnote omitted).

280. See, e.g., Mackin, 668 F.2d at 133 ("[T]here is no inconsistency between confiding to the courts a decision with respect to past facts and refusing to allow them to probe the motives of a requesting government."); Eain, 641 F.2d at 513; In re Lincoln, 228 F. 70 (E.D.N.Y. 1915), aff'd per curiam sub nom. Lincoln v. Powers, 241 U.S. 651 (1916).

This argument did not hinder the drafters of The Extradition Act of 1984, H.R. 3347, 98th Cong., 2d Sess. (1984). That bill, the most "judicial" of the extradition reform measures introduced during the early 1980s, would have allowed judges to inquire whether the requesting nation was actually seeking extradition on the basis of the fugitive's race, religion, sex, nationality, political opinion, or membership in a social group. See supra notes 28-34 and accompanying text. See also H.R. REP. NO. 998, 98th Cong., 2d Sess. at 5-6 (1984).
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state cannot compel testimony of witnesses residing in the requesting state to determine that state's motive for extradition. However, the distinction between general evidence and testimony concerning motive does not bar judicial inquiry into legal procedures and penal treatment in foreign nations. Despite claims to the contrary, courts can effectively obtain and assess information about the legal systems of other states and are thus well equipped to analyze the human rights issues raised by extradition requests. Much of this information is freely available, particularly that which is part of the requesting state's written laws. Moreover, modern technology enables the increasing dissemination of information about foreign states, and many government and private agencies specialize in collecting and presenting human rights data.

Courts therefore should not automatically treat extradition requests as non-justiciable political questions. Lack of information does not impede immigration judges presiding over political asylum and deportation cases from hearing evidence on conditions in foreign countries. These administrative judges are agents of the head of state in the United States, but the resources at their command differ little from the fact-finding devices available to the judiciary: they regularly hear evidence, including affidavits, testimony, and reports from the government. If immigration judges are permitted to

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281. See supra note 37 and accompanying text.
282. Those sections of the Northern Ireland Emergency Provisions Act of 1978 that permit severe restrictions of civil liberties, such as warrantless searches and arrests by police, the denial of right to trial by jury in certain classes of cases, and use of moderate physical maltreatment to induce a statement, would be clearly discernable by a foreign court. See Talcott, supra note 243, at 491 n.114.
283. Judge Weinstein pored over extensive documentation from a variety of sources and heard testimony from several witnesses on both sides of the issue when investigating Israel's treatment of Palestinian prisoners. He may not have had all the facts, but he certainly had enough of them to review an extradition petition aggressively. See supra text accompanying note 204.
285. See supra text accompanying note 204.
286. If an immigration judge denies political asylum or refuses to withhold deportation, the individual may appeal to federal court. While the federal court does not undertake a de novo review of the factual findings, it does scrutinize legal conclusions, a process which often entails detailed consideration of the conditions in a foreign country. Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 424-25 (1987) (discussing circuit court's review of standard applied by immigration judge in asylum hearing); McMullen v. INS, 788 F.2d 591, 599-600 (9th Cir. 1986) (evaluating nature of Provisional Irish Republican Army in deciding whether to grant asylum to member); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287-88 (9th Cir. 1984) (reversing INS denial of political asylum on evidence that petitioner was threatened by rebels in requesting country); McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) (discussing standard of review applied by circuit court).

Some commentators have posited an even closer connection between extradition and political asylum and deportation cases. Two commentators recently argued that the European Court's refusal to extradite in Soering when the fugitive faced "a real risk" of ill treatment reflected the Cardoza-Fonseca "well-founded fear of persecution" standard used by U.S. courts in political asylum cases. John Quigley & S. Adele Shank, Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?, 30 VA. J. INT'L L. 241, 255 (1989). Even if the European Court was not consciously borrowing from political asylum law,
determine whether an individual’s fear of persecution in his native state is well-founded, members of the judiciary hearing extradition cases should not be barred from deciding whether a fugitive faces a real risk of ill treatment in the requesting state.

4. The Safe-Haven Problem

An extradition regime that protects a fugitive’s human rights must also provide a means to bring the fugitive to justice. Human rights considerations cannot defeat the essential purpose of extradition: preventing fugitives from using escape to avoid trial and punishment. This raises the safe-haven problem: the prospect that a requested state’s denial of extradition will attract fleeing criminals.287 Faced with this problem, some supporters of Soering-style jurisprudence suggest inserting a clause into all extradition treaties to allow the requested state, if it refuses to extradite, to try the fugitive on its own soil.288 However, the proposal advanced in this article would solve the safe-haven problem less obtrusively: once assurances are received, the fugitive is extradited to face trial and punishment.289 A requested state that regularly extradites after receiving assurances, unlike a nation that simply denies extradition, will not attract fugitive felons.

5. Assurances and Judicial Activism

The assurances proposal invites less judicial activism than compromise solutions that propose instituting a humanitarian exception to extradition,

the standards for evaluating the risk of ill treatment are undeniably close.

287. The Canadian Supreme Court in the Kindler and Ng cases took this possibility very seriously. In dismissing the challenges to the extradition orders, both plurality opinions cited as a primary concern the risk that felons from the United States would cross the long, undefended border into Canada. Kindler v. Canada, No. 21,321, slip op. at 9 (Can. Sept. 26, 1991) (LaForest, J.) (plurality opinion); id. at 21 (McLachlin, J.) (plurality opinion).

288. Breitenmoser & Wilms, supra note 4, at 881-82; see also 60 INSTITUTE OF INT’L L., INST. OF INT’L L. Y.B., pt. II, at 216 (1983). Several European states have achieved this result by adopting legislation that allows their courts to try fugitives. See Robertson, supra note 5, at 231. This solution would be unworkable in nations like the United Kingdom and the United States, where individuals charged with crimes are entitled to confront their accusers. One commentator has noted this is particularly problematic in the United Kingdom: The UK would have difficulty in [adopting such a rule], and even in trying British subjects for murders committed abroad, owing to the restrictive nature of [the British] system of criminal justice and evidence. Continental courts frequently receive evidence even on vital and contested matters by written statement but UK courts do not. Id. at 231.

289. As Justice Sopinka’s dissent to Kindler and Ng noted, the Canadian Supreme Court’s concern over creation of a safe haven ignored Article 6 of the U.S.-Canada Extradition Treaty, which would have allowed Canada to extradite Kindler and Ng with assurances that the death penalty would not be imposed or carried out. See Kindler, slip op. at 5 (Sopinka, J., dissenting); see also supra note 186.
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allowing courts to deny requests in egregious cases.290 Requiring the requesting state to provide assurances against mistreatment is less drastic than dismissing the extradition request entirely. A court should not take the ultimate measure of dismissing the extradition request until it has exhausted all other avenues along which the extradition might proceed.291

Moreover, the government of the requested state may itself welcome an expanded judicial role in this area. There may be less embarrassment to the requested state’s foreign relations if the judiciary, rather than the government, investigates the requesting state’s penal procedures.292 The requesting state is less likely to treat the denial (or demand for assurances) as a diplomatic snub if it issues from an (arguably) impartial judiciary rather than the political branch responsible for conducting foreign policy.293

VII. CONCLUSION

The Soering decision highlights the inadequacies of current extradition law in the United States, Canada, and the United Kingdom. Soering cast doubt on the legal and factual assumptions underlying the rule of non-inquiry and the restricted judicial role in extradition. In so doing, it invites debate over the continued vitality of the rationales supporting the traditional extradition regime, including the arguments that extradition is a foreign policy matter, that the government can adequately protect human rights, and that the judiciary lacks access to information regarding human rights abuses in foreign states. Several judges in the United States and Canada have embraced the union of human rights and extradition law articulated in Soering, although their efforts have not yet succeeded in displacing the traditional principles.

This article’s proposal for a new extradition regime provides for a more active judicial role in the assessment of human rights while preserving the essential function of extradition. The proposed solution would protect human rights more effectively than the current regime. Ultimately, any extradition model that bars judicial inquiry into the procedures and penal practices of the

290. See generally Anderson, supra note 33, at 163 (allowing judicial invocation of "humanitarian exception" to bar extradition in "egregious cases"); Hughes, supra note 29, at 322 (limiting judicial refusals to extradite to "instances of particularly abusive proceedings which shock the conscience").

291. This proposal also has the advantage of better promoting international comity. By requiring assurances, a court signals that it is willing to respect the requesting state’s legal system if that state promises to treat the fugitive fairly. This slight the requesting state’s legal system less than a judicial declaration that the fugitive cannot receive fair treatment. The demand for assurances may also provide the requesting state an opportunity to show that it respects the rights of accused criminals.

292. See Kester, supra note 43, at 1481-82; Lubet, supra note 18, at 285; see also supra note 270.

293. See Esin v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981) (congressional decision to allow courts to make political offense determination permits President to avoid political and economic retaliation for denials of extradition); SHEARER, supra note 7, at 192; Lubet & Czaczkes, supra note 270, at 200; Note, Bringing the Terrorist to Justice: A Domestic Law Approach, 11 CORNELL J. INT’L L. 71, 74 (1978).
requesting state fails to provide redress for meritorious claims of threatened violations. Judges cannot blind themselves to the consequences of the exercise of extradition; as Judge Weinstein noted, "[i]n instances where immediate political, military or economic needs of the United States induce the State Department to ignore the rights of the accused . . . the courts must be prepared to act."294