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IMPLEMENTING THE U.N. TORTURE CONVENTION IN U.S. EXTRADITION CASES[1]

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The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)[3] entered into force in the United States on November 20, 1994. Article 3.1 of the Torture Convention provides that:

No State Party shall expel, return, ("refouler") or *extradite* a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. [4]

The U.S. Senate's Resolution of Advice and Consent to ratification of the Torture Convention included the "understanding" that the term "substantial grounds for believing" in Article 3 means "more likely than not that he would be tortured."[5]

"Torture" is defined by Article 1 of the Torture Convention to mean:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any king, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[6]

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1. An earlier version of this article was presented and discussed at a workshop on Implementation of the UN Convention on Torture at the University of Denver College of Law Sutton Colloquium and McDougal Lecture Commemorating the 50th Anniversary of the Universal Declaration on Human Rights, April 17-18, 1998.

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3. *Opened for signature* 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), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

4. *Id.* at art. 3(1) (emphasis added).

5. 136 Cong. Rec. S17486, S17492 (daily ed. Oct. 27, 1990).

6. Torture Convention, art 1.1. The last sentence of Article 1.1 states that torture

Article 3.2 of the Torture Convention further sets forth the scope of the inquiry by the "competent authorities" necessary to determine whether an individual is likely to be tortured if he or she is extradited to the demanding country:

For the purpose of determining whether there are such grounds, *the competent authorities* shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.[7]

All of the elements necessary to assert and adjudicate a claim under Article 3 are spelled out explicitly in the Torture Convention: the mandatory prohibition on extradition of someone likely be tortured in the demanding country, the standard of proof to establish such a claim, the definition of torture, and the scope of the inquiry. Nothing else is required by way of legislation to flesh out the requirements for asserting rights under Article 3.

In contrast, several other articles of the Torture Convention, either expressly or by implication, require each State Party to the convention to take effective legislative, administrative, judicial or other measures to prevent and to punish torture in any territory under its jurisdiction. Such measures include provisions for criminal liability and for civil redress and compensation for torture victims.[8]

Article 3, on the other hand, does not appear to require any implementing legislative or administrative action to effectuate its provisions. Instead, in mandatory terms, Article 3 absolutely prohibits the United States, as a State Party to the convention, from extraditing any person to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."

Although there is no statute or published regulation implementing the United States' obligation under Article 3 in the extradition context, the Secretary of State has adopted procedures for evaluating an alleged fugitive's claim that he or she would be tortured by the country seeking his or her extradition.[9] By assuming this responsibility, the Secretary

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"does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

7. Torture Convention, art. 3.2.

8. *See, e.g.*, Article 2.1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); Article 4.1 ("Each State Party shall ensure that all acts of torture are offenses under it criminal law"); Article 14.1 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible").

9. *See* Letter Brief of the United States Department of Justice (Feb. 10, 1998), In the Matter of the Extradition of Chee Fan Chen, No. 97-15609 (9th Cir. Dec. 12, 1997) (on file with author) [hereinafter Letter Brief], *submitted in* In the Matter of the Extradition of Chee Fan Chen, No. 97-15609, pending before the Ninth Circuit [hereafter "Letter Brief"]

of State has effectively implemented Article 3 in extradition cases. No additional administrative or legislative act is necessary since the United States government, in seeking ratification of the Torture Convention recognized that Article 3 is binding as a limitation on the United States' authority to extradite without the necessity of implementing legislation or regulations.[10]

Nevertheless, the United States maintains that the Secretary's procedures are the exclusive remedy available to fugitives to prevent their being surrendered to a country where they are likely to be tortured. The government asserts this exclusive authority pursuant to the Secretary of State's statutory authority to actually extradite fugitives,[11] and under the "rule of non-inquiry" adopted by federal courts, which precludes judicial inquiry in most extradition cases into the human rights practices of U.S. extradition treaty partners.[12]

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at 2 ("The Secretary of State has taken steps to ensure United States Government compliance with our obligation under the Torture Convention").

10. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Rainbow Navigation, Inc. v. Dep't of Navy, 686 F. Supp. 354, 357 (D.D.C. 1988).

"There is no doubt that Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured." Prepared Statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, Hearing on Convention Against Torture [Hearing], Senate Committee on Foreign Relations, S. Hrg. 101-718 (Jan. 30, 1990) at 18. "Article 3 forbids a State Party form forcibly returning a person to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture." Sen. Exec. Rep. 101-30 (August 30, 1990) at 10.

The Senate's resolution of ratification of the Torture Convention does include a "declaration" that "the provisions of Articles 1 through 16 of the Convention are not self-executing." However, the State Department made it clear that in proposing that declaration that it was intended to require that "[a]ny prosecution (or civil action) in the United States for torture will necessarily be pursuant to existing or subsequently enacted Federal or State law." Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pressler, dated April 4, 1990, Sen. Exec. Rep. 101-30, at App. B, p. 41.

A recent analysis under the four judicial approaches for determining whether provisions of a treaty are self-executing, concludes that despite the absence of implementing legislation, "Article 3 should be held to be enforceable by individuals in U.S. courts." Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 Denv. J. Int'l L. & Pol'y 533 (Summer 1998). It is worth noting that the Government did not argue in the *Chen* case that the Torture Convention was not self-executing in the context of extradition cases.

11. 18 U.S.C. § 3186 ("The Secretary of State may order the person committed under Section 3184 . . . to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.").

12. "Under the rule of non-inquiry, courts refrain from 'investigating the fairness of a requesting nation's justice system,' . . . and from inquiring 'into the procedures or treatment which await a surrendered fugitive in the requesting country.'" United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997). "It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990). However, some courts have left "open the possibility" that a case where the extraditee "'would be subject to procedures so antipathetic

However, these traditional extradition statutes and rules pre-date the entry into effect in the United States of Article 3 of the Torture Convention. This paper will explore whether Article 3's mandatory prohibition against the extradition of any persons to another country where they are likely to be tortured modifies the judicial rule of non-inquiry, thereby affording some measure of judicial review of the Secretary of State's heretofore near exclusive authority to decide whether to extradite someone facing such severe human rights violations.

U.S. EXTRADITION AUTHORITY IS SOLELY A CREATURE OF STATUTE AND TREATY. ARTICLE 3 MODIFIES AND LIMITS THAT EXTRADITION AUTHORITY.

Under U.S. law, absent a statute or treaty, the United States government lacks authority and any duty to surrender any person on its territory to a foreign country for purpose of prosecution for an alleged criminal offense.[13] Indeed, the Supreme Court has held that the Constitution forbids U.S. officials from surrendering a fugitive to a foreign government for criminal prosecution absent statutory authority or a treaty obligation to do so.[14] As stated in *Valentine v. United States ex rel. Neidecker*:

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. *There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.* It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.[15]

A fortiori, a treaty provision, such as Article 3, which prohibits extradition under certain circumstances clearly stays the government's authority to act otherwise.

Current U.S. extradition statutes authorize extradition only pursuant to extradition treaties.[16] Federal magistrate judges currently de-

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to a federal court's sense of decency'" might cause those courts to develop a "humanitarian exception" to the rule of non-inquiry. Emami v. U.S. Dist. Ct. for N.D. Cal., 834 F.2d 1444, 1453 (9th Cir. 1987) (*quoting* Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). For a comprehensive review of the rule of non-inquiry predating the entry into effect of the Torture Convention in the U.S., see J. Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991).

13. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); United States v. Howard, 996 F.2d 1320, 1329 (1st Cir. 1993); Quinn v. Robinson, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

14. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936).

15. *Id.* (Emphasis added.)

16. 18 U.S.C. § 3184 (Judicial officers authorized to determine extraditability of any

termine whether the requirements of the particular treaty have been met and so certify those facts to the Secretary of State, who is empowered, in her discretion, to deliver the accused to the agents of the requesting country for trial of the offense charged. The legality of the magistrate judge's certification of extraditability, but generally not the Secretary of State's decision to extradite, is judicially reviewable only by writ of habeas corpus.[17]

Under the Supremacy Clause of the Constitution,[18] all treaties are the "Supreme Law of the Land," on a par with statutes. In particular, extradition treaties are self-executing; they require no implementing legislation to be binding as law.[19] Also, an extradition treaty and general extradition statutes can be modified by a subsequent treaty, such as the Torture Convention, which creates or limits authority to extradite and which is inconsistent with existing authority.[20]

Therefore, pursuant to Article 3, all existing extradition treaties must now be considered to contain a limitation prohibiting the extradition by the United States of any person facing the likelihood of being tortured. As so incorporated into these extradition treaties, Article 3 should also be considered self-executing and enforceable by the individual fugitives who assert that they will be subject to torture if rendered over to the requesting States.

Moreover, any future bilateral extradition treaties, absent Congressional legislation or express treaty language abrogating the Torture Convention's prohibition on extraditing fugitives likely to be tortured, should also be construed as incorporating the terms of Article 3.[21]

The Secretary of State recognizes this limitation on her powers.[22] The issue remains whether the Secretary's decision to extradite a person seeking to enforce an Article 3 claim under the Torture Convention is judicially reviewable.

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fugitive "[w]henever there is a treaty or convention for extradition between the United States and any foreign government . . ."); 18 U.S.C. § 3186 (*see* note 11, *supra*); 18 U.S.C. § 3181(a)(authority to surrender persons "who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government"). 18 U.S.C. § 3181(b) contains the only statutory authority to extradite persons in the absence of a treaty, "in the exercise of comity, . . . other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries," subject to conditions specified.

17. 28 U.S.C. § 2241; *see* Collins v. Miller, 252 U.S. 364, 369 (1920).

18. Article VI, § 2, U.S. Constitution.

19. United States v. Balsys, 119 F.3d 122, 138 n.14 (2d Cir. 1997), *cert. granted*, 1998 U.S. LEXIS 460 (Jan. 16, 1998).

20. Charlton v. Kelly, 229 U.S. 447, 463 (1913)(statutory extradition requirements superseded by subsequent treaty in conflict with the statutory procedures).

21. Mississippi Poultry Ass'n, Inc. v. Madigan, 992 F.2d 1359, 1365 (5th Cir. 1993)("Congress may abrogate a treaty or international obligation entered into by the United States only by a clear statement of its intent to do so.").

22. Letter Brief at 1-2.

Who Decides Whether an Article 3 Prohibition Applies?

Article 3 is silent on the question of who should make the determination of whether there are substantial grounds for believing that a particular fugitive would be in danger of being subjected to torture if delivered for prosecution to the requesting country.[23] Normally the Secretary does not consider the exercise of her authority to extradite until after a federal magistrate judge has certified the fugitive's eligibility for extradition under the applicable treaty, and, where sought, that certification has been tested in the courts in a habeas corpus proceeding.[24]

However, no statutory or treaty provision exists restricting the jurisdiction of the federal courts from considering an Article 3 claim, either prior or subsequent to the Secretary's review of such a claim.

Not surprisingly, the Secretary of State has asserted that "the obligation imposed by the [Torture] Convention with regard to extradition is vested with [her] as the United States official with ultimate responsibility for determining whether a fugitive will be extradited."[25] However, the legislative history of the Senate ratification of the Torture Convention does not support an interpretation which would reserve to the Secretary of State the exclusive role in determining the fate of fugitives who allege they are likely to be tortured in a requesting country.

In a letter dated May 20, 1988, transmitting the Torture Convention to the Senate for its "advice and consent," President Reagan recommended ratification subject to "certain reservations, understandings, and declarations." Included was a recommendation that "the United States declares that the phrase 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."[26] The Bush Administration, in resubmitting the Convention for ratification, omitted this declaration while recognizing its implicitness, because it considered it "not necessary to include . . . in the formal instrument of ratification."[27]

Clearly, under United States statutes, the Secretary of State would

23. Article 3.2 simply states that "the competent authorities" should take into account all relevant considerations without specifying whether those authorities should be administrative or judicial or both. The Justice Department's witness at the hearings on ratification of the Torture Convention, Mark Richard, acknowledged this fact: "Article 3 does not require that such determinations be made subject to judicial review. The determiners and the degree of review, if any, are left by the Convention to internal domestic law." Hearing at 18.

24. *See* In re the Extradition of Howard, 996 F.2d 1320, 1324-25 (1st Cir. 1993). "Decisions on extradition are presented to the Secretary only after a fugitive has been found extraditable by a United States judicial officer and given an opportunity to challenge the finding by seeking a writ of habeas corpus." Letter Brief at 2.

25. Letter Brief at 2.

26. Semmelman, supra at 1225 n. 203.

27. Sen. Exec. Rep. 101-30, App. A, at 35, 37.

be the "competent authority" to determine in the first instance whether her authority to extradite a person has been barred by Article 3. However, that authority does not resolve the issue of whether the Secretary's decision to extradite is subject to judicial review.

Hence, there is no support in the ratifying document or its legislative history for a conclusion that the Secretary of State was intended to have the exclusive authority and that the judiciary should play no role in implementing Article 3.

Indeed, the Administrative Procedure Act (APA) expressly provides that a "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."[28] In the absence of specific statutory review authority, the APA recognizes the right to seek judicial review of agency action by writ of habeas corpus in a court of competent jurisdiction.[29]

HABEAS CORPUS JUDICIAL REVIEW

Under Article 3 of the Torture Convention, the Secretary's decisions do not involve the exercise of her discretion as to whether to extradite in a given case. An Article 3 decision is pursuant to a mandatory *treaty* prohibition against extraditing anyone likely to be subjected to torture in the demanding country. No statute or treaty gives the Secretary the power to override that prohibition in the exercise of her discretion.[30]

As noted earlier, the Habeas Corpus Statute[31] grants jurisdiction to the federal courts to issue a writ of habeas corpus to a person in custody "in violation of the Constitution or laws or *treaties* of the United States."[32] Should the Secretary of State purport to exercise her discretion to override substantial grounds for believing an extraditee would be tortured, such a decision would violate a treaty, *i.e.*, Article 3 of the Torture Convention. It would, therefore, be subject to being challenged by a fugitive in custody by writ of habeas corpus.

The United States government's position asserting exclusive authority under the Torture Convention amounts to a claim that the availability of Section 2241 habeas corpus relief to test the Secretary's decision to extradite despite an Article 3 claim has implicitly been repealed. However, the Supreme Court has made it clear that congressional intent to repeal habeas corpus jurisdictional statutes must be ex-

28. 5 U.S.C. § 702. Since no federal statute expressly precludes judicial review of Article 3 decisions by the Secretary of State and the relief afforded by Article 3 is mandatory not discretionary, those exceptions to judicial review under the APA are inapplicable. 5 U.S.C. § 701(a).

29. 5 U.S.C. § 703.

30. Valentine, 299 U.S. at 9.

31. 28 U.S.C. § 2241.

32. 28 U.S.C. § 2241(c)(3). (Emphasis added.)

press and that "[r]epeals by implication are not favored."[33]

A contrary interpretation, granting sole authority to the executive branch to make an unreviewable determination under Article 3, would raise serious constitutional issues under the Suspension Clause of the Habeas Corpus provision,[34] the Due Process Clause of the Fifth Amendment, and the concept of Separation of Powers enshrined in America's Constitutional structure.[35] In the absence of any other clear avenue for judicial review in Article 3 cases, the unavailability of at least habeas corpus review of the Secretary's decision would clearly amount to an unconstitutional suspension of the writ.[36]

DUE PROCESS REQUIREMENTS IN ARTICLE 3 DECISIONMAKING.

Freedom from Torture Is a Liberty Interest of theHighest Order.

Among the most important issues federal courts must consider in reviewing the Secretary's Article 3 decisions under habeas corpus jurisdiction is: What elements of procedural due process are required to preserve fugitives' Article 3 interests not to be wrongly extradited to countries where they are likely to be tortured? Under the U.S. Constitution, the Torture Convention, and customary international law,[37] freedom

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33. Felker v. Turpin, 116 S.Ct. 2333, 2338 (1996); *accord* Ex Parte Yerger, 75 U.S. 85, 105 (1868). Legislation currently pending in the Senate to implement the Torture Convention, which incorporates the language of Article 3, currently contains jurisdiction-removing language precluding judicial "review" of "claims raised under the convention" or the proposed identical statutory policy. The Survivors of Torture Support Act ["STSP"], S. 1606, 105th Cong., 2nd Sess., § 4(d)(1998). (Other pending bills in both the House and Senate, known as the "Torture Victims Relief Act," contain no such jurisdiction-limiting provisions. S. 1606 and H.R. 3161, 105th Cong., 2nd Sess. (1998).) Similar jurisdiction-limiting language in 1996 immigration legislation has been held not to repeal by implication access to habeas corpus for aliens in custody facing removal from the United States. Goncalves v. Reno, ___ F.3d ___, ___ , 1998 WL 236799 (1st Cir. May 15, 1998) ("Felker regarded Ex parte Yerger as adopting a general rule of construction that any repeal of the federal courts' historic habeas jurisdiction . . . must be explicit and make express reference specifically to the statute granting jurisdiction.")
Therefore, absent an explicit, unambiguous directive in jurisdiction-modifying language specifically abrogating Section 2241 habeas corpus jurisdiction in Article 3 extradition claims, a jurisdiction-limiting statute, if enacted, would likely be held to limit only direct judicial review of the Secretary's decision, not review by habeas corpus.

34. U.S. Const. art. 1, § 9, cl. 2 provides:
The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

35. Goncalves v. Reno, ___ F.3d at _____.

36. *See, e.g.*, Kolster v. INS, 101 F.3d 785, 790-91(1st Cir. 1996) (availability of constitutional habeas review makes repeal of direct review constitutional).

37. "The public law of nations was long ago incorporated into the common law of the United States." Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986)(*citing* The Paquete Habana, 175 U.S. 677, 700 (1900)). "To the extent possible, courts must construe American law so as to avoid violating principles of public international law." Garcia-Mir, 788 F.2d at 1453 (*citing* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64,

from torture is among the highest and weightiest liberty interests recognized in America, as well as worldwide.[38]

Article 1 of the Torture Convention defines torture as:

> Any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. . . .

The Torture Convention requires each State Party, including the United States, to prevent and punish torture committed on its territory and prohibits any State Party from extraditing any person to another State, whether or not a party to the Convention, where that person is likely to be tortured. The Convention definition of torture has been incorporated virtually verbatim into United States implementing criminal and civil liability legislation.[39] Also, the extraterritorial interest of the United States in preventing and punishing torture in other countries has been codified with respect to both aliens and U.S. citizens who are the victims of official torture abroad.[40]

The Eighth Amendment's prohibition against "cruel and unusual punishments" has long been recognized by the Supreme Court as "proscribing 'tortures' and other 'barbarous' methods of punishments."[41]

Additionally, "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law," *i.e.*, "a jus cogens norm."[42] Also, "a jus cogens norm is subject to modification or derogation only by a subsequent jus cogens norm."[43]

Moreover, the United States would violate international law by encouraging or condoning torture by other countries, if it should extradite

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102, 118 (1804).

38. *See, e.g.*, Chahal v. United Kingdom, European Court of Human Rights, (1997) 23 EHRR 413 (15 Nov. 1996), at ¶¶ 79-80 (Article 3 of the European Convention on Human Rights, which prohibits torture in absolute terms "enshrines one of the most fundamental values of democratic society." Its prohibition "is equally absolute in expulsion cases.")

39. 18 U.S.C. § 2340(1); 28 U.S.C. § 1350 note (Section 3(b)).

40. The Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note; The Alien Tort Act (ATA), 28 U.S.C. § 1350.

41. Gregg v. Georgia, 428 U.S. 153, 169-70 (1976).

42. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992).

43. *Id.* at 715. *See* Chahal v. United Kingdom, at ¶ 79 ("Article 3 [of the European Convention on Human Rights] makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation").

someone to a country where he or she would likely be tortured.[44]

Therefore, freedom from torture and from being turned over to another country to be tortured is a liberty interest in the United States of the highest order. As such it is protected by the Due Process Clause of the Fifth Amendment.[45] The question remains: can the interest involved, considering its importance, be adequately protected by a purely administrative decisionmaking process without any opportunity for judicial review?

What Process Is Due?

The U.S. government contends that "because the Secretary [of State] follows a principled decision-making process with appropriate concern for the treatment a requested person will receive if returned to a requesting country," the federal courts, despite Article 3, should not recognize any exception to the rule of judicial non-inquiry.[46]

The Secretary recognizes the "there is no statute or published regulation applicable to the Secretary's decision-making process in determining whether to sign an extradition warrant or whether to impose conditions on an extradition," even where an Article 3 claim has been raised by the alleged fugitive.[47] Nevertheless, the Secretary asserts she "has taken steps to ensure United States Government compliance with [its] obligation under the Torture Convention."[48]

The informal procedures adopted by the Secretary are spelled out in a Letter Brief filed in the *Chen* extradition case currently under advisement in the Ninth Circuit. According to that Letter Brief:

All bureaus in the Department and all posts abroad have been advised that, in order to implement this obligation, the Secretary will consider in all extradition cases whether a person facing extradition "is more likely than not" to be tortured in the country requesting extradition. All Department bureaus and posts abroad have been requested to provide any information relevant to the issue of torture in a particular extradition case to the Office of the Legal Advisor and the Bureau of Democracy, Human Rights and Labor.

> In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze all available information relevant to the case in preparing a rec-

44. *See* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 371 (E.D.La. 1997)(quoting Restatement (3rd), Foreign Relations Law of the United States, § 702(d): "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture. . .")

45. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

46. Letter Brief, at 3.

47. *Id.* at 1.

48. *Id.* at 2.

> ommendation to the Secretary. If the person wanted for extradition has attempted to raise this issue during judicial proceedings, any relevant information provided to the court is reviewed. The fugitive, on his own or through counsel, and other interested parties may also submit additional written documentation to the Department of State for consideration in reaching the decision on extradition. The review also considers other information available to the Department concerning judicial and penal conditions and practices of the requesting country, including the information contained in the State Department's annual Human Rights Reports, and the possible relevance of that information to the individual whose surrender is at issue. . . . The Bureau of Democracy, Human Rights and Labor, which drafts the Human Rights Reports and provides advisory opinions on asylum requests in deportation proceedings under section 207 of the Immigration and Nationality Act, is a key participant in this process.
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> Based on the resulting analysis of all relevant information, the Secretary may decide to surrender the fugitive to the requesting state, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions or after receiving assurance she deems appropriate. . . .[49]

Absent from this process is any requirement for a hearing or that the Secretary make written findings, attach weight to any of the facts and reports she considers, balance that information and provide reasons in compliance with a specific legal standard for her decision. Such fundamental elements of due process and the rule of law in administrative proceedings are essential to prevent arbitrary decisions and to afford the Article 3 claimant meaningful judicial review of the administrative decision in a habeas corpus proceeding.[50] By adhering to the rule of non-inquiry with respect to Article 3 claims, the Secretary has failed to recognize or provide these due process rights, including judicial review in any form, to an Article 3 claimant.

In *Mathews v. Eldridge*, the Supreme Court summarized the criteria for determining whether the administrative process afforded an individual whose liberty interest was at risk was sufficient to satisfy the Due Process Clause:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute proce-

49. *Id.* at 2-3. This supplemental briefing was requested *sua sponte* by the Ninth Circuit panel at oral argument in the Chen case.

50. *See* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978).

dural requirement would entail.[51]

The Private Interest At Stake

As already demonstrated, the right to be free from official torture is of the highest order, a interest which cannot be derogated under international law by ordinary legal norms. The Eighth Amendment's prohibition against cruel and unusual punishment raises freedom from torture to the status of a fundamental constitutional right. The mandatory injunction in a multinational treaty against extraditing someone facing torture and the protection afforded torture victims at home and abroad by United States statutes which impose civil and criminal liability on torturers are designed to comprehensively protect this vital liberty interest.

The Risk of Erroneous Deprivation of Such Interest By the Procedures Provided.

At stake for the potential torture victim is, by definition, severe physical or mental pain or suffering, possibly even death; likely conviction based on a confession coerced by torture, and punishment by universally condemned methods or under torturous and inhumane conditions.

Since "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process,"[52] the potential deprivation here would support a need for much greater procedural protection than that afforded by the Secretary of State.[53] At a minimum, it would require an evidentiary hearing comparable to that constitutionally required to be afforded to those on the "very margin of subsistence," such as those facing loss of welfare benefits.[54]

The "fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards," are additional factors to be weighed.[55] Central to that evaluation "is the nature of the relevant inquiry." [56]

As illustrated by the process outlined by the Secretary, the inquiry

51. Mathews, 424 U.S. at 334-35.

52. *Id.* at 341.

53. *See* Chahal, at ¶ 151 ("Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to Article 3 [of the European Convention on Human Rights], the notion of an effective remedy under Article 13 [of that Convention] requires independent scrutiny of the claim that there exist substantial ground for fearing a real risk of treatment contrary to Article 3").

54. Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Mathews, 424 U.S. at 340.

55. Mathews, 424 U.S. at 343.

56. *Id.*

into an Article 3 claim is both broad in scope and complex in nature. Article 3.2 requires "the competent authorities" to "take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." Such an inquiry into the practices of a foreign country requires substantial research, consideration of many sources of information, the opinion of recognized and independent experts, and objective evaluation free from political, economic and foreign policy considerations.

The Secretary places significant reliance in this process on reports by, and the evaluation of, the State Department's Bureau of Democracy, Human Rights and Labor. This Bureau is staffed by career State Department officers subordinate to the Secretary. Its reports are filtered through and edited by numerous political officers representing differing interests in dealing with the relevant country. The Secretary herself must deal regularly on numerous foreign policy, political and economic issues with the highest officials of the requesting country. The risk, therefore, of decisionmaking based on factors unrelated to the merits of an Article 3 claim is significant in the process currently employed by the government.[57]

During the Secretary's Article 3 process, the fugitive's testimony and the testimony of corroborating witnesses and experts may be presented only in writing, without any opportunity for the Secretary, as decisionmaker, to evaluate their credibility and to compare the credibility and substance of opposing sources. Neither does the fugitive have any opportunity to test the credibility of opposing sources. It is not even clear whether the fugitive has knowledge of or access to all of the information considered by the Secretary in reaching a decision or is provided with any opportunity to rebut that information.

Since the Secretary is not required to render a reasoned decision specifying the weight applied to any fact or opinion, there is no way to

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57. *See* Chahal, at ¶¶ 80, 151 (Improper for British Home Secretary and expulsion review bodies to consider "what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state").
"International collaboration in criminal prosecutions has intensified admirably in recent years." Balsys, 119 F.3d at 130-1. With this increased "cooperative internationalism" in law enforcement, the risk that the interests in preserving and nurturing the relationships established will override the objective judgment about human rights practices and torture in specific cases involving some cooperating countries becomes significant. *See transcript of hearing in* Alexandre Konanykhine v. William J. Carroll, Civ. Action No. 97-449-A (E.D.Va. July 22, 1997)(former KGB agent testified that in the interest of international law enforcement cooperation INS attorneys ignored evidence that Russian officials sought extradition or removal of fugitive in a fabricated criminal case in which the fugitive faced torture). The State Department and the Justice Department frequently cooperate in international law enforcement matters. Hence, political interests of other agencies may influence the Secretary of State's decision in an extradition case with a particular country. *Cf.* Kyles v. Whitley, 131 L.Ed. 2d 490 (1995)(all agencies are part of the same government).

evaluate the validity of any given decision or to root out any arbitrary, discriminatory, or irrational action by the agency. Nor can decisions to override the likelihood of torture because of political, economic or foreign policy interests be detected and corrected. Finally, there is no provision for administrative appeal.

Under comparable conditions, where "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process," the Supreme Court has required an evidentiary hearing before a potentially life-sustaining statutory interest, i.e., welfare benefits, could be terminated.[58] The same procedural protection would appear to be imperative where the risk of torture is at issue.

The Governmental Interest Involved.

The final factor, the government's interest in retaining the procedures chosen, is perhaps the most difficult to assess. Prior to the entry into force of the Torture Convention, the rule of non-inquiry was based on several considerations: the assumption that the United States would not enter into an extradition treaty with a country whose criminal justice system it deemed unfair; the need to honor the interest in comity of nations in mutually enforcing extradition treaties; and the desire to afford the Secretary of State flexibility in exercising discretion in discharging her statutory authority to extradite.[59]

However, none of these considerations rises to the level of a constitutional mandate. In the extradition case of *In re Howard*,[60] the First Circuit rejected the government's suggestion that "the Constitution mandates the rule of noninquiry."

We disagree. The rule did not spring from a belief that courts, as an institution, lack either the authority or the capacity to evaluate foreign legal systems. Rather, the rule came into being as judges, attempting to interpret particular treaties, concluded that, absent a contrary indication in a specific instance, the ratification of an extradition treaty mandated noninquiry as a matter of international comity.[61]

Moreover, the entry into force of Article 3 and the requirement that

58. Goldberg, 397 U.S. at 269; *see also* Mathews, 424 U.S. at 343-44 ("Goldberg noted that in such circumstances 'written submissions are a wholly unsatisfactory basis for decision.'")

59. *See* Ahmad, 910 F.2d at 1067 (comity); Glucksman v. Henkel, 221 U.S. 508, 512 (1911)(extradition treaty assumes the trial will be fair); Semmelman, at 1229-36 (policy considerations). *But see* Emami, 834 F.2d at 1453(leaving open the possibility of a "humanitarian exception" to the rule of non-inquiry, quoting dicta in Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). While the Ninth Circuit appears to adhere to the possibility of a humanitarian exception, the Second Circuit appears to have rejected the *Gallina* dictum. *See* Ahmad, 910 F.2d at 1067.

60. 996 F.2d 1320 (1st Cir. 1993).

61. *Id.* at 1330 n.6.

it be enforced undermines those governmental interests considerably. First, Article 3 provides an express mandatory prohibition against extradition of likely torture victims which modifies all existing extradition treaties and all future ones not inconsistent with its terms. Such a "specific" exception to the right of the United States to extradite anyone has been held to be reviewable and enforceable by the federal courts.[62]

Second, the interests of comity are substantially diminished since Article 3 emanates from a multilateral Convention signed by dozens of countries codifying a universally recognized customary international law of the highest order. Hence, any country's complaint that a United States court refused to extradite based on substantial grounds that the person sought would be tortured should fall on deaf ears.

Third, the flexibility and discretion normally afforded the Secretary in exercising ultimate authority to extradite has been removed by Article 3's mandatory prohibition on extradition of anyone likely to be tortured. The Secretary simply lacks any discretion to extradite such a person. Also, conditions negotiated by the Secretary to prevent the infliction of torture may in some cases be both reasonable and enforceable, thus reducing the likelihood of actual torture being inflicted. However, the ultimate determination of whether the standard prohibiting extradition has been met or not should still, to insure independence of this momentous and irreversible decision, be made by a court.[63]

Finally, the Secretary of State's interests are not the only governmental interests involved in extradition decisions. The federal courts have habeas corpus jurisdiction to test the legality of detaining a fugitive under the Constitution, statutes and "treaties" of the United States. The courts cannot faithfully exercise that jurisdiction simply by rubber-stamping the decision of the executive branch to extradite someone who claims under Article 3 to be facing torture. Such a process, wherein the courts are complicit in violating both the Eighth Amendment and international law of the highest order, would clearly "shock the conscience."[64]

This fundamental concept of due process was inherent in the *Gallina* exception in which the Second Circuit at that time recognized that there could be "situations where the [fugitive], 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 noninquiry.[65]

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62. Quinn v. Robinson, 783 F.2d 776, 781-83 (9th Cir. 1986)(political offense exception in treaty); Howard, 996 F.2d at 1325 (fair trial and discrimination exception in treaty).

63. *See* Chahal, at ¶ 105 (Assurances of protection by Indian government to prevent torture of Sikh separatist leader, accepted by Home Secretary but rejected by European Court of Human Rights as inadequate guarantee of safety.)

64. U.S. v. Salerno, 481 U.S. 739, 746 (1987); *see also* Rochin v. California, 342 U.S. 165 (1952).

65. Gallina, 278 F.2d at 79; *accord* Emami, 834 F.2d at 1453; Arnbjornsdottir-

On balance, the extraordinarily weighty liberty interest of the fugitive, the need for an evidentiary hearing and judicial review to prevent arbitrary or politically motivated erroneous decisionmaking, and the requirement that the courts not participate in a process which would condone torture, in combination, substantially outweigh whatever interest remains in the Secretary of State under Article 3 to be the sole arbiter of fate in such critical human rights decisions mandated by treaty.

CONCLUSION

Article 3 of the Torture Convention requires, as a minimum, judicial review in habeas corpus proceedings of any administrative determination to extradite a fugitive to a country in which it is claimed the fugitive is likely to be tortured.[66] That judicial review should consider both whether the process adopted by the Secretary of State conforms to the constitutional requirements of due process dictated by the interests at stake, and whether the decision by the Secretary is fair and reasonable under the circumstances and in conformity with the standards set forth in the Torture Convention.

It is only through such an independent judicial review of a claim under Article 3 of the Torture Convention that the internationally recognized and constitutionally protected right to be free from torture anywhere in the world can be effectively implemented.

Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983).

66. The details of that judicial review, including the scope of the hearing, the standards of proof, the nature of the review of the Secretary of State's decision under Article 3 are beyond the scope of this article.