

.....UNITED STATES OF AMERICA

No return to execution – The US death penalty as a barrier to extradition

“The datelines alone suggest that something is happening on a widespread scale... The high courts of Canada and South Africa both ruled unanimously this spring that their nations may not extradite even the most wanted criminals to the United States or other nations if they could face capital charges – effectively blocking execution, one case at a time, in an international gesture of judicial noncooperation”.¹

Introduction: Out of step with an evolving consensus

Since 1990, around 40 countries have abolished the death penalty in law. In the same period more than 600 men and women have been killed in execution chambers in the United States of America (USA). Today, as some 3,700 prisoners await execution in the USA, 109 countries have abandoned capital punishment in law or practice. In other words, a clear majority of countries have concluded that justice is not to be found at the hands of state executioners.

The USA’s growing isolation on this fundamental human rights issue has significant consequences for its foreign relations. Nine senior former US diplomats said as much in a brief filed in the United States Supreme Court in June 2001, in which they argued that the execution of people with mental disabilities – one of numerous aspects of the US death penalty which violate specific international safeguards – had become “manifestly inconsistent with evolving international standards of decency”. Such executions, the brief asserted, “strain diplomatic relations with close American allies, provide ammunition to countries with demonstrably worse human rights records, increase US diplomatic isolation, and impair the United States foreign policy interests”.² In the same month, the Parliamentary Assembly of the Council of Europe adopted a resolution calling into question the USA’s observer status because of its continuing resort to capital punishment. The resolution reaffirmed that the Council of Europe – 43 member countries with 800 million inhabitants – “considers that the death penalty has no legitimate place in the penal systems of modern civilized societies, and that its application constitutes torture and inhuman or degrading punishment within the meaning of Article 3 of the European Convention of Human Rights”.³

¹ *Dead Reckoning*, The Nation, 6 August 2001

² *McCarter v North Carolina*. Brief of *Amici Curiae*.

³ *Abolition of the death penalty in Council of Europe Observer states*. Council of Europe Parliamentary Assembly. Resolution 1253 (2001), adopted 25 June 2001.

Half a century after the international community adopted the Universal Declaration of Human Rights, the use of the death penalty against anyone, regardless of the nature of their crimes, strays from evolving global standards of justice. One clear sign of this emerging consensus is the fact that the death penalty is not permitted under the statutes of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda or the International Criminal Court, even though each was established to prosecute the most serious crimes, including genocide, war crimes, and crimes against humanity. Another indication, and the subject of this report, is that governments, in unprecedented numbers, are refusing to extradite criminal suspects to retentionist countries, at least without first obtaining guarantees that the death penalty will not be sought or imposed.

- In November a prosecutor with the Ministry of Foreign Affairs in Thailand noted that his country's use of the death penalty was making it "doubly difficult" to obtain the extradition of suspects from abroad and suggested that his government should abandon capital punishment for certain crimes.⁴
- In July it was reported that Russia would be unwilling to extradite "terrorists" to the USA if they might face the death penalty.⁵
- It was reported on 23 November that Spain would not extradite eight alleged members of the *al-Qaeda* network to the USA while there was a risk that they could face the death penalty and/or trial by special military commissions proposed by a recent presidential order.⁶

⁴ *Death penalty obstructing extraditions.* Bangkok Post, 20 November 2001. The prosecutor was addressing a seminar on international cooperation on criminal affairs and extradition.

⁵ *Radio Free Europe*, 14 July 2001.

⁶ *Spain rules out extradition of terror suspects to US: report.* AFP, 23 November 2001, and *Spain sets hurdle for extraditions.* New York Times, 24 November 2001. Amnesty International has called for the Military Order, signed by President Bush on 13 November and allowing for the trial by special military commissions of non-US citizens suspected of involvement in "international terrorism", to be revoked. The tribunals, which could be set up anywhere, would have the power to pass death sentences without the right of appeal. *Presidential order on military tribunals threatens fundamental principles of justice* (AMR 51/165/2001, 15 November 2001). Amnesty International would oppose the extradition or deportation of anyone to face these military commissions, regardless of whether the defendant would face the death penalty.

The atrocities of 11 September 2001 in New York and Washington have prompted calls from some quarters for the abandonment of extradition assurances against the death penalty.⁷ However, countries which have abolished the death penalty cannot be expected to compromise their own principles by returning suspects to the United States, or any other retentionist country, without such assurances. Obtaining this guarantee has become a standard practice of abolitionist nations, a practice which has been upheld time and again by national courts and international human rights bodies.

The fair and timely return of individuals to face justice is an essential element of international law enforcement. However, the possibility of an execution as a consequence of extradition, deportation or expulsion introduces human rights concerns of the highest importance. Amnesty International, which unreservedly opposes the death penalty in all cases, is mandated to oppose the sending of persons from one country to another where they can reasonably be expected to face the death penalty, torture or other cruel, inhuman or degrading treatment or punishment.⁸ The organization's position is consistent with the international legal principle of *non-refoulement*, which prohibits sending individuals to another country when there is a serious risk that they would face grave violations of their fundamental human rights as a consequence of that move.

Amnesty International is concerned that in the context of the so-called "war on terrorism" announced after the 11 September attacks, the US administration – a strong proponent of judicial killing – may seek to circumvent extradition protections against the death penalty. In October, for example, the USA sent a confidential document to the leaders of the European Union proposing a series of measures to enhance international cooperation against "terrorism". Among the list of 47 proposals made by the USA was reportedly a call on the EU to "eliminate discrimination against United States and third (non-EU) countries' extradition requests to members states" and to "explore alternatives to extradition including expulsion and deportation, where legally available and more efficient".⁹

⁷ See e.g. *Tories challenge death penalty bar*, The Guardian (UK), 8 October 2001. The new leader of the UK opposition Conservative Party, Iain Duncan Smith, reportedly described as "ridiculous and mad" the fact that individuals suspected of involvement in the 11 September attacks could not be extradited to the USA because of the death penalty.

⁸ For example, in 1999 AI sent urgent appeals to the USA not to deport Hani al-Sayegh to Saudi Arabia because he would be at risk of torture, unfair trial and execution. Detained in connection with the 1996 bombing of a US military complex at al-Khobar, he was nevertheless forcibly returned to Saudi Arabia in October 1999. The US Government stated that it had received (undisclosed) assurances that he would not be tortured. Today, he remains in virtual incommunicado detention in Saudi Arabia, his legal status unknown. AI fears that he remains at risk of torture, and that if he comes to trial in connection with the bombing, may face execution after secret proceedings. On 21 June 2001, Hani al-Sayegh and 13 others were indicted on capital charges in the USA, along with 13 others, in connection to the al-Khobar bombing.

⁹ *EU fears US challenge on death row extradition bar*. Reuters, 24 October 2001. On 25 October, EU officials reportedly reiterated that European Union countries will not extradite suspects to the United States if they could face the death penalty. See, e.g. *EU Pledge*. The Guardian (UK), 26 October 2001. And earlier, *Death penalty could affect extradition*, USA Today, 3 October 2001.

In this regard, a recent landmark ruling by the South Africa's Constitutional Court is instructive. Ruling that government officials had acted unlawfully in summarily handing a "terrorist" suspect over to the US Federal Bureau of Investigation (FBI) without seeking assurances that he would not face the death penalty in the USA, the Court made it clear that such an expulsion was unlawful whether characterized as a deportation or an extradition. Similarly, under the European Charter of Fundamental Rights adopted last year: "No one may be *removed, expelled or extradited* to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"¹⁰ (emphasis added).

There is a history of US conduct that fuels concern in this area. In June this year, Juan Garza became only the second federal death row prisoner to be executed in the USA in nearly four decades. There is evidence that the US authorities engineered his original deportation from Mexico in such a way as to avoid having to give assurances against the death penalty under the Mexico/USA extradition treaty. In another case in 1990, US agents forcibly abducted a Mexican national from Mexico and the US Supreme court ruled that the manner of his apprehension – a violation of international law – did not prohibit his trial in the USA. In 1998, the Virginia Supreme Court cited that precedent in upholding the death sentence of a Pakistan national abducted in Pakistan by FBI agents and flown back to the USA where he awaits execution today.

The USA's use of the death penalty has frequently called into question its commitment to an international system for the protection of fundamental human rights. Successive US administrations have adopted a self-serving approach to the ratification of major international human rights treaties, a strategy formulated in part to allow the US justice system to ignore international safeguards governing the use of capital punishment and to defend the US death penalty against the global abolitionist tide. Some of the most damaging conditions it has attached to human rights treaties were lodged in part in response to a landmark ruling in 1989 by the European Court of Human Rights, in which the Court blocked extradition to the United States because of aspects of the USA's use of the death penalty.¹¹

As the United States continues to seek an international alliance in responding to the crimes of 11 September, it has been suggested that one result of such coalition-building might be a greater future respect for international treaties and organizations on the part of the USA. This remains to be seen. In any event, the USA must now recognize that its continuing resort to judicial execution in an increasingly abolitionist world not only flouts world trends and damages its reputation abroad, but also blocks international cooperation on law enforcement. If it wishes to facilitate the return of criminal suspects from other countries, and to be seen to

¹⁰ Article 19(2), *Charter of Fundamental Rights of the European Union*, O.J. C 364/01, of 18 December 2000.

¹¹ *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A No. 161.

be pursuing justice rather than revenge, it should reject the use of the death penalty. Pending abolition of this outdated punishment, any refusal by US authorities to provide extradition assurances against imposition of the death penalty when required to do so can only result in lengthy and unnecessary delays in the administration of justice.

The emergence of death penalty clauses in extradition treaties and laws

Distinct from deportation and expulsion, international extradition is the formal process by which one country surrenders to a second country an individual who stands accused or convicted of a crime committed within the territorial jurisdiction of the requesting state.¹² Generally extradition is not available unless there is an extradition treaty in force between the two countries. Such agreements impose a variety of legal requirements that must be met before the surrender of the detainee can proceed. For example, extradition typically requires compliance with basic principles of natural justice: the individual facing surrender is entitled to challenge the legitimacy of the warrant in a court of law. The domestic courts are often required to verify the identity of the person in custody, to establish that there is sufficient evidence to sustain the charge and that the charge itself is an extraditable offence. Extradition treaties may also prohibit surrender outright for certain categories of individuals and offences, or require the requesting state to meet specific conditions before extradition is permitted. Two common principles of extradition treaties are that the offence is punishable in both countries – the principle of dual criminality – and that the suspect can only be tried and punished for the offences specified in the extradition request – the rule of speciality. The USA has extradition treaties with over 100 countries.

Following the abolition of the death penalty by some countries in the mid-19th century, extradition treaties began to include provisions whereby an abolitionist nation could refuse a surrender request by a retentionist nation unless satisfactory assurances were provided that the death penalty would not be imposed or carried out. One early example is the 1908 treaty between the USA and Portugal – which abolished the death penalty for ordinary crimes in 1867 – authorizing Portuguese authorities to refuse extradition for any offence punishable by death in the requesting state.¹³ More recently, the USA's extradition treaties

¹² Extradition can also occur within a country. Inside the USA, for example, a criminal suspect may be wanted in one state, but arrested in another. A recent case where interstate extradition was challenged was that of Robert Springsteen, arrested in 1999 in West Virginia and wanted for a murder committed in Texas. The basis to this challenge included that Springsteen was 17 at the time of the crime in question, and under West Virginia law would be considered a juvenile, and that it would be unconstitutional to send him back to Texas, where he would be considered an adult and eligible for the death penalty. West Virginia is an abolitionist state. The West Virginia courts refused to block the extradition. Springsteen was tried and sentenced to death in Texas in 2001, in violation of international law prohibiting the use of the death penalty for crimes committed by under-18-year-olds.

¹³ Portugal has now enshrined this in its national constitution, which requires that “no one may be extradited for crimes which carry the death penalty under the law of the requesting State”. Constitution of Portugal, Article 33(3).

with Paraguay and South Africa, which came into force in March and June 2001 respectively, allow both these abolitionist countries to refuse extradition to the USA without assurances against the death penalty.

In 1990, the United Nations General Assembly adopted a Model Treaty on Extradition, in order to provide UN member states with a framework for creating or revising bilateral extradition agreements that would “take into account recent developments in international criminal law”. Mandatory grounds for refusal of extradition under the Model Treaty include “if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status”, as well as “if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14.” Optional grounds for refusal include: “If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.”¹⁴

Until recently, extradition treaties between the USA and abolitionist countries tended to adopt a discretionary standard for death penalty assurances. In March 1976, for example, Canada and the United States ratified a new extradition treaty which included a clause on optional assurances against the death penalty. At the time of the treaty negotiations in 1974, Canada still formally maintained the death penalty in its criminal code, whereas all executions in the USA had been halted by the US Supreme Court and a number of US states had abolished the death penalty outright. Article 6 of the Treaty on Extradition recognized that legal conflict by permitting non-executing jurisdictions to refuse extradition unless satisfactory assurances were provided.¹⁵

Three months after the treaty was ratified, the status of the death penalty in the two countries shifted dramatically. On 2 July, the US Supreme Court issued its decision in *Gregg v. Georgia*, which lifted a four-year judicial moratorium on executions. Two weeks later, the Parliament of Canada formally abolished the death penalty for non-military offences, replacing it with a mandatory life sentence for all first-degree murders.

Although the policy of successive Canadian governments was to consider seeking extradition assurances on a case-by-case basis, the actual practice became one of permitting

¹⁴ Model Treaty on Extradition, A/RES/45/116, 14 December 1990.

¹⁵ Article 6, *Treaty on extradition, as amended by exchange of notes of 28 June and 9 July 1974; entered into force 22 March 1976*. 27 UST 983; TIAS 8237.

almost all capital extraditions to the USA without imposing any conditions against the death penalty. This completely discretionary policy came to an abrupt end in 2001, following a landmark ruling by the Supreme Court of Canada (see below).

In the 25 years since Canada and the USA parted company on the use of the death penalty, the number of countries which are abolitionist for all crimes has more than tripled and now stands at 75. This worldwide trend toward total abolition is also reflected in the increasing application of mandatory obligations in capital extradition cases.

After 10 years of negotiations, the governments of Austria and the United States announced the signing of a new extradition treaty in January 1998. The official Austrian press release noted that the presence of the death penalty in the USA proved to be a major hindrance in the negotiations: “For several years, the question of extradition in case of an impending death sentence remained open. Austria thereby had to insist on its point of view that in case of extradition a death sentence must not be imposed, even if its execution would have been excluded by the treaty or binding assurances were to be given that a death sentence would not be executed.”¹⁶

Other countries have adopted statutory or constitutional provisions which prohibit extradition without assurances to all retentionist countries. For example:

- Australia’s Extradition Act requires that surrender may only proceed if the Attorney-General is satisfied by assurances that the death penalty will not be imposed or carried out.¹⁷
- Panamanian law states that extradition will not be granted “when the offence carries the death penalty in the requesting State, unless the latter formally undertakes to apply a less severe penalty to the person sought”.
- Angola has enshrined protection against extradition to retentionist countries in its national constitution, which prohibits the death penalty and states that “the extradition of foreign citizens for political motives or for charges punishable by the death penalty under the laws of the applicant country shall not be permitted”.¹⁸

¹⁶ *Extradition Treaty between Austria and the United States Signed*, Austrian Press and Information Service, 8 January 1998.

¹⁷ *Extradition Act 1988*, Section 22(3).

¹⁸ Article 27(2). Article 27(1) prohibits any extradition or expulsion of Angolan citizens from Angolan territory.

- After abolishing the death penalty in 1998, Azerbaijan adopted legislation in May 2001 that bans extradition without guarantees that death sentences will not be imposed or carried out.¹⁹

Death penalty limitations in regional extradition conventions

¹⁹ *Azerbaijan not to extradite criminals sentenced to death*, BBC Monitoring Service, 16 May 2001.

As capital punishment has retreated across the world, regional extradition conventions have also been developed. In 1957, the European Convention on Extradition created provisions to permit cooperation between European nations on the return of individuals to jurisdictions which still retained the death penalty. Under Article 11 of the Convention, countries which are abolitionist in law or in practice may obtain sufficient assurances that the death penalty will not be carried out before permitting extradition for an offence which is punishable by death in the requesting state. The stipulation provided abolitionist countries in Europe with the discretionary power to obtain assurances against the death penalty, but did not require them to do so in every case.²⁰ The optional assurance provision contained in the European Convention on Extradition has since evolved into a human rights norm within the European Union. As noted in the introduction, article 19(2) of the Charter of the Fundamental Rights of the European Union states: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

Similarly, article 9 of the 1981 Inter-American Convention on Extradition requires that member States “not grant extradition when the offense in question is punishable in the requesting State by the death penalty”, unless “sufficient assurances” are obtained that capital punishment would not be imposed.²¹

Extradition rulings by international bodies, and the US response

Since the 1980s, as the number of countries abolishing the death penalty has continued to rise, rulings and resolutions by international courts and human rights bodies have shown an emerging consensus against the extradition of individuals from abolitionist countries to face the death penalty elsewhere. For its part, the USA has responded with measures to protect its policies regarding the death penalty from the reach of international human rights standards.

²⁰ For an overview of the development of European extradition norms prohibiting the death penalty, see *The Death Penalty as a Barrier to Extradition*, Amnesty International, AI Index: ACT 51/14/89, February 1989.

²¹ Inter-American Convention on Extradition, 25 February 1981, art. 9, 20 I.L.M. 723 (1981).

In 1989, the European Court of Human Rights blocked the extradition from the United Kingdom to the USA of German national Jens Soering who was facing capital charges in Virginia for the murder of his girlfriend's parents in 1985. The Court ruled unanimously that Soering's extradition "would expose him to a real risk of treatment going beyond the threshold set by Article 3" of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment.²² The Court cited the length of time, six to eight years, that condemned prisoners in Virginia can expect to spend in the harsh conditions of death row, "with the ever present and mounting anguish of awaiting execution" – the so-called 'death row phenomenon'. It also noted personal circumstances relating to Soering himself, "especially his age [18] and mental state at the time of the offence". After the UK had sought firm assurances that Jens Soering would not face the death penalty, he was returned to Virginia and sentenced to life imprisonment.²³

The USA responded with what have been dubbed the "*Soering* reservations" to its subsequent ratification of two major international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In each case, the US made its ratification of the treaty effectively devoid of any real content or intention to change its behaviour by declaring that it considered itself bound by the prohibition on "cruel, inhuman or degrading treatment or punishment" only in so far as this term matched the "cruel and unusual punishment" prohibited by the US Constitution (as interpreted by the United States Supreme Court, a judicial body which remains unlikely to find that the death penalty *per se* offends the constitution). In the case of the Convention Against Torture, the USA also lodged the following "understanding" relating to the 'death row phenomenon': "The United States... does not consider this Convention to restrict or prohibit the United States from applying the death penalty..., including any constitutional period of confinement prior to imposition of the death penalty."²⁴ The US Supreme Court has remained unwilling to examine the cruelty of forcing a human being to live under a sentence of death for periods far in excess of those noted in the European Court's *Soering* decision.²⁵

²² *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A No. 161.

²³ In a 1996 decision in a non-capital case involving the threatened deportation from the UK to India of a Sikh separatist, the European Court noted that Article 3's prohibition against torture or inhuman or degrading treatment or punishment was absolute. Therefore the expulsion of anyone, however "undesirable or dangerous" their activities might be, was prohibited if it raised reasonable fears that a violation of Article 3 would result. The Court was "well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence", but noted that "Article 3 enshrines one of the most fundamental values of democratic society". *Chahal v. United Kingdom* (1996), 23 EHRR 413. The Court's human rights rulings are binding on the 43 member States of the Council of Europe.

²⁴ In ratifying the ICCPR, the US also reserved the right to execute anyone, except pregnant women, subject to its own constitutional constraints. This includes people who were under 18 years old at the time of the crime, which is unequivocally prohibited by the treaty. The USA's reservations to both treaties have been widely condemned, including by the expert UN bodies - the Human Rights Committee and the Committee Against Torture - set up to monitor compliance with the ICCPR and the Convention Against Torture.

²⁵ In 1999, the Court dismissed the appeals of two prisoners who claimed that the length of time they

had spent on death row – 19 and 24 years – amounted to cruel and unusual punishment. Dissenting against the majority’s refusal to consider the claim, Justice Breyer noted that a “growing number of courts outside the United States...have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading or unusually cruel”. He cited decisions by the Judicial Committee of the Privy Council, the Supreme Court of Zimbabwe, the Supreme Court of India, and the European Court of Human Rights. *Knight v Florida; Moore v Nebraska*, 8 November 1999.

In 1994, the UN Human Rights Committee ruled that Canada had violated its obligations under the ICCPR, by extraditing suspected serial killer Charles Ng to California “without having sought and received assurances that he would not be executed” (he was sentenced to death in 1999 and remains on California’s death row). The ruling determined that execution by lethal gas – the sole method used in California at the time – violated the prohibition against cruel, inhuman or degrading punishment in Article 7 of the ICCPR. While acknowledging that capital extraditions were not prohibited outright under the ICCPR, a majority of the Committee found that an extradition to face execution in the gas chamber was not permissible.²⁶

In its report to the UN Committee Against Torture in 2000, the US Government noted that “because critics of capital punishment consider the sanction to be inherently cruel and inhuman, and because many advocates of abolition consider certain methods of execution to be similarly impermissible”, the United States had conditioned its 1994 ratification of the Convention Against Torture to have “the intended effect of leaving the important question of capital punishment to the domestic political, legislative, and judicial processes.”

While the USA has maintained this insular approach, the global abolitionist trend has continued. During its past three sessions, the UN Commission on Human Rights has adopted resolutions calling for a worldwide moratorium on executions. The resolutions have also called on States “that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out”.²⁷

National court rulings on extradition and the death penalty

By the end of the 20th century, executions had ceased entirely in the 43 member states of the Council of Europe. Abolition of the death penalty has become obligatory for all nations seeking membership in the Council and, as already noted, earlier this year its Parliamentary Assembly called into question the continuing observer status of the USA because of its retention of capital punishment.

²⁶ *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994). As of 22 October 2001, there were 147 State Parties to the ICCPR, of which 98 had also recognized the competence of the Human Rights Committee to receive and rule on individual complaints.

²⁷ Most recently, *The question of the death penalty*, E/CN.4/RES/2001/68, 25 April 2001. The resolutions have also welcomed the exclusion of capital punishment from the penalties that the International Criminal Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court are authorized to impose. Fifty-two countries are currently represented on the Commission.

In 1983, the Council of Europe created Protocol No. 6 of the European Convention on Human Rights (ECHR), which states: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”²⁸ Six years later, the UN General Assembly approved the text of the Second Optional Protocol to the ICCPR, which likewise obligates its signatories to abolish the death penalty and to prohibit executions.²⁹ The Organization of American States followed suit the following year, by approving a similar optional protocol to the American Convention on Human Rights.³⁰ While the protocols permit signing nations to reserve the right to retain the death penalty for serious military offences during time of war, even this limited reservation to total abolition is rarely invoked.

Countries which are parties to these human rights protocols have increasingly come to view the refusal to extradite without assurances as a necessary element of their full compliance with the prohibition in their domestic law. In 1990, the Supreme Court of the Netherlands held that a US serviceman stationed in the Netherlands could not be extradited to face a murder charge in the USA without assurances against the death penalty. Although the NATO Status of Forces Agreement provided for unsecured extradition, the Court concluded that the provisions of the Sixth Protocol and the ECHR took precedence and that such assurances were now a required norm under European law. Authorities in the United States provided the necessary guarantees.³¹

²⁸ *Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms*, (ETS No. 114), entered into force 1 March 1985. As of 2 November 2001, 39 of the 43 member States of the Council of Europe had ratified the Protocol.

²⁹ *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, U.N. Doc. A/44/49 (1989), entered into force 11 July 1991. A total of 45 nations are currently parties to the Protocol.

³⁰ *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, O.A.S. Treaty Series No. 73 (1990), adopted June 8, 1990. Eight OAS member nations have now ratified the Protocol.

³¹ *Short v. Netherlands*, (1990) 76 Rechtspraak van de Week 358, (1990) 29 I.L.M. 1378.

The mere presence of the death penalty in the United States can raise an insurmountable barrier to the return of suspects facing capital charges. In June 1996, the Italian Constitutional Court overturned provisions of the Italian penal code and the extradition treaty with the United States, which provided that an extradition could be granted on receipt of assurances – deemed adequate by the courts and the Ministry of Justice – that the death penalty would not be passed or carried out by the requesting state. Although Florida prosecutors had supplied the necessary assurances in order to obtain the return of Italian-born Pietro Venezia, the Court found that no form of guarantee from US officials was sufficient to permit such surrenders.³² As the Italian government subsequently told the UN Human Rights Committee, “the wording ‘adequate assurances’...is not constitutionally permissible” because the values underlying Italy’s constitutional ban on the death penalty “require than an absolute guarantee be given”.³³

Recent court decisions in two abolitionist countries – Canada and South Africa – illustrate the extent to which international judicial opinion on extraditions has evolved over the past decade. On 15 February 2001, the Supreme Court of Canada unanimously ruled that Canadian authorities were required to obtain guarantees against the death penalty before extraditing Canadian citizens Atif Rafay and Sebastian Burns to face capital murder charges in the state of Washington. The Court further held that “in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.” According to all nine judges, “in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped.”³⁴

A decade earlier, the Supreme Court had ruled 4 to 3 that Canadian authorities were under no such constitutional obligation, retaining broad discretionary authority when determining whether or not to seek assurances.³⁵ Confronted with the same basic question just 10 years later, the Supreme Court pointed to a number of factors which now “tilted in favour” of mandatory assurances. Those factors included the evolution of international extradition standards, the worldwide trend toward abolition, growing concerns over the adequacy of US capital procedures and the inherent risk of wrongful conviction and execution. Rafay and Burns were returned to Washington for trial on 28 March 2001, after the USA formally provided Canada with a guarantee that they would not face the death penalty.

On 28 May 2001, the Constitutional Court of South Africa ruled that government officials had violated their constitutional and legal obligations by surrendering a Tanzanian national to the USA without first seeking assurances that he would not face the death penalty

³² Corte Costituzionale, Sentenza n. 223, 1996. Since Italian law permits prosecutions for crimes committed abroad, Pietro Venezia would be tried instead in Italy, based on evidence provided by Florida prosecutors.

³³ CCPR/C/103/Add.4.

³⁴ *USA v. Burns*, [2001] 1 S.C.R. 283.

³⁵ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

on return. Khalfan Khamis Mohamed had been arrested in Cape Town on an international warrant alleging his involvement in the 1998 bombing of the US embassy in Tanzania. He was interrogated without the presence of an attorney, held incommunicado and summarily deported. The Court expressed concern at evidence pointing to the “sinister inference that Mohamed was deliberately kept isolated and uninformed in order to facilitate his removal by the FBI agents”. The Court made it clear that the “procedure followed in removing Mohamed to the United States of America was unlawful whether it is characterised as a deportation or an extradition”.

The Constitutional Court ruled that: “In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.” The Court recalled its 1995 decision finding that the death penalty violated fundamental human rights and the constitution, and added that now “the international community shares this Court’s view of the death sentence, even in the context of international tribunals with jurisdiction over the most egregious offences, including genocide.”

The South African court pointed to the case of Mamdouh Mahmud Salim, who was indicted in the USA along with Mohamed as a co-conspirator in the US embassy bombings: “The German government sought and secured an assurance from the United States government as a condition of the extradition that if he is convicted, Salim will not be sentenced to death. This is consistent with the practice followed by countries that have abolished the death penalty... If the South African authorities had sought an assurance from the United States against the death sentence being imposed on Mohamed before handing him over to the FBI, there is no reason to believe that such an assurance would not have been given.”³⁶

Salim was arrested by German authorities in September 1998 and extradited to the USA three months later. Alleged to be a chief financial aide and weapons procurer for the *al-Qaeda* network headed by Osama bin Laden, Salim is currently awaiting trial in New York on charges stemming from the August 1998 bombings of the US embassies in Kenya and Tanzania, acts of violence which resulted in some 300 dead and thousands of injured.

The Constitutional Court also took the highly unusual step of sending its judgment directly to the US federal judge presiding over Mohamed’s capital murder trial. Mohamed was later convicted, but after three days of deliberation, the jury could not reach the requisite unanimity for a death sentence. As a result he was sentenced to life imprisonment without the possibility of parole. The jury forewoman said that seven of the 12 jurors had concluded that “if Khalfan Mohamed is executed, he will be seen as a martyr and his death may be exploited by others to justify future terrorist acts”. After the trial, a woman whose

³⁶ *Mohamed and another v. President of Republic of South Africa and others*, CCT 17/01 (2001).

husband was killed in the embassy bombing in Tanzania welcomed the fact that a death sentence had not been passed: “Speaking for myself and perhaps for other victims who oppose the death penalty, this verdict is a profound relief. We will not have to be confronted with yet another death in the wake of the bombings tragedy.”³⁷

Assurances given, extraditions proceed

³⁷ *Jury rejects death penalty for terrorist in embassy bombing*. New York Times, 11 July 2001. The same jury had deadlocked in the case of Mohamed Rashed Daoud al-‘Owhali a month earlier, and he was also sentenced to life without parole for his involvement in the Kenya embassy bombing. This time 10 of the 12 jurors concluded that executing him “could make him a martyr”. It is interesting to note that the jury’s decision came the day after the hugely-publicized federal execution of Timothy McVeigh, who was convicted of the bombing of a federal building in Oklahoma City in 1995 in which 168 people were killed and hundreds injured. See: *The illusion of control: “Consensual” executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment* (AMR 51/053/2001, April 2001).

*“In capital [extradition] cases, US prosecutors have no choice but to respect other countries’ judgment about the suitability of the death penalty, even when they do not agree with it.”*³⁸

During the past decade, as prosecutors have realized that there is no alternative but to waive the death penalty if they want to obtain the return of a capital suspect, extradition requests from various US jurisdictions have proceeded only on the basis of guarantees that execution would not be pursued. For example:

- In 1991, prosecutors in Dallas, Texas, attempted to extradite Joy Aylor from France on a capital murder warrant. Despite a two-year effort in the French courts to secure her unconditional return, Texas officials were nonetheless compelled to provide binding assurances against the death penalty to the French authorities. Aylor was sentenced to life imprisonment after her return to Texas.³⁹
- In 1997, in order to secure the return of Beth Ann Carpenter from Ireland on charges of capital murder, a Connecticut prosecutor agreed not to seek a death sentence against her.⁴⁰
- 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 that we could do behind the scenes. We were left with no choice”.⁴¹

³⁸ *Extradition's limits: Death penalty compromise is reasonable*, Editorial, Sacramento Bee, 21 July 2001.

³⁹ *French court upholds Aylor's extradition; U.S. vows no death penalty in capital murder case*, Dallas Morning News, 16 October 1993.

⁴⁰ *The trial of her life*. Hartford Courant, 28 October 2001.

⁴¹ *Del Toro won't face death penalty*. St Petersburg Times, 18 December 1997. A federal prosecutor subsequently told a congressional committee: “Questions have been raised as to why Del Toro, a US citizen, was not simply summarily deported or expelled from Mexico... Clearly, the US government would have preferred the use of deportation mechanisms in this case, and the [Immigration and Naturalization Service] agents at our Embassy in Mexico City vigorously pursued this course... It appears, however, that due to...the perceived difficulties in obtaining an expeditious assurance that the fugitive would not receive the death penalty if surrendered to the authorities in this country, [the Mexican authorities pursued the case] under the terms of the extradition treaty... Both governments have learned from this experience that, when necessary and mutually acceptable, death penalty assurances can be expeditiously provided in deportation cases, as they must be in extradition cases...”. Deputy Assistant Attorney General Mary Lee Warren, testimony to the House of Representatives Subcommittee on Criminal Justice, Drug Policy and Human Resources, 23 June 1999.

- In October 2001, a Florida prosecutor seeking the return of Mario Betancourt from Mexico in connection with two murders committed in January 2000, said that “we really have no choice” but to waive the death penalty.⁴²
- 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 last year. The Wharton County District Attorney said of this practical approach, “I’d rather seek the death penalty, but I have to live in the real world”.⁴³

Some prosecutors will not provide assurances even if that prevents the suspect’s extradition. In Texas, for example, Harris County District Attorney Chuck Rosenthal maintains this position, as did the former District Attorney of Los Angeles County, Gil Garcetti. In 1997 District Attorney Garcetti refused to provide the Mexican authorities with assurances that he would not seek the death penalty against David Alvarez, a US national in Mexico facing murder charges in California. The District Attorney admitted that he had maintained his position despite a request from Attorney General Janet Reno that he waive the death penalty in order to settle the issue. The Mexican government also held firm, and rather than extradite Alvarez without assurances decided to prosecute him in Mexico.⁴⁴

Gil Garcetti’s successor at the Los Angeles County District Attorney’s Office has adopted a different approach aimed at ending stalemates in extradition cases involving abolitionist countries. In the year since he took office, District Attorney Steve Cooley has waived the death penalty in three cases in order to obtain the extradition of the suspect in question. For example, in April Josef Jurcoane was extradited to Los Angeles from Mexico, and in September Juan Manuel Casillas was arrested by Mexican authorities to face extradition to Los Angeles, after District Attorney Cooley gave assurances against the death penalty in each case. The *Los Angeles Times* has said that the District Attorney “is right to embrace a practical approach”, but that the “real answer is to rethink the death penalty.”⁴⁵

⁴² *Killing suspect may lose house in foreclosure.* Port St Lucie News, 4 October 2001.

⁴³ Houston Chronicle, 12 January 2001.

⁴⁴ *US battles Mexico in extradition war.* CNN.com, 30 September 1997; *Mexico to try US fugitive for murder.* CNN.com, 2 October 1997. Mexico reportedly recognized dual citizenship in Alvarez’s case because both his parents were born in Mexico. Two of the four murder victims in the case were Mexican nationals.

⁴⁵ *Perhaps Not Equal, but It’s Just,* Editorial, Los Angeles Times, 10 January 2001.

Suspects facing federal capital charges have also been extradited after the federal authorities gave assurances that they would not pursue the defendant's execution. On 7 September 2001, the Government of Colombia extradited Fabio Ochoa Vasquez to the United States to face charges under the federal drug kingpin statute. The head of the US Drug Enforcement Administration told CNN that "as part of the extradition, he will not be subject to the death penalty".⁴⁶

In March 2001, James Charles Kopp, an activist in the Pro-Life Movement and on the FBI's list of "Ten Most Wanted Fugitives", was arrested in France on charges under US federal and state law of killing a doctor who performed legal abortions at a clinic in New York State. The federal charges carried the possibility of the death penalty. US Attorney General John Ashcroft stated: "Shortly after the arrest, the French government, pursuant to its law and practice, asked the United States to assure it that the death penalty will not be imposed or carried out. Nevertheless, I have been working to ensure the United States' ability to pursue strong punishment for this terrible crime. I wanted to make sure that our nation would not be constrained by limits placed on Kopp's extradition by France, preventing us from seeking punishment outlined by our laws and our Constitution, such as the death penalty. Unfortunately, in order to ensure that Kopp... is brought to justice in America, we have had to agree not to seek the death penalty."⁴⁷

In his statement ruing the fact that the US Government had been stymied in its attempts to pursue Kopp's execution, Attorney General Ashcroft said: "Kopp committed a heinous crime that deserves severe punishment. We need to send a strong message that...violence is not the solution". Within two weeks, the US Government had sent precisely the opposite message, and distanced itself yet further from the aspirations of the international community, by carrying out the first two federal executions in 38 years.

The temptation to circumvent extradition protections

*"Experts warn that bringing persons residing abroad to US justice by means other than extradition or mutual agreement with the host country, ie by abduction and their surreptitious transportation, can vastly complicate US foreign relations, sometimes jeopardizing interests far more important than "justice", deterrence, and the prosecution of a single individual."*⁴⁸

⁴⁶ DEA official: Ochoa extradition sends a message. CNN.com, 8 September 2001.

⁴⁷ Statement by the Attorney General on James Charles Kopp extradition, 7 June 2001.

⁴⁸ Issue Brief for Congress. *Terrorism, the future, and US foreign policy*. Raphael F. Perl, Foreign Affairs, Defense and Trade Division, Congressional Research Service, updated 19 September 2001.

As a result of extradition protections against the death penalty, some US officials have reacted angrily to what they see as foreign interference in the US criminal justice system. For example, after Florida prosecutors had to guarantee not to seek the death penalty against Jose Luis Del Toro in order to obtain his extradition from Mexico (see above), US Congressman Dan Miller introduced a resolution into the House of Representatives calling on the government to renegotiate the USA's extradition treaty with Mexico: "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."⁴⁹ In January 2001, Congressman Miller wrote to President Bush urging him to make extradition reform a priority in his new administration, and in July introduced a bill into Congress which in part would provide for sanctions against governments that are "uncooperative in extradition efforts with the United States".⁵⁰

With this in mind, Amnesty International is concerned by instances in which US agents have circumvented formal extradition procedures, thereby avoiding having to give assurances against the death penalty. The organization is also concerned by the USA's past use and official sanctioning of the forcible abduction of individuals from other countries in violation of the international legal prohibition on arbitrary detention. It fears that, in the context of the current "war on terrorism", US agents and others cooperating with them may be tempted to pursue such tactics – so called "rendition" – in attempting to bring criminal suspects to trial in the United States. One researcher recently noted in a briefing to Congress that "[i]ncreasingly, rendition is being employed by the US as a vehicle for gaining physical custody over terrorist suspects", which he says "raises prospects of other nations using similar tactics against US citizens".⁵¹

⁴⁹ *Congressman Miller's resolution on Del Toro case debated by Congress today.* Congressman Dan Miller, News Release, 15 September 1998. The resolution passed the House of Representatives.

⁵⁰ H.R. 2574 - the International Extradition Enforcement Act of 2001. Having been through various committees and subcommittees, the bill was with the House Subcommittee on Crime at the time of writing.

⁵¹ Raphael F. Perl, *Terrorism, the future, and US foreign policy.* op. cit.

In June 1995, President Bill 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”.⁵² Three years earlier, the US Supreme Court had ruled that the US Government can forcibly abduct a criminal suspect from a foreign country and bring him or her to trial in the USA. The case involved Mexican national Humberto Álvarez-Machain, a doctor who was wanted in the USA for his alleged involvement in the murder of an agent of the US Drug Enforcement Agency (DEA). Álvarez-Machain was abducted in 1990 from Mexico by agents paid by, and under the orders of, the DEA. Two federal courts ruled that he could not be tried in the USA because his abduction had violated the US/Mexico extradition treaty. However, the US Supreme Court disagreed, arguing that the extradition treaty “says nothing about either country refraining from forcibly abducting people from the other’s territory or the consequences if an abduction occurs”.⁵³ The majority rejected the defence argument that the treaty must be interpreted against the backdrop of a customary international law ban on international abductions. The Court said that the defence may have been correct in characterizing the abduction as “shocking” and that it may have violated “general international law principles”, but was nevertheless not a violation of the extradition treaty because the latter had not been invoked. It concluded that Álvarez-Machain’s trial in the USA was therefore not prohibited. The Court’s position had, in effect, not shifted in over a century.⁵⁴

Three of the Supreme Court Justices dissented in *Álvarez-Machain*. Writing for this minority, Justice Stevens wrote: “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 preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, an “avidity to punish is always dangerous to

⁵² PDD-39, on *US Policy on Counterterrorism*, was signed by President Clinton on 21 June 1995, and declassified in 1997. In part, it 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. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and conclusion of new extradition treaties. 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...”.

⁵³ *US v. Alvarez-Machain*, 504 U.S. 655 (1992).

⁵⁴ In 1883, Frederick Ker was kidnapped in Peru and forcibly returned to the USA to stand trial in Illinois. An agent had been sent from the USA to Peru with a warrant to demand Ker in accordance with the extradition treaty between the two countries. However, rather than present the warrant to the Peruvian authorities, the agent forcibly abducted Ker instead. Ker sought to dismiss the case against him on the grounds of his illegal abduction. In *Ker v Illinois* (1886), the US Supreme Court ruled that the treaty had not been invoked and that his abduction did not bar his trial in the US.

liberty” because it leads a nation “to stretch, to misinterpret, and to misapply even the best of laws”.

At the time, Amnesty International expressed its concern about the implications of the judgment, including that it could open the way for forcible abductions of persons who could face the death penalty, a punishment from which they would otherwise be protected under extradition treaties.⁵⁵ Several countries reportedly sought to have their extradition treaties with the USA contain a provision prohibiting transborder abductions, and the Mexican authorities threatened to suspend cooperation with US law enforcement agencies.⁵⁶ In November 1994, the US and Mexican governments signed a treaty prohibiting transborder abductions, “in response to ongoing GOM [Government of Mexico] concerns over the issue”.⁵⁷ However, this bilateral agreement has not been brought before US Congress for ratification and is therefore not in force.

⁵⁵ *USA: Kidnapping of criminal suspects sanctioned by United States Supreme Court.* AI Index: NWS 11/32/92, 12 August 1992. In the context of the aftermath of 11 September, it has been suggested that this Supreme Court precedent “clearly gives Bush a free hand in his pursuit of bin Laden and other terrorists, at least as far as the US courts are concerned.” *No legal snags in terrorist hunt; experts cite precedent.* The Hartford Courant, 20 September 2001.

⁵⁶ *International police cooperation in northern America: A review of practices, strategies, and goals in the United States, Mexico and Canada.* Mathieu Deflem. In: *International Police Cooperation: A World Perspective* (Ed. Koenig and Das), Lexington Books, 2001.

⁵⁷ *International Narcotics Control Strategy Report, March 1995.* US Department of State, Bureau for International Narcotics and Law Enforcement Affairs.

The US Department of Justice's Criminal Resource Manual states that "[f]ugitives deported to the United States or otherwise returned under other than a formal order of extradition often claim that they were kidnapped (by United States or foreign agents) and returned illegally. The courts generally dispose of those arguments under [US Supreme Court precedent]".⁵⁸ The United States Attorneys' Manual urges federal prosecutors to be cautious in this area, but nevertheless suggests that, with Justice Department approval, the abduction or other "extraordinary rendition" of otherwise non-extraditable criminal suspects abroad is possible: "Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Álvarez-Machain* type renditions without advance approval by the Department of Justice." The manual also raises the possibility of luring a person out of a country from which he or she is not extraditable into one from where extradition becomes possible.⁵⁹ This time the manual warns: "Such ruses may also cause foreign relations problems with both the countries from which and to which the lure takes place. Prosecutors must notify the Office of International Affairs (of the Justice Department) before pursuing any scenario involving an undercover or other operation to lure a fugitive into a country for law enforcement purposes."⁶⁰

⁵⁸ *Deportations, Expulsions, or other Extraordinary Renditions*. Section 610, Criminal Resource Manual, Department of Justice. The US Court of Appeals for the Second Circuit has ruled that US jurisdiction will be jeopardized when such abductions resort to the use of "torture, brutality and similar outrageous conduct".

Francisco Toscanino, an Italian national, alleged that he had been abducted in 1973 from his home in Uruguay by Uruguayan police officers, acting as paid agents of the US Government. He stated that he was knocked unconscious in front of his seven-month pregnant wife, bound, blindfolded and driven to Brazil. In Brasilia, he was allegedly tortured over a period of 17 days by Brazilians acting as agents of the USA. He claimed he was subjected to sleep deprivation, electric shocks, beatings and other torture techniques. He claimed that a US official was present at times and participated in some of the interrogations. Eventually, he said that he was drugged and flown to New York. In the same case, Julio Juventino Lujan, an Argentinian national, was allegedly lured to Bolivia, where he was taken into custody by Bolivian police officers acting as paid agents of the US Government. He was held incommunicado and subsequently flown to New York. The Second Circuit ruled that the circumstances of Toscanino's apprehension, if proved, would negate a US court's jurisdiction over him. It ruled that this was not so in Lujan's case. *US v Toscanino*, 500 F.2d 267 (1974) and *Lujan v Gengler*, 510 F.2d 62 (1975).

⁵⁹ Fawaz Yunis, a Lebanese national, was the subject of a so-called "irregular rendition" in September 1987. Wanted in connection with the 1985 hijacking of a Jordanian airliner with two US nationals among its 70 passengers, he was lured aboard a yacht off Cyprus by US federal agents. He was arrested once the yacht entered international waters, and transferred to a US Navy vessel where he was interrogated for several days en route to a rendezvous with a US aircraft carrier. He was flown back to the United States, convicted in federal court in March 1989, and sentenced to 30 years imprisonment. The offences were not eligible for the death penalty. Upholding his conviction in 1991, the US Court of Appeals for the District of Columbia ruled that the circumstances of his seizure did not void the trial court's jurisdiction over him: "While the government's conduct was neither picture perfect nor a model for law enforcement behavior", it had not reached the level of outrageousness necessary to sustain the defendant's jurisdictional argument (see previous footnote). *United States v Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

⁶⁰ United States Attorneys' Manual, 9-15.000, *International extradition and related matters*.

In 1993, after examining the circumstances of Humberto Álvarez-Machain's abduction, the UN Working Group on Arbitrary Detention concluded that "no legal basis whatsoever can be found to justify the deprivation of liberty" and declared that the abduction had been an arbitrary detention as well as constituting illegitimate interference by one state in the sovereignty of another. It was therefore a violation of international law.⁶¹ The expert body noted that "[i]t may be maintained that the Extradition Treaty does not explicitly prohibit abduction, just as it does not prohibit someone being held under an extradition application from being tortured or executed by the requested country. However, it is obvious that this is implicitly prohibited when the subject matter – cooperation in the struggle against crime by surrendering offenders – is regulated in all dimensions by the treaty in question. Abduction is the opposite of surrender..."

Meanwhile Humberto Álvarez-Machain, who had been acquitted at his December 1992 trial in the USA and returned to Mexico, pursued a civil lawsuit against the US in the courts. On 11 September 2001, the Ninth Circuit Court of Appeals ruled that he could claim damages from the US Government. In its decision, the Court stated that his abduction had been a violation of customary international human rights law because it violated his rights to freedom of movement, to remain in his country, to security of his person, as well as the right to freedom from arbitrary detention, adding that "law enforcement officers cannot escape liability by recruiting civilians to do their dirty work". The government's position had been that various of the country's laws envision US agents engaged in foreign law enforcement activity and that for this to be effective, their arrest authority must be able to override international law.⁶² The Ninth Circuit stated: "If this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community".⁶³

⁶¹ UN Doc: E/CN. 4/1994/27, Decision No. 48/1993 (USA).

⁶² The Court noted a 1989 unpublished opinion by the Department of Justice's Office of Legal Counsel which "discussed the authority of the Federal Bureau of Investigation to override international law to conduct extraterritorial law enforcement activities".

⁶³ *Alvarez-Machain v USA*, US Court of Appeals for the Ninth Circuit, CV 93-04072-SVW (2001).

On 15 June 1997, three agents of the Federal Bureau of Investigation (FBI) apprehended Mir Aimal Kasi in a hotel room in Pakistan. He was wanted in the USA in connection with the murder of two employees of the Central Intelligence Agency (CIA) who had been shot outside the CIA Headquarters in Virginia in 1993. The FBI agents took him from the Shalimar Hotel in Dera Ghazi Khan in handcuffs, shackled, gagged, and with a hood over his head. He was flown by plane to another location in Pakistan where he was detained for the next 48 hours in a “holding facility” – in the technical custody of the Pakistan authorities, but always in the presence of the FBI. On 17 June, he was “released” into the custody of the FBI and was flown back to Virginia. During the 12-hour flight, without being advised of his right to seek consular assistance as required under international law,⁶⁴ Mir Aimal Kasi signed a statement admitting to the 1993 shootings. He was convicted and sentenced to death by an all-white jury in February 1998.⁶⁵

In November 1998, the Virginia Supreme Court upheld Mir Aimal Kasi’s death sentence. It noted that the Virginia prosecutor had admitted that the FBI agents did “not have any jurisdiction in the nation of Pakistan”, and that Kasi “was not taken before a judicial officer... until he returned to the United States”. However, it rejected the argument that the abduction had violated the relevant extradition treaty⁶⁶, citing the *Álvarez-Machain* precedent: “Contrary to defendant’s contention, nothing in this treaty can be construed to affirmatively prohibit the forcible abduction of defendant in this case so as to divest the trial court of jurisdiction or to require that “sanctions” be imposed for an alleged violation of the treaty”. Mir Aimal Kasi remains on death row.

⁶⁴ See *A time for action: Protecting the consular rights of foreign nationals facing the death penalty* (AMR 51/106/2001, August 2001).

⁶⁵ It seems that the only non-white person on the jury pool was dismissed by the state during jury selection, because, in the words of the prosecutor, “she was the only member of the entire panel who never read anything about the case or heard anything about the case. My fear is that somebody like that is kind of detached from the real world, and that’s why I struck her”. Earlier, the defence had unsuccessfully sought a change of venue on the grounds that “inflammatory and inaccurate” reports in the local media before the trial would have prejudiced the jurors. After the trial, a motion to set aside the jury’s sentencing decision on the grounds of alleged juror misconduct was also unsuccessful. The motion was based on an article in a local newspaper a few days after the trial quoting from an interview with one of the jurors, in which the juror said that some of the jurors had “thought the crime vile [an “aggravating” factor making a murder punishable by death in Virginia] because Kasi, an immigrant, ‘had attacked the American way of life’”. *Kasi v Commonwealth*, Virginia Supreme Court, 6 November 1998.

⁶⁶ The defence argued that in the absence of a Pakistan/US extradition treaty, the treaty between the US and the UK applied to this case. The US State Department lists this treaty under “Treaties in Force” between the USA and Pakistan.

In the case of Juan Raul Garza, a Mexican American federal prisoner who was executed in the United States on 19 June 2001, the US authorities appear to have engineered a deportation that circumvented extradition protections against the death penalty. In 1992 Juan Garza had been indicted on non-capital federal drug-trafficking charges and fled to Mexico after US Customs agents raided his home in Texas. He was captured by Mexican police nine months later and deported to the USA a matter of hours after his arrest. Shortly after that, the US Government charged him with capital murder. There can be little doubt that at the time of Juan Garza's deportation, the US federal authorities knew that they were going to charge him with offences that could result in the death penalty.⁶⁷ Yet they did not inform their Mexican counterparts of this intent, nor attempt to extradite Garza under the extradition treaty between the USA and Mexico, which provides for the refusal of extradition requests without assurances that the death penalty will not be sought. As a part of the US Government's investigation into the capital murders, for which Garza would be sentenced to death in 1993, US agents had operated inside Mexico apparently without having informed the Mexican Attorney General's Office as provided for by a treaty between the two countries.⁶⁸ It was argued in Garza's bid for executive clemency, that if the USA had properly informed the government of Mexico, the latter would have been in a position to block the extradition of Garza unless assurances against the death penalty were given. Before the execution, the government of Mexico stated that it would not have sent Garza back to the USA had it known he was facing capital charges.⁶⁹

⁶⁷ Another case involving an alleged circumvention of the US/Mexico extradition treaty involved Manuel Salazar. He was sentenced to death in Illinois in 1985 for the murder of a police officer in 1984 when he was 18. A bill of indictment charging him with the murder was filed by the Illinois authorities on 10 April 1985. On 18 May, Manuel Salazar was reportedly seized without warrant from his uncle's home in Mexico by armed Mexican police who took him to a police station. From there he was handed over to US border guards, and picked up from Texas by Illinois police on 21 May. It was alleged that both Mexican and US law enforcement agents were involved in locating Salazar and in his seizure in Mexico. It was also reported that a US\$5,000 reward was offered by the Illinois authorities for his arrest and that a reward was in fact paid to at least one Mexican agent. After nine years on death row, Salazar was granted a new trial, and in 1996 was convicted of the lesser charge of involuntary manslaughter and freed on time served.

⁶⁸ Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance (1987).

⁶⁹ At the sentencing phase of Garza's trial, to bolster its case for Garza to be killed rather than sentenced to life in prison, the US Government produced evidence of his involvement in unresolved murders in Mexico, crimes for which he had never been charged or prosecuted. The Inter-American Commission on Human Rights found that the introduction of this evidence was "antithetical to the most basic and fundamental judicial guarantees" and concluded that Garza had been sentenced to death in an "arbitrary and capricious manner" and called for a halt to his execution, which it said would be a "deliberate and egregious violation" of international standards. The US Government ignored the IACHR's call.

On 1 October 2001, US Attorney General John Ashcroft announced the arrest “abroad” and transportation to the USA of Zayd Hassan Abd Al-Latif Masud Al Safarini, a Palestinian, for his alleged involvement in the 1986 hijacking in Pakistan of Pan American World Airways Flight 73 in which 22 passengers were killed, including two US citizens. The Attorney General stated that Zayd Hassan Safarini – who had originally been sentenced to death in Pakistan for the hijacking, but whose sentence was reduced to life imprisonment on appeal – was arrested by US agents on 28 September after his release from Adiala prison in Rawalpindi the day before.⁷⁰ President Bush referred to the case as a sign of progress in the “war against terrorism”: “he was convicted and sentenced to death. Yet he only served 14 years. Well, we arrested him; we got him; we bought him into Alaska. And today the United States of America will charge him with murder”.⁷¹ Zayd Hassan Safarini will be prosecuted in federal court in Washington DC and faces the possibility of the death penalty if convicted.

On 2 October, five other Adiala detainees who, with Safarini, were indicted by the US in 1991 for their alleged role in the hijacking, petitioned the Lahore High Court to block any attempt to extradite them to the USA. On 5 October, the judge reportedly asked the Pakistan military government to explain “the circumstances under which a Palestinian hijacker left Islamabad and landed in the United States”.⁷² The Jordanian Society for Citizens Rights has reportedly written to Pakistan’s foreign ministry asking for clarification on the circumstances of Zayd Safarini’s apprehension and transfer to the USA.⁷³ Amnesty International has not been able to ascertain these circumstances, but has been told that Zayd Safarini, *en route* to Jordan, was picked up by FBI agents at Bangkok airport in Thailand and taken by US government aircraft to Anchorage in Alaska for a court appearance there before being flown to Washington DC.

On 26 October, a Yemeni national was reportedly handed over to the US authorities by Pakistani agents, in secret and without any formal deportation or extradition proceedings. The detainee, Jamil Qasim Saeed Mohammed, was reportedly wanted in the USA in connection with the bombing of the US destroyer, the *USS Cole*, in Yemen in October 2000, in which 17 US servicemen were killed and some 40 others injured. According to the *Washington Post*, Mohammed was handed over to US officials by masked agents of Pakistan’s Inter-Services Intelligence agency at Karachi International Airport “under highly secretive circumstances”.⁷⁴ He was reportedly flown off in the jet in which the US agents had arrived. The plane’s destination was unknown. At the time of writing, Amnesty

⁷⁰ *United States arrests known hijacker from Pan American World Airways Flight 73*. Department of Justice News Release, 1 October 2001.

⁷¹ “We’re making progress”. Remarks by the President to the Employees of FEMA. 1 October 2001.

⁷² *Pakistan judge asks why hijacker was extradited*. Reuters, 5 October 2001.

⁷³ *Jordanian group protests after citizen abducted in Bangkok, sent to USA*. BBC, 26 November 2001. Zayd Safarini is reported to have a Jordanian passport.

⁷⁴ *Cole suspect turned over by Pakistan*. Washington Post, 28 October 2001.

International had not been able to ascertain the whereabouts or legal status of Jamil Mohammed.

Amnesty International supports the bringing to justice of criminal suspects in accordance with international human rights standards, and without resort to the death penalty.

For justice to be done, as well as to be seen to be done, it believes that governments must maintain scrupulous standards of legality and transparency.

In 1990, US Supreme Court Justice William Brennan wrote: “[A]s our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere.... When we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same.”⁷⁵ He went on to recall a warning given by one of his predecessors, Justice Louis Brandeis, six decades earlier: “In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against this pernicious doctrine, this Court should resolutely set its face.”⁷⁶

Ruling earlier this year that South African government officials had acted unlawfully when they summarily handed Khalfan Khamis Mohamed over to FBI agents in 1999, the Constitutional Court of South Africa said that the warning by Justice Brandeis “was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has particular relevance: we saw in the past what happens when the state bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully.”

Conclusion: Abolition is the way to international cooperation

⁷⁵ *US v Verdugo-Urquidez*, 494, U.S. 259 (1990), Justice Brennan, joined by Justice Marshall, dissenting. The majority ruled that the constitutional protection against unreasonable searches and seizures by the authorities did not extend to protecting foreign nationals against arbitrary action by the US Government outside US territory.

⁷⁶ *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis, dissenting.

About three countries a year have legislated to abolish the death penalty since 1990. In contrast, the USA's conveyor belt of death has executed on average one prisoner a week during those dozen years. While the international community has turned against capital punishment, even for the world's most heinous crimes, the United States continues to use this cruel, arbitrary and discriminatory punishment against children, the mentally impaired, the inadequately represented, those whose guilt remains in doubt, and foreign nationals denied their consular rights. In doing so it not only contravenes world abolitionist trends, it violates international standards.

The USA's growing isolation on this fundamental human rights issue will continue to attract international concern and cause diplomatic friction, not least when the question of extradition arises. In an ever-growing number of countries, it is now unlawful to inflict the death penalty or to send any person to face this cruel and degrading punishment elsewhere. Any attempt by the USA to resort to questionable tactics to subvert existing extradition protections against the death penalty would risk undermining the rule of law and respect for human rights in general, as well as creating further problems in international relations.

Amnesty International fully supports efforts to bring to justice those suspected of criminal acts, including the attacks of 11 September. However, the measures taken in the pursuit of justice, including extradition procedures, must be consistent with international human rights standards. The UN Commission for Human Rights has reaffirmed that "all measures to counter terrorism must be in strict conformity with international law, including international human rights standards." The Commission has called upon all nations "in conformity with their international commitments in the field of human rights, to enhance their cooperation with a view to bringing terrorists to justice."⁷⁷

The solution to the judicial barriers raised in capital extraditions is not the weakening of extradition safeguards as some have suggested – it is the total abolition of the death penalty by all countries which still retain it. Until then, retentionist countries like the USA must be prepared to relinquish pursuit of the death penalty for criminal suspects apprehended abroad. To do otherwise can serve only to undermine the search for justice.

⁷⁷ *Human rights and terrorism*, Commission on Human Rights resolution 2001/37, E/CN.4/RES/2001/37, 23 April 2001.

APPENDIX: CAMPAIGNING AGAINST THE DEATH PENALTY IN THE USA

This is one of a series of papers on the death penalty in the USA issued by the International Secretariat of Amnesty International as part of its worldwide campaign against capital punishment. Others include:

- Violation of the Rights of Foreign Nationals under Sentence of Death* (AMR 51/01/98, January 1998)
Ángel Francisco Breard: Facing Death in a Foreign Land (AMR 51/14/98, March 1998)
The Death Penalty in Texas: Lethal Injustice (AMR 51/10/98, March 1998)
A Macabre Assembly Line of Death: Death Penalty Developments in 1997 (AMR 51/20/98, April 1998)
The Execution of Ángel Francisco Breard: Apologies are not Enough (AMR 51/27/98, May 1998)
On the Wrong Side of History: Children and the Death Penalty (AMR 51/58/98, October 1998)
Adding Insult to Injury: The case of Joseph Stanley Faulder (AMR 51/86/98, November 1998)
Fatal Flaws: Innocence and the Death Penalty in the USA (AMR 51/69/98, November 1998)
Killing Hope: The Imminent Execution of Sean Sellers (AMR 51/108/98, December 1998)
Killing with Prejudice: Race and the Death Penalty in the USA (AMR 51/52/99, May 1999)
Killing without Mercy: Clemency Procedures in Texas (AMR 51/85/99, June 1999)
Time for Humanitarian Intervention: The Imminent Execution of Larry Robison (AMR 51/107/99, July 1999)
Speaking out: Voices against Death (AMR 51/128/99, October 1999)
Shame in the 21st Century: Three Child Offenders Scheduled for Execution in January 2000 (AMR 51/189/99, December 1999)
Beyond Reason: The Imminent Execution of John Paul Penry (AMR 51/195/99, December 1999)
A Life in the Balance: The Case of Mumia Abu-Jamal (AMR 51/01/00, February 2000)
Failing the Future: Death Penalty Developments, March 1998-March 2000 (AMR 51/03/99, April 2000)
Worlds Apart: Violations of the Rights of Foreign Nationals on Death Row - Cases of Europeans (AMR 51/101/00, July 2000)
Crying out for Clemency: The Case of Alexander Williams, Mentally Ill Child Offender Facing Execution (AMR 51/139/00, September 2000)
Memorandum to President Clinton: An Appeal for Human Rights Leadership as the First Federal Execution Looms (AMR 51/158/00, November 2000)
Nevada's Planned Killing of Thomas Nevius (AMR 51/001/2001, March 2001)
The Illusion of Control: "Consensual" Executions, the Impending Death of Timothy McVeigh, and the Brutalizing Futility of Capital Punishment (AMR 51/053/2001, April 2001)
Old Habits Die Hard: The Death Penalty in Oklahoma (AMR 51/055/2001, April 2001)
Open Letter to the US Attorney General Concerning the Imminent Execution of Juan Raul Garza (AMR 51/088/2001, 15 June 2001)
Too Young to Vote, Old Enough to be Executed - Texas Set to Kill another Child Offender (AMR 51/105/2001, July 2001)
Death in Black and White (AMR 51/117/2001, 9 August 2001)
A Time for Action: Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty (AMR 51/106/2001, August 2001)
State Cruelty against Families (AMR 51/132/2001, 4 September 2001)
"The day of my scheduled execution is fast approaching". A Plea for Life and Respect for International Law (AMR 51/149/2001, 12 October 2001)
Time to Reject the Culture of Death (AMR 51/168/2001, 20 November 2001)

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