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)

I. INTRODUCTION

In December 2002, Denmark released a Chechen terrorist rather than
extraditing him to Russia where he might face the death penalty. 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. Mexico also declined to extradite twenty-six
suspects to the United States who would face the death penalty for their alleged
crimes. 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. 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
3. Daniel McGrory, City Was Home to a Terrorist with $25m Price on his Head,
4. Chris Kraul, Results of Mexican State's Pro-Death Penalty Poll Clash with Law,
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

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.

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

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

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.
Institute exempt terrorist activities from the political offense exception. Therefore, although political motivations may often underlie the destructive acts undertaken by terrorists, 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.

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.” 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. Even then, extradition was an exception to asylum; now, those positions are reversed.

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, such country may be requested to yield its jurisdiction to that of another.

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
extradite or punish exists with respect to all offenses by which another state is particularly injured.\footnote{BASSIOUNI \& WISE, supra note 26, at 5.} 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.\footnote{Id.} Thus, such a holding state should be considered bound to either extradite or punish; there was no third alternative.\footnote{Id.}

Currently, the duty to extradite or prosecute appears in at least seventy international criminal law conventions.\footnote{Lee A. Steven, Genocide and the Duty to Extradite orProsecute: Why the United States is in Breach of its International Obligations, 39 VA. J. INT’L L. 425, 447 (1999).} 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.\footnote{Plachta, supra note 28, at 125.} 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.\footnote{See id. at 126.} 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.\footnote{BASSIOUNI \& WISE, supra note 26, at 20.} 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 \textit{opinio juris} (belief that they are legally bound to follow the practice)\footnote{Opinio 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 (\textit{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; \textit{opinio juris} may be inferred from acts or omissions. \textsc{Restatement (Third) of Foreign Relations Law} § 102, cmt. c (1987) (emphasis added).} 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

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.
33. Plachta, supra note 28, at 125.
34. See id. at 126.
35. BASSIOUNI \& WISE, supra note 26, at 20.
36. \textit{Opinio juris} is defined as:
with respect to international offenses in their entirety, and it is this approach that is gaining currency with writers in the field.  

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. 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.” The third form extends the duty to all international offenses.

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.

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).

3) There was controversy through the nineteenth century about whether international law imposed an obligation to extradite absent a treaty. While Grotius, Vattel, and others believed that “general

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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.’” 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

44. BASSIONI & 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

49. Bassioni & Wise, *supra* note 26, at 25. The theoretical underpinnings of Bassioni’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 extradite or punish. This would reflect 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.


binding.  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." 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. 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.

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. 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.

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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)).
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).51 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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59. Id. at 303-18 (citing conventions by subject matter).
61. Id.
63. Id. at 128 (citing Cr.A. 308/75, 31 (II) Isr. L. Rep. 449 (1977)).
64. Alvarez-Machain, supra note 51, 664.
University. 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. 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). 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. 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. That terrorist event yielded so much change in state policy (at least from the perspective of the United States), that terrorism could have catapulted into that


66. Restatement (Third) of Foreign Relations Law § 702 (1987). Note, the Restatement only speaks to “state-sponsored” actions as violative of peremptory 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.


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. 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
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.

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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{77} Libya argued that it had the choice under the aut dedere aut judicare provisions of the 1971 Montreal Convention\textsuperscript{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

\textsuperscript{50} U.S.C. § 1801(c) (2000).
\textsuperscript{74} MALCOLM SHAW, INTERNATIONAL LAW 803-06 (4th ed. 1997).
\textsuperscript{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).
\textsuperscript{76} Enache-Brown & Fried, supra note 50, at 624-25.
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

79. Plachta, supra note 77, at 128-29.
80. Id. at 129.
81. Id.
82. Id. at 131-36.
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, Canada, Mexico, and most recently, Russia.

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. 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.’

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.

86. See Appendix B for the European Union policy on use of the death penalty in the U.S.
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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95. Florence Biedermann, _Kurdish Leader Ocalan Seeks Distance from Rebel_
conflict cost more than 30,000 military and civilian lives, and according to U.S. and international reports, crimes against humanity were committed by both sides. 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. After dropping out of sight, he was arrested on November 12 in Rome, Italy, arriving on a plane from Moscow on a false passport. 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.

The Turkish government immediately filed an extradition request with Italy. 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. Furious at Italy’s refusal to extradite, Turkish citizens vented their anger by boycotting Italian products, protesting, and destroying Italian merchandise. 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. The political rupture was further widened when Ocalan was denied political asylum by Italy and subsequently released pursuant to Italian law. 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.


96. Id.
98. Biedermann, supra note 95.
100. Id.
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.
104. See id.
ridding themselves of his troublesome presence and returning him to Russia. In response to questions about this transfer from Turkey, Russian officials denied having seen Ocalan enter their territory. At that point, Ocalan’s trail was lost by the Turks, creating speculation as to his whereabouts.

In fact, the Greek government, in sympathy with the Kurds, had dispatched a retired vice admiral to Moscow, who retrieved Ocalan to Athens. 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.

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. They quickly picked up on Ocalan’s presence in Nairobi and alerted Turkish intelligence as to the terrorist’s location. By mid-February, Greek officials warned Ocalan that he had been spotted and must leave. 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.

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

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.
112. *Id.*
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. 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. Kenyan embassies and officials were also targeted for their complicity, and less violent demonstrations were held in Geneva and Strasbourg.

Ultimately, the capture of Ocalan revealed Greek duplicity, and further soured the already poor relations between Greece and Turkey. Three Greek ministers lost their jobs over the incident. Israel was drawn into the fray as well, amidst accusations that Mossad (Israeli intelligence) had assisted Turkey in its manhunt. 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.

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.


117. Sancton, supra note 106.
119. Id.
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.\(^\text{125}\)

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\(^\text{Cost. art. 10.}\)

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.\footnote{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.\footnote{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.\footnote{128} The death row phenomenon\footnote{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*,\footnote{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.\footnote{131} Therefore, Canada failed

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\footnote{128. Id. at 443.}

\footnote{129. Discussed *infra*, introduction to Part III.}


to comply with its obligations under the Covenant by extraditing him to the United States.\textsuperscript{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.\textsuperscript{133} Once in custody, his extradition was requested from Canada to the U.S. to stand trial in California for kidnapping and twelve murders.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 \textit{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.\textsuperscript{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

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

139. Id. at art. 4(d).
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.\(^{148}\)

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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.


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.
151. KONST. RF § 1, ch. 1, art. 15, pt. 4.
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].

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. 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. Such promises were ultimately made, and Kopp’s extradition was obtained.


154. Id.

155. Id.

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. In death penalty jurisdictions, a successful prosecutor can ensure his continued employment by putting as many people on death row as possible. 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.

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. In 1987, O’Bamsawin, a Canadian Abenaki Indian, had killed his wife and her lover in Jacksonville with a .357 Magnum. 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.

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

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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).


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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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).

War Crimes

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


**Slavery and Related Crimes**

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   b. Council of Europe
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   c. Organization of American States

   **Unlawful Human Experimentations**

   **Piracy**

   **Aircraft Hijacking and Related Offenses**
   a. United Nations
   b. Council of Europe
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Use of Force Against Internationally Protected Persons
a. United Nations
b. Organization of American States

Taking of Civilian Hostages

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


Environmental Protection


Theft of Nuclear Materials


Unlawful Use of the Mails

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

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Interference with Submarine Cables

Prohibition Against Counterfeiting

Prohibition Against Corrupt Practices in International Commercial Transactions

Mercenarism

United Nations

Council of Europe

Organization of American States
APPENDIX B

EU POLICY ON THE DEATH PENALTY
EU DEMARCHE ON THE DEATH PENALTY

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...

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.\(^\text{166}\) The EU hopes that this initiative will be taken into careful consideration.