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Justice Denied? The Adjudication of Extradition Applications

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Justice Denied? The Adjudication of Extradition Applications

ANN POWERS[†]

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I. INTRODUCTION

If asked to explain extradition, most U.S. lawyers—and indeed many judges and legal scholars—will give only the most rudimentary answers. They may fumble in response saying that it is a procedure for sending criminals back to their home states or nations or, if current with the news, for bringing narcotics traffickers from Latin America to the United States for prosecution. But the details are likely to be blurry, and the lawyer can be excused for conflating extradition with deportation proceedings.¹ This is not surprising, since few attorneys are ever involved in an extradition proceeding, especially an international one, and few legal scholars are familiar with the issues. Even counsel who deal regularly with immigration and deportation matters rarely deal with extradition, and they may be unaware of its unusual elements. Should the question of extradition arise, the accused typically seeks a criminal lawyer, since many of the elements of an extradition proceeding appear criminal in nature—arrest, arraignment, incarceration, and bail. But even most criminal defense lawyers must turn to the library to determine the scope of the process and the rights of the person held for extradition. Their research reveals that many rules that normally govern criminal proceedings do not apply, that some of our most cherished constitutional protections may be limited or denied, and that even international norms of human rights may be ignored.

From the outset of an extradition process in which the United States is the asylum nation, the extraditee is at a disadvantage in challenging the request.² As with most criminal cases, he may have no idea that he is wanted on a criminal charge until he is arrested. Like other detainees, he will likely have to scramble to find defense counsel or, depending upon his financial situation, may have to rely on appointed counsel. The odds of finding counsel—either appointed or retained—who is knowledgeable about extradition proceedings are slight.

On the other side of the proceeding is the government, usually represented by an Assistant U.S. Attorney and perhaps an official from the U.S. Department of Justice's Criminal Division in Washington, who has likely filed a substantial memorandum with the extradition complaint.³ The law seems unfavorable for the accused because, as common wisdom suggests, as long as the requesting country's papers are in order, the judge has little leeway to examine the government's evidence or motivation and, thus, must order extradition.⁴ Extradition cases, however, often never reach a judge because counsel,

1. Extradition in the international setting is the process by which "one sovereign surrenders to another sovereign a person sought as an accused criminal or a fugitive offender." M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 1 (3d ed. 1987) [hereinafter BASSIOUNI, *INTERNATIONAL EXTRADITION*]; see also GEOFF GILBERT, *ASPECTS OF EXTRADITION LAW* 17 (1991); 6 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 727 (1968). International extradition does not apply to a person who has not been charged, but is merely wanted for questioning. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra*, at 227. The return of individuals from one state of the United States to another, typically called interstate rendition, is assured by Article 4, Section 2 of the U.S. Constitution. It differs considerably from international extraditions. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-15.100 (2001), at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm. International extradition is not addressed in the Constitution [hereinafter U.S. ATTORNEYS' MANUAL]. *Id.*

2. In an extradition proceeding the party whose extradition is requested is generally referred to as the relator. For convenience's sake, this article usually uses the more descriptive terms extraditee, detainee, or accused. See, e.g., JORDAN J. PAUST, ET AL., *INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS* 286-87 (1996).

3. The Criminal Division's Office of International Affairs (OIA) is responsible for foreign extradition matters. It provides assistance and support to the offices of U.S. attorneys in handling foreign extradition issues. See U.S. ATTORNEYS' MANUAL, *supra* note 1, § 9-15.210 (2001). For a description of the functions of the OIA, see Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 818-20 (1993).

4. The legal standard to be applied is examined *infra* Part III.B.

inexperienced with extradition matters, concludes that the client should not fight extradition but, instead, should waive his right to a hearing and agree to be deported to the requesting country.

If the client decides to contest extradition, the next unpleasant surprise may be that prehearing release is difficult to secure—even if there is little risk of flight. The extradition judge may be lenient in allowing the government to demonstrate probable cause to support the detention and may be reluctant to grant bail to a person the government labels a fugitive.⁵ If the arrest was provisional, as most are, the client may be incarcerated for many weeks without speedy trial guarantees or establishment of bail while the governments gather the appropriate documents. Incarceration can be especially onerous if the attorney does not speak the language of the requesting nation, making it difficult to obtain information since his client is not readily available for consultation and translation.⁶

Extradition has a long, indeed ancient, history, and many of its tenets evolved over time to meet the needs of nations as they developed their external relations. But as intercourse between states has expanded and changed and as interest in protecting human rights has come to the fore, the rules that control international extraditions appear increasingly antiquated.⁷ As U.S. courts have struggled without clear guidance to apply the hoary principles enunciated in early case law, the difficulties they encounter in conforming rulings to the dictates of extradition law, the constraints of the U.S. Constitution, and international precepts of human rights are patent. Although courts and scholars have addressed a number of these matters in recent years, their conclusions have not been uniform. Many vexing issues remain: the standards for prehearing release, the degree of proof required before an individual can be returned to his home country to face prosecution or incarceration, and the consideration given to the legal and political conditions in the requesting nation. Of special importance is the extent to which an accused may challenge the evidence presented by the prosecutors and present evidence of his own. Especially problematic is the issue of presenting evidence to contradict that of the government or to demonstrate improper motivation on the part of the requesting nation. While there are valid reasons for many of the current rules and restrictions, they can, nonetheless, seriously erode individual protections and, either individually or as a whole, violate human rights standards.

The conflicts between outmoded concepts of extradition law and contemporary notions of human rights are becoming increasingly important as the volume of extraditions increases.⁸ This increase in extraditions appears to result in large part from exponential increases in global commerce and travel coupled with the globalization of crime and criminal organizations. Nations now struggle not only with illegal financial schemes and cyber crimes, but with international terrorism, narcotics and weapons trafficking, and money laundering.⁹ As the ease of travel has increased, as well as emigration, more and more

5. See *infra* Part V.B, V.F.

6. The court may provide a translator at the extradition hearing, but in the author's experience securing translation services for the client in jail can seriously complicate the process.

7. These rules are generally drawn from treaties and from federal statutes. PAUST, ET AL., *supra* note 2, at 95; see *infra* Part III.

8. The State Department and the Department of Justice review hundreds of requests for extradition each year. See Lis Wiehl, *Extradition Law at the Crossroads: The Trend Towards Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 792 (1998).

9. See Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888, 1890 (1996). A report recently released by the National Security Council sees a growing threat to national security from increasingly sophisticated networks of international criminals who exploit expanded trade and information opportunities in their criminal schemes. NAT'L SEC. COUNCIL, INTERNATIONAL CRIME THREAT ASSESSMENT (2000), available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/>

individuals find themselves in situations where their conduct may give rise to foreign criminal charges and extradition requests, even if they have never set foot in the requesting nation.¹⁰ In addition, civil unrest and corruption in some countries appear to have forced emigration by many individuals and raised the specter of politically motivated prosecutions.¹¹ Thus, both the nature of global interactions and the nature of the matters forming the basis for many extradition requests have changed.

In spite of the need to scrutinize extradition requests, the matter has, for the most part, evaded public attention. In rare cases an extradition matter may achieve news media coverage, but by and large there has been little notice given to these types of proceedings. In part, that may be because they often occur very quickly, and the individual sought may have few resources to hire counsel and to otherwise fight the claim. In addition, the stigma attached to an individual, especially a foreigner, against whom criminal charges have been lodged may make him an unlikely recipient of sympathy from the press and public. This negative perception may be especially likely to occur if the case involves narcotics and the individual comes from a country that has a reputation for that activity. However, the courts have shown an increasing willingness in some cases to scrutinize the evidence presented by the government in the extradition hearing,¹² to inquire into the political and human rights conditions in the requesting state,¹³ and to allow release prior to the formal extradition hearing.¹⁴ This trend recognizes the growing dissonance between nineteenth-century extradition processes and twenty-first-century conceptions of human rights.

This article was prompted when a well-regarded LL.M. candidate at Pace Law School's Center for Environmental Legal Studies was arrested and subjected to extradition proceedings. Faculty, staff, and students became embroiled in efforts, ultimately successful, to challenge the extradition request. In doing so, they confronted the substantive and procedural barriers faced by an accused in current extradition processes and the significant potential for human rights abuses. Thus, this article, which analyzes current extradition law, updates what has been a slowly developing area of the law and proposes changes to address some of the shortfalls. Part II presents a brief history of extradition law, focusing on both the national and international conditions that prevailed when the law developed as well as the ensuing changes in those conditions and laws. Part III explains contemporary extradition law and practice, while Part IV explores the statutory, judicial, constitutional,

pub45270index.html. The report contends that organized crime has become diversified internationally, and there are often links between criminals and political elites in home countries. The report cites crimes ranging from trafficking in women and children to copyright and trademark pirating and computer hacking. *See id.* (noting in Chapter 1 that in 1999 roughly 480 million people entered the United States).

10. In the case of many contemporary crimes, an individual need not be present in a country to commit a punishable offense. The ability to prosecute an individual who has committed acts abroad intending for the offense to be consummated in the requesting state is especially important in combating those who export and traffic in narcotics. *See* President's Letter of Transmittal Extradition Treaty with the Republic of Colombia, Sept. 14, 1979, U.S.-Colombia, S. TREATY DOC. NO. 97-98 (1981) [hereinafter U.S.-Colombia Extradition Treaty].

11. *See, e.g.,* Gill v. Imundi, 747 F. Supp. 1028, 1048 (S.D.N.Y. 1990) (Sikhs claim political motivations by Indian government; contend that evidence was fabricated); *In re Ntakirutimana*, 184 F.3d 419, 429, 430-31 (5th Cir. 1999) (Hutu charged with genocide in Rwanda claims government pressure lead to false evidence; tribal retribution); *Maguna-Celaya v. Haro*, 19 F. Supp. 2d 1337, 1339 (S.D. Fla. 1998) (Basque separatist argues confessions coerced).

12. *See, e.g., In re Gonzalez*, 52 F. Supp. 2d 725, 738-41 (W.D. La. 1999) (court admitted alibi witnesses).

13. Courts have traditionally followed a rule of "non-inquiry" when questioning conditions in the requesting country. *See infra* Part V.G. For a summary of the recent scholarship examining the rule of non-inquiry, see Richard J. Wilson, *Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition*, 3 ILSA J. INT'L & COMP. L. 751, 751-52 nn.1-2 (1997) [hereinafter *Non-Inquiry*].

14. *See, e.g., Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997); *Beaulieu v. Hartigan*, 430 F. Supp. 915, 917 (D. Mass. 1977), *rev'd*, 553 F.2d 92 (1st Cir. 1977), *vacated*, 554 F.2d 1 (1st Cir. 1977) (reviewing recent bail cases); *see also* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1448 (1998) (stating that bail decisions are "all over the lot").

and international human rights issues related to a party's attempt to resist extradition. Part V focuses on one case, *In re Extradition of Victor Manuel Tafur-Dominguez*,¹⁵ to illustrate the substantive and procedural issues in current practice and argues that some of the limitations typically placed on the individual are unfair, unwise, unconstitutional, and, even if individually supportable, may in the aggregate violate international human rights norms. Part VI concludes with suggestions for changes to U.S. extradition law and practices that would comport with modern conceptions of individual rights and liberties.

II. ORIGINS AND DEVELOPMENT OF THE EXTRADITION PROCESS

While we might be inclined to think of extradition as a legal process developed by modern nation-states, it has ancient origins. The first reported extradition agreement was in a peace treaty about 1280 B.C.E. between an Egyptian pharaoh and a Hittite prince for the exchange of prisoners of war.¹⁶ While there is little record in the intervening centuries, it appears that until the 1700s nations typically sought individuals for political and religious offenses.¹⁷ For roughly the next 150 years, military offenders appeared to be the primary focus of international extradition efforts,¹⁸ with nations mainly concerned about the repatriation of soldiers after international conflicts.¹⁹ As trade increased among nations, the focus of extraditions changed in order to adequately respond to burgeoning commerce. From the mid-1800s until after the Second World War, the focus seemed to shift to the apprehension and rendition of common criminals.²⁰ In the late nineteenth century, bilateral extradition treaties became more common as countries sought to regularize the rendition of individuals.²¹ It was then at the end of that century that the primary form and rationale for current extradition procedures were formulated.

Early in the history of the United States, extraditions were purely a function of the executive, carried out without judicial participation. The first U.S. extradition agreement was included in the Jay Treaty with Great Britain in 1794.²² While this Treaty made no reference to the judiciary, providing that the respective ministers or officers should surrender the party sought by the requesting nation, it did require evidence of criminality

15. *In re Extradition of Victor Manuel Tafur-Dominguez*, No. 00-154-M (E.D. Pa. 2000).

16. IVAN A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 5 (1971); Allison Marston, *Innocents Abroad: An Analysis of the Constitutionality of the International Extradition Statute*, 33 *STAN. J. INT'L L.* 343, 346-48 (1997); see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 2-3 (1974) [hereinafter BASSIOUNI, *WORLD PUBLIC ORDER*].

17. See BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 4. Ordinary criminals were, however, subjects of extradition. Henry II of England and William the Lion, King of Scotland appear to have entered into the first formal agreement for the return of common criminals in 1174 CE. See JOHN B. MOORE, *A TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 10 (1891). For the most part the arrangements seem to have been informal and ad hoc. Extradition was not limited to Europe during this period, since the Chinese engaged in extradition with neighboring countries. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 1.

18. See BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 4.

19. See generally BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 1, at 3 n.9.

20. See BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 4.

21. Both common law and civil code countries entered into extradition treaties, and although the forms differed somewhat, they were essentially similar. See BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 1, at 11. A major difference is that common law countries typically require that the requesting state demonstrate probable cause to believe that the offense at issue was actually committed. Civil law countries typically consider the warrant itself sufficient to demonstrate a *prima facie* case. See BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 508; see also Kai I. Rebane, Note, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 *FORDHAM INT'L L.J.* 1636, 1651 (1996).

22. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-U.K., art. 27, 8 Stat. 116, 129.

sufficient to meet the standards of the asylum state.²³ Although judicial action was not contemplated by the Treaty, when Britain sought the surrender of an individual for trial on mutiny charges, Jonathan Robbins, who claimed to be an American citizen,²⁴ President John Adams asked for a judicial opinion. The court found sufficient evidence to support the charge and Robbins was extradited to Britain where he was tried and hung.²⁵ The resulting uproar in the United States, based in part on the mistaken premise that Adams had ordered the court to surrender Robbins, was such that President Adams was forced to defend his actions. The controversy ultimately figured in his election defeat. Another extradition treaty was not negotiated until 1842, and it included provisions for judicial determination of the sufficiency of the evidence supporting the request.²⁶ Shortly thereafter, Congress enacted the first statute governing extradition; this statute provided for judicial review of the extradition request, but left the ultimate decision to the executive.²⁷ Although the statute has been amended since that time, it remains substantially similar to the one enacted over a century and a half ago. Thus, we see that, while changes have occurred in the intervening years, practices in effect today were largely defined when sailing ships still plied the ocean.²⁸

By contrast, international views of individual human rights have evolved rapidly during the last century—especially after World War II and the establishment of the United Nations.²⁹ Where once the sovereign rights of nations were paramount and a country's request to obtain an individual to stand trial or serve a sentence was given great weight, contemporary society has a distinctly different view. International treaties, conventions and covenants, and many nations' constitutions have recognized the importance of individual rights and may be in conflict with extradition procedures and processes.³⁰

III. CONTEMPORARY FEDERAL EXTRADITION PROCEDURES

Extradition is the formal process by which an individual, the extraditee, is rendered from the asylum state where he is located to the requesting state in order to face prosecution or, if already convicted, to serve a sentence. Extradition is typically carried out pursuant to a treaty, usually bilateral, and some say that without a valid treaty there can be no extradition.³¹ That statement, however, is not accurate, since states may choose to ignore

23. *See id.*

24. It was later determined that he was Irish. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 304 (1990).

25. *See id.*

26. Treaty to Settle and Define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, Aug. 9, 1842, U.S.-U.K., art. 10, 8 Stat. 572, 576.

27. The first extradition statute was enacted in 1848. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. Although it has been modernized, the current provisions are essentially the same as the 1848 statute. Benjamin N. Bedrick, Comment, *United States Extradition Process: Changes in Law to Address Constitutional Infirmity*, 15 DICK. J. INT'L L. 385, 396 (1997) (discussing the arguments made by the State Department in *Loube v. Christopher*, 893 F. Supp. 65, 67 (D.D.C. 1995)); Marston, *supra* note 16, at 347.

28. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1442 (1988) (discussing additional history on extradition). *See generally* Rebane, *supra* note 21, at 1644-48; Jonathan O. Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 192-94.

29. BASSIOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 4-5.

30. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.10 (2d Cir. 1980). "Eighteen nations have incorporated the Universal Declaration into their own constitutions." *Id.* (citing 48 REVUE INTERNATIONALE DE DROIT PENAL Nos. 3 & 4, at 211 (1977)). *See infra* Part IV.

31. United States law provides that the surrender of individuals is allowed only if a treaty is in force with the requesting nation. *See* 18 U.S.C. § 3181 (1994). Limited exceptions for crimes of violence against U.S. citizens in another country were added on April 24, 1996. *See* Pub. L. No. 104-132, tit. IV, subtit. D, § (a), 110 Stat. 1280.

the lack of a valid treaty³² and enter into ad hoc agreements. In any case, other mechanisms exist that can achieve the transfer of individuals between nations. Mutual legal assistance pacts,³³ informal rendition,³⁴ deportation,³⁵ and even kidnapping³⁶ have been employed toward this end.³⁷

A. *The Extradition Treaty*

Although it is the U.S. Department of State that negotiates an extradition treaty, consent to its ratification must be given by the U.S. Senate. Over time the United States has entered into treaties with many countries and has from time to time modified them. It is currently party to over 100 bilateral and multilateral extradition agreements.³⁸ While the treaties may differ in detail, they are substantially similar in overall structure. In general, an extradition treaty spells out the specific crimes covered and requires reciprocity on the part of the signatories.³⁹ Treaties typically require the issuance of a formal request of extradition, backed by evidence regarding the identity of the person and the nature of the offense, through the diplomatic channels of the state seeking extradition.⁴⁰ The offense must be one that is provided for in the treaty; it must also be an offense in the asylum country.⁴¹ A treaty will frequently also require that, once extradited, the requesting country

32. Colombia, for example, abrogated the U.S.-Colombia Extradition Treaty, see Igor I. Kavas, *Colombia: Supreme Court Decision on Law Concerning the Extradition Treaty Between Colombia and the United States*, 27 I.L.M. 492, 495-96 (1988), but used emergency procedures to extradite drug dealers to the United States. See Motion of Amici Curiae for Leave to File a Memorandum of Law in Support of Relator, *In re Tafur-Dominguez*, No. 00-154-M (E.D. Pa. Apr. 7, 2000) at 13-16 [hereinafter Amici Memorandum of Law].

33. See Craig S. Smith, *Asylum Plea by Chinese Sect's Leader Perplexes the U.S.*, N.Y. TIMES, July 31, 2000, at A3 (noting the lack of an extradition treaty with China and signing of a mutual legal assistance pact intended to provide a framework for return of criminals by either side).

34. Informal rendition occurs outside of a treaty. See BASSOUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 128-29. For a description of U.S. involvement in informal rendition, including abduction, see Nadelmann, *supra* note 3.

35. See, e.g., *Ruiz-Massieu v. Reno*, 91 F.3d 416, 418 (3d Cir. 1996); see also *Non-Inquiry*, *supra* note 13, at 752 n.1. Recently the United States sought several Bosnian citizens of Algerian origin accused of participating in the World Trade Center attack in New York City on September 11, 2001. Rather than pursue extradition, the Bosnian government stripped these individuals of their citizenship and turned them over to the United States. Ian Fischer, *Quaeda Suspect's Bosnian Wife Says He's No Terrorist*, N.Y. TIMES, Jan. 28, 2002, at A3.

36. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); Bruce Zagaris, *Extradition, Evidence Gathering, and Their Relatives in the Twenty-First Century: A U.S. Defense Counsel Perspective*, 23 FORDHAM INT'L L.J. 1403 (2000). Commentators have argued that customary international law does not permit abductions. See *id.* at 1435 n.62; Rebane, *supra* note 21, at 1647; Jonathan A. Gluck, Note, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612, 614 (1994); Brigitte Belton Homrig, Comment, *Abduction as an Alternative to Extradition—A Dangerous Method to Obtain Jurisdiction Over Criminal Defendants*, 28 WAKE FOREST L. REV. 671, 672, 702-03 (1993).

37. See Darin A. Bifani, *The Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence*, 41 BUFF. L. REV. 627, 638 n.63 (1993).

38. U.S. DEP'T. OF STATE, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2000* (2000); see also 18 U.S.C.A. § 3181.

39. However, some of the more recent treaties eschew the listing of crimes and instead limit extradition to crimes punishable by more than one year in prison, and rely on the rule of dual criminality. See *infra* note 41; see, e.g., Treaty of Extradition, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (entered into force Jan. 21, 1977).

40. The requesting country typically submits an extradition request through its embassy to the Department of State, which transmits it to the U.S. Department of Justice. The hearings are prosecuted by the U.S. Attorney for the district where the requested party is found. See U.S. ATTORNEYS' MANUAL, *supra* note 1, § 9-15.700. See generally Wiehl, *supra* note 8, at 731 n.2.

41. This is referred to as the "dual criminality requirement." BASSIUNI, *WORLD PUBLIC ORDER*, *supra* note 16, at 313. It is not necessary that the crimes be identical, but the facts must support a charge in both the requesting and the asylum state. See *id.* at 326-27. The requirement of dual criminality is so universally accepted

will not prosecute an individual for crimes other than those specified in the extradition request.⁴² The treaty usually provides that the extradition will proceed “pursuant to the laws of the requested state.”⁴³ Thus, the evidence presented by the requesting nation must be sufficient to meet the applicable standards of the asylum state. For requests made to the United States, the federal standard of probable cause must be met.⁴⁴ The question of the extent of proof needed to support the detention is a controversial one.⁴⁵ Many of the treaties also allow provisional detention of the extraditee⁴⁶—sometimes for as long as ninety days⁴⁷—while formal papers are submitted.

B. *The Extradition Process*

Under U.S. law federal judges and magistrates,⁴⁸ as well as state judges, are given authority to hear extradition cases.⁴⁹ Such a hearing is a limited one, often analogized to a preliminary hearing in a criminal case. If the judge finds that the legal requirements have been met,⁵⁰ he issues a certificate of extraditability to the secretary of state, who then makes

that it may be customary international law. See SHEARER, *supra* note 16, at 138; Homrig, *supra* note 36, at 675. For a definition of customary international law, see *infra* note 113.

42. This is referred to as the “specialty requirement.” The specialty doctrine may be held applicable even if it is not mentioned in the extradition treaty. See, e.g., *United States v. Rauscher*, 119 U.S. 407, 419–20 (1886); 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, 429–31 (1990). Of course, the extraditing state has no means, other than diplomatic entreaties, to enforce the specialty provision. Rebane, *supra* note 21, at 1653.

43. See, e.g., Extradition Treaty with the Republic of Colombia, Sept. 14, 1979, U.S.-Colom., art. 9, S. TREATY DOC. No. 97-8, (entered into force Mar. 4, 1982) [hereinafter U.S.-Colombia Extradition Treaty].

44. While the treaties usually specify that the standards of the requested state must be met, if the treaty is silent on the issue, U.S. courts have nonetheless required that probable cause be found. See *In re Extradition of Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986); see also *infra* notes 50, 68, 69, 189, 191, 234.

45. Traditionally, the government was allowed to present only the sketchiest of evidence, and some courts went so far as to hold that for provisional arrest, the existence of a foreign warrant from a competent authority was sufficient; see WHITEMAN, *supra* note 1, at 931; see also BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 1, at 718 (quoting *In re Shapiro*, 352 F. Supp. 641 (S.D.N.Y. 1973)); Wiehl, *supra* note 8, at 751 n.72; see, e.g., *Caltagirone v. Grant*, 629 F.2d 739, 743 (2d Cir. 1980) (lower court issued arrest warrant based on U.S. government’s allegation of existence of foreign warrant). The U.S.-Colombia Extradition Treaty, which was the basis for the extradition attempt of Mr. Tafur, contained these basic conditions. However, the situation was complicated by the strange history of treaties with Colombia. See *infra* notes 187–88.

46. Treaties typically allow provisional detention in cases of “urgency” when it is likely that the requested party is a fugitive and will flee before the formal request through diplomatic channels, which may take weeks to prepare, can be completed. Wiehl, *supra* note 8, at 731 n.2. See, e.g., U.S.-Colombia Extradition Treaty, *supra* note 43, art. 11. The majority of warrants in extradition cases are provisional. Wiehl, *supra* note 8, at 734 n.7.

47. See, e.g., Convention Regarding the Reciprocal Extradition of Criminals, Jan. 31, 1930, U.S.-Aus., art. XI, 106 L.N.T.S. 379. In fact, the delay in obtaining an extradition hearing routinely exceeds three months. Wiehl, *supra* note 8, at 751.

48. U.S. magistrates are judicial officers appointed by U.S. district court judges in the respective districts to assist them in certain proceedings and are not judges appointed pursuant to Article III of the U.S. Constitution. Their appointment, tenure, and jurisdiction is spelled out in 28 U.S.C. §§ 631, 636 (2001). The role of the extradition magistrate is established by 18 U.S.C. § 3184 (2001). Whether it is a U.S. magistrate or a U.S. district judge who is the presiding judicial officer at an extradition hearing, he is generally referred to as an “extradition magistrate.” See Jacques Semmelman, *The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT’L L.J. 1295, 1295 n.4 (2000) [hereinafter *Non-Contradiction*]; Andreas F. Lowenfeld, *Ahmad: Profile of an Extradition Case*, 23 N.Y.U. J. INT’L L. & POL. 723, 732 n.28 (1991).

49. Although state judges are authorized by statute to hear extradition requests, it does not appear to be a common occurrence. See *In re Mackin*, 668 F.2d 122, 129–30 n.11 (2d Cir. 1981); Wiehl, *supra* note 8, at 731 n.2.

50. These requirements are whether a valid treaty exists, whether the crime is one covered by the treaty, whether there is reason to believe that the accused is the person sought, and there is probable cause to believe the accused committed the crime. See 18 U.S.C. § 3184 (1994).

the final, formal determination whether to extradite. The decision of the court as to extraditability may not be appealed by either the accused or the government.⁵¹ The accused may, however, seek habeas corpus review, although the scope of that review is restricted.⁵² While the government may not seek review of an adverse decision, it may resubmit the extradition request,⁵³ even numerous times;⁵⁴ the government is not barred by concerns of double jeopardy⁵⁵ or due process.⁵⁶

C. *Competing Interests of Foreign Policy and Comity and the Criminal Justice System*

Extradition is an exercise in foreign policy—including all of the complications that it entails. A nation has a sovereign interest in preserving and protecting its jurisdiction over events that happen within its territory. It is interested in making sure that its own laws are obeyed and has a substantial interest in assuring that offenders cannot escape punishment by traveling beyond its national boundaries.⁵⁷ To protect this jurisdiction a country must have some ability to secure the return of those who have violated its laws.⁵⁸ Thus, it is in a nation's interest to cooperate with other nations that also wish to assure that violators within their territories are not beyond the reach of their own laws. This mutual need for accommodation is reinforced by general principles of comity and international cooperation.

Efforts to accommodate a treaty partner requesting extradition, and to do so in an expeditious fashion, can lead to conflicts between the requested state's extradition

51. A magistrate's decision to certify the accused for extradition is not an appealable final order. *Caplan v. Vokes*, 649 F.2d 1336 (9th Cir. 1981); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 478 cmt. c (1987) [hereinafter RESTATEMENT]. The decision to certify is to be tested through application for the writ of habeas corpus. *Castro Bobadilla v. Reno*, 826 F. Supp. 1428, 1431 (S.D. Fla. 1993), *aff'd without op.*, 28 F.3d 116 (11th Cir. 1994).

52. See RESTATEMENT, *supra* note 51, § 478 reporters' note 2 (1987).

53. See *Collins v. Loisel*, 262 U.S. 426, 429–30 (1923); *United States v. Doherty*, 786 F.2d 491, 492–93 (2d Cir. 1986). *In re Mahmoud Abed Atta, a/k/a/ "Mahmoud el-Abed Ahmad"*, 706 F. Supp. 1032 (E.D.N.Y. 1989), was an original extradition hearing before a federal magistrate. When the request was denied, the government filed a second request, which was heard by a U.S. district judge, sitting as a magistrate, who conducted a hearing *de novo*. *Lowenfeld*, *supra* note 48, at 732–33. The effect of this was the same as having an appeal to a higher authority. *Id.* at 733. When the judge granted the extradition request, Ahmad filed for habeas corpus, which was heard by another district court judge. *Id.* at 735–36.

54. See *Ruiz-Massieu v. Reno*, 91 F.3d 416, 418 (3d Cir. 1996). The government attempted four times to extradite Ruiz-Massieu unsuccessfully, then sought deportation. He committed suicide after being charged in the United States with money laundering. See Mark Stevenson, Associated Press, *Ruiz Massieu Kills Himself in New Jersey* (Sept. 15, 1999), <http://www.eco.utexas.edu/~archive/chiapas95/1999.09/msg00230.html>.

55. See *Hooker v. Klein*, 573 F.2d 1360, 1365, 1367 n.7 (9th Cir. 1978). This is apparently because there has not been a determination as to guilt. *Lowenfeld*, *supra* note 48, at 732 n.27 (analogizing to a second effort by a prosecutor to seek an indictment); see also *Collins v. Loisel*, 262 U.S. at 429–30; *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

56. *Merino v. United States Marshall*, 326 F.2d 5, 13 (9th Cir. 1963) (stating that due process and fair hearing are "not applicable . . . in an international extradition case").

57. In responding to a request from Attorney General Robert F. Kennedy concerning extradition, Secretary of State Dean Rusk pointed out the practicalities, writing that "[t]he manner in which this Government interprets and executes an extradition agreement with a foreign country will doubtless affect the treatment given extradition requests the United States makes to that country." Letter from Dean Rusk, U.S. Secretary of State, to Robert Kennedy, U.S. Attorney General (Apr. 20, 1961), reprinted in 6 WHITEMAN, *supra* note 1, at 999–1000; see also *Bedrick*, *supra* note 27, at 390 n.35; *Marston*, *supra* note 16, at 347 n.23.

58. "Enforcement of our own laws . . . is the governmental interest served by extradition treaties." *Parretti v. United States*, 122 F.3d 758, 780 (9th Cir. 1997). The concurring judge in *Parretti* took a broader view, suggesting that the interest served was larger than domestic law enforcement. "It is important to the nation's overall ability to work effectively in the international arena that it be thought of as a country that keeps its commitments." *Id.* at 786 (Reinhardt, J., concurring).

procedures and its general criminal laws and constitutional provisions, which may require higher levels of proof or greater attention to individual rights than are conducive to rapid extradition processes. In the United States well-developed criminal jurisprudence⁵⁹ requires that an individual normally be accorded such minimal procedures as a demonstration of probable cause before incarceration, the opportunity for bail during the pendency of the proceedings, and a speedy judicial resolution of the charges. These requirements may complicate the extradition process, but foreign policy considerations make expedition and simplicity important. Unfortunately, it may be the individual's rights that are sacrificed to political expediency.⁶⁰

D. *The Nature of the Proceeding*

An extradition proceeding is sometimes called *sui generis*,⁶¹ since it purportedly is not criminal in nature,⁶² but it obviously does not fit neatly into the civil mold.⁶³ But any extraditee who has been subjected to arrest and imprisonment and who has been brought to the courtroom in handcuffs to face lawyers from the Department of Justice's Criminal Division can attest that the process has all the attributes of a criminal proceeding. Yet the Federal Rules of Criminal Procedure specifically do not apply,⁶⁴ nor do the Federal Rules of Evidence.⁶⁵ The judge is then often left to rely on case law, much of which predates both current societal problems and contemporary notions of human rights.

In addition to approving extradition treaties, Congress also establishes the role of the court and the measures necessary for controlling the extradition proceeding. Thus, extradition hearings are authorized by federal statute.⁶⁶ These hearings are often analogized to a preliminary hearing in a domestic criminal case, and it is to those proceedings that the courts look for guidance.⁶⁷ But extradition standards are less stringent. While probable cause must be demonstrated before extradition will be approved,⁶⁸ the government's proof not only may be based on hearsay, but can be presented in documentary form without live witnesses. Many of our constitutional protections do not apply—including Fourth,⁶⁹ Fifth,⁷⁰

59. The jurisprudence continues to develop. See generally *Thirteenth Annual Review of Criminal Procedure*, 89 GEO. L.J. 1045 (2001).

60. Commentators have long suggested that the executive might be less-than-thorough and objective in reviewing evidence of guilt when policy considerations are at stake. See Marston, *supra* note 16, at 364.

61. See, e.g., *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976); Bedrick, *supra* note 27, at 403; U.S. ATTORNEYS' MANUAL, *supra* note 1, at Criminal Resource Manual § 614.

62. *Romeo v. Roache*, 820 F.2d 540, 543-44 (1st Cir. 1987).

63. See, e.g., *Jhirad*, 536 F.2d at 482.

64. FED. R. CRIM. P. 54(b)(5).

65. The Advisory Committee Note to Federal Rule of Evidence 1101 states that: "Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§ 3181-195. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore § 4(6)." FED. R. EVID. 1101, advisory committee's note.

66. 18 U.S.C. § 3184 (1994) provides statutory authority for an extradition hearing when a valid treaty exists.

67. The courts have frequently held that extradition hearings are in the nature of a preliminary hearing in which the judge must determine if there is probable cause that justifies the holding of an accused to answer for a charge. *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Charlton v. Kelly*, 229 U.S. 447, 460 (1913); *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *In re Extradition of Gunther Lehming*, 951 F. Supp. 505, 513-14 (D. Del. 1996); *Republic of France v. Moghadam*, 617 F. Supp. 777, 781 (N.D. Cal. 1985).

68. The government does not disagree that probable cause must be shown in order to extradite, but has argued that to detain an accused on a provisional warrant the existence of a foreign arrest warrant is sufficient. That argument was rejected in *Parretti v. United States*, 122 F.3d 758, 770-71 (9th Cir. 1997).

69. The Warrant Clause of the Fourth Amendment prohibits searches and seizures except "upon probable cause." U.S. CONST. amend. IV. Although the probable cause standard must be met at the extradition hearing,

Sixth,⁷¹ and Eighth⁷² Amendment privileges.⁷³ Discovery is generally not available,⁷⁴ and in attempting to defend against a case, the accused is traditionally limited in the nature of the evidence that may be presented in defense, since the courts allow only evidence that may explain, not contradict, the government's evidence. As the courts have recognized, the line between explanatory and contradictory evidence is less than distinct.⁷⁵ Finally, courts are usually in unfamiliar territory when dealing with foreign crimes and criminal systems and may be reluctant to venture too far in a matter with potential foreign-policy implications.

E. *The Role of the State Department*

Since extradition is both historically and currently a matter of foreign policy, the U.S. Department of State plays a key role. As noted earlier, it is the State Department that negotiates extradition treaties with other nations and ultimately decides whether rendition will be granted. It receives the formal requests,⁷⁶ which are handled by the Office of the

courts traditionally did not require a demonstration of probable cause for a provisional detention. In *Parretti*, a federal court for the first time held that the government must meet the same standard of probable cause under the Fourth Amendment for an extradition detention as in a federal criminal case. For an examination of some of the early jurisprudence on the issue of probable cause, especially whether testimony or affidavits were required to support the arrest warrant, see generally Wiehl, *supra* note 8, at 734 n.10. In *Parretti*, the court went further and ruled that the government would have to prove that the extraditee posed a risk of flight before he could be detained pending a hearing. *Parretti*, 122 F.3d at 778-82. The court based this on Fifth Amendment considerations. *Id.* at 780. At the time of the *Parretti* decision, the government and some commentators suggested that it would hamper the government's efforts to detain and extradite fugitives, as well as to obtain the return of individuals whom it wished to prosecute and to negotiate new treaties. See, e.g., Wiehl, *supra* note 8, at 738-39 nn.24-25, 27. Whether that has in fact been the case is not apparent. In addition to the probable cause issue, courts may refuse to apply the exclusionary rule. See *Romeo v. Roache*, 820 F.2d 540 (1st Cir. 1987); *Simmons v. Braun*, 627 F.2d 635, 637 (2d Cir. 1980).

70. *Charlton v. Kelly*, 229 U.S. 447, 461-62 (no right to cross-examine); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406-07 (9th Cir. 1988) (no right to cross-examine); *Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (no statutory basis for ordering discovery); *Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984) (no right to cross-examine). The Fifth Amendment right to due process may also be violated by detention of an individual who poses no risk of flight. See Wiehl, *supra* note 8, at 762. In addition to due process, the Fifth Amendment prohibits placing an individual twice in jeopardy for the same crime. U.S. CONST. amend. V.

71. *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir. 1976) (no guarantee of speedy trial); *Freedman v. United States*, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977). The Sixth Amendment guarantees rights to speedy and public trial, to confront witnesses, and to have compulsory process to obtain witnesses for the defense. U.S. CONST. amend. VI.

72. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

73. See generally Bifani, *supra* note 37, at 641-61.

74. *Messina v. United States*, 728 F.2d 77 (2d Cir. 1984) (no right to cross-examine); *In re Singh*, 123 F.R.D. 108 (D.N.J. 1987). *But see* *Emami v. U.S. Dist. Court for Northern Dist. of Cal.*, 834 F.2d 1444, 1452 (9th Cir. 1987) (court has discretion to grant or deny discovery; should not convert to dress rehearsal for trial); *Quinn v. Robinson*, 783 F.2d 776, 817 n.41 (9th Cir. 1986) (court may order as justice requires); *Wright v. Henkel*, 190 U.S. 40 (1903); *United States v. Messina*, 566 F. Supp. 740 (E.D.N.Y. 1983). In typical preliminary hearing the defense has at least some opportunity for discovery of the government's case.

75. See *infra* Part V.G.

76. Initial requests for extradition typically come in the form of a letter, cable, or sometimes even a phone call asking that a party be arrested and held "provisionally" while the requesting nation prepares the formal extradition request. For example, in *Parretti v. United States*, the French government requested Parretti's provisional arrest via diplomatic note to the State Department. *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997). Facts to support the warrant before the magistrate were provided to U.S. officials "in an informal way." *Id.* at 762. This "package" may be voluminous, and its contents dictated by the extradition treaty at issue. It typically contains charging documents, summaries of testimony, affidavits, certified translations, and the requisite ambassadorial certifications and judicial certifications. See Wiehl, *supra* note 8, at 731 n.2.

Legal Adviser.⁷⁷ These formal requests are reviewed to make sure that the proper documentation has been provided and forwarded to the U.S. Department of Justice. While it would not be accurate to say that the State Department makes no assessment of the sufficiency of the charges, that role is left primarily to the Justice Department. Although State Department officials may well be concerned about the rights of individuals sought by another country, there may be a natural tendency to try to accommodate a nation with which the United States wishes to maintain cordial relations. Thus, the political tenor of the relationship may have an effect on the State Department's actions in an extradition proceeding, and, as noted previously, the danger exists that individual rights may give way to political interests.⁷⁸ Although the State Department has the choice to refuse to extradite,⁷⁹ even after a court has issued a certificate of extraditability, refusal is an exceedingly rare occurrence.⁸⁰ The decision of the secretary of state is final and is not subject to judicial review.⁸¹

F. *The Role of the Justice Department*

It is the U.S. Justice Department that assumes the primary role in complying with the extradition request. When the Justice Department receives the referral from the State Department, it reviews the referral to determine whether it meets substantive legal requirements and then arranges for an extradition complaint to be filed in a U.S. district court and an arrest warrant to be issued. In most cases the matter is referred to the appropriate U.S. Attorney's Office, which drafts the complaint and the warrant application—generally using a form complaint⁸²—and secures issuance of the warrant by a

77. U.S. ATTORNEYS' MANUAL, *supra* note 1, at Criminal Resource Manual § 612.

78. See Bedrick, *supra* note 27, at 394 (stating that the secretary may decide to extradite based on policy considerations). This may be reinforced by the courts that may view treaties as protective of state, rather than individual, interests. Rebane, *supra* note 21, at 1656; Bifani, *supra* note 37, at 695–96.

79. By statute, the ultimate decision whether to extradite rests with the secretary of state. 18 U.S.C. § 3186; see also 17 Op. Att'y Gen. 184 (1881). The secretary may consider *de novo* the evidence that was before the court, as well as new evidence, but is not required to do so. See Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1328 (1962).

80. See Shapiro v. Ferrandina, 478 F.2d 894, 906 n.11 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973); *Non-Inquiry*, *supra* note 13, at 755.

81. See Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980); Peroff v. Hylton, 563 F.2d 1099, 1102–03 (4th Cir. 1977).

82. To assist prosecutors in preparing complaints for provisional arrest warrants, the Department of Justice provides a sample complaint in the U.S. Attorneys' Manual. The form requires that the treaty provisions allowing provisional arrest be set forth, along with a statement as to the existence and nature of the foreign charge, a brief synopsis of the facts, and the existence of a foreign arrest warrant. No details are required to support the charges or the belief that the accused poses a risk of flight. The model is as follows:

COMPLAINT FOR PROVISIONAL ARREST WITH A VIEW TOWARDS EXTRADITION
(18 U.S.C. sec. 3184)

I, the undersigned Assistant United States Attorney, being duly sworn, state on information and belief that the following is true and correct:

1. In this matter I act for and on behalf of the Government of _____;
2. There is an Extradition Treaty in force between the United States and _____, _____[cite]_____;
3. The treaty provides in Article _____ for the provisional arrest and detention of fugitives pending the submission of a formal request and supporting documents;
4. In accordance with Article _____ of the treaty, the Government of _____ has asked the United States for the provisional arrest of _____[name of fugitive]_____ with a view towards his/her extradition;
5. According to the information provided by the requesting state in the form authorized by the treaty, _____[name of fugitive]_____ was charged with _____ count(s) of

judge or magistrate.⁸³ In a case in which the United States already has an interest, the U.S. law enforcement agency concerned with that matter might play a large role in the warrant request and the arrest.⁸⁴ The arrest warrant may provide for the seizure of evidence, or there may be a separate search warrant. If the arrestee is a foreign national, the Immigration and Naturalization Service (INS) may also become involved. Once the arrest has been made, the Justice Department, usually through the U.S. Attorney's Office, handles the court proceedings on behalf of the requesting nation,⁸⁵ including any collateral challenges. The government does not typically present live witnesses, but relies instead on the documentary evidence provided by the requesting nation.⁸⁶

G. *The Role of the Court*

As stated earlier, extraditions originally functioned under the executive branch as part of that branch's foreign affairs function, carried out without legislative or judicial supervision.⁸⁷ However, current extradition law is a creature of treaties, negotiated by the executive branch and approved by the legislature. Most current treaties give general

_____[offense]_____, in violation of Section _____ of the Criminal Code of _____, committed within the jurisdiction of _____ and a warrant or his arrest was issued on _____[date]_____ by _____, a _____[judge/magistrate]_____ of _____;

6. The warrant was issued on the basis of the following facts:
7. The offense with which _____[name of fugitive]_____ is charged is provided for in Article _____ of the Extradition Treaty cited above;
8. _____[Name of fugitive]_____ may be found within the jurisdiction of this court _____[give location]_____;
9. The requesting state has represented that it will submit a formal request for extradition, supported by the documents specified in the treaty, within _____ days, as required by Article _____ of the Extradition Treaty.

WHEREFORE, the undersigned complainant requests that a warrant for the arrest of the a forenamed [sic] person be issued in accordance with Title 18, United States Code, Section 3184, and the Extradition Treaty between the United States and _____.

U.S. ATTORNEYS' MANUAL, *supra* note 1, at Criminal Resource Manual § 616. There is no requirement that facts demonstrating probable cause be alleged. That is in contrast to the model form to be used when it is the United States that is seeking a provisional arrest in a foreign nation. There the federal prosecutor is instructed to provide sufficient information to establish probable cause. *See* Wiehl, *supra* note 8, at 749 n.67; U.S. ATTORNEYS' MANUAL, *supra* note 1, § 9-15.230.

83. Typically an Assistant U.S. Attorney swears to the complaint, on information and belief, based on the information provided by the requesting state. *See* Wiehl, *supra* note 8, at 749. Although complaints and warrants may be based on information and belief in domestic criminal cases, the information and belief in a request for a provisional arrest may be simply that a foreign charge has been made and a foreign warrant exists. *See* Parretti v. United States, 122 F.3d 758 (9th Cir. 1997). The need for a copy of the arrest warrant may even be dispensed with, and the details of the crime need not be specified. *See* Grin v. Shine, 187 U.S. 181, 193 (1902); Bifani, *supra* note 37, at 643.

84. For example, in a major drug trafficking case the Drug Enforcement Administration may already be working with enforcement authorities in the requesting state, as occurred in the *Tafur* case. *See* discussion *infra* Part V.A.

85. Generally, the U.S. Attorney for the district where the proceeding is held is responsible for the proceedings, with the assistance of attorneys from the Criminal Division's Office of International Affairs in Washington, D.C. *See* U.S. ATTORNEYS' MANUAL, *supra* note 1, at §§ 9-15.210, 9-15.700.

86. In most cases, once the hearing actually occurs, it is not lengthy. But that is not always the situation, and there have been prolonged proceedings in which both the government and the accused presented witnesses on various issues. *See, e.g., In re Mahmoud Abed Atta*, 706 F. Supp. 1032, 1050-51 (E.D.N.Y. 1989).

87. In 1799, then-Congressman John Marshall asserted that the power to extradite was a function of the executive branch's power to conduct foreign affairs. 10 ANNALS OF CONG. 596-618 (1800) (referring to *United States v. Robbins*, 27 F. Cas. 825 (S.C.S.C. 1799) (no. 16,175)).

responsibility for extradition to the executive, investing it with the ultimate authority to determine whether rendition is to be made, but requiring the court to determine whether the treaty has been complied with, standards met, and procedures followed.⁸⁸

Because of the bifurcated nature of the extradition process, the proper roles of the judiciary and the executive have been debated. Some commentators have argued that allowing the secretary of state the final say on extradition usurps the role of the judiciary in violation of the Separation of Powers Clause of the U.S. Constitution.⁸⁹ Others have reasoned that extradition is a matter of foreign affairs and that the role of the judiciary derives not from Article III, but as an adjunct to the executive.⁹⁰ Thus the court is arguably exercising Article II rather than Article III powers when ruling on extradition matters. There have been challenges to the current extradition scheme on separation of powers grounds, but these generally have been rejected by the courts.⁹¹ Such rejection seems sound, since Congress may define the scope of the court's jurisdiction. Moreover, the court is simply certifying that procedures have been met, leaving the political decision to the executive. Nevertheless, the issue remains unsettled.

In any event, most courts appear to believe that the jurisprudence leaves them little room to exercise some of their normal judicial prerogatives. Typically courts consider themselves limited to the determination of five factors: (1) whether a valid treaty is in existence; (2) whether the crime is one covered by the treaty; (3) whether the conduct is also criminal in the asylum state;⁹² (4) whether the individual is the party sought by the foreign government; and (5) whether there is probable cause to believe that the individual sought committed the crime. The courts eschew inquiries into the motivation of the extraditing state, the judicial processes of the requesting state, and the conditions that the accused will face if returned.⁹³ These issues are deemed to be within the purview of the secretary of state who, it is assumed, would not enter into an extradition treaty with a nation whose judicial processes and treatment of prisoners are not acceptable. Much deference is given to the role of the secretary in conducting foreign policy duties and to the need for comity in foreign affairs. Thus, the rule of "non-inquiry" has developed, along with other rules and standards to expedite the process.⁹⁴

88. See generally, e.g., Extradition Treaty, Sept. 14, 1979, U.S.-Colom., S. TREATY DOC. NO. 97-98 (1981).

89. See, e.g., *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995) (finding the statute unconstitutional on separation of powers grounds), *vacated on other grounds*, 82 F.3d 1081 (D.C. Cir. 1996), *analyzed in* Marston, *supra* note 16.

90. *LoDuca v. United States*, 93 F.3d 1100, 1105 (2d Cir. 1996); *United States v. Kirby*, 102 F.3d 365, 374 n.11 (9th Cir. 1996).

91. Even the district court in *Lobue* indicated that the statute would pass constitutional muster if it did not require that the court forward a copy of all of the hearing testimony to the secretary. *Lobue*, 893 F. Supp. at 72-74. One commentator has suggested that the separation of powers issue might be addressed by amending the statute to reverse the order in which the court and the State Department review the cases, or that the entire function be vested in the executive, providing for review by administrative law judges. Bedrick, *supra* note 27, at 400-03.

92. See *supra* text accompanying note 41.

93. See discussion of the rule of non-inquiry *infra* Part V.H.

94. The Supreme Court has recognized that even the comity doctrine, which concerns the deference states afford each other, is protective of individual rights:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), *quoted in* Bifani, *supra* note 37, at 658 n.174.

IV. CONTEMPORARY HUMAN RIGHTS NORMS

A. *Individual Rights Under the U.S. Constitution*

A criminal defendant in the United States enjoys a broad range of constitutional protections. Over time, these protections have been refined and expanded through judicial interpretation as our notions of individual rights have grown. A person may not be arrested or incarcerated without probable cause; he must be apprised of the evidence against him and have an opportunity to refute it by confronting his accusers and by presenting evidence in his own behalf; he is presumed innocent until proven otherwise; he has a right to counsel; and he has a right to a speedy trial.⁹⁵ If incarcerated, he typically has a right to bail. By statute and case law, a defendant will usually be able to discover important aspects of the government's case. Unfortunately, many of these protections may not extend to a person arrested on an extradition warrant.

B. *Individual Rights Under International Law*

The place accorded the individual in international law has changed radically over time, depending upon the needs of intercourse among nations and, to some degree, on theories of international law espoused by commentators. This historical development is only capsulized in this article.⁹⁶

Some of the earliest concerns for the rights of individuals in international law arose when citizens of one nation were subjected to injuries or wrongs by a foreign nation, usually while traveling abroad. Since the home state often had a strong economic interest in the well-being of its citizens abroad, the rule evolved that a state has the right to demand reparations for injuries to its citizens from the foreign nation where the injury occurred.⁹⁷ A concomitant rule was that a state was responsible for the treatment of foreigners within its boundaries. The method of seeking reparations was originally by private action, sanctioned by the home state.⁹⁸ This later changed to more formal action by the state itself, including blockading ports or seizing territory.⁹⁹ As international claims commissions or arbitration entities were established, states submitted conflicts involving injuries to private parties. As a prerequisite to bringing an international claim, the doctrine of exhaustion developed, requiring an individual to have sought and exhausted remedies available in the offending state.¹⁰⁰ But even though the injury occurred to private parties, it was the state that was entitled to redress and was the proper party in an international proceeding.¹⁰¹

Although international law was traditionally concerned with the protection of a nation's citizens abroad, instances of actions taken by a nation or nations to protect citizens

95. U.S. CONST. amend. V (double jeopardy; self-incrimination; due process); amend. VI (speedy trial; confronting accusers; right to counsel); *see* *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (presumption of innocence); *U.S. v. Marion*, 404 U.S. 307, 320 (1971) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront accusers); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

96. *See, e.g.*, P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151 (1992); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

97. Sohn, *supra* note 96, at 2.

98. *Id.* at 3. The home state would typically issue letters of marque and reprisal authorizing private parties to seize ships or goods of the offending nation. *Id.*

99. *Id.* at 3.

100. *Id.* at 4.

101. *Id.* at 4.

from persecution by their own governments did occur. Typically this involved minority populations. Protection for such populations became formalized after World War I with the formation of the League of Nations, but the protection of individual rights as a concern of international law did not truly come to the fore until after World War II.¹⁰² As a result of the atrocities carried out by Nazi Germany, the world perspective on human rights was altered, and the status of individuals in international law was transformed.¹⁰³ This new status was reflected in the creation of the Charter and other organizing instruments of the new United Nations.

Although the Charter of the United Nations speaks primarily in terms of the conduct of nations, its preamble clearly affirms the central position that fundamental human rights hold in the foundation and mission of the organization.¹⁰⁴ One of the first major tasks undertaken by the General Assembly was to adopt a document drafted by the Commission on Human Rights. This Universal Declaration of Human Rights (UDHR)¹⁰⁵ recognizes the existence of inalienable human rights and their transcendent significance and sets forth those rights as a “common standard of achievement for all peoples and all nations.”¹⁰⁶ Continuing the alteration of the traditional perception of the individual in international law, the Declaration asserts that an individual has the right to be recognized “everywhere as a person before the law.”¹⁰⁷ In over two dozen other articles, the Declaration sets forth a number of rights that are relevant to the extradition process. The various articles relevant to extradition declare the right to be free from arbitrary arrest and detention,¹⁰⁸ to have a fair and public trial of any criminal charges,¹⁰⁹ with all the guarantees necessary for a defense,¹¹⁰ and to be presumed innocent until proven otherwise.¹¹¹ Finally, the General Assembly declared it an inalienable individual right to be free of torture and cruel, inhuman, or degrading treatment or punishment.¹¹² Although the Declaration is not a treaty or convention, and, thus, not binding by its own terms, it has been recognized and acquiesced to by most nations to the extent that it has become customary international law.¹¹³ Its legal guarantees are also contained in the International Covenant on Civil and Political Rights (ICCPR),¹¹⁴ which the United States has ratified,¹¹⁵ albeit with conditions relevant to Victor Tafur’s case.¹¹⁶

102. See LEAGUE OF NATIONS COVENANT art. 23. Until WWII individuals were not subjects under international law. To be a subject in international law means to be “capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.” Menon, *supra* note 96, at 152.

103. Sohn, *supra* note 96, at 6.

104. U.N. CHARTER pmb., ¶ 2. The Charter does, however, specify that it is not authorizing “the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” *Id.* art. 2, ¶ 7.

105. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

106. *Id.* ¶ 1.

107. *Id.* art. 6.

108. *Id.* art. 9.

109. *Id.* art. 10.

110. *Id.* art. 11(1).

111. UDHR, *supra* note 105. By contrast, the U.S. Constitution does not explicitly establish a presumption of innocence. The Supreme Court, however, has found it to be “a basic component of a fair trial under our system of criminal justice,” *Estelle v. Williams*, 4425 U.S. 501, 503 (1976), and required by due process considerations. *Taylor v. Kentucky*, 436 U.S. 478, 485–86 (1978).

112. UDHR, *supra* note 105, art. 5.

113. Quigley, *supra* note 42, at 425; Sohn, *supra* note 96, at 12, 16–17. Customary international law arises from the practices of states in their dealings with one another which give rise to a consensus on the law and to expectations among members of the international community that states will conform their behavior to these norms. See SHEARER, *supra* note 16, at 138. Customary international law is part of the U.S. common law, unless it has been altered by legislative or executive action. See *The Paquete Habana*, 175 U.S. 677 (1900); Homrig, *supra* note 36, at 695–97.

114. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), G.A. Res. 2200 (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 368 (1967) [hereinafter ICCPR]. The Covenant was opened for signature by the UN General

Numerous conventions and treaties dealing with human rights issues have been formulated after the establishment of the United Nations and the adoption of the UDHR, both on a global and a regional level. We may look to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),¹¹⁷ the American Convention for Human Rights (American Convention),¹¹⁸ the Convention Against Torture (CAT),¹¹⁹ the Convention Relating to the Status of Refugees,¹²⁰ and others for guidance on current norms of human rights.¹²¹ These various conventions have been described by one commentator as a “pyramid of documents, with the Charter at its apex,” which is “a veritable internationalization and codification of human rights law, an international bill of human rights.”¹²²

One of the most important elements of this pyramid is the ICCPR. Crafted by the United Nations Commission on Human Rights and approved by the General Assembly, this document formally codifies and elaborates upon those principles set forth in the Declaration, making them binding obligations on the nations that are parties to the Covenant. In addition

Assembly in 1966 and entered into force in 1976. As of December 18, 2001, 152 countries were parties or signatories to the Convention, including the United States and Colombia. Office of the UN High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Jan. 7, 2002).

115. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2000, at 392–93 (2000).

116. The first is a reservation to Article 7 that “cruel, inhuman or degrading treatment or punishment” has the same meaning as it would under the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution. See U.S. Reservations, Declarations & Understandings, ICCPR, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992), Reservation 3, available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm [hereinafter ICCPR Reservations]. In ratifying the ICCPR the Senate also declared that the provisions of the Covenant were largely non-self-executing. See ICCPR Reservations, Declaration 1. The U.S. also spelled out a specific understanding regarding ICCPR art. 10, segregation of unconvicted prisoners. See Sohn, *supra* note 96, at 12.

117. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention], available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

118. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 11–19 (entered into force July 18, 1978), reprinted in 9 I.L.M. 673, 685–93 (1970), available at <http://www.umn.edu/humanrts/oasinstr/zoas3con.htm> [hereinafter American Convention]. The United States has never ratified the Convention. Inter-American Commission on Human Rights, Organization of American States, *Signatures and Current Status of Ratifications: American Convention on Human Rights*, <http://www.cidh.oas.org/B%E1sicos/basic4.htm> (last visited Feb. 8, 2002).

119. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985), available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm [hereinafter CAT]. The United States and Colombia are parties to the Convention. U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html> [hereinafter U.S. CAT Reservations]; see *supra* note 105.

120. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force, April 22, 1954), arts. 1(A)(2), 33(1); incorporated by reference into the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (1967), reprinted in 6 I.L.M. 78 (1967). The United States ratified the Protocol, and incorporated the definition of refugee into the Immigration and Nationality Act, 8 U.S.C. §§ 1101(42), 1253(h) (2001). Wilson, *supra* note 13, at 762 n.32. The Convention prohibits the expulsion or return of refugees if, because of their political opinions, their life or liberty would be threatened. Convention Relating to the Status of Refugees, *supra*, art. 37. See *Nicosia v. Wall*, 442 F.2d 1005, 1006 n.4 (5th Cir. 1971).

121. See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, 29 I.L.M. 1305. This treaty is one of several adopted by the former Conference on Security and Cooperation in Europe, now the Organization for Security and Cooperation in Europe.

122. Sohn, *supra* note 96, at 12.

to precluding arbitrary arrest or detention,¹²³ cruel and unusual punishment, and torture¹²⁴ and requiring fair public trials,¹²⁵ the Covenant establishes a general rule in favor of bail for persons awaiting trial.¹²⁶ Like the Charter, the ICCPR guarantees an accused a presumption of innocence¹²⁷ and, in a provision important to the Tafur proceeding, establishes that an accused who is incarcerated while awaiting trial is to be segregated from those already convicted and accorded separate treatment as appropriate to someone who has not been convicted of a crime.¹²⁸

CAT expands upon both the Charter and the ICCPR in order to effectuate their restrictions on torture and cruel, inhuman, or degrading treatment or punishment. Torture is defined in this Convention as intentional infliction of severe physical or mental pain for eliciting information, intimidating, or punishing an individual, done by or with the acquiescence of a public official.¹²⁹ Article 3 of the Convention prohibits any party from extraditing an individual if there are substantial grounds to believe that he would be subjected to torture in the requesting state.¹³⁰ The requested state may consider all of the relevant information and circumstances, including whether the requesting state has a pattern of human rights violations of a gross and flagrant nature.¹³¹ In such a case, the requested state is bound by its obligations under the Convention to refuse extradition.¹³²

123. ICCPR, *supra* note 114, art. 9, ¶ 1. Unlawful arrest and detention is also prohibited by the African Charter on Human and People's Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (entered into force on Oct. 21, 1986), reprinted in 21 I.L.M. 58 (1982), available at <http://www1.umn.edu/humanrts/oasinstr/zoas6cts.htm>, the American Convention on Human Rights, *supra* note 118, at art. 7; and the European Convention, *supra* note 117, art. 5.

124. ICCPR, *supra* note 114, art. 7. The United States ratified the treaty, but with a reservation. See *supra* note 116.

125. ICCPR, *supra* note 114, art. 9, ¶ 3.

126. *Id.*

127. *Id.* art. 14, ¶ 2. See also European Convention, *supra* note 117, art. 6, ¶ 2.

128. ICCPR, *supra* note 114, art. 10, ¶ 2(a). The U.N. Human Rights Committee is charged with oversight of the ICCPR. See UNHCHR, *Introduction to the Human Rights Committee*, at <http://www.unhchr.ch/html/menu2/6/a/introhrc.htm>. General Comment 21, ¶ 9, issued by the Committee, notes that segregation of accused persons from those already convicted "is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2." *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. HRI/GEN/1/Rev.5 (2001). In ratifying the ICCPR the United States asserted its understanding that "the reference to 'exceptional circumstances' in paragraph 2 (a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons." United States Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, S. EXEC. REP. NO. 102-23 (1992), reprinted in 31 I.L.M. 645 (1992) (on file with author).

129. CAT, *supra* note 119, art. 1, ¶ 1. Regarding a similar provision in the ICCPR, General Comment 20, ¶ 5, to the ICCPR, the Human Rights Committee notes that the prohibition is not limited to infliction of physical pain, but also applies to "acts that cause mental suffering to the victim." *ICCPR General Comment 20*, Hum. Rts. Comm., 44th Sess. (1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (1994), available at <http://www.unhchr.ch/tbs/doc.nsf> [hereinafter *General Comment 20*].

130. CAT, *supra* note 119, art. 3, ¶ 1. A similar provision is found in the ICCPR. General Comment 20, Paragraph 9 to the ICCPR notes the Committee's view that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." *General Comment 20*, *supra* note 129.

131. CAT, *supra* note 119, art. 3, ¶ 2.

132. A similar provision is found in Article 9 of the International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205. It provides that a state holding a person accused of hostage taking should not accede to an extradition request if there is reason to believe that the request was made for the purpose of punishing him on account of his ethnic origin or other impermissible factors, including political opinion. *Id.* art. 9, ¶ 1. Extradition should also be refused if the person's position would be prejudiced due to the same impermissible factors. *Id.* art. 9, ¶ 1(b)(i).

The treaties and conventions are binding by their terms on parties, but even for those who have not adhered to a treaty, provisions which constitute peremptory human rights norms are binding as *jus cogens*¹³³ (i.e., overriding principles) under international law, and under the terms of the Vienna Convention on the Law of Treaties (Vienna Convention).¹³⁴ Under Article 53 of the Vienna Convention, a treaty is deemed void *ab initio* if it conflicts with a peremptory norm of international law.¹³⁵ Thus, human rights law as derived from human rights treaties is superior to, and controlling over, other treaties, including extradition treaties, under public international law. Moreover, even if the formal provisions of an extradition treaty are not violative of human rights norms, the application of those provisions might be—a point that will be further explored below.¹³⁶ Finally, regardless of whether a treaty is binding upon a state, it may provide guidance in determining contemporary human rights norms that should inform a court's decision in extradition proceedings.

C. *The European Court of Human Rights and Other Regional Bodies*

Although a specific judicial tribunal for human rights does not exist at the global level, the United Nations Human Rights Committee established by the ICCPR¹³⁷ has developed jurisprudence of increasing importance to the analysis of international human rights issues.¹³⁸ Additionally, significant judicial decisions shaping human rights jurisprudence have been made at the regional level under the European Convention and the American Convention. Under both conventions non-judicial commissions provide oversight of human rights matters, and judicial tribunals have been established. The European Commission for Human Rights has accepted over 16,000 complaints that the Convention has been violated since its inception in 1953.¹³⁹ It has referred numerous cases to the European Court of

133. Article 53 of the Vienna Convention defines *jus cogens* as accepted norms from which no derogation is permitted. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1988), reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention]. Not all human rights norms are *jus cogens*. Among those that are generally accepted are “torture or other cruel, inhuman, or degrading treatment or punishment,” and “prolonged arbitrary detention.” RESTATEMENT, *supra* note 51, §§ 702(d), (e) cmt. n (1987). The Restatement suggests that release on bail may not be required if trial is not unreasonably delayed. *Id.* § 702 cmt. h. However, the detention is arbitrary if the warrant is not sufficiently specific. *Id.* The United States has also stated that arbitrariness will result if the detention “is incompatible with the principles of justice or with the dignity of the human person.” *Id.* (citing Statement of U.S. Delegation, U.N. GAOR, at 137, U.N. Doc. A/C.3/SR.863 (1958)). “A state may also violate customary international law if it engages in or condones “a consistent pattern of gross violations of internationally recognized human rights.” RESTATEMENT, *supra* note 51, § 702(g).

134. See Vienna Convention, *supra* note 133, art. 53. The United States agreed to Article 53 with reservations and has not ratified the Convention. RESTATEMENT, *supra* note 51, at pt. III, introductory cmt. Nevertheless, the principles of Article 53 are recognized as customary international law; even if not binding on the United States, they may provide a useful guidepost to courts in an extradition matter. See *id.* § 331 rpts. n.4.

135. RESTATEMENT, *supra* note 51, § 331(2)(b); see *id.* § 702 cmt. n.

136. Not only do individuals have rights enunciated and protected by the Charter, the Declaration, the ICCPR, and the various conventions and other instruments, they also may in some instances have a venue for seeking redress—the International Court of Justice. The jurisdiction of the court extends to all matters specifically provided for in the Charter and in treaties and conventions, as well as cases referred by parties. Statute of the International Court of Justice, June 26, 1945, art. 36, ¶ 1, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945), available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetext/istatute.htm>.

137. ICCPR, *supra* note 114, art. 28. The United Nations Human Rights Committee operates under the Optional Protocol to the ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967).

138. See Richard J. Wilson, *Using International Human Rights Law and Machinery In Defending Borderless Crime Cases*, 20 FORDHAM INT'L L.J. 1606, 1608 (1997) [hereinafter *Borderless Crime*].

139. Kevin Boyle, *Europe: The Council of Europe, the CSCE, and the European Community*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 135, 138–52 (Hurst Hannum ed., 2d ed. 1992).

Human Rights.¹⁴⁰ The Inter-American Commission on Human Rights and the Inter-American Court for Human Rights implement the American Convention.¹⁴¹ The tribunals have developed a body of jurisprudence that extracts many of its principles from basic norms of human rights found in the Charter and other UN instruments. Indeed, the European Court has been especially active, developing into one of the world's foremost sources of human rights law by providing innovative interpretations and greatly expanding the protection of human rights.¹⁴²

D. *The United States' Duties Under International Human Rights Law*

Although international human rights law creates individual rights and imposes duties upon states, this reality is often not recognized in the United States' judicial system. Perhaps because of our geographic isolation, most American citizens—and probably most lawyers and jurists—seldom think beyond the federal Constitution and statutes as the highest law of the United States. But as previously noted, treaties to which the United States is a party and customary international law are part of the law of the land. As a signatory to the UDHR, the ICCPR, CAT, the Hostage Convention, and other treaties, the United States has agreed, with certain reservations, to be bound by their provisions and to incorporate them into U.S. law.¹⁴³ Thus, the United States must, *inter alia*, accord a presumption of innocence to an extraditee, afford adequate procedural protections, and assure that the human rights of the individual will not be jeopardized by extradition to the requesting nation. To the extent that any of these obligations conflict with existing U.S. laws and practices, those laws and practices should be conformed to the nation's international obligations whenever possible.¹⁴⁴

In recent years scholars have examined a number of extradition-related issues under U.S. law. Although the Supreme Court has not dealt directly with extradition since early in the last century, its decision in *U.S. v. Alvarez-Machain*,¹⁴⁵ involving abduction in lieu of extradition, was the subject of commentary. Along similar lines, the decision of the Ninth Circuit in *Parretti v. United States*,¹⁴⁶ applying traditional bail standards to an extradition detention, has received scholarly scrutiny.¹⁴⁷ Less attention has been paid, however, to the numerous human rights issues that can arise in an extradition process. These concerns can be raised more clearly, perhaps, in the context of a particular case.

140. See generally The European Commission, *Role of the European Commission*, at http://www.europea/en/int/comm/role_en.htm (last visited Feb. 18, 2002).

141. The American Convention established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. See American Convention, *supra* note 118, chs. VII, VIII.

142. Michael P. Shea, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, 17 YALE J. INT'L L. 85, 99, 101 (1993). Especially noteworthy is the court's expanded definition of torture. *Id.* at 101–02. Even if not “torture,” inhumane conduct violates Article 3 of the European Convention. Egmez v. Cyprus, App. No. 30873/96 (Dec. 21, 2000) ¶ 79, available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=109203149&Notice=0&Noticemode=&RelatedMode=0>. Petitions will only be accepted by the European Court of Human Rights if the petitioner has exhausted all domestic remedies. European Convention, *supra* note 117, art. 35, ¶ 1 (originally art. 25).

143. See, e.g., ICCPR, *supra* note 114, art. 2 (requiring each state to adopt laws and rules to guarantee the rights and freedoms set forth in the Covenant). The United States signed the Torture Convention with reservations. See U.S. CAT Reservations, *supra* note 119.

144. See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986).

145. 504 U.S. 655 (1992).

146. 122 F.3d 758 (9th Cir. 1997).

147. See, e.g., Jeffrey M. Olson, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161 (1998).

V. IN RE EXTRADITION OF VICTOR MANUEL TAFUR-DOMINGUEZ

The March 4 arrest was dramatic. Gun-toting Drug Enforcement Administration agents stopped a van near Philadelphia and pulled out Victor Manuel Tafur-Dominguez. Justice Department officials proudly announced he was a fugitive drug trafficker who would be the first Colombian ever extradited from the U[nited] S[tates] to Colombia.¹⁴⁸

The arrest, described by Tafur as “cinematographic,” began a nightmarish process for the Colombian lawyer who was in the United States, studying for a master’s degree in environmental law.¹⁴⁹ The detention was based on a warrant issued by Colombia, charging Tafur with suspicion of having participated in financing a multi-million dollar cocaine deal.¹⁵⁰ In fact, Tafur was an unlikely drug financier, since both he and his family had a long history of actively opposing drugs and drug traffickers. His father, Donald Tafur, had served for seventeen years in leadership positions in both the Colombian House of Representatives and Senate. He was instrumental in the late 1970s and early 1980s in securing legislative approval of the U.S.-Colombia Extradition Treaty,¹⁵¹ which provides for the extradition of drug dealers from Colombia to stand trial in the United States.¹⁵² Ironically, the government would use this very treaty against his son.

When the Treaty was ratified Senator Tafur began to receive death threats, and he and his family lived under armed guard for a number of years.¹⁵³ In 1992, he was assassinated at his home.¹⁵⁴ Victor Tafur, like his father, worked to stem the drug trade in Colombia. He was a highly placed official in the presidential program *Plante*—a government program to teach farmers to plant alternative crops instead of coca and poppy—when he was gravely injured in a plane crash in the Andes while on an official mission.¹⁵⁵ In June 1999, he came

148. Douglas Waller & Cathleen Farrell, *The DEA's Big Bust: Did They Get the Wrong Guy?*, TIME, Apr. 17, 2000, at 18.

149. See Douglas Waller & Cathleen Farrell, *Nightmare on I-95 Manuel Tafur Faces Extradition to Colombia on Cocaine Charges. But is it All a Mistake?*, TIME INT’L, Apr. 17, 2000, at 20.

150. In December 1998, Colombian authorities seized a shipment of 6219 kilos of cocaine in Cartagena destined for Spain, worth over \$120 million wholesale, secreted in shipping containers. Complaint at 2, *In re Tafur-Dominguez*, No. 00-M-154-1 (E.D. Pa. filed May 3, 2000) [hereinafter Complaint]; Hearing Record at 6, 22, *In re Tafur-Dominguez*, No. 00-M-154-1 (E.D. Pa. May 3, 2000) [hereinafter Hearing (May 3, 2000)]; Waller & Farrell, *supra* note 148, at 18.

151. U.S.-Colombia Extradition Treaty, *supra* note 10. Senator Tafur was a principal sponsor of the Extradition Treaty for ratification in the Senate of Colombia, and wrote a treatise, INTERNATIONAL PENAL LAW (1969), in which he described extradition and its key elements. See Waller & Farrell, *supra* note 149, at 20.

152. The extradition treaty was enacted by the Colombian Congress as a result of the inability of Colombian courts to convict, and Colombian jails to contain, narco-traffickers. The cartels reacted violently, waging a campaign of terror against public officials, journalists, and human rights activists. See generally GABRIEL GARCIA MARQUEZ, NEWS OF A KIDNAPPING (1996). The cartel leaders called themselves “The Extraditables,” and their motto became, “Better a grave in Colombia than a cell in the United States.” *Id.* at 22; see Nadelmann, *supra* note 3, at 852–55; Luz E. Nagle, *The Rule of Law or the Rule of Fear: Some Thoughts on Colombian Extradition*, 13 LOY. L.A. INT’L & COMP. L.J. 851, 869 (1991).

153. He was also critical of the government and its failure to prosecute the drug cartels, and sponsored amendments to the Penal Code to address the drug trade. Declaration [of Victor Manuel Tafur-Dominguez] Pursuant to 28 U.S.C. § 1746, at 2–3, *In re Tafur-Dominguez* (INS May 8, 2000) (A#077-626-394); see also Robert Armengol, *Tafur Calls Drug Case “Baseless”*, THE INTELLIGENCER, Jan 2, 2001 (on file with author).

154. See Hearing (May 3, 2000), *supra* note 150, at 56; *Asesinado Donald Tafur*, EL PAÍS (Cali), Mar. 7, 1992, at A1.

155. In March 1999, Victor Tafur and other colleagues, officials, and reporters were in two light planes on an official trip in the Andes. The plane in which Tafur was riding crashed in the mountains. For over two days rescuers were unable to reach the plane, and when they did, they found all of the seven occupants dead but Tafur,

to the United States to receive medical treatment and to recover from his injuries. He stayed with his mother, who had moved to the United States, remarried, and become a naturalized U.S. citizen, living outside of Philadelphia. That fall, while still recovering from the injuries, Tafur commenced studies in New York for a master's degree in environmental law.

Before Tafur left Colombia, the Colombian Congress made a large, long-delayed lump sum pension payment to his mother for the legislative service of his deceased father. Because of the ever-present danger of kidnapping,¹⁵⁶ Tafur wished to move the money out of the country with dispatch.¹⁵⁷ To do so, it was necessary to exchange the pesos for dollars. In doing that Tafur wrote a number of checks, some of which were improperly reindorsed and wound up in the account of a sham corporation involved in the cocaine deal at the heart of the extradition matter. Those checks served as the basis for the charges of narcotics trafficking by the Colombian prosecutor in spite of the fact that all of the pension funds had been transferred to Mrs. Tafur's bank and were accounted for.¹⁵⁸

Colombia did not submit formal extradition papers but apparently requested by telephone that the U.S. State Department provisionally detain Tafur, as permitted under the Treaty.¹⁵⁹ A U.S. warrant was issued for his arrest, and the Drug Enforcement Administration (DEA) agents in Philadelphia took him into custody. Search warrants were subsequently executed at the house of his mother and stepfather and at Tafur's law school dormitory.¹⁶⁰

At an initial hearing before the extradition magistrate the government requested that Tafur be held without bail for sixty days, as provided in the Treaty, while the government obtained the appropriate paperwork from Colombia.¹⁶¹ The judge expressed reservations

who was close to death. See *Subdirector del Plante en Estado Critico Despues del Accidente*, DIARIO DE HUILA, Mar. 24, 1999, at A1; *Un Sobreviviente en la Avioneta*, EL TIEMPO (Bogotá), Mar. 23, 1999, at A1.

156. There were approximately 3000 people kidnapped in Colombia in 1999, often to finance guerilla groups that utilize kidnapping and extortion as a major source of income. Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 31 (2000); Paul Wellstone, *Bush Should Start Over in Colombia*, N.Y. TIMES, Dec. 26, 2000, at A31; U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: COLOMBIA (Feb. 25, 2000), at 21, available at http://www.state.gov/www/global/human_rights/1999_hrp_report/colombia.html (last visited Jan. 5, 2001) [hereinafter 1999 COUNTRY REPORT]. A recent U.S. Department of State travel advisory warns U.S. citizens against travel to Colombia, noting the high levels of violence in all parts of the country due to narco-traffickers, guerrillas, paramilitary groups, and other criminal elements. The State Department further warned that:

There is a greater risk of being kidnapped in Colombia than in any other country in the world. More than a dozen U.S. citizens were kidnapped in Colombia in 1999, twice as many as in 1998. Some have been individual incidents and others have involved large group hostage situations. In some cases, the victims have been murdered. Most kidnappings of U.S. citizens in Colombia have been committed by guerrilla groups, including the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), which were both designated as Foreign Terrorist Organizations by the Secretary of State in October 1997.

U.S. Dep't of State, *Colombia—Travel Warning*, Jan. 28, 2000, at http://travel.state.gov/colombia_warning.html.

157. Hearing (May 3, 2000), *supra* note 150, at 35. As the court noted, considering the unsettled conditions in Colombia, a desire to transfer one's funds out of the country was certainly legitimate. *Id.* at 19.

158. Hearing (May 3, 2000), *supra* note 150, at 44–45.

159. U.S.–Colombia Extradition Treaty, *supra* note 10, art. 11.

160. U.S.–Colombia Extradition Treaty, *supra* note 10, art. 11. There was no evidence of a crime committed in the United States. When the court later expressed concern about the sufficiency of the evidence supplied by Colombia to support the warrant, the government attempted to allay those fears by suggesting that U.S. money laundering statutes could have been violated. Letter from Virgil B. Walker, Assistant U.S. Attorney, to the Honorable Charles B. Smith, U.S. Magistrate Judge, *In re Tafur-Dominguez*, No. 00-M-154-1 (E.D. Pa. Mar. 6, 2000) [hereinafter Letter from Virgil B. Walker].

161. U.S.–Colombia Extradition Treaty, *supra* note 10, art. 11.

about the evidence in the case as well as whether a situation of urgency existed to support provisional detention, but nevertheless declined to grant bail. Instead, he gave the government only thirty days in which to secure the charging documents.¹⁶² When the government was unable to produce the requisite documents at the end of thirty days, the judge refused to continue to hold Tafur and released him to “house arrest” at his mother’s home.¹⁶³ The judge further required that the pension money, which was in Mrs. Tafur’s bank account, be posted as bond.¹⁶⁴ Subsequently the government completed the paperwork and an extradition hearing was held. Tafur challenged not only probable cause, but also the validity of the Treaty and the procedures and conditions that he would face if returned to Colombia.¹⁶⁵ The extradition judge declined to consider any issues but probable cause.¹⁶⁶ The government presented documentary evidence to support its claim.¹⁶⁷ Tafur testified on his own behalf and also presented documentary evidence, some of which was rejected by the judge as “contradicting” rather than “explaining” the government’s evidence.¹⁶⁸ Nonetheless, at the conclusion of the hearing the court found no probable cause to believe that Tafur was involved with the drug scheme and refused to issue a certificate of extraditability.¹⁶⁹

At a number of points in the process, the case law or decisions made by the court stand in sharp contrast to those standards of liberty and process normally associated with U.S. courts. From the denial of prehearing release, to the conditions of incarceration, to the

162. Hearing Record at 9, 19, 25, *In re* Tafur-Dominguez, No. 00-M-154 (E.D. Pa. Apr. 13, 2000) [hereinafter Hearing (Apr. 13, 2000)].

163. Order, *In re* Tafur-Dominguez, No. 00-154-M (E.D. Pa. Apr. 13, 2000) (setting conditions of release).

164. *Id.*

165. Amici Memorandum of Law, *supra* note 32, at 6.

166. See Hearing (May 3, 2000), *supra* note 150, at 3; Hearing (Apr. 13, 2000), *supra* note 162, at 19. Several other issues were urged upon the court: that the treaty had been invalidated by Colombia, that the requisite “dual criminality” was lacking, and that Tafur’s human rights would be violated if he was returned to Colombia. Amici Memorandum of Law, *supra* note 32, at 6.

The Extradition Treaty between the United States and the Republic of Colombia was signed in Washington on September 14, 1979. It appeared to have been approved by Colombia (Law 27 of 1980) and entered into force on March 4, 1982. However, the circumstances of its approval by Colombia and subsequent actions by Colombia may have rendered the treaty unenforceable. See Kavas, *supra* note 32, at 495–96. Specifically, in 1991 Colombia amended its Constitution to prohibit the extradition of Colombian citizens. CONSTITUCIÓN POLÍTICA DE COLOMBIA tit. I, art. 35 (1991), states “Se prohíbe la extradición de colombianos por nacimiento.” This prohibition under Colombian law came about because of the Medellín cartel’s adamant opposition to extradition of Colombians to the United States. See Esquirol, *supra* note 156, at 32 n.26. The unenforceability of the treaty was in fact acknowledged by the U.S. Court of Appeals for the Third Circuit in *United States v. Santini*, 963 F.2d 585, 592 (3d Cir. 1992). The Colombian Constitution was again amended in 1997, Acto Legislativo Número 01 de 1997 (Dec. 16, 1997) (Colom.); see Esquirol, *supra* note 156, at 32 n.26, but doubts were raised about its constitutionality. See *Colombia to Deport Criminals*, SUN-SENTINEL (Fort Lauderdale), Dec. 17, 1997, at 18 (discussing the law passed by the Colombian legislature on November 25, 1997 permitting the extradition of Colombian nationals, but then-President Samper admitted that there were doubts about its constitutionality). Accordingly, amici argued that there was not an effective treaty of extradition for the court to enforce. In support of this argument amici cited a scholarly study written by Senator Donald Tafur, in which he emphasized that “[t]he [Extradition] Treaty has been written based on absolute reciprocity, since it contemplates equal rights and obligations for each party.” Amici Memorandum of Law, *supra* note 32, at 4 n.4. Amici further argued that according to the principles of international law—*pacta sunt servanda*—every treaty in force is binding upon the parties to it and must be performed by them in good faith. Amici Memorandum of Law, *supra* note 32, at 17. However, Colombia has ignored this requirement and amended its constitution to defeat the object and intent of the Extradition Treaty. *Id.* Thus even if the Treaty is not technically invalid *de jure*, it has at least been *de facto* invalidated, and lacked the reciprocal obligation required for valid extradition treaties. *Id.*

167. See Hearing (May 3, 2000), *supra* note 150, at 4, 6, 24, 68, 69 (referencing previously submitted documents).

168. Hearing (May 3, 2000), *supra* note 150, at 53–54.

169. Order, *In re* Tafur-Dominguez, No. 00-154-M (E.D. Pa. May 3, 2000).

rejection of evidence, serious questions were presented about the extent to which there was a deprivation of Tafur's constitutional and human rights.

A. Arrest, Search, and Seizure

Colombia is a civil law country, with a judiciary composed of professional courts and a system of investigating prosecutors.¹⁷⁰ Unlike the United States, where prosecutorial and judicial functions are separated, the Colombian prosecutors may undertake functions of both.¹⁷¹ The prosecutors not only carry out investigations, but have the authority to issue arrest warrants, and those warrants need not be based on probable cause.¹⁷² Indeed, it appears that the general practice of the special drug prosecutors is to issue warrants for the detention of anyone related to a drug transaction in order to secure his testimony. Moreover, on matters involving drugs, individuals may be arrested merely on suspicion of illicit activities.¹⁷³ Because of the danger to the drug prosecutors from the cartels, in 1987 the president of Colombia established anonymous—or “faceless”—courts and prosecutors.¹⁷⁴ A “faceless” special narcotics prosecutor issued the original warrant for Tafur¹⁷⁵ in September 1999, charging him with drug trafficking.¹⁷⁶ That warrant called for his arrest for investigation.¹⁷⁷ Tafur, who was in the United States, was not informed of the warrant but learned that the authorities were investigating his financial transactions before his law school's Christmas break. Once he became aware of the situation, he returned to Colombia to look into the matter and hired counsel in Colombia to analyze the situation. Tafur also secured a new student visa from the U.S. Embassy for his post-graduate studies in the United States and returned to New York to commence the new semester of classes.¹⁷⁸ No attempt to serve the warrant was made while he was in Colombia.

It was not until over two months later that Tafur was arrested. He—or at least his mother's home—had apparently been under surveillance for many weeks before his arrest.¹⁷⁹ Tafur was taken into custody and questioned by both DEA and INS agents. The U.S. warrant that had been issued for his arrest was based on a complaint filed by an

170. See Hearing (May 3, 2000), *supra* note 150, at 25–26 (prosecutor describes Colombian inquisitorial system); see also John Henry Merryman, *The Civil Law Tradition* (1998), reprinted in JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS, CASES AND MATERIALS* 696 (1978).

171. 1999 COUNTRY REPORT, *supra* note 156, at 29.

172. See ANDEAN COMM'N OF JURISTS, *COLOMBIA: THE RIGHT TO JUSTICE* 43–48 (1991) [hereinafter *COLOMBIA: THE RIGHT TO JUSTICE*].

173. Robert Weiner, *War By Other Means: Colombia's Faceless Courts*, *NACLA REPORT ON THE AMERICAS*, Sept.–Oct. 1996, at 31, 35.

174. See *infra* note 320. The use of anonymous prosecutors was declared unconstitutional in 2000. *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Colombia*, U.N. GAOR, Hum. Rts. Comm., ¶ 223, U.N. Doc. E/CN.4/2001/15 (2001) [hereinafter *High Commissioner's Report*].

175. The government attorneys argued to the court that their delay in obtaining information from the Colombian government was due to being unable to ascertain who the prosecutor handling the case was. See Hearing (Apr. 13, 2000), *supra* note 162, at 17.

176. Ley 30 de 1986, artículo 33, MINISTERIO DE GOBIERNO LEYES (Law 30, art. 33 (1986) (Drug Trafficking)) (Colom.); see Complaint, *supra* note 150, at 1.

177. See Complaint, *supra* note 150, at 1. Pursuant to that warrant, bail could have been available after arrest. For whatever reason, a second warrant was issued on December 31, 1999, and that warrant called for detention without bail. See Complaint, *supra* note 150, at 1 (“Specialized Prosecutor in and for the Circuit of Santafe de Bogota, ordered the detention of Victor Manuel Tafur-Dominguez.”).

178. See Motion to Quash Arrest Warrant, Search Warrants and to Release Individual, *In re Tafur-Dominguez*, No. 00-154-M (E.D. Pa. Mar. 8, 2000) at 4 [hereinafter *Motion to Quash*].

179. DEA agents had even conducted “trash runs” at Tafur's mother's house from January through March 2000. Affidavit of Brian K. Kutz in support of application for search warrant, at 1 (approx. Mar. 4, 2000); see Letter from Virgil B. Walker, *supra* note 160.

Assistant U.S. Attorney. It contained only the sketchiest factual grounds to support the request and did not provide the source of any of the information.¹⁸⁰ The complaint set forth the existence of the Colombian arrest warrant, but the only facts alleged concerning Tafur's conduct were that he had withdrawn money from his personal bank account and that the money was deposited into the accounts of a dummy corporation, E.I. Caribe, that constructed the containers for the seized cocaine shipment. The complaint did not allege that Tafur made the deposit. The warrant was not based on either personal knowledge of the DEA agents or the Assistant U.S. Attorney, but on information transmitted from Colombia.¹⁸¹ No affidavits on personal knowledge by Colombian authorities, depositions,

180. The Complaint reads as follows:

I, Virgil B. Walker, the undersigned Assistant United States Attorney, being duly sworn, state on information and belief that the following is true and correct:

1. In this matter, I act for and on behalf of the Republic of Colombia.
2. There is a treaty of extradition in force between the United States of America and the Republic of Colombia
3. Pursuant to the treaty, Colombia has submitted a formal request through diplomatic channels for the provisional arrest and extradition of Victor Manuel Tafur-Dominguez.
4. Victor Manuel Tafur-Dominguez is the subject of an arrest warrant issued on September 27, 1999, by the Prosecutor's Office for the Criminal Courts, Special Circuit, Narcotics sub-unit, Bogota, charging him with drug trafficking in violation of Article 33, Law 30, 1986. On December 31, 1999, the Specialized Prosecutor in and for the Circuit of Santafe de Bogota, ordered the detention of Victor Manuel Tafur-Dominguez. The sentence for this crime is 6 to 20 years in prison, except that Section 38.3 of Law 30 provides that the penalty is doubled where the amount of drug confiscated exceeds 5 kilograms (here it was 6,219 kilograms). Drug trafficking is covered as an extraditable offense by Article 2 of the Extradition Treaty between the United States and the Republic of Colombia.
5. The warrant was issued on the basis of the following facts: Victor Manuel Tafur-Dominguez is believed to have financed the shipment of 6,219 kilograms of cocaine which was seized at the port of Cartagena on December 3, 1998. The cocaine was contained in secret compartments in six shipping containers. The containers were scheduled to be shipped through Jamaica and Cuba with a final destination of Spain. The shipping of the containers was arranged by the Colombian company E.I. Caribe. E.I. Caribe is a front company. The investigation that took place after the seizure of the 6,219 kilograms of cocaine on December 3, 1998, uncovered physical evidence proving that E.I. Caribe employees constructed the false compartments in the shipping containers. The investigation also uncovered the fact that Victor Manuel Tafur-Dominguez withdrew approximately \$560 million from his personal bank account and this money was deposited in the accounts of E.I. Caribe for the purpose of purchasing the containers in which the cocaine was concealed and packed. (I believe, and are [sic] attempting to confirm, that the \$560 million is Colombian currency and therefore has a value of approximately 1 million United States dollars.) [This dollar figure was incorrect and grossly overstated.]
6. Victor Manuel Tafur-Dominguez has fled outside the boundaries of the Republic of Colombia, and has been located by agents of the Drug Enforcement Administration in the Eastern District of Pennsylvania.
7. [Description of Tafur.]
8. The crime of narcotics trafficking, with which Victor Manuel Tafur-Dominguez is charged with having committed in the Republic of Colombia, is among the offenses enumerated in Article 2 of the treaty on extradition in force between the United States and the Republic of Colombia
9. The immediate arrest of Victor Manuel Tafur-Dominguez pending receipt of a regular diplomatic request for extradition, with accompanying documents, is covered under Article 11 of the extradition treaty providing for provisional arrest.
10. I am informed through diplomatic channels that a regular diplomatic request for the extradition of the said Victor Manuel Tafur-Dominguez will be made in conformity with said treaty, and the complete papers upon which the demand for extradition is founded will be presented within two months as required by Article 11, of said treaty.

Complaint, *supra* note 150, at 1-3.

181. The complaint obviously was drafted using the model supplied to prosecutors in the U.S. Attorneys' Manual. See U.S. ATTORNEYS' MANUAL, *supra* note 1, Criminal Resource Manual § 616.

or other supporting documents accompanied the information from Colombia. Nonetheless, the warrant was issued by the U.S. magistrate. After arresting and questioning Tafur, DEA agents secured a search warrant¹⁸² and executed it at both Tafur's mother's home in Pennsylvania and his dormitory room in New York, seizing papers, documents, and computers belonging to Tafur and his mother.

It appears that most extradition warrants are provisional,¹⁸³ and courts have often distinguished between the probable cause required for an extradition request and the probable cause that would support a provisional arrest. For the latter, the showing was often rudimentary. The government has consistently argued that the provisional arrest warrant could be based on information and belief rather than sworn personal knowledge, or at least on information and belief based on sworn testimony.¹⁸⁴ The rationale for implementing a different standard of probable cause for a provisional arrest was that, if the government delayed in order to secure depositions or affidavits, the accused might flee and the United States would then be unable to comply with its various extradition treaty requirements. Thus, courts struggled with the extent and nature of proof required to support provisional detention. Early Supreme Court cases, while confusing, seemed to support the proposition that complaints could be based only on information and "belief."¹⁸⁵ Lower courts interpreted these cases to permit a relaxed standard for proof.¹⁸⁶ Some went so far as to hold that a provisional arrest warrant could be issued with only a complaint either alleging the existence of a treaty, and that the accused had committed a crime covered by it,¹⁸⁷ or just alleging that a foreign arrest warrant existed.¹⁸⁸

Recently, however, some courts have questioned these assumptions. The Second Circuit held that, although "the provisional arrest and extradition proceedings must differ in some way, the difference does not lie in the requirement of probable cause."¹⁸⁹ And the Ninth Circuit was the first to declare that provisional arrest and detention without probable cause violated the Fourth Amendment.¹⁹⁰ The Ninth Circuit was especially explicit, stating that "[t]he clarity of this language allows for no exceptions, regardless of whether the government's purpose in making the arrest is to enforce treaties or our own domestic laws."¹⁹¹

182. Search Warrant, *In re Tafur-Dominguez*, No. 00-M-154-1 (E.D. Pa. approx. Mar. 3, 2000). The search warrant was issued by a different magistrate than the one who had issued the arrest warrant. Tafur's counsel contended that the government deliberately sought another judge "at midnight" in order to avoid the magistrate who had issued the arrest warrant and was more experienced in search and seizure matters. Motion to Quash, *supra* note 178, at 5-6.

183. See Wiehl, *supra* note 8, at 733 n.7.

184. See *id.* at 734 n.10.

185. See generally *Fernandez v. Phillips*, 268 U.S. 311, 313 (1925); *Glucksman v. Henkel*, 221 U.S. 508, 514 (1911); *Yordi v. Nolte*, 215 U.S. 227, 230-31 (1909); *Grin v. Shine*, 187 U.S. 181, 193 (1902); *Rice v. Ames*, 180 U.S. 371, 374-75 (1901).

186. *In re Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986) (stating that evidence can be informal).

187. *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984).

188. *In re Kraielburd*, 786 F.2d 1395, 1396-97 (9th Cir. 1986).

189. *Caltagirone v. Grant*, 629 F.2d 739, 747 (2d Cir. 1980). Other courts have questioned treaties without deciding the constitutionality of provisional warrants issued without an evidentiary showing of probable cause. *Sahagian v. United States*, 864 F.2d 509, 512-13 (7th Cir. 1988); accord *In re Russell*, 805 F.2d 1217 (5th Cir. 1986); *United States v. Williams*, 480 F. Supp. 482, 485 (D. Mass. 1979), *rev'd on other grounds*, 611 F.2d 914 (1st Cir. 1979).

190. See *Parretti v. United States*, 122 F.3d 758, 771 (9th Cir. 1997).

191. See *id.*; see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) ("Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause."); *Parretti*, 122 F.2d at 771-72; *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984) (court may consider procedural defects and government conduct which may violate the Constitution); *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983) ("The United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct.");

The search executed on Tafur's home and dormitory room suffers from the same lack of probable cause. The application for the search warrant did little more than repeat the allegations contained in the application for the arrest warrant. The only additional information supplied to the court was that, while being questioned, Tafur told the agents that he had documentation to support his explanation of the financial transfer at his home. That information hardly seems to go further in supplying probable cause to believe that an offense had been committed than did the original allegations. Although the extradition magistrate never had to rule on a suppression motion regarding the search warrant, he did express concern about the sufficiency of the evidence supporting it and suggested that the seized items might be suppressed.¹⁹²

B. *Provisional Detention Without Bail*

Article 11 of the U.S.-Colombia Extradition Treaty provides that, in cases of urgency, the accused may be detained provisionally, for up to sixty days, without the filing of formal extradition papers.¹⁹³ The Treaty does not deal with the question of bail. Thus, as noted earlier, even though the magistrate expressed reservations at the initial detention hearing regarding the existence of probable cause to support the arrest, he denied Tafur's request for release. This is hardly surprising, since the alleged offense involved a narcotics scheme worth over US\$100 million and Tafur was a foreign national. However, the judge refused to give the government the full sixty days it sought, limiting it, instead, to thirty days. By the expiration of the thirty days, the government had not produced the extradition documents, and Tafur had been able to supply the court with ample information explaining the situation and attesting to his good character. Faculty, staff, and students from Tafur's law school had also filed an amicus brief on his behalf. Nonetheless, the government argued strenuously, with substantial case support, that, unlike a typical domestic criminal case,¹⁹⁴ bail was not allowed in extradition matters.¹⁹⁵

A "myth" of extradition practice is that bail is unavailable.¹⁹⁶ Actually, the courts have traditionally held that there is a presumption that bail will not be granted in an

Angelo M. Russo, *The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in Parretti v. United States*, 49 DEPAUL L. REV. 1041, 1059-62 (2000) (stating that other courts have held that the government must show probable cause not only for the extradition itself, but also for the provisional warrant).

192. Letter from Virgil B. Walker, *supra* note 160, at 1. After the court refused to certify extradition, Tafur sought the return of the property that had been seized. The federal prosecutors maintained that an investigation was still pending in Colombia and refused to return the property. Included in the property were original immigration papers and other documents that Tafur was required to personally possess. Motion for Return of Property, *In re Tafur-Dominguez*, No. 00-154-M (E.D. Pa. June 22, 2000). It was not until threatened with a court hearing that the prosecutors returned the seized items to Tafur and his mother.

193. U.S.-Colombia Extradition Treaty, *supra* note 10, art. 11.

194. See Judiciary Act of 1789, chs. 20, 33, 1 Stat. 73, 91 (1789) (codified as amended at 18 U.S.C. § 3141(a) (1994)). Almost from the beginning of the Republic, arrestees in U.S. criminal cases have been accorded the right to conditional release pending trial. See 18 U.S.C. § 3142(e)-(g) (1994). In order to obtain pretrial detention, the United States must demonstrate that the individual has been charged with a serious felony and that no conditions of release can guarantee his appearance at trial or protect the safety of the community.

195. See 18 U.S.C. § 3184 (1994). Nothing in the statute which controls extradition speaks to the issues of detention or bail. The Bail Reform Act of 1984, 18 U.S.C. § 3141, has been held by the courts to be inapplicable to extradition proceedings on the rationale that extraditions are not criminal in nature, and that the Bail Act applies only to U.S. criminal proceedings. See *Kamrin v. United States*, 725 F.2d 1225, 1227-28 (9th Cir. 1984).

196. *Kester*, *supra* note 28, at 1447-49; see *Beaulieu v. Hartigan*, 430 F. Supp. 915, 916 (D. Mass. 1977), *rev'd*, 553 F.2d 92 (1st Cir. 1977) (noting that granting bail was the rule rather than the exception, but on limited review of cases).

extradition matter, and that only when there are “special circumstances” will an extraditee be released pending hearing.¹⁹⁷ Some of the cases have been especially harsh, resulting in long periods of incarceration even for individuals with strong ties to the community and little risk of flight.¹⁹⁸ The rationale, of course, is that if the accused flees, then the United States will be unable to comply with its treaty commitments. Moreover, since the United States depends on the good will of the other nation when it seeks to extradite, the U.S. government is often eager to accommodate its treaty partners. This appeared especially true in the Tafur case, since the United States was attempting to extradite a significant number of individuals from Colombia to the United States to stand trial for narcotics trafficking.¹⁹⁹

Recently, however, some courts have begun to give more weight to the risk of flight and consequently have looked hard at the level of the government’s proof.²⁰⁰ For example, the U.S. District Court for the Western District of Louisiana released two detainees on bond under “special circumstances”²⁰¹ quite similar to those in Tafur’s case. Two Mexican nationals had been accused by the Mexican government of robbing a bank. The U.S. magistrate granted bond, finding that the individuals had “a substantial likelihood of success on the merits at the extradition hearing because it appears the government will be unable to establish probable cause”²⁰² The court asserted that “the decision to grant bail and, consequently, the determination of what constitutes a ‘special circumstance,’ is left to the sound discretion of the trial judge.”²⁰³

The use of provisional detention seems especially questionable in the Tafur case, since there was no evidence of urgency—other than the assertions of the Colombian and U.S. governments, who labeled him a fugitive. Tafur was in the United States lawfully, under a proper student visa, living openly in a university dormitory, and attending law school classes. He had filed the proper immigration forms in both Colombia and the United States, advising of his whereabouts. When he learned that the Colombian Office of the Special Prosecutor was investigating him, he retained an attorney in Colombia and the Special Prosecutor granted Tafur’s attorney permission to present, by March 3, 2000, his exculpatory evidence. Tafur had assembled copies of the financial transactions surrounding the checks issued in connection with his transfer of his father’s Colombian government pension funds to his mother’s bank account. But, instead of being allowed to present his evidence to the Special Prosecutor in Colombia in order to confirm his innocence, he was surveilled for weeks by DEA agents and ultimately arrested.

Tafur’s arrest and detention without bail not only violated the U.S. Constitution, it also contravened established human rights norms. It should be noted that, while Tafur was a foreign national, a U.S. citizen would have faced the same denial of constitutionally

197. This doctrine originated almost a century ago when the Supreme Court in *Wright v. Henkel*, 190 U.S. 40, 63 (1903), ruled that even though bail should not ordinarily be granted, a court might do so if the case presented “special circumstances” that warranted release.

198. For a summary of the cases and law on this issue, see Wiehl, *supra* note 8, at 754 n.83. The severity with which some courts regard the limitations on bail was illustrated by the case of a Russian official who was detained in New York on a Swiss warrant charging bribery. Although the Russian ambassador appeared at the detention hearing and pledged that the Russian government would assure the official’s appearance, the court refused to find “special circumstances” and denied bail. See Alan Feuer, *New York Judge Denies Bail to Russian Aide in Corruption Case*, N.Y. TIMES, Jan. 26, 2001, at A3.

199. The Justice Department attorney estimated that there were approximately sixty individuals in custody in Colombia, and that approximately thirty to forty additional provisional arrest warrants were pending. Hearing (Apr. 13, 2000), *supra* note 162, at 14. He noted that it was taking approximately a year from arrest to actual extradition for a case to wind its way through the Colombian extradition process. *Id.*

200. See, e.g., *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997).

201. See generally *In re Ricardo Gonzalez, Victor Huerta*, 52 F. Supp. 2d 725 (W.D. La. 1999).

202. *Id.* at 728.

203. *Id.* at 736.

protected rights. The UDHR assures the right to be free of arbitrary arrest and detention,²⁰⁴ as does the ICCPR.²⁰⁵ The American Convention is similar and also emphasizes the right to release pending trial.²⁰⁶ The European Convention on Extradition addresses provisional arrests, providing the possibility of provisional release at any time and specifying that “the requested Party shall decide the matter in accordance with its law.”²⁰⁷ All of these documents and the rights they establish are broadly accepted by the nations of the world and set the standard by which the detention of an individual pending extradition proceedings should be judged. By these standards, the detention of Victor Tafur was seriously wanting.

C. *Detention in a General Prison*

When bail was denied, Tafur was remanded to the custody of the U.S. Marshall Service as a federal prisoner, but was incarcerated in a state prison, which also raised human rights issues. Both Article 10 of the ICCPR and Article 5(4) of the American Convention, deal with incarceration of unconvicted individuals.²⁰⁸ The American Convention explicitly provides that “[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.”²⁰⁹ While the United States has not ratified the American Convention at all and has ratified the ICCPR with reservations,²¹⁰ these documents represent a benchmark by which Tafur’s treatment may be measured. Tafur was not housed in a federal facility for pretrial detainees, but was, instead, confined for six weeks in a general prison of the Commonwealth of Pennsylvania. For most of the time he was in a cell with four or five other inmates, a number of whom were convicted criminals serving their sentences. At times he was in general holding cells with as many as a dozen other prisoners. He was subjected to the humiliating routines of prison life, including strip searches on returning from court. Under the prison’s rules, he was held in “quarantine” for the first fifteen days of incarceration and denied access to everyone but his attorney. Subsequently, he was allowed visits only one hour a week by no more than two people and only limited phone calls. Although attempts were made to provide him with his class notes and course books so he might maintain his legal studies, almost all were denied to him because his mail was rejected in a seemingly arbitrary fashion. He was still suffering from injuries received in the plane crash, but received essentially no treatment. Serious back and spine injuries in the plane crash even made climbing into a top bunk an ordeal, yet no special accommodations were made. When he was transferred to a different correctional facility,²¹¹

204. UDHR, *supra* note 105, art. 9.

205. *Id.* art. 9.

206. American Convention, *supra* note 118, art. 7, ¶¶ 3, 5.

207. European Convention on Extradition, Dec. 13, 1957, art. 16, ¶¶ 1, 4, Europ. T.S. No. 24, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/024.htm>. The Convention also limits the period of provisional detention to forty days, and allows for termination in as little as eighteen days if the request for extradition and supporting documents are not forthcoming. *Id.* ¶ 4. The Model Treaty on Extradition, does not address the issue of bail but does limit detention to forty days. *Model Treaty on Extradition*, G.A. Res. 45/116, U.N. GAOR, 3d Comm., 45th Sess., 68th plen. mtg. at 214, Supp. No. 49, U.N. Doc. A/45/49 (1990), *available at* <http://www.uncjin.org/Standards/Rules/r17/r17.html>.

208. ICCPR, *supra* note 114, art. 10; American Convention, *supra* note 118, art. 5, ¶ 4.

209. American Convention, *supra* note 118, art. 5, ¶ 4.

210. U.S. CAT Reservations, *supra* note 119.

211. See Chris Hedges, *Policy to Protect Jailed Immigrants is Adopted by U.S.*, N.Y. TIMES, Jan. 2, 2001, at A1. The jail in which Tafur spent his last period of incarceration was the subject of complaints by inmates. *Id.* When Tafur was finally granted bail, after six weeks of incarceration, he was confined to the home of his mother and stepfather, with electronic monitoring prohibiting even movement to their adjoining bonsai workshop. See Order (Apr. 13, 2000), *supra* note 163, at 1.

at a substantial distance from both the court and his home, Tafur was again subjected to a quarantine period.

The American Convention is not the only document establishing rights or providing guidance on the treatment of prisoners. The United Nations General Assembly adopted a resolution providing guidelines for the treatment of those convicted of crimes or otherwise detained.²¹² Under the principles set down in the resolution, persons in detention are to be presumed innocent²¹³ and treated as “appropriate to their unconvicted status.”²¹⁴ “Whenever possible, they are to be kept separate from convicted prisoners.”²¹⁵ The guidelines presume release pending trial, and call for a judicial or other authority able to review continued detention.²¹⁶ Other bodies have adopted rules dealing with prisoners, which include separate treatment for unconvicted individuals.²¹⁷ Obviously the conditions under which Tafur was held did not meet “the minimum conditions which are accepted as suitable by the United Nations.”²¹⁸ Tafur languished for six weeks in grim conditions until he was released to house arrest. The conditions of his incarceration were offensive to human rights norms, especially when coupled with a provisional detention without probable cause.

D. *The Immigration and Naturalization Service*

Agents of the INS participated in the detention, questioning, and prosecution of Tafur from the time of his arrest. An INS agent, apparently assigned to work with the DEA, was present for the initial interrogation and participated throughout the case. When Tafur had been incarcerated for several weeks, he was served in his jail cell with a notice of deportation²¹⁹ and his student status was revoked. That notice, alleging that he had entered the country illegally because he was involved with drug activity in Colombia, relied on the same grounds as the extradition warrant.²²⁰ The service of the notice appears to have been aimed at insuring that if Tafur was released on the extradition warrant, then removal proceedings under the immigration laws might be instituted.²²¹ This type of strategy has been referred to as “disguised extradition,”²²² and, while it may be legal, it circumvents the

212. A detained person is defined as “any person deprived of personal liberty except as a result of conviction for an offence.” *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 76th plen. mtg., at 298, U.N. Doc. A/Res/43/173 (1988), available at http://www.unhchr.ch/html/menu3/b/h_comp36.htm.

213. *Id.* principle 36.

214. *Id.* principle 8.

215. *Id.*

216. *Id.* principles 39, 11(3).

217. United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, ¶ 85 (1) [hereinafter United Nations Standard Minimum Rules]. The Rules refer to these individuals as “untried prisoners” who “are presumed to be innocent and shall be treated as such.” *Id.* ¶ 84 (1)(2). They are to be kept separate from convicted prisoners and enjoy a substantially different regime, including single celling and different prison garb. *Id.* ¶¶ 85, 86, 88.

218. *Id.* ¶ 2.

219. Notice to Appear at 3, *In re* Tafur-Dominguez (File No. A077 626 394, Case No. PMI0003000060) (INS Mar. 17, 2000) [hereinafter Notice to Appear].

220. 8 U.S.C. § 1229a (2000); Notice to Appear, *supra* note 219, at 3 (reissued Mar. 31, 2000). No date was specified for a hearing, but a detainer was lodged at the jail to ensure that if Tafur were released on the extradition warrant he would be detained for the INS. However, when he released Tafur on bail, the court extracted from the government an agreement not to rearrest Tafur on the INS warrant. The government agreed to this in order to avoid an immediate hearing.

221. 8 U.S.C. § 1251(a)(2) (1988).

222. SHEARER, *supra* note 16, at 78; see also Terry Richard Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT’L L. 294, 333–35 (1987). The

extradition process and deprives the extraditee of certain safeguards.²²³ In the case of Tafur, the facts upon which the INS relied in filing its notice were the ones alleged in the extradition complaint.²²⁴ However, in a removal proceeding the government has the burden of demonstrating its case by clear and convincing evidence.²²⁵ In this case, the government most likely would not have been able to prevail in the removal proceeding once the extradition magistrate found that the government could not meet even the threshold standard of probable cause. So the only real function of the detainer at that stage of the proceedings was to prevent Tafur's release if the extradition magistrate granted bail.²²⁶ However, the court, as a condition of giving the government additional time to secure the requisite documents from Colombia, released Tafur on bail and extracted from the government an agreement not to rearrest him on the immigration matter.²²⁷ Had the court not protected him in this fashion, the extraditee might have been subjected to further incarceration even though the court had found no probable cause to believe that he had engaged in criminal conduct.

E. Probable Cause to Extradite

The Fourth Amendment to the U.S. Constitution provides that "no [w]arrants shall issue, but upon probable cause . . ."²²⁸ As noted earlier, although the government has argued in the past that a traditional showing of probable cause is not required in extradition matters, the courts have ruled that the Fourth Amendment protects all persons from arbitrary arrest, including persons arrested pursuant to a treaty,²²⁹ and that the government must conform its conduct to the requirements of the Constitution when carrying out its treaty obligations.²³⁰ The probable cause issue may arise at two junctures in an extradition case because an extraditee is usually arrested on a provisional warrant. Thus, the court must consider whether probable cause exists for the detention as well as for the actual surrender. While the courts have not developed clear jurisprudence regarding provisional detention, the standards appear relatively relaxed, with the courts accepting facsimile copies of Interpol arrest warrants.²³¹ Whether this practice meets constitutional standards is open to

use of immigration proceedings as an alternative to extradition is one of the devices sometimes used to evade the extradition process. It simplifies matters for both the requesting and asylum state, since formal extradition processes, including a judicial hearing, need not be pursued, and deportation processes contain fewer safeguards for the individual. Countries may use other procedures, such as informal rendition, in which the wanted individual is simply returned to a common border.

223. Rebane, *supra* note 21, at 1671. For example, the dual criminality requirement and the "doctrine of specialty" might be avoided.

224. Complaint, *supra* note 150, at 1-3; Notice (Mar. 17, 2000) at 3 (listing the facts).

225. 8 U.S.C. § 1229a(c)(3)(A) (2000).

226. The INS filed a detainer with the prison so that if Tafur was released on the extradition charge he would continue to be detained on the INS notice. See Hearing (Apr. 13, 2000), *supra* note 162, at 31.

227. Hearing (Apr. 13, 2000), *supra* note 162, at 36-40. After the magistrate denied extradition, the INS warrant was still pending. However, the INS took no immediate action. This left Tafur with the possibility that he might be rearrested at any time. Hearing (May 3, 2000), *supra* note 150, at 76. Several months later, after he requested clarification of his student status, the INS confirmed that he was in status. Letter from M. Frances Holmes, Acting District Director, Immigration and Naturalization Serv., Philadelphia District, to Joseph A. Tate, Attorney for Victor Manuel Tafur (July 22, 2000) (on file with the author) (notice that Tafur's student visa was reinstated). The magistrate stated that he did not want Tafur "whisked out of the country without the due process" to which the court deemed him entitled. Hearing (Apr. 13, 2000), *supra* note 162, at 34. In spite of the judge's efforts Tafur was rearrested and briefly detained after the hearing.

228. U.S. CONST. amend. IV.

229. Reid v. Covert, 354 U.S. 1, 16-18 (1957).

230. Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983).

231. See Russo, *supra* note 191, at 1058.

question, as demonstrated by the Ninth Circuit's decision in *Parretti v. United States*.²³² In the case of Victor Tafur, the government simply alleged that he had withdrawn money from his account and paid it to drug interests—with no supporting detail. While it would certainly not support a warrant application in a domestic criminal case, it is apparently the kind of evidence that is accepted on a regular basis by courts on requests for provisional detention.²³³

At an extradition hearing, probable cause is measured by the federal standard used in preliminary hearings.²³⁴ It is established “when the evidence presented supports a reasonable belief that a fugitive committed the charged offenses.”²³⁵ Thus, probable cause signifies evidence “sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.”²³⁶ As courts have explained:

Probable cause means more than opportunity to commit crime or presence in a particular place. It must be more than surmise or suspicion. There must be some tangible fact or incident which will support a judicial act, something which invokes discrimination of judicial discretion.²³⁷

In Victor Tafur’s case, the Department of Justice, on behalf of the Colombian government, contended that Tafur had helped to finance a drug shipment through the dummy corporation, E.I. Caribe. The evidence to support this charge was supplied by the Colombian prosecutor, not by U.S. sources. The allegations were set forth in Colombian documents that summarized evidence against a number of parties. As for Tafur, the Colombian prosecutor stated that Tafur had drawn a number of checks to two individuals. Some of the checks were endorsed over to other payees,²³⁸ a not uncommon procedure in Colombia,²³⁹ even though Tafur had marked them for deposit only.²⁴⁰ One was then

232. *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997).

233. *See Russo*, *supra* note 191, at 1058.

234. *Sindona v. Grant*, 619 F.2d 167, 175 (2d Cir. 1980). Courts for the most part apply the federal standard for probable cause. *See, e.g., Greci v. Birknes*, 527 F.2d 956, 958 (1st Cir. 1976); *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973); *Republic of France v. Moghadam*, 617 F. Supp. 777 (N.D. Cal. 1985). Some courts have employed applied state law. *See, e.g., In re Shapiro*, 352 F. Supp. 641, 647 (S.D.N.Y. 1973); *United States ex rel. Karadzole v. Artuković*, 170 F. Supp. 383, 388–89 (S.D. Cal. 1959); *Non-Contradiction*, *supra* note 48, at 1303 n.39, 1311 n.72.

235. *In re Extradition of Gunther Lehming*, 951 F. Supp. 505, 514 (D. Del. 1996); *see also In re Marzook*, 924 F. Supp. 565, 579 (S.D.N.Y. 1996).

236. *Coleman*, 477 F.2d at 1202.

237. *Reis v. United States Marshal*, 192 F. Supp. 79, 82 (E.D. Pa. 1961) (quoting *United States v. Johnson*, 292 F. 491, 493 (D. Wash. 1923)). “In order to determine probable cause, a judge must review the evidence presented and make an independent determination that the accused committed the crimes alleged.” *In re Extradition of Gunther Lehming*, 951 F. Supp. at 514. The review is to assure that the magistrate does not “serve merely as a rubber stamp” but actually performs a “‘neutral and detached’ function.” *Aguilar v. Texas*, 378 U.S. 108, 111, (1964). Thus, a judge “should not accept without question the complainant’s mere conclusion that the person whose arrest is sought has committed a crime.” *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

238. Investigation of the Legal Status of Victor Manuel Tafur-Dominguez at Summary of the Investigation, Delegate Prosecutor’s office to Criminal in and for the Circuit v. José Villeros, Ricardo Estrada et al. (Dec. 31, 1999) (file no. 35575) (official trans.) (on file with author) [hereinafter Investigation of the Legal Status]. According to Colombian law, the actions and responsibilities of the endorser of a check are not imputed to the creator or writer of the check. *See generally* Code of Commerce of Colombia.

239. *See* Decreto 410 of 1971, art. 654 (Mar. 27 1971).

240. Hearing (May 3, 2000), *supra* note 150, at 47. Endorsed checks are sometimes treated as money. Jared Kotler, *Extradition Case Stirs Support in Colombia*, THE INTELLIGENCE RECORD, Apr. 23, 2000, at www.phillyburbs.com/intelligenceerecord/news/news_all/715427.htm.

reindorsed to E.I. Caribe.²⁴¹ The Justice Department was careful not to say that Tafur had directly given money to E.I. Caribe, and no evidence was presented that showed that he had any connection to the company. The Colombian government came forward with no evidence to link Tafur to the illicit activities undertaken by E.I. Caribe.

To bolster the case against Tafur, the Colombian papers identified one of the individuals in the exchange transaction as “prone to crime.”²⁴² The prosecutors described a second individual as someone “engaged in unclear transactions in representation of third parties whom they don’t know.”²⁴³ Thus, the document concludes that “transactions that lack of proper formalities, payment, uncertain loans and drawers and beneficiaries of securities used . . . lead to infer[ring] the intention of hiding the source of origin of the money used.”²⁴⁴

Finally, the documents allege that “[u]p to now, the money transference by TAFUR to E.I. CARIBE had no licit explanation if we do take into account his work,” apparently implying that Tafur had gained the money from illicit activity connected to his position as a government official.²⁴⁵ Illicit enrichment is a charge commonly used against corrupt officials, but that was not the crime with which Tafur was charged and this allegation did not support a finding of probable cause for drug trafficking.²⁴⁶

241. Several checks were reindorsed to an individual and a corporation having connections with E.I. Caribe, although there was no indication that these checks ever reached E.I. Caribe. Amici Memorandum of Law, *supra* note 32, at 8–9. Two other checks wound up in the hands of an individual who used them to purchase an automobile for a third party. *Id.* These are the only allegations in the Colombian papers relating to Tafur. *Id.*

The Colombian prosecutor attempted to draw conclusions that seemed unwarranted from the few facts set forth in the papers. Referring to the purchase by an endorsee of an automobile for a third party, the prosecutors claimed that this showed Tafur’s guilt since “nobody is going to draw checks to buy an expensive MERCEDES BENZ that isn’t registered to his name.” *Id.* The court was being asked to draw the conclusion that because a check drawn by Victor Tafur was eventually used by someone else as partial payment for an automobile for yet a third party, Tafur must be a drug dealer. *See id.* But that check was given to the businessman with whom Tafur exchanged funds, who subsequently endorsed it to a second person, who used it to purchase the car. *See id.* This appears to involve a rather large leap of logic.

242. Investigation of the Legal Status, *supra* note 238, at Findings.

243. *Id.*

244. *Id.*

245. *Id.* In a seeming inconsistency the documents note that the money came from the account of the Colombian Congress, *id.*, and was the pension of Tafur’s father, an assassinated Colombian Senator. Hearing (May 3, 2000), *supra* note 150, at 32–33.

246. Both the crime alleged by the government, and the crime with which Victor Tafur would likely have been charged if extradited, fail the required test of “dual criminality.” Amici Memorandum of Law, *supra* note 32, at 19. The Extradition Treaty between the United States and the Republic of Colombia explicitly applies to “(a) Offenses described in the Appendix to this Treaty which are *punishable under the laws of both Contracting Parties*; or (b) Offenses, whether listed in the Appendix to this Treaty or not, provided they are *punishable under the Federal laws of the United States and the laws of the Republic of Colombia*.” U.S.-Colombia Extradition Treaty, *supra* note 43, art. 2, ¶ 1 (emphasis added).

To satisfy the dual criminality requirement, the treaty offense must be punishable in both the asylum country and the requesting country. *Id.*; United States v. Bogue, No. 98-572-M, 1998 U.S. Dist. LEXIS 16784 (E.D. Pa. 1998). There is no crime of illicit enrichment in the United States, and could never be one because it imposes an unconstitutional necessity for self-incrimination. *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT’L L. 243, 281–82 (1998). In fact, the main objection of the United States to the adoption of the currently proposed Inter-American Convention Against Corruption, a treaty that mandates that the parties adopt the crime of illicit enrichment, is the fact that the crime would be unconstitutional. *See id.* “The U.S. delay in signing the Convention has been justified by the possible inconsistency of this latter requirement with the constitutional protection in the U.S. against self-incrimination.” Ibrahim F.I. Shihata, *Corruption—A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT’L L. 451, 471 (1996).

Under the law of Colombia, a person charged with illicit enrichment bears the burden of proof of showing that the money in question was the product of legal activities. The shift in the burden of proof in Colombia is effected

Exchange transactions of the type in which Tafur engaged are routine in Colombia, and because of the potential for money laundering, he took pains to find reputable parties to deal with in making the exchange and he marked the checks to prohibit reindorsement. Although some of the procedures may seem odd by U.S. banking standards, they were commonplace and fully legal in Colombia. And most crucially, all of the pension money was promptly transferred to his mother's bank, as is documented by bank records. The money could not, therefore, have been used to finance the drug deal.

Nonetheless, the Colombian prosecutors issued an arrest warrant for Tafur based on no more than the reindorsed checks and their desire to investigate further. While it may be acceptable in Colombia to arrest for investigation, it does not pass constitutional muster in the United States. Nor does it meet the requirements of the U.S.-Colombia Extradition Treaty, which provides that the standards of the requested state are to be applied, which in the United States means probable cause must be found.²⁴⁷

Tafur's situation was analogous to that examined by the court in *In re Extradition of Gunther Lehming*, who was accused of bankruptcy fraud and related offenses.²⁴⁸ Lehming challenged the government's evidence, arguing that it did not show that he acted with the requisite fraudulent intent, and that it did not implicate him personally in the criminal activity.²⁴⁹ The warrant of arrest advised that Lehming "is strongly suspected of committing these offenses, on the grounds of several witness statements . . . as well as on the basis of documents (accounting records, invoices, and other)."²⁵⁰ The court found that this warrant did not provide sufficient factual detail to allow the court to conclude that probable cause existed.²⁵¹ Further, an affidavit submitted by the trustee in bankruptcy, a report prepared by the trustee, contracts, and other documents examined by the court failed to support probable cause.²⁵² The court found that it had not been "provided sufficient factual information regarding the subject matter of the contracts, the method by which liabilities were fictitiously increased or the benefit derived therefrom."²⁵³ Further, "Lehming's alleged involvement, knowledge, and/or acquiescence is not discussed."²⁵⁴ The court acknowledged that bankruptcy fraud is commonly proven by circumstantial evidence, but that "the [g]overnment has not provided sufficient factual evidence supporting" its claim.²⁵⁵

notwithstanding provisions in the Colombian Constitution that "[e]very person is presumed innocent until he has been proven guilty by a court of justice." CONST. COLOM. art. 29. No such exception would be permissible under the U.S. Constitution because the Fifth Amendment explicitly protects an individual from self-incrimination and has been interpreted to include a presumption of innocence. U.S. CONST. amend. V; see *Quinn v. United States*, 349 U.S. 155, 161-62 (1955).

247. See generally *In re Extradition of Gunther Lehming*, 951 F. Supp. 505, 513-15 (D. Del. 1996). The United States has an obligation to ensure that when it seeks an arrest warrant on behalf of a foreign nation, the warrant application meets constitutional standards. See *Paretti v. United States*, 112 F.3d 1363 (9th Cir. 1997). Regarding Tafur, the prosecutors recognized the insufficiency of the allegations and asked Colombia for additional information. Hearing (Apr. 13, 2000), *supra* note 162, at 38. Justice officials even stated publicly that they were not vouching for the Colombian allegations. Waller, *supra* note 148 at 18. They nonetheless went forward with the extradition.

248. *In re Extradition of Gunther Lehming*, 951 F. Supp. 510.

249. *Id.* at 508, 515.

250. *Id.* at 516.

251. *Id.*

252. *Id.* at 517.

253. *Id.* at 518.

254. *In re Extradition of Gunther Lehming*, 951 F. Supp. 505, 518 (D. Del. 1996).

255. *Id.* at 518. In situations less extreme than the situation here, federal courts have declined to extradite. A federal Magistrate in Newark, New Jersey, declined to extradite former Mexican Attorney General Mario Ruiz Massieu, on the grounds that no probable cause existed since the witness affidavits from Mexico were "incredible and unreliable." *Ruiz-Massieu v. Reno*, 915 F. Supp. 681, 688 (D.N.J. 1996), *rev'd*, *Ruiz-Massieu v. Reno*, 91 F.3d 416, 418 (3d Cir. 1996). The decision is unreported but chronicled in later *habeas corpus* proceedings. *Id.*;

In Tafur's case, the government's arrest warrant contained only bald allegations of his culpability, unsupported by actual evidence. The government presented no affidavits, deposition testimony, or other competent evidence that could provide the court with a "substantial basis for . . . conclud[ing]" that probable cause exists.²⁵⁶ Read most generously, the facts alleged in the complaint showed that Victor Tafur withdrew the Colombian government's pension money from his bank account in pesos, wrote checks to exchange those pesos for dollars, and that some of the checks, after being reindorsed, wound up related to the account of a corporation that apparently was involved in illicit drug activity. That alone would not demonstrate any culpability on the part of Tafur.

Moreover, the explanatory evidence offered by Tafur demonstrated that the elements of a *prima facie* case were wanting.²⁵⁷ Tafur wrote checks marked to prevent endorsement, and all of the money he removed from his account was transferred to that of his mother. The checks were reindorsed by third parties unbeknownst to Tafur and in spite of his precautions. Thus, the case presented against Victor Tafur was substantially less than that found wanting by the court in *Lehming*. The magistrate judge agreed with the assertions on Tafur's behalf and found no probable cause.

F. Evidentiary Issues

As indicated previously, an extradition hearing is typically likened to a preliminary hearing in a domestic criminal case, where the primary function is to determine whether sufficient evidence exists to hold a defendant for trial.²⁵⁸ While this analogy may be superficially satisfying, an extradition hearing provides little of the protections secured to an individual at a preliminary examination in a criminal case. In a normal criminal case, federal law requires a prompt determination of probable cause if the accused is in custody,²⁵⁹ the accused is entitled to a certain amount of discovery,²⁶⁰ and most constitutional protections apply.²⁶¹ This differs substantially from extradition proceedings, where discovery is usually not available,²⁶² the right to confront and examine witnesses is severely limited,²⁶³ and the standard of probable cause may be less stringent.²⁶⁴

Magistrates, in determining probable cause in an extradition hearing, typically recognize that they may exercise some discretion in the amount of evidence they receive,²⁶⁵

see also *Borderless Crime*, *supra* note 138, at 1619; R.L. Jackson & J. Darling, *US Judge Won't Extradite Former Mexico Official*, L.A. TIMES, June 23, 1995, at A1.

256. *Jones v. United States*, 362 U.S. 257, 271 (1960); *see also* *Parretti v. United States*, 122 F.3d 758, 799 (9th Cir. 1997).

257. *See In re Okeke*, No. 96-7019P-01, 1996 WL 622213 (D.N.J. Sept. 5, 1996).

258. *Merino v. United States Marshall*, 326 F.2d 5, 12 (9th Cir. 1963).

259. *See* cases cited *supra* note 67 and accompanying text; *see also* FED R. CRIM. P. 5(c).

260. *See* FED. R. CRIM. P. 5.1(a).

261. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 1, at 702-61.

262. When Victor Tafur's defense counsel sought discovery from the government it was refused on the grounds that there is no statutory or treaty basis for discovery in extradition matters. Letter from Virgil B. Walker, Assistant U.S. Attorney, to Joseph A. Tate (Apr. 5, 2000) (refusing discovery) (on file with the author).

263. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 1, at 708.

264. "Extradition law [18 U.S.C. § 3190 (1988)] permits the requesting country to introduce evidence ex parte in the requesting country, while those same ex parte opportunities are unavailable to the accused. Additionally, the requesting country need not set forth the crime for which the fugitive was indicted with any particularity or produce an authentic copy of the arrest warrant." *Bifani*, *supra* note 37, at 643 (citing *Grin v. Shine*, 187 U.S. 181 (1902)).

265. *Charlton v. Kelly*, 229 U.S. 447, 461 (1913). Admissibility of evidence presented by the government is governed specifically by 18 U.S.C. § 3190 (1995).

but deem such discretion limited in its nature and scope. They hold that an individual facing extradition is permitted to introduce evidence that refutes the finding of probable cause²⁶⁶ by offering evidence that explains the circumstances before the court or clarifies the government's proof.²⁶⁷ But evidence generally may not be offered to contradict testimony, challenge the credibility of witnesses, or establish a defense to the crimes alleged.²⁶⁸ This is referred to as the "rule of non-contradiction."²⁶⁹ Indeed, some courts may go so far as to hold that the affidavits or other testimony of government witnesses must be taken as true in the extradition process.²⁷⁰

The rationale for the rule of non-contradiction is straightforward, since the extradition hearing is not intended to be a trial on the merits, but merely a hearing on the existence of probable cause.²⁷¹ The requesting state generally need not provide any more than record evidence, since to do otherwise would present severe logistical problems and undercut the whole purpose of having an extradition treaty.²⁷² Requiring the requesting nation to present a substantial amount of evidence could hamper efforts to return individuals to the requesting state to face criminal charges. Moreover, the asylum state, acting on behalf of the requesting state, wishes to see that the hearing proceeds expeditiously, since it is in its own self-interest to be cooperative to ensure that the cooperation will be reciprocal.

Under the rule of non-contradiction, however, a court may admit evidence that might explain ambiguities or doubtful elements of the government's *prima facie* case.²⁷³ The precise boundary is murky between evidence that contradicts the government's proof and that which merely explains it. This rule, if strictly applied, can lead to oppressive and unfair results because even the most incredible government evidence and affiants must be accepted, while seemingly credible evidence put forth by the accused may have to be rejected. As a result, the courts have sometimes stretched the limits in finding evidence explanatory rather than contradictory²⁷⁴ and recognized that the hearing must comport with due process.²⁷⁵ Thus, some courts have created a caveat to the rule, under which "evidence

266. *Collins v. Loisel*, 42 U.S. 309, 316 (1922); *Charlton*, 229 U.S. at 461; *In re Extradition of Gunther Lehming*, 951 F. Supp. 505, 514 (D. Del. 1996); *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978); *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883).

267. *Ntakirutimana v. Reno*, 184 F.3d 419, 429 (5th Cir. 1999).

268. *Sindona*, 450 F. Supp. at 685.

269. See *Non-Contradiction*, *supra* note 48.

270. See *In re Mahmoud Abed Atta*, 706 F. Supp. 1032, 1050-51 (E.D.N.Y. 1989); *In re Pineda Lara*, No. 97 Cr. Misc. 1 (THK), 1998 U.S. Dist. LEXIS 1777, at 25 (S.D.N.Y. Feb. 18, 1998); see also *Non-Contradiction*, *supra* note 48, at 1299 n.20.

271. *Collins*, 262 U.S. 426; *Charlton*, 229 U.S. at 461; *In re Wadge*, 15 F. 864 (S.D.N.Y. 1883).

272. See *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *In re Orteiza y Cortes*, 136 U.S. 330, 337 (1890); *In re Wadge*, 15 F. 864; see also *Non-Contradiction*, *supra* note 48, at 1301 n.27.

273. *In re Okeke*, No. 96-7019P-01, 1996 WL 622213 (D.N.J. Sept. 5, 1996).

274. See, e.g., *In re Gonzalez*, 52 F. Supp. 2d 725 (W.D. La. 1999). Alibi evidence has typically been found to be contradictory rather than explanatory. Gonzalez was the first case to go so far as to admit this type of evidence. See also *Non-Contradiction*, *supra* note 48, at 1299.

275. *United States v. Kin-Hong*, 110 F.3d 103, 106 (1st Cir. 1997); *United States v. Manzi*, 888 F.2d 204, 206 (1st Cir. 1989); see also *Non-Contradiction*, *supra* note 48, at 1300 n.23. One author has pointed out the problems that arise when the line between facts and conclusions is blurred. Under the inquisitorial system in many civil code countries, the investigating judicial official may compel testimony and the production of documents, and may issue a charge or warrant. Most U.S. courts decline to accept the conclusions of the official as "facts" which may not be contradicted. *Non-Contradiction*, *supra* note 48, at 1304-05 & nn.42-45.

that would completely negate probable cause,²⁷⁶ or that would obliterate “the requisite elements” has been held admissible.²⁷⁷

In the case of Victor Tafur, the rule of non-contradiction posed problems for the defense. At the hearing the government introduced the documents supplied by Colombia and argued that they demonstrated probable cause sufficient to believe that Tafur had helped finance the drug shipment seized in Cartagena. The government’s evidence consisted of the checks that had been written by Tafur to a Colombian businessman, Rafael McCausland, and one of his associates. Tafur had been put in touch with the businessman by the president of a stock exchange house, Rafael Piedrahita; McCausland was his client. Piedrahita took the checks that Tafur wrote and held them until wire confirmation was received that the money had been transferred to Tafur’s mother’s account. He then turned them over to a messenger sent to his office by McCausland.²⁷⁸ However, as part of the government’s extradition package, an affidavit from Piedrahita was included, averring that he did not know whether the transaction had been completed.²⁷⁹ The government insisted that the affidavit showed that Tafur’s story was not the truth and that he was in league with the drug traffickers.

In challenging the government’s case, Tafur took the stand and testified to the events that led to the writing and transmitting of the checks. In so doing, his counsel introduced copies of bank statements and faxes from the bank and from Piedrahita to explain how the transaction occurred and identify the parties involved. Problems arose, however, when Tafur’s counsel attempted to introduce an affidavit from Piedrahita made subsequent to the one submitted by the government; this statement went further in concurring with Tafur’s description of the facts and acknowledged that Piedrahita had, in fact, given Tafur’s checks to McCausland’s messenger.²⁸⁰ At that point, the government objected, and the judge ruled that the affidavit was contradictory, rather than explanatory and refused to admit it.²⁸¹ But the two affidavits were by the same individual and, if one of the primary reasons for rejecting “contradictory evidence” is the desire to avoid issues of credibility,²⁸² then it seems that affidavits by the same individual may not raise that issue to the same extent as testimony by different witnesses.²⁸³ In fact, courts have sometimes allowed the introduction of recantations by witnesses,²⁸⁴ which would seem to carry the admission of “contradictory” evidence one step further than the amplified statement proffered by Tafur.

276. *Sandhu v. Burke*, 97 Civ. 4608, 2000 U.S. Dist. LEXIS 3584, at *20 (S.D.N.Y. Feb. 7, 2000). One commentator has argued that this standard originated with a misreading of language in *In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1973), and that the court in *Sindona* did not intend to expand “explanatory” evidence to include contradictory evidence which negates probable cause. *Non-Contradiction*, *supra* note 48, at 1316.

277. See *In re Okeke*, 1996 WL 622213 at *11. Semmelman makes a similar argument, that the court did not intend to expand the accused’s right to present evidence, regarding the “obliterate” standard. *Non-Contradiction*, *supra* note 48, at 1315.

278. Hearing (May 3, 2000), *supra* note 150, at 40–42, 53.

279. *Id.* at 52–53.

280. *Id.* at 50.

281. *Id.* at 52–53.

282. *Id.* at 50.

283. There is, admittedly, a discrepancy between the first and second affidavits, perhaps explained by Piedrahita’s initial desire to not appear too involved with McCausland. Piedrahita’s second affidavit is more forthcoming in describing the transaction. It is not surprising that he might choose to be less than forthcoming in a situation where he might himself be accused of participating in the drug scheme, especially in Colombia, where anyone with even a small amount of knowledge concerning a narcotics scheme may be in danger and subject to reprisals. See, e.g., COLOMBIA: THE RIGHT TO JUSTICE, *supra* note 172.

284. See, e.g., *Maguna-Celaya v. Haro*, 19 F. Supp. 2d 1337 (S.D. Fla. 1998); *In re Extradition of Contreras*, 800 F. Supp. 1462 (S.D. Tex. 1992); *Republic of France v. Moghadam*, F. Supp. 777 (N.D. Cal. 1985) (In all three cases, the courts denied extradition finding the recantation of witnesses more credible than their original statements).

In this case the magistrate's rejection of the defense's affidavit was not determinative, since the judge appeared to base his ruling solely on the failure of the government's evidence to demonstrate probable cause. That ruling did, nevertheless, depend on the introduction of evidence by Tafur showing that all of the money had been received in his mother's account shortly after he made the transfer. None of the defense records were certified, and the government argued strenuously that they were fraudulent.²⁸⁵ Nonetheless, the court considered them explanatory, rather than contradictory. However, in a closer case, the exclusion of the affidavit could well have made a difference, and the rule of non-contradiction would have worked to the severe disadvantage of the extraditee.

The rule of non-contradiction serves a practical purpose; however, if strictly applied, the rule can deny an individual the opportunity to provide evidence to negate probable cause. The result may be the continuing incarceration of the accused, transfer as a prisoner in custody to the requesting nation, and lengthy incarceration awaiting trial. Such treatment runs counter to principles of human rights that emphasize individual liberty and freedom from unjust detention. It is especially problematic in this age of rapid communication, which expedites the transfer of information and could enable prompt verification of at least certain types of evidence.²⁸⁶

G. *The Rule of Non-inquiry*

Traditionally, federal courts have been urged to follow the "rule of non-inquiry" regarding the conditions in the state that seeks to extradite a person from the United States.²⁸⁷ This means that the court does not inquire into the human rights conditions and the quality of justice in the requesting nation, deeming both of those issues a political and foreign policy matter for the secretary of state.²⁸⁸ Prior to World War II, this rule of non-inquiry had some justification in concepts of comity and deference to the sovereignty of other states. However, the establishment of the international law of human rights after World War II fundamentally changed the basis for that doctrine, and modern legal scholars have argued that the policy reasons that once supported the extreme deference to an extradition request no longer justify an unreasoned application of the rule of non-inquiry.²⁸⁹

Human rights laws apply to all UN Member States.²⁹⁰ Accordingly, courts have a duty to inquire into the implied and actual threats to an accused's life if a state requests to extradite that individual. At least some courts have found a basis for this conclusion in concepts of due process under the U.S. Constitution.²⁹¹ The Federal Court of Appeals for the Second Circuit, for example, declined to extradite individuals whom Mexico sought,

285. Hearing (May 3, 2000), *supra* note 150, at 14–16.

286. The magistrate in the Tafur case noted that the U.S.-Colombia Extradition Treaty was written in 1979 and that conditions had changed. He questioned the need for a sixty-day period in the "information age." Hearing (Apr. 13, 2000), *supra* note 162, at 25.

287. This rule originated early in the last century in the case of *Neely v. Henkel*, 180 U.S. 109 (1901).

288. See Shea, *supra* note 142, at 93; *Non-Inquiry*, *supra* note 13, at 752–54.

289. See David B. Sullivan, *Abandoning the Rule of Non-Inquiry in International Extradition*, 15 HASTINGS INT'L & COMP. L. REV. 111 (1999); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991); see also *Non-Inquiry*, *supra* note 13. Wilson questioned the objectivity of the U.S. government when it both prosecutes the extradition case on behalf of the requesting state, then must pass judgment on its observance of human rights norms. *Id.* at 755. See generally Shea, *supra* note 142.

290. Mitchell A. Meyers, Note & Comment, *A Defense of Unilateral or Multi-Lateral Intervention Where a Violation of International Human Rights Law by a State Constitutes an Implied Waiver of Sovereignty*, 3 ILSA J. INT'L & COMP. L. 895, 901 (1997).

291. See, e.g., *In re Burt*, 737 F.2d 1477, 1484–85 (7th Cir. 1984); *Nicosia v. Wall*, 442 F.2d 1005, 1006–07 (5th Cir. 1971); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

reasoning that conditions in Mexico violated basic human rights to such an extent that their due process would be denied.²⁹² Similarly, the Fourth Circuit held that a federal court may not extradite a person when it would violate his constitutional rights to do so,²⁹³ while the Seventh Circuit ruled that extradition may not violate the fundamental values of “fair play and decency” embodied in constitutional due process of law.²⁹⁴ This concern for human rights and due process is not a recent development; as far back as forty years ago, the Second Circuit asserted in *Gallina v. Fraser* that “[w]e 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 [of the rule of non-inquiry] set out above.”²⁹⁵

The United States has recognized that, in some circumstances, it has an obligation to inquire into the treatment which an individual will receive if transferred to another nation. Article 9 of the 1979 International Convention Against the Taking of Hostages (Hostage Convention),²⁹⁶ ratified by the United States in 1984, requires that extradition:

shall not be granted if the requested State Party has substantial grounds for believing: (a) That the request . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or (b) That the person’s position may be prejudiced (i) for any of the reasons mentioned in subparagraph (a).²⁹⁷

In the case of Colombia, the dangers facing an individual returned to that country are well documented. Colombia is a desperately troubled nation. As the oldest democracy in Latin America, it has been battered by four decades of civil strife and political violence, which have been fueled by vast amounts of drug money.²⁹⁸ The Andean Commission of Jurists has found that political violence and common crimes have been aggravated by the guerrilla movement, drug trafficking, and terrorism.²⁹⁹ The violence escalates, with left-wing guerrillas, who are funded by the drug trade, battling right-wing paramilitary groups, who are also supported by drug interests and by some of the Colombian armed forces.³⁰⁰ Both factions engage in kidnapping and extortion.³⁰¹ There were several thousand reported kidnappings each year, and the murder rate is ten times that of the United States.³⁰² Paid

292. *Rosado v. Civiletti*, 621 F.2d 1179, 1182 (2d Cir. 1980).

293. *Plaster v. United States*, 720 F.2d 340 (4th Cir. 1983).

294. *See In re Burt*, 737 F.2d at 1482.

295. *Gallina*, 278 F.2d at 79. One commentator has suggested that “the [non-inquiry] practice is sufficiently uneven to cast doubt as to its existence.” Quigley, *supra* note 42, at 438; *see* M. Cherif Bassouni, *Extradition Reform Legislation in the United States: 1981–1983*, 17 AKRON L. REV. 495, 571 (1984).

296. *See* International Convention Against the Taking of Hostages, Dec. 4, 1979, art. 9, 18 I.L.M. 1456.

297. *Id.*; *see also Non-Inquiry*, *supra* note 13, at 761–62.

298. *See* COLOMBIA: THE RIGHT TO JUSTICE, *supra* note 172, at 1, 21.

299. *Id.* at 16–31.

300. The guerrilla forces number as many as 17,000 and control substantial areas of Colombia. They are as well, or better, equipped than the military, with helicopters and probably surface-to-air missiles. Their war chest is in the hundreds of millions of dollars. *See* 1999 COUNTRY REPORT, *supra* note 156. Added to that, Colombia suffers from an unemployment rate of as high as twenty percent, and the country is in the throes of the worst recession in seventy years. *Id.*; Juan Forero, *Europe’s Aid Plan for Colombia Falls Short of Drug War’s Goals*, N.Y. TIMES, Oct. 25, 2000, at A12. To top it off, corruption abounds. *See generally* Wellstone, *supra* note 156, at A31. The country’s last president, Ernesto Samper, was accused of taking campaign contributions from narco-traffickers. Esquirol, *supra* note 156, at 31–32. All of this has resulted in an exodus from the country of hundreds of thousands of Colombians, from all social and economic strata. *See generally* Wellstone, *supra* note 156, at A31.

301. *See* Wellstone, *supra* note 156, at A31; 1999 COUNTRY REPORT, *supra* note 156, at 21–24.

302. *See id.*

assassins are common, and in Tafur's home of Cali, a third of the murders for which there was information were by paid killers.³⁰³ The paramilitary forces, which are often sanctioned by the army,³⁰⁴ and other groups are accused of gross human rights violations by Human Rights Watch, a non-governmental organization that monitors human rights issues.³⁰⁵ The United Nations High Commissioner for Human Rights reports that the paramilitaries' primary method of operation, indeed their military strategy, is the killing of defenseless civilians.³⁰⁶

The groups linked to drug trafficking are extremely powerful and have been responsible for the murders of prosecutors and judges investigating their activities, government ministers, prominent journalists, and others.³⁰⁷ The U.S. Department of State's 1999 Country Report on Human Rights Practices for Colombia, in forty-five excruciatingly detailed pages, sets forth innumerable instances of political and other extrajudicial killings, denials of fair public trials and other individual rights, and numerous other human rights abuses.³⁰⁸ The report noted that, although there is an independent civilian judicial system, judges, witnesses, and prosecutors are commonly bribed or intimidated.³⁰⁹ According to human rights groups, the courts violate individuals' fundamental rights to due process and may deny the right to a public trial.³¹⁰ According to a scholar from the Lawyers Committee for Human Rights, defendants are held without formal charges for an average of fourteen months.³¹¹ In 1995, the UN Committee Against Torture reviewed Colombia's efforts to bring itself in line with the Hostage Convention, stating that it recognized that a "climate of widespread violence" provoked by insurgents, drug-traffickers[,] and armed civilian groups" kept Colombia from fully implementing the Convention.³¹² The Committee also noted problems with the judicial system and widespread impunity from prosecution on the part of those responsible for torture and other inhumane treatment.³¹³

In the "faceless courts," the prosecutors have many procedural advantages and can make the task of defending an accused arduous. Anonymous informants are common, and an individual may be arrested and held for years while the prosecutor investigates the charges.³¹⁴ The accused may not be fully informed of the charges, the allegations may be changed as the process continues, and during the whole procedure attorneys for the accused may be kept in the dark. They may have to attend repeated depositions of witnesses, if they receive notice, but may have no opportunity to cross-examine those deposed.³¹⁵ One scholar, who is familiar with the system, observed that the prosecutors have supplanted judges and that the term "judicial" refers to the prosecutor.³¹⁶ The trial phase is largely a

303. See COLOMBIA: THE RIGHT TO JUSTICE, *supra* note 172, at 133-34.

304. See Juan Forero, *Rightist Squads in Colombia Beating the Rebels*, N.Y. TIMES, Dec. 5, 2000, at A14.

305. HUMAN RIGHTS WATCH, COLOMBIA'S KILLER NETWORKS, THE MILITARY-PARAMILITARY PARTNERSHIP AND THE UNITED STATES (1996).

306. *High Commissioner's Report*, *supra* note 174, ¶ 88.

307. *Id.* at 133-34. In Cali, Victor Tafur's home, according to the Commission to study violence, "of 120 homicides for which information was available, 44 (34%) were committed by paid assassins." COLOMBIA: THE RIGHT TO JUSTICE, *supra* note 172, at 133-34.

308. 1999 COUNTRY REPORT, *supra* note 156. The annual country reports prepared by the State Department are thorough and detailed compilations of human rights and country conditions. They are generally considered a model of accuracy and fairness. Wilson, *Non-Inquiry*, *supra* note 13, at 755.

309. 1999 COUNTRY REPORT, *supra* note 156, at 28.

310. *Id.* at 4.

311. Weiner, *supra* note 173, at 36.

312. Press Release HR/4245, Committee Against Torture, Committee Against Torture Concludes Review of Colombia's Report (Nov. 24, 1995), at <http://www.un.org/News/Press/docs/1995/19951124.hr4245.html> (last visited Feb. 8, 2002) (on file with author).

313. *Id.*

314. See Weiner, *supra* note 173, at 31-32.

315. *Id.*

316. *Id.* at 33.

paper-shuffling exercise, so that “prosecutors are the judges, and the real judges are largely window dressing.”³¹⁷

In the case of Victor Tafur, it is likely that if he were returned to Colombia, his life would be in danger. Tafur’s father was threatened with death for his role in presenting the U.S.-Colombia Extradition Treaty to the Senate of Colombia for ratification and was later murdered. The family was threatened if it tried to pursue an investigation into the murder, and Tafur lived under armed guard. Tafur, who subsequently worked in a Colombian program to eliminate drug crops, became unwittingly enmeshed in a drug-related money-laundering scheme. There were subsequent threats, and the Justice Department acknowledged in Tafur’s extradition proceedings that at least a dozen people connected to the scheme had been murdered.³¹⁸ The ability of the Colombian government to protect Tafur should he be returned to that country is in serious question.³¹⁹

Clearly, the justice system in Colombia is reeling from the political turmoil and violence.³²⁰ Moreover, political considerations may have affected the Colombian government’s decision to seek Tafur’s extradition. At the time of Tafur’s arrest, the U.S. Congress was considering major funding to assist the government of Colombia with combating narcotics trafficking, and both the U.S. government and that of Colombia were publicly highlighting the severity of the narcotics trafficking problems and the efforts being made to address them.³²¹ Moreover, Tafur’s case is complicated by the political alignments involved. Under Colombian law, the special prosecutor is designed to be an independent official, free of the executive branch, in somewhat the same fashion as independent prosecutors under the U.S. system.³²² However, parallels with U.S. law are not complete.

317. *Id.*

318. Hearing (Apr. 13, 2000), *supra* note 162, at 17–18.

319. In addition to being potentially subjected to corrupt prosecutors and judicial officials, Tafur would undoubtedly face imprisonment if returned to Colombia. Prisons in Colombia are overcrowded and dangerous, and prison guards and officials often are corrupt. 1999 COUNTRY REPORT, *supra* note 156. Due to all these factors, it certainly appears that the threat to his life would be substantial.

320. The extradition treaty, which Victor Tafur’s father helped to pass twenty years ago in order to extradite Colombians to face charges in the United States, led to social and political tension. See Nagle, *supra* note 152, at 851 n.1, 865–67. A bloody confrontation with drug traffickers (the “Extraditables”), who rightly feared their surrender to the American authorities, ensued. See MARQUEZ, *supra* note 152, at 22. In addition, bloody confrontations between leftist guerrillas and government forces left many dead. They culminated in the 1985 seizure of the Palace of Justice by a guerrilla faction, during which nine magistrates of the Supreme Court and its president were killed. See *Colombian Drug Trafficking and Control: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong. 1 (1987) (statement of the Honorable Charles B. Rangel). As a consequence, the drug prosecutors were given anonymity, becoming “faceless.” 1999 COUNTRY REPORT, *supra* note 156; Nagle, *supra* note 152, at 131; Esquirol, *supra* note 156, at 36 n.56; Nagle, *supra* note 152, at 867. The bribery or intimidation of judges and prosecutors has been commonplace. See generally *id.* at 863–65; Kavaz, *supra* note 32, at 492. The faceless courts were subject to serious abuse since everyone but the accused was anonymous and the courts were closed to the public. For a description of the courts, see Weiner, *supra* note 173. Although the system has recently been modified, see *High Commissioner’s Report*, *supra* note 174, ¶ 223, when Tafur’s sister was called to give testimony under oath to the prosecutors, she testified to a screen and through a microphone system.

321. See Eric Pianin & Helen Dewar, *GOP, White House Clear Hurdle on Colombia Involvement*, WASH. POST, June 28, 2000, at A4, available at LEXIS, General News; Alan Fram, *Kosovo Emergency Bill Worked On*, Associated Press, June 27, 2000, available at LEXIS, Wires; Ariana Huffington, *Colombia Chopper Wars*, Ariana Online (June 26, 2000), at www.arianaonline.com/columns/files/062600.html (on file with author). At the time of Victor Tafur’s arrest, Congress was considering passage of the Military Construction Appropriations Act, 2001: Fiscal Year 2000 Supplemental Appropriations. It was later signed into law by President Clinton on July 13, 2000. Military Construction Appropriations Act, 2001: Fiscal Year 2000 Supplemental Appropriations, Pub. L. No. 106-246, 2000 U.S.C.C.A.N. (114 Stat. 511) 435.

322. 1999 COUNTRY REPORT, *supra* note 156.

In the United States, special prosecutors are selected by a panel of three federal judges.³²³ In Colombia, the special prosecutor is chosen by the Colombian Supreme Court from three candidates proposed by the president.³²⁴ In Tafur's case, the special prosecutor was of a different party than both the president of Colombia and Tafur and had strong political ties to the previous president.³²⁵ Given those facts, the possibility emerges that the treatment of Tafur may have been less than balanced.

Certainly, the strong possibility exists that if Tafur were returned to Colombia, his life would be in jeopardy and the government would likely be unable to protect him.³²⁶ To return him under such conditions would constitute a denial of due process³²⁷ and a violation of human rights norms. But even in light of such strong evidence, the extradition magistrate refused to look behind the extradition request and consider the circumstances that might have fostered it or the conditions that Tafur would face if returned to Colombia. The court relied instead on the "rule of non-inquiry," finding that such considerations were for the executive, not the judiciary.³²⁸

H. Human Rights Law and the Tafur Extradition Proceeding

As noted earlier, human rights law embodied in ratified treaties is a part of the law of the land under the Constitution of the United States; furthermore, human rights law is superior to, and controlling over, extradition treaties under public international law. But even if a court is not bound by international law,³²⁹ it can look to those precepts when determining whether procedures are fundamentally fair and just.³³⁰ When examined in light

323. 28 U.S.C. § 49 (2000).

324. 1999 COUNTRY REPORT, *supra* note 156.

325. The former president, Ernesto Samper, was accused of taking money from narcotraffickers to finance his 1994 campaign for president. Members of his administration were convicted and imprisoned, and Samper was impeached, but not convicted. The United States nevertheless withdrew his visa. Esquirol, *supra* note 156, at 31–32.

326. Based on these facts Tafur sought asylum in the United States on May 10, 2000. Application for Asylum and Withholding of Removal, *In re* Tafur-Dominguez (File No. A077 626 394) (INS May 10, 2000). As of January 2002, the INS had not rendered a decision.

327. Even if Tafur's life somehow could have been protected upon his extradition, a real punishment would nonetheless have been inflicted simply by the fact of extradition. Regardless of whether he were later exonerated in Colombia, it is probable that the Immigration and Naturalization Service would deny Tafur the opportunity to return to the United States to continue his post-graduate studies because he had been arrested and extradited. Tafur would have lost his year of study of environmental law, and his tuition and dormitory fees. His attempt to build a new career for himself in environmental law would have been frustrated. Extradition in this case would not merely be doing Colombia's bidding, but would be extracting a significant penalty from a person presumed by law to be innocent.

The *amici* proposed "one way to accommodate the need of the Colombian government's Public Prosecutor to investigate allegations against Victor Tafur according to its national procedures, while avoiding irreparable harm to his human rights, and the infliction of extra-judicial penalties, would be to release Victor Tafur with the understanding that he would agree to submit to interrogation by the Colombian Special Prosecutor, at the Embassy of the Republic of Colombia in Washington, D.C., or at the Mission of Republic of Colombia at the United Nations headquarters in New York City, or even by video [sic] tele-conference. Such buildings are Colombia territories, and . . . the Special Prosecutor's investigators . . . would be able to conduct their examination securely within Colombian territory." *Amici Memorandum of Law*, *supra* note 32, at 24–25.

328. Hearing (Apr. 13, 2000), *supra* note 162, at 19.

329. Some courts have found customary international law controlling. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981). Others have refused to apply it when it conflicted with a domestic statute. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986).

330. Courts have recognized the effect that evolving international human rights norms can have in shaping our own standards of due process. In considering the question of indeterminate detention of an alien without bail, the court in *Caballero v. Caplinger*, 914 F. Supp. 1374, 1379 (E.D. La. 1996), looked to international documents such as the Universal Declaration of Human Rights and the European Convention. Similarly, the court in *Lareau*

of international human rights norms, the provisional detention and limitations on evidence in the Tafur proceeding are problematic. But the rule of non-inquiry is especially troublesome considering the facts of this case. Since Colombia's troubled civil and political conditions are well-known, and the threats to Victor Tafur's life were real and continuing, the extradition court should have followed the human rights precedents of other tribunals outside the federal court system, which deny extradition on facts similar to those in the Tafur case.

Other tribunals have applied human rights norms in situations analogous to these. The state that expels or extradites a person may not violate the human rights of a potential extraditee in doing so. Even if the extraditing state is observing the person's human rights in its own territory, that state may not extradite an individual if it would subject the person to "a real risk" that his human rights would be violated.³³¹

The threatened violation of Victor Tafur's human rights, had he been extradited to Colombia, could have occurred, not because someone influencing the government wanted such an event, but because the government could not prevent it. Murder by drug cartel agents is too often a reality in Colombia. And under international law, the ultimate responsibility lies with the state of Colombia, even if the action is due to private individuals.³³² This principle has been recognized in the United States in non-extradition

v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981), considered the United Nations Standard Minimum Rules, *supra* note 217, when reviewing claims of constitutionally inadequate conditions in a local prison. The court noted that adoption of the standards by international bodies did not necessarily render them applicable in the case before the court, but constituted "an authoritative international statement of basic norms of human dignity The standards embodied in this statement are relevant to the 'canons of decency and fairness which express the notions of justice' embodied in the Due Process Clause." *Lareau*, 507 F. Supp. at 1188 n.9.

331. See *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. H.R. Rep. 1 (1992) (court report) (stating that deportation of a person who faced a "real threat" of inhumane treatment in the receiving state is a violation of human rights, although the court found in this case that there was no "real threat"). In *Maroufidou v. Sweden*, the UN Human Rights Commission upheld Sweden's right to expel a woman to Greece, but Sweden did have to present evidence to the tribunal as to her security in Greece in the face of allegations that she would likely be "harassed and even physically attacked by persons she assumed to be right-wing extremists." *Selected Decisions Under the Optional Protocol*, U.N. ESCOR, Hum. Rts. Comm., 12th Sess., Comm. No. 58/1979, at 80, U.N. Doc. CCPR/C/OP/1 (1990). In *Vijayanathan v. France*, App. Nos. 17550/90 and 17825/91, 15 Eur. H.R. Rep. 62 (1992), France was obliged to enquire into claims that if persons were returned to Sri Lanka, where a civil war was in progress not unlike the situation in Colombia, their human rights would be compromised because of their Tamil ethnic background. Several European courts have refused to extradite persons to the United States when the accused would face the death penalty as a possible punishment. See, e.g., *Venezia v. Ministero di Grazia e Giustizia*, Sentence No. 2232-1996 (Italian Const. Ct., June 27, 1996); *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

332. The Inter-American Court of Human Rights states this clearly in Judgment in *Velasquez Rodriguez Case (Forced Disappearance and Death of Individual in Honduras)*, Case 7920 (July 29, 1988), 28 I.L.M. 291, 326 (1989), in which it explains that a state has an affirmative duty not only to refrain from official acts which might directly violate the extradited individual's human rights, but to exercise due diligence to protect him from the acts of others.

Thus, in principle, any violation of rights recognized by the Convention [International Convention on Human Rights or recognized by the Inter-American Court of Human Rights, *supra*] carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

proceedings. For example, the Board of Immigration Appeals refused to return a woman to Togo because of well-founded fears that she would risk genital mutilation.³³³ The Board held that human rights violations “can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control.”³³⁴

Accordingly, before a federal court can extradite an individual, it must examine the factual and legal assurances that his human rights will be protected. In Victor Tafur’s case, the court should have inquired into the situation in Colombia, which, in light of conditions in that country, would have provided ample evidence for it to conclude that the governments of Colombia and the United States could not guarantee Tafur’s safety if extradited. Since his human rights could not be protected, the court could appropriately have refused to extradite him on those grounds.

I. The Cumulative Effect of the Government’s Actions

The extradition process contains a number of discrete steps, all of which have implications for the rights and liberties of the accused. Similarly, all of the steps may have implications for the government, and it is up to the extraditing judge to assure that a balance is struck by which both the interests of the government and the rights of the accused are protected. By any rational evaluation, extradition is a criminal proceeding, and the standards of domestic criminal proceedings, as well as international human rights precepts, should inform the process. In the United States we have developed strong constitutionally based protections for those accused of crimes, and those norms should not be unquestioningly transgressed because of foreign-policy concerns. Instead, notions of due process and fundamental fairness should always guide the court. While it is tempting (and lawyerly) to review a particular case issue-by-issue and to determine at each isolated step whether an individual’s rights have been violated, in the end the court should also consider the case as a whole to determine whether the process has been both fair and just. When the Tafur case is examined in this light, the lack of fundamental fairness is apparent.

Although Victor Tafur is a foreign national, he is nonetheless entitled to the same constitutional protections as are citizens of the United States.³³⁵ He is presumed innocent and must be treated as such. To be deprived of his liberty or property, probable cause must be demonstrated.³³⁶ In the proceedings against him, he must be given the opportunity to defend himself and, to some extent, the opportunity to challenge the evidence presented by the government.³³⁷ Yet he was arrested and taken into custody on a warrant that did not demonstrate probable cause, and his house and dormitory room were searched pursuant to another warrant, no more supportable than the first. He was denied release (even though the judge questioned the substance of the case) and held for six weeks in a prison with convicted felons. When finally released, he was under house arrest, severely restricted in his movements. His attorney was refused discovery, and at the extradition hearing Tafur was not allowed to produce evidence to challenge that presented by the government. Moreover, Tafur faced the very real prospect of being returned to Colombia as a prisoner, where his legal rights, not to mention his life and safety, could not be assured. Although the

Id. at 326, ¶ 172. Further, the court continues, the “duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts.” *Id.* at 325, ¶ 175.

333. *In re Fauziya Kasinga*, File A73 476 695, Interim Decision 3278, 1996 BIA LEXIS 15, at *19 (Bd. Immig. App., June 13, 1996).

334. *Id.*

335. *U.S. v. Lambers-Camorlinge*, 206 F.3d 882, 889 (9th Cir. 2000).

336. U.S. CONST. amend. IV.

337. *Id.* amend. V.

judge, in the end, declined to issue a certificate of extraditability, Tafur was not, and could not be, made whole for injuries resulting from the flawed extradition process. He suffered imprisonment, impairment of his health, damage to his reputation, and substantial financial costs. The extradition process in Tafur's case resulted in fundamental unfairness; allowing such instances of unfairness to continue not only ignores the rights of detainees, but undermines the trust of our own citizens in the process.³³⁸

VI. CONCLUSION: ENSURING JUSTICE—OPTIONS FOR JUDICIAL DECISIONS AND LEGISLATIVE REFORM

The law that governs extradition in the modern United States was once modern itself—one hundred and twenty years ago.³³⁹ In the ensuing years, the face of our nation has changed, as well as its connections with the larger global community. Where once we stood far removed from most other nations, isolated by distance and the difficulty of voyaging, now travelers—visitors, tourists, immigrants—are whisked to and from foreign shores in hours. U.S. citizens, from children to seniors, trot fearlessly to the farthest reaches of the globe, and many of our residents and citizens are considerably more bi-national than at any time in our past, with one foot in the United States and another in their country of origin. Modern transportation and modern modes of communication make the world a web of tightly-linked and interdependent nation states. There are literally hundreds of treaties, conventions, and agreements that bind groups of nations. As European integration progresses, as the North American Free Trade Agreement takes effect, and as other similar processes occur around the globe, national borders become less distinct. At the same time, global standards of human rights, now increasingly accompanied by a growing belief that we are indeed our brothers' keepers (even if those brothers are foreign nationals), create new rights for individuals and impose new duties on national governments. No longer will the public remain unaware of the significance of some of our rendition procedures, since the individual who is interviewed by the press in a U.S. prison today may be on national news tomorrow before a foreign tribunal that may offer a brand of justice somewhat deficient in its appreciation of human rights norms. The changed world circumstances are profound,

338. Elements of Tafur's arrest and incarceration also raise issues concerning the presumption of innocence. The presumption of innocence is recognized in Article 11(1) of the Universal Declaration of Human Rights, and is contained also in Article 14(2) of the ICCPR, *supra* note 114, at 176; ratified by the United States Senate and in force since August 9, 1992, and ratified also by Colombia. International Covenant on Civil and Political Rights, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp>. The right is again set forth in Article 8(2) of the American Convention on Human Rights. American Convention, *supra* note 118, at 147. Amici for Tafur argued that Tafur was denied the presumption of innocence when he was detained provisionally pursuant to the extradition treaty even when there was no urgency, and then denied bail. Amici Memorandum of Law, *supra* note 32, at 29. Because the presumption of innocence must be observed by all public authorities, the U.S. Departments of State and Justice and the Drug Enforcement Administration also had a duty to refrain from pre-judging the outcome of a criminal investigation or trial. See Manfred Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 254, para. 36 (1993). Tafur arguably was denied the presumption of innocence since he was "tried" in the newspapers when DEA agents boasted of his capture and announced the prospect that he would be the first drug trafficker extradited from the United States to Colombia under the Extradition Treaty. See, e.g., Jonathan Bandler, *Suspect Led Quiet Life On Campus*, THE JOURNAL NEWS, Mar. 8, 2000, at 1B; S. Cohen, *Cocaine Smuggling Charged*, THE JOURNAL NEWS (Westchester County, N.Y.), Mar. 7, 2000, at 1A. They further argued that these allegations had had a chilling effect on the academic community at Tafur's law school, and intimidated many from inquiring further into the facts surrounding Tafur's arrest, and from assisting in his defense, all in violation of accepted standards of human rights. Amici Memorandum of Law, *supra* note 32, at 29.

339. The last substantial legislative changes to the extradition statute, 18 U.S.C. § 3181-95, were in 1882. H.R. REP. NO. 98-998, at 2 (1984).

and the extradition procedures that were once appropriate no longer serve the interests of justice in today's world.

There have been attempts to amend the extradition laws in the last twenty years; none however, have been successful.³⁴⁰ The Department of Justice supported some proposed revisions to clarify the process. But, in order to guarantee that the fundamental human rights of an extraditee are protected, reforms must be comprehensive.³⁴¹ Although important considerations of foreign policy and international comity must be recognized and accommodated, the reforms should be focused on assuring the rights of the individual.

It has been noted above that current extraditions take place under a patchwork of bilateral³⁴² and multilateral treaties. While the frameworks of most of the treaties are similar, the details may vary substantially. Some treaty provisions may differ in scope but not nature, others may have major substantive implications. The U.S.-Sweden Extradition Treaty, for example, stipulates that there may be no extradition if sending the accused to the requesting state would be inconsistent with humanitarian considerations.³⁴³ Moreover, if a treaty differs from the federal extradition statute and post-dates it, which most do, then the treaty controls. With the increased number of extraditions, not to mention the increased number of nations, this situation should be rationalized with a statute that gives clear directives to the executive and the courts on both substantive and procedural matters, supplemented as necessary by treaty provisions.³⁴⁴

Unfortunately, no matter how much a wholesale revision of the extradition statute may be warranted, there has been little interest in such an undertaking since the 1980 efforts.

340. The last major efforts at amendment were in the early 1980s. There were strong proponents of reform on Capitol Hill, and substantial progress was made toward revamping the law, but certain issues proved intractable and the efforts foundered. See *In re Mackin*, 668 F.2d 122, 128 (2d Cir. 1981) (bill developed with Justice and State Departments to modernize extradition laws); see also Shea, *supra* note 142, at 91-92 nn.27-34 (for citations to various proposed bills amending the extradition statute, their accompanying congressional debates, and a brief discussion of their impacts upon the executive and judicial role in the extradition process); Kester, *supra* note 28, at 1442; Tracey Hughes, Comment: *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, 9 B.C. INT'L & COMP. L. REV. 293 (1986) (for an analysis of legislative attempts to reform the extradition statute and their potential impacts on the judiciary). See generally M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495 (1984) [hereinafter Bassiouni, *Extradition Reform*] (for a complete analysis of legislative attempts to reform the extradition statute between 1981-83).

341. The legislation proposed by the House Judiciary Committee in 1984 would have made substantial changes in existing law, the most important of which were: setting standards for release pending hearing; codifying the "political offense" exception; eliminating the "rule of non-inquiry"; and allowing either party to appeal the extradition magistrate's ruling. The bill also permitted extradition requests to be filed only in federal court; required the Attorney General to act as the complainant; permitted the issuance of an arrest warrant when the whereabouts of the party were unknown 18 U.S.C. § 3184 requires the warrant to be filed where the requested party is found); provided for issuance of a summons to commence proceedings instead of a warrant; established a right to counsel and authorized the appointment of counsel for indigent accused; and codified the "dual criminality" rule. H.R. REP. NO. 98-998 at 7-8 (1984) (report accompanying H.R. 3347). Section 3192(a)(2) of the proposed legislation circumscribed the government's ability to file additional requests after denial of extradition. *Id.* at 47. The bill was opposed by the Department of Justice. See Bassiouni, *Extradition Reform*, *supra* note 340, at 496 n.8.

342. The United States apparently does not avail itself of multilateral treaties, relying instead on individually negotiated bilateral treaties. See Bassiouni, *Extradition Reform*, *supra* note 340, at 508.

343. Convention on Extradition, Oct. 24, 1961, U.S.-Swed., 14 U.S.T. 1845, 1849 (entered into force Dec. 3, 1963) [hereinafter U.S.-Sweden Extradition Treaty]. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides that "the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request." U.N. ESCOR, UN Doc. E/CONF.82/15 (1998), reprinted in 28 I.L.M. 497, 497 (1989), available at http://www.incb.org/e/ind_conv.htm.

344. See Bassiouni, *Extradition Reform*, *supra* note 340, at 505-06.

Moreover, in today's political climate, with a large U.S. stake in bringing terrorists as well as foreign drug-traffickers to the United States to face trial, it seems unlikely that overhauling the extradition laws to expand the protections of accused individuals would garner much support in either the executive or legislative branch.³⁴⁵ Meanwhile, courts continue to grapple with a growing number of extraditions—without uniformity of results. Accordingly, at least some changes to the present statutory scheme should be considered.

Several human rights violations in the Tafur case should be addressed in any reform proposal: (1) the question of provisional detention without bail; (2) the scope of evidentiary rights at the hearing, especially the rule of non-contradiction; and (3) the rule of non-inquiry. Without revisions to existing law in all of these areas, the process will remain seriously flawed.³⁴⁶

As to provisional detention, obviously it is necessary for law enforcement officers to move with dispatch and to seize an accused whenever he is found. It is also necessary to detain that individual until a hearing occurs and a court can review the grounds for detention. But once the matter has been brought before the court, the calculus changes. In both an extradition proceeding and a domestic criminal matter the court seeks to assure the future presence of the accused. The only real distinction is that, in an extradition hearing, the failure of the accused to appear has ramifications outside of the particular proceeding. Since the United States may be unable to comply with the surrender request, future treaty partners may, in turn, fail to honor subsequent U.S. requests.³⁴⁷ This particular factor is the primary one upon which the government has based its resistance to release and underlay its rejection of attempts to amend the extradition statute in the 1980s.³⁴⁸ Those amendments did not apply the Bail Reform Act³⁴⁹ to extradition matters but, instead, created a procedure designed to apply provisions of the Act selectively,³⁵⁰ thereby attempting to address the Justice Department's concerns regarding pre-hearing release. The bill required that the extraditee be held for ten days, unless he could prove by a preponderance of the evidence that he did not present a substantial risk of flight or a danger to the community.³⁵¹ Thereafter, the detention could be extended in ten-day increments on a showing of good cause by the government.³⁵² In a bow to the Department of Justice, the legislation specified that in considering release the court "shall take into account whether a relationship with a

345. There were abortive attempts in 1992–93 after the Supreme Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), to forbid abduction in lieu of extradition. See International Kidnapping and Extradition Treaty Enforcement Act of 1993, H.R. 3346, 103d Cong. (1993); International Kidnapping and Extradition Treaty Enforcement Act of 1993, H.R. 5565, 102d Cong. (1992). The only recent congressional interest was demonstrated in 1999 when a bill was introduced in the House of Representatives attempting primarily to deal with attempts by individuals or foreign nations to thwart U.S. extradition efforts. See International Extradition Enforcement Act of 1999, H.R. 3212, 106th Cong. (1999).

346. The changes considered by Congress in the 1980s were substantial but did not fundamentally alter the roles of the executive and the judiciary. See discussion *supra* notes 344–45. At least one writer has suggested vesting the entire procedure for extraditions with the executive by establishing a system of administrative law judges within the Department of State. Bedrick, *supra* note 27, at 401–02. This suggestion was addressed, however, at rectifying any potential separation of powers violations in the current scheme.

347. H.R. REP. NO. 98-998, at 14–15 (1982) (report accompanying H.R. 3347); H.R. REP. NO. 97-627, at 35 (1982) (report accompanying H.R. 6046). The only other difference that the congressional committee could discern was that in a domestic criminal case the forfeiture of a bond when an accused fails to appear benefits the charging state. *Id.*

348. See Bassiouni, *Extradition Reform*, *supra* note 340, at 496 n.8; see also H.R. REP. NO. 97-627, at 2 (1982) (report accompanying H.R. 6046).

349. 18 U.S.C. §§ 3141–50, 3156 (2001).

350. H.R. REP. NO. 98-998, at 15.

351. Essentially the standards of the Bail Reform Act. See *id.*

352. *Id.* at 15–18, 48–49.

foreign state will be jeopardized with respect to a treaty concerning extradition.”³⁵³ The balancing of the individual liberty of the detainee against the foreign policy interests of the state certainly raises troubling constitutional questions, but the court need only “take into account” the state’s interest.³⁵⁴ Moreover, the courts presently undertake this balancing on an ad hoc basis without guidance from the legislature.

Certainly, the government can face serious difficulties in handling extradition requests for a foreign nation, especially for the many nations whose systems are not based on the common law model. Language differences further complicate the matter. The Tafur case amply demonstrates the unusual problems that may plague assistant U.S. attorneys in dealing with an unfamiliar system. However, the Department of Justice maintains an entire section devoted to international affairs and has developed expertise in this area.³⁵⁵ And as the Tafur case demonstrates, deadlines force action. Moreover, modern means of communication make instantaneous global communication a reality. It may have required sixty days in the time of sailing ships to secure information, but we live in the information age with facsimile machines and the Internet. If modern business can carry out complicated commercial transactions in compressed time frames, there is no reason to expect less of our government when human liberty is at stake.

Basic tenets of constitutionally mandated protections must control.³⁵⁶ The United States argues that an international extradition procedure is not a criminal case and that, as a result, the Bail Reform Act is not applicable.³⁵⁷ The government relies on a long line of cases holding that bail is presumptively not available and may be granted only when special circumstances are present. But an unconvicted detainee is presumed innocent under both U.S. law and international law. The Fifth Amendment’s mandate that “no person shall be . . . deprived of . . . liberty . . . without due process of law”³⁵⁸ should mean that an individual detained for an extradition hearing receives no less of a guarantee of freedom than one detained for domestic criminal prosecution.

The formal extradition hearing is the crucial point in an extradition procedure, yet one at which the current extradition law may seriously hamper the detainee’s ability to adequately present a case. Obviously, the hearing is not intended to be a trial on the merits of the requesting nation’s charges. It is a determination that sufficient reason exists to believe that the detainee has committed an extraditable offense and should be surrendered for prosecution or imprisonment. Thus, the comparison of the scope of the extradition hearing to a preliminary hearing in a domestic criminal case is realistic.³⁵⁹ Indeed, the

353. *Id.* at 49.

354. *Id.*

355. See Nadelmann, *supra* note 3, at 818–19.

356. Although bail has traditionally been restricted in extradition cases, courts have begun to question the constitutionality of such detention. The Ninth Circuit in *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997) broke firmly with prior case law, holding that the detention without a demonstrated risk of flight violated the Due Process clause of the Fifth Amendment. The constitutionality of refusing bail when no such risk is shown has also been questioned by commentators. See, e.g., Jeffrey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599, 618–19 (1987).

357. See, e.g., Memorandum of Law in Opposition to Bail, at 2, *In re Tafur-Dominguez*, No. 00-154-M (E.D. Pa. Mar. 6, 2000) (relying upon *United States v. Hills*, 765 F. Supp. 381, 385 n.5 (E.D. Mich. 1991); *Kamrin v. United States*, 725 F.2d 1225, 1227–28 (9th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984)). The government contends that the definition of offense in the Act limits its application to domestic crimes.

358. U.S. CONST. amend. V.

359. A preliminary examination is not constitutionally mandated, but the requirement for one is established by statute, 18 U.S.C. § 3060, and rule, FED. R. CRIM. P. 5(c). Under U.S. law a preliminary hearing to determine whether probable cause for an arrest exists must be held within ten days following initial appearance if the defendant is in custody, otherwise within twenty days. Whether the arrest was made pursuant to a warrant is not a factor. See 18 U.S.C. § 3060. For a comparison of preliminary hearings to extradition hearings, see Marston, *supra* note 16, at 361–63.

extradition hearing is even more procedurally significant, since once it is complete the court's role ends and constitutional provisions no longer can be guaranteed.³⁶⁰ That being so, the reasons for not affording an extraditee the same rights available in a domestic criminal case must be closely scrutinized. If one of the primary reasons that we strive to comply with a foreign request is to ensure that we will not be hampered in enforcing our own laws, then it seems counter-intuitive to undercut our own domestic laws by refusing to afford established legal protections to an extraditee—who, in some cases, may himself be a U.S. citizen. This applies not only to the hearing itself, but also to discovery prior to the hearing. There is no obvious reason not to afford an extraditee the same level of discovery that a domestic federal pretrial detainee would be afforded. Realistically, providing comparable discovery would place little burden on the prosecutor since pretrial discovery in a domestic federal criminal case is limited.³⁶¹

At a preliminary hearing the government's evidence may be based in whole or in part on hearsay,³⁶² but the defendant has the right to examine whatever witnesses are presented and to offer evidence in his own defense.³⁶³ The defendant may also have a limited right to subpoena witnesses who could present evidence to negate probable cause.³⁶⁴ The extradition statute makes no similar provisions, but, as noted earlier, courts have fashioned rules to permit the introduction of evidence. The rule of non-contradiction seeks to avoid requiring the requesting nation to be put to its proof in the court of the asylum state. Yet if applied strictly, especially in combination with other evidentiary restrictions, the rule can work severe hardship. Government witnesses or evidence of questionable credibility has to be taken at face value while the defendant's evidence is barred. Under the rule, for example, a defendant with clear proof of innocence, perhaps witnesses who could verify his presence in the United States at the time of the crime committed in the requesting country, would be barred from presenting that testimony because it contradicts the government's evidence. Yet it would be unlikely that the defendant would be able to produce these witnesses in the foreign nation if extradited. The fundamental unfairness and due process implications of such situations have led some courts to develop further refinements on the rule, allowing contradictory evidence if it "completely negates" or "obliterates" probable cause.³⁶⁵ Such a standard, however, provides little more guidance to courts than the "explanatory-contradictory" dichotomy.

One writer has proposed refining the rule of non-contradiction by creating a summary judgment standard, which would allow the court to admit evidence if no reasonable fact finder could disagree with it.³⁶⁶ The standard is designed to allow a court to accept

360. See Michael E. O'Neill, *Article III and the Process Due a Connecticut Yankee Before King Arthur's Court*, 76 MARQ. L. REV. 1, 17, 49-51 (1992).

361. Discovery is confined mainly to providing a summary of the facts against the defendant, any of his own statements, and physical evidence. FED. CRIM. P. 16(a)(1). The government must produce the statement of a witness who testifies at a preliminary hearing, but not until after the testimony is given. FED. R. CRIM. P. 5.1(d), 26.2. Certainly any exculpatory material should be disclosed. See *Brady v. Maryland*, 373 U.S. 83 (1963).

362. FED. R. CRIM. P. 5.1(a).

363. *Id.*

364. An accused may be entitled to subpoena a witness under certain circumstances. *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967) (showing by the accused that witnesses are material to the issue of probable cause, requests for subpoenas should be granted).

365. See, e.g., *In re Gonzalez*, 52 F. Supp. 2d 725 (W.D. La. 1999); *Republic of France v. Moghadam*, 617 F. Supp. 777 (N.D. Cal. 1985).

366. It was suggested that the appropriate standard for considering whether to admit evidence is not whether it is explanatory or contradictory, but whether "the accused's evidence is such that no reasonable fact finder could disagree with it . . . even if it provides a defense to the charges or contradicts evidence presented by the requesting government." Semmelman, *Non-Contradiction*, *supra* note 48, at 1302. This is similar to the standard used in

“unimpeachable” evidence, such as a fully documented alibi, but the instances in which the evidence is of such caliber are likely to be relatively few.³⁶⁷ The legislation proposed by the Judiciary Committee in the 1980s took a broader approach. It reiterated existing law that the guilt or innocence of the party was not before the court, but allowed the accused to introduce evidence concerning issues that were before the court.³⁶⁸ Such a standard leaves much room for interpretation since probable cause is before the court and refuting probable cause raises issues of guilt and innocence. A better approach would be to allow courts to accept evidence from an accused when to reject it would lead to fundamental unfairness. Thus, if the evidence proffered by the accused is of the type that would be substantially more difficult to procure in the requesting state, such as alibi witnesses located in the United States, the court should allow its admission. The court would then consider it, along with other evidence, to determine whether it met the traditional test for probable cause (i.e., evidence that would lead a reasonable person to conclude that the accused had committed the alleged offense). This is essentially a due process standard, which leaves a court free to exercise its judgment on the nature of evidence to be accepted. While it does not provide a bright line, it is the type of discretion that courts already exercise on a regular basis.

The third key area in need of reform is the rule of non-inquiry. Ignoring the potential for serious deprivations of human rights, should an individual be surrendered, would make the court complicit in these violations.³⁶⁹ It may not only violate the due process rights of the individual, but it can erode the confidence of U.S. citizens in the judiciary. The Judiciary Committee draft would have eliminated the rule of non-inquiry and placed an affirmative duty on the court to inquire into allegations of human rights abuse once raised by the extraditee. If the individual established by a preponderance of the evidence the likelihood of being subjected to fundamental unfairness, the court would not extradite.³⁷⁰ The statute did not provide guidance as to what might constitute fundamental unfairness, but left that determination to the court. Based on the legislative history, it appears that the drafters intended to eliminate the “shocking to the conscience” standard and provide more flexibility to the court.³⁷¹

One scholar with extensive experience in extradition matters has suggested that the rule of non-inquiry be abandoned and that, instead, the courts should first determine whether the requesting and asylum countries have professed a commitment to basic human rights principles.³⁷² If so, the court in the requested state would be allowed to weigh the evidence presented by the extraditee to demonstrate that he would be subjected to persecution, denial of a fair trial, or other human rights violations in the requesting nation. Extradition should then be denied unless adequate assurances could be provided that such threats would not be realized. Courts in the United States routinely make such judgments regarding conditions in

civil cases for deciding a motion for summary judgment. *Id.* While this seems a reasonable approach upon first consideration, it is not clear that it provides any clearer demarcation than the current rule. *Id.* at 1301–02.

367. In *Moghadam*, for instance, the issue was whether the recantation by the government’s primary witness could be introduced by the extraditee. The court ruled that it could. *Moghadam*, 617 F. Supp. at 783.

368. H.R. REP. NO. 98-998, at 14, 51 (1982).

369. Relying on the executive to protect the right of the individual is problematic. As Judge Weinstein noted in *Ahmad v. Wigen*, “immediate political, military or economic needs of the United States [may] induce the State Department to ignore the rights of the accused.” *Ahmad v. Wigen*, 726 F. Supp. 389, 415 (E.D.N.Y. 1989), *aff’d*, 910 F.2d 1063 (2d Cir. 1990).

370. H.R. REP. NO. 98-998, at 4, 6, 52, 60 (1982).

371. H.R. REP. NO. 98-998, at 6. One writer has suggested that an extraditee be allowed to present evidence of potential abuse or persecution if surrendered. In the face of a sufficiently strong showing, the court should then evaluate the treatment against human rights norms. If the likely treatment violated these norms, the court should refuse to extradite unless the requesting state provided adequate assurances that the surrendered party would be treated fairly. Shea, *supra* note 142, at 126. The difficulty with such an approach is, of course, that there is no way to assure that the requesting country lives up to its guarantees.

372. Wilson, *Non-Inquiry*, *supra* note 13, at 753, 765.

other countries in asylum cases, and it would not be a major step to allow it in extradition cases.³⁷³ This scholar suggests that, in a situation in which the requesting country does not accept basic human rights norms, the country of asylum should look to customary international human rights norms to determine its legal obligations.³⁷⁴ The ICCPR could provide the framework for determining whether treatment violated human rights norms.³⁷⁵ While this appears to be a workable proposal, the difficulty lies in enforcing any assurances offered by the requesting party.³⁷⁶ For that reason, it seems simpler and equally efficient to allow the courts to make the same judgments as they are accustomed to making in an asylum case.

In conclusion, there are numerous flaws in present extradition law that call for a major revamping of extradition procedures and practices. While some of this can be accomplished through continuing judicial construction of standards and precedents, a better approach would be to enact legislative changes along the lines proposed by the Judiciary Committee over fifteen years ago. The changes were due then—they are well overdue now.

373. As Wilson points out, in both Switzerland and Austria, extradition will not be countenanced if the requesting state does not observe basic human rights standards. *Id.* at 765.

374. *Id.* at 753 n.4.

375. *Id.* at 761.

376. *Id.* at 758–59. Unfortunately, there is little way to enforce those assurances, except by refusing subsequent requests. See Shea, *supra* note 142, at 130 nn.255–58.