



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 25 | Number 3

Article 12

6-1-2003

Extradition and Life Imprisonment

Vanessa Maaskamp

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Vanessa Maaskamp, *Extradition and Life Imprisonment*, 25 Loy. L.A. Int'l & Comp. L. Rev. 741 (2003).
Available at: <https://digitalcommons.lmu.edu/ilr/vol25/iss3/12>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

EXTRADITION AND LIFE IMPRISONMENT

I. INTRODUCTION

The Mexican Supreme Court issued two landmark extradition opinions in 2001.¹ First, on January 18, 2001, the Mexican Supreme Court declared that the extradition of Mexican nationals is legal.² This decision marked a drastic policy change from Mexico's historical reluctance to extradite nationals.³ Subsequently, on October 2, 2001, the Mexican Supreme Court clarified their earlier ruling, holding that Mexico will not extradite suspects who face a potential life sentence in the country requesting extradition.⁴

This Comment focuses on Mexico's October 2001 ruling. This decisive ruling raises several important issues ranging from specific effects on U.S. sentencing guidelines to the general impact on extradition policies between the United States and Mexico.

To ensure continued extradition from Mexico to the United States, the United States must follow Mexican sentencing guidelines. Moreover, to further facilitate extradition, the U.S.-

1. Extradition is defined as "[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged." BLACK'S LAW DICTIONARY 605 (7th ed. 1999).

2. 13 S.J.F. 9 (9a época 2001), analyzed in *Supreme Court Imposes New Limits on Extradition*, SOURCEMEX ECONOMIC NEWS & ANALYSIS ON MEXICO, Oct. 10, 2001, available at 2001 WL 10229580.

3. *Mexico's Highest Court Approves Quicker Extradition of Drug Traffickers to U.S.*, SOURCEMEX ECONOMIC NEWS & ANALYSIS ON MEXICO, Jan. 24, 2001, available at 2001 WL 10229484 [hereinafter *Mexico's Highest Court Approves Quicker Extradition*]; Rodrigo Labardini, *Mexico's Supreme Court Allows the Extradition of Mexican Nationals*, 17 INT'L ENFORCEMENT L. REP. 106, 108-09 (2001).

4. 14 S.J.F. 13 (9a época 2001), analyzed in Rodrigo Labardini, *Extradition from Mexico Allowed with Assurances that Life Imprisonment Will Not Be Imposed*, 18 INT'L ENFORCEMENT L. REP. 404, 404 (2002) [hereinafter Labardini, *Life Imprisonment*].

Mexico Extradition Treaty⁵ must adequately articulate non-life imprisonment assurances.

This Comment also compares Mexico's approach to extradition to the judicially created rule of non-inquiry in the United States.⁶ The rule of non-inquiry provides that U.S. courts will not question the procedures or punishments that await an extraditee in a foreign country.⁷ In *Gallina v. Fraser*, however, the Second Circuit announced, in dictum, a possible humanitarian exception to the rule of non-inquiry.⁸ The rule of non-inquiry does not need to be abandoned if courts apply the humanitarian exception in appropriate cases.

Part II discusses pertinent principles and information relating to extradition between the United States and Mexico. Part III analyzes Mexico's decisive Supreme Court rulings, specifically the January and October 2001 rulings. It explores the effect of these rulings on international extradition between the United States and Mexico, including the difficulty of providing non-life imprisonment assurances to Mexico. Additionally, Part III reviews several alternatives to extradition, as well as concerns other countries share with respect to life imprisonment sentences. Finally, Part III compares Mexico's approach to international extradition with the judicially created rule of non-inquiry in the United States.⁹

II. BACKGROUND

The contentious history of extradition between the United States and Mexico is framed by key aspects of Mexico's Constitution and judicial system, the 1978 U.S.-Mexico Extradition Treaty, and extradition procedures in the United States and Mexico.

5. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter U.S.-Mexico Extradition Treaty].

6. *Neely v. Henkel*, 180 U.S. 109 (1901); 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, 753 (1997) (discussing the rule of non-inquiry created by the *Neely* court).

7. *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999).

8. *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

9. *Neely*, 180 U.S. at 109.

A. Reluctance and Mistrust

Extradition between the United States and Mexico “has been plagued by reluctance and mistrust.”¹⁰ Historically, Mexico has been reluctant to extradite its nationals.¹¹ Indeed, before 1995, Mexico had never extradited a Mexican national.¹² Furthermore, Mexico has even been reluctant to extradite U.S. citizens to the United States.¹³ For example, between 1980 and 1994, Mexico extradited only eight people to the United States.¹⁴

The United States contributes to the climate of reluctance and mistrust through the use of transborder abduction.¹⁵ In 1990, the forcible abduction of Dr. Humberto Alvarez-Machain from Guadalajara, Mexico to the United States caused significant upheaval in U.S.-Mexico relations.¹⁶ Mexico viewed the abduction as an egregious violation of their territorial sovereignty¹⁷ and was appalled when the U.S. Supreme Court authorized the abduction of Dr. Alvarez-Machain as a legitimate means of obtaining jurisdiction over the matter.¹⁸

Extradition between the United States and Mexico is also hampered by the differing views each country has with respect to the death penalty.¹⁹ For example, in Mexico, the death penalty is “constitutionally contemplated,” but not applied.²⁰ In the United

10. Rishi Hingoraney, Note, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 GA. J. INT'L & COMP. L. 331, 331 (2002).

11. *Id.*

12. Labardini, *supra* note 3, at 109.

13. Dea Abramschmitt, Comment, *Neighboring Countries; Un-neighborly Acts: A Look at the Extradition Relationships Among the United States, Mexico, and Canada*, 4 J. TRANSNAT'L L. & POL'Y 121, 129-30 (1995).

14. Labardini, *Life Imprisonment*, *supra* note 4, at 405. The United States also did not extradite many people to Mexico between 1980 and 1994. During these years, the United States extradited only thirty people to Mexico. *Id.*

15. Hingoraney, *supra* note 10, at 331.

16. *Id.* at 331-32, 352-53.

17. *Id.* at 332.

18. Hingoraney, *supra* note 10, at 332 (the abduction of Alvarez-Machain was upheld as a matter of U.S. constitutional law, not customary international law).

19. See Hingoraney, *supra* note 10, at 342.

20. Labardini, *Life Imprisonment*, *supra* note 4, at 404 n.36. Article 22 of the Mexican Constitution allows the death penalty for “high treason committed during a foreign war, parricide, murder that is treacherous, premeditated, or committed for profit, arson, abduction, highway robbery, piracy, and grave military offenses.” MEX. CONST. art. 22. The U.S.-Mexico Extradition Treaty prohibits extradition if a potential extraditee faces the death penalty in the United States. U.S.-Mexico Extradition Treaty, art. 8.

States, on the other hand, the death penalty is applied.²¹ In *Gregg v. Georgia*, the United States Supreme Court declared “that the punishment of death does not invariably violate the Constitution.”²² Consequently, the two contrasting views on the death penalty hampers international extradition because Mexico often refuses to extradite if a defendant potentially awaits the death penalty in the United States.²³

B. Three Key Aspects of Mexico's Constitution and Judicial System

Three important aspects of Mexico's Constitution and judicial system provide necessary background for this Comment. First, Mexico is a civil law country where *stare decisis* “carries little weight.”²⁴ As a result, judges in Mexico decide cases by interpreting and applying black letter law instead of case law.²⁵ Second, as mentioned above, the death penalty is “constitutionally contemplated” but not applied in Mexico.²⁶ Finally, Mexico's Constitution requires that inmates be given the opportunity for rehabilitation.²⁷

C. 1978 U.S.-Mexico Extradition Treaty

The current extradition treaty between the United States and Mexico was signed on May 4, 1978 and entered into force on January 25, 1980.²⁸ Article 1, paragraph 2 of the treaty allows extradition for “offense[s] committed outside the territory of the requesting [state]” if the laws of the requested state “provide for the punishment of such an offense” or if “the person sought is a national of the requesting [state].”²⁹ Additionally, the offense must

21. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

22. *Id.* at 169.

23. Greg Moran, *Mexican Ruling Complicates Extraditions; Prosecutors Here Stymied in Life-term Cases*, SAN DIEGO UNION TRIB., Feb. 25, 2002, at A3.

24. Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive to Drug Traffickers—150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. J. INT'L L. & POL'Y 519, 533 (1997).

25. *Id.* This is important because Mexico's October 2001 ruling was made based on an interpretation and application of specific Mexican constitutional provisions. See Labardini, *Life Imprisonment*, *supra* note 4, at 408.

26. Labardini, *Life Imprisonment*, *supra* note 4, at 409 n.36 (2002).

27. *Id.* at 410 (explaining that according to Mexico's October 2001 ruling, life sentences leave no opportunity for rehabilitation).

28. U.S.-Mexico Extradition Treaty, *supra* note 5.

29. *Id.* art. 1, para. 2.

be punishable by both countries, and requires a “deprivation of liberty” of more than one year.³⁰

The U.S.-Mexico Extradition Treaty uses the list method for extraditable crimes.³¹ Under the list method, to be an extraditable offense, the crime must be one of the thirty-one listed offenses in the appendix of the treaty.³² A crime not listed in the appendix is still extraditable, however, if it involves “willful acts which are punishable, in accordance with the federal laws of both countries, by a deprivation of liberty for no less than one year.”³³

Two other articles of the U.S.-Mexico Extradition Treaty are relevant here. One is Article 8 of the treaty, which provides:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.³⁴

Thus, the treaty allows extradition to the United States in death penalty cases, if the United States “furnishes such assurances” that the death penalty will be not be imposed.

Article 9 is the second relevant article of the U.S.-Mexican Extradition Treaty. According to Article 9, extradition of nationals is not mandatory, but discretionary: “[n]either Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.”³⁵ Article 9 further provides that in all other cases, those not involving nationals, the United States and Mexico are bound by the duty to extradite or prosecute, which means that a country must either extradite or prosecute a suspect, if so requested by the other country.³⁶

30. *Id.* art. 2, para. 1.

31. *Id.* app.

32. *Id.* art. 2, para. 1, app.; Zagaris & Peralta, *supra* note 24, at 579. The thirty-one extraditable offenses range from murder to kidnapping to embezzlement. U.S.-Mexico Extradition Treaty, *supra* note 5, app.

33. Zagaris & Peralta, *supra* note 24, at 579; U.S.-Mexico Extradition Treaty, *supra* note 5, art. 2, para. 3.

34. U.S.-Mexico Extradition Treaty, *supra* note 5, art. 8.

35. *Id.* art. 9, para. 1.

36. *Id.* art. 9, para. 2.

D. Mexico's Procedures for Extradition to the United States

The U.S. State Department, through diplomatic channels, presents extradition requests to the Mexican Ministry of Foreign Affairs.³⁷ The Mexican Ministry of Foreign Affairs decides whether the request conforms with Mexican law and the U.S.-Mexico Extradition Treaty.³⁸ If the request satisfies the requirements, the extradition materials are given to the Mexican Attorney General.³⁹ A Mexican district judge will then determine if there is probable cause⁴⁰ to believe "the suspect committed the crime charged in the extradition request."⁴¹ If the district judge finds probable cause, the requested suspect is arrested and an extradition hearing is held before the judge.⁴² The judge decides whether to extradite the suspect, but the Ministry of Foreign Affairs also reviews such decisions.⁴³ Indeed, the Ministry of Foreign Affairs is the final authority in deciding whether extradition is appropriate.⁴⁴

E. Extradition Procedures from the United States

In the United States, international extradition is under the purview of the federal government.⁴⁵ Federal magistrate judges decide the question of extraditability based on the applicable extradition treaty.⁴⁶ The magistrate judge decides whether there is probable cause "to believe that the person before the court is extraditable."⁴⁷ If a magistrate judge finds a defendant extraditable, the Secretary of State decides whether to surrender the defendant to the requesting state.⁴⁸ When the Secretary of State signs a surrender warrant, the United States Marshals service handles the transfer of the extraditee.⁴⁹

37. Zagaris & Peralta, *supra* note 24, at 551.

38. Hingoraney, *supra* note 10, at 339; Zagaris & Peralta, *supra* note 24, at 543.

39. Hingoraney, *supra* note 10, at 339; Zagaris & Peralta, *supra* note 24, at 543.

40. Hingoraney, *supra* note 10, at 339.

41. Zagaris & Peralta, *supra* note 24, at 544.

42. Hingoraney, *supra* note 10, at 339.

43. *Id.*

44. *Id.* at 339-40.

45. 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, 402 (1990).

46. 18 U.S.C. § 3184 (2000); Quigley, *supra* note 45, at 402.

47. Zagaris & Peralta, *supra* note 24, at 561.

48. 18 U.S.C. § 3186 (2000); Quigley, *supra* note 45, at 402.

49. Zagaris & Peralta, *supra* note 24, at 561.

Thus, in the United States and Mexico, the federal government handles extradition.⁵⁰ For example, the federal government of each country makes the final decision on whether to extradite a suspect to the requesting state.⁵¹ In the United States, the final decision on whether to extradite is made by the Secretary of State,⁵² and in Mexico, the final decision is made by the Mexican Ministry of Foreign Affairs.⁵³ Additionally, federal judges in each country make the preliminary finding of whether the suspect is extraditable.⁵⁴ In the United States, however, if a federal magistrate judge finds that a suspect is extraditable, the Secretary of State decides whether to surrender the suspect to the requesting state.⁵⁵ Conversely, in Mexico, the federal judge decides whether to extradite the suspect.⁵⁶ The Mexican Ministry of Foreign Affairs, however, reviews the judge's finding and ultimately makes the decision.⁵⁷

III. ANALYSIS

A. *The Law in Mexico*

The following section analyzes the Mexican Supreme Court decisions of January 18, 2001 and October 2, 2001, in addition to several alternatives to extradition.

1. January 18, 2001 Mexican Supreme Court Ruling

On January 18, 2001, the Mexican Supreme Court ruled that the extradition of Mexican nationals from Mexico does not violate the Mexican Constitution.⁵⁸ Pursuant to this landmark ruling, the Mexican federal government has "discretionary" power to

50. Quigley, *supra* note 45, at 402; Hingoraney, *supra* note 10, at 339-40.

51. *Id.*

52. Quigley, *supra* note 45, at 402.

53. Hingoraney, *supra* note 10, at 339-40.

54. Zagaris & Peralta, *supra* note 24, at 561; Hingoraney, *supra* note 10, at 339. In Mexico, the district judge determines whether there is probable cause to believe "the suspect committed the crime charged in the extradition request." Zagaris & Peralta, *supra* note 24, at 544. In the United States, the federal magistrate judge determines whether there is probable cause "to relieve the person is extraditable." *Id.* at 561.

55. Quigley, *supra* note 45, at 402.

56. Hingoraney, *supra* note 10, at 339.

57. *Id.* at 339-40.

58. 13 S.J.F. 9 (9a época 2001), analyzed in *Supreme Court Imposes New Limits on Extradition*, *supra* note 2.

extradite Mexican nationals if they are sentenced according to Mexican guidelines.⁵⁹ This decision marked a drastic change in Mexico's extradition policies, which are known for a reluctance to extradite nationals.⁶⁰ Prior to this holding, Mexico extradited several of its nationals to the United States, but "the extradition process had become delayed by endless appeals."⁶¹ The January 2001 ruling definitively declared that the extradition of Mexican nationals is constitutional and can be expedited by limiting the number of appeals for Mexican nationals accused of drug trafficking in the United States.⁶² Pursuant to this ruling, Mexico extradited eight nationals to the United States in 2001.⁶³ This is the identical number of people Mexico extradited to the United States between 1980 and 1994.⁶⁴ Therefore, the January 2001 ruling is significant because in one year Mexico extradited the same number of people as it had over the previous fourteen years.

The January 2001 ruling paved the way for the extradition of Mexican national, Everardo Arturo Paez-Martinez.⁶⁵ The Mexican Supreme Court held that the Mexican government could extradite Paez-Martinez to the United States where he would face drug smuggling charges in California.⁶⁶ Paez-Martinez was a member of the Arellano Felix Drug Trafficking Organization (AFO) and "represented the first extradition from Mexico to the United States of a high-ranking member of the AFO."⁶⁷ In a companion case, the court ruled that the Mexican government could extradite another Mexican national, Oscar Malherbe de Leon, to the United

59. *Mexico's Highest Court Approves Quicker Extradition*, *supra* note 3.

60. *Id.*; see also Labardini, *supra* note 3, at 108-09. This is in accordance with the 1978 U.S.-Mexico Extradition Treaty, which provides "[n]either Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so." U.S.-Mexico Extradition Treaty, *supra* note 5, art. 9, para. 1.

61. *Mexico's Highest Court Approves Quicker Extradition*, *supra* note 3.

62. *Id.*

63. Labardini, *Life Imprisonment*, *supra* note 4, at 406 (two of the Mexican nationals had dual citizenship).

64. *Id.* at 405.

65. Press Release, Office of the United States Attorney, Southern District of California, AFO Kingpin Sentenced to 30 Years in Prison (Jan. 14, 2002) (on file with author) [hereinafter Press Release].

66. *Mexico's Highest Court Approves Quicker Extradition*, *supra* note 3.

67. Press Release, *supra* note 65.

States to stand trial.⁶⁸ Malherbe was indicted in 1990 in the United States as “a top aide to the Tamaulipas-based Gulf drug cartel.”⁶⁹

At the time of the January 2001 ruling, it appeared that if Mexican nationals did not face the death penalty in the United States, their extradition would conform to Mexican sentencing guidelines⁷⁰ because the death penalty is not applied in Mexico.⁷¹ Moreover, the U.S.-Mexico Extradition Treaty allows for extradition to the United States in death penalty cases, provided the United States “furnishes such assurances” that the death penalty will not be imposed or executed.⁷²

2. October 2, 2001 Mexican Supreme Court Ruling

The Mexican Supreme Court clarified their January 2001 ruling on October 2, 2001.⁷³ The court held that the state requesting extradition “must provide assurances that life imprisonment will not be imposed.”⁷⁴ The court’s decision was based on Article 22 of the Mexican Constitution,⁷⁵ pronouncing that “[p]unishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or extreme punishments are prohibited.”⁷⁶ According to the court, Article 22 prohibits life imprisonment because it is an “unusual or extreme” punishment.⁷⁷ Rodrigo Labardini, an expert on Mexican extradition law, asserts that life imprisonment is an “unusual or extreme” punishment because “it does not contemplate or allow for the constitutional principles of social readaptation and humane punishment embodied in articles 18 and 22 of the Constitution.”⁷⁸

68. *Id.*

69. *Id.*

70. *See Mexico’s Highest Court Approves Quicker Extradition, supra* note 3.

71. Labardini, *Life Imprisonment, supra* note 4, at 404 n.36.

72. U.S.-Mexico Extradition Treaty, *supra* note 5, art. 8.

73. Hugh Dellios, *Mexico, U.S. Cultural Split Complicates Extradition*, CHI. TRIB., June 14, 2002, at N1.

74. Labardini, *Life Imprisonment, supra* note 4, at 404.

75. 14 S.J.F. 13 (9a época 2001), *analyzed in* Labardini, *Life Imprisonment, supra* note 4, at 406.

76. MEX. CONST. art. 22.

77. *See* 14 S.J.F. 13 (9a época 2001), *analyzed in* Labardini, *Life Imprisonment, supra* note 4, at 406.

78. *Id.* at 408.

The Mexican Supreme Court emphasized that pursuant to Article 18 of the Mexican Constitution, social readaptation is the primary goal of criminal sentencing.⁷⁹ The court opined that the goals of social readaptation are not met if life imprisonment prevents an individual from returning to society.⁸⁰ Furthermore, life imprisonment is “cruel and inhuman and disproportionate due to its unspecified duration in years.”⁸¹ Accordingly, the Mexican Supreme Court ruled that life imprisonment is proscribed by articles 18 and 22 of the Mexican Constitution.⁸²

The October 2001 holding did not clearly define the scope of “life imprisonment.”⁸³ Article 25 of the Mexican Federal Criminal Code permits a maximum prison term of sixty years.⁸⁴ Article 25, notwithstanding, Article 366, section III permits a seventy-year sentence with no parole for kidnappers who kill their victims.⁸⁵ Therefore, it appears that a sentence longer than sixty years constitutes “life imprisonment.” In the case of kidnappers who murder their victims, however, a sentence longer than seventy years without parole constitutes “life imprisonment.”

It is unclear whether the difference between a life sentence with parole and a life sentence without parole is a distinction without a difference.⁸⁶ Extradition experts agree that “the ruling prohibits extradition of suspects who face no-parole imprisonments, [but] some say it also applies to those who face any sentence in which they could spend life in prison.”⁸⁷ Thus, the October ruling would significantly expand if it applied to any sentence that carried the possibility of life in prison.⁸⁸ For example, in California, any Mexican national facing a third felony conviction would escape extradition because for certain specified offenses, a third felony conviction carries a term of life imprisonment, with

79. Labardini, *Life Imprisonment*, *supra* note 4, at 410.

80. *Id.*

81. 14 S.J.F. 13 (9a época 2001), *analyzed in* Labardini, *Life Imprisonment*, *supra* note 4, at 410.

82. *Id.*

83. Labardini, *Life Imprisonment*, *supra* note 4, at 411; Moran, *supra* note 23.

84. CODIGO PENAL PARA EL DISTRITO FEDERAL [C.P.D.F.] art. 25 (Mex.), *translated in* Labardini, *Life Imprisonment*, *supra* note 4, at 409 n.38.

85. C.P.D.F. art. 366(III) (Mex.), *translated in* Labardini, *Life Imprisonment*, *supra* note 4, at 409 n.38.

86. Labardini, *Life Imprisonment*, *supra* note 4, at 411.

87. Moran, *supra* note 23.

88. *Id.*

the possibility of parole in twenty years.⁸⁹ It remains unclear how the Mexican Supreme Court will treat such prison sentences.⁹⁰

The Mexican Supreme Court emphasized that non-life imprisonment assurances are procedural requirements that do not affect the substance of an extradition petition.⁹¹ This procedural requirement, however, may impede international extradition,⁹² as seen in the case of Jesus Amezcua, a drug trafficker known as the “king of amphetamines.”⁹³ In May 2002, a lower Mexican tribunal ruled, in Amezcua’s case, that a “diplomatic note from U.S. officials promising that prosecutors would not seek a life sentence was not a sufficient guarantee.”⁹⁴ Amezcua’s lawyer explained that the diplomatic note was insufficient because “U.S. courts are independent of the executive branch, so he could be sentenced to a life term anyway.”⁹⁵ Indeed, the separation of power between the executive and judicial branches complicates qualifying adequate non-life imprisonment assurances.

An excellent example of a successful extradition case is the case of Everardo Arturo Paez-Martinez.⁹⁶ The January 2001 ruling paved the way for the extradition of this Mexican national.⁹⁷ Paez-Martinez originally faced a life sentence in the United States.⁹⁸ Before he was extradited, however, the Mexican Supreme Court’s October 2001 ruling prohibited the extradition of suspects facing life imprisonment.⁹⁹ After this ruling, Paez-Martinez pled guilty to a charge carrying a thirty-year sentence,¹⁰⁰ which is well within Mexico’s sixty-year maximum prison term.¹⁰¹ According to Patrick K. O’Toole, the U.S. Attorney on the Paez-Martinez case, “the resolution and the sentence demonstrates our ability to balance Mexico’s constitutionally protected rights afforded to its citizens

89. CAL. PENAL CODE § 667.7 (Deering 1998); Labardini, *Life Imprisonment*, *supra* note 4, at 411 n.52.

90. See Labardini, *Life Imprisonment*, *supra* note 4, at 411.

91. *Id.* at 409.

92. *Id.* at 412-13.

93. Dellios, *supra* note 73.

94. *Id.*

95. *Id.*

96. Press Release, *supra* note 65.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. C.P.D.F. art. 25 (Mex.), translated in Labardini, *Life Imprisonment*, *supra* note 4, at 409 n.38.

with the critical need to extradite and prosecute leaders of the AFO.”¹⁰² Therefore, it appears that some U.S. prosecutors compromise and abide by Mexico’s October 2001 ruling to successfully extradite suspects charged of crimes in the United States.¹⁰³ Furthermore, it also appears that at least some lower Mexican tribunals accept non-life imprisonment assurances from prosecutors.

Other prosecutors, however, believe that Mexico’s October 2001 ruling will frustrate their ability to seek appropriately harsh punishments.¹⁰⁴ For example, the extradition of Juan Manuel Casillas Jr. was barred because the Los Angeles extraditions unit was “unwilling to drop charges that carry a no-parole sentence.”¹⁰⁵ Casillas, a Mexican national, was charged with killing two teenage girls.¹⁰⁶ The Los Angeles extraditions unit sought Casillas’ extradition before Mexico’s October 2001 ruling and was willing to forgo pursuit of the death penalty to secure his extradition.¹⁰⁷ Before Casillas was extradited, however, Mexico handed down their October ruling. The Los Angeles extraditions unit refused to comply with this ruling.¹⁰⁸ Other prosecutors agree with the Los Angeles extraditions unit and have refused to comply with Mexico’s October 2001 ruling.¹⁰⁹ This is significant because if U.S. prosecutors refuse to comply with Mexico’s ruling, it may bring international extradition between the United States and Mexico to a standstill.¹¹⁰

If the United States refuses to comply with Mexico’s ruling, the October 2001 ruling may severely limit extradition “of the most serious criminals” from Mexico to the United States.¹¹¹ The

102. Press Release, *supra* note 65.

103. Labardini, *Life Imprisonment*, *supra* note 4, at 413-14 (noting that Arizona prosecutors assured Mexico that they would not seek life sentences).

104. Dellios, *supra* note 73.

105. Moran, *supra* note 23.

106. *Id.*

107. *Id.*

108. *Id.*

109. See Labardini, *Life Imprisonment*, *supra* note 4, at 414.

110. As of July 2002, Mexico has denied the extradition of seventy defendants facing life imprisonment in the United States. See Bruce Zagaris, *Mexican Court Denies U.S. Extradition Request Due to Potential Life Sentence*, 18 INT’L ENFORCEMENT L. REP. 270, 270 (2002).

111. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 2001 (2002), at

reason for this is “the vast majority of fugitives requested via extradition are normally charged with serious offenses carrying possible life sentences.”¹¹² Furthermore, death penalty crimes constitute only a small percentage of crimes; whereas crimes carrying possible life sentences are more abundant.¹¹³ This presents a number of problems because while non-death penalty assurances are provided for in the U.S.-Mexico Extradition Treaty,¹¹⁴ non-life imprisonment assurances are not.¹¹⁵ Thus, Mexico is under no obligation to extradite even if the United States offers non-life imprisonment assurances. Moreover, as the U.S. State Department declared, “the U.S. is generally not able to provide formal assurances to any country that a prospective extraditee will not face a life sentence.”¹¹⁶ The reason the United States cannot generally provide formal non-life imprisonment assurances is because at sentencing, prosecutors “can only recommend [to] a judge the length of the sentence.”¹¹⁷ With the death penalty, on the other hand, the “decision to pursue the death penalty is a prosecutor’s choice.”¹¹⁸

Therefore, it is necessary for the United States and Mexico to establish what would constitute an appropriate non-life imprisonment assurance. This may include a judge abiding by a prosecutor’s sentencing request if the prosecutor assured the Mexican government that a life sentence would not be imposed. In addition, it may be necessary to rewrite the current U.S.-Mexico Extradition Treaty to provide for adequate non-life imprisonment assurances.

<http://www.state.gov/g/inl/rls/nrcrpt/2001/rpt/8478.htm> [hereinafter INT’L NARCOTICS CONTROL STRATEGY REPORT].

112. Labardini, *Life Imprisonment*, *supra* note 4, at 412 (In general, prosecutors only pursue extradition where the case is serious enough and the defendant faces a potential life sentence.).

113. Moran, *supra* note 23.

114. U.S.-Mexico Extradition Treaty, *supra* note 5, art. 8.

115. INT’L NARCOTICS CONTROL STRATEGY REPORT, *supra* note 111; Labardini, *Life Imprisonment*, *supra* note 4, at 406, 413.

116. INT’L NARCOTICS CONTROL STRATEGY REPORT, *supra* note 111.

117. Labardini, *Life Imprisonment*, *supra* note 4, at 413 n.75.

118. *Id.*

3. Criticisms of Mexico's October 2001 Ruling

Mexico's October 2001 ruling has come under attack as being adverse to the U.S.-Mexico Extradition Treaty.¹¹⁹ For example, the U.S.-Mexico Extradition Treaty does not mention non-life imprisonment assurances,¹²⁰ but the October 2001 ruling mandates such an assurance before extraditing a suspect. In addition, U.S. officials believe that crimes committed in the United States are punishable according to U.S. sentencing guidelines, not Mexico's.¹²¹ As a result, Mexico's ruling provoked the fifty state attorney generals to send a letter to U.S. Attorney General John Ashcroft and Secretary of State Colin Powell, urging the United States to protest Mexico's decision.¹²² The attorney generals complained that Mexico's ruling not only "unduly interferes with our sovereignty but also creates an unhealthy and dangerous incentive for people to commit grievous crimes and escape into Mexico."¹²³

The attorney generals' warning is compounded by Mexico's October 2001 ruling, which did not discuss the nationality of possible extraditees.¹²⁴ This means that the ruling applies "to all fugitives in Mexican territory" and is not simply limited to Mexican nationals.¹²⁵ Therefore, it is possible that Mexico would refuse to extradite a U.S. citizen who fled to Mexico if a potential life sentence awaited the citizen in the United States. It appears that such a scenario would interfere with U.S. sovereignty because Mexico would be imposing its sentencing guidelines in the United States against a U.S. citizen.

4. Alternatives to Extradition

There are currently three potential alternatives to extradition. Varying in degree of complexity, these alternatives are: deportation, abduction, and the duty to extradite or prosecute.

119. *Id.* at 412.

120. *Id.* at 406.

121. *Id.* at 412.

122. Dellios, *supra* note 73.

123. *Id.*

124. Labardini, *Life Imprisonment*, *supra* note 4, at 408.

125. *Id.*

a. Deportation

The case of Christian Longo, a U.S. citizen, is an excellent example of how efficient, as well as time and cost-effective, deportation can be.¹²⁶ Longo was suspected of murdering his wife and three children in Oregon, and subsequently fled to Mexico.¹²⁷ After being identified in Mexico and captured by Mexican authorities, Longo “waived his right to an extradition hearing despite the fact that Mexico normally does not extradite fugitives who encounter the potential of the death penalty.”¹²⁸ Several hours later, Longo was deported to the United States.¹²⁹ This case illustrates that Mexico “will arrest and instantly deport U.S. citizens whose arrest the U.S. requests on criminal charges.”¹³⁰ Thus, deportation of U.S. citizens is a great alternative to the lengthy extradition process. Furthermore, deportation avoids treading on U.S. sovereignty. Specifically, with deportation, Mexican sentencing guidelines would not be imposed or even implicated.

b. Abduction

Abduction is a potential alternative to extradition,¹³¹ although it is controversial. “Abduction or kidnapping is the seizure of a fugitive on the territory of another state without the consent of the latter. This seizure can be effected by agents of the requesting state or by private persons acting on its behalf.”¹³² On June 15, 1992, the U.S. Supreme Court, in the case of *United States v. Alvarez-Machain*, found that the forcible abduction of Dr. Alvarez-Machain from Mexico did not violate the U.S.-Mexico Extradition Treaty because the extradition treaty is silent on the issue of abductions.¹³³ Therefore, the Court held that the forcible

126. See Bruce Zagaris, *Mexico Arrests and Hands Over U.S. Citizen Wanted for Oregon Murders*, 18 INT’L ENFORCEMENT L. REP. 102, 102 (2002).

127. *Id.*

128. *Id.* at 103.

129. *Id.* at 102.

130. *Id.* at 103.

131. See CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* 51 (1980).

132. *Id.*

133. *Alvarez-Machain*, 504 U.S. at 655, 657, 663, 666, 670 (1992); Bradley Thrush, *United States’ Sanctioned Kidnapping Abroad: Can the United States Restore International Confidence in its Extradition Treaties?*, 11 ARIZ. J. INT’L & COMP. L. 181, 181-82 (1994).

abduction of Dr. Alvarez-Machain "does not . . . prohibit his trial in a court in the United States for violations of the criminal laws of the United States."¹³⁴

The *Alvarez-Machain* decision outraged the Mexican government and the international community.¹³⁵ In fact, "[g]overnments around the world condemned the decision as a blatant violation of international law, and sent formal protests to the U.S. government."¹³⁶ Indeed, the *Alvarez-Machain* decision spurred a chain reaction throughout the region.¹³⁷ As a result of the decision, Mexico temporarily stopped cooperating with U.S. drug enforcement agents in Mexico.¹³⁸ In addition, other Latin American countries refused to honor United States' extradition requests.¹³⁹

On November 23, 1994, the United States and Mexico signed a Treaty to Prohibit Transborder Abductions.¹⁴⁰ The treaty is not in effect, however, because it has not been submitted to the Senate for ratification.¹⁴¹ Therefore, it appears that transborder abduction is still an option in the United States.

As mentioned earlier, the *Alvarez-Machain* decision added to the climate of mistrust between Mexico and the United States.¹⁴² It is worrisome that, as a result of Mexico's October 2001 ruling, the United States could resort to transborder abductions when extradition is blocked due to the procedural requirement that life imprisonment cannot be imposed. There is a consensus that transborder abduction violates customary international law.¹⁴³ In fact, authorities believe that it is "flatly impermissible under longstanding customary norms for one state to send its agents to seize an individual located in the territory of another state without

134. *Alvarez-Machain*, 504 U.S. at 670.

135. Hingoraney, *supra* note 10, at 352.

136. *Id.*

137. Various Latin American governments protested the United States decision. In addition, the United States received threats of retaliation against U.S. citizens from countries requesting extradition from the United States. *Id.*

138. *Id.*

139. *Id.*

140. Zagaris & Peralta, *supra* note 24, at 592.

141. *Id.*

142. Hingoraney, *supra* note 10, at 331.

143. Michael J. Glennon, *International Kidnapping: State-sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. SOC'Y INT'L L. NEWSL. 746, 746-47 (1992).

the consent of the government of that state.”¹⁴⁴ Consequently, the United States should not resort to transborder abductions as an alternative to extradition.

c. The Duty to Extradite or Prosecute

A third possible alternative to extradition is simply the duty to extradite or prosecute.¹⁴⁵ This duty, commonly referred to as *aut dedere aut judicare*, is found in Article 9 of the U.S.-Mexico Extradition Treaty.¹⁴⁶ The treaty states, “[i]f extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.”¹⁴⁷ The principle of *aut dedere aut judicare*, however, is not a viable option because of endemic corruption in Mexican law enforcement.¹⁴⁸ One commentator asserted that “drug kingpins enjoy a virtual immunity from arrest or molestation.”¹⁴⁹ Thus, the principle of *aut dedere aut judicare* is insufficient to cure the problem posed by Mexico’s October 2001 ruling: if Mexico refuses to extradite a drug trafficker to the United States due to a possible life sentence, the drug trafficker will go virtually unpunished in Mexico.

Because deportation appears to be the only viable alternative to extradition, the United States must arrive at a solution to the extradition problem posed by Mexico’s October 2001 ruling.

5. Other Countries Also Forbid Life Imprisonment

Mexico’s October 2001 ruling should also cause concern because other countries share Mexico’s disdain for life imprisonment.¹⁵⁰ Portugal, Venezuela, Brazil, Colombia, Costa

144. *Id.* at 746. The American Law Institute asserts that it is customary international law for a state to obtain the consent of another state before “[a] state’s law enforcement officers may exercise their function in the territory of another state.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987).

145. M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 3 (1995).

146. U.S.-Mexico Extradition Treaty, *supra* note 5, art. 9, para. 2; Hingoraney, *supra* note 10, at 335.

147. U.S.-Mexico Extradition Treaty, *supra* note 5, art. 9, para. 2.

148. Hingoraney, *supra* note 10, at 349.

149. *Id.*

150. Labardini, *Life Imprisonment*, *supra* note 4, at 411.

Rica, and El Salvador also forbid life imprisonment.¹⁵¹ Moreover, the Inter-American Convention on Extradition prohibits extradition "when the offense in question is punishable in the requesting state by the death penalty, by life imprisonment, or by degrading punishment."¹⁵² Thus, the United States should be concerned that other countries may also forbid extradition if a suspect faces life imprisonment in the United States.¹⁵³

6. The Age-Crime Curve

The concern that Mexico's non-life imprisonment policy will interfere with the ability of prosecutors to seek stiff punishments should be alleviated by Mexico's sixty-year prison terms.¹⁵⁴ Indeed, criminological research has consistently confirmed that adolescents and young adults commit most crimes.¹⁵⁵ This phenomenon is known as the age-crime curve.¹⁵⁶ Consistent with this phenomenon, criminologist Larry J. Siegel asserts that "hard core chronic offenders commit less crime as they age."¹⁵⁷ Although crime rates decline at various rates for different offenses, in general, crime rates steadily decline after the age of thirty.¹⁵⁸ For example, the murder arrest rate by the age of sixty is zero, for all practical statistical purposes.¹⁵⁹ As mentioned above, Mexico permits a prison term of up to sixty years. Thus, according to the

151. *Id.*

152. Inter-American Convention on Extradition, Feb. 25, 1981, O.A.S. Document OEA/Ser.A/36 (SEPF), 20 I.L.M. 723 (entered into force Mar. 28, 1992) (the following countries signed the Inter-American Convention on Extradition: Chile, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Uruguay, and Venezuela); Labardini, *Life Imprisonment*, *supra* note 4, at 411.

153. The U.S.-Venezuela Extradition Treaty forbids extradition if the suspect faces life imprisonment in the United States, unless Venezuela receives an assurance that life imprisonment will not be imposed. The treaty does not state what would constitute an adequate assurance. Extradition Treaty, Jan. 19-21, 1922, U.S.-Venez., art. IV, 43 Stat. 1698, 1702; Labardini, *Life Imprisonment*, *supra* note 4, at 411 n. 54.

154. C.P.D.F. art. 25 (Mex.); Labardini, *Life Imprisonment*, *supra* note 4, at 409 n.38.

155. Jeffrey Butts, *Youth Violence: Perception Versus Reality*, at <http://www.urban.org/urlprint.cfm?ID=7492> (last visited Sept. 21, 2003); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 978 n.81 (2002).

156. Butts, *supra* note 155. The age-crime curve says that age is inversely related to crime and applies "[r]egardless of economic status, marital status, race, sex, and soon." LARRY J. SIEGEL, *CRIMINOLOGY* 62 (6th ed. 1998).

157. SIEGEL, *supra* note 156, at 63.

158. Dressler, *supra* note 155, at 978 n.81.

159. Butts, *supra* note 155.

age-crime curve, it is statistically unlikely that an extraditee would commit a crime after spending sixty years in prison. As a result, the United States would still satisfy its need to punish criminals and protect society if it followed Mexican sentencing guidelines in extradition cases from Mexico. Finally, such an approach ensures that Mexico will not become a safe-haven for criminals.

7. Alternatives to Following Mexican Sentencing Guidelines

Although the United States will at times be unable to prosecute to the full extent of U.S. law, the alternatives to following Mexican sentencing guidelines are bleak. For example, Labardini hypothesized a Mexican constitutional amendment “to explicitly provide for life imprisonment.”¹⁶⁰ Labardini argued that because life imprisonment is prohibited by the Mexican Constitution, a mere amendment to the U.S.-Mexico Extradition Treaty is inadequate to cure the current dilemma posed by Mexico’s October 2001 ruling.¹⁶¹ Labardini warns, however, that “due to the current domestic political situation, opening debate to amend the Constitution ... will prove very difficult, similar to a Pandora’s Box that could even pull into public debate the settled issue of extraditing Mexican nationals.”¹⁶² Moreover, because passing a constitutional amendment is such a long and tedious endeavor, this alternative would not provide current relief to U.S. prosecutors seeking extradition from Mexico. Also, there is no indication that such a constitutional amendment could even be passed. Therefore, amending Mexico’s constitution to provide for life imprisonment is not a viable alternative.

Contrary to Labardini’s argument, amending the U.S.-Mexico Extradition Treaty does appear to be a viable alternative. Labardini argued that this is not a viable alternative because Mexican courts can disregard non-life imprisonment assurances from the United States if a court is not satisfied with the language of such an assurance.¹⁶³ This is exactly where the language of the U.S.-Mexico Extradition Treaty needs to be amended, however. The treaty must specifically state what constitutes an adequate non-life imprisonment assurance. Consequently, Mexican courts

160. Labardini, *Life Imprisonment*, *supra* note 4, at 414.

161. *Id.*

162. *Id.*

163. *Id.*

could not arbitrarily throw out non-life imprisonment assurances from the United States.

In sum, it appears that the best solution is to follow Mexico's sentencing guidelines to ensure continued extradition from Mexico to the United States. This is the simplest, fastest, and most cost-effective approach. Some may argue that such an approach diminishes U.S. sovereignty because the United States would be following Mexican sentencing guidelines in U.S. courts. This approach, however, is simply a compromise to effectively extradite and punish criminals. Indeed, "[c]ompromising to facilitate extradition is not unusual."¹⁶⁴ Before the October 2001 ruling, U.S. prosecutors "regularly promised not to pursue the death penalty" when requesting extradition from Mexico.¹⁶⁵ Thus, the United States must now also promise not to seek life imprisonment when requesting extradition from Mexico. Non-life imprisonment assurances, however, are complicated by the fact that a judge is free upon sentencing to impose a life sentence despite such an assurance. As a result, in extradition cases from Mexico, U.S. judges must adhere to the non-life imprisonment assurances given to Mexico to ensure extradition to the United States.

B. U.S. Law

The United States takes a different position than Mexico in inquiring into the punishment that potentially awaits an extraditee in the requesting state. Under what is known as the rule of non-inquiry, the United States does not generally "inquire into the processes by which a requested state secures evidence of probable cause to request extradition, the means by which a criminal conviction is obtained in a foreign state, or the penal treatment to which a relator may be subjected upon extradition."¹⁶⁶ This rule of non-inquiry was judicially developed in 1901 in the case of *Neely v. Henkel*.¹⁶⁷ There, the Supreme Court held that protections in the U.S. criminal system do not apply to crimes that take place outside

164. *Id.* at 413 n.75.

165. *Id.*

166. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 569 (4th ed. 2002).

167. *Neely*, 180 U.S. at 109; Wilson, *supra* note 6, at 753 (Wilson proposes that judicial inquiry should be allowed into the criminal processes as well as the conditions and severity of punishment that await an extraditee in a foreign country).

of the United States.¹⁶⁸ Today, the rule of non-inquiry is generally stated as: “an extraditing court will generally not inquire into the procedures or treatment which await a surrendered fugitive in the requesting country.”¹⁶⁹ The theory behind this rule is that the power to make such determinations belongs to the executive branch, not the courts.¹⁷⁰

1. Consequences of the Rule of Non-inquiry

One of the dire consequences resulting from the rule of non-inquiry and leaving discretion to the executive branch is “a bona fide claim of unfair treatment would not receive adequate consideration by either the judicial or executive branch.”¹⁷¹ Moreover, the executive branch could sacrifice individual interests to maintain foreign relations.¹⁷² In addition, “the executive branch, acting through the Justice Department in extradition proceedings, may have ethical conflicts in distancing itself from the interests of foreign governments” because during the extradition process, the Department of Justice represents the legal interests of the state requesting extradition.¹⁷³ The executive branch cannot represent the interests of the state requesting extradition and at the same time “neutrally assess the potential human rights consequences of extradition.”¹⁷⁴

Moreover, there is little evidence that the executive branch is a better fact-finder than the judicial branch.¹⁷⁵ There is even evidence to the contrary, such as past executive branch decisions to negotiate extradition treaties with governments that have since become repressive.¹⁷⁶ Therefore, abandoning the rule of non-inquiry allows courts to inquire into the procedures and treatment awaiting an extraditee in a foreign state.¹⁷⁷

168. See *Neely*, 180 U.S. at 123. Wilson, *supra* note 6, at 753.

169. *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999).

170. *Mainero*, 164 F.3d at 1210; BASSIOUNI, *supra* note 166, at 572–73.

171. Leslie Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception*, 1983 MICH. Y.B. INT'L LEGAL STUD. 153, 153–54.

172. *Id.* at 164.

173. Wilson, *supra* note 6, at 755.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

3. A Possible Humanitarian Exception

There is a possible humanitarian exception to the rule of non-inquiry, however.¹⁷⁸ In *Gallina v. Fraser*, the Second Circuit stated in dictum that “[w]e can imagine situations where the relator, upon extradition, would be subject to procedures or punishments so antipathetic to a federal court’s sense of decency as to require reexamination of the principle set out above.”¹⁷⁹ The court, however, held that the humanitarian exception did not apply in this case where an Italian court convicted Gallina in absentia.¹⁸⁰

The *Gallina* court’s reluctance to apply the humanitarian exception to bar the extradition of a defendant is echoed in many cases.¹⁸¹ For example, in *Cornejo-Barreto v. Seifert*, the Ninth Circuit declined to apply the humanitarian exception even though evidence was introduced that Cornejo-Barreto had been tortured by the Mexican police.¹⁸² Cornejo-Barreto testified, among other things, that he was “deprived of food and water, subjected to death threats, beaten with fists and rifle butts, repeatedly hooded with a plastic bag until he lost consciousness, hung by the wrists, and shocked with electrodes attached to various parts of his body including his genitals.”¹⁸³ Indeed, Cornejo-Barreto believed that if he was extradited to Mexico, he would again be tortured by the Mexican police.¹⁸⁴ The Ninth Circuit, however, “deferred to the Secretary of State to exercise Executive Discretion on the basis of a petition that [Cornejo-Barreto] would present to the Secretary of State.”¹⁸⁵

In *Cornejo-Barreto*, the Ninth Circuit discussed Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸⁶ Article 3 prohibits the extradition of a person “to another State where there are substantial grounds for believing that he would be in danger of

178. *Gallina*, 278 F.2d at 79; BASSIOUNI, *supra* note 166, at 572.

179. *Gallina*, 278 F.2d at 79.

180. *Id.*

181. See *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir. 1980); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000); *Mainero*, 164 F.3d at 1210.

182. See *Cornejo-Barreto*, 218 F.3d at 1008, 1017.

183. See *Id.* at 1008.

184. *Id.*

185. BASSIOUNI, *supra* note 166, at 583; see also *Cornejo-Barreto*, 218 F.3d at 1014.

186. *Cornejo-Barreto*, 218 F.3d at 1010-16.

being subjected to torture.”¹⁸⁷ The Ninth Circuit determined that the Convention Against Torture must be upheld under the discretion of the executive branch, not the judicial branch,¹⁸⁸ in line with other courts.¹⁸⁹

The Ninth Circuit also declined to apply the humanitarian exception in *Mainero v. Gregg*.¹⁹⁰ In that case, the appellants, charged with “murder and criminal association with the Arellano Felix drug trafficking organization [AFO],”¹⁹¹ claimed that they were tortured in Mexico and that their statements were obtained under duress.¹⁹² The appellants urged the court not to extradite them to Mexico because they feared they would be further tortured into implicating others in the AFO.¹⁹³ In reaching a conclusion, the court stated that “to date no court has ever denied extradition based on a fugitive’s anticipated treatment in the requesting country.”¹⁹⁴ The court further held that, the claims of torture were speculative.¹⁹⁵ The court then concluded that “in view of the facts of this case, the well established rule of non-inquiry, and the scant authority for creating a humanitarian exception, we decline to overturn either extradition order on humanitarian grounds.”¹⁹⁶ Therefore, it appears that the humanitarian exception, mentioned in dictum in the *Gallina* opinion, is marginally effective.

There is mounting dicta, however, in some circuit court opinions, that the rule of non-inquiry could be eroded in the proper case.¹⁹⁷ This could theoretically happen in two types of cases:

- 1) where the evidence presented by the requested state is the product of a serious violation of due process (such as torture), the court could give no weight or even refuse to admit the evidence; and 2) where there is evidence that the individual

187. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 4, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture]; see BASSIOUNI, *supra* note 166, at 583. Both the United States and Mexico have ratified the Convention against Torture. *Cornejo-Barreto*, 218 F.3d at 1011.

188. See *Cornejo-Barreto*, 218 F.3d at 1014.

189. BASSIOUNI, *supra* note 166, at 583.

190. *Mainero*, 164 F.3d at 1210.

191. *Id.*

192. *Id.* at 1204.

193. *Id.* at 1210.

194. *Id.*

195. *Id.*

196. *Id.*

197. BASSIOUNI, *supra* note 166, at 575.

may be subjected to cruel, inhuman or degrading treatment in the requesting state, the court could refuse to order the relator's extradition.¹⁹⁸

The Ninth Circuit's haunting words, however, show that "to date no court has ever denied extradition based on a fugitive's anticipated treatment in the requesting country."¹⁹⁹ Nonetheless, the "limited inquiry" in which some courts have engaged with regard to the humanitarian exception indicates that such inquiry may be expanded if allowed by treaty.²⁰⁰

The rule of non-inquiry does not need to be abandoned, however, if courts are willing to apply the humanitarian exception in appropriate cases. For example, in *Mainero v. Gregg*, the court declined to apply the humanitarian exception, noting that the claims of torture were purely speculative.²⁰¹ Therefore, it appears that if a claim of torture could be substantiated, that the Ninth Circuit would be willing to apply the humanitarian exception.

If U.S. courts begin to apply the humanitarian exception, it could significantly add to the tension created by Mexico's October 2001 ruling, which prohibits extradition if a suspect faces life imprisonment in the country requesting extradition. Application of the humanitarian exception might add to the tension because U.S. courts would be inquiring into the procedures and punishments awaiting an extraditee in Mexico. Such inquiry may not only exacerbate tensions, but may also frustrate extradition between the United States and Mexico because U.S. courts would be taking an active stance in prohibiting extradition on grounds of torture or similar unfair treatment. Even though application of the humanitarian exception might increase tension and further frustrate extradition, it is necessary for the judiciary to ensure that the procedures or punishments in the country requesting extradition are not "antipathetic to a federal court's sense of decency."²⁰²

198. *Id.* at 575.

199. *Mainero*, 164 F.3d at 1210.

200. BASSIOUNI, *supra* note 166, at 583.

201. *Mainero*, 164 F.3d at 1210.

202. *Gallina*, 278 F.2d at 79.

IV. CONCLUSION

Extradition between the United States and Mexico has been a contentious issue for many years. The October 2, 2001 Mexican Supreme Court ruling, prohibiting extradition if a potential extraditee faces a life sentence in the requesting state, adds to the turmoil.

The fastest, simplest, and most cost-effective way to facilitate extradition from Mexico to the United States is to follow Mexico's sentencing guidelines in punishing extraditees. Following Mexico's sentencing guidelines will accomplish a number of important goals. First, it ensures that Mexico will continue to extradite suspects to the United States thus avoiding a safe-haven for criminals in Mexico. Second, the United States will still be able to effectively try and punish criminals. Although under Mexico's sentencing guidelines the United States will only be able to sentence extraditees from Mexico for up to sixty years in prison, this still satisfies the need to punish criminals and protect society. Finally, according to the age-crime curve, a sixty-year sentence will ensure extremely low recidivism rates because statistically people commit significantly fewer crimes as they age.

The U.S.-Mexico Extradition treaty must be rewritten to provide for adequate non-life imprisonment assurances. Such a provision would prevent a Mexican court from arbitrarily deciding that a non-life imprisonment assurance was inadequate. In addition, it may be necessary for U.S. courts to agree not to impose a life sentence, if Mexico was given a non-life imprisonment assurance in exchange for extradition to the United States.

Finally, U.S. courts should begin actively inquiring into the procedures and treatment awaiting an extraditee in a country requesting extradition, via the humanitarian exception. While such inquiry may further add to the tension between the U.S. and Mexico, U.S. courts must take an active role in protecting the human rights of potential extraditees.

*Vanessa Maaskamp**

* J.D. Candidate, Loyola Law School, Los Angeles, 2004; B.A. Psychology, University of California at Santa Barbara, 2000. I would like to thank my family for their love, encouragement, inspiration, and support. A special thanks to Caroline Hurtado for her tireless efforts and Professor Laurence Helfer for his early guidance.