1999

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THE ROLE OF UNITED STATES FEDERAL COURTS IN EXTRADITION MATTERS: THE RULE OF NON-INQUIRY, PREVENTIVE DETENTION, AND COMPARATIVE LEGAL ANALYSIS

Rachel A. Van Cleave

I. INTRODUCTION

The recent efforts of Spain to extradite General Augusto Pinochet from England have coalesced and brought to the fore issues relating to extradition, international cooperation, and human rights.1 The extradition request raises a rather familiar tension as to whether an extradition request is primarily a political or a judicial matter.2 In addition, the decision by Britain's...
House of Lords illustrates the increasing importance of the question regarding the extent to which a national court, ruling on an extradition request, should consider international law or the law of another country. On November 25, 1998, the House of Lords determined that Pinochet lacks absolute immunity from arrest for actions taken while in office in Chile. Ostensibly, the case raised only the narrow issue of immunity. In the course of deciding whether or not Pinochet could claim immunity as a former Head of State, the House of Lords looked beyond the law effective within its borders and considered principles of customary international law. In addition to examining British law on immunity, the court applied the Diplomatic Privileges Act of 1964 to hold that immunity does apply to a former head of state. Furthermore, the court relied on "normative principles of international law" to determine that the crimes alleged against Pinochet—torture, genocide and hostage taking—fall beyond the scope of acts performed by a head of state which qualify for immunity. Finally, the court concluded that the English act of state doctrine, which counsels "courts of one state against questioning the validity or legality of official acts of another state," does not apply where it would "run counter to the state of customary international law." In fact, the court quoted the Third Restatement of The Foreign Relations Law of the United States, concluding that the act of state doctrine should not apply where allegations of torture or genocide are involved since "international law of human rights is well established and contemplates external scrutiny of such acts." Notably absent from the opinions which denied Pinochet's immunity claim was any mention of the effect of Chile's grant of amnesty to Pinochet in 1988, implying that the court attached no weight to that act of


3. See Regina v. Bartle, House of Lords, Session 1998-99, Publications on the Internet <http://www.parliament.the-stationary-office.co.uk/pa/id199899/ljudgmt/jd981125/pino01.htm> (the full opinion is at nine links from the web site, and these are numbered pino01, pino02, etc., therefore, future reference is to the link number).


5. See Bartle, pino09, supra note 3, at 4-5 (Lord Steyn).

6. Id. at 7.

7. See Bartle, pino08, supra note 3.

8. Bartle, pino01, supra note 3 (quoting Oppenheim's INTERNATIONAL LAW 365 (9th ed. 1992)).


10. Id.
Just as the extradition case of Pinochet focused on the single question of immunity, yet raised broader concerns, so too does the scope of this article. My interest in the area of extradition arose out of a very narrow, yet intriguing comparative point regarding the extent to which a U.S. court should attempt to understand the criminal justice system of another country to decide whether the requesting country had complied with a treaty requirement. An analysis of the requesting country's system, which I advocate, is not for the purpose of judging the other system, but rather, first on a practical level, of ensuring that the terms of an extradition treaty are complied with and, secondly, and more broadly, of educating federal courts on the criminal justice systems of other countries.

Dinko Sakic,12 Leon Mugesera,13 Father Federico Marcos Cunha,14 Joanne Chesimard,15 and Ira Einhorn16 have been, like Pinochet, the subject of recent extradition requests seeking their return to the requesting country where they might face either a trial for the crimes charged or a prison sentence for the crimes of which they had been convicted. By contrast, Felice Rovelli,17 Jan Alf Assarsson,18 Reza Emami,19 Hans-Juergen Kaiser,20 and

11. But see Bartle, pino07, supra note 3 (voting against extradition and citing two investigations of the Chilean amnesty and pointing out that there was no finding that the amnesties were contrary to international law). See Eugene Robinson, Pinochet's Influence Lingers—Successor Chafes Under Constitution Imposed by Chilean General, WASHINGTON POST, Sept. 13, 1990, at A25 (discussing the amnesty law passed by Pinochet barring prosecution of Pinochet and other military officers).

12. Former Nazi who was the commander of the concentration camp, Jasenovac, where it is estimated that from 85,000 to 600,000 Jews, Serbs and Gypsies were murdered. See Guy Dinmore, Croatia Confronts Its Past as War Crimes Suspect Returns, WASH. POST, June 19, 1998, at A35. Sakic fled to Argentina after World War II and was extradited to Croatia on June 19, 1998. See id.

13. Top official of the former Hutu President Juvenal Habarnimana of Rwanda. See Ex-official of Rwanda is Ordered Deported, TORONTO STAR, July 12, 1996, at A9. Mugesera is accused of calling for the extermination of Tutsis in 1992 and is living in Canada. See id. Mugesera was ordered deported on July 11, 1996. See id.


17. See In re Extradition of Rovelli, 977 F.Supp. 566 (D. Conn. 1997) (holding that extradition failed to show special circumstances necessary to overcome presumption against bail).

18. See In re Extradition of Assarsson, 635 F.2d 1237 (7th Cir. 1980) (holding that the Court of Appeals in extradition cases may review only those conditions which preclude
Giovanni Arnaboldi were each the subject of extradition requests by countries seeking to detain them, in the absence of pending charges, for investigatory purposes. Unlike U.S. law, where an detained individual must be charged or released without delay, in a number of countries an individual may be detained for months and subsequently released without charges ever being filed. As to each of the individuals named in the second group above, the country requesting extradition has relied on an arrest warrant for this form of preventive detention to support the extradition request even

extradition for offenses which are otherwise extraditable and any such conditions must come from the treaty itself).

19. See Emami v. United States District Court, 834 F.2d 1444 (9th Cir. 1987) (holding that the district court had jurisdiction to order physician's extradition for "detention for investigation" under extradition treaty between West Germany and the United States because the crimes with which the physician was charged were extraditable offenses).

20. See Kaiser v. Rutherford, 827 F.Supp. 832 (D.D.C. 1993) (holding that a formal charging document was not required under the extradition treaty between the United States and the Federal Republic of Germany and that the defendant's extradition was not contrary to the doctrine of dual criminality).


22. See Fed. R. Crim. P. § 5(a) ("[A]n officer making an arrest ... shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge ... "); see also Cal. Penal Code § 825(a)(1) (West 1998) ("[T]he defendant shall in all cases be taken before the magistrate without unnecessary delay, and in any event, within forty-eight hours after his or her arrest, excluding Sundays and holidays"); see, e.g., McNabb v. United States, 318 U.S. 332 (1943) (holding that a conviction resting on evidence secured through flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law); United States v. Yong Bing-Gong, 594 F.Supp. 248 (N.D.N.Y. 1984), aff'd, 788 F.2d 4 (1986), cert. denied, 479 U.S. 818 (1986) (holding 24-hour delay between arrest and arraignment was unreasonable). The arraignment formally notifies the defendant of the charges the prosecutor has filed and formally initiates the criminal proceeding. See Ronald J. Allen, et al., Constitutional Criminal Procedure: An Examination of the Fourth, Fifth, and Sixth Amendments and Related Areas 16 (3d ed. 1995).

23. The term preventive detention might also refer to the detention of a defendant without bail upon indictment, pending trial. See Bail Reform Act of 1984, 18 U.S.C. § 3142(e) ("[I]f ... the judicial officer finds that no condition ... will reasonably assure the appearance of the person ... and the safety of any other person and the community, [he] shall order the detention of the person before trial"); United States v. Salerno, 481 U.S. 739 (1987) (upholding the Bail Reform Act); Jerold H. Israel, et al., Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text 470 (1988) ("the term 'preventive detention' is usually used to describe the pretrial detention of a defendant to protect society from the risk of criminal conduct by him pending disposition of the outstanding criminal charges"); Stanislaw Frankowski and Henry Luepke, Pre-Trial Detention in the U.S., in Preventive Detention: A Comparative and International Law Perspective 53 (S. Frankowski & D. Shelton, eds. 1992). This term is also used to describe the provisional arrest and detention of an individual pending a decision by a country of whether to request the extradition of the person. See, e.g., 18 U.S.C. § 3187; Parretti v. United States, 122 F.3d 758 (9th Cir. 1997) (finding that the provision in the U.S. extradition treaty with France allowing provisional arrest of someone "pending a possible request that the fugi-
though the treaty with the United States provides only that persons charged or convicted with certain offenses are extraditable. This raises an important and interesting comparative point as to what the word charged means and at what point someone has been charged within different criminal justice systems. Rather than assay the significance of this point by engaging in a comparative analysis, U.S. courts sidestep the issue by relying on a doctrine which originally stated that guarantees contained in the U.S. Constitution did not apply beyond the borders of the United States—the rule of non-inquiry. As this paper discusses, the rule of non-inquiry has developed into a rule under which federal courts restrain themselves from examining the criminal justice system of the requesting country when the person subject to the extradition request claims that the requesting country will not provide him with a fair trial, or that its officials will subject him to mistreatment. However, in the context of the specific issue discussed in this paper, that is, whether the relator has been charged, federal courts do not apply what I call a pure rule of non-inquiry. Rather, courts combine the rule of non-inquiry with a form of treaty interpretation that precludes an in-depth analysis of the requesting country’s system.

This paper argues that applying the rule of non-inquiry to the issue of whether the requested person has been charged is analytically incorrect where the relevant treaty defines as extraditable persons who have been charged or convicted of certain offenses, thus requiring a judicial determination as to whether the person requested has been charged as part of the initial inquiry into extraditability. By contrast, the rule of non-inquiry is typically used to reject arguments of persons who are otherwise extraditable. This issue has not received much analysis perhaps because federal courts are reluctant to look beyond an arrest warrant issued by a foreign judge for fear that they lack the knowledge needed to evaluate such an order. This paper argues several reasons why courts should consider whether the person to be extradited will face trial proceedings. In addition to this procedural analysis regarding at what point the rule of non-inquiry is applicable, this paper also stresses why it is necessary for U.S. federal judges to understand the criminal justice systems of other countries, and to engage in an analysis of such systems.

This paper first discusses the importance of understanding the criminal justice systems of other countries to explain why, as a matter of general policy, the rule of non-inquiry should not apply. Next, this paper briefly outlines the extradition process and asserts that as a matter of method of analy-

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sis, the question of whether the relator has been charged for purposes of the extradition treaty must be answered as a first step in determining whether the relator is extraditable at all, thus before the rule of non-inquiry enters the analysis. The focus of this paper then shifts to the meaning of the word *charged* in extradition treaties, and whether, as a matter of treaty interpretation, that term includes one who is sought by a foreign country for the purpose of preventive detention. The point of this paper is not necessarily to criticize the code provisions permitting preventive detention in certain countries, but rather to demonstrate that an order of preventive detention does not constitute a charge under U.S. extradition treaties, and further that U.S. federal courts should make an effort to examine the procedure of the requesting country to determine whether the requested person has been charged. Finally, this paper discusses some recent cases which indicate that federal courts might be beginning to seriously consider the issue raised in this paper.

25. Arbitrary arrest and indefinite detention violate several international treaties, including Article 3 of The Universal Declaration of Human Rights, adopted on December 10, 1948. *See* Helena Cook, *Preventive Detention—International Standards and the Protection of the Individual*, in *PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 2 (S. Frankowski & D. Shelton, eds. 1992). In Italy, however, preventive detention is subject to judicial supervision and review on appeal. I do not claim that this type of preventive detention is violative of human rights, but rather that it is not the same as being charged with a crime because the person who is subject to the detention order does not necessarily face criminal proceedings. Nonetheless, there is some indication that preventive detention has been used to encourage suspects to help the government in its investigation. In any event, it would be rather hypocritical for a U.S. court to find preventive detention in other countries violative of human rights given the treatment of illegal aliens in the United States, for example. *See* Barrerra-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (when the native country of an excludable alien refuses to allow him to return, he may be detained even though he has not been convicted of a crime and is not awaiting a criminal trial); Cruz-Elias v. United States Att'y General, 870 F.Supp. 692 (E.D. Va. 1994) (holding that the Attorney General has the authority to detain indefinitely an excludable alien); Nwankwo v. Reno, 828 F. Supp. 171 (E.D.N.Y. 1993) (alien who has served criminal sentence may continue to be detained pending deportation proceedings); Lance C. Pace, *Barrera-Echavarria v. Rison: The Court Once Again Sees the Fiction and Ignores the Truth*, 19 Hous. J. Int'l L. 533 (1997); Louis N. Schulze, Jr., *The United States' Detention of Refugees: Evidence of the Senate's Flawed Ratification of the International Covenant on Civil and Political Rights*, 23 New Eng. J. On Crim. & Civ. Confinement 641 (1997). *See also* Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding a Kansas Sexually Violent Predator statute which allows the civil commitment of those who have served a full sentence for sexual crimes); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. Colo. L. Rev. 73 (1999) (discussing the Hendricks decision); Jesse H. Choper, *Uri and Caroline Bauer Memorial Lecture: On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-97 Term*, 19 Cardozo L. Rev. 2259, 2265 (1998) (discussing the Hendricks case).
II. THE IMPORTANCE OF UNDERSTANDING FOREIGN CRIMINAL JUSTICE SYSTEMS

There is little doubt that crime has become globalized. The recent indictment issued by a federal grand jury in Los Angeles, California charging twenty-six Mexican bankers and three Mexican banks with laundering drug money illustrates the relative ease with which individuals and illegal profits cross borders. This scheme allegedly involved banks in Mexico, Spain, and Venezuela, as well as south Florida trading companies, in money laundering by Colombia drug cartels. If nations are to fight such enterprises effectively, cooperation is crucial, and extradition is one critical tool for facilitating multilateral cooperation. But cooperation among countries also requires a great degree of understanding of the different criminal justice systems. As the American criminal justice system increasingly comes into contact with foreign systems, it is important not only that U.S. representatives learn about the other systems in order to better negotiate, but also that U.S. courts similarly acquire knowledge of legal systems and traditions different from that of the United States in order to implement accurately and effectively the results of multilateral cooperation.

There are a number of additional purposes which are served by comparative law study. Aside from an academic theoretical purpose of better understanding law and constructing models, other purposes include gaining greater insight into the system under which one was trained. In addition,


31. See Mirjan Damaška, Structures of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480 (1974-75) (including a classic example of such model building).

32. See William T. Pizzi, A Holistic Approach to Criminal Justice Scholarship, 79 JUDICATURE 58 (1995) (suggesting that the study of other criminal justice systems might force American judges, lawyers, and scholars to consider the broader impact of the crea-
the study of foreign legal systems might provide ideas for reforming the native system.33

Comparative study might also focus on "similarities among . . . legal systems . . . to find a common core of legal solutions and institutions."34 A recent example are the discussions which took place during the spring and summer of 1998 on the creation of the permanent International Criminal Court which would have jurisdiction over crimes of genocide, crimes against humanity, and war crimes.35 Other efforts include the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda36 by the Security Council of the United Nations for the "prosecution of persons responsible for serious violations of international humanitarian law" committed in those countries.37 These types of coordination and cooperation projects have required individuals trained in countries of divergent legal traditions to reach agreements about joint procedures while ensuring protection of the rights of individuals so prosecuted.38 Similar efforts to harmonize different criminal justice systems on a regional level include those by the Council of Europe to harmonize the criminal justice systems of member

tion of greater constitutional rights).


34. Schlesinger, supra note 33, at 361.


36. The first verdict by this court was of Jean-Paul Akayesu, former Mayor of the central Rwandan town of Taba. See James C. McKinley, Jr., U.N. Tribunal Convicts Rwandan of '94 Genocide, N.Y. TIMES, Sept. 3, 1998, at A1. Akayesu was convicted of the crime of genocide. See id.; see also War Criminals, Torturers and Mass Murderers Can Be Brought to Justice, THE ECONOMIST, Dec. 5, 1998, available in 1998 WL 11700842 (reporting that the Yugoslav tribunal has issued 21 indictments against 56 people, and has convicted and sentenced 5 defendants); Former Interahamwe Militia Chief Found Guilty of Genocide Charges, IRISH TIMES, Dec. 15, 1998, available in 1998 WL 24529721 (reporting this to be the third conviction by the Rwandan Tribunal).


states, and specifically, to draft a European model penal code. Critical to such processes of coordination is an understanding of the different criminal justice systems. In furthering this understanding, the discussions regarding the International Criminal Court were very often enlightening. For example, comparative criminal justice experts were able to convince representatives of common law countries that a rule prohibiting the use of hearsay evidence was not critical to fairness in a non-jury system. Thus, comparative study in this context has a very practical educative purpose which is relevant to extradition law as well. Simply examining and understanding a foreign criminal justice system does not equate to criticizing, judging, or second-guessing it. Rather, study leads to understanding. Such understanding is increasingly important when judicial systems of different countries come into greater contact with each other.

Finally, and also related to the above purpose of furthering cooperation among nations, comparative study is necessary where a national court determines that foreign law controls, as in a tort case, requiring the court to examine and apply the foreign law. This judicative comparative study is also relevant to extradition law, most notably under the principle of double criminality which requires that the crime for which the extraditee will be prosecuted is punishable in “both the demanding and the requested country.” This requirement compels American judges who decide extradition requests to engage in an examination of the criminal law of the requesting country to determine whether the offense is also punishable under U.S. laws.

Similarly, an understanding of foreign criminal justice systems is important to the narrow issue examined in this paper. Where an extradition treaty states that persons charged are extraditable, the issue is not resolved by simply translating the word charged. Rather, it is much more important to explain the concept and to put it into context. Furthermore, as the United

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40. See Harris, *supra* note 38, at 4.

41. For example, in Volkswagen v. Valdez, 909 S.W.2d 900 (Tex. 1995), the Texas Supreme Court examined German law to determine whether information sought in a discovery request was protected under German privacy laws. The court held that it was an abuse of discretion for the trial court to reject any consideration of German law. *Id.* at 903. See also Panama Processes v. Cities Service Co., 796 P.2d 276 (Okla. 1990) (applying Brazilian law in a breach of contract dispute).

42. See Eser, *supra* note 30, at 498.


44. See Eser, *supra* note 30, at 499; BASSIOUNI, *supra* note 26 at 325.

States moves toward becoming involved in institutions like the International Criminal Court, federal courts will not be able to hide behind the rule of non-inquiry, but rather will have to make an effort to learn about different systems and traditions. Before examining the comparative point of when one is charged for extradition purposes, it is necessary to briefly discuss U.S. extradition law and practice.

III. EXTRADITION LAW AND THE DOCTRINE OF NON-INQUIRY IN THE UNITED STATES

The extradition process, although not considered a criminal matter, involves both the executive and judicial branches. A government seeking the extradition of an individual from the United States first submits a formal request to the State Department supported by the documentation required under the terms of the treaty. For example, the treaty with Italy sets out the typically required documents: a statement of the facts of the case, evidence supporting a reasonable basis to believe that the person requested committed the crime, texts of the laws describing the elements of the offense, punishment and any applicable statute of limitations, and a copy of the arrest warrant. If approved by the State Department and the Justice Department, the request is forwarded to the relevant U.S. District Attorney, who then files a request with the local federal district court. This request is usually accompanied by a request for a warrant to arrest the person sought. Upon


47. See Romeo v. Roache, 820 F.2d 540, 543-33 (1st Cir. 1987) (extradition proceedings are generally not considered criminal prosecutions); but see John G. Kester, Some Myths of United States Extradition Law, 76 GEO. L.J. 1441, 1446 (1988) (“The time is overdue to recognize the stakes in extradition hearings and to stop pretending that they are little more than squabbles over venue.”).

48. See BASSIOUNI, supra note 26, at 39 (listing the legislative branch as well because federal legislation “regulate[s] the procedures of extradition subject to the provisions of the relevant treaty”).


52. See id. U.S. law, and most extradition treaties, allow for “provisional arrests” of a fugitive before a formal request for extradition has been made. See 18 U.S.C. § 3187; see also, e.g., Treaty of Extradition between the United States and Ireland, July 13, 1983, art. X, 35 U.S.T. 2523 (permitting the provisional arrest and detention of the requested person
arrest, the relator initially appears before the magistrate or district judge for a determination that the relator is the person named in the extradition request and whether he should be released on bail pending the extradition hearing. At the extradition hearing, the judge first determines whether the requirements for extradition have been satisfied. Such requirements include whether the offense charged is one for which the treaty permits extradition, that the offense satisfies the requirement of "dual or double criminality," that the evidence supports a finding of probable cause that the relator committed the offense, and that any other treaty requirements are satisfied. Once the court has determined that these requirements are satisfied, the court may consider whether there are grounds for denying extradition, which are usually set out as exceptions in the treaty. Such exceptions include the political offense exception, that the relator was tried in absentia by the requesting country, or that the requesting country might impose the death penalty on the relator. The question of extraditability is separate from the issue of whether reasons otherwise exist for not extraditing the relator.

Another exception which has been often argued, but which has not been successful, is that the demanding country will not treat the relator fairly. For

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53. The term relator describes the person who is the subject of the extradition request.
54. See 18 U.S.C. § 3184 (providing that such proceedings are to be before "any justice or judge of the United States or any [U.S.] magistrate . . . authorized . . . by a court of the United States").
56. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 312 (1974); BASSIOUNI ET AL., supra note 37, at 287.
57. See BASSIOUNI, supra note 26, at 322. "This requirement means that the offense charged constitutes an offense in both [the requesting and demanding] legal systems." Id.
58. See BASSIOUNI ET AL., supra note 37, at 287.
59. See Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (rejecting an argument based on the political offense exception, but reviewing the history of the exception as well as the various approaches used to define the exception).
60. See BASSIOUNI, supra note 26, at 443. This was the reason given by the French court for denying the U.S. request for extradition of Ira Einhorn. See supra note 5; see also Steven Levy, Getting Away With It: Ira Einhorn, NEWSWEEK, Dec. 15, 1997; John Lichfield, Hippy Escapes Extradition, THE INDEPENDENT (London), Dec. 5, 1997.
61. See BASSIOUNI, supra note 56, at 459; see also BASSIOUNI, supra note 26, at 491-93; Paul Holmes, Italian Death Penalty Ruling Hailed as Landmark, REUTERS NORTH AMERICAN WIRE, June 27, 1996. Italy denied a request by the United States to extradite Pietro Venezia because Venezia faced capital murder charges in the state of Florida, despite assurances by Florida prosecutors that they would not seek the death penalty against Venezia. See id. But see Roger Cohen, Germany Sends Embassy Terror Suspect to U.S., N.Y. TIMES, Dec. 21, 1998, at A7. Germany agreed to extradite Mamdouh Mahmud Salim, suspected of involvement with the Embassy bombings in Kenya and Tanzania, on the condition that U.S. prosecutors guarantee that Salim would not face the death penalty. See id.
example, in *Ahmad v. Wigen*, the relator argued that the demanding country, Israel, would subject him to torture and cruel and unusual punishment. The district court conducted an extensive hearing on this allegation which the court justified as necessary to ensure that "[t]he [U.S.] courts may not be parties to abusive judicial practices, even where sensitive foreign relations matters are concerned." The court ultimately determined that the relator had not shown by clear and convincing evidence that he would be subject to such procedures or treatment as to shock the conscience of an American jurist. On appeal, the Second Circuit affirmed the granting of extradition, but sharply criticized the district court for taking testimony and receiving extensive documentation on Israel’s procedures and treatment of prisoners. “This, we think, was improper. The interests of international comity are served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced.” Rather, the court held, “[t]he function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.” Thus, the court concluded that the rule of non-inquiry precluded judicial examination of another country’s criminal justice system. The point of this article is not to contend that preventive detention of the relator by the requesting country is in a category with torture or murder. Nor is it to agree with the application of the rule of non-inquiry in cases such as *Ahmad*. Rather, the purpose here is to show that the rule of non-inquiry is inapplicable to a determination of whether the relator has been charged.

Justice Harlan initially formulated the rule of non-inquiry in 1901 as a conclusion that the guarantees of the U.S. Constitution “have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.” In *Neely*, the Supreme Court rejected a U.S.

63. 726 F.Supp. at 412.
64. See id. at 416.
65. See id. at 411.
66. See id. at 420.
67. *Ahmad*, 910 F.2d at 1067.
68. Id.
69. See also *In re Singh*, 123 F.R.D. 127, 127 (D.N.J. 1987) (following the *Ahmad* decision and refusing to consider the claim that the relators would “face torture and/or murder upon their return to India”); Lauren Sara Wolfe, *Gill & Sandhu v. Imundi: Due Process and Judicial Inquiry into Potential Mistreatment of Extraditees by Requesting Countries*, 13 LOY. L.A. INT’L & COMP. L.J. 1009 (1991) (discussing cases applying non-inquiry where relator argues that he will be subject to mistreatment by the requesting country).
citizen's argument that the statute under which he was to be extradited to Cuba did not secure rights attributed to criminal defendants under the U.S. Constitution. The court stated that U.S. citizenship did not entitle the relator "to demand, of right, a trial in any other mode than that allowed to [the] people [of] the country whose laws [the relator] has violated and from whose justice he has fled." Courts rely on this rule to dismiss arguments by the requested person, who is otherwise extraditable, that the procedures of the request ing country violate the U.S. Constitution. The rule of non-inquiry is based in part upon the rationale that "[i]t is not the business of [U.S.] courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation." Ten years after Neely, in Glucksman v. Henkel, the Court rejected the relator's claim that the extradition request from Russia did not adequately identify the relator as the person sought. Justice Holmes concluded that as long as "there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose [the relator] guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender." This statement essentially set out the requirement of probable cause, now well established. However, Justice Holmes then added the following dicta, "[w]e are bound by the existence of an extradition treaty to assume that the trial will be fair," even though there is nothing in the opinion to indicate a specific challenge to the criminal justice system in Russia. In 1960, this conclusion was reaffirmed in Gallina v. Fraser. The court in Gallina emphasized that there was no precedent "indicating that the foreign proceedings must conform to American concepts of due process." Furthermore, the court held that any conditions placed on extradition, such as retrial, "are to be determined solely by the non-judicial branches of the Government." Though not expressly naming the rule of non-inquiry, the court in Gallina relied on a separation of powers rationale when it found itself restrained to apply the terms of the treaty, which allowed extradition of one who had been convicted in absentia, and left any possible assurances of retrial to the discretion of the executive branch. In Gallina, however, the court stated that situations may exist "where the relator, upon extradition, would be subject to procedures or

72. Id. at 123.
74. 221 U.S. 508 (1911).
75. Id. at 512.
76. See BASSIOUNI, supra note 26, at 552-56.
77. 221 U.S. at 512.
78. 278 F.2d 77 (2d Cir. 1960) (approving extradition of relator who had been convicted in absentia in Italy).
79. Id. at 78.
80. Id.
81. See Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("the right of international extradition is solely a creature of treaty").
punishment so antipathetic to a federal court's sense of decency as to require a reexamination of the principle [of non-inquiry]. Thus, the court indicated that the rule of non-inquiry is not an absolute rule.

More recently, the rationale for the rule of non-inquiry has been bolstered by both the principle of comity, as expressed by the Second Circuit in Ahmed, as well as the political question doctrine which holds that the question of whether to extradite is inherently political and therefore must be left to the executive branch. Thus, where the executive branch has entered into an extradition treaty with a particular country, that branch is presumed to have studied the country's criminal justice system and determined that it is sufficiently fair to permit extradition of individuals to that country, generally. The rule also extends to individual questions of extradition where the expectation is that if the Departments of State and Justice are concerned about the procedures of the requesting nation, they will "shy away from presenting extradition requests from such regimes." Thus, individuals must look to the executive branch, rather than to the judiciary, for protection from unfair treatment by the demanding country. These justifications for the non-inquiry rule are weak. What began as a rule that protections under the U.S. Constitution do not extend beyond U.S. borders has become a doctrine which asks federal courts to decline to try to understand the criminal justice system of another country. Comity is not threatened when U.S. courts attempt to comprehend aspects of a foreign country's system; such an inquiry does not threaten the sovereignty of the other country. Furthermore, the State Department's priority is conducting the nation's foreign policy, not protecting the rights of one who is the subject of an extradition request. Given this clear conflict of interest, the federal courts serve as an important check on the executive branch's power to extradite.

82. Id. at 79.
83. See In re Singh, 123 F.R.D. 127, 132 (D.N.J. 1987) ("This dictum [from Gallina] must be understood not as a command to depart from the doctrine of noninquiry but, instead, as a suggestion that, under some situations, the doctrine might be reexamined.").
84. See supra notes 62-68 and accompanying text.
85. See Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965) ("review by habeas corpus . . . tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide"); Ahmed, 910 F.2d at 1067.
87. Kester, supra note 47, at 1480.
88. A separation of powers analysis is beyond the scope of this article. However, there have been recent challenges to the extradition statute arguing a separation of powers violation. See DeSilva v. DiLeonardi, 125 F.3d 1110 (7th Cir. 1997) (rejecting argument that extradition statutory provision § 3184, which allows the Secretary of State to review and set aside a judicial determination of extraditability, is unconstitutional.) Argument was not raised in the original extradition proceeding. See id. See Lobue v. Christopher, 893 F.Supp. 65, 70 (D.C. Cir. 1995) (finding § 3184 unconstitutional because it "confer[s]
In addition to situations where the relator seeks to show that the requesting country's procedures are unfair or violate U.S. Constitutional notions of due process, courts use the rule of non-inquiry to reject arguments which seek to expand exceptions to extradition already provided for in the treaty. The following examples illustrate this use of non-inquiry and support the argument that analysis of extraditability under the terms of the treaty precedes that of non-inquiry. In Kamrin v. United States, the treaty provided that extradition is not permitted where the offense is time barred under the laws of the requesting country, Australia. Nonetheless, the relator argued that the crime charged by the Australian court was barred by the statute of limitations under U.S. law, though it was not time barred in Australia. Relying on the language of the treaty, which precluded extradition if the offense was time barred under the law of the requesting country, the court refused to accept the relator's argument. The court addressed the rule of non-inquiry only because the relator made the broader argument that the court should not extradite where trial of the offense would violate U.S. law. Similarly, in In re Extradition of Ryan, the court rejected a double jeopardy argument of the relator, relying on the language of the treaty. The treaty provided that extradition was prohibited if the relator had been convicted or acquitted by the requested country for the same crime for which extradition is sought. In Ryan, the relator had not been convicted or acquitted in the United States for the crimes for which her extradition was sought. Rather, she argued that her prosecution in Austria for the same crimes precluded extradition to Germany. The court first looked to the language of the treaty to

upon the Secretary of State the authority to review the legal determinations of extradition judges”), vacated 82 F.3d 1081 (lack of jurisdiction to decide the issue). For discussions of these cases, see Allison Marston, Innocents Abroad: An Analysis of the Constitutionality of the International Extradition Statute, 33 STAN. J. INT'L L. 343 (1997); Catherine N. O'Donnell, The Unconstitutionality of the U.S. Extradition Statute, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 497 (1997).

The dual rationales of comity and separation of powers which support the rule of non-inquiry also underlie the act of state doctrine, another rule by which the judiciary restrains itself in the area of international law. The act of state doctrine, also beyond the scope of this article, "precludes United States federal courts from adjudicating the public acts a recognized foreign sovereign power commits within its own territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987). Just as the rule of non-inquiry has been criticized for violating separation of powers, so too has the doctrine of act of state. See Michael J. Bazyler, Abolishing the Act of State Doctrine 134 U. PENN. L. REV. 325 (1986); Carol Hamilton Jordan, International Law—Act of State Doctrine— Blind Application of the Act of State Doctrine Precludes Judicial Review, 10 SUFFOLK TRANSNAT'L L.J. 319 (1986). As to judicial deference generally in matters of international law, see Richard B. Lillich, The Proper Role of Domestic Courts in the International Legal Order, 11 VA. J. INT'L L. 9, 22-23 (1970). Judicial abdication to the Department of State has "lessened the stature of United States domestic courts in the international community by requiring them to act in sovereign immunity cases as virtual arms of the executive branch of the government." Id.

89. 725 F.2d 1225 (9th Cir.), cert. denied, 469 U.S. 817 (1984).
find that it did not preclude extradition to Germany where the relator may have been prosecuted in another country. The court then applied the rule of non-inquiry to reject the more general argument that prosecution in Germany would violate the U.S. constitutional protection against double jeopardy since she had been prosecuted in Austria for what she claimed were the same crimes. In both of these cases, the court first looked to the language of the treaty to determine whether its requirements had been satisfied for the extradition of the relator. These cases support the argument that the analysis of extradition is two-pronged. First, the federal judge determines whether the person is extraditable under the terms of the treaty and, if the person is found to be extraditable, then the court considers arguments that the request should nonetheless be denied. It is only during the second phase that the doctrine of non-inquiry is relevant. The question of whether the person requested has been charged is within the first step of the analysis. Consequently, the non-inquiry rule does not affect this issue. However, U.S. courts have relied on non-inquiry when rejecting arguments opposing extradition based on the absence of a charge.

IV. THE QUESTION OF CHARGED AND THE USE OF PREVENTIVE DETENTION

This section focuses on the meaning of the word charged in extradition treaties and illustrates how federal courts have folded non-inquiry into an analysis of how to interpret the relevant treaty. The extradition treaty between the United States and Italy contains language common to that found in other extradition treaties. The treaty provides that "[t]he Contracting Parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities of the Requesting Party have charged with or found guilty of an extraditable offense."

The treaty requires that the relator have been charged by the requesting country. This is not merely a technical question, nor one based on semantics. The issue can have sig-

91. See In re Extradition of Moglia, 813 F.Supp. 1438 (D. Haw. 1993), which lists the following requirements for extradition:
(1) that there is an extradition treaty in force between the United States and Italy;
(2) that Italy has "charged" Moglia with one or more crimes (see article I of the treaty);
(3) that a certified copy of the arrest warrant or any order having similar effect has been presented to this court . . . ;
(4) that the crimes for which he is charged are extraditable offenses within the terms of the treaty . . . ;
(5) that the evidence submitted established a reasonable basis to believe that Moglia committed the charged offenses . . . ; and
(6) that the individual before the court is the same person who is charged in Italy.
Id., at 1439-40 (citations omitted) (emphasis added).
93. See In re Assarsson, 635 F.2d 1237, 1243 (7th Cir. 1980) (dismissing relator's argument regarding the lack of a charge as one "based on semantics, not substance").
significant consequences for the person who is the subject of an extradition request. Where the requesting country seeks the extradition of a person to detain him for investigatory purposes, pursuant to an order for preventive detention, the relator faces the uncertain prospect of being held in a jail of the requesting country for months, not knowing whether he will ultimately be charged and stand trial, or simply be released. 94 Such a situation is quite different from being extradited to another country while facing charges upon which the government will have to present evidence pursuant to the procedures of the demanding country. However, despite the language of the treaty, and the important differences between being charged and being detained for investigatory purposes, U.S. federal courts have rejected such arguments. When confronted with this issue, courts tend to treat it as a matter of treaty interpretation, which certainly is involved. However, in the process of interpreting the treaty, the courts express a reluctance to examine the criminal justice system of the requesting country for the purpose of determining whether the request satisfies the term charged as interpreted by the court.

The first reported case to examine the significance of charged under a treaty provision similar to the treaty with Italy is In re Assarsson. 95 In Assarsson, a Swedish court, pursuant to a petition filed by the prosecutor, issued a warrant to arrest Assarsson for suspicion on good grounds of committing gross arson, attempted gross fraud, and gross fraud. 96 This arrest warrant was then used to support a request for Assarsson's extradition under the U.S. treaty with Sweden. The applicable version of the extradition treaty provided that each country is to extradite "persons... who have been charged." 97 Assarsson argued that the arrest warrant did not satisfy the requirement that he be charged under the treaty because, under Swedish law, criminal proceedings begin with the issuance of a summons. The Seventh

94. For example, under Italian law a suspect may be held under an order for preventive detention for a period of time ranging from three months to one year, depending upon the punishment prescribed for the suspected offense, without the filing of charges. See Codice di Procedura Penale [C.P.P.] (Italy) art. 303(1)(a).

Another concern raised by the absence of "formal" charges relates to the "principle of speciality which holds that the requesting state may prosecute or punish the relator only for the crime for which extradition is granted." BASSIOUNI, supra note 26, at 551. Where the requesting country has not duly charged the relator, and the United States extradites the relator anyway, there is a possibility that the requesting country will punish the relator for an offense for which the federal court might not have granted extradition. See id. at 552.

95. 635 F.2d 1237 (7th Cir. 1980), cert. denied, 451 U.S. 938.

96. See id. at 1238.

Circuit rejected this argument, stating that the treaty did not include a requirement that the requesting country file formal charges against the person requested. The court concluded that the language in the first article of the treaty did not create such a requirement. Rather, the court stated, this use of the word *charged* intended in a “generic sense only to indicate ‘accused.’” In response to the relator’s argument that his extradition based on the arrest warrant would, in effect, permit extradition on mere suspicion, the court stated that regardless of the basis of the arrest warrant, extradition required a finding of probable cause by the extradition magistrate. The opinion in *Assarsson* does not indicate that the relator was sought for preventive detention or questioning purposes, but implies that as long as there is probable cause to believe that the relator committed an extraditable offense, it is simply not relevant whether the relator, upon being sent to the requesting country, faces pending charges upon which he will stand trial, or whether he will be detained in the absence of charges. The rule of non-inquiry does not preclude such a consideration of the procedures of another country. Yet the court in *Assarsson* refused to consider the effect of the documentation submitted by Sweden, under Swedish law.

While the court in *Assarsson* did not expressly invoke the rule of non-inquiry, it relied on concerns which mirror the reasoning underlying this rule. The court stated that its “refusal to review compliance with foreign criminal procedure is . . . based on respect for the sovereignty of other nations.” Yet, the analysis raised by Assarsson’s argument did not require the court to determine whether the Swedish court had complied with its own law, but whether the defendant had been charged for purposes of the treaty. The court also reasoned that it was “not expected to become [an] expert in the laws of foreign nations.” This concern is also misplaced, and perhaps dis-

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98. See 635 F.2d at 1242.
99. Id. One commentator has noted that the term *accused* is used in other extradition treaties, indicating a difference between being accused and being charged. See BASSIOUNI, supra note 26, at 551 citing the Israel-Sweden Extradition Treaty, 516 U.N.T.S. 3, and the United Kingdom-Sweden Extradition Treaty, 390 U.N.T.S. 118, stating that the relator must be “accused or convicted.” Indeed, most of the extradition treaties entered into by the United States with other countries use the term *charged*. However, the fact that differences exist should lead one to conclude that there is some significant difference between *charged* and other terminology. For example, the treaty between the United States and Spain provides that the parties “agree to extradite to each other for *prosecution* or to undergo sentence persons sought for extraditable offences.” Treaty of Extradition between United States and Spain, 1988, art. I, U.S.T. (emphasis added). See also Treaty on Extradition Between The United States and Japan, Mar. 3, 1978, art. I, 31 U.S.T. 894 (each party agrees to extradite those “sought by the other Party for prosecution, for trial, or to execute punishment”) (emphasis added); Treaty of Extradition Between the United States and Barbados, et al., Dec. 22, 1931, art. I, U.S.T. (each party agrees to extradite “those persons who, being *accused or convicted*”) (emphasis added).
100. See 635 F.2d at 1243-44.
101. Id. at 1244.
102. Id.
ingenious, since there are several situations in which U.S. courts must decide applications of foreign law,\(^{103}\) even in the context of extradition.\(^{104}\)

Interestingly, in the extradition matter of Assarsson's brother, *In re Extradition of Assarsson*,\(^{105}\) the Eighth Circuit relied on the Seventh Circuit's conclusion regarding the issue of whether the relator had been charged under Swedish law.\(^{106}\) The Eighth Circuit did examine Swedish criminal procedure, however, when it considered the relator's argument that the federal statute of limitations barred extradition.\(^{107}\) Federal law bars prosecution "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."\(^{108}\) In a footnote, the court acknowledged that "[t]he Swedish authorities have not obtained a summons against [the relator]." Criminal prosecutions in Sweden begin with the filing of a 'summons."\(^{109}\) The lack of a summons was precisely what the relator claimed failed to satisfy the treaty requirement that he be charged.\(^{110}\) The government argued that the Eighth Circuit should have found that the statute of limitations was tolled by the Swedish arrest order.\(^{111}\) The court rejected this argument, noting that "arrest does not toll the running of the statute of limitations."\(^{112}\) The court managed to avoid an inconsistent ruling which, on the one hand found that the relator had been charged even though the document did not constitute a formal charge, and on the other hand found that the charges, though not formal, nonetheless tolled the statute of limitations. The court upheld the district court's determination that the relator was a fugitive and therefore the issue of whether criminal proceedings had been initiated was irrelevant.\(^{113}\) This is another example of U.S. courts attempting to understand another country's criminal justice system. It is interesting that in the same opinion the court refused to examine the criminal

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103. See supra note 41 and accompanying text.

104. For example, the requirement of dual or double criminality is "[a] common requirement for extradition . . . that the acts which form the basis for the extradition request constitute a crime under the law of both the requesting and the requested States." *Act Charged, A Crime in Both Countries*, 6 WHITEMAN DIGEST 13, at 773.

105. 687 F.2d 1157 (8th Cir. 1982).

106. See id. at 1159-60.

107. Unlike the treaty involved in the *Kamrin* case (see supra note 89 and accompanying text), the treaty with Sweden provides that "[extradition] shall not be granted . . . when the legal proceedings . . . has become barred by limitation according to the laws of either the requesting state or the requested state." Treaty of Extradition between the United States and Sweden, Oct. 24, 1961, U.S.-Sweden, art. V, para. 2, 14 U.S.T. 1845, 1849 (emphasis added).


109. 687 F.2d at 1161, n.7.

110. See id. at 1159.

111. See id. at 1161, n.8.

112. Id.

113. See id. at 1162-63, n.11. Specifically, the court held that the relator left Sweden with the intent to avoid arrest or prosecution, and that such departure "tOLled the running of the statute of limitations." Id. at 1162.
justice system as to one issue, yet looked at the same aspect of the system with respect to another.

There has been very little scholarly attention devoted to the analysis of charge in Assarsson, and most of the caselaw simply follows its reasoning without analysis. The response of the executive branch and the Senate is of greater significance. After the Assarsson case, Sweden and the United States negotiated a supplement to the extradition treaty which changed the wording of Article I of the treaty to create an obligation to extradite "those persons . . . who are sought for the purpose of prosecution." The report on this change indicates that it was intended to clarify that a Swedish arrest warrant is the requisite charging document. This is important for three reasons. First, the language chosen to avoid the perceived problem of what constitutes a charging instrument under Swedish law focuses on whether the person is sought for prosecution purposes, in contrast to investigatory purposes or preventive detention purposes. This indicates that the word charged is not meant as a generic concept that includes someone who has been accused or is under suspicion, contrary to the conclusion of the Assarsson court. Second, the statement in the Senate Report quoted above indicates that in ratifying the supplement to the treaty, the Senate intended as a requirement for extradition that the subject of the request be formally charged by the requesting country, and not merely under suspicion or wanted for questioning. Finally, it is significant that despite the granting of Assarsson's extradition by the Seventh Circuit, the Executive Branch and the Senate perceived a need to clarify the treaty, implying a lack of confidence in the court's analysis in Assarsson. This further indicates an acknowledgment of the difference between being charged and being sought for preventive detention or investigatory purposes.

A recent extradition request submitted to the United States by Italy is illustrative of these concerns of treaty interpretation and the use of preven-

114. See John T. Soma, et al., Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?, 34 HARV. J. ON LEGIS. 317, 332 n.86 (citing Assarsson as an example of how even the minimal requirements of the extradition treaty are not consistently satisfied); John Francis Stephens, The Denaturalization and Extradition of Ivan the Terrible, 26 RUTGERS L.J. 821, 841 n.125 (characterizing the decision in Assarsson as questionable); Kester, supra note 43, at 1446 n.29 (characterizing the decision in Assarsson as questionable). Greater analysis of the Assarsson case is found in BASSIOUNI, supra note 26, at 550-52.

115. See Emami v. District Court, 834 F.2d 1444, 1448 (9th Cir. 1987); In re Extradition of Assarsson, 687 F.2d 1157, 1057-58 (8th Cir. 1982) (extradition proceedings against the brother of the Assarsson who was the subject of the Seventh Circuit opinion); In re Extradition of La Salvia, 1986 U.S. Dist. LEXIS 29789, 19-20 (S.D.N.Y.); Republic of France v. Moghadam, 617 F.Supp. 777, 781 (N.D. Cal. 1985).


118. See 635 F.2d at 1242.
tive detention. In June of 1996, an Italian judge for preliminary investigations (giudice delle indagini preliminari or G.I.P.) issued an order for the preventive detention (misura cautelare) of Felice Rovelli and his mother, Primarosa Battistella. The order described Rovelli and Battistella as suspects (indagati) in a judicial bribery scheme involving public officials in the Tribunale of Rome. Italy relied on the order of preventive detention to support extradition requests to Switzerland for Battistella, and the United States for Rovelli. Switzerland denied the request to extradite Battistella. The basis of the preventive detention order was a suspicion that Rovelli and Battistella had paid $44.6 million in bribes to win a lawsuit which involved the father and husband, Nino Rovelli. Rovelli and Battistella had submitted to questioning by Italian prosecutors in Switzerland prior to the extradition requests. They told the prosecutors that while on his deathbed, Nino Rovelli told them three lawyers would visit them and they were to pay the lawyers. After Nino Rovelli's death, the lawyers asked for the money and Rovelli and Battistella paid them without asking any questions. Rovelli had been living in the United States for fifteen years.

Some foreign jurisdictions have provisions which allow for a deprivation of liberty for extended periods of time in situations where the individual is not assured to face trial, and upon expiration of the detention period will be released without any resolution of the suspicions. Under Italian law, a person who is suspected of committing a crime which is punishable by a minimum sentence of more than four years may be the subject of a prosecutor's

119. For the discussion of the Rovelli extradition matter, I rely primarily on documents submitted by the Italian government in support of his extradition. These same documents were also relied upon by the United States government before the extradition magistrate, Thomas Smith of the United States District Court in Hartford, Connecticut. In re Extradition Rovelli, Misc. No. 2:97M38TPS (D. Conn. 1997).

120. See Mark Pazniokas, Italian Intrigue in a Hartford Jail Cell; Rising Star on Wall Street Fights Extradition to Homeland, HARTFORD COURANT, June 7, 1997, at A1.

121. See generally PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE (S. Frankowski & D. Shelton eds. 1992). Recent events in the news indicate the use of detention without initiation of criminal proceedings. See John Murray Brown, London and Dublin Grapple with the Problem of Rooting Out the Real IRA: Both Governments Have Promised New Measures in the Wake of Omagh Bomb, THE FINANCIAL TIMES (London), Aug. 18, 1998, at 7 (discussing the use of internment or detention without trial); Bert Roughton Jr., Loss in N. Ireland Blast 'Cut Through All Classes,' THE ATLANTA CONST., Aug. 18, 1998, at 12A. "Northern Ireland anti-terrorist law allows suspects to be detained for questioning for up to one week before being charged or released." Id. Following the American Embassy bombings in Kenya and Tanzania on August 7, 1998, news reports indicate that suspects were detained without charges by officials in Tanzania and in Pakistan. See Dean E. Murphy and Ann M. Simmons, The U.S. Embassy Bombings, L.A. TIMES, Aug. 12, 1998, at A6. "Six Iraqis and six Sudanese are among 14 'dubious characters' being detained by police, but the men have not been charged with a crime." Id. See Kamran Khan and Pamela Constable, Embassy Bomb Suspect Reportedly Tied Rogue Saudi to Plot, THE BOSTON GLOBE, Aug. 19, 1998, at A10. "A Palestinian suspect . . . was detained and questioned for a week by Pakistani authorities." Id.
request for preventive detention in prison.\textsuperscript{122} Under the Italian Code of Criminal Procedure, the requirements for preventive detention include that grave or serious suspicion of guilt (\textit{gravi indizi di colpevolezza}) exist\textsuperscript{123} and that one of the following situations be present: 1) a fear that the investigations could be jeopardized by the tampering or destruction of evidence; 2) a fear that the defendant or suspect will flee; or 3) a fear that the defendant or suspect will commit a violent crime or a crime similar to the one charged or under investigation.\textsuperscript{124} Furthermore, in order to impose preventive detention in prison, the code requires that all other measures be inadequate.\textsuperscript{125} This device is used to detain persons who have been caught \textit{in flagranza} and arrested, pending resolution of the charges filed, as well as those who have been convicted at the trial of first instance (\textit{giudizio di primo grado}).\textsuperscript{126} A person who is a suspect may also be detained pending the investigation of the allegations, before the prosecutor has made a request to bind the person over for trial. While the standard is the same, one who has been arrested is more certain to face at least a preliminary hearing if not a trial or other procedure to resolve the matter.\textsuperscript{127} A suspect who is arrested only for purposes of carrying out a preventive detention order cannot be sure that there will be a resolution of the criminal allegations of which he is suspected; instead, he may simply be released upon the expiration of the period for detention. U.S. criminal procedure law has no equivalent to the form of preventive detention described above. In the United States, once arrested, an individual may

\begin{itemize}
  \item \textsuperscript{122} See C.P.P. art. 280(1). Other forms of precautionary measures include house arrest (C.P.P. art. 284), prohibition on travel outside the country (C.P.P. art. 281), and a requirement that the individual report to a specific police office on specific days at certain times (C.P.P. art. 282).
  \item \textsuperscript{123} See C.P.P. art. 273 (1).
  \item \textsuperscript{124} See C.P.P. art. 274.
  \item \textsuperscript{125} See C.P.P. art. 275(3). See \textit{supra} note 122 for other precautionary measures.
  \item \textsuperscript{126} Under Italian law a conviction is not considered final until the trial of third instance. See Rachel A. Van Cleave, \textit{Italy, in CRIMINAL PROCEDURE: A WORLDWIDE SURVEY} (Craig M. Bradley ed., forthcoming, 1999) (manuscript at 61, on file with author); ANIELLO NAPPI, GUIDA AL CODICE DI PROCEDURA PENALE 665 (6th ed. 1997) [Guide to the Criminal Procedure Code]. See also Alessandra Stanley, \textit{3-Step Justice System: Conviction, Appeal, Escape}, N.Y. TIMES, May 23, 1998, at A4 (quipping that the Italian system allows many to avoid serving sentences by escaping while their conviction is reviewed by the courts of second and third instance). Under Italian law, however, the procedure for imposing preventive detention pending an investigation may also be used to detain an individual who has been convicted in the trial of the first instance, pending review.
\end{itemize}
be detained without bail pending a judicial decision to bind the individual over for trial. This process occurs after a preliminary hearing or the issuance of an indictment by a grand jury.\textsuperscript{128} Since there is no U.S. equivalent to this mechanism, it is important for federal courts to consider the nature of the order issued by the country seeking extradition of a person in the United States.

The federal court in the \textit{Rovelli} case should have considered the significance of the order of preventive detention in connection with another important difference between the United States and Italian criminal justice systems. The Italian Code of Criminal Procedure makes an express distinction between suspects and defendants.\textsuperscript{129} The term used for a defendant is \textit{imputato}, which is a form of the noun \textit{imputazione}, which means charge, indictment, or information.\textsuperscript{130} An individual does not become an \textit{imputato} until the prosecutor has charged him with a crime in a request of committal, or binding over, for trial.\textsuperscript{131} The term \textit{imputato} is in contrast to the term for suspect, or person under investigation (\textit{indagato} or \textit{persona sottoposta alle indagini}).\textsuperscript{132} This distinction is significant and not merely a matter of semantics.\textsuperscript{133} The Italian criminal justice system uses these two terms to distinguish between the investigatory stage and the initiation of criminal proceedings (\textit{procedimento}).\textsuperscript{134} The investigatory phase begins when the police have received notice of a crime (\textit{notizia del reato}),\textsuperscript{135} and ends with either the prosecutor's initiation of criminal proceedings by a request of remand for trial (\textit{rinvio a giudizio}),\textsuperscript{136} or a request to dismiss the case (\textit{archiviazione}).\textsuperscript{137} The supporting documents submitted by the Italian government for Rovelli's extradition illustrate the significance of these differences. The order issued by the judge for preliminary investigations (\textit{giudice pre le indagini preliminari}),\textsuperscript{138} is entitled "Order on the Application of Preventive Detention" (\textit{Ordinanza di Ap-\textsuperscript{128}} See \textit{Allen}, supra note 22, at 12-15; \textit{but see supra} note 25 (discussing other forms of detention in the United States).
\textsuperscript{129} See \textit{Van Cleave}, supra note 126, at 31-32.
\textsuperscript{130} See \textit{Francesco De Franchis}, \textit{Dizionario Giuridico} 873 (2nd ed., 1996).
\textsuperscript{131} See C.P.P. art. 60; \textit{Franchis}, supra note 130, at 1247 (defining \textit{rinvio a giudizio} as "committal for trial").
\textsuperscript{132} See C.P.P. art. 61(1) (guaranteeing the suspect the same rights as the \textit{imputato} or person charged). \textit{See also Franchis}, supra note 130, at 880 (defining \textit{indagato} as indicted person, but explaining, in Italian, that there really is no equivalent term under the common law, and giving as the best definition "the condition of a suspected person in the stage of judicial investigation before a formal request for prosecution is made").
\textsuperscript{133} See \textit{supra} note 93, citing \textit{Assarsson}, 635 F.2d at 1243.
\textsuperscript{134} See \textit{Franchis}, supra note 130, at 1125 (lamenting the difficulty of translating the term \textit{procedimento} into an equivalent under the common law).
\textsuperscript{135} See C.P.P. art 330; \textit{Nappi}, supra note 126, at 22.
\textsuperscript{136} See C.P.P. art 405(1).
\textsuperscript{137} See C.P.P. art. 408(1). \textit{See also Franchis}, supra note 130, at 389. \textit{Archiviazione} literally means to file away in the archives. \textit{See Nappi}, supra note 126, at 22.
\textsuperscript{138} See C.P.P. art. 328.
plicazione di Misura Cautelare), and repeatedly refers to Rovelli as indagato, or suspect. While the order speaks of charges, it qualifies these as preliminary, or tentative charges (imputazione preliminare). While the fact that Rovelli had not been committed or remanded for trial may not be enough to preclude extradition under the treaty, when that fact is coupled with the fact that under the Italian mechanism of preventive detention, he would not necessarily have the allegations against him resolved, a U.S. federal court should not permit extradition.

The Italian code provides that preventive detention for evidentiary needs is limited to thirty days, unless the investigations are particularly complex or several persons are under investigation for the offense, in which case the initial period of detention is three months to one year, depending upon the sentence prescribed for the suspected offense. In addition, if the investigations are particularly complex, the term may be extended for up to one-half of the term described above. Thus, depending upon the offense suspected, one may be held for up to eighteen months in prison during the investigation, pending a decision by the prosecutor of whether to initiate criminal proceedings by requesting that the suspect be bound over for trial (rinvio a giudizio). Upon the expiration of the detention term, there is no dismissal (archiviazione), but rather a judicial order to release the person. The district court judge in the Rovelli case did not grasp this key distinction. While in the United States a suspect might be detained pending an indictment, it is clear upon arrest that the prosecutor will seek an indictment within a short period of time. Under Italian law, the order for preventive detention permits authorities to hold the suspect even where there is not necessarily a prospect that the suspect will go before a judge at a preliminary hearing at which the prosecutor will either request that the suspect be bound over for trial, or that the charges be dismissed. Rather, without citation or analysis, the judge in Rovelli concluded that the "arrest warrant issued by the Italian authorities constitutes a charging document under Italian law."

Even though the opinion pertained only to the issue of bail, it is significant for what it lacks in reasoning and support. In the end, Rovelli spent six months in an Italian prison, never facing the prospect of a trial or other proceeding to resolve any suspicions. Therefore, whether a federal judge

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140. See id. at 4, 26, 27, 62, 71.
141. See id. at 70.
142. See C.P.P. art. 301(2bis).
143. See C.P.P. art. 303(1)(a 1-3).
144. See C.P.P. art. 305(2).
145. See supra note 22.
147. Ultimately, he was released because the Supreme Court determined that the judge for preliminary investigations had erroneously held that Rovelli presented a risk of flight. Telephone interview with Robert A. Culp in New York, N.Y. (May 20, 1998).
comprehends another country's criminal justice system sufficiently to know whether the treaty requirements are satisfied can have a significant impact on the person who is the subject of the extradition request.\textsuperscript{148} A federal court should engage in an examination of another country's criminal justice system similar to that above in the context of interpreting the relevant provisions of the extradition treaty with that country. Generally speaking, courts should interpret treaties "in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in the light of its objects and purpose."\textsuperscript{149}

It is clear that given the differences between the United States and Italian criminal justice systems, the term charged does not have an ordinary meaning. The Italian language version of the extradition treaty with Italy sheds minimal light on this issue. It states that the parties agree to extradite "le persone che siano perseguitae o che siano state condannate,"\textsuperscript{150} which translates to "persons who are being prosecuted or have been convicted." The Italian version does not use any of the terms described earlier which mean either suspect (indagato) or charged (imputato). This is most likely due to the fact that the Italian Code of Criminal Procedure was completely rewritten in 1989, six years after the treaty was signed.

Aside from the terms of the treaty, another important source for discerning the intent of the parties is the drafting history of the document, as well as any other agreements between the two countries.\textsuperscript{151} Interestingly, the extradition treaty between the United States and Italy was reported favorably by the Senate Foreign Relations Committee on June 20, 1984,\textsuperscript{152} the very same day on which the same committee favorably reported the Supplementary Convention on Extradition with Sweden.\textsuperscript{153} As discussed earlier, the supplementary convention with Sweden replaced language in the extradition treaty stating that the person sought be "charged," with language that such person be "sought for the purpose of prosecution."\textsuperscript{154} The fact that language in the treaty with Italy was not broadened consistently with the treaty with Sweden indicates that the requirement that the relator be charged is not satisfied by an order of preventive detention.\textsuperscript{155}

\textsuperscript{148} Rovelli was away from his American wife and their two young children.
\textsuperscript{149} \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES} § 329(1) (1980).
\textsuperscript{151} \textit{See} BASIOUNI, supra note 26, at 82.
\textsuperscript{154} \textit{See supra} notes 116-17 and accompanying text.
\textsuperscript{155} The interpretation suggested in the text could certainly be criticized as unduly narrow. \textit{See} Martin A. Rogoff, \textit{Interpretation of International Agreements by Domestic
In addition, if the Italian government wanted to obtain evidence from Rovelli, it could have proceeded under the Treaty with the Italian Republic on Mutual Assistance in Criminal Matters. Under this treaty, the two countries agree to assist each other in criminal investigations and proceeding, in a number of ways, including taking the testimony of "[a] person from whom evidence is sought." Thus, an extradition request was not the only form of cooperation Italy could have sought, and in construing a treaty requirement that the requested person be charged, courts should consider the existence of other alternatives, especially where the relator is sought pursuant to an order for preventive detention. In the Arnaboldi case, discussed below, after the magistrate declined to hold the relator without bail because Italy relied on an order of preventive detention for extradition, an Italian judge came to the United States and questioned Arnaboldi. While each extradition treaty the United States has with other countries has its own particularities, analysis of the U.S.-Italy treaty is illustrative of the necessity to understand not only the treaty language, but the context of the court system of the requesting country.

V. Glimmers of Understanding

There are a few indications that some federal courts are beginning to understand the difference between an arrest warrant for pending charges and an arrest warrant for preventive detention. In In re Extradition of La Salvia, the district court accepted affidavits from experts on the criminal

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COURTS AND THE POLITICS OF INTERNATIONAL TREATY RELATIONS: REFLECTIONS ON SOME RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 11 AM. U. J. INT'L L. & POL'Y 559 (1996) (pointing to a trend of unduly narrow interpretation of treaties by the U.S. Supreme Court). However, in the context of extradition "to err in the liberality of interpreting extradition treaties is in fact to place individuals in greater jeopardy of their lives and liberties." BASSIOUNI, supra note 26, at 90 (comparing the effects of liberal interpretation of treaties of commerce and navigation with the effects in extradition). But see Rogoff, supra at 583-92 (criticizing the narrow interpretation given the extradition treaty with Mexico in United States v. Alvarez-Machain, 504 U.S. 655 (1992), which held that the United States did not violate the treaty when U.S. drug enforcement agents participated in the kidnapping of a suspect from his home in Mexico in order to bring him before a judge in the United States).

157. See id. art. 1.
158. Id. arts. 14 and 15.
159. See Report on Mutual Legal Assistance Treaty with Italy, June 20, 1984, U.S.-Italian Republic, S. EXEC. REP. NO. 98-36, at 11-12 (1984). "The United States has long been able to extradite fugitives . . . to foreign countries. However, prior to this Treaty, it has not had the authority to take the far less intrusive step of seeking its courts . . . to compel the appearance of a witness . . . ." Id.
The arrest warrant issued by the Argentine judge stated that the requirements for preventive detention were satisfied. Based on the uncontested evidence in the affidavit of the government’s expert witness, the court determined that under Argentine law an order for preventive detention could be issued only as to a person who has been charged. Therefore, the relator would simply be subjected to pre-trial, rather than pre-charge, detention. The court in La Salvia initially cited to Assarsson, stating that the term charge was intended to have a generic meaning. However, the court then went on to consider the detailed affidavit of the government’s expert on Argentine criminal procedure, which analyzed the different terms used, similar to the analysis above of Italian criminal procedure. The analysis in this opinion recognized a difference between detention after the filing of charges while the accused awaits trial, and detention pending the completion of the investigation and either the filing of charges or the release of the suspect. It is significant that the court did not eschew any examination of Argentine criminal proceedings by claiming a lack of expertise as the court in Assarsson did.

The distinction between pre-charge detention and pre-trial detention was also implicitly acknowledged in In re Extradition of Moglia. Moglia had initially been found in Australia, and Italy had requested his extradition from that country. However, the Australian court denied the request, finding that the arrest warrant for Moglia “was for investigative purposes only and that Moglia had not in fact been ‘charged’ within the meaning of the treaty.” When Moglia raised this same argument to the U.S. extradition magistrate, the court rejected it because the Italian prosecutor had subsequently requested Moglia’s commitment for trial. The court stated, “[t]here is no dispute that under Italian law once a prosecutor asks the court for a person’s commitment for trial, that person has been ‘charged’ within the meaning of the treaty.” While the court in Moglia did not directly confront

162. See id. at 21.
163. See Treaty of Extradition Between the United States and Argentina, Jan. 21, 1972, art. I, 23 U.S.T. 3504 (authorizing extradition of “persons . . . who have been charged with or convicted”).
164. Unfortunately, the court completely discounted the affidavit of the realtor’s expert due to its conclusory nature. See id. I think the lesson for lawyers representing persons on extradition matters is obvious.
165. See id. at 23-24.
166. See id. at 17.
167. See id. at 21-22 (examining the meaning of terms such as procesamiento and procesada and finding that they refer to the charging process and one who has been charged).
169. Id. at 1440.
170. Id.
the distinction between charged and under suspicion, the opinion indicates some initial understanding of the difference argued in this paper. In addition, the court did not dismiss the issue as a matter beyond the scope of review by a federal court.

Finally, in *In re Extradition of Arnaboldi*,171 at the bail hearing172 following Arnaboldi’s arrest, the magistrate granted the relator’s release on bail pending the extradition hearing. The court relied on Arnaboldi’s argument that the Italian arrest warrant was an order for preventive detention while the Italian authorities investigated the suspected crimes, and therefore Arnaboldi was not a person charged for purposes of the extradition treaty.173 This order, while only relating to the issue of release pending the extradition hearing, expresses the clearest understanding by a U.S. court of the difference asserted in this paper. The magistrate found “sufficient reason to question whether [the relator] faces the criminal charges listed in the extradition complaint; or is simply wanted for questioning as part of an ongoing criminal investigation.”174 Based on this concern, the magistrate granted the relator’s request to be released on bail pending the extradition hearing. Subsequently, an Italian judge went to Florida and questioned Arnaboldi.175

These examples of courts attempting to understand aspects of another system are imperative to ensure that the terms of the treaty are actually satisfied. Furthermore, such efforts at understanding do not violate the rule of non-inquiry, because the issue of charged is within the initial prong of the analysis, and because the court does not engage in an evaluation or judgment of the foreign system, but rather seeks to comprehend it. Nor did the courts in *La Salvia*, *Moglia*, and *Arnaboldi* fold concerns relating to non-inquiry into their interpretation of the word charged in the relevant treaties.

### VI. CONCLUSION

The initial decision by the House of Lords in the extradition matter of Pinochet examined international law as part of its analysis of the issue of immunity.176 The decision by Spain’s National Court affirming Spain’s jurisdiction over Pinochet was hailed as a “landmark ruling based on international law.”177 These events illustrate a recognition of the important role

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175. *See Kegerreis Telephone Interview*, supra note 160.
176. *See supra* notes 5-11 and accompanying text.
domestic courts play in the arena of international law generally, and extradition, specifically. In the context of extradition, U.S. federal courts should attempt to understand the criminal justice systems of other countries for the practical purpose of ensuring that the requesting countries adhere to the terms of the treaty. Examining the criminal proceedings of the requesting country to determine that the relator has been charged does not involve, much less violate, the doctrine of non-inquiry, and courts should not eschew such an analysis. This, of course, means that the burden of providing federal courts with such evidence falls on the attorneys.

Broadcast, Dec. 14, 1998, Transcript No. 98121402-211 [Interview with Ruth Wedgwood, Professor of Law, Yale University Law School] discussing the implications of the Spanish precedent on the issue of universal jurisdiction).