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NOTES

Missed Opportunity? The Affirmation of the Death Penalty in the AEDPA: Extradition Scenarios

I. INTRODUCTION

The United States cannot ignore the issue of terrorism. Besides continued attacks around the world,¹ the United States must now contend with the fact of internal terrorism. The United States still mourns the domestic terrorist bombing of Oklahoma City and the Olympic Games explosion, as well as the Unabomber attacks.² Events like these push the populous of America to demand a response from the government to do something in furtherance of the fight against terrorism at home and abroad. In response to the public pressure Congress passed the Anti-terrorism and Effective Death Penalty Act of 1996³ (AEDPA), which expanded an unwise death penalty policy.⁴ The AEDPA extended death penalty eligible crimes to encompass terrorist acts that transcend the United States' national boundaries. The continued expansion is directly at odds with policy of the rest of the western hemisphere⁵ and ultimately will lead to increased conflict and hostility in the future regarding extraditions to the United States. This Note does not pose an easy solution to the problem of extradition and the death penalty, because if there was one, it would already be law. Instead, due to the complex nature of the issue, the Note focuses on bringing to light the problem, specifically the imposition of the death penalty to terrorists' acts abroad, and proposes a long-term goal of abolishing the death penalty. The actions taken by Congress in response to public rage may have been good politics, but the extension of the death penalty is not sound policy.

The AEDPA was approved by both Houses of Congress and signed by the President in April of 1996.⁶ President Clinton proposed the Omnibus Counterterrorism Act of 1995, which was aimed at international terrorism.⁷ Most of his suggested legislation was incorporated into the AEDPA,⁸ along with provisions addressing domestic terror-

1. See Sage R. Knauff, Note, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763, 766 (1996).

2. See Rick Vernier, *Land of the Free, Home of Terror*, CHICAGO SUN-TIMES, August 4, 1996, at 31.

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered of 18 U.S.C.A.) (West Supp. 1997).

4. 18 U.S.C.A. § 2332(b) (West Supp. 1997)).

5. See *infra* Part IV.

6. Approved by the Senate on April 17, 1996 and the House of Representatives on April 18, 1996. *Supra* note 3. The bill was signed into law by President Clinton on April 24, 1996. Statement on Signing the Antiterrorism and Effective Death Penalty Act, 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996).

7. Statement on Signing the Antiterrorism and Effective Death Penalty Act, 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996).

8. *Id.*; President's Remarks on American Security in a Changing World at George Washington

ism that transcended national borders.⁹ The final AEDPA was expediently pushed through Congress so that there would be confirmed remedial legislation before the one year anniversary of the Oklahoma bombing.¹⁰

II. JURISDICTION OVER TERRORIST ACTS

Before delving into the death penalty aspects of the legislation, the first issue of concern is Congress' ability to prescribe legislation over terrorist acts that occur outside the United States. This area is governed by international law regarding extraterritorial jurisdiction.¹¹ Jurisdictional guidelines set forth in treaties between nations and adherence to accepted international standards of conduct generally assist in maintaining international peace with respect to extradition scenarios. Extraterritorial jurisdiction necessarily touches on issues of sovereign equality and territorial integrity of states, which are cornerstones of international law.

The United States' Restatement of Foreign Relations allows for the creation of laws that affect the interests of another state only if the promulgation and enforcement of these laws falls within one of its recognized forms of prescriptive jurisdiction as set forth in § 402 and § 404 of the Restatement.¹² International law recognizes various forms of jurisdictional principles including nationality,¹³ territoriality,¹⁴ passive personality,¹⁵ protective,¹⁶ and universality.¹⁷ The most widely accepted justifications for extraterritorial jurisdiction in international law are the territoriality and the nationality principles.¹⁸ Territoriality confers power onto a state to prescribe laws within its own boundaries, while nationality acknowledges prescription over nationals wherever they are located.¹⁹ Neither of these principles cover extraterritorial acts, i.e. acts committed by non-nationals against United States nationals outside the United States'

University, 32 WEEKLY COMP. PRES. DOC. 1404 (Aug. 5, 1996).

9. 18 U.S.C.A. § 2332(b) (West Supp. 1997).

10. See Elizabeth Shogren, *Senate OKs \$1-Billion Anti-Terrorism Measure*, L.A. TIMES, April 18 1996, at 1.

11. Extraterritorial jurisdiction is the ability to bring an individual into the jurisdiction of a nation even though the individual did not commit the crime within that jurisdiction, nor is the individual necessarily a national of that jurisdiction. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 states:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of person, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

13. See I.A. SHEARER, STARKE'S INTERNATIONAL LAW 208 (11th ed. 1994).

14. *Id.*

15. Passive personality jurisdiction is assumed by the state of which the injured is a national. *Id.* at 210.

16. Protective principle states that a state may exercise jurisdiction over crimes against its security or national interests. *Id.* at 211.

17. Universality permits all states to apprehend and punish offenders of such crimes that are contrary to the interests of the international community. An example of such a crime is piracy. *Id.* at 212.

18. RESTATEMENT (THIRD) FOREIGN RELATIONS, Pt. V, Ch. 1, Subch. A, introductory note (1987).

19. See SHEARER *supra* note 13, at 208.

boundaries.

Previously, the United States prosecuted terrorist acts against nationals through its participation in multilateral conventions such as the Tokyo Convention on Offenses and Certain Other Acts, Committed While on Board Aircraft²⁰ and the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance.²¹ These conventions were set up among nations to deal with specific, enumerated terrorist acts. The general use of terrorism to cover a wide range of acts has not been workable because of little international agreement on the definition of terrorism. The Omnibus Diplomatic Security and Antiterrorism Act of 1986,²² the first statute to address this extraterritorial issue, went beyond the reach of any of these conventions to cover acts against American nationals abroad that were not specifically enumerated in the conventions. So long as a United States national was a victim, the United States could prosecute under its laws, according to this act. Beyond territoriality and nationality principles, prescriptive jurisdiction is vaguely defined in international law. It becomes even more nebulous when extradition of a suspect is involved because the nations participating must be convinced that the requesting state has a justifiable claim to jurisdiction.²³

For the AEDPA to be legitimate under international law and enforced through the cooperation of the international community, the jurisdictional basis must be valid and the international community willing to support it. There is debate on the precise justification the United States put forth in support of its extension of extraterritorial jurisdiction.²⁴ Although numerous authors have asserted alternative justifications, the consensus is the passive personality principle is the most appropriate.²⁵ The United States has the official policy of only performing extraditions with nations that have established reciprocal treaties with the United States.²⁶ The 1986 extension of extraterritorial jurisdiction, combined with the 1994 reinstatement of the death penalty for terrorist acts²⁷ makes the granting of an extradition request all the less likely.

20. Tokyo Convention on Offenses and Certain Other Acts, Committed While on Board Aircraft, September 14, 1963, 20 U.T.S. 2941.

21. Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance, February 2, 1971, 27 U.S.T. 3949. See also Knauft *supra* note 1, at 768.

22. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (codified as amended in scattered sections of 18 U.S.C.) (1994).

23. See generally Patrick Donnelly, *Extraterritorial Jurisdiction over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987).

24. See Brandon S. Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985, 991 (June 1990) (asserting that the main basis for extraterritorial jurisdiction in the Act is the protective principle); Donnelly, *supra* note 23 at 599-607 (stating the statute bases its jurisdiction on the passive personality principle and the universality theory); IAIN CAMERON, *THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION* (1994); Jon C. Cowen, Note, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice*, 21 CORNELL INT'L L.J. 127 (1988) (arguing the Act was based solely on the passive personality principle).

25. See *supra* note 24.

26. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 49 (3d ed. 1996).

27. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C.A. § 2332(a)(1) (West Supp. 1997). Although S. 1798 proposed the death penalty for the terrorist murder of United States

III. EXTRADITION AND THE DEATH PENALTY

Assuming that the United States believes it is justified in exercising jurisdiction over the crime on prescriptive grounds, the next hurdle is getting the nation, where the defendant is found, to surrender the suspect. Even if the jurisdictional basis is valid under international law, the host nation may find reason not to extradite the suspect. Under international law, the modern understanding is that, in absence of a treaty, there is no duty on the host nation to prosecute or hand over the suspect.²⁸ Rather, it is deemed to be an imperfect obligation, only having the force of international law when there is a compact committing the parties to extradition via a contract-like situation.²⁹ However, even when there is an extradition treaty, nations may deny extradition if the treaty allows refusal based on the death penalty³⁰ or if there is a conflict among treaties regarding the duty to extradite.³¹ The AEDPA can only continue to jeopardize the likelihood of the foreign country handing over the suspect because of its affirmation and extension of the death penalty in the realm of international extraditions of terrorists.

The United States federal statutes had not imposed the death penalty to any crimes since 1972³² until the Anti-Drug Abuse Act of 1988.³³ The Violent Crime Control Act of 1994³⁴ introduced the death penalty for international terrorist acts committed against United States nationals abroad,³⁵ and the AEDPA of 1996 has sought to broaden the implementation of the death penalty to include terrorism that transcends national boundaries and shorten habeas corpus petitions. Our country's increasing use of the death penalty will hinder the likelihood of bringing terrorists to justice because this trend is at direct odds with the international community's trend towards the abolition of the death penalty.³⁶ If the legislature had taken the opportunity to assess the international climate, they would have seen the wisdom behind imposing a mandatory

nationals abroad, it died in the House Judiciary Committee after passing the Senate in 1989. The House-Senate conference killed it. Although it was H.R. 4032 that was finally incorporated into the Violent Crime Control Act of 1994, discussion around S. 1798 encompasses the main debate on the issue in Congress and will be referenced throughout this Note.

28. BASSIOUNI *supra* note 26 at 5-6 (stating that contemporary practice reflects this point of view with respect to common criminality but, with respect to international criminality, the trend has favored the view that there is a definite duty on nations to extradite persons accused of serious crimes); see also Mark W. Janis, INTRODUCTION TO INTERNATIONAL LAW 348-50 (2d ed. 1993). Strong support for the modern view by Brownlie, who stated, "with the exception of alleged crimes under international law, in the absence of a treaty, surrender of an alleged criminal cannot be demanded as of right." IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 315 (1990) (citations omitted).

29. *Id.*

30. In 1989, the United States had twenty extradition treaties in operation that held that the other nation could deny extradition if there was a possibility the suspect will face the death penalty in the United States. The nations having those treaties with the United States at the time were Argentina, Australia, Brazil, Canada, Colombia, Denmark, Finland, Germany, Ireland, Israel, Italy, Mexico, the Netherlands, New Zealand, Norway, Paraguay, Spain, Sweden, the United Kingdom, and Uruguay. 135 CONG. REC. S14205-06, S14214 (daily ed. Oct. 26, 1989) (statement of Sen. Kennedy).

31. See *infra* Part IV.

32. *Furman v. Georgia*, 408 U.S. 238 (1972) (finding the death penalty in violation of the 8th and 14th Amendments).

33. Anti-Drug Abuse Act of 1988, 22 U.S.C. § 848 (1994) (reinstating use of the death penalty); 135 CONG. REC. S579-01, S614 (daily ed. Jan. 12, 1991) (statement of Sen. Specter).

34. Violent Crime Control Act of 1994, 18 U.S.C.A. § 2332(a)(1) (West Supp. 1997).

35. *Id.*

36. See generally WILLIAM SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993).

life sentence.³⁷ Current law permits the sentence for convicted terrorist acts against United States nationals abroad to range from a fine up to capital punishment.³⁸ Mandatory life imprisonment would instead guarantee that the defendant stand trial in the United States.³⁹

IV. INTERNATIONAL VIEWS ON EXTRADITION AND THE DEATH PENALTY

The Government acknowledges that terrorism is an international problem that requires cooperation among nations.⁴⁰ The most fundamental considerations when drafting legislation on terrorism should be international judicial decisions, treaties, and customary international law. In 1989, the European Court of Human Rights decided a pivotal case in international law pertaining to extradition and international human rights. *Soering v. United Kingdom*⁴¹ dealt with a young German man who had escaped from the United States after he and his girlfriend killed her parents. The couple fled to England, where they were arrested for passing bad checks.⁴² While the girlfriend negotiated with prosecutors, the man, Jens Soering, fought extradition to the United States. The murders took place in Virginia and at the time, the crime was death penalty eligible. As to the request to extradite Mr. Soering according to the Extradition Treaty of 1972,⁴³ the British government wanted assurances that the death penalty would not be sought.⁴⁴ The United States agreed to pass on to the sentencing judge the statement that the United Kingdom did not want the death penalty to be available.⁴⁵ Mr Soering protested the extradition to the European Court of Human Rights in Strasbourg, France. Mr. Soering argued under Article Three of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁶ that his possible punishment if extradited would equal degrading and inhuman conduct, and possibly even torture. Furthermore, he argued that if the death penalty or the process awaiting the death penalty was identified as degrading or inhuman, that the United Kingdom had an affirmative duty as a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms not to place Mr. Soering in a position where he would be in jeopardy of facing such treatment.⁴⁷

The court decided the issue, not on the death penalty itself, but rather on exposure to the death row phenomenon,⁴⁸ a possible form of psychological torture, would

37. See 135 CONG. REC. S14260-01 (daily ed. Oct. 26, 1989) (statement of Sen. Hatfield regarding his suggested amendment to S. 1798 which proposed a mandatory life sentence without the possibility of parole for the terrorist killing of a U.S. national abroad).

38. 18 U.S.C.A. § 2332(a)(1) (West Supp. 1997).

39. See *supra* note 37.

40. See, e.g., Warren P. Strobel, *Clinton Urges UN to Fight Crime, Terror Talk Addresses U.S. Skeptics*, WASH. TIMES, Oct. 23, 1995, at A1.

41. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A.) (1989), reprinted in 28 I.L.M. 1063 (1989).

42. *Soering*, 28 I.L.M. at 1072.

43. Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (entered into force Jan. 21, 1977).

44. *Soering*, 28 I.L.M. at 1073.

45. *Id.* at 1073.

46. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, opened for signature Nov. 4, 1950, states, "No one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." Europ. T.S. No. 5 (entered into force Sept. 3, 1953).

47. *Soering*, 28 I.L.M. at 1091-93.

48. The death row phenomenon is a form of psychological torture experienced by people incarcerated for long durations pending execution. See Daniel P. Blank, *Mumia Abu-Jamal and the "Death*

make the extradition a breach of Article Three of the European Convention for the Protection of Human Rights.⁴⁹ Although not reaching the requisite level of torture,⁵⁰ the court concluded that the prospect of waiting for execution for six to eight years was degrading and inhuman.⁵¹ The court agreed with Mr. Soering that the United Kingdom had a duty to protect him from being placed in a position where such action was a possibility.⁵² Moreover, the court stated that the prosecutor for the United States' original recommendation to the American judge was not sufficient, especially since the prosecutor admitted that he wanted to seek the death penalty.⁵³ The court considered the options available and decided it would be best to extradite Mr. Soering to his homeland of Germany for prosecution of the crime with no threat of the death penalty being imposed.⁵⁴

The proponents of the AEDPA presumably would assert that habeas corpus reforms lessen any possible death row phenomenon. While the changes are likely to cause the death penalty to be carried forth more quickly, the situation created is less than ideal. There is still ostensibly a long duration when the individual on death row is waiting for execution and the procedural short cuts may infringe on several valued human rights such as the prohibition on cruel and inhuman treatment and the right to a fair trial. The possible shortened length of time on death row and the effect of that on the death row phenomenon in all probability would not persuade the international community to accept the death penalty.⁵⁵

The United States has a history of swaying in its position on the death penalty.⁵⁶ The question used to be whether it was just or moral. The death penalty has been held to be constitutional⁵⁷ and now the question seems to be how quickly the sentence of death can be executed. The United States' stance on the death penalty receives little support from other western nations⁵⁸ and "more than half the world's states are now abolitionist either de jure or de facto, and almost all of them have taken this step since WWII."⁵⁹ The *Soering* case clearly indicates the reality that the United States' jurisprudential stance on the death penalty has been drifting away from the rest of the western world. We are now the only western nation that carries out the death

Row Phenomenon," 48 STAN. L. REV. 1625 (1996) (reviewing MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* (1995)).

49. *Soering*, 28 I.L.M. at 1096-97.

50. *Id.*, 28 I.L.M. at 1097-1100.

51. *Id.* at 1100.

52. *Id.* at 1093-1101.

53. *Id.* at 1095 (informing the sentencing judge that the wishes of the United Kingdom do not eliminate the possibility of the death penalty).

54. *Id.* at 1100. At the end of the day, the United States finally assured the British Government that no capital murder charges would be brought against Mr. Soering. So, he was eventually extradited to the United States in 1991. See Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845, 872 (1990).

55. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY IN AMERICA 178-81 (1987); WILLIAM SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT & TORTURE 8-11 (1996); SCHABAS, *supra* note 36, at 6-22.

56. *Furman v. Georgia*, 408 U.S. 238 (1972) (finding the death penalty to be arbitrary and capricious, therefore unconstitutional as cruel and unusual punishment); *Gregg v. Georgia* 428 U.S. 153 (1976) (approving state efforts regarding the death penalty and deeming it constitutional under a bifurcated proceeding).

57. *Gregg*, 425 U.S. at 153.

58. AMNESTY INTERNATIONAL, *supra* note 55, at 178-89.

59. SCHABAS, *supra* note 55, at 9.

penalty for ordinary crimes.⁶⁰ International agreements around the globe condemn the death penalty.⁶¹ The United States, while being a signatory⁶² to many of these organizations, has always reserved the right to decide on the imposition of the death penalty.⁶³ Even though the Supreme Court has applied the Eighth Amendment concept of cruelty to the death penalty and found the punishment not to be cruel, in situations such as international extradition, the *evolving standards of decency* test⁶⁴ should apply the international community's standards as was the case in *Thompson v. Oklahoma*.⁶⁵ Also, the argument against the death penalty as violating the right to life has not been fully addressed in the international community. If our goal is to make extradition effective and to prosecute terrorist offenders, the United States must look to international standards and realize the death penalty is an outdated form of punishment and no longer accepted.

The two most pervasive justifications for the death penalty are retribution and deterrence.⁶⁶ No one can deny that the limited retributive aspect may be valid so long as the execution is performed on the individual which the community feels was guilty. The deterrent aspect has never been established⁶⁷ and is much less convincing when dealing with terrorist acts,⁶⁸ but this is the justification given in support of the legislation by Congress. Senator D'Amato argued how imposing the death penalty for terrorist acts would send a powerful message to terrorists around the world and deter future acts.⁶⁹ But, terrorists are people who would give their lives for their cause; death is a price they are willing to pay and they are not likely to be deterred by the thought of dying. In fact, the belief in dying for the cause is heroic to many and a community may make a martyr of the person executed. The death penalty is unlikely to convince possible terrorists not to follow through with their plan. Therefore, retribution is the only viable justification for the death penalty for terrorists. However, that rationale is not defensible if the death penalty is what keeps the United States from prosecuting the suspect.

60. AMNESTY INTERNATIONAL, *supra* note 55, at 228-30.

61. See American Convention on Human Rights (1979) 1144 U.N.T.S. 123; Protocol No. 6 to the Convention for the Protection of Human Rights & Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. 114; Second Optional Protocol to the International Covenant on Civil & Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, 44 U.N. GAOR Supp. No. 49 at 206, U.N. Doc. A/44/824 (1989) (ratified July 11, 1991).

62. Signatory is a term used in diplomacy to indicate a nation which is a party to a treaty. BLACK'S LAW DICTIONARY 1381 (6th ed. 1990). Under the Vienna Convention on Treaties, Article 18, a signatory nation can do nothing to defeat the object and purpose of signed treaties. See AMNESTY INTERNATIONAL, *supra* note 55, at 178.

63. SCHABAS, *supra* note 36, at 92.

64. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The evolving standards of decency test was applied in *Furman v. Georgia*, 408 U.S. 238 (1972).

65. *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (referring to international viewpoints in applying the death penalty to juveniles).

66. ROGER HOOD, *THE DEATH PENALTY* 180 (1996).

67. See *THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH* (Robert M. Bohm ed., 1991). See also HOOD, *supra* note 66, at 210-12.

68. In order for the theory of deterrence to be valid a rational person will not commit a crime if the severity of the punishment for the criminal act and the perceived certainty of receiving punishment outweigh the benefits of the illegal conduct. Franklin E. Zimring & Michael Laurence, *Death Penalty*, in *DEATH PENALTY* (Amnesty International ed. 1995).

69. 135 CONG. REC. S14227-01 (daily ed. Oct. 26, 1989) (statement of Sen. D'Amato).

V. ENFORCING EXTRADITION

As is evident by this Note, the main problem pertaining to the death penalty in this context arises when a nation has a terrorist within its borders and refuses to extradite the individual to the United States because it knows the law permits the imposition of the death penalty. Although issues like this should be dealt with in the extradition treaty between the United States and the other nation, adherence to the treaty is not always guaranteed. Additionally, the United States has treaties permitting refusal.⁷⁰ The nation may not want to extradite the individual even if the United States promises not to impose the death penalty, or more likely, if the United States is unwilling to make such a promise. One of the solutions to this type of extradition problem in the past has been international abduction.⁷¹

The recent case of *United States v. Alvarez-Machain*⁷² is an example of an abduction of a suspect in order to enforce United States' laws against an individual. In *Alvarez-Machain*, a Mexican national was forcibly kidnapped and brought to the United States to stand trial for participating in kidnapping and murdering a drug enforcement agent.⁷³ Although the district court held that it did not have proper jurisdiction over the individual because there was a violation of the Extradition Treaty between the United States and Mexico⁷⁴ and the appeals court upheld the decision,⁷⁵ the Supreme Court of the United States reversed and remanded.⁷⁶ The Supreme Court held that the Extradition Treaty did not prohibit abduction outside of its terms, and general principles of international law did not imply terms into the Treaty that an abduction, such as what occurred, was prohibited.⁷⁷ Thus, the district court did have jurisdiction to try the Mexican national who was forcibly kidnapped and brought within its jurisdiction.

The United States Constitution permits Congress and the Executive to act in violation of international law.⁷⁸ However, at the same time, the Executive branch is constitutionally restricted to act according to its own treaty until the treaty is voided or suspended.⁷⁹ Because of the governing nature of the treaty, in order for the United States courts to have jurisdiction without violating the Constitution, the act of state-

70. See *supra* note 30.

71. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988) (stating that the mode of acquiring jurisdiction over a Lebanese man suspected in relation to a hijacking was not relevant to the prosecution under the federal district court's law; the suspect was lured into international waters by the FBI and forcibly arrested and brought back to the United States).

72. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

73. *Id.* at 557.

74. *United States v. Cara-Quintero*, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd sub nom.*, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992); Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059, T.I.A.S. No. 9656 (entered into force on Jan. 25, 1980).

75. *Alvarez-Machain*, 946 F.2d at 1467.

76. *Alvarez-Machain*, 504 U.S. at 670.

77. *Id.* at 663-70.

78. Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 751 (Oct. 1992) (stating that the violation of international law by an act of Congress does not render that act invalid under United States domestic law). See also *The Paquete Habana*, 175 U.S. 677 (1900).

79. The United States Constitution confers power upon the Executive to enter into treaties. At the same time, these treaties are binding upon the government as Article VI states, "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

sponsored abductions must not violate the treaty between the two respective nations.

It is unlikely that the treaty will expressly grant the authority to abduct a terrorist from within another's borders, therefore, the courts must determine the legality through interpretation of the treaty. The *Ker-Frisbie* rule is a court-initiated doctrine that deals with this type of situation in United States law. With its foundation in the decisions of *Ker v. Illinois*⁸⁰ and *Frisbie v. Collins*,⁸¹ the rule states the general proposition that a United States court can exercise jurisdiction over a defendant in a criminal case, regardless of the manner in which the defendant was brought within the court's territorial jurisdiction.⁸² Although the validity of the *Ker-Frisbie* rule was doubted prior to *Alvarez-Machain*,⁸³ the decision confirmed it as valid under current United States law.⁸⁴

There are two conflicting views as to the purpose of extradition treaties. The majority in *Alvarez-Machain* advocated that the only purpose of these treaties is to impose mutual obligations to surrender fugitives of justice.⁸⁵ This rationale was invoked to back up the claim that the United States did not violate the treaty in *Alvarez-Machain*⁸⁶ and for further extension of the *Ker-Frisbie* rule. The dissent argued the more appropriate definition under international law that the purpose of extradition treaties is a reduction of conflicts arising when a fugitive takes refuge within another nation's borders.⁸⁷ This justification for extradition treaties recognizes the importance of acknowledging territorial integrity of other nations and the sovereignty of its government in controlling the affairs of its land by implying a duty not to abduct an individual within the foreign nation's borders.⁸⁸ With this interpretation, abduction would be a violation of the treaty if it was not pre-approved or approved following the abduction.⁸⁹

80. *Ker v. Illinois*, 119 U.S. 436 (1886) (determining that the abduction of a citizen of Lima to stand trial for larceny was not a violation of due process).

81. *Frisbie v. Collins*, 342 U.S. 519 (1952) (addressing the forcible abduction from one state to another, concluding that it would not be a denial of due process in a later conviction proceeding).

82. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991). See generally Keith Hight & George Kahale III, *International Decisions: Criminal Jurisdiction-Extradition Treaties-U.S. Government-Sponsored Abduction of Mexican Citizen*, 86 AM. J. INT'L L. 811 (1992).

83. See generally *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

84. *United States v. Alvarez-Machain*, 504 U.S. 655, 660-62 (1992) (expanding the scope of the *Ker-Frisbie* doctrine to encompass state-sponsored kidnapping in violation of customary international law). In order to be customary international law, factors to be considered are duration, uniformity and generality of practice, as well as *opinio juris*. Although this is not currently the case with regard to the death penalty, the trend indicates it soon may be. BROWNLIE, *supra* note 28, at 5-7. *Opinio juris* is a concept that the practice is required by or consistent with prevailing international law. *Id.* at 7. In *Ker v. Illinois*, the kidnapper was not a state agent, but rather a Pinkerton security guard. The differences between the two cases are worthy of investigation, but are not within the scope of this Note. See Charles Biblowit, Comment, *Transborder Abductions and United States Policy: Comments on United States v. Alvarez-Machain*, 9 NY INT'L L. REV. 105 (1996).

85. *Alvarez-Machain*, 504 U.S. at 664.

86. *Id.* With this reasoning, there was no violation because there was no obligation on the United States to refrain from abduction.

87. *Id.* at 672 n.4.

88. One of the most fundamental principles of international relations is territorial integrity of a sovereign nation, as embodied in Article 17 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, as amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, as well as provisions of the United Nations Charter, June 26, 1946, 59 Stat 1031, T.S. No. 993. The United States is a signatory of both documents.

89. See Biblowit, *supra* note 84.

The *Alvarez-Machain* decision invited much criticism from around the world.⁹⁰ The decision appeared to be in blatant violation of international law. The United States has previously recognized the importance of national sovereignty in its decisions.⁹¹ In *Murray v. Schooner Charming Betsy*, the Supreme Court declared that congressional legislation should not be interpreted in violation of customary international law if there were any other interpretation available.⁹² Notwithstanding the high regard given to national sovereignty and international law in the past, the Court conceded the possibility that it was violating accepted international principles when it reversed the lower courts' decisions and conferred jurisdiction over Mr. Alvarez-Machain.⁹³

Although the courts of the United States permitted the state-sponsored abduction of a criminal and granted jurisdiction, in the area of law dealing with extradition, cooperation in an international setting is the key to effectiveness. By following international standards of conduct, the United States would show it is cooperating with other nations and working towards achieving justice in all countries, instead of bucking against the international community. State-sponsored abduction's repudiation of international norms may jeopardize our future relations with nations and encourage harboring of suspected terrorists. If our courts support state-sponsored abductions, those decisions may set a precedent that undermines the motivation for other nations to make treaties with the United States. Although the economic and political influence of the United States is powerful, our policies do not lend to cooperation and can defeat the goal of prosecuting suspected terrorists in the United States' court system. By adhering to international customs, decisions, and its own extradition treaties, the United States increases the likelihood of bringing international terrorists to justice and, in this process, protecting its own national security.⁹⁴

VI. PROPOSAL

Any retributive justification for capital punishment is severely undermined when the suspect cannot even be extradited to the United States. Senator Mitchell was correct in stating, "the Senate is being asked to consider legislation on the basis of a slogan instead of a reason," when the Senate considered the proposal for the death penalty for the terrorist murder of United States nationals abroad in 1989.⁹⁵ Besides

90. Among those voicing disapproval are the New York Times, the Inter-American Juridical Committee of the Organization of American States, and numerous other nations, including Mexico. See Biblowit, *supra* note 84. See also Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention By Foreign Defendant Kidnapped Abroad By U.S. Agents*, 37 WM. & MARY L.REV 1401, 1512 n.454 (1996) (discussing the outrage of Mexicans and disapproval voiced by Canada, Colombia, and numerous other nations).

91. *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), wherein Chief Justice Marshall declared, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute." See also Biblowit, *supra* note 84, at 108. See *Verdugo-Urquidez*, 939 F.2d 1341 (holding that extradition treaties prohibit government-authorized kidnapping of individuals from the jurisdiction of one of the signatories for the purpose of trying the individual in the courts of the other signatory; the Court acknowledged that a nation may, however, consent to the removal of the individual from its territory outside the formal procedures of the extradition treaty after the fact, by failing to protest to the kidnapping).

92. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

93. *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). See also Biblowit, *supra* note 84, at 108.

94. Biblowit, *supra* note 84, at 115 (arguing that respecting international law and treaty obligations facilitates international cooperation in defeating terrorism).

95. 135 CONG. REC. S14227-01 (daily ed. Oct. 26, 1989) (statement of Sen. Mitchell during the

the political and emotional appeal of the legislation based on the slogan of sending a message to terrorists, the legislation is detrimental to the prosecution of terrorists, thus, counterproductive to its aims.

The AEDPA expands the terrorist crimes eligible for the death penalty. A mandatory life sentence without the possibility of parole would be a more effective solution. Instead of leaving a jury to decide the punishment for a convicted terrorist, which could range from a fine to the sentence of death, a mandatory life sentence guarantees a life sentence in jail without the possibility of parole.⁹⁶ As put forth convincingly by Senator Levin, this measure would be more effective and tougher than the possible retributive benefit of death because of the certainty of severe punishment.⁹⁷ There are extradition treaties in place with nations that will not extradite because of the death penalty possibility.⁹⁸ The United States has to promise not to seek the death penalty when dealing with these nations in order for the extradition to come to fruition and this weakens the Government's strength and effectiveness. Instead of the emotive death penalty for terrorists as set forth in the AEDPA and its predecessors, Congress should consider its effectiveness and amend the statute in favor of a mandatory life sentence without the possibility of parole.

Even though the focus of this Note is on terrorist acts resulting in the death of a United States nationals abroad, the issue is not fully addressed until dealing with the event of a domestic terrorist who flees. If the above stated policy was limited only to terrorist murders of United States nationals abroad, the end result would be inconsistent and consequently unfair. Terrorists who commit their crimes domestically and then flee may still have the death penalty brought against them, an occurrence that will invoke the AEDPA legislation or state law that may implement the death penalty.⁹⁹ If the criminal does not flee, the crime could be death penalty eligible. However, if the same crime was committed abroad and a national was killed, the terrorist would not likely be subjected to the death penalty. This appears to be an inconsistent application of the law and arguably, a favorable disposition for those who flee. Although a mandatory life sentence is not seen by some as the more favorable alternative, the inconsistency of the death penalty's application must be addressed.

One way to address the issue is to handle it on a case-by-case basis. Under that understanding, whenever the situation arises when the terrorist is abroad, the United States enters into negotiations with the other nation. If the nation demands that the death penalty not be imposed, then the United States may promise not to pursue it in order to prosecute the defendant.¹⁰⁰

This proposed solution does not address the main inconsistency. Even though there may not be any debate between the United States and the other nation regarding the death penalty in some situations, the nations that do oppose it will demand that the United States not enforce the death penalty. Under that circumstance, the inconsistency is not overcome. Once terrorists reach a nation that prohibits the death penalty, they

original debate on the imposition of the death penalty for terrorist murders of United States nationals abroad).

96. See *supra* note 37.

97. See 135 CONG. REC. S14205-06 (daily ed. Oct. 26, 1989) (statement of Sen. Levin).

98. See *supra* note 30.

99. Fairness issues arising from different punishments under federal and state laws is beyond the scope of this Note.

100. As was the case in *Soering*, 28 I.L.M. 1063.

are within a safe haven and it is likely that they will either not be prosecuted or the United States will promise not to seek the death penalty. If it does not seek the death penalty for terrorists that manage to get into one of such nations, then the maximum punishment for the same crime will vary. Even though the law is the same, if the suspect gets abroad, the probable sentence imposed is not.

Another proposal to the problem of inconsistency is taking the underlying argument of this Note to its final conclusion that the United States should abolish the death penalty. As noted, the international community is heading towards this consensus.¹⁰¹ The *Soering* case indicates that the European Court of Human Rights finds the death row phenomenon is in violation of Article Three of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰² Moreover, many international agreements, such as the Second Optional Protocol to the International Covenant on Civil and Political Rights,¹⁰³ Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰⁴ and the American Convention on Human Rights' Pact of San Jose, Costa Rica¹⁰⁵ expressly state that actions should be undertaken towards abolishing the death penalty. The United Nations General Assembly declared that it was desirable to restrict the number of offenses for which the death penalty might be imposed, with a view towards abolishing the death penalty entirely.¹⁰⁶

Removing the possibility of the death penalty with regard to international crimes, such as terrorism, is the first step in reaching a solution to this complex international criminal issue. There is no easy solution to the extradition problem manifest in terrorist crimes and the abolition of the death penalty may not be supported by the majority of the public.¹⁰⁷ But, sometimes sound public policy trumps a referendum vote.

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101. See *supra* Part IV.

102. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, opened for signature Nov. 4, 1950, Europ. T.S. No. 5 (entered into force Sept. 3, 1953).

103. Second Optional Protocol to the International Covenant on Civil & Political Rights Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, 44 U.N. GAOR Supp. No. 49 at 206, U.N. Doc. A/44/824 (1989) (ratified July 11, 1991).

104. Protocol No. 6 to the Convention for the Protection of Human Rights & Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. 114.

105. American Convention on Human Rights "Pact of San Jose, Costa Rica," Art. 4, 1144 U.N.T.S. 144 (1979).

106. See Hugo Adam Bedau, *The Case Against the Death Penalty* (visited Nov. 11, 1997) <<http://www.dnai.com/~mwood/deathpen.html>> (citing to UN Ecosoc, Official Records 58th Sess. (1971), Supp. 1, p. 36).

107. Statistics indicate that a large percentage of Americans say that they are for the death penalty. However, statistics also reveal that if given the option of the imposition of the death penalty or life imprisonment plus restitution, the approval rate of the death penalty decreases markedly. See *supra* Part IV.

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