

# **EXTRADITING TERRORISTS HITS A DEATH PENALTY KIBOSH**

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The United States has long been a target of criticism for its continuing implementation of the death penalty. Although the criticism is nothing new, unforeseen consequences have arisen. In previous years, a primary incentive to abolish the death penalty was to put an end to the political and social backlash caused by its practice. However, the events of September 11, 2001, have provided the United States with a new cause to abandon capital punishment. Terrorist activities, especially the destruction of the World Trade Center and Pentagon, have made Americans painfully aware that the peace and security once enjoyed in this country may be a relic of the past. Investigation into these events has revealed that the fight against terrorism is one that must be waged on the world stage. It is a fight the United States cannot win unilaterally. Reliance on allies is a necessity and the United States must comport with international norms if cooperation is to be achieved. The United States' ability to secure the extradition of terrorists is hindered by its retention of the death penalty.

This comment will attempt to show how the United States' use of the death penalty will harm its ability to fight terrorism. First, the principles and history of extradition in the United States will be set forth. An analysis of the use of the death penalty and the international movement towards abolition follows. Then, several extradition treaties currently in effect are examined. Emphasis is placed on those treaties with countries that have particular importance to the United States because of their close proximity or known al-Qaeda presence. Finally, alternative means of bringing defendants to the United States will be analyzed, including reliance on forcible abduction.

## **I. EXTRADITION**

### **A. DEFINITION**

Extradition is the "surrender by one state or country requested state to another requesting state of an individual accused or convicted of an offense outside its own territory and with the territorial jurisdiction of the other, which, being competent to try

and punish him, demands the surrender.”<sup>1</sup> To prosecute a defendant, the United States must have subject matter jurisdiction and jurisdiction over the individual.<sup>2</sup> Extradition treaties or a national law of the requested state are necessary to invoke the proper jurisdiction.<sup>3</sup> Before the United States requests extradition from another country, authorities must determine whether the conduct was committed within the territory of the United States or produced detrimental effects there.<sup>4</sup> After subject matter jurisdiction has been established, prosecutors try to establish personal jurisdiction over the suspect through successful extradition back to a U.S. court.<sup>5</sup>

## B. REQUIREMENTS AND PURPOSE

International extradition agreements have traditionally been either bilateral or multilateral treaties. Under bilateral agreements, two countries draft an agreement suited to the particular needs of their situation.<sup>6</sup> Multilateral treaties, however, are typically regional conventions that create uniform procedures among countries with similar geographical and historical ties.<sup>7</sup> As of 1997, the United States had negotiated and ratified over one hundred bilateral treaties with other countries.<sup>8</sup> U.S. treaties are largely based on the theory of reciprocity. Under the doctrine of reciprocity, the United States and the other signatory country grant an extradition request only in exchange for the extradition or promise of future extradition of an individual it seeks from the requesting country.<sup>9</sup>

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<sup>1</sup> Black's Law Dictionary

<sup>2</sup> Matthew W. Henning, *Note: Extradition controversies: How enthusiastic prosecutions can lead to international incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 350 (1999).

<sup>3</sup> Mary K. Martin, *A one-way ticket back to the United States: The collision of international extradition law and the death penalty*, 11 CAP. DEF. J. 243, 245 (1999).

<sup>4</sup> See Henning, *supra* note 2, at 351.

<sup>5</sup> *Id.*

<sup>6</sup> See Martin, *supra* note 3, at 246.

<sup>7</sup> *Id.*

<sup>8</sup> See Henning, *supra* note 2, at 350.

<sup>9</sup> *Id.* at 351.

These treaties have several universal requirements. Both civil and common law countries require the invocation of extradition be accompanied by proof that the alleged crime constitutes an extraditable offense.<sup>10</sup> Generally, these treaties enumerate those offenses to which the treaty parties agree warrant extradition.<sup>11</sup> The treaty usually specifies that the offenses listed are exhaustive or establishes a degree of punishment for which an offense becomes extraditable.<sup>12</sup>

Double criminality is a second requirement. The double criminality doctrine states that conduct is not extraditable unless it is a crime under the laws of both the requested and requesting state.<sup>13</sup> The basic policy supporting double criminality is that nations are equal in their powers of self-determination and are guaranteed the right to forbid a requesting country from punishing a fugitive for conduct not considered a crime under the laws of the requested state.<sup>14</sup>

The specialty doctrine imposes another requirement before extradition can be granted. Requiring specialty prevents the receiving country from prosecuting an individual for offenses other than those for which extradition was sought.<sup>15</sup> Five rationales support this doctrine: (1) the requested state could have refused extradition for an offense other than that upon which the request was based; (2) the requested nation's surrender of the fugitive provides the requesting state with the *in personam* jurisdiction required; (3) the prosecution or punishment by the requesting country would be impossible without the requested country's surrender of the person; (4) the use of the requested state's processes to effectuate the surrender of an individual for an offense other than those presented in the request would constitute an abuse of a formal process; and (5) the requested nation relies upon the representations of the requesting nation in using its process.<sup>16</sup>

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<sup>10</sup> *Id.* at 352.

<sup>11</sup> *See* Martin, *supra* note 3, at 245.

<sup>12</sup> *See* Henning, *supra* note 2, at 352.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 353.

<sup>16</sup> *Id.*

## C. NON-COMPLIANCE

Even if the above-mentioned requirements are met, a country possesses no duty to surrender a criminal suspect to another country under international law.<sup>17</sup> Theoretically, each state has the right to grant immunity from prosecution to a fugitive as long as that person is within the state's territorial jurisdiction.<sup>18</sup> However, most states voluntarily accept a limitation on their sovereignty because they recognize the importance of international cooperation in prosecuting serious crimes.<sup>19</sup> Countries accept limitations on their sovereignty for four general purposes: (1) to obtain reciprocal return of fugitive offenders; (2) to facilitate the punishment of wrongful conduct, and thereby promote justice; (3) to avoid harboring within their borders those who may commit offenses similar to those which they are accused of committing in another jurisdiction; and (4) to avoid international tensions created by one country's refusal to return a particularly sought-after accused offender.<sup>20</sup>

While countries are under pressure to comport with extradition treaties, many still fail to comply if any exception exists to relieve their duty. An exception that has been relied on with more frequency over the past two decades is the death penalty.<sup>21</sup> In any extradition request, the laws of the requested state are controlling; if the requested state has prohibited the death penalty, that country has the right to refuse or to condition the surrender of the suspect.<sup>22</sup> Typically, where a suspect is charged with a capital crime, the requested state will seek sufficient assurances that the state or the United States government will not seek the death penalty. In such instances, the political disposition of the requested government and the facts of the particular case are likely to determine whether the requested country will impose such conditions.<sup>23</sup> Most countries view it as improper to ask a state to use its legal system to facilitate an extradition that may

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<sup>17</sup> See Martin, *supra* note 3, at 245.

<sup>18</sup> See Henning, *supra* note 2, at 350.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 354.

<sup>22</sup> *Id.*

<sup>23</sup> MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 341 (2001).

result in a practice that is repugnant to the values, law and public policy of that country.<sup>24</sup>

#### D. RAPID INCREASE IN USE

The use of extradition treaties has grown substantially in the past four decades. In 1960, the Department of State reported to the Department of Justice that in the 15-year-period between 1945 and 1960, United States courts certified 137 extradition requests- an average of 9 per year.<sup>25</sup> By 1983, the U.S. was experiencing an enormous surge in extradition requests. A Department of Justice spokesman noted this change and one of the reasons for it:

With major advances in transportation, communication, and data processing in the past fifteen years, the world has effectively become a much smaller place. . . Transnational criminal activity is being encountered with increasing frequency. . . in the 1960's the number of extradition requests to and from the United States seldom exceeded twenty per year (in each direction). . . In 1982, we made or received 338 extradition requests.<sup>26</sup>

By 1991, the number of extradition requests made and received by the United States had risen to 718, and continues to increase.<sup>27</sup> The significance of increased extradition requests corresponds with an increasing trend toward the abolition of the death penalty worldwide. It would thus appear that the United States is more likely to encounter opposition to extradition on the basis of retaining the death penalty.

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<sup>24</sup> *Id.*

<sup>25</sup> See Abbell, *supra* note 23, at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 11.

## II. INTERNATIONAL ABOLITION MOVEMENT

### A. DEATH PENALTY LANDSCAPE

At the end of the twentieth century, over half of all countries in the world had abolished the death penalty in law or practice.<sup>28</sup> Amnesty International reports that, in recent years, an average of two countries annually have abolished the death penalty in law.<sup>29</sup> The total of abolitionist countries in law or practice stands at 106 and the number of retentionist countries stands at 90.<sup>30</sup> While most of retentionist countries have carried out executions in the past decade, far fewer actually execute a prisoner in a given year.<sup>31</sup>

<sup>28</sup> Ved P. Nanda, *Bases for refusing international extradition requests- capital punishment and torture*, 23 *FORDHAM INT'L L. J.* 1369, 1371 (1999).

<sup>29</sup> *Id.* The 70 states that have abolished the death penalty for all crimes are Andorra, Angola, Australia, Austria, Azerbaijan, Belgium, Bulgaria, Cambodia, Canada, Cape Verde, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, East Timor, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Liechtenstein, Lithuania, Luxembourg, Macedonia, Marshall Islands, Mauritius, Micronesia, Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Palau, Panama, Paraguay, Poland, Portugal, Romania, San Marino, Tome and Principe, Seychelles, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tuvalu, United Kingdom, Uruguay, Vanuatu, Vatican City State, and Venezuela. The 13 that have abolished the death penalty for ordinary crimes only are Argentina, Bolivia, Bosnia-Herzegovina, Brazil, Cook Islands, Cyprus, El Salvador, Fiji, Israel, Latvia, Malta, Mexico, and Peru. The 23 de facto abolitionist states are Albania, Bermuda, Bhutan, Brunei Darussalam, Central African Republic, Congo, Cote D'Ivoire, Djibouti, Gambia, Grenada, Madagascar, Maldives, Mali, Nauru, Niger, Papua New Guinea, Senegal, Sri Lanka, Suriname, Togo, Tonga, Turkey, and Western Samoa.

<sup>30</sup> *Id.* The 90 retentionist states are Afghanistan, Algeria, Antigua and Barbuda, Armenia, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Chile, China, Comoros, Democratic Republic of Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Liberia, Libya, Malawi, Malaysia, Mauritania, Mongolia, Morocco, Myanmar, Nigeria, North Korea, Oman, Pakistan, Palestinian Authority, Philippines, Qatar, Russian Federation, Rwanda, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and Grenadines, Saudi Arabia, Sierra Leone, Singapore, Somalia, South Korea, Sudan, Swaziland, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, Yugoslavia, Zambia, and Zimbabwe.

<sup>31</sup> *Id.*

Among North America, South America, Central America, and Western Europe; the United States, Guyana, Guatemala, and Belize are the only retentionist states.<sup>32</sup> Many countries that retain capital punishment are located in Africa. Amnesty International characterized the inability of many African nations to respond to the *opinio juris* toward abolition as hindered by declining economies and political instability.<sup>33</sup> Governments have resorted to using the death penalty to combat rising crime rates due to poverty and to maintain political power by executing leading advocates of political reform.<sup>34</sup> Nevertheless, almost half the nations in Africa have abolished the death penalty.<sup>35</sup> Compliance with the growing trend toward abolition has also been difficult where countries are ruled by Islamic governments.<sup>36</sup> Arab and Islamic nations have defended the death penalty in the name of obedience to Islamic law and the strictures of the shari'a.<sup>37</sup> For example, during debate at the 1994 session of the General Assembly, the Sudanese delegate noted that "capital punishment was a divine right according to some religions, in particular Islam. . . Capital punishment was enshrined in the Koran and millions of inhabitants of the Muslim world believed that it was a teaching of God."<sup>38</sup>

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<sup>32</sup> Michelle McKee, *Tinkering with the Machinery of Death: Understanding Why the United State's Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 159 (2000). These nations should especially feel legally obligated to abolish the death penalty since the existence of "regional" customary international law is recognized by the Restatement as having the same binding effect on member-states of that region. Moreover, the American Commission on Human Rights and the European Commission on Human Rights have both created protocols to abolish the death penalty and pressure member nations to work toward abolition of the death penalty.

<sup>33</sup> *Id.* at 160.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 161.

<sup>37</sup> *Id.*

<sup>38</sup> William Schabas, *Symposium on the Future of International Human Rights: International Law and Abolition of the Death Penalty*, 55 WASH & LEE L. REV. 797, 807 n.57 (1998).

## B. INTERNATIONAL HUMAN RIGHTS AGREEMENTS

Before the passage of human rights agreements, suspected criminals had limited power to challenge their extradition proceedings.<sup>39</sup> Under the doctrine of non-inquiry, the judiciary of the requested state, even at the request of the suspect, could not review the judicial and penal circumstances of the requesting state.<sup>40</sup> Instead, the judiciary acceded to the discretion of the executive branch, which theoretically would give more thoughtful consideration to foreign policy and to the importance of upholding duties under treaties.<sup>41</sup> The passage of human rights legislation places a larger burden on member states to insure that suspects are treated in a fashion appropriate to the requirements of the agreements.

The International Covenant on Civil and Political Rights (ICCPR), adopted by the General Assembly in 1966, proclaims in Article 6 the “inherent right to life” of every human being.<sup>42</sup> This Article establishes restrictions and safeguards on the death penalty in countries that have not abolished it.<sup>43</sup> In such countries, a “sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime. . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”<sup>44</sup> In 1989, the United Nations General Assembly adopted the Second Optional Protocol to the ICCPR acknowledging a worldwide effort to abolish capital punishment for all purposes and obligating each state party to “take all necessary measures to abolish the death penalty within its jurisdiction.”<sup>45</sup>

The American Convention on Human Rights (ACHR) forbids capital punishment for political offenses or related common crimes.<sup>46</sup> The ACHR mandates that countries that have not abolished the death penalty may impose it only for the most serious

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<sup>39</sup> See Martin, *supra* note 3, at 246.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 246-47.

<sup>42</sup> See Nanda, *supra* note 28, at 1372.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1372-73.

<sup>46</sup> *Id.*

crimes and are not to extend such punishment to crimes for which it does not presently apply.<sup>47</sup> It further states that the death penalty shall not be reestablished in states that have abolished it.<sup>48</sup> In 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.<sup>49</sup> Referring to the recognition of the right to life and restrictions on the application of the death penalty in Article 4 of the ACHR, the Protocol obligates states member not to “apply the death penalty in their territory to any person subject to their jurisdiction.”<sup>50</sup>

The ICCPR and ACHR have established judicial bodies for extradites to pursue claims of human rights violations.<sup>51</sup> These international judicial bodies are not bound by the jurisprudence and rules of national courts.<sup>52</sup> Instead, these bodies look to the tenets of human rights agreements, including the “right to life,” the prohibition against prolonged arbitrary detention, and the prohibition against torture or other cruel, inhumane, or degrading treatment or punishment, in making their decisions.<sup>53</sup> Expanding extradition law has caused countries, such as the United States, to face increasing difficulty in extraditing suspected criminal defendants because many countries view the death penalty as a human rights violation.<sup>54</sup>

The enforcement body for the ICCPR is the United Nations Human Rights Committee (UNHRC). The UNHRC has the authority to request and review reports on participating States’ compliance with the Covenant’s provisions.<sup>55</sup> The UNHRC also has the authority, when the State has accepted UNHRC jurisdiction through accession to the Optional Protocol, to review complaints brought by individuals alleging State violations or rights

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Martin, *supra* note 3, at 247.

<sup>52</sup> *Id.* at 248.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Mary K. Newcomer, *Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L. J. 611, 622 (1995).

guaranteed under the Covenant.<sup>56</sup> After reviewing a complaint, the UNHRC issues its “views” regarding whether or not there was a violation by the State.<sup>57</sup> The “views” are not binding, but are generally considered authoritative interpretations of the ICCPR.<sup>58</sup> The Committee has recently adopted the new measure of appointing a “Special Rapporteur for the Follow-Up of Views” to monitor compliance.<sup>59</sup>

The establishment of these international judicial bodies is especially odious to the United States. One of the reasons why U.S. officials react so strongly when another country refuses extradition due to perceived human rights violations is because U.S. courts typically have refused to inquire into the possibility of unfair treatment by a requesting country.<sup>60</sup> Under the United States’ conception of international extradition, allowing a court to inquire into the practices of other countries impermissibly infringes on principles of state sovereignty and reciprocity.<sup>61</sup> The principle of extraterritoriality is the most basic limitation on extradition.<sup>62</sup> Extraterritoriality regards the right of nations to control activity within their borders as sacrosanct.<sup>63</sup> Respect for the territorial sovereignty of other nations has always been a basic tenet of extradition law.<sup>64</sup> This may be the preferred means for the United States but many countries feel strongly about protecting human rights across national borders and will make inquiries into the conditions present in a requesting state before extraditing a prisoner.

### C. SUPPORT OF THE DEATH PENALTY IN THE UNITED STATES

Despite the international movement towards abolition, the United States remains a staunch proponent of the practice.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Henning, *supra* note 2, at 351.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Thirty-eight states retain the death penalty.<sup>65</sup> Polls indicate that nearly two-thirds of Americans support capital punishment.<sup>66</sup>

While it is clear on an international scale that the death penalty is being phased out of continued practice, the United States has actually increased the scope of crimes eligible for capital punishment over the past decade. One such example is Anti-Terrorism and Effective Death Penalty Act (AEDPA) passed by Congress in 1996. The AEDPA extended death penalty eligible crimes to encompass terrorist acts that transcend the United States' national boundaries.<sup>67</sup>

One need not look far for an example of the incredible support for the death penalty in the United States. The sniper shootings that occurred around Washington D.C. in the fall of 2002 provides sufficient illumination on this matter. Due to the fact that shootings occurred in multiple jurisdictions, there has been considerable discussion to determine which jurisdiction should have priority in trying these individuals. A key issue in determining the proper jurisdiction is where John Allen Muhammad and 17-year-old John Lee Malvo can both face the death penalty.<sup>68</sup>

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<sup>65</sup> Amnesty International USA, *Death Penalty: Facts & Figures: U.S. Executions by State*, available at <http://www.amnestyusa.org/abolish/retentionist-state.html>. The twelve states that have abolished the practice are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia has also abolished its usage.

<sup>66</sup> The Polling Report, Inc., *DNA "Fingerprinting,"* available at <http://www.pollingreport.com/crime.htm#Death>. According to the Harris Poll, taken in July 2001, 67% of adults favored the death penalty, 26% opposed it, and 7% were unsure.

<sup>67</sup> Susan M. McGarvey, *Note: Missed Opportunity? The Affirmation of the Death Penalty in the AEDPA: Extradition Scenarios*, 24 J. LEGIS. 99 (1998). If the legislature had taken the opportunity to assess the international climate, they would have seen the wisdom of imposing a mandatory life sentence. Current law permits the sentence for convicted terrorist acts against United States nationals abroad to range from a fine up to capital punishment. Mandatory life imprisonment would instead guarantee that the defendant stand trial in the United States.

<sup>68</sup> Guardian Unlimited, *Death Penalty Sought for Sniper* (Oct. 25, 2002), available at <http://www.guardian.co.uk/usguns/Story/0,2763,819462,00.html>. Maryland, where six victims were slain, and Virginia, where three were killed, both have capital punishment. Maryland has had a moratorium on executions since May but Virginia has executed more death row inmates than any state but Texas. The states' laws also differ on age: A 17-year-old would be eligible for the death penalty in Virginia and Alabama but not in Maryland. Officials say a federal prosecution is

### III. SPECIFIC EXTRADITION TREATY ANALYSIS

The following section of the paper seeks to examine the extradition treaties the United States currently has in effect with the nations of Italy, Mexico, Canada, Germany, and Spain. These particular countries have been chosen for several reasons. Italy was selected because the U.S. State Department has called Milan, Italy's second-largest city, the main al Qaeda headquarters in Europe.<sup>69</sup> Mexico and Canada were selected because they are geographic neighbors of the United States and thus the potential for terrorists to use these nations as home bases is particularly high. Germany has been selected because it is now known that an instrumental al Qaeda cell conducted much of the September 11, 2001, planning in that country.<sup>70</sup> Lastly, Spain has been chosen because of al-Qaeda known presence and disputes regarding the extradition of terrorists have already risen.<sup>71</sup>

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unlikely because it appears there is no federal law that would make the person or persons responsible for the sniper killings eligible for the death penalty.

<sup>69</sup> Eric J. Lyman, United Press International, *Italy Tracking 500 Terror Suspects*, WASH. TIMES, June 19, 2002. Italy has been the site of several plots linked to terror groups, including a suspected plan to poison the water supply at the U.S. Embassy in Rome earlier this year. That plot resulted in the arrest of eight Moroccans. Security experts say that Italy is an attractive base for extremists groups because of a combination of existing Islamic communities, relatively lax law enforcement and a geographic position that puts most of Europe, North Africa and parts of the Middle East within easy reach.

<sup>70</sup> Melissa Eddy, *Germany Arrests Al-Qaida Suspects*, GUARDIAN UNLIMITED, Jan. 11, 2003, available at <http://www.guardian.co.uk/international/story/0,3604,872623,00.html>. Germany has been central to the investigation of the Sept. 11 attacks as home to several of the key plotters including three of the suicide hijackers who formed the core of an al-Qaida cell in Hamburg. Bin Laden's alleged finance chief, Mamdouh Mahum Salim, also operated in Germany and was arrested in 1998 in Munich and turned over to the United States.

<sup>71</sup> Jerome Socolovsky, *Spain Arrests Three with WTC Videos*, ASSOCIATED PRESS, July 17, 2002, available at [www.cooperativeresearch.org/completetimeline/2002/ap071702.html](http://www.cooperativeresearch.org/completetimeline/2002/ap071702.html). Spain has been a focal point of the overseas investigation launched after the terrorist attacks on the United States. An FBI task force is working with law enforcement authorities in Spain to locate and capture suspected terrorists, including men with terrorist links who have traveled to the United States in recent year. Investigators have already gathered ample evidence that Atta visited Spain twice in 2001 including a weeklong trip in July where he may have attended a series of meetings with other al-Qaida operatives.

## A. ITALY

The United States extradition treaty with Italy went into effect on September 24, 1984. Article 9 deals with capital punishment. It states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not provide for such punishment for that offense, extradition shall be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.<sup>72</sup>

The Italian Constitutional Court, in a vehement demonstration of that country's disdain for the death penalty, has ruled that Article 9 is unconstitutional. In the case of *Venezia v. Ministero di Grazia e Giustizia*, the Court stated that mere assurances were insufficient. The Court held that the prohibition on the death penalty in the Italian Constitution is absolute and precludes extradition for a capital offense. Even if government officials or the courts find sufficient from the requesting state that the death penalty will not be imposed, extradition will still be denied.<sup>73</sup> The Court states that Article 9 of the Extradition Treaty violates several provisions of the Italian Constitution, including Article 2, which protects fundamental human rights, and Article 27(4), which prohibits the death penalty.<sup>74</sup> The absolute character of the protection granted by Article 2 to fundamental human rights affects the exercise of powers by all public authorities, including those in charge of international judicial cooperation.<sup>75</sup> The Court held that the very concept of "sufficient assurances" that the death penalty shall not be imposed or executed is constitutionally

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<sup>72</sup> Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, U.S.-Italy, 35 U.S.T. 3023, 3029-30.

<sup>73</sup> Andrea Bianchi, *International Decision: Venezia v. Ministero di Grazia e Giustizia*, 91 A.J.I.L. 727 (1997).

<sup>74</sup> *Id.* at 727-28.

<sup>75</sup> *Id.*

inadmissible because the right to life requires absolute protection.<sup>76</sup> Such protection cannot be dependent on the discretion of public authorities who, on a case-by-case basis, must decide whether the assurances given by the requesting state were effective and reliable.<sup>77</sup>

## B. MEXICO

The United States extradition treaty with Mexico went into effect on January 25, 1980. Article 8 deals with capital punishment. It states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.<sup>78</sup>

The vast majority of foreign nationals sitting on death rows in the United States are of Mexican origin. Therefore, it is no surprise that extradition between these two nations is often a hotly contested issue. The greatest sources of dispute are continued shenanigans<sup>79</sup> perpetrated by the United States in an effort to subvert provisions of the treaty. In June 2001, Juan Garza became only the second federal death row prisoner to be executed in the United States in nearly four decades.<sup>80</sup> Evidence suggests U.S. authorities engineered his original deportation from Mexico to avoid providing assurances against the death penalty.

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* With this decision, the extradition of fugitives charged with crimes punishable by death in the United States has been ruled out under Italian constitutional law, at least pursuant to the Extradition Treaty. Overall, practice seems to suggest the emergence of a Europe *ordre public*, which prohibits the extradition of fugitives when this may entail, under the circumstances of the case, a violation of values enshrined in either the European Convention or the forum state's constitution.

<sup>78</sup> 31 U.S.T. 5059, 1978 N.S.T. LEXIS 330, 336-37.

<sup>79</sup> Webster's dictionary defines shenanigans as acts of mischief, deceit, or trickery.

<sup>80</sup> Amnesty International, *Further Information on UA 297/02 (AMR 51/155/2002, 1 October 2002) – Death Penalty/Legal Concern*, available at [www.web.amnesty.org/ai.nsf/recent/AMR511712002?OpenDocument](http://www.web.amnesty.org/ai.nsf/recent/AMR511712002?OpenDocument).

Prosecutors in the United States are increasingly finding it necessary to comply with Article 8 to secure the extradition of criminals.<sup>81</sup> Some U.S. officials have reacted angrily to this practice, viewing it as foreign interference in the U.S. criminal justice system.<sup>82</sup> U.S. Congressman Dan Miller introduced a resolution into the House of Representatives calling on the government to renegotiate the United States' extradition treaty with Mexico.<sup>83</sup>

### C. CANADA

The United States extradition treaty with Canada went into effect on March 22, 1976. Article 6 deals with capital punishment. It states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.<sup>84</sup>

Although Article 6 states that "extradition *may* be refused" unless assurances are provided that the death penalty will not be

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<sup>81</sup> *Id.* In 1997, Florida prosecutors were only able to obtain the extradition from Mexico of murder suspect Jose Luis del Toro after providing assurances against the death penalty. One of the Sarasota County prosecutors said: "We tried to do everything we could do behind the scenes. We were left with no choice." In Texas, a prosecutor promised that he would not seek the death penalty against Romeo Lopez, in Mexico and wanted in connection with a murder committed in Wharton County. The District Attorney said of this practical approach, "I'd rather seek the death penalty, but I have to live in the real world."

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Congressman Miller stated "The people of Florida should have decided whether or not Jose Luis Del Toro's crime warranted the death penalty, NOT the Mexican government. As a Member of Congress, I cannot, and I WILL NOT, stand by quietly as Mexico deprives my Congressional District of the right to pursue justice. This is an outrage, it is a violation of US sovereignty, and we cannot allow it to happen again."

<sup>84</sup> Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, U.S.-Can., 27 U.S.T 983; U.S.T. LEXIS 226.

imposed, the Supreme Court of Canada has interpreted this provision more narrowly. In *United States v. Burns*,<sup>85</sup> the Canadian Supreme Court ruled that extradition to the United States without assurances that the death penalty will not be carried out for capital crimes violates the Canadian Charter of Rights and Freedoms in all but exceptional cases.<sup>86</sup> The Court lists several factors to justify their rigid interpretation of Article 6. The Court noted that Canada abolished the death penalty and that the abolition of the death penalty has emerged as a major Canadian initiative at the international level, reflecting a concern increasingly shared by most of the world's democracies.<sup>87</sup> "It is difficult to avoid the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped."<sup>88</sup>

#### D. GERMANY

The United States extradition treaty with Germany went into effect on August 29, 1980. Article 12 deals with capital punishment. It states:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and

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<sup>85</sup> Glen Sebastian Burns and Atif Ahmad Rafay, both Canadian citizens at the time that the crimes in question were committed, were convicted of bludgeoning to death Rafay's mother, father and sister in their Bellevue, Washington home. After they returned to Canada they boasted about having committed the crime to an undercover agent of the Royal Canadian Mounted Police. The Canadian Minister of Justice agreed to grant extradition without requiring any undertaking that the death penalty would not be imposed, although the extradition treaty between Canada and the United States permits either party to make surrender subject to that condition.

<sup>86</sup> William A. Schabas, *International Decision: United States v. Burns*, 95 A.J.I.L 666 (2001).

<sup>87</sup> *Id.* at 667.

<sup>88</sup> *Id.* In the process of considering the administration of the death penalty in the United States and how that potentially weighed against extradition without assurances, the Court referred to a September 2000 study by the U.S. Justice Department that raised the question of racial bias in the behavior of federal prosecutors in seeking the death penalty. The Court summarized part of the study's results as follows: It was the first comprehensive review of the federal death penalty since it was reinstated in 1988. The data shows that federal prosecutors were almost twice as likely to recommend the death penalty for black defendants when the victim was non-black than when he or she was black. Moreover, a white defendant was almost twice as likely to be given a plea agreement whereby the prosecution agreed not to seek the death penalty.

the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State furnishes such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.<sup>89</sup>

Germany, like the countries previously discussed, has a shared history with the United States. *Soering v. United Kingdom* involves the extradition of a German national to the United States. In *Soering*, the European Court of Human Rights unanimously decided that Great Britain's extradition of the defendant to the United States to stand trial for capital murder, an offense punishable by death under Virginia state law, would violate the prohibition against "inhuman treatment or punishment" in the European Convention on Human Rights.<sup>90</sup> The main factor in *Soering* was not the potential imposition of the death penalty itself, however, but the "death row phenomenon" of prolonged detention prior to execution.<sup>91</sup> *Soering* obviously makes it considerably more difficult for the United States to extradite fugitives facing the death penalty from the twenty-two countries in the Council of Europe.<sup>92</sup> Since procedural due process concerns will continue to cause substantial delays between sentence and execution, and a strict regime will continue to be applied to persons convicted of capital crimes, the factual predicate that is labeled the "death row phenomenon" will almost always be present in U.S. death penalty cases.<sup>93</sup>

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<sup>89</sup> 32 U.S.T. 1485; 1978 U.S.T. LEXIS 304.

<sup>90</sup> Richard B. Lillich, *The Soering case*, 85 A.J.I.L. 128 (1991).

<sup>91</sup> See Schabas, *supra* note 86, at 667. The "death row phenomenon" is caused by five factors: (1) delays in the appeal system; (2) the fact that age and mental condition may not be taken into account in determining the sentence; (3) conditions of detention on death row; (4) the execution procedure; and (5) the possibility that extradition to another country could take place where the death penalty had been abolished.

<sup>92</sup> See Lillich, *supra* note 16, at 145.

<sup>93</sup> *Id.*

## E. SPAIN

The United States extradition treaty with Spain went into effect on June 16, 1971. Article 7 deals with capital punishment. It states:

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party, extradition shall be denied unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or if imposed, shall not be executed.<sup>94</sup>

Of the examined treaties, Spain is the only country that explicitly states that extradition *shall* be denied unless assurances that the death penalty will not be imposed are given. Spain is adamant in securing the promises necessary under this Article. Two months after the attacks on the World Trade Center and the Pentagon, Spanish authorities made widely publicized arrests of alleged terrorists in Madrid and Granada.<sup>95</sup> Eight men were formally charged with being members of cells affiliated with the Al-Qaeda network.<sup>96</sup> According to Spanish authorities, the terrorist cells had been in direct communication with the participants in the attacks; Mohammed Atta, who piloted the first airplane into the Trade Center, visited Spain twice in the nine months prior to the attack.<sup>97</sup>

Despite the United States interest in these prisoners, they remain in Spanish custody. The main roadblock for extradition is the possibility that these suspected terrorists might face the death penalty in the United States.<sup>98</sup>

## F. OVERVIEW

The various extradition treaties viewed above have language that is very similar if not identical. However, the interpretation

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<sup>94</sup> 22 U.S.T. 737; 1970 U.S.T. LEXIS 490.

<sup>95</sup> Daniel J. Sharfstein, *Human Rights Beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 SANTA CLARA L. REV. 1137 (2002).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1138.

given to the language varies greatly with each country with constitutional constraints or policy preferences. The range of constraints placed on the United States is quite varied. For example, the Italian Constitutional Court has essentially ruled that any criminal facing even the possibility of the death penalty cannot be extradited. Assurances that the death penalty shall not be imposed are insufficient. Although not as restrictive as Italy, other countries in Europe may make it difficult to obtain extraditions due to the position taken by the ECHR in *Soering* (cite). The “death row phenomenon” may serve as grounds for refusing extradition and the United States may be forced to disprove such conditions exist. Lastly, countries such as Mexico and Canada take a more definitive position. Those countries seek to enforce the letter of the law. In order to secure the extradition of criminals facing a possibility of capital punishment, the United States must make assurances that such avenues will not be pursued.

#### IV. RELIANCE ON ALTERNATIVE MEANS

The United States has a long history of turning to renegade measures in order to secure the possession of fugitives. Much criticism has been directed at the United States for taking such initiatives but it apparently has fallen on deaf ears.

##### A. KER-FRISBIE DOCTRINE

In *Ker v. Illinois*, the U.S. Supreme Court was presented with a case involving the legality of an extraterritorial abduction.<sup>99</sup> The defendant, while living in Peru, was indicted by the state of Illinois for embezzlement and larceny.<sup>100</sup> The governor of Illinois requested that the U.S. State Department issue a warrant for Ker’s return, pursuant to the extradition treaty between the U.S. and Peru.<sup>101</sup> The U.S. government issued the warrant and authorized an agent to serve the warrant on the Peruvian government and receive the suspect in return.<sup>102</sup> But, instead of following the agreement, the agent forcibly abducted the defendant and

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<sup>99</sup> *Ker v. Illinois*, 119 U.S. 436 (1886).

<sup>100</sup> See Henning, *supra* note 2, at 362.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

placed him aboard a ship bound for the U.S.<sup>103</sup> Illinois subsequently tried and convicted the defendant.<sup>104</sup>

On appeal, the U.S. Supreme Court held that the defendant's forcible abduction was not a sufficient reason for him not to answer when brought within the jurisdiction of the Court, which had the right to try him for such an offense.<sup>105</sup> In other words, forcible abduction does not deprive a court of personal jurisdiction over the defendant.<sup>106</sup> This basic rule was later upheld in *Frisbie v. Collins*, where the defendant contended that his forcible abduction from Illinois to Michigan to stand trial violated his due process rights under the Fourteenth Amendment.<sup>107</sup> The Supreme Court held that:

The power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction.<sup>108</sup> Due process of law is satisfied when one present is convicted of a crime after having been apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards.<sup>109</sup>

Over the years, the *Ker-Frisbie* doctrine has blossomed into a general rule that U.S. courts will impose virtually no restrictions on how U.S. officials obtain custody over fugitives.<sup>110</sup> However, some district courts have been willing to apply narrow exceptions to the *Ker-Frisbie* doctrine based on a violation of the applicable extradition treaty or a violation of the defendant's due process rights.<sup>111</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Frisbie v. Collins*, 342 U.S. 519 (1952).

<sup>108</sup> See Henning, *supra* note 2, at 362.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 363.

<sup>111</sup> *Id.*

## B. ALVAREZ-MACHAIN

In 1992, the United States Supreme Court ruled in *U.S. v. Alvarez-Machain* that the U.S. government can forcibly abduct a criminal suspect from a foreign country and bring him to trial in the United States.<sup>112</sup> Agents of the Drug Enforcement Administration kidnapped Dr. Alvarez-Machain, a Mexican citizen residing in Guadalajara.<sup>113</sup> He was transported to Texas where he was taken into custody.<sup>114</sup> He had been charged roughly two months prior in connection with the murder in Mexico of DEA Special Agent Enrique Camarena and Alfredo Zavala-Avelar.<sup>115</sup> Chief Justice Rehnquist, writing for the majority, concluded that the extradition treaty did not, by its terms, prohibit abductions or state-sponsored kidnapping as an alternative to formal extradition procedures.<sup>116</sup> There was no provision in the treaty that expressly said, "Thou shalt not abduct".<sup>117</sup> The Alvarez-Machain decision, in its insistence that outrageous conduct is permitted so long as it is not explicitly prohibited by the terms of the treaty, is a relatively modern version of a kind of cleverness that has plagued the law of nations and maybe the law in general since antiquity.<sup>118</sup> A standard criticism of *Alvarez-Machain* is that it is based on a bizarre form of literalism, a literalism that insists on the express prohibition of otherwise illegal conduct.<sup>119</sup>

Justice Stevens, writing for the minority, stated:

I suspect most courts throughout the civilized world will be deeply disturbed by the monstrous decision the Court announces today. For every nation that has an interest in

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<sup>112</sup> *Id.*

<sup>113</sup> Ralph Steinhardt, *Kidnapping Foreign Criminal Suspects*, 15 WHITTIER L. REV. 419, 420 (1994).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 421. An example is the story of Plataeans, of the ancient Greek city-state, who promised the Thebans that their prisoners of war would be returned. The Plataeans killed the prisoners before returning them, however, maintaining that they never promised to return them alive.

<sup>119</sup> *Id.*

preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, and ‘avidity to punish is always dangerous to liberty’ because it leads a nation “to stretch, to misinterpret, and to misapply even the best of laws”.<sup>120</sup>

### C. PRESIDENTIAL DECISION DIRECTIVE

In June 1995, President Clinton signed a Presidential Decision Directive which approved the return of “terrorists” from abroad “by force. . .without the cooperation of the host government,” if “adequate cooperation” was not forthcoming and could not be brought about by “appropriate measures.”<sup>121</sup>

## V. CONCLUSION

In a recent Los Angeles Times article Bruce Shapiro stated:

[T]he pursuit of Al Qaeda is colliding head-on with a dispute to which few Americans until now paid any attention: a worldwide legal war against the U.S. death penalty. It’s a serious confrontation. Spain refuses to extradite Al Qaeda suspects if they will face capital charges. France will go to court against a death sentence for its indicted citizen Mousaoui. Tony Blair’s administration has tied itself in knots over how its Afghanistan occupation troops might handle a captured Osama bin Laden. Europe’s immovability on the subject of the death penalty, even for World Trade Center conspirators, has left Washington gob smacked. But it shouldn’t. The pursuit of Al Qaeda simply has pushed to the boiling point long-simmering disquiet with American capital justice. . . All this turmoil reflects a fundamental shift in the global politics of death: To most of our closest

<sup>120</sup> See Amnesty International, *supra* note 77.

<sup>121</sup> See Amnesty International, *supra* note 77. PDD-39, on US Policy on Counterterrorism, in part reads: “We shall vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States. When terrorists wanted for violation of US law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government.”

allies, execution is now as repugnant as slavery. And the nations retaining capital punishment make for dubious company.<sup>122</sup>

There are many reasons why the United States should abandon the practice of the death penalty. Capital punishment is a practice that loses favor with the world's democracies with each passing day. In order for the United States to comport with what is certainly becoming an international norm the death penalty needs to be abolished.

In the specific instance of combating terrorism, the United States would be well suited to become an abolitionist nation. By doing so, the burden on government officials in their pursuit of obtaining the extradition of suspected criminals would be eased. Currently, the process of extraditing a criminal who is subject to death penalty is akin to walking in a political minefield. Many countries will not extradite offenders to a nation that will subject them to the death penalty without assurances that such action will not be taken. Italy will not extradite regardless of whether or not an assurance. It would not be surprising to see other countries follow suit. The United States should not jeopardize national security by adhering to practices that many countries find offensive. The battle against terrorism is one that is fought on a global scale and the United States cannot fight this opponent unilaterally.

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<sup>122</sup> Bruce Shapiro, *Spurned for Our Death Penalty*, L.A. TIMES, Dec. 21, 2001, at B15.

