

Fordham International Law Journal

Volume 20, Issue 5

1996

Article 8

Using International Human Rights Law and Machinery in Defending Borderless Crime Cases

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Richard J. Wilson

Abstract

This Essay focuses on four areas of international human rights law. The first area, the protection of attorneys' fees from forfeiture, is an issue of great concern in the United States, given the state of the law there. The next area, the application of the death penalty in international law, will also include arguments about the "death row phenomenon." The third area addressed is the use of international human rights law to overcome the rule of non-inquiry in extradition matters, a rule by which the judicial authority reviewing the propriety of extradition is barred from inquiry into the fairness of judicial procedures, prison conditions, or other potential issues of mistreatment in the requesting country at any stage in the proceedings. The final area, the use of abduction by government officials or their paid patrons as a means to bring suspects within a court's jurisdiction for criminal prosecution, is a process used by governments including the United States in lieu of extradition.

USING INTERNATIONAL HUMAN RIGHTS LAW AND MACHINERY IN DEFENDING BORDERLESS CRIME CASES

*Richard J. Wilson**

INTRODUCTION

Practitioners of criminal law in Europe are already well aware of the impact, both real and potential, of international human rights law in the prosecution and defense of criminal cases. The European Convention on Human Rights and Fundamental Freedoms¹ ("European Convention on Human Rights") has already had a major impact on the national practice of criminal law among the various European Union² ("EU") Member States. The same, unfortunately, cannot be said for the United States, which has staunchly refused to make itself a party to any international human rights instrument which might subject it to review of allegations of individual violations of human rights, whether in the criminal process or any other.

Despite a refusal to participate fully in the review of its own human rights record in individual cases, however, the United States has shown some willingness to participate in the international regime of human rights, having ratified, in the past several years, the Convention Against Torture³ ("Torture Convention"),

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter European Convention].

2. Treaty on European Union, Feb. 7, 1992, art. A, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179 -II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)). Until 1995, the twelve European Union ("EU") Member States were Belgium, Denmark, France, Germany, Greece, Spain, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. TEU, *supra*, pmb. O.J. C 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 725-26. On January 1, 1995, Austria, Finland and Sweden became EU Member States. *The European Commission: The Week in Europe — Week Ending 31 May 1996*, M2 PRESSWIRE, June 7, 1996, available in WESTLAW, Allnewsplus Database.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-

the International Covenant on Civil and Political Rights⁴ ("ICCPR"), and the International Convention on the Elimination of Racial Discrimination⁵ ("Race Convention").

It is something of a struggle to find common ground from the diverse human rights experiences of the United States and the Continent. For the purposes of this paper, I shall assume some, though minimal, knowledge of international and general human rights law. Moreover, while I shall attempt to include European examples where possible, as my knowledge of human rights issues comes mostly from U.S. experiences, I will address the issues presented largely from a U.S. perspective.

This paper comes directly out of my experience of having used international human rights law as a defense attorney in actual criminal cases handled by the International Human Rights Law Clinic at the law school of the American University, in Washington, D.C. As the director of the Clinic, I select cases appropriate for our students to handle as part of their student practice. Students working in teams then, under my close supervision, perform all work and make all judgments as to the direction of the litigation. I will focus on four areas of international human rights law, all but the first of which have come up in litigation handled by the Clinic. In examining these areas, I will discuss the clinic litigation involved and, if necessary, give a more general analysis of the issues presented. The first area, the protection of attorneys' fees from forfeiture, is an issue of great concern in the United States, given the state of the law there. The next area, the application of the death penalty in international law, will also include arguments about the "death row phenomenon."⁶ The third area addressed is the use of international human rights law to overcome the rule of non-inquiry in extradi-

ment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/46 (1984), 1991 Gr. Brit. T.S. No. 107 (Cm. 1775) [hereinafter *Torture Convention*].

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18, 999 U.N.T.S. 171, 178, 1977 Gr. Brit. T.S. No. 6 (Cmnd. 6702), at 11 (entered into force Mar. 23, 1976) [hereinafter *ICCPR*].

5. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969).

6. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), 28 I.L.M. 1063 (1989) (holding that "death row phenomenon" of prolonged delay awaiting execution under difficult conditions of confinement violated international human rights law).

tion matters,⁷ a rule by which the judicial authority reviewing the propriety of extradition is barred from inquiry into the fairness of judicial procedures, prison conditions, or other potential issues of mistreatment in the requesting country at any stage in the proceedings.⁸ This rule is applied in both the United States and in many of the Commonwealth countries.⁹ The final area, the use of abduction by government officials or their paid patrons as a means to bring suspects within a court's jurisdiction for criminal prosecution, is a process used by governments including the United States in lieu of extradition. This process was approved by the United States Supreme Court, in the absence of an explicit prohibition in the relevant extradition treaty.¹⁰

In discussing each of these areas, I will focus on the use of international human rights law primarily as it might be interpreted in international venues, such as those of the European or Inter-American systems for human rights protection,¹¹ the two regional mechanisms for the enforcement of human rights. Some mention will also be made of the United Nations Human Rights Committee,¹² which operates under the Optional Protocol¹³ to the ICCPR, whose jurisprudence is becoming increasingly important for analysis of international human rights issues, and which provides another locus of political pressure for governmental compliance with international norms.

7. See Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 *YALE J. INT'L L.* 85, 93 (1992) (defining rule of non-inquiry as blocking of judicial inquiry into fairness of judicial procedures and penal conditions of requesting country in traditional extradition process).

8. *Id.*

9. *Id.* at n.13.

10. See *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (holding that forcible abduction of foreign national into United States does not deprive U.S. criminal courts of jurisdiction, and does not violate extradition treaty which fails to explicitly prohibit such acts).

11. Bruce Zagaris, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Constructing a Hemispheric Initiative Against Transnational Crime*, 19 *FORDHAM INT'L L.J.* 1888, 1896 (1996) (discussing such Inter-American systems for human rights as Inter-American Commission on Human Rights and Inter-American Court for Human Rights).

12. ICCPR, *supra* note 4, art. 28, 999 U.N.T.S. at 179, 6 I.L.M. at 376. Eighteen members, chosen for their moral character and competence in human rights, comprise the United Nations Human Rights Committee. *Id.*

13. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

I. PROTECTING ATTORNEYS' FEES FROM FORFEITURE USING INTERNATIONAL HUMAN RIGHTS LAW

Knowing the issue of protecting attorneys' fees from forfeiture is near and dear to the hearts of all criminal defense lawyers, I shall begin here. It certainly is an issue of current interest to defense lawyers in the United States, where F. Lee Bailey, the well-known criminal defense attorney, became the latest in a string of casualties in a battle over forfeiture of attorneys' fees.¹⁴ Bailey was jailed for contempt of court for more than a month when he refused to surrender nearly US\$17 million in cash and stock which he said was a legitimate fee paid by a private client, but which a federal trial court judge in Gainesville, Florida said was the proceeds of criminal activity subject to forfeiture under federal law after Bailey's client, Claude Duboc, had pleaded guilty.¹⁵ Although he eventually surrendered the stock to gain his release, Bailey vowed that he would settle the issue by litigation.¹⁶

Bailey's jailing, and the ongoing conflicts over whether attorneys' fees should be subject to seizure at all, arise out of an interpretation of federal statutory law by the U.S. Supreme Court.¹⁷ In 1989, the court narrowly held in twin 5-4 decisions¹⁸ that defense attorneys' fees are subject to forfeiture under federal statutes which permit pre-trial seizure of assets of the ac-

14. See *F. Lee Bailey Freed From Jail in Dispute Over Drug Money*, N.Y. TIMES, April 20, 1996, at A12 [hereinafter *F. Lee Bailey Freed From Jail*] (discussing U.S. Federal Court sending Mr. Bailey to Federal Detention Center after missing court-imposed deadline to turn over stock and money that had belonged to his client whom Government claimed had obtained stock and money illegally). A similar dispute during the 1990 trial of deposed Panamanian strongman Manuel Noriega led me to write an extended article on the international implications of the seizure of attorneys' fees, from which much of the material in this section is taken. See Richard J. Wilson, *Human Rights and Money Laundering: The Prospect of International Seizure of Defense Attorney Fees*, 3 CRIM. L. F. 85, 86 (1991) (noting that dispute between United States and Noriega "may be the first of many cases raising difficult questions of international law and policy with regard to the payment of attorney fees."). See also Eugene R. Gaetke and Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165 (1992) (discussing collective impact of domestic money laundering laws on criminal defense bar).

15. *F. Lee Bailey Freed From Jail*, *supra* note 14, at A12.

16. *Id.*

17. See *U.S. v. Monsanto*, 491 U.S. 600, 611 (1989) (finding that attorney's fees are not exempt from forfeiture); *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 632 (1989) (holding that there is no sixth amendment right to exclude attorney's fees from forfeiture).

18. *Monsanto*, 491 U.S. at 600; *Caplin*, 491 U.S. at 617.

cused when those assets are proven to be the product of criminal activity.¹⁹ The Court concluded that statutory language and compelling governmental purposes in adoption of the legislation justified forfeiture;²⁰ the justices held that attorneys' fees forfeiture violates neither the Sixth Amendment right to counsel nor the Fifth Amendment due process clause.²¹ The U.S. statute, dealing with continuing criminal enterprises²² ("CCEs"), requires that "any property constituting, or derived from . . . proceeds . . . obtained"²³ from certain drug-related offenses be forfeited to the federal government.²⁴ In one of the twin decisions, *U.S. v. Monsanto*, the Court interpreted this statutory language narrowly and literally.²⁵ The Court found the statutory language of the CCEs statute to be unambiguous.²⁶ Congress' failure to include an exemption for attorneys' fees, according to the Court's slim majority,²⁷ was intentional in light of the use of the term "any property"²⁸ when referring to assets subject to forfeiture.²⁹

At about the same time as these twin decisions, the international community was completing work on two new treaties which would raise the same issues relating to forfeiture and at-

19. *Monsanto*, 491 U.S. at 611 (1989); *Caplin*, 491 U.S. at 632.

20. *Caplin*, 491 U.S. at 633.

21. *Monsanto*, 491 U.S. at 614 ("we hold that neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees."); *Caplin*, 491 U.S. at 619 (holding statute that does not provide exception to forfeiture for attorney's fees to be constitutional).

22. 21 U.S.C. § 853(a) (1986) deals with continuing criminal enterprises ("CCEs"). Section 853(a), when discussing property subject to criminal forfeiture, states:

[a]ny person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation

21 U.S.C. § 853(a) (1986).

23. 21 U.S.C. § 853(a) (1986).

24. *Id.*

25. See *Monsanto*, 491 U.S. at 607 (concluding that "the statute is unambiguous in failing to exclude assets that could be used to pay an attorney from its definition of forfeitable property.").

26. *Id.*

27. *Id.* (noting that 5-4 majority decided this case).

28. See *supra* note 22 and accompanying text (detailing provisions of § 853(a), the CCE statute).

29. *Monsanto*, 491 U.S. at 607.

torneys' fees. These two instruments were the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances³⁰ ("U.N. Narcotic Drugs Convention") and the 1990 Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime³¹ ("Laundering Convention"). Neither instrument, on its face, resolves the question of whether attorneys' fees are among the seizable assets gained from criminal conduct. Arguably, the exemption language of both conventions, as well as strong supporting commentary, implies the inclusion of defense attorneys among exempted third parties.³² This conclusion seems all the more true when the language of the two conventions is compared with that of the U.S. CCEs statute and its strict interpretation by the Supreme Court.³³

30. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 6, 3, 28 I.L.M. 493, 507 (1989) [hereinafter U.N. Narcotic Drugs Convention]. At the signing ceremony of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("U.N. Narcotic Drugs Convention") in December of 1988, signatory countries included Canada, Denmark, Italy, Norway, Spain, Sweden, United Kingdom, United States and Yugoslavia. The United States has since become a party.

31. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, Europ. T.S. No. 141, 30 I.L.M. 148 (1991) [hereinafter Laundering Convention]. Signatories to Laundering Convention included Belgium, Cyprus, Denmark, F.R.G., Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

32. See Wilson, *supra* note 14, at 87 (concluding that "the exemption language of both the UN Drug Convention and the Laundering Convention excludes defense attorney fees from seizure."). The U.N. Narcotics Convention states, in Article 5.8, that the confiscation provisions "shall not be construed as prejudicing the rights of bona fide third parties." U.N. Narcotic Drugs Convention, *supra* note 30, art. 5.8, 28 I.L.M. 493, 507. If attorneys, who are not mentioned by name, are such parties, it seems clear that their right to fees is protected. Article 5 of the Laundering Convention protects legal remedies for "interested parties," who are to be guaranteed "effective legal remedies in order to preserve their rights." Laundering Convention, *supra* note 31, Europ. T.S. No. 141, 30 I.L.M. 148, 152. The Explanatory Report to the Convention makes clear that the experts agree that the document cannot be read to "make it criminal to hire a lawyer or to accept a fee." Council of Europe, Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime add. II, point 33 (1990) [hereinafter Explanatory Report]. Curiously, however, the Convention itself does not clearly address the issue.

33. The exemption language in the U.S. CCEs statute is not nearly as clear as that of the conventions. The CCEs statute states that property "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited" unless the third party satisfies certain requirements for exemption. 21 U.S.C. § 853(c). Moreover, the legislative history of the U.S. CCEs statute is not as clear as the express statements of the Explanatory Report to the Laundering Convention. See Wilson, *supra* note 14, at 92-93

To the extent that there is any ambiguity on the face of the two international conventions, there are also strong arguments against the seizure of attorneys' fees by the use of international human rights law and principles.³⁴ For example, in *Caplin & Drysdale, Chartered v. U.S.*, the U.S. Supreme Court rejected an argument that the U.S. CCEs statute caused deprivation of Fifth Amendment due process of law because the CCE statute upsets the "balance of forces between the accused and his accuser."³⁵ The Court rejected this argument as speculative, holding that the possibility of prosecutorial abuse of process was not enough to require the facial invalidity of the CCE statute.³⁶ This rejected argument would almost certainly prevail under the European system of human rights protection, where integral to it is a fair and public trial by an independent and impartial tribunal.³⁷ Moreover, while the U.S. Constitution contains no explicit guarantee of the presumption of innocence, this presumption is explicitly guaranteed in such international instruments as the Universal Declaration of Human Rights,³⁸ the ICCPR,³⁹ the Copenhagen Document on Human Rights,⁴⁰ the American Declaration on the Rights and Duties of Man,⁴¹ and the European Convention on Human Rights and Fundamental Freedoms.⁴² The pre-

(comparing statements of U.S. CCE statute and Explanatory Report to Laundering Convention).

34. See Wilson, *supra* note 14, at 92-93 (providing fuller discussion of use of international human rights instruments and mechanisms).

35. *Caplin*, 491 U.S. at 634.

36. *Id.*

37. See P. VAN DIJK and G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 251 (1984) (discussing European system of human rights protection); Wilson, *supra* note 14, at 100-03 (detailing case law relating to European system of human rights protection).

38. Universal Declaration of Human Rights, art. 18, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

39. ICCPR *supra* note 4, art. 14, 999 U.N.T.S. at 179, 6 I.L.M. at 376.

40. Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, *reprinted in* 29 I.L.M. 1305, art. 5.19 (1990) [hereinafter Copenhagen Document]. The Copenhagen Document is part of a series of treaties adopted by the Organization for Security and Cooperation in Europe ("OSCE"). The organization was recently renamed. Its former name was the Conference on Security and Cooperation in Europe ("CSCE").

41. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, art. III, in 1 *Annals Organization Am. Sts.* 130, 130 (1949).

42. European Convention, *supra* note 1, 213 U.N.T.S. 221, Europ. T.S. No. 5. Notably, the United States participated in these treaties and is a signatory to many of them, including the Copenhagen Document, the American Declaration on the Rights and

sumption of innocence seems a meaningless sham if the government intervenes denying the defense access to counsel of its choice. Finally, the Basic Principles on the Role of Lawyers⁴³ ("Principles"), adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990,⁴⁴ provides in Article 16 that "Governments shall ensure that lawyers . . . shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."⁴⁵ The forcible seizure of attorneys' fees by a government is surely an economic sanction under Article 16 and thus is in violation of the Article's principles.

A European expert has noted that the notion of seizure of attorneys' fees is alien in Europe.⁴⁶ The same expert asserted that if the issue were to reach the European Court of Human Rights, the Court would strike down such a forfeiture as a violation of the presumption of innocence.⁴⁷ The notion of forfeiture of attorneys' fees also seemed alien in the United States before it became the law of the land in 1989.⁴⁸ The international law on

Duties of Man. The United States signed the founding document of the American Declaration on the Rights and Duties of Man as a member of the Organization of American States. While the signatories originally intended the declaration to be an aspirational statement for the hemisphere, there is now a body of jurisprudence that holds it to have become binding international law in the region. See Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Inter-American Court of Human Rights (1989), at paras. 45, 47; Case 9647 (United States), Res. 3/87 (27 March 1987) in 1986-1987 ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, OEA/Ser. L/L/V/II.71, doc. 9, rev. 1 (22 September 1987), at 147; Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828 (1975).

43. Fionnuala Ni Aolain, *Legal Developments: The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, n.129 (1996) (noting that Eighth U.N. Conference on Prevention of Crime and Treatment of Offenders in August-September, 1990 adopted these principles).

44. United Nations, Report of the Eighth United States Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - September 1990, A/CONF.144/28 (Oct. 5, 1990).

45. *Id.*

46. Bruce Zagaris, *ABA National Institute Considers International and Foreign Law Aspects of Asset Forfeiture*, 6 INT'L ENFORCEMENT L. RPTR. 435, 438 (1990) (containing Observations of Hans Nilsson, Administrator of the Directorate of Legal Affairs, Division of Crime Problems, Council of Europe).

47. *Id.* at 438.

48. See *supra* note 19 and accompanying text (discussing twin decisions that held forfeiture of attorneys' fees to be constitutional).

attorneys' fees seizure is not yet settled, and the defense bar must be vigilant in assuring that the U.S. experience continues to be the exception, rather than the rule in the international community.

II. *INTERNATIONAL HUMAN RIGHTS, THE DEATH PENALTY AND THE DEATH ROW PHENOMENON*

The death penalty and the death row phenomenon⁴⁹ add another dimension to international human rights law. American University's International Human Rights Law Clinic has been active in several cases challenging the imposition of the death penalty in the United States under international human rights law. It has three cases pending before the Inter-American Commission on Human Rights,⁵⁰ all arising from murder convictions in the United States for which the courts sentenced to death the defendants, all African-American men. The three cases involve William Andrews, who Utah officials executed for committing capital murder;⁵¹ Gary Graham, who awaits execution in Texas;⁵² and Calvin Burdine, also on death row in Texas.⁵³ In two other U.S. cases, the Clinic filed briefs *amicus curiae* in the U.S. Court of Appeals for the Armed Forces. The

49. See *supra* note 6 and accompanying text (discussing that court held that death row phenomenon of prolonged delay awaiting execution under difficult conditions of confinement violated international human rights law).

50. See American Convention for Human Rights, Opened for Signature Nov. 22, 1969, Chs. VII-VIII, O.A.S.T.S. No. 36, at 11-19, 9 I.L.M. 673, 685-93 (1970) (entered into force July 18, 1978) (providing for the Inter-American Commission on Human Rights); Zagaris, *supra* note 11, at 1897 (positing that Inter-American Commission on Human Rights serves "to safeguard the implementation of the rights set forth in the Convention").

51. See Richard Wilson, *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395 (1994) (providing extensive review of procedural history of Andrews case).

52. See *id.* (providing extensive review of procedural history of Graham case).

53. Case No. 11.423, Petition Alleging Violations of the Human Rights of Calvin Jerrod Burdine by the United States of America and the State of Texas, submitted Jan. 11, 1995. Brent E. Newton, of the Texas Resource Center in Houston, Texas, serves as counsel for the petitioner in domestic proceedings and appears as co-counsel on the petition. The Commission issued Precautionary Measures under Article 29.2 of its Regulations on Jan. 13, 1995. Such measures are available *ex parte* to avoid "irreparable damage to persons." In a related matter, the Clinic also submitted an *amicus curiae* brief in the Texas federal district court, where Mr. Burdine had filed a successor habeas corpus petition. The Clinic's brief argued that the federal courts were bound by international human rights norms regarding torture and that the precautionary measures of the Commission were binding on the domestic courts. *Burdine v. Scott*, *Amicus Curiae* Brief of the International Human Rights Law Clinic in Support of Petitioner, Civ. Ac-

Clinic filed one on behalf of James Murphy, who the Government convicted of the murder of three people while stationed in Germany.⁵⁴ The Clinic filed the other on behalf of Herbert Smulls, whose appeal was recently decided by the Missouri Supreme Court.⁵⁵ Each of these cases presents distinct aspects of the application of international human rights law.

In the Inter-American Commission, the case involving William Andrews has proceeded the furthest. In an extensive written decision, the Commission, finding the petition to be admissible, proceeded to the merits of the case.⁵⁶ Oral arguments were held on the merits in February 1996 and a decision is pending. Mr. Andrews, a black soldier, asserts that he was the victim of racial discrimination in the application of the death penalty to him. He further contends that his eighteen year wait on death row was a violation of the death row phenomenon first condemned in *Soering v. United Kingdom*, a well-known decision of the European Court of Human Rights.⁵⁷ In *Soering*, the Court held that Great Britain would violate the European Convention on Human Rights if it extradited Jens Soering to the United States to face murder charges and a potential death sentence in the state of Virginia.⁵⁸ The Court found that the death row phenomenon of prolonged delay awaiting execution under difficult conditions of confinement, violated Article 3 of the European Convention on Human Rights, which protects against "inhuman or degrading treatment or punishment."⁵⁹

tion No. H-94-4190, U.S.D.C., S. Dist. of Texas, filed April 10, 1995. The litigation is still pending in that court.

54. United States v. Murphy, Brief *Amicus Curiae* of the International Human Rights Law Clinic in Support of the Appellant, Docket No. 64,926/AR, U.S. Court of Appeals for the Armed Forces, submitted May 4, 1995. A student from the Clinic orally argued the *amicus* position in May, 1997. The litigation is pending as of this writing.

55. State v. Smulls, Brief of *Amicus Curiae* in Support of Herbert Smulls, No. 75511 (S.C. Mo.), filed May 17, 1995. Minnesota Advocates for Human Rights, in Minneapolis, Minnesota appeared as co-counsel on the brief, and Professor Robert Popper of the School of Law, University of Missouri, Kansas City, appeared of counsel.

56. Case 11.139, Report No. 3/95, OEA/Ser/L/V/II.88 Doc. 15 (Feb. 16, 1995).

57. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), 28 I.L.M. 1063 (1989) (holding that "death row phenomenon" of prolonged delay awaiting execution while under difficult conditions of confinement violated international human rights law).

58. *Id.*

59. *Id.*; European Convention, *supra* note 1, art. 3, 213 U.N.T.S. 221, Europ. T.S. No. 5. The United States was so concerned about its potential liability for violations of *Soering* that it included an express reservation to Article 7 of both the Torture Conven-

Andrews' racial prejudice claim asserts that an incident at trial, never reviewed on the merits in any domestic court, so infected the verdict as to render the decision a nullity. The incident occurred at Andrews' trial when the bailiff, after receiving a note from a juror, notified the trial judge. The note, allegedly found in the jury room, stated "Hang the Niggers," accompanied by a crude, black stick-figure hanged from a noose.⁶⁰ Despite the defense counsel's objection and request to sequester the jury, the judge simply admonished the jury not to let the note influence them.⁶¹ The Smulls litigation in Missouri, in which we filed a brief *amicus curiae*,⁶² raised a related question as the facts show a pattern of racial prejudice in the selection of the jury which sentenced Smulls to death.⁶³ While the Missouri Supreme Court's *en banc* split decision did not mention the brief or the international law issues, the case was remanded for a new post conviction hearing before a different judge, where racial prejudice by the trial court was sufficiently demonstrated.

The *Graham* case⁶⁴ raises the question of the propriety of the U.S. rule announced by the U.S. Supreme Court in *Herrera v. Collins* that, even with the imposition of the death penalty, a state court under state law may constitutionally preclude a claim of innocence from collateral review.⁶⁵ The Inter-American Commission on Human Rights tabled Graham's case on its docket when, in response to the intense scrutiny of the international community, the Texas courts granted Mr. Graham review of his well-documented claim of innocence.⁶⁶ The *Burdine* litigation⁶⁷ raises another question of great international import, the use of

tion and the ICCPR, limiting the meaning of "cruel, inhuman or degrading treatment or punishment" in the latter to the meaning of cruel and unusual punishment under the Fifth, Eighth and/or Fourteenth Amendments to the U.S. Constitution. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77 (1993).

60. Case 11.139, Report No. 3/95, OEA/Ser/L/V/II.88 Doc. 15 (Feb. 16, 1995).

61. *Id.* at 17-18.

62. See *supra* note 55 and accompanying text (discussing brief filed on behalf of Smulls).

63. *State v. Smulls*, 935 S.W.2d 9 (S.C. Mo. 1996).

64. See *supra* note 52 and accompanying text (discussing Graham case and his awaiting execution in Texas).

65. *Herrera v. Collins*, 506 U.S. 390 (1993).

66. See Richard Wilson, *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395 (1994) (providing extensive review of procedural histories of Andrews and Graham cases, including updates of cases).

67. See *supra* note 53 and accompanying text (discussing Burdine litigation).

psychological torture while the defendant awaits execution. Mr. Burdine was twice put through the process of isolation and preparation for execution when Texas prison officials were aware that the courts had stayed his execution. The *Burdine* case also raises the death row phenomenon issue. The U.S. Supreme Court gave this issue a boost when it stayed the execution of Clarence Lackey, also on death row in Texas, to permit review of that issue by the lower courts.⁶⁸ For that reason and others, the Burdine petition has been tabled at the Commission pending exhaustion of domestic remedies.

The *Murphy* litigation also raises an interesting question under international human rights law.⁶⁹ A U.S. military court martial convicted Murphy of the murder of his German wife and two children in German territory.⁷⁰ Murphy's case is one of the first to apply new provisions of military law which permit the imposition of the death penalty for certain murders.⁷¹ The NATO Status of Forces Treaty between Germany and the United States governed jurisdiction in the matter.⁷² The German Government, which opposes the use of the death penalty at the national level, sought assurances that Murphy would not be subjected to the death penalty, and has been told that the chances that an execution would be carried forward are remote, yet under the terms of the NATO Status of Forces Agreement ("SOFA") treaty, German law permits a local prosecutor to surrender jurisdiction to the United States, which the local prosecutor did in this case.⁷³ The case, now pending before the U.S. Court of Appeals for the Armed Forces, raises interesting jurisdictional questions addressed in the brief, including the nature of obligations at surrender for trial under NATO-SOFA, where the defendant faces

68. *Lackey v. Texas*, 115 S.Ct. 1421 (1995) ("[t]hrough the importance and novelty of the question presented . . . are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts.").

69. See *supra* note 54 and accompanying text (discussing Murphy litigation).

70. Appellate decisions reporting the procedural history of this case are *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. *en banc* 1990); *Murphy v. Judges of the Army Ct. of Military Rev.*, 34 M.J. 310 (C.M.A. 1992).

71. The current death penalty statute for murders committed while the defendant is a member of the armed forces is 10 U.S.C. § 918 (1988).

72. The Status-of-Forces Treaty, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2486.

73. See U.S. Department of State, correspondence of George P. Shultz, Sec. of State, and Hans Dietrich Genschew, German Foreign Minister, Sept. 1988 (on file with the *Fordham International Law Journal*).

possible punishment.⁷⁴ The *amicus curiae* brief we filed also argued that Murphy, a black man, suffered violations of the ICCPR and the Race Convention. The brief also contended that Murphy's execution would violate an emerging international customary norm that prohibits state-sponsored killing of an individual who commits murder in an abolitionist country, here Germany. This case presents the anomalous situation of a German Federal Government being opposed to the execution but unable to formally appear in the matter, having surrendered jurisdiction under the treaty.

Another interesting development in the use of international human rights law in the application of the death penalty is the recent trend toward limiting certain methods of execution due to the method being cruel or inhuman. The case of *Ng v. Canada*, where Mr. Ng faced the death penalty if extradited from Canada to California, exemplifies this trend.⁷⁵ In *Ng*, the Human Rights Committee, relying on the *Soering* principles regarding state responsibility, found that extradition of Mr. Ng would violate Article 7 of the ICCPR, in that death by cyanide gas asphyxiation is cruel, inhuman, and degrading treatment and punishment.⁷⁶ More recently, in February 1996, the Ninth Circuit U.S. Court of Appeals found the use of lethal gas for execution in California violated the U.S. Constitution's Eighth Amendment, which prohibits cruel and unusual punishment.⁷⁷

The United States finds itself increasingly isolated in the international community in its continued enthusiastic use of the death penalty at both the state and federal levels. The U.S. Government's ongoing actions put it, with each passing day, further from compliance with the evolving norms of international human rights law that point towards abolition. Hopefully, the litigation described above will be part of the bricks and mortar of an evolving jurisprudence in international law which eventually

74. See *supra* note 54 and accompanying text (discussing Murphy litigation and noting case is still pending).

75. *Ng v. Canada*, Communication No. 469/1991, decision of 5 Nov. 1993, 15 HUMAN RIGHTS L. J. 149 (1994).

76. *Id.*

77. See U.S. Const. amend. VIII ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

results in the abolition of capital punishment in the United States.

III. UNIVERSAL CONCEPTS OF HUMAN RIGHTS WEAKEN THE RULE OF NON-INQUIRY IN EXTRADITION

Another area in which international human rights law will continue to play a strong role is that of extradition. In June of 1995, the Mexican Government requested the extradition of former Deputy Attorney General Mario Ruiz Massieu, whom the Government accused of engaging in a cover-up in the investigation of the assassination of his own brother, a top official in Mexico's ruling party.⁷⁸ The judge in the case, a federal magistrate sitting in Newark, New Jersey, denied the extradition request, ruling that witness statements taken in Mexico were "incredible and unreliable,"⁷⁹ because they were taken in a country which was infected with "massive corruption"⁸⁰ growing out of the cocaine-smuggling trade, and that Mexico "has admittedly practiced torture in the questioning of suspects."⁸¹ The magistrate also suggested that the witnesses did not have counsel present when their statements were given.⁸² The magistrate invoked the practice of judicial inquiry into the protection of human rights in the legal system of the receiving state, here Mexico, and expanded on a growing international trend in abandonment of the rule of non-inquiry.⁸³

The International Human Rights Law Clinic handled a case involving the application of the rule of non-inquiry, *Calum Ian Innes v. United States*.⁸⁴ This case involved the extradition of Mr. Innes from the United States to France, where he had been convicted *in absentia* in 1982 of various offenses having to do with importation of illegal drugs, smuggling, and fraudulent profits.

78. See Robert L. Jackson & Juanita Darling, *U.S. Judge Won't Extradite Former Mexico Official*, L.A. TIMES, June 23, 1995, at A1 (discussing Mexico's ruling parties actions with reference to Massieu).

79. See *id.* (detailing judge's comments concerning case).

80. *Id.*

81. *Id.*

82. *Id.*

83. See *supra* note 7 and accompanying text (discussing rule of non-inquiry and defining it as where extradition law has traditionally blocked judicial inquiry into fairness of judicial procedures and penal conditions of requesting country).

84. *Innes v. U.S.*, No. 93-5112, 1994 U.S. App. LEXIS 22691 (5th Cir. Aug. 5, 1994).

French authorities commenced the extradition process by filing a complaint, in December 1992, in the Western District of Louisiana, where Mr. Innes was serving time on a federal conviction. A federal magistrate certified Mr. Innes as extraditable and Mr. Innes filed a timely petition for writ of habeas corpus in the U.S. District Court for the Western District of Louisiana. The Court denied the writ in June 1993. After the District Court denied the appointment of counsel, Mr. Innes filed a *pro se* appeal notice. The Clinic was approached to undertake his appeal on a *pro bono* basis on August 23, 1993. The same day, unknown to the Clinic, the Secretary of State signed a warrant for the transfer of Mr. Innes to France. On August 27, 1993, Mr. Innes was moved to France. Not knowing the exact whereabouts of its client, the Clinic entered an appearance on August 31 and sought an emergency stay of removal or, in the alternative, Mr. Innes' return to the United States. The Court denied the motion as moot, but did not dismiss the appeal. Following full briefing and oral argument of the case, a short memorandum decision dismissed the appeal as moot in August 1994.

The *Innes* appeal raised two principal questions: first, whether the executive branch, knowing of his pending appeal, violated court rules and separation of powers by intentionally removing him from the jurisdiction; and second, whether the 1982 French trials *in absentia*, even with the French government's guarantee of *trials de novo*, could meet the minimal standards of international human rights norms that the United States and France accept by virtue of their common ratification of the ICCPR, which requires in Article 14(3)(d) that the defendant be tried "in his presence."⁸⁵ The second issue is the focus of this section.⁸⁶

85. ICCPR, *supra* note 4, art. 14(3)(d), 999 U.N.T.S. at 179, 6 I.L.M. at 376.

86. The first issue also raises fascinating issues of international law beyond the scope of this article. The practice of removal of the extraditee during the pendency of appeal is apparently on the rise. We were aware of a number of such cases in addition to our own. In no case, to our knowledge, did the court intervene to return the extraditee; all courts dismissed the appeal as moot. While a stay order barring removal may protect the appellant, many defendants are unrepresented by counsel and unaware of the risk of not seeking a stay. We did make the argument that another U.S. Court of Appeals had used the All Writs Act to order the return of John Demjanjuk, alleged to be "Ivan the Terrible," a notorious guard at Treblinka, from Israel when he had been deported improperly from the United States. The case is an unreported bench ruling. *Demjanjuk v. Petrovsky*, No. 85-3435, 1993 U.S. App. LEXIS 20596 (6th Cir. 1993).

The rule of non-inquiry is a basic component in the regime of extradition of many North American and European countries. It asserts that the sending country will not look behind the receiving country's request for extradition because such inquiry is an invasion of the requesting country's sovereignty and a violation of international principles of comity. Thus, neither the criminal processes to which the defendant will be subjected nor the conditions of confinement in the receiving country are relevant factors for consideration by the reviewing authority in the sending state. This rule, devised at the turn of the century in the United States and well-established in much of Europe, should be abandoned. Judicial inquiry should be permitted so long as both the sending and receiving states are parties to international human rights instruments which define the countries' common acceptance of binding principles of international human rights in the criminal process. In the absence of acceptance by the receiving country of basic human rights norms through treaty ratification, the sending country should apply acknowledged principles of international law to the recognition of human rights obligations which are binding on the receiving country as a matter of customary international law.

In the United States, the rule of non-inquiry was developed judicially in 1901 in the U.S. Supreme Court's decision in *Neely v. Henkel*.⁸⁷ The Court rejected a contention by the extraditee that, if surrendered to Cuba, he would not be tried under procedures which conformed to guarantees found in the U.S. Constitution. The Court held that the safeguards of the U.S. legal system, and in particular its criminal procedures, are inapplicable to crimes committed in foreign jurisdictions.⁸⁸ Other rationales have developed, in the United States and abroad, to justify the use of the rule of non-inquiry.⁸⁹ In general, these include assertions that court review of decisions on the operation of overseas legal systems would involve the courts in foreign affairs.⁹⁰ This argument is expressed through the political question doctrine, under which the courts may decline consideration of issues which are assigned to the political branches of government. Another argu-

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

88. *Id.* at 123.

89. See Shea, *supra* note 7, at 93 (discussing arguments justifying rule of non-inquiry).

90. *Id.*

ment is that courts lack the investigative machinery to verify claims of alleged abuses of human rights in foreign legal systems.⁹¹ Still another argument is that review of the legal systems of states with differing ideologies allows notorious criminals to escape punishment.⁹² None of these reasons, including those originally offered in *Neely*,⁹³ can withstand scrutiny in the face of the developing law of international human rights.

The premises underlying the *Neely* decision have been undermined with the passage of time. There, the person being extradited argued that the Cuban legal system failed to conform with the requirements of the U.S. Constitution.⁹⁴ No argument was offered that the country's legal system could not measure up against a universally accepted international human rights standard because such standards did not formally evolve until after World War II. Understandably, the Court was reluctant to extend U.S. constitutional guarantees to another country. Moreover, the person to be extradited had no real case or controversy alleging actual violation of his rights by the Cuban legal system, nor did he offer proof about how the Cuban legal system was likely to treat him. He offered only general allegations that the Cuban legal system did not provide habeas corpus protection, prohibition of ex post facto laws, or jury trial.⁹⁵ He did not offer proof as to how he had been or might be affected by such failures in Cuban law.⁹⁶ Today, such proof is easily available through extensive human rights reporting by both domestic and international monitors or through expert testimony. In the context of political asylum claims, for example, the Cuban legal system routinely comes under close scrutiny and has been held to violate the human rights norms inherent in the law of political asylum.⁹⁷

Asylum judges make findings of fact and law about the quality of justice, often basing their findings on the extensive and detailed annual reports on human rights country conditions pre-

91. *Id.*

92. *Id.*

93. *See supra* note 87 and accompanying text (discussing *Neely*).

94. *Neely*, 180 U.S. at 114-15.

95. *Id.*

96. *Id.* at 122.

97. *See, e.g.*, Matter of Toboso-Alfonso, No. A-23220644, Int. Dec. 3222, 1990 BIA Lexis 23 (Board of Immigration Appeals 1990) (granting withholding of deportation to gay Cuban because he could not find adequate protection in Cuban legal system).

pared by the U.S. State Department, now considered a model of accuracy and fairness.⁹⁸ There is little evidence that the executive branch is any more capable of exercising the fact-finding function than the judicial branch and some evidence to demonstrate the contrary. In the United States, for example, the Executive has negotiated extradition treaties with many countries whose governments have since changed to repressive regimes. While the State Department reserves the right to terminate an extradition treaty where fundamental fairness cannot be preserved, the United States has never done so in its history.⁹⁹

Perhaps the most difficult issue to deal with in this area is that of an appropriate remedy. It is often asserted that a decision not to grant a petition for extradition because of close judicial inquiry will make the sending country a haven for international criminals because the only effective remedy in such situations is the release of the defendant from custody.¹⁰⁰ While this is often offered as a theoretical problem, it has never actually occurred. Perhaps the best example is the case involving Jens Soering in the European human rights system.¹⁰¹ In fact, despite the difficulty in dealing with a state government through the U.S. State Department, prosecutors in Virginia eventually relented on their pursuit of the death penalty and assured British authorities that they would not seek capital punishment. Soering was extradited, convicted of murder, and sentenced to life without parole.¹⁰² The requirement that assurances be given

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

99. See Lauren Sara Wolfe, *Gill & Sandhu v. Imundi: Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries*, 13 *LOY. L.A. INT'L & COMP. L.J.* 1009, 1029 (1991) (noting that United States has never terminated extradition treaty).

100. *Id.* at 1037.

101. See *supra* note 59 and accompanying text (discussing Jens Soering).

102. Ralph G. Steinhardt, *Recent Developments in the Soering Litigation*, 11 *HUM. RTS. L. J.* 453, 454 (1990). See Richard B. Lillich, *The Soering Case*, 85 *AM.J. INT'L L.* 128 (1991) (providing full discussion of Soering Case); John B. Quigley and S. Adele Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 *VIRG. J. INT'L L.* 241 (1989) (discussing Soering Case); Colin Warbick, *Coherence and the European Court of Human Rights: The Adjudicative Background of the Soering Case*, 11 *MICH. J. INT'L L.* 1073, 1078-80, 1090-95 (1990) (criticizing Soering decision as overreaching by Court).

before the sending state surrenders the individual to be extradited goes a long way toward resolution of the problem of safe haven.¹⁰³

U.S. and Commonwealth Courts have shown increasing interest in abandonment of the rule of non-inquiry. A series of decisions in the United States uses the standard set out in the early decision of *Gallina v. Fraser*, where the court observed that judicial inquiry is appropriate when "the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require [the rule of non-inquiry's] reexamination."¹⁰⁴ Similar trends are discern-

103. A more difficult problem, in my view, is that of the consequences of the receiving government's failure to fulfill its assurances. A recent example from my own practice is relevant here. In 1994, I was contacted by U.S. lawyers working for Joseph Kindler, an American who escaped to Canada following his conviction for murder and death sentence in Pennsylvania in 1983. Kindler was extradited from Canada in a case which drew international attention. Shea, *supra* note 7, at 114-119. The Human Rights Committee, in a divided decision, found that Kindler's extradition from Canada to face the death penalty would not violate Article 7 of the ICCPR because Kindler's facts were distinguishable from Soering's in that counsel had not alleged poor conditions or the effects of delay in the Pennsylvania death penalty regime and there had been no simultaneous request for extradition to a non-death penalty jurisdiction as had been the case with Germany in the *Soering* litigation. *Kindler v. Canada*, Communication No. 470/1991, Decision of 30 July 1993, reported at 14 Hum. Rts L.J. 307 (1993). After his extradition, Kindler's U.S. defense counsel asserted to me that his appeals in the U.S. legal system were given short shrift by the courts, generally on grounds of procedural bar, waiver, and collateral estoppel. His lawyers inquired whether there was any recourse for this failure to provide fundamental due process, which they felt had been part of the basis for the Canadian executive branch and courts' willingness to return Kindler to the United States. The Canadian government itself expressed some interest in intervention in the appellate process but had no means, other than by diplomatic channels, to intervene in the jurisdiction of the U.S. courts. On consultation with colleagues, our conclusion was that there is no legal basis, and no legal precedent, for intervention in the proceedings based on breach of promise by the receiving state. Our conclusion was that Kindler had only diplomatic, not judicial, recourse.

104. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960). The *Gallina* Court's reasoning has been questioned more recently in the appeal from a well-reasoned decision granting extradition to Israel, but, using the reasoning of the *Soering* decision, observing that a court which extradites to a state that violates human rights makes the court a party to the violation. *Ahmad v. Wigen*, 726 F. Supp. 389, 410 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990). An interesting case is the January 1996 decision of a federal district court judge in *Sidali v. INS*. See *Sidali v. INS*, 914 F. Supp. 1104 (N.J. 1996). There, the court refused extradition and granted habeas corpus relief, finding that the government had not established probable cause to believe that the petitioner had committed a crime in Turkey, although the highest reviewing court of that country had upheld his conviction for rape and murder there. The judge provides an excellent analysis of what, to Western legal systems, seems an arcane criminal procedure in Turkey, noting that the petitioner was acquitted by two separate

able in Canada and the United Kingdom.¹⁰⁵

Perhaps the *Gallina* standard is too strict. A better standard for qualification of the rule of non-inquiry can be found in the statutory language of the Supplementary Extradition Treaty between the United States and the United Kingdom¹⁰⁶ ("Supplementary Treaty"). The Supplementary Treaty, in Article 3(a), prohibits extradition "if the person sought establishes. . . by a preponderance of the evidence that. . . he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions."¹⁰⁷ This language, taken in part from the international standard for the establishment of a claim of political asylum, provides a statutory abrogation of the rule of non-inquiry coupled with a reasonable standard of proof, preponderance of the evidence, for establishment of the claim. Moreover, unlike the traditional, unappealable extradition inquiry before a federal magistrate, the Supplementary Treaty stipulates, in Article 3(b), that decisions by the magistrate are immediately appealable by either party to the federal district court or court of

trial courts before his conviction was upheld on appeal by the prosecution to a reviewing tribunal which reexamined both the factual and legal sufficiency of the lower courts' decisions to acquit. See John B. Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C. J. INT'L L. & COM. REG. 401 (1990) (providing excellent compilation of decisions which erode rule of non-inquiry); David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111 (1992) (discussing cases eroding rule of non-inquiry).

105. See Shea, *supra* note 7, at 113-119 (discussing Canadian and U.K. cases related to rule of non-inquiry).

106. Supplementary Extradition Treaty, June 25, 1985, U.S.-U.K., 24 I.L.M. 1105 [hereinafter Supplementary Treaty].

107. *Id.* art. 3(a), 24 I.L.M. 1105, 1106-07. This language is similar to that found in Article 3(2) of the European Convention on Extradition, which provides that extradition shall not be granted

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

European Convention on Extradition, Dec. 13, 1957, art. 3(2), 359 U.N.T.S. 173, 178, Europ. T.S. No. 24, at 3. See MICHAEL ABBELL AND BRUNO RISTOW, INTERNATIONAL JUDICIAL ASSISTANCE, VOL. 4, CRIMINAL: EXTRADITION 108-109, 211-212, A-47 (1990) (noting that there are also similarities with U.N. Model Extradition Code and that the United States "strenuously resisted" such language before it ultimately agreed to some version of it in treaties with three countries, Ireland in 1984, Jamaica in 1983, and the United Kingdom here).

appeals, as appropriate.¹⁰⁸ This Congressionally established standard for abrogation of the rule of non-inquiry makes the judiciary the appropriate locus for review of compliance by the receiving state with basic norms of international human rights.

Unfortunately, the limited judicial interpretations of the Supplemental Treaty to date indicate a continued reluctance by courts to intervene in extradition proceedings. In *United States v. Howard*, the First Circuit U.S. Court of Appeals found that the petitioner, an African-American citizen accused of a particularly brutal murder of a white female in the United Kingdom, had not established sufficient proof of systematic racial prejudice in England to carry his burden of proof of particularized prejudice directed toward him.¹⁰⁹ A more troubling decision is that of the Ninth Circuit U.S. Court of Appeals in *United States v. Smyth*. There, after the District Court had refused extradition,¹¹⁰ the Court of Appeals found that James Smyth, convicted of attempted murder of a prison officer in Belfast, had not established, by a preponderance of the evidence, that his potential punishment or restrictions in Northern Ireland's Maze Prison would be due to his affiliation with the Irish Republican Army and not merely with his escape from prison.¹¹¹ The extensive evidence offered by the petitioner, as well as the refusal of U.K. officials to cooperate with the fact-finding efforts of the trial

108. Supplemental Treaty, *supra* note 106, art. 3(b), 24 I.L.M. 1105, 1106-07. Cases and commentary on this legislatively-established exception to the rule of non-inquiry note that it was adopted as a concession to those in the U.S. Congress who opposed a broader effort to sharply narrow crimes designated as political under the Supplementary Treaty. The scholarly output on the advisability of this course of action is heated and extensive. See, e.g., Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L. L. 257 (1988) (discussing advisability of exception to the rule of non-inquiry); Note, *Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System*, 12 LOY. L.A. INT'L & COMP. L. J. 249 (1989) (discussing options for rule of non-inquiry).

109. *United States v. Howard*, 996 F.2d 1320, 1331 (1st Cir. 1993). The decision seems justified on the record before the court, in that the petitioner offered little specific evidence as to prejudice directed toward him. The petitioner argued for a per se rule, once evidence of prejudice was established. *Id.* at 1331. The reviewing court, justifiably in this author's view, rejected that standard and the sufficiency of the proof to establish specific prejudice directed at the petitioner. See Mary B. McDonald, *Extradition Law — Supplementary Extradition Treaty Between United States and United Kingdom — Interpreted as Partial Abrogation of the Rule of Non-Inquiry*, 18 SUFFOLK TRANSNAT'L L. REV. 391, 395-98 (1995) (discussing Howard case).

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

111. *United States v. Smyth*, 61 F.3d 711, 713 (9th Cir. 1995).

judge, militate against extradition if the reviewing court were to have applied the extensive jurisprudence of asylum law where a well-founded fear of persecution due to political opinion exists.¹¹² Explicit note should be made here of the fact that both the United States and the United Kingdom are now parties to the Torture Convention, which states, in Article 3(1) that “[n]o State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹¹³ While there is a question as to whether the potential retaliation against Smyth would amount to torture, this explicit prohibition in international human rights law cannot be ignored.

It is important to note that practitioners, at least in the United States, can also use domestic constitutional provisions such as due process of law to prevent removal from the country or to protect against other abuses in treaties. The district court’s decision in *Xiao v. Reno* provides an example of the mix of domestic due process and international human rights principles.¹¹⁴ *Xiao* is a horrifying account of torture by Chinese officials and withholding of evidence by the U.S. Government. The case, known widely as the Goldfish Case because it dealt with a conspiracy to import heroin into the United States inside condoms sewn into the body cavities of dead goldfish, involved the parole into the United States of a Chinese citizen, Wang Zong Xiao, who was to testify for the prosecution.¹¹⁵ When the trial court declared a mistrial because of evidence from Wang that he had been tortured into confessing his own involvement in the case, the Government sought to return Wang to China.¹¹⁶ Wang filed for political asylum.¹¹⁷ The trial court entered a permanent injunction against the removal of Wang, holding that due process would be violated if he were forced to return to China, given its prior treatment of him.¹¹⁸ In another recent case, *Colello v. U.S.*

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

113. Torture Convention, GA Res. 39/46, art. 3(1) (Dec. 10, 1984).

114. *Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993).

115. *Id.* at 1513.

116. *Id.* at 1512.

117. *Id.* at 1511.

118. *Id.* at 1537. Notably, the District Court rejected an argument from the government that it was without jurisdiction because the case involved a non-justiciable political question. *Id.* at 1545 et seq. It also rejected an argument by the government,

Security and Exchange Commission, the District Court held that a treaty which permitted the freezing of a U.S. citizen's assets in Switzerland itself violated due process of law, in that it failed to provide notice and an opportunity to defend through a post-deprivation hearing.¹¹⁹ It also held that the treaty violated the Fourth Amendment to the U.S. Constitution on its face because it allowed freezing of the assets based on reasonable suspicion, rather than on probable cause, as is constitutionally required.¹²⁰ The most adventurous of the recent court decisions, though, is that of a federal district court in New Jersey, which, in reviewing the authority of the U.S. Secretary of State to order deportation, found that the unreviewable nature of that authority was an unconstitutional delegation of powers to the executive branch of judicial powers.¹²¹ In this case, the Government sought the deportation of Mario Ruiz Massieu, whose earlier adventures with the extradition process was discussed above.¹²² The case is now on appeal from the grant of a permanent injunction enjoining the deportation proceeding against Ruiz Massieu.¹²³

IV. HUMAN RIGHTS PROTECTION FROM KIDNAPPING OF THE CRIMINAL ACCUSED

Human rights protection from kidnapping of the criminal accused is a topic of great importance and a recent U.S. court case, *United States v. Ballesteros*,¹²⁴ dramatically exhibits the topic. In *Ballesteros*, Juan Matta Ballesteros was abducted from his home in Tegucigalpa, Honduras near dawn on April 5, 1988.¹²⁵ Four

relying on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that the U.S. Constitution's substantive due process provisions could not extend to the extra-territorial acts of the Chinese government, particularly when Wang was an alien on parole in the United States. The Court distinguished *Verdugo-Urquidez* by noting that the government's actions here covered a period of two years, that many were taken in the United States, and that it was U.S. prosecutorial action alone which compelled him "to make an unconscionable choice between telling the truth and saving his own life." *Id.* at 1548.

119. *Colello v. U.S. Securities and Exchange Commission*, 908 F. Supp. 738, 752 (C.D. Cal. 1995).

120. *Colello*, 908 F. Supp. 738, at 755.

121. *Ruiz Massieu v. Reno*, 915 F. Supp. 681 (N.J. 1996).

122. *See supra* note 78 and accompanying text (discussing Massieu).

123. *Massieu*, 915 F. Supp. at 681. The decision finds unconstitutional 8 U.S.C. 1251(a)(4)(C)(I), which, according to the court, had not been construed previously. *Id.*

124. *United States v. Ballesteros*, 71 F.3d 754 (9th Cir. 1995).

125. *Id.* at 761.

U.S. Marshals, aided by Honduran Special Troops known as Cobras, bound his hands, put a black hood over his head, thrust him onto the floor of a car operated by a Marshal, and drove him to a U.S. Air Force Base nearby.¹²⁶ Within twenty-four hours of his abduction, he was a federal prisoner in the penitentiary at Marion, Illinois, charged with racketeering and kidnapping offenses. Reluctantly following the precedent of *United States v. Alvarez-Machain*,¹²⁷ the Ninth Circuit U.S. Court of Appeals upheld the jurisdiction of the U.S. courts to try Matta.¹²⁸ In an angry concurring opinion, Judge John T. Noonan noting that the actions of the Marshals were completely outside their mandate stated that “[w]hen an agency whose primary function is to obey our orders, and whose functions do not include overseas abductions, undertakes to kidnap from abroad a person for production in trial in a federal court, this action becomes our business.¹²⁹ He continued, “[w]e are called on to supervise cruel conduct designed to provide us with jurisdiction.”¹³⁰ He concurred only because a previous federal court had tried and convicted the defendant, thus breaking the confinement caused by the abduction.¹³¹ The facts in *Ballesteros* are a flagrant example of a common practice which continues to this day in the United States, the practice of the state-sponsored abduction or kidnapping of individuals for the sole purpose of making them subject to the jurisdiction of the federal courts of the United States.

The International Human Rights Law Clinic, with co-counsel Bruce Zagaris, a Washington, D.C. private practitioner and expert in the area of international criminal law, have filed a petition with the Inter-American Commission on Human Rights challenging the practice of state-sponsored abduction as a viola-

126. *Id.*

127. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). The case involves the kidnapping of Dr. Alvarez-Machain from Mexico by agents hired by the U.S. Drug Enforcement Agency. Dr. Machain, who was allegedly implicated in the death of a DEA agent in Mexico, was taken from Guadalajara to El Paso, Texas, where he was tried and convicted. The U.S. Supreme Court held that, in the absence of an explicit provision in the U.S.-Mexico Extradition Treaty prohibiting abduction, the practice was constitutionally permissible.

128. *Ballesteros*, 71 F.3d at 774.

129. *Id.* at 775.

130. *See id.* (“[the accused] stands before us not as the victim of an abduction (which he once was) but as a lawfully-held prisoner . . . [a]ccordingly, we need not dismiss the case.”).

131. *Id.* at 765.

tion on international human rights law. The petition is filed on behalf of three victims of kidnapping, Kenneth Walker, a Canadian citizen, and Hossein Alikhani and George Christoforou, citizens of Cyprus. The petition seeks a finding from the Commission that state-sponsored kidnapping is a violation of international human rights law, as well as recommendations to the U.S. Government that the convictions of the petitioners based on lack of jurisdiction be vacated. It also calls for the Commission to investigate and report on the practice of kidnapping by the U.S. Customs officials involved in all cases and for fair compensation be paid the petitioners. The petitioners have also expressed their willingness to engage in friendly settlement discussions with the U.S. Government.

The complaint alleges that the petitioners were victims of the practice of what is called abduction by deceit or deception. In both cases, U.S. Customs agents, posing as business people, persuaded the petitioners Walker and Alikhani, respectively, to leave their countries for business purposes. Once Walker stopped over in the United States, and Alikhani was in a chartered plane on the way to the alleged business site, each petitioner was forcibly detained and charged with crimes in the United States, where each stood trial and was subsequently convicted. Christoforou, on the other hand, remains in Cyprus with an international arrest warrant hanging over his head and an explicit communication from the U.S. Government that they may forcibly abduct and subject him to U.S. criminal jurisdiction. In each case, the governments of the countries involved formally protested the actions of the U.S. Customs agents. Canada protested the actions against Walker. The Bahamas, where the U.S. Customs agents and Mr. Alikhani met and from where they departed, and Cyprus protested the actions against Alikhani and Christoforou. The United States has never filed formal extradition requests in any of these cases, though extradition treaties exist with both countries.

The petition filed by the International Human Rights Law Clinic and Bruce Zagaris alleges, *inter alia*, violations of Articles I (Liberty and Personal Security), VIII (Freedom of Movement), XVIII (Right to a Fair Trial), XXV (Protection from Arbitrary Arrest), and XXVI (Due Process of Law) of the American Decla-

ration of the Rights and Duties of Man.¹³² It also argues that the practice of state-sponsored kidnapping is a violation of international law's *jus cogens* norms,¹³³ a peremptory rule of international law that prevails over any conflicting rule or agreement, including treaties. A *jus cogens* norm permits no derogation and can be modified only by a subsequent international law norm of the same character.¹³⁴ The Inter-American Commission has found that a *jus cogens* norm exists among the member states of the Organization of American States prescribing the execution of children.¹³⁵ Their rationale for doing so was that state-sponsored kidnapping of criminal suspects is so offensive to the law of nations that it shocks the conscience of mankind. State sponsored abductions, thus, are *jus cogens* violations.¹³⁶

To support the argument of a *jus cogens* violation, the petition presented several arguments. The use of kidnapping by governments is, first of all, implicitly prohibited by the numerous international human rights law prohibitions on unlawful arrest and detention. Also, the practice of nations, particularly in response to the decision in *Alvarez-Machain* in the United States, is either to explicitly prohibit the use of state-sponsored kidnapping by law or case decision, or, at the very least, by diplomatic protest when such action is taken. Finally, international

132. American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 12, O.A.S.T.S. No. 36, at 5, 9 I.L.M. 673, 679 (entered into force July 18, 1978).

133. Jill M. Sheldon, *Nuclear Weapons and The Laws of War: Does Customary International Law Prohibit The Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INT'L L.J. 181 (noting that a "peremptory norm, also known as *jus cogens*, represents fundamental and compelling law, or overriding principles of international law.").

134. Restatement (Third) of the Foreign Relations Law of the United 102 comment k (1987).

135. See *Roach and Pinkerton v. United States*, Case No. 9674 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 54 (27 Mar. 1987), Inter-Am C.H.R. 147, 169, OEA/ser. L./V/II.71, doc. 9, rev. 1 (1987) (concluding that *jus cogens* norm exists among Organization of American States' members prescribing execution of children). The *Roach* conclusion may be sound, but the Commission's reasoning in reaching that conclusion has been sharply criticized. FRANK NEWMAN and DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 270 (1990) (summarizing these criticisms).

136. *Roach* states that a customary rule "achieves the status of *jus cogens* precisely because it is the kind of rule that it would shock the conscience of mankind. . . for a state to protest." *Roach and Pinkerton v. United States*, Case No. 9674 (United States), Inter-Am. C.H.R., OEA/ser. L./V/II.69, doc. 17 para. 54 (27 Mar. 1987), Inter-Am C.H.R. 147, 169, OEA/ser. L./V/II.71, doc. 9, rev. 1 (1987).

legal organizations have criticized state-sponsored abductions as violations of international law.

Unlawful arrest and detention is prohibited by several human rights conventions: Article 9 of the ICCPR,¹³⁷ Article 5 of the European Convention on Human Rights,¹³⁸ Article 7 of the American Convention on Human Rights,¹³⁹ and Article 6 of the African Charter on Human and People's Rights.¹⁴⁰ In *Canon Garcia v. Ecuador*, the Human Rights Committee found that Ecuador had violated Article 9 of the ICCPR by participating in the kidnapping of a person to stand trial for drug trafficking offenses in the United States.¹⁴¹ The governments of Australia, Austria, Britain, Finland, Germany, the Netherlands, Norway, New Zealand, Sweden, and Switzerland have all stated that they regard abductions as a violation of their sovereignty and would protest the same if it happened to their nationals.¹⁴² Court decisions in New Zealand, South Africa, and the United Kingdom have reversed the state of the law in these common law countries, where physical presence of the person before the court was sufficient to confer jurisdiction on the court.¹⁴³ Civil law jurisdictions, such as Switzerland, have also condemned the practice.¹⁴⁴ Customary international law also has recognized state-sponsored abductions as unlawful. The unlawful nature of this

137. ICCPR *supra* note 4, art. 9, 999 U.N.T.S. at 179, 6 I.L.M. at 376.

138. European Convention, *supra* note 1, art. 5, 213 U.N.T.S. 221, Europ. T.S. No. 5.

139. American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 6, O.A.S.T.S. No. 36, at 5, 9 I.L.M. 673, 679 (entered into force July 18, 1978).

140. African Charter on Human and Peoples' Rights, June 27, 1981, art. 6, 21 I.L.M. 59, 60 (1982) (entered into force Oct. 21, 1986).

141. *Canon Garcia v. Ecuador*, Decision of 11 May 1991, UN Doc. CCPR/C-43/D319/1988.

142. See SECRETARIA DE RELACIONES EXTERIORES DE MEXICO, LIMITS TO JURISDICTION DOCUMENTS AND JUDICIAL RESOLUTIONS ON THE ALVAREZ MACHAIN CASE 81, 90-91 (1992) (discussing Canadian Government *Amicus* brief in *U.S. v. Alvarez Machain*); Julian J.E. Schutte, *General Report on the Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings*, 65 INT'L REV. PENAL LAW 83, 122 (1994) (asserting that it is undisputed that international abduction constitutes violation of international law). Julian J.E. Schutte is a high-level official in the Dutch Ministry of Justice.

143. *R v. Harley* [1978] 2 NZLR 199 (NZ); *S. v. Reahan* 1992 (1) South African Criminal Law Reports 307 (ZS) at 317 (Zimbabwe) (SA); *R v. Horseferry Road Magistrates' Court, Ex parte Bennett*, 3 All ER 138 (1993) (ENG).

144. See the decision of the Swiss Federal Supreme Court of 25 July 1982, EUR GRUNDR ZEITSCHRIFT (1983) 435; 39 Swiss Yearbook of International Law 228 (1982).

sort of conduct requires restitution of the *status quo ante*.¹⁴⁵

The Inter-American Juridical Committee has unanimously concluded that the United States Supreme Court decision in *Alvarez-Machain* violates general principles of international law.¹⁴⁶ In the aftermath of *Alvarez-Machain*, international law scholars condemned extraterritorial abduction, including those custodial arrests secured under false pretenses. For example, the International Penal Law Association Congress, at its 1994 meeting in Rio de Janeiro, adopted the following resolution:

Abducting a person from a foreign country or enticing a person under false pretenses to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution. The victim of such a violation should have the right to be brought into the position which existed prior to the violation. The violation entails liability in respect of the person concerned and the State whose sovereignty has been violated, without prejudice to any criminal liability of the persons responsible for the abduction. Similarly, procedures such as deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures should be avoided.¹⁴⁷

In short, the weight of international legal opinion has united in its common abhorrence of the practice of state-sponsored abduction, and that condemnation is sufficient to justify the condemnation of such practice as a *jus cogens* violation of international law.

The petition on behalf of all three kidnaping victims was filed with the Commission in July of 1995. As of the date of this writing, the Commission has not opened the case, a process which consists of giving it a docket number and transmitting the relevant portions of the petition to the government concerned

145. See Mexico Secretary of Foreign Relations, *Limits to National Jurisdiction, Documents and Judicial Resolutions on the Alvarez Machain Case*, Vol. 1 (Mexico 1992) at 91 (on file with the *Fordham International Law Journal*) (discussing materials on subject of state-sponsored abductions as unlawful).

146. Opinion of the Juridical Committee (August 15, 1992).

147. Resolutions of the XVth International Congress of Penal Law, Section IV, *The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperative Procedures in Criminal Matters*, 66 INT'L REV. PENAL L. 67, 70, para. 19 (1995).

for its response. The reason for this is the pursuit of additional domestic remedies by one of the petitioners, Mr. Alikhani. All domestic remedies must be exhausted before the petition is admissible in the Commission.¹⁴⁸ In an effort to expedite his case, petitioner Walker moved to sever his case from those of Christaforou and Alikhani and to proceed with a request for admissibility before the Commission. The request was granted.¹⁴⁹

CONCLUSION

Significantly, a number of the cases mentioned above involve the use of alternatives by the U.S. Government to formal extradition. The Government proposed or used deportation in the cases involving John Demjanjuk, referred to as Ivan the Terrible, and Mario Ruiz Massieu. The Government chose kidnapping in the cases of Walker, Alikhani, Christaforou, and many other cases documented in the petition. Every indication is that the United States will continue to use these other means of rendition, both legal and illegal, as an alternative to extradition.

The President, in 1995, signed into law the Omnibus Counterterrorism Act,¹⁵⁰ which promises not only to carry forward this trend toward the use of deportation in lieu of extradition, but also adopts new procedures which put the United States further from compliance with international human rights law. The bill creates a new tribunal which can commence proceedings against any alien, legal or illegal, without his or her knowledge or opportunity to respond.¹⁵¹ The court can hear evidence of terrorist activity on the part of the alien and take action to deport that person without an opportunity by the alien to review the evidence on which the deportation is based.¹⁵² Moreover, the bill expands the potential use of evidence obtained by wiretapping, but denies the alien the right to either discovery of the evidence or the right to seek its suppression if illegally ob-

148. Regulations of the Inter-American Commission on Human Rights, arts. 35(a) and 37.

149. Severance of claims is also permitted by the Commission's regulations. *Id.* at Article 40.

150. Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong., 1st Sess. (1995).

151. *Id.*

152. *Id.*

tained.¹⁵³ Civil libertarians have also criticized the overly broad definition of a terrorist organization, asserting that the bill's definition could sweep in every armed resistance movement. Other provisions of the bill dramatically curtail procedural access to the federal writ of habeas corpus, which could further hamper defendants on death row from effective appellate review of their convictions.¹⁵⁴

In short, the catalog of U.S. violations of international human rights law seems daunting to us as criminal defense attorneys and defenders of international human rights. We look to the positive experience of Europe as a source of some solace and look forward to the day when the United States will acknowledge its own accountability in the community of nations for violations of international human rights law.

153. *Id.*

154. See Bruce Zagaris, *International Counterterrorism Act Moves Through U.S. Congress*, 11 INT'L ENFORCE. L. RPTR. 193 (1995) (providing thorough review of immigration-related aspects of Antiterrorism Act and of its changes in substantive criminal law).