CHEATING JUSTICE BY CHEATING DEATH: THE DOCTRINAL COLLISION FOR PROSECUTING FOREIGN TERRORISTS – PASSAGE OF *AUT DEDERE AUT JUDICARE* INTO CUSTOMARY LAW & REFUSAL TO EXTRADITE BASED ON THE DEATH PENALTY

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The purpose of foreign policy is not to provide an outlet for our own sentiment of hope or indignation; it is to shape real events in a real world.

– President John F. Kennedy, Mormon Tabernacle, Salt Lake City, Utah (Sept. 26, 1963)[1]

I. INTRODUCTION

In December 2002, Denmark released a Chechen terrorist rather than extraditing him to Russia where he might face the death penalty.[2] Britain refused to honor an Egyptian request to arrest and extradite a terrorist implicated in the 1995 assassination attempt against President Mubarak, as conviction for that crime carried the death penalty.[3] Mexico also declined to extradite twenty-six suspects to the United States who would face the death penalty for their alleged crimes.[4] What happens when Osama bin Laden or other terrorists surface in countries that refuse to extradite them to requesting states where capital punishment is a sentencing option?

The tension between justice and mercy is a taught one, often wrapping legal strictures in religious or moral garb.[5] However, the debate reaches no higher pitch than with regard to the appropriateness of capital punishment. Some societies, like the United States, handle the question on a jurisdiction by jurisdiction basis in accord with principles of federalism, while others, like Canada, handle it at the national level. Whatever the internal accommodations may be, national governments must decide whether domestic sentiment will

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1. John F. Kennedy, Address at the Mormon Tabernacle (Sept. 26, 1963), *in* PUB. PAPERS 736 (Sept. 26, 1963).

2. BBC News, *Denmark Frees Top Chechen Envoy* (Dec. 3, 2002), *available at* http://news.bbc.co.uk/2/hi/europe/2539567.stm.

3. Daniel McGrory, *City Was Home to a Terrorist with $25m Price on his Head*, TIMES (London), Jan. 16, 2003, at 4.

4. Chris Kraul, *Results of Mexican State's Pro-Death Penalty Poll Clash with Law, Tradition*, L.A. TIMES, Feb. 19, 2003, at A3.

5. *See, e.g., Micah* 6:8 (King James): "What doth the Lord require of thee, but to do justly, and to love mercy . . . ."

influence extradition requests from foreign countries – and to what extent.

In the aftermath of the September 11th terrorist bombings of the World Trade Center and the Pentagon in the United States, America and its allies began a simultaneously proactive and responsive war on terror around the globe to disrupt terrorist networks, prevent attacks before they happen, and arrest or kill terrorists.[6] As terrorists are arrested, something must ultimately be done with them – in the United States or abroad.

Captured members of the fundamentalist Muslim al Qaeda network or Afghanistan's deposed Taliban regime typically receive a one-way ticket to the Camp Delta detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba. There are 620 such individuals of forty-three nationalities currently in detention there.[7] While their ultimate fate is unknown, the legal groundwork has been laid to try them by military commission under presidential authority.[8] Domestic federal courts in the U.S. justice system have determined that they have no jurisdiction there.[9]

Still others may be arrested in this war on terror, and those terrorists may face domestic criminal tribunals in the United States or elsewhere. Many countries may become viable jurisdictions to try those captured. China, Russia, the Philippines, Indonesia, and Israel are all pursuing their own radical Islamic terrorists.[10] Malaysia, Singapore, France, Germany, Britain, Italy and Spain have all captured suspects in the war on terror.[11] Americans continue to be attacked in Afghanistan, Yemen, Pakistan, and Kuwait.[12]

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6. *See President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4.

7. Jeffrey Kaye, *The Detainees*, NEWSHOUR WITH JIM LEHRER – PBS, *available at* http://www.pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html (Jan. 22, 2003); Neil A. Lewis, *Detainees From the Afghan War Remain in a Legal Limbo in Cuba*, N.Y. TIMES, April 23, 2003, at A1.

8. Michael J. Kelly, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283 (2002).

9. Coalition of Clergy v. Bush, 189 F. Supp. 2nd 1036 (D. Ca. 2002); Neil A. Lewis*, Traces of Terror: The Prisoners; Judge Rebuffs Detainees at Guantanamo*, N.Y. TIMES, Aug. 1, 2002, at A20.

10. Elaine Sciolino, *Putin Unleashes His Fury Against Chechen Guerrillas*, N.Y. TIMES, Nov. 12, 2002, at A10; Erik Eckholm, *American Gives Beijing Good News: Rebels on Terror List*, N.Y. TIMES, Aug. 27, 2002, at A3; Raymond Bonner, *Indonesia; Report Tracks Terror Trail of an Islamic Group*, N.Y. TIMES, Dec. 12, 2002, at A25; Raymond Bonner*, Southeast Asia Remains Fertile For Al Qaeda*, N.Y. TIMES, Oct. 28, 2002, at A1.

11. Marlise Simons*, Europeans Warn of Terror Attacks in Event of War with Iraq*, N.Y. TIMES, Jan. 29, 2003, at A18; Raymond Bonner & Jane Perlez, *A Qaeda Cell; Bali Bomb Plotters Said to Plan To Hit Foreign Schools in Jakarta*, N.Y. TIMES, Nov. 18, 2002, at A1.

12. Neil McFarquhar, *3 U.S. Citizens Slain in Yemen In Rifle Attack*, N.Y. TIMES, Dec. 31, 2002, at A1; Carlotta Gall, *At the Afghan Border, Warnings of Attacks Tied to Iraq War*, N.Y. TIMES, Jan. 28, 2003, at A13.

Where should terrorists be tried for their crimes? Is there a legal duty to prosecute or extradite terrorists? Does international law offer any guidance? Does it matter that suspects could face the death penalty in some of those jurisdictions? For instance, if the government in Jakarta captures individuals responsible for bombing the vacation resort in Bali last year,[13] should those individuals be tried in the Indonesian justice system since that is where the crime occurred, should they be tried in Australia because eighty-eight of the 202 resulting deaths from that explosion were Australian nationals,[14] or should they be tried in America because they are linked to the al Qaeda network?[15]

Indeed, refusal to extradite based on the death penalty could become a significant legal impediment to Washington's prosecution of the war on terror. As Professor Alan Clarke of the University of Wisconsin notes:

> America's need to question al-Qaeda suspects in Spain may be a difficult task in light of Spain's refusal to extradite unless the United States hews to European trends regarding both the death penalty and the use of military courts. Meanwhile, Great Britain has been tying itself in knots over the same problem of extradition to the United States. The French Justice Minister, Marylise Lebranchu, warned that France will oppose the death penalty for French citizen and alleged al Qaeda member Zacarias Moussaoui, and that a death sentence will create "diplomatic difficulties." Moussaoui, who was apprehended in Minnesota, presents no extradition problems, but France's strong opposition in his case makes it even clearer . . . that no terrorist . . . will be extradited from France without ironclad assurances on the death penalty. Germany is also refusing to extradite Islamic militants to countries where they face the possibility of the death penalty.
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> U.S. Defense Secretary Donald H. Rumsfeld is quoted as saying that the U.S. military will "try to prevent enemy leaders from falling into the hands of peacekeeping troops from allied nations that might oppose capital punishment." One wonders to what extent U.S. soldiers might interfere with British or French troops to accomplish that end, or what the diplomatic consequences might be if there was an armed

13. Bonner & Perlez, *supra* note 11.

14. Seth Mydans & Richard Bonner, *An Intensive Hunt Led to a Terror Suspect and, Officials Hope, Details of Future Plots*, N.Y. TIMES, Aug. 16, 2003, at A3.

15. In fact, over thirty individuals associated with the Indonesian al Qaeda affiliate "Jemaah Islamiyah" have been arrested and are awaiting trial in Indonesian courts in connection with that terrorist act – one person has already been tried and sentenced to death. Jane Perlez, *Court Decides to Sentence Bali Bomber to Death*, N.Y. TIMES, Aug. 8, 2003, at A8.

> showdown? . . . Given that "the hunt for fresh targets in pursuing al-Qaeda has now spread to Africa, South America and the Balkans," the problems for U.S. foreign policy can only increase.[16]

Such knotty questions are often the rubric of final examinations in conflicts of law classes (or the malevolent professor of a public international law course). However, these issues demand more attention as the war on terror progresses and generates detainees with increasingly diverse citizenship, allegiances, and criminal conduct. The doctrine *aut dedere aut judicare* (i.e., the duty to either extradite criminals or prosecute them domestically) presents an easy, and deceptively simple, solution to the problems outlined above.

But successful use of this mechanism depends on several factors: (1) Has the doctrine passed into customary international law, thereby making it binding on all states? (2) If so, does it encompass all crimes? (3) If not, are crimes of terrorism becoming amenable to this doctrine? (4) If so, can the existence of the death penalty as a punishment option in a requesting state provide a basis for countries to refuse extradition even if they choose not to prosecute, in apparent derogation of the customary norm?

This article examines each of these questions in turn and explores the options states have in effectively bringing terrorists to justice in light of the probable answers to those questions. For these purposes, application of the traditional and limited political offense exceptions to extradition are not discussed;[17] these exceptions already constitute a widely-accepted bar to extradition.[18] Moreover, authoritative bodies such as the International Law

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16. Alan Clarke, *Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783, 802-08 (2003) (citations omitted).

17. Justice Francis Murphy, of the Irish Supreme Court, succinctly outlined the political offense exception this way:

> Extradition law has, for centuries, expressed a clear concern for the protection of the human rights of the requested person. The exception from extradition, the political offence, is built on a triple rationale: firstly, the political argument that states should remain neutral *vis-a-vis* the internal political affairs of other states. Secondly, the moral argument provides that resistance to oppression is legitimate and that, therefore, political crimes can be justified. Thirdly, the humanitarian argument provides that a political offender should not be extradited to a state in which he risks an unfair trial.

Justice Francis Murphy, Address at the 10th International Judicial Conference, Strasbourg (May 23-24, 2002) (transcript available at http://www.coe.int/T/E/Communication-_and_Research/Press/Events/5.-Ministerial_conferences/2002/200205_International-_Judicial_Conference_Strasbourg/Panel3_FrancisMurphy.asp).

18. Christine E. Cervasio, *Extradition and the International Criminal Court: The Future of the Political Offense Doctrine*, 11 PACE INT'L L. REV. 419, 419 (1999).

Institute exempt terrorist activities from the political offense exception.[19] Therefore, although political motivations may often underlie the destructive acts undertaken by terrorists,[20] a discussion of their ability to utilize this exception to avoid extradition is beyond the scope of this article, which instead focuses on their ability to avoid extradition to countries where they may face the death penalty.[21]

II. *AUT DEDERE AUT JUDICARE:* DUTY TO EXTRADITE OR PROSECUTE

What exactly is extradition? *Black's Law Dictionary* offers a good, succinct definition: "[t]he surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."[22] While the oldest extradition treaty was between the Egyptian Pharaoh Ramses II and the Hittite Prince Hattusili, current extradition practice did not develop until the eighteenth century.[23] Even then, extradition was an exception to asylum; now, those positions are reversed.[24]

Assuming countries have a nexus with a captured terrorist under the traditional territorial or extraterritorial (i.e., nationality, passive personality, universal, or protective) theories of jurisdiction to prescribe and punish criminal conduct,[25] such country may be requested to yield its jurisdiction to that of another

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19. *New Problems of Extradition*, at Art. II § 3, Justitia et Pace, Institut de Droit International, Session of Cambridge (Sept. 1, 1983), *available at* http://www.idi-iil.org/idiE/resolutionsE/1983_camb_03_en.PDF.

20. *See* Renuka E. Rao, *Protecting Fugitive's Rights While Ensuring the Prosecution and Punishment of Criminals: An Examination of the New E.U. Extradition Treaty*, 21 B.C. INT'L & COMP. L. REV. 229, 231-33 (1998).

21. In-depth discussion of divergence between use of extradition models of non-inquiry (not considering what happens to the requested suspect once they are extradited) and judicial inquiry (taking into consideration what happens to the requested suspect after extradition) also lies beyond the scope of this paper. For more on this point, *see* Kyle M. Medley, *The Widening of the Atlantic: Extradition Practices Between the United States and Europe*, 68 BROOK. L. REV. 1213 (2003).

22. *See* Cervasio, *supra* note 18, at 421 (*quoting* Black's Law Dictionary 585 (6th ed. 1990)).

23. *Id*.

24. *Id*.

25. Harvard's Research Council first identified these five bases for assertion of penal jurisdiction in 1935:

> An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less

country which has a stronger interest in prosecution. For instance, if a former Nazi concentration camp commander were discovered living in Dushanbe, the Tajikistan government would be able to exercise personal jurisdiction over him, buttressed by the universal jurisdiction accorded all nations over perpetrators of genocide. However, Israel may have a stronger interest in prosecuting the commander, as an overwhelmingly high percentage of Jews were extinguished at his camp, the survivors of which reside in Tel Aviv, and the Israeli government is clearly more motivated to commit prosecutorial resources to his case than are the Tajik authorities. Israel would lodge a request for extradition with the Justice Ministry in Dushanbe through diplomatic channels, and an extradition process would ensue. Tajikistan has not joined the Genocide Convention, so it is under no treaty obligation to either extradite or prosecute this commander. Thus, in the absence of a customary legal obligation to do so, the Tajik government's decision is ultimately a political one.

Nevertheless, that part of the political and legal landscape may be changing. There is growing acceptance of a generalized customary law norm requiring custodial states to either extradite or prosecute major criminals.[26] The expression *aut dedere* (surrender or extradite) *aut judicare* (adjudicate or prosecute) is used to express a duty to extradite or prosecute a fugitive from justice.[27] This phrase is the adaptation of an earlier expression coined by Hugo Grotius, the seventeenth century Dutch jurist and author of *On the Law of War & Peace* (1631), known as the father of international law: *aut dedere aut punire* (either extradite or punish).[28] Grotius' argument was "that a general obligation to

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> extensive penal jurisdiction is claimed by States at the present time. These five principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

The Research in Int'l. Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935). These jurisdictional theories have been incorporated into the Restatement as well. *E.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402, cmts. c, c-g (1987).

26. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (Martinus Nijhoff Publishers 1995).

27. *Id.* at xii.

28. Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 123-24 (1999). Grotius' medieval use of the term punish over adjudicate was consonant with Roman law, which operated on the assumption that an

extradite or punish exists with respect to all offenses by which another state is particularly injured."[29] Moreover, a state that had been so particularly injured obtained a natural right to punish the offender, and any state holding the offender should not interfere with that right.[30] Thus, such a holding state should be considered bound to either extradite or punish; there was no third alternative.[31]

Currently, the duty to extradite or prosecute appears in at least seventy international criminal law conventions.[32] Traditionally, apart from the theoretical natural law notions mentioned above, it was generally accepted that no duty to extradite or prosecute existed in customary law.[33] However, that view is now beginning to change and strong arguments are being advanced in support of finding the duty to exist absent a treaty provision.[34] Thus, whether (and the extent to which) the duty has become part of customary international law is a controversial question.

The argument can take a narrow or broad approach. The narrow approach holds that the duty to extradite or prosecute can become customary international law with respect to one offense defined in one treaty.[35] Thus, it evolves to bind states not party to the treaty on a highly individualized, crime-by-crime basis through a slow process of accretion, depending on state practice and the degree of *opinio juris* (belief that they are legally bound to follow the practice)[36] evidenced by non-party states. The broad approach holds that the duty has become a customary rule with respect to a class of international offenses, or

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offender was guilty until proven innocent. But it cannot be assumed that Grotius meant to punish prior to establishment of guilt.

29. BASSIOUNI & WISE, *supra* note 26, at 5.

30. *Id.*

31. *Id*.

32. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 447 (1999).

33. Plachta, *supra* note 28, at 125.

34. *See id*. at 126.

35. BASSIOUNI & WISE, *supra* note 26, at 20.

36. O*pinio juris* is defined as:

> For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. c (1987) (emphasis added).

with respect to international offenses in their entirety, and it is this approach that is gaining currency with writers in the field.[37]

This broad approach, in turn, has three basic manifestations. In its first form, it applies the duty to those offenders who commit war crimes or crimes against humanity.[38] The second form extends the duty further to also include acts of international terrorism because terrorism is such a bitter pill for the entire international community that "all states are bound to cooperate in ensuring that their perpetrators are brought to justice."[39] The third form extends the duty to all international offenses.[40]

This third argument rests, perhaps precariously in some places, on the following six teleological points identified by Professor M. Cherif Bassiouni of DePaul University, the chief proponent of the broadest manifestation of the broad approach:

> 1) Historically, the duty to extradite or punish was not limited to international offenses; it could also apply to ordinary offenses as well. The duty was connected with the interests inherent in the concept of *civitas maxima* (an international community, or super-state polis). Grotius thought that there was a common social order and that every state's criminal law tried to secure that order.[41]
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> 2) It is better to refer to the principle of *aut dedere aut judicare* instead of a principle of *aut dedere aut punire* because the offender might be innocent. The most that the duty can demand is extradition or that the person be put on trial (with punishment to follow if a guilty verdict is returned).[42]
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> 3) There was controversy through the nineteenth century about whether international law imposed an obligation to extradite absent a treaty. While Grotius, Vattel,[43] and others believed that "general

37. BASSIOUNI & WISE, *supra* note 26, at 21.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*. at 22.
42. BASSIOUNI & WISE, *supra* note 26, at 20.
43. Emmerich de Vattel, an eighteenth century Swiss philosopher/jurist, made an important early contribution to the development of international law with his 1760 treatise, Law of Nations, which argued for the supremacy of international law, as reflective of natural law, over positive (national) legislation. *See* EMMERICH DE VATTEL, THE LAW OF

international law imposes a definite legal duty to extradite," other writers argued "that the duty to extradite is, at best, an 'imperfect obligation.'"[44] According to naturalists, an "imperfect obligation" is only a moral obligation, not a legal obligation, and thus not legally binding unless it is contained within an extradition treaty.[45]

4) The question is whether an exception is created for international offenses to the rule there is no duty to extradite absent a treaty. An exception should exist for all international offenses. Since all states are concerned with international offenses, all states should "cooperate in bringing those who commit such offenses to justice." Without direct enforcement before an international criminal court, each state must prosecute offenders in their own courts.[46]

5) "[A] duty to extradite or prosecute therefore follows from the common interest which all states have in the suppression of international offenses."[47] It is a duty owed to the *civitas maxima*, the international community. However, using naturalist thought, the duty is still an "imperfect obligation" unless it is imposed by a treaty or imposed as a matter of state practice. The duty to extradite or prosecute has been accepted as a legal obligation in a number of multilateral treaties that define international offenses. The constant acceptance in the treaties of the duty "may be taken to confirm that, at least so far as international offenses are concerned, the principle *aut dedere aut judicare* has been accepted as a positive norm of general international law."[48]

6) The duty is more than an ordinary norm of general international law. These international offenses are

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NATIONS, OR THE PRINCIPLES OF THE LAW OF NATURE (CHARLES G. FENWICK TRANS., 1768).

44. BASSIOUNI & WISE, *supra* note 26, at 23, (*quoting* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 181 (8th ed., R. H. Dana ed. 1866)).

45. *Id*.

46. *Id*. at 24. (The author does note that an international criminal court would be ineffective unless states were obliged to surrender or prosecute).

47. *Id*.

48. *Id*.

> "universally condemned," and many of the rules proscribing them are *jus cogens* norms. These rules cannot be changed by a treaty. Therefore, inasmuch as the principle *aut dedere aut judicare* is a rule of general international law, it is also a *jus cogens* principle.[49]

A. Passage into Customary Law

At a minimum, *aut dedere aut judicare* exists as a general norm of law, theoretically binding on all states.[50] But courts and tribunals do not often resort to general principles of law as dispositive of sensitive legal issues;[51] they are, instead, often cited in support of an outcome that rests firmly on a treaty-based or customary law-based holding.[52] To be a rule of customary international law, *aut dedere aut judicare* has to be in general practice and regarded by states as legally

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49. BASSIOUNI & WISE, *supra* note 26, at 25. The theoretical underpinnings of Bassiouni's approach rely on the concept of *civitas maxima*. However, there are two other ways to view international relations that do not focus on the common good. One way regards international relations as anarchy, where nation-states exist in a Hobbesian state of nature. From this perspective, each state pursues its own interest and is not bound by moral or legal obligations in international relations. Another way to view international relations is under the "society of states" model. Here, states pursue their own purpose, but do so within prescriptions regarding toleration and accommodation that allow them to live with other states. Thus, under this model, there is no common good.

Nevertheless, the society of states construct contains many of the principles of traditional international law. For instance, extradition would exist, but be based wholly on reciprocal self-interest because crime generally only concerns the state in which it is committed, and so there is no general duty to extradite or punish. This would reflect modern practice, which imposes no absolute duty to surrender an offender absent a treaty. Furthermore, the concept of "extradite or punish" as advanced by Grotius is treated as a bilateral obligation, not one based on "a common interest in the repression of crime" as argued earlier. Indeed, Grotius discusses two ways a state could actually become liable for the acts of private individuals: *patientia* and *receptus*. *Patientia* is "a failure to take steps to prevent acts injurious to other states; *receptus* is "harboring those who have committed such acts." Liability occurs if there has been special injury to another state. Conversely, liability could be avoided by surrendering or punishing the offenders.

50. Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L.J. 613, 631-32 (1998).

51. United States v. Alvarez-Machain, 504 U.S. 655, 664 (1992); David S. Finkelstein, *"Ever Been in a [Foreign] Prison?": The Implementation of Transfer of Penal Sanctions Treaties by U.S. States*, 66 FORDHAM L. REV. 125, 135 (1997).

52. Richard B. Lillich, *The Growing Importance of International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 16-17 (1995/1996); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. 1 (1987).

binding.[53] State practice might not support the contention that the principle has become a customary rule: "[C]ontemporary practice furnishes 'far from consistent evidence' of the 'actual existence' of a general obligation to extradite or prosecute with respect to international offenses."[54] For example, while it is now generally accepted that war crimes, genocide, and crimes against humanity are subject to universal jurisdiction, it is not clear whether such jurisdiction must be exercised.

Some scholars consider the exercise of universal jurisdiction permissive.[55] Others consider it mandatory when coupled with *aut dedere aut judicare* (effectively allowing universal jurisdiction to lift *aut dedere aut judicare* into customary law in connection with *jus cogens* crimes):

> [U]niversal jurisdiction adheres only to the most egregious offenses . . . . [B]ecause the international order has traditionally enforced international criminal law through domestic enforcement mechanisms, it has developed and applied the aut dedere aut judicare principle to these crimes . . . . [T]he duty to extradite or prosecute under customary international law applies as a mandatory, affirmative obligation for serious crimes such as war crimes, crimes against humanity, and genocide. This affirmative duty follows from the common interest that all states have in the suppression of these crimes.[56]

Even though the focus is shifting away from state practice to "normative utterances," this does not mean that a mere assertion of practice becoming custom will reflect existing law.[57] Provisions in multilateral treaties, therefore, may not reflect current state practice; these statements only become general international law if states accept them as binding. As a result, Bassiouni faces a significant problem in arguing that *aut dedere aut judicare* applies to *all* international offenses because that contention involves taking specific statements and inferring a general duty. No one document states that the international community supports the principle's application to all international offenses.[58]

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53. Plachta, *supra* note 28, at 125.

54. BASSIOUNI & WISE, *supra* note 26, at 43 (*quoting* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 22 (2d ed. 1987)).

55. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations*, 39 VA. J. INT'L L. 425, 440 (1999).

56. *Id*. at 441-43 (footnotes omitted).

57. BASSIOUNI & WISE, *supra* note 26, at 46-47.

58. *Id*. at 49-50. Even so, there is a plausible principal that postulates that international offenses must have certain attributes and these oblige to penalize the conduct. Such attributes include:

1) Behavior so abhorred by the international community that it is considered an

Nevertheless, Bassiouni looks for support to the shear dearth of multilateral agreements during the last century that contain either express or implied *aut dedere aut judicare* provisions as evidence of sufficient *opinio juris* to indicate a willingness by states for the principle to become customary. (*See Appendix A*).[59] Some would concede that *aut dedere aut judicare* provisions in multilateral treaties amount to bestowing universal jurisdiction on those crimes.[60] While others, again, take a more restrictive view, considering those provisions only as "advance waivers" against future objections to the assertion of jurisdiction over those crimes by other states parties (states non-parties being excluded).[61] Either way, there is some supporting anecdotal evidence that judges within national systems are beginning to apply the doctrine on their own. The Austrian Supreme Court has held that when the government has refused an extradition request from a third country, then the government must, as a consequence, offer the foreign defendant's home state the right to prosecute.[62] In addition, an Israeli court has held that where Israeli law prohibited the prosecution of a foreign national, Israel was obligated to extradite the individual pursuant to international law.[63] On the contrary, however, the U.S. Supreme Court stated as recently as 1992 that: "In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution."[64]

Nevertheless, the question remains as to whether this scheme applies to acts of terrorism. Clearly, the broadest category that Bassiouni outlines encompasses terrorism. However, this approach has the least support, even from the co-author of Bassiouni's treatise, Professor Edward Wise of Wayne State

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international crime.

2) A multilateral treaty that demands the crime's suppression is a guide to what behavior amounts to an international crime.

3) If the conduct is censured in a widely ratified multilateral treaty, it can also be viewed as a breach of customary international law.

4) There is direct liability on individuals who perpetrate international crimes.

5) States are enforcing international law when they prosecute these individuals.

6) These international crimes concern all states.

7) Thus, all states are able to prosecute these individuals.

8) In addition, all states are obligated to bring these individuals to justice – which implies a duty to extradite or prosecute.

Id.

59. *Id*. at 303-18 (citing conventions by subject matter).

60. Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 311-12 (2000).

61. *Id*.

62. Plachta, *supra* note 28, at 127-28 (citing OJZ 1961/95 (Aus.), *translated in* 38 I.L.R. 133, 134 (1961)).

63. *Id*. at 128 (citing Cr.A. 308/75, 31 (II) Isr. L. Rep. 449 (1977)).

64. *Alvarez-Machain*, *supra* note 51, 664.

University.[65] The middle road, relating back to the three manifestations of the broad approach favoring the existence of *aut dedere aut judicare* in customary law, is that the duty exists beyond treaties for crimes of international terrorism. The most restrictive of the broad approaches confines the duty's existence to war crimes and crimes against humanity.

Logically, even this last approach would include the class of crimes known as *jus cogens* acts that share the same level of heinous character as war crimes. This view dovetails with Grotius' theoretical underpinning: the state most aggrieved by the acts should retain jurisdiction, and the canon of *jus cogens* acts (e.g., slavery, torture, genocide, piracy) are so grievous as to easily lend themselves to this construct.[66] Moreover, due to its heinous nature, once an act is regarded as *jus cogens*, no treaty can be made to carry out the act (otherwise the treaty is void).[67] So, for example, no treaty could be made to carry out genocide because there is a peremptory norm against such conduct. Additionally, universal jurisdiction automatically extends over perpetrators of *jus cogens* acts, allowing any state to try them.[68] The next logical step is to include terrorism into that canon of prohibited conduct, thereby conferring on it the application of *aut dedere aut judicare*.

B. Crimes of Terrorism Amenable to the Principle

If *aut dedere aut judicare* has passed into customary law and become binding on all states under the middle approach, then terrorism is covered. However, if the doctrine has only become binding under the more restrictive approach, a much easier argument to accept and currently the most agreed upon, then the proper question is whether terrorism has entered the *jus cogens* canon? The consensus before September 11, 2001, was that this had not yet occurred.[69] That terrorist event yielded so much change in state policy (at least from the perspective of the United States),[70] that terrorism could have catapulted into that

65. *See* Richard B. Bilder & Roger S. Clark, Book Review, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, 91 AM. J. INT'L L. 204 (1997).

66. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). Note, the Restatement only speaks to "state-sponsored" actions as violative of preemptory norms, not those acts committed by individuals. However, for purposes of this analysis, the conduct is being considered as entering a class of actions universally condemned by the international community in order to support a finding that *aut dedere aut judicare* exists with respect to such acts (individual liability to follow in domestic national courts once jurisdiction is obtained over the offenders).

67. *Id*. at cmt. n.

68. *Id*. at reporter's note 12.

69. William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 110-11 (2002) ("[S]ome courts and commentators have suggested that state-sponsored terrorism might even violate a *jus cogens* norm of customary international law.").

70. The events of September 11, 2001 directly precipitated creation of a new cabinet

class of crime.

An example from recent history demonstrates the process by which a criminal act can become subject to *jus cogens* peremptory norms. During the 1980s, in response to worldwide condemnation of South Africa's race policies, Apartheid, or "systematic racial discrimination," entered into the *jus cogens* canon.[71] The Restatement (Third) of Foreign Relations describes the mechanics of the process:

> Numerous United Nations resolutions have declared *apartheid* to be a violation of international law. The General Assembly has adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, as of 1987, 86 states had adhered to it; the United States was not a party. The International Court of Justice has declared *apartheid* to be "a flagrant violation of the purposes and principles of the Charter." *Apartheid* is listed as an example of an international crime in the draft articles provisionally approved by the International Law Commission . . . .
>
> Presumably the same definition would obtain for purposes of the prohibition of *apartheid* under this section . . . . The Convention also creates obligations beyond those imposed by customary international law. It attaches personal criminal responsibility to all individuals who commit, participate in, incite, abet, encourage or co-operate in the crime. The Convention also requires states to suppress, prevent any encouragement of, and punish *apartheid*. Among parties to the Convention, *apartheid* is also effectively made a subject of universal jurisdiction.[72]

However, the prospect of terrorism becoming an act covered by *jus cogens* is more problematic.[73] The lack of agreement on a universally accepted

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department (Homeland Security) – which, in turn, precipitated the largest reorganization of the federal government since World War II, passage of sweeping anti-terrorism police powers under the 2001 USA Patriot Act, redirection of two entire agencies (FBI and CIA) toward combating terrorism, and aggressive international efforts on the part of the U.S. to capture terrorists and bring them to justice.

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 rep.'s note 7 (1987).
72. *Id*. (emphasis added) (citations omitted).
73. U.S. statutory law defines "international terrorism" as activities that:
    1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
    2) appear to be intended (A) to intimidate or coerce a civilian

definition stems from one inescapable fact: one state's terrorist is another state's freedom fighter.[74] The most notable manifestation of this perspective problem lies in President Reagan's 1986 recognition of the U.S.-supported Nicaraguan Contras as the "moral equal of our Founding Fathers."[75] In short, there are too many political sacred cows that would be gored if a workable definition were to emerge.

Nonetheless, individual criminal acts that would usually constitute terrorism in the aggregate, have been outlawed separately, including hijacking, commandeering embassies, and using weapons of mass destruction. Perhaps these acts can be made amenable to the *aut dedere aut judicare* duty if they are carried out as part of a terrorist activity and thereby make the jump into *jus cogens*. For example, while murder and kidnapping alone would not rise to the level of *jus cogens* acts, if undertaken in connection with terrorist action (e.g., mass murder or mass kidnapping), these acts might qualify and, therefore, render the perpetrators amenable to the *aut dedere aut judicare* principle.

Some terrorist actions such as hijacking, torture, and hostage-taking are already outlawed by multilateral treaties that do contain *aut dedere aut judicare* provisions.[76] However, for the principle to extend to non-party states and reach the terrorists they may have in custody, the doctrine must exist in customary law and the crime must be amenable to the principle. This difficult issue arose in the Pan American Flight 103 case, where a passenger jet was destroyed by Libyan terrorists over Lockerbie, Scotland in 1988, and neither the United States nor the United Kingdom could assert jurisdiction over the terrorists hiding in Tripoli.[77] Libya argued that it had the choice under the *aut dedere aut judicare* provisions of the 1971 Montreal Convention[78] to prosecute or extradite, and it chose to prosecute. However, the United States and United Kingdom found that choice unacceptable:

> Clearly, the two sides were on a conflicting course. While Libya relied on . . . Article 7 of the Montreal Convention, as

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> population; (B) to influence the policy of a government by intimidation or coercion; or (C) to effect the conduct of a government by assassination or kidnapping; and
>
> 3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801(c) (2000).

74. MALCOLM SHAW, INTERNATIONAL LAW 803-06 (4th ed. 1997).

75. Howard Fineman, *The Wordsmith Behind the Speech*, NEWSWEEK, Aug. 28, 1988, at 16 (quoting President Reagan in a speech to conservative PACs, March 1985).

76. Enache-Brown & Fried, *supra* note 50, at 624-25.

77. Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare*, 12 EUR. J. INT'L L. 125 (2001).

78. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177.

> the governing principle that entitled it to prosecute its own nationals especially in the absence of an extradition treaty, both the U.S. and U.K. governments categorically demanded the surrender of the two suspects . . . [and trial of them] in their courts. While Libya contended that its domestic law forbade the extradition of its nationals, the U.S. and U.K. denied that this was a valid excuse for not surrendering the suspects.[79]

Frustrated by Libya's actions and unwilling to disclose the criminal evidence they had amassed, America and Britain went to the U.N. Security Council and secured Resolutions 731 and 748. Those resolutions demanded that Libya surrender the two fugitives and imposed economic sanctions until compliance was achieved.[80] Libya sought relief in the International Court of Justice (ICJ), which declined to award provisional measures – effectively affirming the precedence of Security Council resolutions under Article 103 of the Charter over any other international agreement, including Article 7 of the Montreal Convention.[81]

For Libya, the way out from under the embargo, while still maintaining the veneer of protecting its nationals, was a political solution engineered by the U.N. Secretary General, Kofi Anan. Both suspects were transferred from Libya to a third country – the Netherlands – to stand trial before Scottish judges under Scottish law.[82] The result was one acquittal and one guilty verdict.[83] Some think this may give rise to an amended version of the principle: aut dedere aut judicare aut transfere (extradite, prosecute, or transfer).[84] Thus, on the Libyan model, if stalemate ensues, transfer to a third country could be a middle road approach that saves the original doctrine while altering it in the process.

III. REFUSAL TO EXTRADITE BASED ON THE DEATH PENALTY

Use of the death penalty to punish violent offenders has become anathema in some, mostly Western, democratic societies.[85] As with any responsive government, elected lawmakers and executive officials naturally

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79. Plachta, *supra* note 77, at 128-29.

80. *Id.* at 129.

81. *Id.*

82. *Id.* at 131-36.

83. Michael J. Kelly, Opinion*, Imperfect Justice*, SAN DIEGO UNION-TRIB., Feb. 7, 2001, at B7.

84. *See* Plachta, *supra* note 77, at 136.

85. Peter Finn, *Germany Balks at Helping U.S. in Moussaoui Trial*, CHI. TRIB., June 11, 2002, at A3 ("Capital punishment has been abolished in all 15 countries of the European Union. That policy is widely held in Europe to be a crucial attribute of democratic society.").

attempt to meet the demands of their public; thus, policy attempts to follow popular opinion over time, and law seeks to catch up with policy. This process has resulted in the gradual ban of the once ubiquitous death penalty as a criminal sentencing option throughout Europe,[86] Canada, Mexico, and most recently, Russia.[87]

The legal grounds sought to justify this policy choice, and rationalize it into existing jurisprudence, is that the "cruel and unusual" punishment inflicted by way of a death sentence is tantamount to torture – a violation of basic human rights.[88] The thrust of the argument is not targeted at the resulting death so much as the "death row phenomenon" that is a precursor to the execution of the sentence:

> It is difficult to argue that customary international law contains a rule prohibiting the death penalty. No human rights convention outlaws the death penalty, although protocols to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights do so. All Western European states have abolished this penalty *de facto* or *de jure*, but it is still a lawful penalty in many states. Neither *usus* nor *opinio juris* therefore supports such a prohibition under international law. In *Soering* the European Court of Human Rights was obliged to base its finding on the death row phenomenon rather than on the death penalty itself because the latter is not outlawed by either the European Convention or customary law, while the former as a form of inhuman and degrading treatment is so prohibited. However, in *Kindler v. Canada* the UN Human Rights Committee held that, 'while States Parties are not obliged to abolish the death penalty totally, they are obliged to limit its use.'[89]

The "death row phenomenon" was defined by the European Court of Human Rights as an amalgam of several factors facing the defendant were he extradited to the United States for murder: the long time the inmate had to wait on death row, the harsh conditions attending that wait, and the mounting anguish of awaiting execution.[90]

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86. *See* Appendix B for the European Union policy on use of the death penalty in the U.S.

87. Amnesty International – USA, *Abolitionist & Retentionist Countries*, *available at* http://www.amnestyusa.org/abolish/abret2.html (Sept. 2002).

88. John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 196-98 (1998).

89. *Id*. at 196 (emphasis added) (citations omitted).

90. *Id*. at 198 (citing Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R.

A. Domestic Considerations

Domestic political pressure, case law, statutory law, or constitutions that incorporate this repugnance to the death sentence may be significant obstacles to extradition, and thereby put the requested state in breach of its international legal obligations if *aut dedere aut judicare* is deemed to have passed into customary law, terrorism is covered by the duty, and the offender is guilty of terrorist acts.

Whether the domestic prohibition on extradition is *de facto* or *de jure*, the result remains the same – a disinclination to extradite. Moreover, the customary law principle that states may not use internal political or legal constraints as an excuse to avoid meeting their international legal obligations, reflected in the Vienna Convention on the Law of Treaties,[91] is also violated.

Case law prohibiting extradition of prisoners to requesting states that maintain the death sentence has restricted the ability of governments as diverse as those in India, Zimbabwe and the United Kingdom from going forward with extradition requests.[92] France, Germany, and Spain have more recently routinely denied extradition requests of terrorist suspects to the United States unless a promise is extracted from the Justice Department not to seek the death penalty – a particularly steep political price to extract given domestic American sentiment toward terrorists.[93]

A recent case demonstrates the political and legal problems that can flow from such a blanket prohibition on extradition, as well as the international ramifications that can occur due to domestic restraints on compliance with international law. During the 1980s and 90s, Abdullah Ocalan led the Kurdistan Workers Party (PKK), a terrorist-oriented militant group operating in southeastern Turkey, in pursuit of independence.[94] Turkey conducted a low-intensity war against Ocalan and the PKK in response to PKK terrorist attacks on Turks and Turkish businesses in that part of the country.[95] This decade-and-a-half long

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Rep. 439, 489 para. 111 (1989) (Eur. Ct. H.R.)).

91. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 8 I.L.M. 679 (1969).

92. Dugard & Van Den Wyngaert, *supra* note 88, at 198 (citing India: Triveniben v. State of Gujurat, [1989] 1 S.C.J. 383; Madhu Mehtu v. Union of India, [1989] 3 S.C.R. 775; Vatheeswaran v. State of Tamil Nadu, [1983] 2 S.C.R. 348; Sher Singh v. State of Punjab, [1983] 2 S.C.R. 582, 593; Zimbabwe: Catholic Commission for Justice & Peace, Zimbabwe v. Attorney-General Zimbabwe, 1993 (4) SALR 239 (Sup. Ct.); Britain: Pratt v. Attorney-General for Jamaica, [1993] 3 W.L.R. 995 (P.C.), 98 ILR 335).

93. Finn, *supra* note 85; T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals*, WASH. POST, Nov. 29, 2001, at A23.

94. Stephen Kinzer, *Turkish Commandos Capture a Kurdish Leader in Raid into Iraq*, N.Y. TIMES, April 15, 1998, at A5. For further discussion, s*ee generally*, Hanz Chiappetta, *Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan?*, 13 PACE INT'L L. REV. 117, 121-22 (2001).

95. Florence Biedermann, *Kurdish Leader Ocalan Seeks Distance from Rebel*

conflict cost more than 30,000 military and civilian lives,[96] and according to U.S. and international reports, crimes against humanity were committed by both sides.[97]

Until late 1997, Turkey could not get to Ocalan himself because he was directing the PKK from exile in Damascus, Syria, with that country's tacit consent. However, after a formal threat of military incursion by an increasingly frustrated Turkey against Syria unless they expelled Ocalan, the Syrian government relented and Ocalan was expelled.[98] After dropping out of sight, he was arrested on November 12 in Rome, Italy, arriving on a plane from Moscow on a false passport.[99] Italian authorities held him pursuant to a German arrest warrant for homicide; however, the Germans ultimately decided not to press for extradition, fearing eruptions of violence between the significant Turkish and Kurdish populations in Germany.[100]

The Turkish government immediately filed an extradition request with Italy.[101] Unfortunately, this request put the Italian government in the difficult position of having to deny Turkey's request because the Italian Constitution, as interpreted by the Constitutional Court, forbids extradition from Italy to countries that allow the death penalty as an option for sentencing, as Turkey did at that time.[102] Furious at Italy's refusal to extradite, Turkish citizens vented their anger by boycotting Italian products, protesting, and destroying Italian merchandise.[103]

Anxious to capitalize on public sentiment, the weak and politically crippled government in Ankara publicly denounced Italy's decision and threatened economic reprisals against Italy, throwing Turkish-Italian foreign relations into a tailspin.[104] The political rupture was further widened when Ocalan was denied political asylum by Italy and subsequently released pursuant to Italian law.[105] Thus began the final leg of Ocalan's odyssey as a fugitive from Turkish justice. In mid-January, Italian authorities placed Ocalan on a flight to Moscow,

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Atrocities, AGENCE FRANCE-PRESSE, Dec. 14, 1998, *available at* 1998 WL 16659498.

96. *Id.*

97. Stephen Kinzer, *Kurdish Guerilla's Lawyer Quits, Saying He's Been Threatened*, N.Y. TIMES, Feb. 27 1999 at A7.

98. Biedermann, *supra* note 95.

99. Alessandra Stanley, *Italy Ending House Arrest of Rebel Chief of the Kurds*, N.Y. TIMES, Dec. 17, 1998 at A11.

100. *Id.*

101. Associated Press, *Italy Arrests Kurdish Rebel*, N.Y. TIMES, Nov. 14, 1998, at A6.

102. COST. art. 10, 26-27; Stephen Kinzer, *Turks are Furious over Rebuff from Italy on Kurd Rebel Chief*, N.Y. TIMES, Nov. 23, 1998, at A12; Chiappetta, *supra* note 94. For a full exposition of Italy's legal reaction to the Ocalan incident in connection with the political offense exception to extradition (which is not treated in this paper), *see generally* Chiappetta, *supra* note 94.

103. Alessandra Stanley, *Italy Rejects Turkey's Bid for the Extradition of Kurd*, N.Y. TIMES, Nov. 21, 1999, at A6.

104. *See id.*

105. Stanley, *supra* note 99, at A11.

ridding themselves of his troublesome presence and returning him to Russia.[106] In response to questions about this transfer from Turkey, Russian officials denied having seen Ocalan enter their territory.[107] At that point, Ocalan's trail was lost by the Turks, creating speculation as to his whereabouts.[108]

In fact, the Greek government, in sympathy with the Kurds, had dispatched a retired vice admiral to Moscow, who retrieved Ocalan to Athens.[109] However, Greek offers of refuge in Algeria, Morocco, Tunisia, and Libya were all rejected by the PKK leader. Subsequently, he flew to Minsk, Belarus, in a futile attempt to reach The Netherlands – which denied his request to land. Arriving back in Greece at the beginning of February, Ocalan was diverted to the island of Corfu, where his plane was refueled before he was permitted to proceed to Nairobi, Kenya for temporary sanctuary at the Greek Embassy.[110]

Fortuitously, over one hundred American intelligence and law enforcement agents were on site continuing their investigation of the U.S. embassy bombing that had occurred there the previous year.[111] They quickly picked up on Ocalan's presence in Nairobi and alerted Turkish intelligence as to the terrorist's location.[112] By mid-February, Greek officials warned Ocalan that he had been spotted and must leave.[113] Three days later, the order came from Greece to "boot him out," and by nightfall, he was en route to Nairobi's airport to obtain transport to Amsterdam under Kenyan and Greek escort.[114]

The Kenyan vehicle, however, was lost by the Greeks, and a team of Turkish commandos captured Ocalan during the confusion.[115] The prisoner was immediately airlifted to Turkey and transferred to a remote prison island in the Sea of Marmara.[116] Upon his seizure and relocation to Turkey, violent protests

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106. Thomas Sancton, Meh et al., *The Kurds Aflame with Rage: The Hunt for and Capture of Abdullah Ocalan, the Kurdish Rebel Leader, Has Brought the Kurdish Cause to the Attention of the World*, TIME, March 1, 1999, at 20.

107. *Russia Says It Knows Nothing of Rebel Kurd*, WASH. POST, Jan. 19, 1999, at A14.

108. Reuters, *Greek Embassy in Nairobi Hands Rebel Kurd to Kenya, Report Says*, N.Y. TIMES, Feb. 16, 1999, at A8; Amberin Zaman, *Turks Say Rebel Kurd Is in Greece; Athens Denies Claim; Dutch, Swiss Turned Separatist Away*, WASH. POST, Feb. 2, 1999, at A9.

109. Sancton, *supra* note 106.

110. *Id.* According to Kenyan officials, an unmarked jet landed that night at the airport carrying Ocalan, who was traveling under the name of Lazarus Marvos on a false Cypriot passport.

111. Tim Weiner, *U.S. Helped Turkey Find and Capture Kurd Rebel*, N.Y. TIMES, Feb. 20, 1999, at A1.

112. *Id.*

113. Sancton, *supra* note 106.

114. *Id.*

115. *Id.*

116. *See* Weiner, *supra* note 111. This scenario is reminiscent of the kidnapping of former Nazi, Adolf Eichmann, from Argentina in 1961 by Israeli agents. He was spirited back to Jerusalem where he stood trial for crimes committed during the Second World War.

erupted around Europe. Kurds, outraged at Ocalan's capture, rampaged against Greek embassies in response to the perception that Greece had handed Ocalan over to Turkey.[117] In Vienna, the Greek Ambassador to Austria and his wife were taken hostage in the embassy, and more Greek hostages were taken at Greek ambassadorial offices in The Hague, London, Paris, Leipzig, and Bonn.[118] Kenyan embassies and officials were also targeted for their complicity, and less violent demonstrations were held in Geneva and Strasbourg.[119]

Ultimately, the capture of Ocalan revealed Greek duplicity, and further soured the already poor relations between Greece and Turkey.[120] Three Greek ministers lost their jobs over the incident.[121] Israel was drawn into the fray as well, amidst accusations that Mossad (Israeli intelligence) had assisted Turkey in its manhunt.[122] Kurdish anger against Israel culminated in the storming of the Israeli consulate in Berlin, where Israeli troops killed three Kurds and wounded sixteen others while defending the compound.[123]

All of this political brinkmanship, diplomatic fury, mass rioting, and general international chaos could have been avoided had Italian courts found the provisions of their constitution that prohibit extradition to death penalty states inoperable under international law, with which Article 10 of the Italian constitution mandates compliance.[124] Turkey should have asserted the *aut dedere*

See also Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics, in* THE PROSECUTION OF INTERNATIONAL CRIMES 125 (Rogers S. Clark & Madeleine Sann eds., 1996).

117. Sancton, *supra* note 106.

118. Alessandra Stanley, *Top Kurd's Arrest Unleashes Rioting All Across Europe*, N.Y. TIMES, Feb. 16, 1999, at A1.

119. *Id.*

120. *See* Stephen Kinzer, *In Snatching a Fugitive Rebel, Ankara Wins Opportunities on Several Fronts*, N.Y. TIMES, Feb. 17, 1999, at A6.

121. Roger Cohen, *Arrest Uniting Europe's Kurds in Indignation*, N.Y. TIMES, Feb. 18, 1999, at A1; Stephen Kinzer, *Turks Haunted by Treaty Forgotten by Most Nations, Kurdish Rebel's Desire to Create a Separate State Resurrects Painful Memories of Humiliation*, GLOBE & MAIL (Toronto), Dec. 9, 1998, at A22.

122. Joel Greenberg, *Israel Denies Role but Fears Reprisal for Ties to Turkey*, N.Y. TIMES, Feb. 18, 1999, at A8.

123. Sancton, *supra* note 106.

124. The Italian Constitution states:

> 1) Italy's legal system shall conform with the generally recognized principles of international law.
>
> 2) The legal status of foreigners shall be regulated by law in conformity with international rules and treaties.
>
> 3) Foreigners to whom the actual exercise of the democratic freedoms guaranteed by the Italian Constitution is denied in their own country, shall be entitled to the right of asylum within the territory of the Republic, under conditions laid down by law.
>
> 4) The extradition of a foreigner for political offences shall not be permitted.

aut judicare duty in the Ocalan case from the start.

However, even if Italian courts had asserted universal jurisdiction to try Ocalan for his crimes in Rome, it is unlikely that they would have done so. Where the requesting state's extradition request has been turned down because the specter of the death penalty in that jurisdiction is repugnant to the requested state's law, policy, or social consciousness, the practicalities are that no prosecution will ensue in the requested state even though there may be an international obligation to do so. The reasons for this stem from the reality of the resulting situation:

> Where the requested state is empowered under its internal law to try the person in respect of whom a request for extradition has been made and it has reason to believe that the human rights of that person will be seriously violated in the requesting state, it may itself institute a prosecution against that person. No doubt, this will raise problems of evidence, especially in common law jurisdictions where oral evidence features prominently in trial proceedings. In theory, the requesting state might be asked to forward the evidence. Yet it is unlikely that a state whose extradition request has been refused on human rights grounds will be prepared to cooperate with the authorities of the requested state. Furthermore, the evidence thus produced will probably be considered with suspicion by the courts of the requested state, which, after all, will have refused extradition on account of flaws in the human rights protection in the requesting state. Finally, it is not certain that the requesting state will always be interested in having the requested state prosecute the case, as doing so might result in an acquittal for lack of evidence and have the effect of *non bis in idem* [literally, "not twice for the same thing" – a general prohibition on double jeopardy] on future prosecutions in the requesting state.
>
> It is therefore not surprising that there are few examples of procedures *aut judicare* as an alternative to procedures *aut dedere* brought in requested states that have refused extradition on human rights grounds or on other diplomatically sensitive grounds such as the political offense exception. The only cases in which the rule seems to function are those in which the requested state has jurisdiction over the offender because of the offender's nationality or because the offense was committed, in part or in whole, on its territory.[125]

COST. art. 10.

125. Dugard & Van Den Wyngaert, *supra* note 88, at 209-10 (emphasis added).

Thus, justice may be successfully evaded by the clever perpetrator. This forces governments anxious to rid themselves of a menace into situations where intelligence services abduct offenders to force extradition through non-diplomatic channels, or alternatively, assassinate them as the U.S. Central Intelligence Agency did with al Qaeda operatives in the deserts of Yemen in November 2002, when an unmanned aircraft operated by the CIA confirmed satellite identification of six al Qaeda operatives driving in the remote northern region and fired missiles at the target, killing all on board. One of those assassinated was Ali Qaed Sinan al-Harthi, the man believed responsible for coordinating the attack on the U.S.S. Cole in 2000 that killed seventeen American sailors.[126]

B. International Considerations

International case law has also developed to make the potential infliction of a death sentence a viable bar to extradition as well. In the famous *Soering* case, the European Court of Human Rights held that, given the age and mental state of the defendant, extradition from the U.K. to Virginia for trial, and a resulting sentence that put him on death row, would constitute inhuman and degrading punishment prohibited by the European Convention on Human Rights.[127] In that case, Jens Soering, a German citizen, participated in the murder of his girlfriend's parents at their home in Virginia in 1985. He was arrested in Britain, where he fled after the crime, and the American extradition request for him was filed thereafter.[128] The death row phenomenon[129] was the fate that the Court sought to avoid for this individual.

The United Nations Human Rights Committee (hereinafter "Committee") used an alternate basis for denying extradition to a death penalty requesting state. Instead of accepting the *Soering* rationale of the death row phenomenon, in the case of *Ng v. Canada*,[130] the Committee focused on execution method - finding that the possible sentence of execution by gas asphyxiation in California (which could take ten minutes to cause death) was a form of "prolonged suffering" tantamount to "cruel and inhuman treatment" within the meaning of the International Covenant on Civil and Political Rights.[131] Therefore, Canada failed

126. Howard Witt, *Killing of al Qaeda Suspects Was Lawful*, CHI. TRIB., Nov. 24, 2002, at A1.

127. Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 478 (1989) (Eur. Ct. H.R.).

128. *Id.* at 443.

129. Discussed *infra*, introduction to Part III.

130. Chitat Ng v. Canada, U.N. Human Rights Committee., 49th Sess., Comm. No. 469/1991, ¶¶ 16.3-.4, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

131. Dugard & Van Den Wyngaert, *supra* note 88, at 199 (citing 98 I.L.R. 479); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976.

to comply with its obligations under the Covenant by extraditing him to the United States.[132]

In that case, Chitat Ng, a British subject born in Hong Kong, was arrested, charged and convicted of armed robbery and shooting a storeowner in Calgary, Alberta in 1985.[133] Once in custody, his extradition was requested from Canada to the U.S. to stand trial in California for kidnapping and twelve murders.[134] He was extradited in 1991, which gave rise to his claim to the Committee of human rights abuse by Canada for sending him to California.[135]

The Committee's holding leaves open the distinct possibility that other forms of execution could be found to propagate "prolonged suffering" such as electrocution, firing squad, stoning, hanging, lethal injection, etc. Thus, as Professors John Dugard of Witwatersrand University and Christine Van Den Wyngaert of Antwerp University note: "Like *Soering, Ng* sends out a message to states that retain capital punishment that they cannot be confident that their extradition treaties will be honored where the death penalty is a possible punishment."[136] They also aptly point out that practical considerations may force prosecutors in a requesting state to abandon the death penalty option altogether in order to secure the prisoner's extradition:

> In these circumstances it is difficult to argue with conviction that the death row phenomenon is, or should be, a bar to extradition in the absence of special circumstances of the kind considered in *Soering*, which take the matter beyond the threshold of permissibility. On the other hand, a requesting state that retains the death penalty would be wise to realize that, despite judicial protestations to the contrary, the refusal of extradition on account of the death row phenomenon will often simply be a stratagem to avoid the death penalty itself. This means that the death row phenomenon will continue to be raised as an obstacle to extradition as long as international law tolerates the death penalty. In these circumstances a requesting state would be well-advised to provide firm assurances that it will not impose the death penalty on the fugitive when it initiates an extradition request for a crime that carries the death sentence under its law.[137]

Such practical sentiment has found its way into the U.N. General Assembly's Model Treaty on Extradition, adopted in December, 1990, as a guide

132. Dugard & Van Den Wyngaert, *supra* note 88, at 199.
133. Ng, *supra* note 130, ¶¶ 1, 2.1.
134. *Id.* ¶ 2.1.
135. *Id.* ¶ 1.
136. Dugard & Van Den Wyngaert, *supra* note 88, at 199.
137. *Id.* at 199.

to be adopted by countries around the world, bilaterally or multilaterally, to normalize extradition processes.[138] Specifically, the Model Treaty provides in Article 4, Optional Grounds for Refusal:

> Extradition may be refused in any of the following circumstances: . . . If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.[139]

U.N. General Assembly resolutions are often viewed as reflective of world opinion because a majority of the world's countries necessarily vote to adopt them.[140] However, for customary law purposes, they are also considered reflective of developing *opinio juris*.[141] Thus, the argument could be made that *opinio juris* is coalescing around refusing extradition based on the death penalty. Because a majority of nations continue to allow the death penalty as a domestic punishment option,[142] the national practice element necessary for such a rule to form in customary law is still lacking for it to be universally applicable.

Nevertheless, where a requesting country has already incorporated a provision such as Article 4(d) of the Model Treaty into a bilateral extradition treaty, that country must accept the requested country's refusal to extradite based on the death penalty until *aut dedere aut judicare* can be shown to have later passed into custom and the requested state considers itself bound by the resulting duty.[143] Such is the case with current bilateral extradition treaties the United States has with Canada[144] and the United Kingdom[145] allowing for death penalty

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138. Model Treaty on Extradition, G.A. Res. 45/116, 45th Sess., 68th plen. mtg., *available at* http://www.un.org/documents/ga/res/45/a45r116.htm (1990).

139. *Id*. at art. 4(d).

140. *See* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 145-46 (4th ed. 2001).

141. *See* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 139-42 (3d ed. 1999) (citing Schachter, *International Law in Theory and Practice*, 178 Rec. des Cours 111-21 (1982-V)).

142. Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 YALE J. INT'L L. 193, 215 n.95 (2002); Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 90 n.429 (2002). In March 2002 Amnesty International reported that eighty-five countries continue to allow the death penalty, seventy-six countries have abolished the death penalty, twenty countries retain the death penalty but have not used it in ten years, and fourteen countries retain the death penalty only for exceptional crimes. Amnesty International, *Facts and Figures on the Death Penalty* (2002), at http://www.amnestyusa.org/abolish/facts_fgures032002.pdf.

143. *See* Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

144. Treaty on Extradition Between Canada and the United States of America, Dec. 3,

refusals to extradite absent a promise to waive its application in sentencing.

C. Passage into Regional Customary Law

Although customary law, in its global sense, does not support an obligation to refuse extradition based on the death penalty, as most states still allow capital punishment, such an obligation may be well-positioned to pass into regional customary practice.[146] The ICJ first recognized the possibility of regional customary law emerging on a non-universal basis in the 1950 Asylum case between Columbia and Peru, and accepted an argument based on this premise the following year in the Anglo-Norwegian Fisheries Case.[147] The area where such regional customary law would most likely arise is Europe, where thirty-nine states have abolished the death penalty and ratified Protocol 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – which outlaws use of capital punishment in peacetime.[148]

1971, U.S.-Can., 27 U.S.T. 983 (1976).

145. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (1977).

146. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 377 (3d ed. 2002). Professor Schabas notes that emergence of such a universal prohibition may be on the horizon soon:

> [C]ustomary international law does not prohibit capital punishment. [B]ut trends in State practice, in the development of international norms, and in fundamental human values suggest that it will not be true for very long. This study was dedicated to several famous victims of the death penalty: Socrates, Spartacus and Jesus Christ, Joan of Arc, Danton and Robespierre, John Brown, Louis Riel, Roger Casemen, Sacco and Vanzetti, the Rosenbergs and Ken Saro-Wiwa. What is remarkable about such a list is how it permits history to be measured by executions: the apex of Greek philosophy, the decline of Rome and the birth of Christianity, the beginnings of the Renaissance, the French Revolution, the Cold War. It is a gruesome yardstick indeed of human 'progress,' but, like every yardstick, it must have an end. The constant attention of international human rights law to the abolition of capital punishment has brought that end into sight.

Id.

147. MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 97-99 (2d ed. 2001) (citing Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20); Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18)).

148. Protocol No. Six to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 28,1983, Europ. T.S. 114.

IV. THE DOCTRINAL COLLISION

Two equally principled doctrines are on a collision path here. One is the increasingly accepted international legal doctrine to either prosecute or extradite terrorists. The other is the increasingly invoked prohibition against sending criminal offenders to meet their death abroad.

A. Legal Stalemate

In some counties, the domestic legal constraint takes precedence over international law. This is true, for example in the United States, where Article 6 of the Constitution places treaties and federal statutes as co-equal articulations of the supreme law of the land *under* the Constitution.[149]

But while American law currently disallows extradition from the United States absent a treaty,[150] Washington is not precluded from attempting to apply *aut dedere aut judicare* to other countries holding offenders America wishes to try where the domestic legal system of the holding country allows for international legal duties to take precedence over domestic law. As noted above, Article 10 of the Italian Constitution allows for this. Russia provides another example. Article 15, section 4 of the Russian Federation Constitution states:

> The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.[151]

Thus, if the Duma were to make it illegal for the government to extradite offenders to countries that applied the death penalty, that law would fail under Article 15 of the Constitution because it would contravene Russia's international legal obligation under *aut dedere aut judicare*.

In practical terms, the collision of these emerging doctrines means that captured terrorists may be able to escape justice if the legal obligations work to cancel each other. Some scholars have recognized the dilemma and encouraged according priority to one or the other doctrine. For instance, in its 2000 report, the U.N. Asia and Far East Institute recommended that "the principle of *aut dedere aut judicare* (extradite or prosecute) should be applied and implemented in cases where extradition is denied on two grounds: [1.] nationality of the accused and

149. U.S. CONST. art. VI, § 2.
150. 18 U.S.C. §§ 3184-95 (2001).
151. KONST. RF § 1, ch. 1, art. 15, pt. 4.

[2.] the death penalty."[152] However, absent agreed-upon legal priority or political concurrence not to seek the death penalty in exchange for the offender's extradition, the only other way out of the doctrinal stalemate is to argue for extradition based on internal legal provisions of the host country if they exist.

B. Political Accommodation

Exchange of notes, understandings, and reciprocal commitments are the grease of foreign relations: they exist beneath the level of legal rights and obligations. It is in such an area that assurances can be made by a requesting death penalty state not to seek such punishment in exchange for extradition of a criminal in a requested non-death penalty state. However, because prosecutions for criminal conduct occur at two levels in the United States, state and federal, this dynamic can be a tricky one. At the federal level, the process is much like that of any national justice ministry:

> [D]etermining whether to seek the death penalty begins with a recommendation by the local United States attorney. It is followed by a review by a capital punishment committee in the Justice Department and a final decision by the attorney general. This procedure cannot begin . . . until the defendant is represented by a lawyer. . . . [T]he Justice Department's Office of International Affairs would [handle discussions with the foreign jurisdiction].[153]

This was the case with the proposed prosecution of anti-abortion extremist James C. Kopp, an American accused of the 1998 shooting and killing of Bernard Slepian, a Buffalo doctor who performed abortions.[154] After a two-and-a-half year manhunt, Kopp was located in a French seaside village and the U.S. Department of Justice immediately filed an extradition request for his return to stand charges. However, French authorities sought assurances that he would not face the death penalty prior to granting the extradition request.[155] Such promises were ultimately made, and Kopp's extradition was obtained.[156]

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152. Luz del Carmen Ibanez Carranza, Chair, *Refusal of Mutual Legal Assistance or Extradition* 188, 194 (available through 114th International Training Course, Resource Material Series No. 57, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Jan. 17 - Feb. 18, 2000), *available at* http://www.unafei.or.jp/pdf/57-16.pdf.

153. John Kifner, *France Will Not Extradite if Death Penalty is Possible*, N.Y. TIMES, Mar. 31, 2001, at B4.

154. *Id.*

155. *Id.*

156. Randal C. Archibold, *Abortion Foe Fights Charges in Killing Doctor*, N.Y. TIMES, June 6, 2002, at B5.

The political calculus works differently, however, on the municipal level. Local district attorneys are often elected to their positions, and a key strategy employed by most to get elected is a "tough on crime" stance. Moreover, to be re-elected, a strong conviction rate is essential.[157] In death penalty jurisdictions, a successful prosecutor can ensure his continued employment by putting as many people on death row as possible.[158] Consequently, there is a built-in disincentive to accept terms from foreign nations that bind the local district attorney's ability to prosecute vigorously and seek maximum penalization. To do otherwise could be interpreted by an opponent as somehow going "soft on crime." This is especially true with high profile cases.[159]

Low profile cases, or those in which the gravity of the crime is mitigated by its character, are more amenable to this negotiation process in order to secure the suspect. For example, Florida prosecutors promised the Canadian Justice Ministry that they would not seek the death penalty against Lee O'Bamsawin in exchange for his extradition from Montreal.[160] In 1987, O'Bamsawin, a Canadian Abenaki Indian, had killed his wife and her lover in Jacksonville with a .357 Magnum.[161] The Canadian government granted his extradition in 1992, and Florida authorities rationalized to the public that O'Bamsawin's crime was one of passion as opposed to cold-blooded murder.[162]

A broader concern is the impact on American justice, or that of other countries, of this dynamic. Non-death penalty states are effectively changing the way justice works in death penalty states by forcing the death penalty jurisdiction to abandon its public policy prior to asserting jurisdiction over the criminal it seeks. In the long-term, does allowing such a dynamic to continue mean that other foreign prohibitions can be effectuated in domestic prosecutions? Professor Speedy Rice of Gonzaga University, believes they will:

> Foreign governments must refuse to extradite an individual until they first receive a written assurance that the death penalty will not be imposed. A prime example is a recent Mexican Supreme Court case. In October 2001, the Mexican Supreme Court issued a ruling that declared unconstitutional the extradition of an accused into the United States for any capital offense. The Mexican Constitution states that every

157. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2080-81 (2000).

158. *Id.* ("[T]he more death sentences a local prosecutor can obtain, the more votes he will get.").

159. *Id.* at 2078-96; *See also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002).

160. John F. Burns, *Canada Wins U.S. Extradition Deal*, N.Y. TIMES, Feb. 14, 1992, at A3.

161. *Id.*

162. *Id.*

> individual is capable of rehabilitation. Hence, no defendant extradited from Mexico to the United States can receive a sentence greater than forty years (sixty years for extreme cases), and certainly no death penalty. In just two months, the ruling "has stopped the extradition of more than 70 high-profile defendants." The consequence of this ruling is that prosecutors in the United States are forced to either reduce the sentences extradited defendants receive, or not prosecute the defendants at all.
>
> The second most recent example of "extradition with assurances" is from the Supreme Court of Canada. In 1994, Atif Rafay and Glen Sebastian Burns murdered Rafay's parents in Bellevue, Washington. After the murder, they fled to Canada. Prosecutors in Washington requested extradition. Following extensive appeals, the Supreme Court of Canada ruled that the criminal defendants in Canada may not be extradited to the United States if they face a death penalty eligible offense. The court held that "assurances [that prosecutors will not seek the death penalty] are constitutionally required in all but exceptional cases."
>
> As the Canadian and Mexican cases illustrate, the United States is now sandwiched between two countries that have abolished the death penalty, and that have affirmatively established they will no longer extradite potential capital defendants to the United States without expressed assurances that the death penalty will not be imposed.[163]

If this accommodation successfully takes root in practice, it would amount to offering more favorable treatment to criminals who flee the country (and are savvy about their choice of destination) than to those who remain in the jurisdiction where their offense was committed. This, in turn, could raise serious equal justice issues. Although the decision on whether to seek the death penalty lies within prosecutorial discretion, how far would federal courts be willing to go in allowing criminals who have the intelligence, means, and connections to escape the death penalty while those captured within the U.S. remain subjected to it?[164]

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163. Speedy Rice & Renee Luke, *U.S. Courts, the Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 SANTA CLARA L. REV. 1061, 1094-95 (2002) (citations omitted).

164. The reader can draw his/her own socio-economic, ethnic conclusions about that question.

V. CONCLUSION

Whether it is the United States seeking to try and convict terrorists or other countries that have an interest in doing so lest they go free, justice is the ultimate aim. But where these suspects have been captured abroad, extradition may not be the foremost consideration of the government that physically controls them. Other states may have competing extradition requests, which may put the requested state in the position of having to judge which potential jurisdiction has the most significant contacts with the defendant or which has suffered the most harm at his hands.

Such subjective judgments are no treat for the judges in whose lap they fall or the cabinet minister in whose portfolio they come under. Moreover, if the requesting state is a jurisdiction where the death sentence is a prosecutorial option (or at least a political requirement – as in the United States), and the requested state has abolished the death penalty through legislation, its constitution, or by case law, then a negotiated settlement may be the only way out of the dilemma to avoid turning the perpetrator loose.

If capture is imminent, can a sophisticated terrorist commit his terrible act in one state and then flee to another state that refuses extradition to jurisdictions that impose the death penalty? Yes. He may gamble that even if he is extradited, he won't face capital punishment, and that if his extradition is refused, the host state will decline to prosecute, interpreting its *aut dedere aut judicare* obligation as discretionary for prosecution as opposed to mandatory. Either way, the odds are good that he will remain alive.

But such an outcome, increasingly (and distressingly) typical, makes a mockery of the law. Allowing criminals to "play the system" in this way does service neither to justice nor ultimately to the death penalty abolitionist or retentionist camps – as it avoids the underlying question altogether. This need not be the case. An accurate understanding of the law provides a way out for countries caught in the middle of the doctrinal collision outlined in this paper.

If the *aut dedere aut judicare* principle is regarded as an emerging customary norm in connection with at least the *jus cogens* crimes, and terrorism is regarded as *jus cogens* conduct, then the logical framework is complete, preventing the would-be terrorist from escaping justice. Terrorists, just as surely as pirates, slave traders, and genocidal maniacs, would be exempted from normal extradition considerations since they are committers of *jus cogens* conduct – acts so heinous in nature as to be universally condemned. Thus, no customary norm could emerge that protects them, thereby truncating further development of refusal to extradite based on the death penalty into customary law with regard to terrorists.

The obvious benefit to this legal construct is that non-suicidal terrorists would be prevented from visiting their terrible deeds upon the innocent with impunity, knowing that they had a method of avoiding death themselves by actually bending the law to their own advantage. But there is also an ancillary

benefit, for the United States at a minimum, in that difficult constitutional questions on equal treatment in sentencing of these criminals would not arise. Indeed, terrorists captured abroad or at home would face the same justice. As terrorism and terrorist acts proliferate exponentially, as the news reminds us nightly is happening, the heretofore underdeveloped capacity of international law to deal with the perpetrators needs adjustment. Now is the time for that adjustment to occur. Innocent civilians who suffer the most from terrorist acts deserve it. Governments that find themselves caught between legal doctrines require it. Justice demands it.

APPENDIX A

The Prohibition Against Aggression

Treaty of Versailles, June 28, 1919, T.S. No. 4, 11 Martens Nouveau Recueil (3d) 323.

Covenant of the League of Nations, 1 LEAGUE OF NATIONS O.J. 3 (1920).

General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (Kellogg Briand Pact).

Inter-American Anti-War Treaty of Non-aggression and Conciliation, Oct. 10, 1933, 49 Stat. 3363, 163 L.N.T.S. 393 (Saavendra Lamas Treaty).

Definition of Aggression, G.A. Res. 3314 XXIX, U.N. GAOR, 6th Comm., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

War Crimes

Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 18 Martens Nouveau Recueil 607 (First Red Cross Convention).

Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (2d) 219 (Declaration of Brussels).

Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (2d) 949.

Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (3d) 461 (Hague, IV).

Convention for the Adoption to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 3 Martens Nouveau Recueil (3d) 630 (Hague, X).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, 2 Martens Nouveau Recueil (3d) 620 (Second Red Cross Convention).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

Treaty of Peace Between the Allied Powers and Hungary, June 4, 1920, 15 AM. J. INT'L L. 1 (1921) (Treaty of Trianon).

Treaty of Peace Between the Allied Powers and Turkey, Aug. 10, 1920, 15 AM. J. INT'L L. 179 (1920) (Treaty of Sevres).

Treaty of Peace Between Belgium, the British Empire, China, Cuba, Czechoslovakia, France, Greece, the Hedjaz, Italy, Japan, Poland, Portugal, the Serb-Croat-Slovene State, Siam, and the United States, and Bulgaria, Nov. 27, 1919, 226 Consol. T.S. 332 (Treaty of Neuilly-sur-Seine).

Treaty of Peace Between the British Empire, France, Italy, Japan and the United States, and Belgium, China, Czechoslovakia, Cuba, Greece, Nicaragua, Panama, Portugal, Roumania, the Serb-Croat-Slovene State and Siam, and Austria, Sept. 10, 1919, 226 Consol. T.S. 8 (Treaty of St. Germain-en-Laye).

Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742, 3 Bevans 775.

Declaration of German Atrocities, Nov. 1, 1943, 3 Bevans 816.

Agreement Concerning an Armistice with Romania, Sept. 12, 1944, 59 Stat. 1712, 3 Bevans 901.

Agreement Concerning an Armistice with Bulgaria, Oct. 28, 1944, 58 Stat. 1498, 3 Bevans 909.

Proclamation by the Heads of Governments, United States, China and the United Kingdom, July 26, 1945, 3 Bevans 1204 (terms of the Japanese surrender).

Protocol of Proceedings, Aug. 2, 1945, 3 Bevans 1207 (Berlin [Potsdam] Conference).

Report on the Tripartite Conference of Berlin, Aug. 2, 1945, 3 Bevans 1224.

Report of the Crimea Conference, Feb. 11, 1945, 3 Bevans 1005 (Yalta Conference).

Agreement on the Machinery of Control in Austria, June 28, 1946, 62 Stat. 4036, 138 U.N.T.S. 85.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (I Geneva Convention).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (II Geneva Convention).

Geneva Convention of Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (III Geneva Convention).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (IV Geneva Convention).

Protocol I Additional to the Geneva Conventions of August 12, 1949, adopted Dec. 12, 1977, U.N. Doc. A/32/144 (1977), 16 I.L.M. 139.

Protocol II Additional to the Geneva Conventions of August 12, 1949, adopted Dec. 12, 1977, U.N. Doc. A/32/144 (1977), 16 I.L.M. 1442.

Unlawful Use of Weapons

Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, 25 L.N.T.S. 202, 13 Martens Nouveau Recueil (3d) 643.

The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 16 I.L.M. 88 (1977).

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.

Crimes Against Humanity

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (London Charter).

International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (Far East Charter).

Control Council Law No. 10, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, reprinted in BENJAMIN B. FERENCZ, AN

INTERNATIONAL CRIMINAL COURT – A STEP TOWARDS WORLD PEACE 488 (1980).

United Nations Security Council Resolution 827, May 25, 1993, 32 I.L.M. 1203 (Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia).

Prohibition Against Genocide

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

Racial Discrimination and Apartheid

International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res. 3068, U.N. GAOR 28th Sess., Supp. No. 30, U.N. Doc. A/9233/Add.1 (1973).

Slavery and Related Crimes

Declaration Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 63 Consol. T.S. 473 (Treaty of Vienna, Act XV).

Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 92 Consol. T.S. 437 (Treaty of London).

Treaty Between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, for the Suppression of the African Slave Trade, Apr. 7, 1862, U.S.-U.K., 12 Stat. 1225 (Treaty of Washington). Supplemented by Additional Article, Feb. 27, 1863, 13 Stat 645. Modified by Additional Convention, June 3, 1870, 16 Stat. 777.

Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors, July 2, 1890, 27 Stat. 886, 17 Martens Nouveau Recueil (2d) 345 (General Act of Brussels).

Convention Revising the General Act of Berlin and the General Act and Declaration of Brussels, Sept. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 25 (St. Germain-en-Laye Convention).

Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

Protocol to the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

International Convention for the Suppression of the White Slave Traffic, May 10, 1910, 7 Martens Nouveau Recueil (3d) 252, 211 Consol. T.S. 45.

International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, 18 AM. J. INT'L L. 130 (1924).

International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 L.N.T.S. 55.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S.

3.

Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

Convention on the High Seas, Apr. 29, 1958, 12 U.S.T. 2312, 450 U.N.T.S. 82.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/12, 21 I.L.M. 1261 (Montego Bay Convention).

Prohibition Against Torture

a. United Nations

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), reprinted in 23 I.L.M. 1027.

b. Council of Europe

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, 27 I.L.M. 1152.

c. Organization of American States

Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S. T.S. No. 67, O.A.S. Doc OEA/Ser. P, AG/doc 2023/85 rev. 1, Mar. 12, 1986.

Unlawful Human Experimentations

Draft Convention for the Prevention and Suppression of Unlawful Human Experimentation, U.N. Doc. E/CN/4/Sub.2/NGO/80 (Aug. 13, 1980), reprinted in 51 Revue International de Droit Pénal 419 (1980).

Draft Principles for the International Regulation of Human Experimentation (U.N. Commission on Human Rights), reprinted in 51 Revue Internationale de Droit Pénal 357 (1980).

Piracy

Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135.

Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (Montego Bay Convention).

Aircraft Hijacking and Related Offenses

a. United Nations

Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 League of Nations O. J. 23 (1938).

Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (Tokyo Convention).

Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (Hague Convention).

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (Montreal Convention).

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627 (Montreal Protocol).

b. Council of Europe

European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90.

Crimes Against the Safety of International Maritime Navigation

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 (IMO Convention).

Use of Force Against Internationally Protected Persons

a. United Nations

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 13 I.L.M. 41 (New York Convention).

b. Organization of American States

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 10 I.L.M. 255 (O.A.S. Convention).

Taking of Civilian Hostages

International Convention Against the Taking of Hostages, Dec. 18, 1979, 18 I.L.M. 1456.

Drug Offenses

International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187.

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in and Use of, Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337.

International Opium Convention, Feb. 19, 1925, 81 L.N.T.S. 317.

Protocol to the International Opium Convention, Feb. 19, 1925, 81 L.N.T.S. 356.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Stat. 1543, 139 L.N.T.S. 301.

Agreement Concerning the Suppression of Opium-Smoking, Nov. 27, 1931, 177 L.N.T.S. 373.

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 299.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, June 23, 1953, 14 U.S.T. 10, 456 U.N.T.S. 56.

Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204.

Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3.

Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 175.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493.

Prohibition Against International Traffic in Obscene Publications

Agreement for the Suppression of the Circulation of Obscene Publications, May 4, 1910, 37 Stat. 1511, 7 Martens Nouveau Recueil (3d) 266.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Sept. 12, 1923, 27 L.N.T.S. 213, 7 Martens Nouveau Recueil (3d) 266. Amended by the Protocol signed at Lake Success, New York, Nov. 12, 1947, 46 U.N.T.S. 169.

Protection of National and Archaeological Treasures

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 I.L.M. 289 (UNESCO Cultural Property Convention).

Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350.

Environmental Protection

Convention for the Preservation of Fur Seals in the North Pacific, July 7, 1911, 37 Stat. 1542, 5 Martens Nouveau Recueil (3d) 720.

International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, 190 U.N.T.S. 79.

Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.

International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

International Convention for the Prevention of Pollution of the Sea by Oil, May 1, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3.

Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, 8 U.S.T. 2283, 314 U.N.T.S. 105.

International Convention of the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319.

Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918, 13 I.L.M. 13.

Theft of Nuclear Materials

Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 18 I.L.M. 1422.

Unlawful Use of the Mails

Universal Postal Union Convention, July 4, 1891, 28 Stat. 1078, 17 Martens Nouveau Recueil (2d) 628.

Universal Postal Union Convention, June 15, 1897, 30 Stat. 1629, 28 Martens Nouveau Recueil (2d) 453.

Universal Postal Union Convention, May 26, 1906, 35 Stat. 1639, 1 Martens Nouveau Recueil (3d) 355.

Universal Postal Union Convention, Nov. 30, 1920, 42 Stat. 1971, 15 Martens Nouveau Recueil (3d) 722.

Universal Postal Union Convention, Aug. 28, 1924, 44 Stat. 2221, 40 L.N.T.S. 19.

Universal Postal Union Convention, June 28, 1929, 46 Stat. 2523, 102 L.N.T.S. 245.

Universal Postal Union Convention, Mar. 20, 1934, 49 Stat. 2741, 174 L.N.T.S. 171.

Universal Postal Union Convention, May 23, 1939, 54 Stat. 2049, 202 L.N.T.S. 159.

Universal Postal Union Convention, July 5, 1947, 62 Stat. 3157, 4 Bevans 482.

Universal Postal Union Convention, July 11, 1952, 4 U.S.T. 1118, 169 U.N.T.S. 3.

Universal Postal Union Convention, Oct. 3, 1957, 10 U.S.T. 413, 364 U.N.T.S. 3.
Universal Postal Union Convention, July 10, 1864, 16 U.S.T. 1291, 611 U.N.T.S. 7.
Universal Postal Union Convention, Nov. 14, 1969, 22 U.S.T. 1056, 810 U.N.T.S. 7.
Universal Postal Union Convention, Oct. 26, 1979, T.I.A.S. No. 9972.

Interference with Submarine Cables

Convention for the Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989, 11 Martens Nouveau Recueil (2d) 281.

Declaration for the Protection of Submarine Cables, Dec. 1, 1886, 25 Stat. 1424, 1 Bevans 112.

Final Protocol for the Protection of Submarine Cables, July 7, 1887, 25 Stat. 1425, 1 Bevans 114.

Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (Montego Bay Convention).

Prohibition Against Counterfeiting

International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 371.

Optional Protocol to the International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 395.

Prohibition Against Corrupt Practices in International Commercial Transactions

Draft International Agreement on Illicit Payments, U.N. Doc. E/1979/104 (May 25, 1979), reprinted in 18 I.L.M. 1025.

Draft Code of Conduct on Transnational Corporations, in Report on the Special Session (Mar. 7-18 and May 9-21 1983) of the Commission on Transnational Corporations, U.N. ESCOR, Spec. Sess., Supp. No. 7 at 12-27, U.N. Doc. E/1983/17/Rev. 1, reprinted in 23 I.L.M. 626.

Mercenarism

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 29 I.L.M. 91.

United Nations

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68.

Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840, U.N. GAOR, 26th Sess., U.N. Doc. A/RES/26/2840 (1971).

Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., U.N. Doc. A/RES/28/3074 (1973).

Model Treaty on Extradition, G.A. Res. 116, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/116 (1991).

United Nations Security Council Resolution 731, U.N. SCOR, 3033d mtg. (Jan. 21, 1992), 31 I.L.M. 731.

United Nations Security Council Resolution 748, U.N. SCOR, 3063d mtg. (Mar. 31, 1992), 31 I.L.M. 731.

United Nations Security Council Resolution 883, U.N. SCOR, 3312th mtg. (Nov. 11, 1993).

Council of Europe

European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24.

European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, Europ. T.S. No. 73.

European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540.

European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90, 15 I.L.M. 1272.

Organization of American States

Pan-American Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, O.A.S. T.S. No. 36, 3 Bevans 152.

APPENDIX B

EU POLICY ON THE DEATH PENALTY
EU DEMARCHE ON THE DEATH PENALTY[165]

Presented, with a Memorandum, to United States Assistant Secretary of State for Human Rights, Frank Loy, on February 25, 2000 by the EU Presidency, represented by Ambassador Joao da Rocha Paris, Embassy of Portugal, accompanied by Françoise Barry Delongchamps, Deputy Chief of Mission, Embassy of France and Ambassador Guenter Burghardt, Head of Delegation, European Commission.

The European Union (EU) is opposed to the death penalty in all cases and accordingly aims at its universal abolition. In line with the international community view, the EU considers that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights.

- The EU expresses its concern about the increasing number of persons sentenced to death and executed in the United States of America (USA) - nearly 600 executions have been carried out since reinstatement of the death penalty in 1976, nearly 500 of which took place in the 1990s -, and, in particular about the fact that among these persons are individuals who were aged under 18 at the time of the commission of the crime, suffered from mental disorder, or were in fact innocent and unable to prove their innocence due to evident lack of adequate legal assistance.

- The reservation made by the USA to Article 6 of the International Covenant on Civil and Political Rights (ICCPR), concerning the prohibition of imposing the death penalty on minors, is in the Human Rights Committee's view incompatible with the object and the purpose of the ICCPR. Several EU Member States have formally objected to the reservation. The EU urges the USA to withdraw it as a matter of urgency.

- The United Nations Convention on the Rights of the Child prohibits sentencing minors both to death and also to imprisonment for life without the possibility of release. These are juvenile justice standards of paramount relevance and the EU urges the USA to ratify the Convention.

- At the dawn of a new millennium the EU hopes that the USA will join the abolitionist movement, becoming an example of great weight for retentionist countries. As a first step the EU calls upon the USA to establish a moratorium on the use of the death penalty with a view to completely eliminating capital punishment.

- The EU calls upon the USA to respect the strict conditions under which

165. Press Release, EU Policy on the Death Penalty (May 10, 2001), *at* http://www.eurunion.org/legislat/DeathPenalty/Demarche10May.htm.

the death penalty may be used, which are set forth in several international instruments including the ICCPR, the UN Convention on the Rights on the Child, the UN.ECOSOC Safeguard Guaranteeing Protection of those Facing the Death Penalty and the American Convention on Human Rights. Furthermore, the EU reiterates the respect due to the guarantee of the Vienna Convention that a detained national of any State party will be notified without delay of his right to contact his consulate.

- Consistent with the EU approach in question of the death penalty in the USA, a Memorandum presenting an overview on the principles, experiences, policies and alternative solutions guiding the abolitionist movement in Western Europe will be delivered to the relevant federal and state US authorities.[166] The EU hopes that this initiative will be taken into careful consideration.

166. EU Memorandum on the Death Penalty, *at* http://www.eurunion.org/legislat-/DeathPenalty/eumemorandum.htm (last visited Oct. 7, 2003).